COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

SCCrApp.No. 199 of 2018

BETWEEN

D'ANGELO T ADDERLEY

Intended Appellant

AND

REGINA

Intended respondent

BEFORE:	**The Honourable Mr. Justice Roy Jones, JA**
	The Honourable Mr. Justice Milton Evans, JA
	The Honourable Madam Justice Bethell, JA
APPEARANCES:	**Mr. Dorsey McPhee for the Intended Appellant**
	Ms. Stephanie Pintard for the Intended Respondent
DATES:	**10 November 2020; 16 November 2020; 25 January 2021; 30 March 2021; 18 May 2021, 21 June 2021; 13 January 2022**

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Criminal Appeal - Appeal against Conviction - Application for Extension of Time -Section 17 of the Court of Appeal Act- Murder- Attempted Murder- Delay - Prospects of Success – Exercise of Discretion

On 22 September 2016, D'Angelo T. Adderley was convicted of the murder of Sheria Curry and the attempted murder of Shanko Smith. He was later sentenced on 9 February 2017 to thirty five (35) years imprisonment on the charge of murder and fifteen (15) years imprisonment on the attempted murder, with the sentences to take effect from the date of conviction and to run concurrently. On 1 October 2018, almost two years out of time, he filed a Notice of Appeal against his conviction. On 13 May 2021, he filed an application for an extension of time to appeal against his convictions citing his reason for the delay as not knowing how to go about his appeal through the system. He appeals his conviction on the grounds that the judge did not adequately and fairly assess the identification evidence, the statement of Adderley's his co-accused should have omitted his name and was highly prejudicial against him and that the verdict was unsafe and unsatisfactory. On 21 June 2021, after hearing the arguments, the Court reserved its decision.

Held: The application for extension of time is refused. The convictions and sentences are affirmed.

The intended appellant's appeal was almost 2 years out of time and his proffered explanation is unacceptable.The proposed grounds of intended appellant's appeal have no prospect of success. It is readily apparent that the judge drew the jury's attention to the need to be cautious when considering the evidence of the alleged eyewitnesses, giving the reason for such caution and the possibility of an error being made even in cases of purported recognition. The learned judge gave explicit directions to the jury that the statement of the co-accused was not evidence against the intended appellant and had properly fulfilled his duty and there is no merit to the ground that the verdict is safe and unsatisfactory. Therefore, the EOT application is refused and the convictions and sentences are affirmed.

R v Turnbull and others [1976] 3 All ER 549 considered

R v Thomas Henry Weeder (1980) 71 Cr. App. R. 228 considered

Dennis Lobban v Queen [1995] 1 W.L.R 877 considered

JUDGMENT

Judgment delivered by The Hon. Madam Justice Carolita Bethell, JA

1. On 3 November 2010, Sheria Curry and Shanko Smith were in their yard in the Fox Hill area when a Hyundai SUV drove up and shots were fired into the yard hitting them. Ms.

Curry was killed and Mr. Smith was injured.Witnesses to the tragedy identified the intended appellant as one of the shooters. He was charged along with two others for the murder of Ms. Curry and the attempted murder of Mr. Smith. At the trial witnesses gave evidence that the intended appellant was the front seat passenger and that they knew him prior to the incident as Bowie. On the 22nd September 2016 the intended appellant was convicted on both counts. On the 9th February, 2017 he was sentenced to thirty five (35) years imprisonment for the murder of Sheria Curry and fifteen (15) years imprisonment for the attempted murder of Shanko Smith. Both terms of imprisonment were to take effect from the date of conviction and were to run concurrently.

2. Following his conviction and sentence the intended appellant failed to file an appeal within the 21- day statutory deadline for appeals stipulated in section 17 of the Court of Appeal Act. He lodged an appeal against conviction on the 1 October 2018 some 20 months after conviction. On the 13 May 2021 the intended appellant filed a bundle of documents including an affidavit in support of an application for an extension of time to appeal his conviction acknowledging that his appeal was almost 2 years out of time.

3. On 21 June 2021, having heard the submissions of Counsel, we adjourned this matter to await our decision on the intended appellant's application to extend the time within which to appeal ("the EOT application"). We render our decision now. For the reasons set out in this judgment, we do not grant leave to appeal out of time.

Background

4. On 3 November 2010, a grey/silver coloured Jeep (the Jeep") with three occupants pulled up on the street by a yard belonging to Sheria Curry where a number of persons were gathered. They included Sheria Curry, Shanko Smith ("Shanko"), Terez Curry ("Terez"), Anthony Brice ("Brice") and Kendino Knowles ("Kendino"). Two occupants of the Jeep fired shots at the persons assembled there. Sheria Curry and Shanko Smith received gunshot injuries. Ms. Curry died as a result of her injuries but Mr. Smith survived.

5. As a result of the police's investigations, three men were arrested and charged in connection with the shootings. They were the intended appellant, Lynden Prosper ("Prosper") and Denard Davis ("Davis"). During his interview with the police, the intended appellant declined to answer most of the questions put to him but he is alleged to have acknowledged his familiarity with Prosper and Davis and to have said that he had been with Davis the entirety of the day in question.

6. The intended appellant participated in an identification parade that included at least seven other participants. He was positively identified by Terez, Brice and Kendino as the person they saw in the Jeep on the day in question brandishing a handgun and firing it in the direction of persons in Ms. Curry's yard.

7. At their trial, the Prosecution alleged that Davis had admitted to his role in the event as the driver of the Jeep. He named D'Angelo Adderley as his front seat passenger and Lynden as seated in the back seat. Counsel for the intended appellant, Mr. Stanley Rolle, made a no case to answer submission at the end of the Prosecution's case primarily on the grounds that the evidence of the identifying witnesses was wholly unreliable and the

evidence relating to the actual shooting was materially inconsistent in relation to what the front seat passenger in the Jeep is alleged to have done. The judge did not accede to the no case to answer submission and called upon the intended appellant to answer the charges in the information.

8. The intended appellant did not testify nor did he call any witnesses. He was convicted of the offences of Murder and Attempted Murder as noted above. The intended appellant filed a Criminal Form 1 on 1 October 2018, seeking to appeal his conviction.

The Extension of Time Application

9. As the intended appellant was sentenced on 9 February 2017, he was required to file his notice of appeal within twenty-one days of that date, pursuant to section 17(1) and (3) of the Court of Appeal Act. Those sub-sections read:

> **"17. (1) Where a person convicted desires to appeal to the court or to obtain the leave of the court to appeal under the provisions of this Part of this Act, he shall give notice of appeal or of his application for leave to appeal in such manner as may be prescribed by rules of court within twenty-one days of the conviction.**
>
> **...**
>
> **(3) For the purposes of this section the date of conviction shall, where the Supreme Court has adjourned the trial of an information after conviction, be deemed to be the date on which such court has sentenced or otherwise dealt with the appellant."**

10. He filed his Notice of Appeal on 1 October 2018, some nineteen months later than he should have. The intended appellant therefore had to seek the leave of the Court to appeal out of time. He filed his application for an extension of time within which to appeal against his convictions ("the EOT application") on 13 May 2021.

11. The Court has the power to grant an extension of time within which to appeal pursuant to rule 9 of the Court of Appeal Rules, 2005; and in exercising that discretion, it has regard to four factors, namely, the length of the delay; the reasons for the delay; the prospects of success; and any prejudice to the respondent: Attorney General v Omar Chisholm MCCrApp No. 303 of 2014 and Gary Thurston v Regina SCCrApp. No. 11 of 2020.

Period of Delay and Reasons for delay

12. I have already identified the period of delay as some nineteen months. The intended appellant sought to explain this delay by including an affidavit sworn to by him in his skeleton arguments filed on 13 May 2021. In paragraph 5 of his affidavit, he deposes that he "did not understand the way how to go by on appeal true the system." As already noted, he does acknowledge that his appeal was about two years out of time. His

proffered explanation is unacceptable. Nevertheless, his appeal may yet be allowed to proceed if he is able to demonstrate that it has a good prospect of success.

Prospects of Success

13. The third factor to which the Court has regard is the prospects of success of the appeal. In my view, this is the most important of the four factors since if the appeal has no likelihood of succeeding, there is little utility in granting the leave sought in the EOT application. An assessment of this factor requires that we examine the proposed grounds of appeal on which the intended appellant will rely. The grounds as set out in the intended appellant's affidavit are as follows:

> **1. The learned judge erred in law when he did not adequately and fairly assess the identification evidence, and there being no other evidence to support the correctness of the identification which resulted from an irregular identification parade, should have withdrawn the ID evidence from the jury under the Turnbull guidelines.**
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> **2. The learned judge erred where in the circumstances of this case he did not edit the Statement of the co accused, where omission would not prejudice the co accused's defence but was highly prejudicial to the intended appellant.**
>
> **3. The verdict is unsatisfactory and unsafe in the circumstances.**

Ground 1

14. The main thrust of Mr. McPhee's submissions on the first ground was that the purported identification by the three witnesses: Terez, Brice and Kendino was based on a fleeting glance and was of such poor quality that the judge should have withdrawn the case from the jury since the identification of the intended appellant by the three witnesses was the only evidence adduced against him. Moreover, the judge failed to adequately and fairly assess the identification evidence in the case.

15. The judge's summing up pertaining to the issue of identification of the intended appellant and his co-accused begins at page 587 of the transcript and continues to page 593. He directed the jury as follows:

> **"So the issue is -- the critical question in this matter is who fired these guns. Who are they, the defendants Lynden Prosper and D'Angelo Adderley, as some of the witnesses have indicated.**
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> **Now, as just indicated, certain of the prosecution witnesses indicate that it was D'Angelo Adderley, Bowie, they did not refer to him by name. Bowie and Lynden Prosper, he was referred to by name. By Lynden Prosper name. Who had guns and were firing.**
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> **So the prosecution's case depend upon the correctness of the identification of these defendants by these witnesses. And in these circumstances, I must warn you of the special need for caution before convicting the accused men, Lynden Prosper and D'Angelo Adderley, on the evidence of the identification of the**

witnesses alone. And as I have indicated there is one other bit of evidence in respect of statements made by the defendants and I will come to that.

This is in relation to Lynden Prosper and D'Angelo Adderley. Nobody identifies the driver. The driver identified himself in the statement. The statement in which he said he did not know what was going on.

Now the need for the warning in respect of identification, is because it is possible for an honest witness to have made a mistaken identification. There have been wrongful convictions in the past as a result of such mistakes. Even apparently convincing witness can be mistaken. So can a number of apparently convincing witnesses. Even with identification involving recognition by the witnesses of the accused, as someone he knows, mistakes even in recognition of close family and friends are sometimes made and so care must be taken where the witness says that he knows the accused men. And as I have said, in respect of Lynden Prosper, the witnesses said they knew him. Some of them said they knew him basically all their lives.

In respect of the case of Bowie, some of the witnesses said they knew him for several years, since he came into the community. You must examine very carefully the circumstance in which an identification is made. And in considering whether you can rely on that evidence, you must ask yourselves the following questions. And these questions, and I will come to the evidence, you will consider the evidence of each of the witnesses in respect of these particular questions.

Those questions you will ask is: How long did the witnesses have the person that they say were the accused men, the men who did the shooting, under their observation. Again, as I said, this is Lynden Prosper and D'Angelo Adderley. How long did the witnesses say that they had these men under their observation.

The Court says that the shortest of times indicated by any of the witnesses was about a minute. Some witnesses said up to two to three minutes. The next question to ask yourself and I will come, as I said, to each of the witnesses. The next question to ask yourself is at what distance was the observation made. And, again, when I come to the witnesses I will indicate. They indicated where they were in the yard. Where, they say, they saw the car in the yard or on the sides of the street. You will consider the distance that the witness say they were from the vehicle that all of the witnesses have said these shots were fired from.

The next question you will consider is in what lighting conditions was the observation made. You will recall during this

case, this played a key part of the cross-examination of a number of the witnesses by counsel on behalf of the Prosper and Adderley. So, each witness, you consider what they say about the lighting. All of the witnesses really say that this incident took place around 7:30 or later on, on the evening, November evening. And they each refer to the streetlights, as to where they -- as to how they were able to make the observation that they made.

You will consider the evidence. You have the photographs. And you have the evidence of the photographer, particularly when he was called back. Because when he was initially called as a witness, he was not cross-examined. He was called back and asked a few questions about whether he had to use a flash to take the photographs.

You have the photographs with you. So that's a question to consider when you consider the evidence of the identification of the witnesses who purport to identify either Bowie or Lynden Prosper, also known as 'Rice'.

You also consider the question, did anything impede that observation. And in that regard you consider the cross-examination and the evidence of the witnesses relative to whether the car windows were up or down, whether there were any tint on the windows, what were the condition in respect of those things.

None of the witnesses indicated that there was anything on the faces of any of these men. They also identified two men or those who identified one person, anything on the face of any of these persons.

The next question is how long between the observation and the identification to the police. And in that regard Lynden Prosper was identified by name by a number of the witnesses. He did not attend an identification parade and I will speak to you, give you directions on that.

D'Angelo Adderley, it is alleged that on the 3rd of November D'Angelo Adderley was in an identification parade four days later and three witnesses attended that identification parade and identified him. We'll come to that evidence.

So, it appears from the evidence of those who identified Lynden Prosper, he was identified by name, and the statements were given to the police. And in respect of the defendant, D'Angelo Adderley, he was identified by the name Bowie, and then four days later on an identification parade was identified by three of the witnesses.

Anthony Brice, Terez Curry, and Kendino Knowles, I will come to that evidence.

...

The next question to consider is, have the witnesses ever seen the men before. Again, that evidence is given by each of the witnesses. They say, and you consider what their evidence is individually, of course; and the witnesses each said that they knew Lynden Prosper. As I have said already, some of them, for most of their lives, knew Bowie from he moved into the community, really living on Johnson Road. That is the evidence. And you consider this -- well ,the jury will consider this whole issue. So they are all saying that they knew these persons from beforehand. This is not a first time identification.

Another question to ask yourself is, are there any marked differences between the description given to the police and the appearance of the accused. Now, counsel for Mr. Adderley, in particular, queried whether the --for instance, Inspector Demeritte, ASP Demeritte, he came into court -- you heard from the inspector who conducted the identification parade, whether he, in fact, had a description of -- from the witnesses, of Bowie when he was comprising the identification parade. He said that he did not have a description, but the defendant selected persons. He had D'Angelo Adderley and he selected persons who, he said, were of similar description. So, from the evidence, you will find that there was no description given. Really names were given.

.....

You consider the incident, how long the incident took, the lighting conditions to determine whether, as the questions indicate and as I warned you, whether they were mistaken as to the identification of the Lynden Prosper. Whether they were mistaken as to the identification of Bowie, the defendant D'Angelo Adderley; because they knew these people. You consider the circumstances, the event, the time, the nighttime, the lighting conditions, what was taking place, to determine whether you can accept the evidence of these witnesses or any of these witnesses. Now the questions I have posed in respect to the identification and the evidence, they are all matters which go to the quality of the identification. If you consider that the quantity of the identification is good and remains good throughout, then you may convict on it, even if there is no other evidence to support it."

The Authorities

16. The classic authority on the issue of identification in criminal trials is found in the case of **R v Turnbull and others** [1976] 3 All ER 549 where Lord Widgery, CJ stated at pages 551 - 2:

> **"First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge**

should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment, when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however, that an adequate warning has been given about the special need for caution. Were the courts to adjudge otherwise, affronts to justice would frequently occur. A few examples, taken over the whole spectrum of criminal activity, will illustrate what the effects on the maintenance of law and order would be if any law

were enacted that no person could be convicted on evidence of visual identification alone."

17. **Turnbull** (Supra) has been followed in this jurisdiction and, in my opinion, continues to be good law. Lord Widgery, CJ urged judges to explain the need for caution when approaching cases based on identification. In his directions to the jury, the judge said, inter alia:

> **"There have been wrongful convictions in the past as a result of such mistakes. Even apparently convincing witness can be mistaken. So can a number of apparently convincing witnesses. Even with identification involving recognition by the witnesses of the accused, as someone he knows, mistakes even in recognition of close family and friends are sometimes made and so care must be taken where the witness says that he knows the accused men."** (p. 588-9 of the transcript)

18. It is readily apparent that the jury's attention was drawn to the need to be cautious when considering the evidence of the alleged eyewitnesses, the reason for such caution and the possibility of an error being made even in cases of purported recognition.

19. In regard to the complaint that there was only the impugned identification of the three witnesses to connect the intended appellant to the offences and that the judge should have withdrawn the case from the jury in the circumstances, the intended respondent meets this complaint with the case of **R v Thomas Henry Weeder** (1980) 71 Cr. App. R. 228. I set out the head note of **Weeder**:

> **"When the quality of the identifying evidence is poor the judge should withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. The identification evidence can be poor, even though it is given by a number of witnesses. They may all have had only the opportunity of a fleeting glance or a longer observation made in difficult conditions, e.g. the occupants of a bus who observed the incident at night as they drove past.**
>
> **Where the quality of the identification evidence is such that the jury can be safely left to assess its value, even though there is no other evidence to support it, then the trial judge is fully entitled, if so minded, to direct the jury that an identification by one witness can constitute support for the, identification by another, provided that he warns them in clear terms that even a number of honest witnesses can all be mistaken."**

20. The judge could have told the jury that the evidence of one of the eyewitnesses could be used to support the identification of another of the identifying witnesses. That he did not do so, benefited the intended appellant. Still, the jury having heard the evidence of the alleged eyewitnesses and having been given the warning to exercise caution and the

reason for doing so, I find that there is no merit in this ground. Insofar as the success of this appeal depends on this ground, it must fail.

Ground 2

21. Mr. McPhee submits that the most egregious thing that happened is that the out of court statement of the intended appellant's co-accused Denard Davis was not edited by the learned judge to omit the name of the intended appellant and this was highly prejudicial to the intended appellant.

22. During the trial, the learned judge dismissed an application by the intended appellant to edit the statement following the decision in **Dennis Lobban v Queen** [1995] 1 W.L.R 877 where the Privy Council held :

> **"(1) that although a judge had a discretion to refuse to admit evidence tendered by the Prosecution, if in his opinion, its prejudicial effect outweighed its probative value and, in a joint trial he could exclude evidence on which the Prosecution intended to rely as being probative of its case against one defendant if it would be unduly prejudicial to another defendant, the judge no discretionary power at the request of one defendant to exclude relevant evidence,albeit tendered by the Prosecution which was prejudicial to him, but tended to support the defence of another defendant; that, accordingly, where a statement of a co-defendant contained admissions and an exculpatory explanation the judge has no discretionary power to direct on the basis of justice as between the defendants the editing of the exculpatory part on which the co-defendant wishes to rely; that while the co-defendant's statement was not admissible in evidence against the defendant the entire statement was relevant and admissible as part of the Prosecution case against the co-defendant, and since the last part of the statement which implicated the defendant and referred to him by name, was of significant relevance to the co-defendant's defence he had an absolute right to the whole of the exculpatory material in his statement placed before the jury; that the judge had therefore not erred in refusing to order the editing of the statement; and that, in any event, the judge had been entitled to consider that it would be unfair to the co-accused for any of the exculpatory explanation to be excluded and he would have had no justification for concluding that the admission of the last part would be of greater prejudice to the defendant than it's exclusion would be to the co-defendant.**
>
> **(2)That where the interests of justice did not require separate trials and the statement of one defendant implicating another defendant was admitted in evidence, the trial judge had a duty to protect the interests of the latter from the real risk of prejudice by giving explicit directions to the jury that the statement was not evidence against him; and that since the**

judge had properly fulfilled that duty, the admission of the statement of the co-defendant in its entirety before he was discharged did not constitute an irregularity."

23. In my opinion, the learned trial judge exercised his discretion correctly and did not err in editing the out of court statement of the intended appellant's co-accused as he had an absolute right to have the whole of that exculpatory material in his statement placed before the jury.

24. At page 574 of the summing up the learned judge touched on the directions to the jury and had this to say:

> **"From the statement – and I will come and give directions in respect of the statements – of Denard Davis, which was put into court, Mr. Davis indicates in that statement, that he was driving the vehicle and that two persons were in that vehicle. He identifies who they are. That is no evidence against those persons. I will give you directions on that as well."**

25. The learned judge later on in the summing up gave full and explicit directions at pages 578 – 579:

> **"As I have indicated to you, the statement refers to other persons. Now, what is said by the defendant outside of court, can be evidence for or against that defendant. But it cannot be evidence against any other defendant or any other person. So, you may admit something about yourself but you cannot admit something about somebody else. No defendant has come to the witness box and said anything about any other defendant. The statement of Denard Davis and anything said about any of the other defendants -- and I will come to what the police said that the persons said when they were questioned, when I come to that evidence -- but no defendant can confess for anybody else. And so, when you consider the statement of Denard Davis, notwithstanding the reference to two other persons, you do not take that as evidence against those other persons. That is only evidence for -- since he says he relies on it -- himself or against himself. Since the Crown says that it is a mixed statement. But you cannot take that evidence and use that against Lynden Prosper or D'Angelo Adderley. An out of court statement by a defendant, cannot be evidence against any other defendant. And the same applies as in another statement which the person denies any involvement in anything but says "I was together with the defendant, Denard Davis". I will come to that entirety. Again, that is no evidence against Denard Davis, because that's a statement which does not admit to anything, but that's a statement made outside of court and put into evidence, just as to what the defendant said. That particular defendant said, when he was questioned. And so, the statement of Denard Davis is evidence for or against him only. The statement any other**

defendant, is his statement about what he did or did not do. Only. No evidence against any other defendant."

26. I further find that the learned judge gave explicit directions to the jury that the statement was not evidence against the intended appellant and that he had properly fulfilled his duty. I find no merit in this ground.

Ground 3

27. The verdict is unsatisfactory and unsafe in the circumstances.

28. I find that the verdict is safe and satisfactory and find no merit in this ground. The Intended Appellant was identified by three (3) witnesses who saw him firing shots into a yard that cause the death of Sheria Curry and attempted to kill Shanko Smith.

Disposition

29. I am satisfied that the proposed grounds of intended appellant's appeal have no prospect of success. Therefore, the EOT application is refused. The convictions and sentences are affirmed.

The Honourable Madam Justice Bethell, JA

30. I agree the reasons and disposition in this appeal.

The Honourable Mr. Justice Jones, JA

31. I also agree.

The Honourable Mr. Justice Evans, JA