BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Magisterial Appeal No. 2 of 2011

BETWEEN:

TEDDY ORLANDO GILL **Appellant**

AND

COMMISSIONER OF POLICE **Respondent**

BEFORE: The Honourable Marston C.D. Gibson, Chief Justice, The Honourable Peter D.H. Williams and The Honourable Sandra P. Mason, Justices of Appeal.

2011: October 26

2019: March 14

Mr. Michael J. Koeiman with Ms. Kristin C. A. Edwards for the Appellant

Mrs. Wanda Blair for the Respondent

DECISION

PETER WILLIAMS JA:

I. FACTS

[1] Mr. and Mrs. Cumberbatch operated as vendors at Grantley Adams Memorial School. On 11 March 2010, they left their home at Farmers Housing Area, St. Thomas, for the School. Shortly after midday the husband, Adolphus, received a call from his granddaughter as a result of which he returned home. When he arrived he saw people outside of his house. He discovered that the kitchen door was open, both the side door lock and his bedroom door lock were broken and inside the house was ransacked. The wife, Cynthia, found that food and other items in the house as well as $3,050.00 in cash belonging to her were missing, amounting to a total loss of $3,668.60 as stated on the charge sheet (but the correct figure should have been $3,683.60).

[2] Mr. Randal Corbin was the main prosecution witness. He was the Cumberbatch's neighbour. On the day of the incident he saw the accused coming down the steps of the Cumberbatch's house ("on his all fours climbing out"); he had a cloth bag over his back. Corbin spoke to the accused for 10 minutes. He asked him "what he was doing in the gentleman's house" but he gave no explanation for being there. Corbin tried unsuccessfully to block the accused's car from driving away. Corbin followed in his own car (except for

a brief period) until the accused drove into Holetown Police Station. What transpired was bizarre.

[3] Corbin made a report to the police of seeing the accused coming out of the Cumberbatch's house. The police arrested the accused and took him into the Station. Corbin drove off. There was no evidence from the police (PC 1289 Hinds) of any complaint made at Holetown Station by the accused against Corbin or any complaint of Corbin's Land Rover hitting Gill's car. Hinds under cross-examination stated that the accused said nothing to him about his car being hit.

[4] However, it was the accused's explanation that he drove into the Police Station because Corbin's Land Rover had hit his car in Holetown and that he showed the damage to the police. Corbin said that he never hit the accused's car. Further, the accused's defence was that he had stopped in the area of Farmers because his car was overheating and that a man with a Land Rover came and blocked the road and would not let him pass but he "ain't went in no house".

[5] On the following day, 12 March 2010, Corbin gave a signed statement to the police. On 14 March 2010, the accused was formally charged with burglary contrary to ***section 24(1)(b)*** of the ***Theft Act, Cap.155***. On 17 March 2010,

Corbin identified the accused at Speighstown Police Station as the man who was seen coming out of the Cumberbatch's house.

[6] Not surprisingly, the Magistrate for District "D", Mr. Douglas Frederick, found the evidence of the accused "unbelievable". He found Corbin to be "a credible witness" and the identification of the accused to be good "when the ***Turnbull*** guidelines were applied". The evidence of the Police was credible and the prosecution had discharged its burden of proof. He therefore convicted and sentenced the accused on 22 December 2010 to six months' imprisonment.

II. APPEAL

(a) Against conviction

[7] On 28 December 2010, Mr. Koeiman filed a Notice of Appeal. The grounds of appeal were essentially that the decision was against the weight of evidence and erroneous in law. However, three revised grounds of appeal were argued based on the appellant's skeleton argument filed on 14 October 2011. Mr. Koeiman argued the first ground. He submitted that if the Magistrate had properly applied the provisions of ***subsection 102(4)*** of the ***Evidence Act, Cap 121*** (the ***Act***) he would have had to dismiss the case against the accused. ***Section 102*** of the ***Act*** provides for directions that should be given to the jury

where identification evidence has been admitted, in the light of the special need for caution before accepting such evidence. ***Section 102*** provides for directions to the jury as follows:

> (1) Where identification evidence has been admitted, the Judge shall inform the jury that there is a special need for caution before accepting identification evidence and of the reasons for the need for caution, both generally and in the circumstances of the case.
>
> (2) In particular, the Judge shall warn the jury that it should not find, on the basis of the identification evidence, that the accused was a person to whom the relevant offence was committed unless
>
> *(a)* there are, in relation to the identification, special circumstances that tend to support the identification; or
>
> *(b)* there is substantial evidence, not being identification evidence that tends to prove the guilt of the accused and the jury accepts that evidence.
>
> (3) **Special circumstances *include***
>
> *(a)* the accused being known to the person who made the identification; and
>
> *(b)* the identification having been made on the basis of a characteristic that is unusual.
>
> (4) Where
>
> *(a)* it is not reasonably open to find the accused guilty except on the basis of identification evidence;
>
> *(b)* there are no special circumstances of the kind mentioned in subsection (2)*(a)*; and

> *(c)* there is no evidence of the kind mentioned in subsection (2)*(b)*, the Judge shall direct that the accused be acquitted." (Emphasis added.)

[8] This Court (***Sir David Simmons CJ, Chase*** and ***Waterman JJA***) considered ***section 102*** in the case of ***DPP's Reference No. 1 of 2001, unreported decision of 26 February 2002***. The Court at ***paragraph [30]*** of the decision noted that the ***Act*** was "modeled after the Report of the Australian Law Commission which proposed a new Evidence Act for Australia". In the case of the ***Reference*** the accused had been charged with assault following his attack on a young woman on Kadooment Day when he tried to rob her of her chain. The trial judge directed the jury that the accused be acquitted under ***subsection 102(4)*** of the ***Act***. The Court held that the direction given to the jury was based on too narrow an interpretation of the ***Act*** and was made in error. The trial judge should therefore have left the matter for the determination of the jury. Mr. Koeiman invited us to review the ***Reference*** decision and in effect to adopt the narrow interpretation of ***section 102(4)***, which had already been rejected by this Court.

[9] I cannot accept Mr. Koeiman's submission. Nevertheless, it is worth recording a few points on ***section 102***. First, ***section 102*** had its genesis in section 101 of the Australian Law Reform Commission (ALRC) Bill, which the Barbados ***Act*** followed. The Australian *Annotation and Commentary on*

the Uniform Evidence Acts entitled, ***"The New Law of Evidence"*** by ***Anderson, Williams and Clegg, Second Edition (2009)*** explains the position at ***paragraph 116.2, note 150***:

> "Note that s 101 of the proposed ALRC Bill specified certain details for inclusion in the judicial warning. In particular, the judge was to direct the jury that it should not find the accused guilty on the basis of the identification evidence unless there were either special circumstances supporting the identification (familiarity or an unusual characteristic of the offender that aided identification) or the jury accepted substantial evidence (other than identification evidence) that tended to prove the guilt of the accused. Section 101 of the proposed bill also contained a directive that the trial judge direct the jury to acquit the accused where the prosecution case depended on identification evidence and there were neither special circumstances supporting the identification nor substantial prosecution evidence in addition to the identification evidence."

[10] However, the Australian Evidence Act 1995 (Commonwealth) did not follow the draft Bill but instead section 116 was enacted simply as follows:

> (1) If identification evidence has been admitted, the judge is to inform the jury:
>
> *(a)* that there is a special need for caution before accepting identification evidence; and
>
> *(b)* of the reasons for that need for caution, both generally and in the circumstances of the case.
>
> (2) It is not necessary that a particular form of words be used in so informing the jury."

[11] ***Cross on Evidence, Ninth Australian Edition (2013),*** by ***J D Heydon*** states at ***page 94***:

> "The [Australian] Act does not adopt an ALRC recommendation that there be a judicial power to direct an acquittal where the only evidence supporting a conviction was identification evidence and there were no special circumstances supporting the reliability of the identification. That is the law in England as a matter of common law. But it is not the law in Australia."

[12] ***Section 102*** of the Barbados ***Act*** therefore accords with the English common law. In ***R. v. Turnbull [1977] QB 224*** at ***229-30 Lord Widgery CJ*** delivering the judgment of the full Court of Appeal (five judges) specifically stated the situation in which the trial judge should direct the jury that the accused be acquitted:

> "When in the judgment of the trial judge, the quality of the identification evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."

[13] Where there is no jury "a judge in a judge-only trial must take into account any judicial warnings that are required at law and his or her judgment in such circumstances must express the principles of law that have been applied in reaching his or her verdict. Magistrates too must expressly warn themselves

in respect of identification evidence.": ***Anderson, Williams and Clegg*** at ***paragraph 116.2***.

[14] The facts and circumstances of this case did not require the Magistrate to acquit the accused. As ably explained by Mrs. Blair this was a simple case tried summarily in which no difficulty arose in relation to the identification of the accused. Apart from the accused being clearly identified when he was coming from the house with a bag, he was under almost constant surveillance from the time he left Farmers until he arrived at Holetown Police Station, where a complaint was made against him. There was also a later identification at Speighstown Police Station. Moreover, the accused admitted to the police that he stopped his car in the area of Farmers and that there was a man with a Land Rover who blocked his car. The conduct of the accused subsequent to his initial identification by Mr. Corbin constituted substantial circumstantial evidence in support of the identification tending to prove the guilt of the accused. There is therefore no merit in counsel's main submission against the conviction.

[15] The second ground of appeal against conviction was argued by Ms. Edwards. The complaint in the skeleton argument was that:

> "The Magistrate erred in law in rejecting the evidence of the appellant by reason only that it conflicted with the

> testimony of a police officer. Police officers should not be placed in a favourable category of witness. Their evidence is to be weighed on the same basis as the evidence of civilian witnesses and the accused."

[16] Ms. Edwards submitted forcefully that the error of the Magistrate was that he accorded "a particular level of significance" or a "special standard" to the evidence of the police officers over and above that of the other witnesses in the case. She was critical of the Magistrate's reasons for his decision when he merely stated, without elaborating, that the evidence of the police was credible. She also took issue with the Magistrate's oral (though not in the record) description of the police evidence as a "tiebreaker"; the implication being that the police evidence was decisive because according to the Magistrate the police "had no axe to grind" and therefore "no motive to lie".

[17] In support of her submissions on the proper approach to the evidence of police officers we were referred to the English Court of Appeal decision in ***Derek William Bentley [2001] 1 Cr.App.R. 21*** at ***page 307*** in which it was held at ***page 308*** that:

> "The judge's treatment of the evidence could not be supported because he had approach[ed] the evidence on the assumption that police officers, because they were police officers, were likely to be accurate and reliable witnesses, and that the defendants, because they were defendants, were likely to be inaccurate and unreliable."

Lord Bingham CJ stated at ***page 327*** the manner in which the evidence should be treated, as follows:

> "The guilt of a defendant is to be judged on all the evidence in an open-minded and fair-minded way."

[18] The Privy Council referred to ***Bentley*** in ***Pitman v. The State (Trinidad and Tobago) (2008) 73 WIR 404*** in which the judge's remarks painted an unbalanced picture of the evidence and were likely to influence the jury to accept the evidence of a Justice of the Peace and a Police Constable in preference to that of the appellant. There was "the risk of injustice if a jury is invited to approach the evidence on the assumption that police officers because they hold that office, are likely to be accurate and reliable witnesses and defendants, because they are defendants, are likely to be inaccurate and unreliable". The Privy Council considered "the judge's comments as ill-chosen and of a nature which should be avoided in a criminal trial" but they did not consider that they were sufficiently prejudicial to make the conviction unsafe.

[19] In the instant case the facts and circumstances were consistent with the prosecution evidence while the defence was not credible. The Magistrate expressly held that the prosecution discharged its burden of proof and he

rejected the accused's version of events. The Magistrate's holding on the evidence was correct and his remarks did not make the conviction unsafe.

(b) Against sentence

[20] The third ground of appeal was against sentence. Mr. Koeiman's argument was that the Magistrate's sentence was based on theft from the house of cash (apart from the items) amounting to $3,050.00 whereas the evidence supported a loss of only $1,045.00. The discrepancy arose because Cynthia did not give specific evidence in relation to the amount of cash stolen except for evidence of $1,000.00 in the wardrobe and about $45.00 under the TV. However, she did state that she also had "solid money from tithing and change in the purses".

[21] There are two simple answers to Mr. Koeiman's submission. First, Cynthia did give some evidence of $3,050.00 in cash being stolen and this figure was not effectively challenged. Secondly, in the circumstances of this case it didn't really matter whether the appellant burgled the Cumberbatch's house and took away $1,045.00 rather than $3,050.00.

[22] The sentence imposed by the Magistrate was manifestly not excessive especially taking into account the appellant's shocking antecedents of robbery and rape.

III. DISPOSAL

[23] I would therefore dismiss the appeal and confirm the conviction and sentence of six months but for a credit in respect of the time that the appellant spent in prison in relation to this offence prior to imposition of the sentence on 22 December 2010. The appellant spent two periods on remand in prison in connection with this offence according to the information given by the prison authorities: first, from 15 March to 21 April, 2010 (37 days) and secondly, from 22 December, 2010 to 2 February, 2011 (33 days). However, in view of the manner in which it is suggested that the appeal should be disposed of, those periods are not now material.

[24] The offence took place on 11 March 2010. Many years have elapsed pending the disposal of the case. There has been unconstitutional delay. The sentence that we have confirmed would normally date from the original date of sentence on 22 December 2010. Six months since that date has long expired. It has taken this Court from 26 October 2011 to deliver its decision. The timely delivery of judgments by this Court is the responsibility of the President of the Court. The procedure which should be adopted was discussed by ***Peter Williams JA*** in ***Elvis Erwin Alexander v. R., Criminal Appeal No. 14 of 2007, unreported decision of 13 June 2014*** at ***paragraphs [80]*** and ***[107]***.

[25] An appeal against a short sentence should be placed on a fast track for hearing and decision. It is neither satisfactory for an appellant in these circumstances to serve out his time in prison before his appeal is heard and decided nor for him to be on bail and having lost his appeal to commence serving his sentence years after it was imposed. In ***Sabapathee v. The Director of Public Prosecutions (Mauritius) [2015] 1 LRC 148*** at ***paragraph [26]*** the Privy Council stated that cases in which a custodial sentence will have expired by the time that the appeal is heard "ought to be processed expeditiously".

[26] The appellant has been in and out of prison on a number of offences since committing the instant offence. In the unfortunate circumstances of the delay in this case the appropriate order to make by way of remedial justice and constitutional redress is a declaration that the appellant be deemed to have already served his sentence. I would accordingly declare that the appellant has served his term of imprisonment in respect of this offence by the conclusion of today's hearing when the term shall expire.

Justice of Appeal

Chief Justice

Justice of Appeal