

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CRIMINAL APPEALS 11 & 14 /16 (S & C)

Ind 89/15

C#7000/15

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and

Mark A Seymour

Appellant

Before:

**The Hon John Martin QC, Justice of Appeal
The Hon Sir Richard Field, Justice of Appeal
The Hon Dennis Morrison, Justice of Appeal**

Appearances: Laurence Aiolfi of Samson & McGrath for the appellant and Scott Wainwright for DPP

JUDGMENT

**Revised from transcript of oral judgment 8 March 2017 and Approved
Released 31 January 2018**

FIELD, JA

1. On 29 January 2016, after a trial by jury in the Grand Court before the Honorable Justice Quin, this appellant, Mark Anthony Seymour, was convicted of wounding with intent contrary to section 203 of the Penal Code and on 11 May 2016 was sentenced to eight years' imprisonment.
2. The appellant appeals his conviction and, if that fails, his sentence of eight years.

3. The relevant background facts can be shortly stated. At about 1:33 am in the early morning of 21 November 2015, the complainant, Mr. Wayne Wright, was stabbed in the left chest area with a pointed object which penetrated his left lung. Not long thereafter, the complainant found it increasingly hard to breathe and was taken by his friend, Alex Bennett ("Mr. Bennett"), to hospital where it was discovered that he had a punctured collapsed lung. The stabbing occurred in a paved area outside the entrance to the Nectar Lounge Bar ("the Nectar Bar"), which at the time was situated in the Seven Mile shopping centre.
4. In the course of that evening, the complainant had visited a number of bars before arriving at the Nectar Bar with Mr. Bennett at about six minutes before midnight. He met at the Nectar Bar his cousin Ezekiel Carter who was there with two girls and another male friend. He said in evidence that by the time of the incident he had consumed about seven Heineken beers, maybe more.
5. Stills from the CCTV coverage timed at 01:10:12 and 00:10:26 show, firstly, the appellant walking towards the complainant and Mr. Bennett standing outside the entrance to the Nectar Bar, and secondly the appellant standing very close to the complainant bumping fists with Mr. Bennett. Another still timed at 01:28:48 shows the appellant and Mr. Bennett exchanging words, by which time the complainant had moved out of sight of the camera but remained not far from the appellant and Mr. Bennett. The complainant testified that a short while later, the appellant started to be threatening and abusive towards him. At this point the distance between the appellant and the complainant was about 40 feet and the complainant had an unobstructed view. The relevant parts of the transcript of the complainant's evidence in-chief read as follows:

“Qu: And Mark Seymour had gone into the area that we have just described?

A: Yes, sir.

Qu: What happened next please?

A: I was standing up and I hear like when he start saying like Dog City punks and this and that and then he just --

Qu: Just pause there. Who was saying that?

A: Mark Seymour."

....

"Qu: So he was saying Dog City punks to you?

A: Yes, sir.

Qu: How far away from you was he when he said that?

A: Like 'bout the same length or about the same length from the wall to me.

Qu: So from the wall behind the jury to you?

A: Yes, sir.

Qu: What happened next?

A: I tried not to pay him any mind so he just continuing, continuing with all the words.

Qu: Just pause there. What words was he continuing with, as best as you can remember, please?

A: Like he would do me things and like stuff to try to intimidate me then. Like, I can't really recall what he was saying but I remember he was saying like he would do me things, like, he would do me stuff, like.

Qu: What was going through your mind at that point?

A: I wasn't really paying him like that much attention, like, because I never went out there to look no problems or nothing so I was trying to ignore him and stuff.

Qu: All right. How long did this saying of things to you continue for?

A: Like five minutes or less than five minutes.

Qu: Was he with anyone whilst he was doing this or was he on his own?

A: He was standing up beside two men but I don't know who they was.

Qu: All right. What happened next, please?

A: And then I was talking to my cousin Zeka and Zeka walked off and same time he walked off Mark Seymour approach me and same time he approach me I just felt like this box in my chest, so as he box me I just try and push him off ..."

6. Then later:

“Qu: Who was it that boxed you in the chest?

A: Mark Seymour.

Qu: ... The area where this happened, can you describe the lighting conditions?

A: It was like a little bit of light.

Qu: I'm sorry, can you say that again?

A: It was enough light. Where I was was enough light.

Qu: There was or there wasn't?

A: Was.

Qu: There was enough light?

A: Yes, sir."

7. Then later still:

“Qu: So how long was he throwing these slurs at you?

A: Any time my cousin walked off, as my cousin walk off he like, that is when he attack me, then walk over to me.

Qu: From the distance that you've just described?

A: Yes, sir.

Qu: What sort of speed did he move at?

A: -- like ordinary walking.

Qu: You say you were boxed in the chest?

A: Yes, sir.

Qu: Did you feel anything at that point when you were boxed in the chest?

A: No, sir.

Qu: What happened immediately upon being boxed in the chest?

A: My cousin separated us, like part us and then I walk the other way."

8. And then finally:

"Qu: And how sure are you that it was Mark Hilary that stabbed you?"

(I interject to say that Mark Hilary was a name by which the appellant was known in earlier years to the complainant.)

A: Because that's the last person I had a like conflict with.

Qu: At the time this incident happened -- ... -- how clearly could you see him?

A: I know it was him."

9. It was not seriously in dispute that the complainant had known the appellant for a number of years. They had been in prison at the same time - the complainant in the juvenile section and the appellant in the adult section, and from time to time they had spoken to one another. This part of the evidence resulted in the inclusion in the formal admissions of details of the complainant's convictions for robbery and possession of an offensive firearm with intent to commit an offence. The document containing the formal admissions was given to the jury. It also contained admissions as to the appellant's extensive criminal record that included several convictions for assault, both common assault and assault causing actual bodily harm, assaulting the police and threatening violence. The appellant's convictions were admitted into the evidence in support of the prosecution's contention that they showed a propensity to violence.
10. In re-examination, the complainant, in reply to questions about how sure he could be that it was the appellant who stabbed him and how clearly he could see the appellant at the time of the incident, answered: "Because that's the last person I had a conflict with." "I know it was him."
11. Shortly after the stabbing, Mr. Bennett, and another man, got into a fight which caused some bleeding to Mr. Bennett's forehead.
12. To begin with, the complainant did not name the person who had stabbed him, but a few hours later that morning he told the police that it was the appellant who was the assailant.
13. Two and a half weeks after the stabbing, when the appellant was in custody on remand for the index offence, the complainant was shot, although not fatally, by a man he said he did not know and could not identify.
14. In cross-examination, the appellant's case was put to the complainant as follows, each part of which the complainant denied: (i) He was drunk at the time of the incident and could not remember everything that happened. (ii) He did not initially

tell the police who stabbed him because he did not know who it was. (iii) He was involved in another dispute that did not involve the appellant and that was how he got stabbed. (iv) The person with whom Mr. Bennett had the fight could have been the man who stabbed him. (v) He knew who stabbed him and who shot him and neither of these persons was the appellant. (vi) Although he said that there was enough light to see that it was the appellant who stabbed him, he had testified that he did not see the appellant holding any weapon.

15. The complainant was not asked about his previous convictions, whether in-chief or in cross-examination.
16. The appellant gave evidence testifying that he knew the complainant but did not know his name. He accepted that he was outside the entrance to the Nectar Bar when the complainant was there and said that he separated Mr. Bennett and the man Mr. Bennett had a fight with in which weapons were used. He had done nothing to Mr. Wright. The area in question was dark. The photographs shown to the jury were taken with a flash that made it look lighter than it was. He denied stabbing the complainant or mouthing off against him.
17. He was asked in-chief about his criminal record and admitted assaulting the police sometimes when they came to arrest him, and said that when he made threats to kill, he was upset at being treated badly and his anger made him say things he did not really mean.
18. Neither Crown counsel nor counsel for the defence raised with Justice Quin the question whether he should give a *Turnbull* direction on the issue of identification. Nor was there any discussion between the bar and Mr. Justice Quin as to what, if anything, ought to be said in the summing up about the complainant's convictions.
19. In the course of summing up the case, Justice Quin briefly rehearsed the main points of the evidence given by the complainant and the appellant. In rehearsing the complainant's evidence, he reminded the jury: (i) that the complainant had said

that there was enough light for him to see the appellant; and (ii) in response to the question how clearly he could see the appellant, the complainant replied, "I know it was him".

20. The judge also summarised the respective cases of the prosecution and the defence, in the course of which he told them that the Crown was saying that it was not a question of the complainant identifying a stranger; instead he was identifying someone he knew. He reminded the jury that the defence contended both that there was no corroboration of the complainant's identification evidence and the identification might be mistaken because of drunkenness. The judge also referred to the question of the lighting and reminded the jury of what the complainant had said about that.
21. In addition, the judge reminded the jury that both the appellant and the complainant had convictions. He said, "Mr. Seymour and Mr. Wright both have convictions. Mr. Seymour has, well you have them with you, convictions for assaulting a police officer, common assault and assault causing actual bodily harm." The jury was told that they had the admissions in a formal document and thereafter the judge gave a conventional bad character direction in respect of the appellant.
22. On behalf of the appellant, Mr. Aiolfi, who did not appear at the trial, advances two grounds of appeal. The first ground was that the appellant's conviction was unsafe because the judge had failed to direct the jury on the relevance of the previous convictions of the complainant. The second ground was that the conviction was unsafe because Justice Quin had failed to give a direction on identification in accordance with the judgment of the Court of Appeal of England and Wales in *Turnbull* [1977] QB 224.

Ground One

23. In support of the first ground of appeal, Mr. Aiolfi submitted that the credibility of the complainant was central to the case and the complainant's previous convictions were directly relevant to his credibility because they could affect his standing in the minds of the jury; they therefore crossed the threshold for admissibility. He referred us to the observation of Lawton LJ in *R v Sweet-Escott* (1971) 55 Cr App R 316 that cross-examination as to credit must relate to the witness's likely standing after cross-examination with the tribunal which is trying him or listening to his evidence. It was submitted that the judge's failure to direct the jury on how they should approach the complainant's previous convictions may have resulted in the jury failing to understand that the convictions were relevant to the complainant's credibility. Further, the absence of any such direction was compounded by the fact that the judge did remind the jury on how they may use the appellant's bad character. As a result, the jury may have been even more likely to form the view that the victim's convictions were not relevant or were no more than background information and did not affect his credibility. In addition, the obvious disparity in the way in which the convictions were treated may have led the jury to place undue weight on the previous convictions of the appellant.
24. Mr. Aiolfi cited paragraph 24 of the judgment in *Campbell* [2007] 2 Cr App R 28:

"The change in the law relating to character evidence introduced by the 2003 Act should be the occasion for simplifying the directions to juries in relation to such evidence. Decisions in this field before the relevant provisions of the 2003 Act came into force are unhelpful and should not be cited. Where evidence of bad character is introduced the jury should be given assistance as to its relevance that is tailored to the facts of the individual case. Relevance can normally be deduced by the application of common sense. The summing up that assists the jury with the relevance of bad character evidence will accord with common sense and assist them to avoid prejudice that is at odds with this."

25. Counsel for the Crown, Mr. Wainwright, drew our attention to the closing sentence of paragraph 23 in this judgment:

"Failure to give a direction that is no more than assistance in applying common sense to the evidence should not automatically be treated as a ground of appeal, let alone as a reason to allow an appeal."

26. Those words were echoed in the case of *R v Kelly* EWCA Crim. 1436.
27. In our judgment, the judge's failure to give a direction to the jury as to the use that was open to them to make of the complainant's previous convictions was not a material irregularity. In our view, the jury were bound, as a matter of common sense, to take into account the serious convictions that the complainant had - robbery and possession of a firearm with intent. They would inevitably have assessed the evidence of the complainant having regard to what they had heard about him and the impression that he made on them in the course of giving his evidence. It was accordingly we think that the judge was entitled to rely on the jury using their common sense and would take this approach when considering the complaint's evidence.
28. For these reasons, we dismiss the first ground of appeal.

Ground Two

29. As is well known, it was held in *Turnbull* that where a case against the defendant depends substantially on the correctness of the identification of the defendant, the jury should be warned of the special care needed for caution before convicting the defendant and the reasons for that caution, namely, that experience has shown that honest witnesses can be mistaken in their identification, whilst at the same time appearing to be convincing given their undoubted honesty.

30. *Turnbull* also requires that the trial judge should direct the jury to examine closely the circumstances in which the identification was made and remind the jury of specific weaknesses which had appeared in the identification evidence. The direction should be given whether the defendant was a stranger to the identifying witness or was someone he believed he had recognised.
31. In *R v Oakwell* (1978) 66 Cr App R 174, decided shortly after the decision in *Turnbull*, the appellant had been charged with using threatening behaviour and with assaulting a police constable. He was convicted of the first charge, but the jury failed to agree on the assault charge. The police officer testified that he attended a disturbance in Sheerness High Street, where he saw some men fighting, including the appellant, Oakwell. He walked over to the fight and grabbed the man who he said was Oakwell by the collar and told him he was under arrest for a breach of the peace. The apprehended man then turned his back on the constable, who grabbed him round the neck to try to restrain him, at which point the man hit the officer twice in the stomach.
32. The trial judge said something about identification at the end of his judgment, but he did not give anything like a full *Turnbull* direction. In response to an argument that the judge erred in not giving a *Turnbull* direction, Lord Widgery, who had recently delivered the judgment in *Turnbull*, said:

"To start with, it was something of a surprise to the Court to realise that any identification problem arose in this case at all. But further investigation shows that it amounts to this. There was a period when Constable Tapson was on the ground when he had not got Oakwell in his sight, and the suggestion is that there may have been confusion in Constable Tapson's mind between the man who knocked him down and the man Oakwell, who was standing up beside him when he got up again."

"This is not the sort of identity problem which *Turnbull* is really intended to deal with. *Turnbull* is intended primarily to deal with the ghastly risk in case of fleeting encounters. This was not that kind of case." [p. 178]

33. In *R v Slater* [1995] 1 Cr App R 584, Rose LJ said:

"In the judgment of this Court, the need for a *Turnbull* direction arises where there is the possibility of mistaken identification. Such a possibility will generally arise when the issue is whether the defendant was present and a witness claims to identify him on the basis of a previous sighting or sightings. In such a case, it is essential that the jury examine each of the relevant sightings with care and that they be directed to do so in accordance with *Turnbull*. Where, however, there is no issue as to the defendant's presence at or near the scene of the offence, but the issue is as to what he was doing, it does not automatically follow, in the judgment of this Court, that a *Turnbull* direction must be given. Whether such a direction is necessary will depend on the circumstances of the particular case. It will be necessary where, on the evidence, the possibility exists that a witness may have mistaken one person for another, for example, because of similarities in face, build or clothing between two or more persons present."

"Furthermore, it would, as it seems to us, be contrary to common sense to require a *Turnbull* direction in all cases where presence is admitted but conduct disputed. Purely by way of example, such a direction would not, in our view, generally be necessary if the defendant admitted he was the only person present when the complainant received his injuries, or if a woman and a man were present and the complainant said the man caused his injuries Of course, in all but the first of those examples, an appropriate warning would need to be given if in a particular case, for example, the lighting was bad or there were other circumstances giving rise to the possibility of mistake. But, in our judgment, the possibility of mistake is a necessary prerequisite for an identification issue to arise as to require a *Turnbull* direction." [p.589.]

34. In *Beckford v R* (1993) 97 Cr App R 409, an appeal from the Jamaican Court of Appeal to the Privy Council, the appellants and co-accused were charged with murder. At the trial, the principal witness for the Crown testified that he had known one of the appellants for about a year, another since birth and the third

from when he was a little boy. He said that he heard gunshots and ran to a position about eight chains (176 yards) away from where he saw the three appellants all armed with shotguns, with one of them holding the deceased. He subsequently moved to about two chains, (44 yards) from the men whom he saw running onto a track. The trial judge did not give a *Turnbull* warning about identification evidence, but told the jury that the issue of identification was critical. The Privy Council allowed the appellants their appeal. The decision of the Board was given by Lord Lowry who said:

"The need to give the general warning even in recognition cases where the main challenge is to the truthfulness of the witness should be obvious. The first question for the jury is whether the witness is honest. If the answer to that question is yes, the next question is the same as that which must be asked concerning every honest witness who purports to make an identification, namely, is he right or could he be mistaken? "

"Of course, no rule is absolutely universal. If, for example, the witness's identification evidence is that the accused was his workmate whom he has known for 20 years and that he was conversing with him for half an hour face to face in the same room and the witness is sane and sober, then, if credibility is the issue, it will be the only issue. But cases like that will constitute a very rare exception to a strong general rule."[p.415]

35. *Beckford* was cited in another Privy Council case, *Capron v The Queen* UKPC 34, which was an appeal from the Bahamas Court of Appeal. In the course of giving the Board's decision, Lord Rodger referred to the case of *Shand* [1996] 2 Cr App R 204 and went on to say:

"The Board notes that in both *Beckford* and *Shand* there is a suggestion that only in "wholly exceptional" or "very rare" cases could a court dispense with giving a *Turnbull* warning even where the main issue is the credibility of the witness or witnesses. In their Lordships' view, experience tends to show the wisdom of Lord Widgery's apprehension in *Turnbull* that using the phrase "exceptional circumstances" to describe

situations in which the risk of mistaken identification is reduced would be liable to result in the build-up of case law as to which circumstances can properly be described as exceptional and which cannot. Such case law is liable to divert attention from what really matters, which is the nature of the identification evidence in each case. Perusal of the cases where the Board either has, or has not, allowed an appeal where the trial judge has omitted to give a *Turnbull* direction in a recognition case indicates that, not unexpectedly, the result depends on such matters as whether the evidence is corroborated, whether the conditions for observation were good, whether it was a fleeting glance etc. This suggests that, even in a recognition case, the trial judge should always give an appropriate *Turnbull* direction unless, despite any defence challenges, the nature of the eye witness evidence is such that the direction would add nothing of substance to the judge's other directions to the jury on how they should approach that evidence." [para 16]

36. The Board dismissed the ground of appeal based on the failure to give a *Turnbull* direction but allowed the appeal on other grounds.
37. In our judgment, it follows from these authorities that the issue we have to decide is whether in this case, assuming that the complainant's evidence was accepted by the jury as being truthful and reliable, there was a real, as distinct from a fanciful, possibility that the identification of the appellant by the claimant could be mistaken. If there was such a risk, a *Turnbull* direction should have been given and this appeal should be allowed. On the other hand, if there was no such risk, the judge's directions to the jury involve no material irregularity and the appellant's conviction was safe.
38. Mr Aiolfi submitted that identification was a substantial issue in the case and there was a real possibility that the complainant's identification of the appellant was mistaken. He identified four particular issues in support of that submission. First, he said there was evidence to support the contention that the complainant may have been intoxicated and therefore his identification was unreliable. Secondly, he drew attention to the complainant's evidence about the lighting. It was dark but not

so dark as for the complainant not to identify the appellant. Next, he submitted that the length of the relevant observation may well have been short. He drew our attention to a passage in the evidence of the complainant which was capable of suggesting that based on what was said as to when the cousin walked away, the cousin being the man who separated the complainant from the appellant, the time under which the appellant was under observation, moving towards the complainant to inflict the stabbing, was short. And, finally, Mr Aiolfi submitted that there were other people in the area, and those others may well have had violence in mind given the fight that broke out between Mr. Bennett and some others who were at the scene.

39. We have given careful consideration to Mr Aiolfi's attractively presented submissions, but we decline to accept them. It is not in dispute that the appellant was at the scene of the incident at the relevant time. The CCTV stills show, as the appellant admitted when giving evidence, that he was close to the scene of the stabbing very shortly before and very shortly after the complainant was stabbed. Further, the appellant was known to the complainant and was in the complainant's unobstructed view when the appellant banged fist with Mr. Bennett, with the complainant standing very close by and also when, on the complainant's evidence, the appellant subsequently threatened and abused the complainant for up to five minutes from a distance of about 40 feet and was then seen by the complainant to walk slowly, straight up to him and hit him in the chest with a concealed weapon.
40. In our view, if the complainant's evidence was truthful and reliable, there was no real possibility that his identification of the appellant could be mistaken.
41. In our judgment, in the particular circumstances of this case, there was no necessity for the judge to go beyond the observations he made to the jury about the issue of identification and give a *Turnbull* direction. And the jury, having accepted that the complainant's evidence was truthful and reliable, we are satisfied that the appellant's conviction is safe and accordingly this ground of appeal should also be dismissed.

Sentence

42. The appellant appeals against the sentence of eight years imposed by the trial judge. When passing sentence, Justice Quin observed that the offence involved a gratuitous act of extreme violence and he noted that the consequences of the stabbing had been very serious for the complainant. He took into account the 60 previous convictions that the appellant had, including many convictions for assaulting police, resisting arrest, threatening violence, assault causing actual bodily harm and other assaults involving actual bodily harm. He also drew attention to the fact that the attack had been entirely unprovoked. He referred to two authorities. The first was the decision in *Hyre* (Criminal Appeal 9 of 2009) in which this court upheld the sentence of seven years, the facts of which were substantially similar to the facts in this case. There, about five serious stabbing injuries had been inflicted on the victim. The other case was that of *Rowe* (Criminal Appeal 9 of 2015) where, after a trial, a sentence of six years' imprisonment for wounding with intent was upheld. In *Rowe*, there was some provocation and the appellant did not have any previous convictions. The appellant in *Hyre* also did not have any previous convictions.
43. Mr. Aiolfi submitted that given that this was a Category 2 case within the UK Sentencing Guidelines and that the starting point under those guidelines was six years, with a range of five to nine years, the judge was not entitled to raise the sentence from six years to eight years. Mr. Aiolfi also contended that the case was much closer to *Hyre* and the sentence certainly ought not to have been as high as eight years.
44. In our judgment, although the sentence of eight years was towards the very upper end of the sentencing range appropriate on the facts of this case, the sentence imposed was not manifestly excessive. This was a very serious offence; very serious injuries were caused; and the attack was wholly unprovoked. The appellant also had an appalling criminal record which constituted a very significant aggravating factor.

45. Accordingly, for the reasons we have given, the appeal against sentence is also dismissed.

Martin, JA

Morrison, JA