COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

SCCrApp. No.221 of 2018

B E T W E E N

JOCELYN SIMILIEN

Appellant

AND

REGINA

Respondent

BEFORE: **The Honorable Sir Michael Barnett, P**

The Honorable Mr. Justice Roy Jones JA

The Honorable Mr. Justice Milton Evans JA

APPEARANCES: **The Appellant, Pro se**

Miss Cordell Frazier, Counsel for the Respondent

DATES: **10 October 2019; 23 January 2020; 9 March 2020; 29 July 2020**

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Criminal Appeal- Armed Robbery- Whether trial judge gave proper directions to the jury- Identification Evidence-Inconsistent Evidence

On 26 May 2012 Reuben Sears was outside disposing of his trash, when he was approached from behind by two men demanding that he give them his money. One of the men held a gun to his head while the other searched his pockets and took his wallet, cell phone and keys. On 30 May 2012 Mr. Sears identified the appellant, in an identification parade, as one of the men that had

robbed him and also as the one who had held the gun to his head. He further stated that he recognized both men because they had previously robbed him in 2011 when they had entered his home unmasked. The appellant was subsequently charged with armed robbery. On 11 June 2018, the appellant was convicted of armed robbery and was later sentenced to a term of ten years imprisonment. The appellant appeals his conviction and sentence.

Held: appeal dismissed; conviction and sentence affirmed.

It is settled law that where there is a sufficiency of evidence, the weight to be given to contradictions and inconsistencies is a matter for the jury. The credibility of a witness is a matter for the jury. A judge would be wrong to usurp that function. The judge is obliged to point out inconsistencies and other matters which may affect the credibility of a witness's testimony and she did so. There can be no criticism of the directions to the jury with regard to inconsistencies as set out in the summation.

It is part of the background of the identification evidence to show the strength of Mr. Sears visual identification of the appellant. No doubt the statement that the appellant robbed him a year earlier was prejudicial to the appellant. However, the judge is entitled to admit that evidence if she was satisfied that its probative value outweigh its prejudicial effect. It is no doubt that it had probative value to the quality of Mr. Sears identification evidence.

The judge did not, in her direction, give any special attention to Mr. Sear's statement that the appellant had robbed him before. In fact, she reminded the jury that the appellant had a good character, no previous convictions and that they were entitled to consider his credibility and propensity to have committed this offence of robbery.

We cannot find that a sentence was unduly harsh which warrants a reduction by an appellate court.

Hall v Regina [2016] 1 BHS J No 90 applied
Orville Brown v R [2010] JMCA Crim 74 considered
R v Galbraith [1981] 1 WLR 1039 considered
*Toal v HM Advocate [*2012] SCCR 735 considered

REASONS FOR DECISION

Reasons for decision delivered by the Honourable Sir Michael Barnett, P:

1. The appellant appealed his conviction for armed robbery. At the conclusion of his appeal we dismissed the same and undertook to give our reasons at a later date. We now do so.

The Facts

2. On the evening of the 26 May 2012 two men approached the virtual complainant Rueben Sears. The shorter of the two held a gun and the latter took Mr. Sears wallet, phone and keys.

3. At an identification parade, Mr. Sears identified the appellant as one of the two persons who robbed him. In his evidence at the trial, Mr. Sears said that he could identify the appellant as he was one of the two persons who robbed him a year before at his home.

4. The trial judge rejected a no case submission made on his behalf. The appellant elected to exercise his right to remain silent and did not give evidence.

5. The jury convicted him by a majority verdict of 7-2. He was sentenced to 10 years imprisonment from the date of his conviction.

6. He appeals that conviction and sentence. He represented himself in this appeal. I will deal with his grounds of appeal seriatim.

Ground One: The trial judge did not accede to the no case submission and failed to give proper directions to the jury as to the appellant's defence.

7. The short answer to this ground is that given the evidence of identification made by the virtual complainant, the judge was obliged to reject the no case submission. It was a matter for the jury to accept or reject the cogency of that identification evidence.

8. As was said in **Galbraith:**

> **"(b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."**

9. As to the direction to the jury on the appellants defence the judge said:

The defence's case is that the Crown has not proven beyond a reasonable doubt that the accused man Jocelyn Similien was the person responsible for the crime. The defence say, and they say so strongly, that he did not commit the crime and that this is a case of mistaken identity. I must again remind the jurors that the defendant is presumed to be innocent unless he is found guilty by you after considering all of the evidence. I must also again remind you that the prosecution must on their evidence satisfy you that the accused is guilty.

As such, before you move to consider the defence put forward by the accused through his counsel, you must be satisfied that the Crown has put before you evidence on which you are satisfied that the accused has committed the offence. If after considering the evidence of the Crown you are not satisfied, you must acquit. In the alternative, if having heard and considered the evidence of the prosecution you're satisfied that there's evidence on which you can find the accused guilty then you can convict. In order to convict you must be satisfied of the truth of the evidence as led by the Crown.

There were inconsistencies in the evidence of Mr. Sears, and counsel for the defendant in her closing address comprehensively took you through them. They related principally to the height of the gunman, the colour of the weapon, the initial positioning of the assailants, and the initial positioning of the weapon.

She also pointed out the inconsistency in the evidence of ASP Maycock with respect to the identification parade form. The defendant signed it or did he not sign it? As I initially indicated jurors, these are questions which only you can answer as you decide what facts you believe. You're entitled to look up the discrepancies in order to determine how much reliance you can place on what the witness has said. Such discrepancies may impress you as being inevitable and may well represent no more than -- and may well not be of the moment to you having regard to the passage of time, and as such nothing turns on them.

However, if after considering all of the evidence, you're satisfied that the Crown has led evidence on which you are

satisfied that you feel sure that the crime of armed robbery was committed and that it was this accused who committed that crime, then and only then can you convict the accused of the offence.

Madam forewoman and members of the jury, you've heard that the defendant is a young man. I say to you that he has no previous convictions, he is of good character. The fact that the defendant had not offended in the past does not mean that he could not have committed the offence with which he is charged but it may make it mean that he's less likely to have committed the offence. You should take this into account in the defendant's favour. What weight should you give to the defendant's good character and to the extent to which it assist on the facts of this particular case are for you, and you alone to decide.

In making that assessment you may take into account sorry, it's for you and you alone to decide.

And, so, Madam forewoman and members of the jury, this matter boils down to what you believe, did Mr. Sears know the accused? And did he, without assistance correctly identify him? Do you accept the evidence of Mr. Sears? Did you find him to be a credible witness? Do you accept the evidence from the other Crown witnesses? Were the inconsistencies in Mr. Sears's evidence so grave so as to strike at the root of all that he has said to you? If you accept the evidence from the prosecution, then you are entitled to find that the accused did commit the offence. If you do not accept the evidence of the prosecution witnesses then you must acquit."[Emphasis added]

10. Indeed, prior to that, the judge made clear to the jury the basis of the prosecution's case against the appellant. She said:

> **"Members of the jury, this case which you have to decide turns squarely on the reliability of the identification of the accused man by the virtual complainant herein, Mr. Reuben Sears. As a result, it is my duty to direct you on how you should approach evidence of identification. There is a special need for caution when the case against an accused depends on the correctness of a visual identification. The reason for caution is that experience teaches us that a witness who is generally**

convinced of the correctness of his identification maybe impressive but at last, mistaken.

This may be even when a number of witnesses come to give same identification evidence. It is very important therefore, ladies and gentlemen, that you should examine the circumstances in which the identification is made.

Consider how long did the witness have the defendant under observation. At what distance did the witness say that he observed him? In what lighting conditions did he say that he saw them? Did anything infer with or obstruct that observation of the defendant? Have the witness ever seen the persons he observed before? Was there any special reason why he remembered him or them? How long was it between the original observation and the identification with the police? Were there any marked differences between the description given to the police by the witness when he had first seen them and the appearance of the defendant?" [Emphasis added]

11. In our judgment the trial judge was very fair in her directions as to the appellant's case. It is to be noted that in her directions the judge did not draw any attention to Mr. Sears evidence that the appellant had robbed him before. It was a matter for the jury whether they accepted the evidence of Mr. Sears

12. This ground had no merit.

Ground two: The trial judge erred when she allowed the case to proceed or continue before the jury because of inconsistencies.

13. It is settled law that where there was a sufficiency of evidence, the weight to be given to contradictions and inconsistencies was a matter for the jury. see **Toal v HM Advocate** 2012 SCCR 735, LJG.

14. The judge cannot be faulted for permitting the jury to consider the prosecution's evidence. There can be no criticism of the directions to the jury with regard to inconsistencies as set out in the summation which was extracted earlier at paragraph 9 above.

15. This ground had no merit.

Ground three: The trial judge erred in allowing the case to go to trial given the lack of credibility of the virtual complainant.

16. Again, this ground is flawed. The credibility of a witness is a matter for the jury. A judge would be wrong to usurp that function. The judge is obliged to point out inconsistencies and other matters which may affect the credibility of a witness's testimony. She did so. At the end of the day it is always a matter for the jury.

Ground four: The judge erred by not addressing the omissions and accepting mistakes from the virtual complainant and not rule on it.

17. Again, these are all matters for the jury. The judge may point them out to the jury, but it is for them to assess the credibility of a witness.

Ground five: The judge erred by not addressing the prejudicial statements that was mentioned by the virtual complainant and a police inspector.

18. The matters complained of under this ground were (a) the statement by Mr. Sears that he recognized the appellant because he had robbed him before and (b) the statement of ASP Maycock that the appellant was in custody for other matters.

19. As I said earlier, the judge made no comment on the evidence of Mr. Sears that he recognized the appellant as he was one of the persons who robbed him a year earlier. Although, not clearly articulated by the appellant who was unrepresented at the appeal, the submission is that the judge ought to have directed the jury that that evidence may have related to the quality of the identification but the mere fact that he may have robbed Mr. Sears a year earlier did not itself mean that he was the person who robbed Mr. Sears on the day which was the subject of the charge.

20. No doubt the statement that the appellant robbed him a year earlier was prejudicial to him. But the judge was entitled to admit that evidence if she was satisfied that its probative value outweigh its prejudicial effect. No doubt it had probative value to the quality of Mr. Sears identification evidence.

21. A similar issue was considered by the Court of Appeal of Jamaica in **Orville Brown v R** [2010] JMCA Crim 74.

22. It that case, the appellant was charged with robbery. The virtual complainant testified that he was robbed by two persons. He said that he was able to see the whole of them as they were about two feet from him. He also said that he saw their faces for about 3-4 minutes. He reported the matter to the police and he and the police went in search of them. He saw the appellant and pointed him out to the police.

23. The judgment continued:

> **"[4] Mr. Tomlinson testified that it was not the first time that he had seen his assailants, as before he started to operate his taxi, which he had been doing for about one year before the incident, he had been a conductor on a bus for about six years, and he had seen these men in the Montego Bay Bus Park, "all the while". He could not remember when last he had seen them, but he knew that he had seen them, "more than one time". In fact he made this statement, <u>to which surprisingly there was no objection</u>, "A nuh the first time me see dem do dem something deh but a nuh wid me, you understand". Toward the end of the examination in chief he was asked yet again about his knowledge of the appellant during the period that he used to 'run bus' and he said, "Really an truly, a whole heap of time mi see him". The bus route was from Negril to Montego Bay and he would sometimes see the appellant four times for the week. He never exchanged any words with him at any time and did not know his name. He said, "Mi see how him behave all the while, so through that, mi stay far"."**
> **[Emphasis added]**

24. One of the grounds of appeal in that case was that evidence of the virtual complainant that he had seen him before should not have been admitted into evidence because of its prejudicial effect.

25. The court rejected that ground. In paragraph 30 of that judgment the Court said:

> **"[30] It is therefore patently clear that evidence can be led and will be considered relevant and admissible if providing a background against which the offence was committed <u>and particularly if it is adduced to strengthen the visual identification.</u> The learned trial judge in this case, in his summing up, commented on the previous knowledge of the virtual complainant and the appellant and his accomplice, and why in his view they would have stood out to the appellant, and why he would have remembered them. The learned trial judge also went through the visual identification evidence, recognizing that there was no corroborative evidence and that he should therefore proceed with caution. He set out the evidence in great detail and he then analyzed it in order to show how he had arrived at his findings." [Emphasis added]**

26. In our judgement this ground must fail. Firstly, it was admissible to show the strength of Mr. Sears visual identification of the appellant. It was part of the background to the identification evidence. Secondly, the appellant's counsel did not object to the

admissibility of that evidence and indeed cross-examined Mr. Sears on that identification. Thirdly, the judge did not in her direction give any special attention to that earlier incident. Indeed, it is arguable that to do so may have given that earlier incident more prominence than it should have received thus increasing its prejudicial effect. Fourthly, the judge did remind the jury that the appellant had a good character he had no previous convictions and that they were entitled to take it into account in considering his credibility and in considering his propensity to have committed this offence of robbery.

27. There is some force to the submission that the judge should have given a robust direction to the jury that Mr. Sears evidence that the appellant had robbed him before only relates to the quality of his identification and was not itself evidence that the appellant had committed the offence on 26 May 2016, but this is a judgment call of the trial judge. By giving a more robust direction to the jury, he may well have drawn more attention to that earlier incident than as to the identification at the identification parade.

28. We did not regard that complaint as being one that affected the safety of the verdict.

29. As to the complaint about the statement by ASP Maycock that the appellant was in custody for other matters, this is also unfortunate. However, this fact came out in cross-examination. In her summation the trial judge did direct the jury as follows:

> **"Jurors, at this juncture I again remind you to give no regard to the statement made by ASP Maycock that the witness -- sorry, that the defendant herein was in custody for a number of matters."**

30. In our view this direction was adequate. Indeed to highlight it in stronger terms may well have drawn more attention to that fact which would have been more prejudicial to the appellant.

Ground six: The judge erred in law when she failed to rule that the evidence of the virtual complainant was unreliable as it was inconsistent with evidence at an earlier trial.

31. Inconsistencies are matters for the jury. This ground must fail.

Ground seven: The judge erred in a material irregularity in allowing the prejudice statement and not directed or address it when the virtual complainant said "I recognized them because they had robbed me before"

32. We dealt with this issue under the fifth ground.

Ground eight: The judge erred when she permitted prejudicial evidence for the virtual complainant that he recognized the appellant because he had robbed him before.

33. This is a reformulation of ground five. It was relevant evidence and although prejudicial, it had probative value as it could be taken into account by the jury in determining whether Sears identification evidence was reliable.

34. No objection was taken to the admissibility of this evidence and the virtual complainant was cross examined on it.

35. This ground has no merit.

36. As a result we were of the view that the grounds had very little merit and to the extent that it is suggested that the judge should have done a little more in her directions, we were satisfied that it did not affect the safety of the conviction.

37. Finally, the appellant also complains about the length of the sentence. He was sentence to 10 years imprisonment, the judge having taken into account the two years already spent in prison. In her sentencing ruling the judge said:

> **"In The Bahamas, the offence of armed robbery while armed with firearm carries the maximum penalty of life imprisonment. This penalty underscores the gravity of the offence in the country as it places this offence in the category of such other serious crimes such as murder and manslaughter, which nearly always warrants custodial sentence. In exercising my discretion in sentencing, I consider those factors which are both mitigating and aggravating about the offence and the offender.**
>
> **In respect to the convict, I have considered as mitigating circumstance the fact that he was gainfully employed at the time of the offence and is the father of four young children whom he provided for prior to his remand. He had no previous criminal history and despite the seriousness of the crime, there was no physical harm to the victim. According to the probation report summation, he has participated in four programs offered at The Bahamas Department of Corrections which suggests his receptiveness to engage in positive activity. He can be considered candidate for reform and rehabilitation.**
>
> **The Court also considered the aggravating factors in this case; and those particularly are, the seriousness of the offence and that gun was used in the commission of the offence and that weapon was never recovered.**

As said earlier, the offence of armed robbery is very prevalent in The Bahamas, and in particular, in New Providence and especially the use of firearms.

In applying the principles of sentencing to the facts of this case, sentence is required which is sufficient to express the community's abhorrence of this type of offence or behaviour. That sentence must be able to act as deterrent to the Convict specifically and to other persons minded to act in similar fashion.

The Court is also of the view, however, that the Convict must, after the appropriate sentence, have an opportunity to be rehabilitated and eventually return to society, and it would not impose life sentence.

In taking into consideration all of the circumstances and including the credit of ten-month period spent on remand and further two-year period of custodial sentence prior to successful appeal, I find that the appropriate sentence for the Convict, Joycelyn Similien, would be ten years with effect from the date of his conviction, that being the 11th of June, 2018."

38. The appellant says that this is effectively a 12 years and 10 months sentence for a first offender. He submits that this is unduly harsh.

39. It is settled law that an appellate court will not interfere with a sentence unless it is so harsh that no reasonable judge could have imposed it. A 13 year sentence does not meet that criterion. In **Hall v Regina** [2016] 1 BHS J No 90, a 19 year old was convicted of armed robbery. He had no previous convictions. He was sentenced to 18 years. On appeal to this Court the sentence was reduced to 15 years. Allen P, in delivering the judgment of the Court said:

" 7 As to the appeal against sentence, counsel urged us to find that the sentence of 18 years for armed robbery was unduly severe and ought to be reduced. She urged us to reduce that sentence on the basis that he was 19 years old when the offence was committed, that he had no previous convictions, and that these matters should be given considerable weight in determining what was the appropriate sentence in his case.

8 Counsel referred us to the Court of Appeal cases of Jeremy Kemp, Leon Rahming and Derek Stuart as support for her

submission that the sentence was unduly severe. We have looked at those cases, and, in fact, only one of them, namely the Rahming case, was an appeal against sentence, and was the only case in which this court actually considered the appropriateness of the sentence. This court determined in that case that 10 years was the appropriate sentence for armed robbery.

9 In this case, the judge placed great weight on the fact that three armed men (one of whom was the appellant) invaded the complainant's house and beat him and robbed him there. She considered this an aggravating factor (a circumstance which was not present in the Rahming case), and came to the conclusion that 18 years was an appropriate sentence.

9 We have considered the circumstances of the offence as well as the facts that the appellant did not have any previous convictions, and was a youth of 19 years old and have concluded that notwithstanding the aggravating factor of the home invasion, we would allow the appeal against sentence, quash the sentence of 18 years and impose the sentence of 15 years from the date of conviction. That sentence takes into account the eight months spent on remand."

40. In light of that decision, we cannot find that a sentence of 13 years was unduly harsh which warrants a reduction by an appellate court. Although the trial judge could have imposed lesser sentence, we cannot say that the sentence in this case was unduly harsh.

41. For these reasons we dismissed the appeal and affirmed the conviction and sentence.

The Honourable Sir Michael Barnett, P

The Honourable Mr. Justice Jones, JA

The Honourable Mr. Justice Evans, JA