[2017] JMCA Crim 8

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO 9/2016

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE McDONALD-BISHOP JA
THE HON MR JUSTICE F WILLIAMS JA

ERROL ROCHESTER v R

Norman Manley for the appellant

Mrs Andrea Martin-Swaby for the Crown

23 February and 3 March 2017

F WILLIAMS JA

[1] When this matter came on for hearing on 23 February 2017, we made the following orders:

> "1. The appeal is allowed;
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> 2. The conviction is quashed and the sentence is set aside;
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> 3. A verdict and judgment of acquittal are entered."

[2] These are our promised reasons for the making of those orders.

[3] By notice of appeal and separate grounds of appeal, both filed on 10 May 2016, the appellant sought to set aside his conviction and sentence for the offence of larceny from the person, contrary to section 19 of the Larceny Act.

[4] The facts which were found by a learned Parish Judge for the parish of Manchester and which resulted in the appellant's conviction on 4 April 2016, were that, on 10 October 2010, he stole the sum of $200,000.00 from the virtual complainant in the Mandeville Market. This he did (on the finding of the learned Parish Judge) by approaching the virtual complainant from the side, pulling a bag containing a windbreaker over the virtual complainant's head, and taking the money from his pants pocket during the struggle that ensued between them.

[5] The appellant's sentencing was put off to 2 May 2016, for the purpose of obtaining a social enquiry report and for checks to be made as to whether the appellant had a criminal record. On that day he was sentenced to six months' imprisonment at hard labour. He was offered bail by the learned Parish Judge, pending the hearing of his appeal.

[6] These are the two grounds of appeal that have been filed on the appellant's behalf:

> "1. That the conviction entered by the Learned Resident Magistrate [sic] is unreasonable and unsafe having regard to the evidence.
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> 2. That the Learned Trial Judge erred in law/fact when she completely ignored the evidence of the virtual complainant that he had pointed out someone (not the suspect) as the

> person who had taken monies from his person when he attended the identification parade with respect to incident [sic] the subject matter of the indictment."

[7] In amended skeleton arguments filed on 17 February 2017, the appellant asked that his conviction and sentence be set aside and a verdict of acquittal be entered; or, in the alternative, that the sentence be reduced.

[8] By way of further background, it should be pointed out that at the trial there was no dispute that the parties knew each other. The virtual complainant testified to knowing the appellant for at least a year and for perhaps as many as seven years (depending on how that bit of the evidence is read). They lived in the same district. This prior knowledge was confirmed by the appellant in his unsworn statement, in which he said that they lived in the same community and that he had known the virtual complainant for more than 12 years. In the said unsworn statement the appellant also appears to have placed himself at or near the scene of the incident on the day in question, saying that the virtual complainant approached him at the market and told him to tell his friends to return the money. He (the appellant) walked off and turned himself over to the police.

[9] The learned Parish Judge having dismissed a no-case submission, and thereafter having heard the unsworn statement and submissions from both sides, found the main issues in the case to be identification (or recognition) along with the issue of credibility. No weight was placed on the unsworn statement, the court being of the view that, if the words attributed to the virtual complainant by the appellant were indeed spoken by him (telling him to have his friends return the money), there would have been no need

for the appellant to have (as he said) turned himself in to the police. The court analyzed some of the inconsistencies in the case, resolving them in favour of the virtual complainant. The court found as well that an identification parade was not necessary in the circumstances of this case. The case of **R v Creamer** (1984) 80 Cr App Rep 248, was referred to in support of the court's decision to accept the evidence of the virtual complainant regarding his reason for not having pointed out the suspect on the identification parade that was held in relation to the incident.

The appeal

[10] The focus of Mr Manley, who argued the appeal on behalf of the appellant, was on the learned trial judge's treatment of the identification parade and, more specifically, the fact that the virtual complainant had pointed out someone other than the suspect on that parade. The virtual complainant's explanation for doing so was that he had been threatened and he was afraid (see page 5 of the notes of evidence). On this issue Mr Manley's written submission was as follows:

> "At trial the learned trial judge completely ignored the fact that witness [sic] admitted on oath that he lied to the attending officer conducting the parade: a) when he told the said officer that he was there to identify the person who had stolen the monies taken at the material time, and b) further when he identified as his assailant a the [sic] person who was a 'volunteer' on the parade and not the suspect. The Learned Judge did not examine on this point the creditability [sic] of the witness that he was threatened before the holding of the parade."

[11] Mr Manley also made a submission summarizing the principles stated in Archbold: Criminal Pleading, Evidence and Practice 2005 edition, paragraphs 14-15, that:

> "...though a Turnbull warning is not required on the defence attack on the veracity and not the accuracy of the identifying witness…however there is an obvious need to give a general warning in recognition cases where the main challenge is to the truthfulness of the witness (Arch 2005-14-15)."

[12] On behalf of the Crown, Mrs Martin-Swaby, while contending that the learned Parish Judge dealt adequately with the question of identification, to her credit, realistically accepted that a question arose in respect of how the learned Parish Judge attempted to deal with the fact that the virtual complainant had, on purpose, not pointed out the suspect and the explanation that he gave for doing so.

Discussion

[13] In fairness to the learned Parish Judge, it would not be entirely accurate to say that the evidence as to the virtual complainant's lie about the identification parade was "completely ignored". In the record of proceedings, this matter is mentioned in two places. First, it is mentioned in the learned Parish Judge's ruling on the no-case submission in which it is briefly stated as follows:

> "There is a case to answer. It is the Ruling. Complainant's credibility that is in issue, hasn't been damaged to extent that case to be withdrawn. He has given an explanation for not pointing out accused- Cramer vs The Queen [sic] gives me guidance that evidence may be allowed furthermore in this case ID Parade was not absolutely necessary."

[14] This ruling was in response to a no-case submission that was based primarily on an attack on the virtual complainant's credibility and that specifically mentioned the fact that the virtual complainant admitted to having lied concerning the identification parade.

[15] In the notes of evidence, it is noted again that, during his closing submissions, Mr Manley raised the same issue. The matter was addressed in the learned Parish Judge's reasons for judgment, in particular at paragraphs 13–16, as follows:

> "13. In this case an identification parade was conducted where the Virtual Complainant failed to point out the Accused and proffered that his reason for doing so was on the basis that he was threatened, fearful and that he has reported the threat to a Detective Windeth of the Mandeville Police Station.
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> 14. The case of **Regina v Cramer** [sic] (1984) 80 Cr App Rep 248 is instructive in this area as in that case it was ruled that the where [sic] a witness does not make any identification at an identification parade but subsequently informs a police officer that he has identified the accused such evidence is admissible. In allowing the evidence I do have regard to public policy that would perhaps frown on the evidence of things said outside of the presence of the accused being allowed but state that the court has to have regard to the environment which is [sic] operates. Allegations of threats though not novel in this jurisdiction and often abused still have to be taken seriously. So whereas I make no judgment in terms of the veracity of the claim of a threat, I do find that it is reason enough for me to have allowed the evidence that I have allowed in this case.
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> 15. Additionally I do find that this is not one of those cases where an identification parade was absolutely necessary. The previous knowledge of the Defendant by the VC for some seven years with numerous interactions that has [sic] not been challenged would be sufficient. The fact that the VC could not state what the Defendant's given name was

> but stated only an alias Joe is not fatal, so the subsequent pointing out in court would not have amounted to dock identification. In this regard, I have taken guidance from the privy [sic] Council case of the [sic] **Mark France and Rupert Vassell vs. The Queen** [2012] UKPC 28 and which was very recently approved in **Andre Brown vs Regina**
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> Credibility
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> 16. In assessing the Virtual Complainant's credibility or believability I have taken regard of his previous knowledge of the Defendant. This previous knowledge is a period of seven years and most importantly a period devoid of any malice or bad blood between the parties. So in my capacity as tribunal of fact, in applying common sense, I have asked myself the question: why would the Complainant make up a story about an acquaintance stealing $200,000.00 from his pocket?"

[16] From the foregoing, it can be seen that some consideration was given to the fact that the virtual complainant had intentionally not pointed out the appellant at the identification parade and to the reason that he gave for doing so. It is, however, unfortunate for the learned Parish Judge to have taken the position that: "I make no judgment in terms of the veracity of the claim of a threat". In our view, the resolution of that issue was necessary. It was required as being part and parcel of and inextricably bound up with the central question of whether the virtual complainant was a witness of truth. Had there, for example, been a finding by the learned Parish Judge that the virtual complainant had not been threatened and/or did not report the matter of the threat, that would have raised the question of the real reason for the fact that the suspect was not pointed out on the identification parade. Could the failure to do so have arisen from an inability to have identified the robber, given the circumstances of the attack? And if so, could the appellant therefore have been speaking the truth in

saying that the virtual complainant asked him to have his friends return the money? All these are questions that ought to have exercised the mind of the learned Parish Judge in considering the issue of credibility. The uncertainty surrounding this point would have been compounded by the absence from the trial of the investigating officer, to whom the virtual complainant had, on his evidence, made the report of the threat. So that, while we think that, based on the case of **R v Creamer**, the learned Parish Judge correctly ruled admissible the virtual complainant's evidence in relation to the identification parade, there was a need for the actual consideration of that admitted evidence in relation to the virtual complainant's credibility. And while the learned Parish Judge might very well have been correct in concluding that an identification parade was not absolutely necessary, that fact ought not to have resulted in a failure to have considered (a) the reality that one was in fact held; (b) at that parade the virtual complainant pointed out a volunteer, and not the suspect; and (c) he claimed that the reason for not pointing out the suspect was that he had been threatened. This failure on the part of the learned Parish Judge to have resolved the issue of credibility concerning the virtual complainant's pointing out of a volunteer instead of the suspect and his subsequent explanation (given for the first time at the trial), when it was necessary for that issue to have been resolved, in our view renders the conviction unsafe.

[17] At the end of the day, therefore, we allowed the appeal; and made the orders set out in paragraph [1] hereof.