[2018] JMCA App 3

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 69/2013

APPLICATION NO 126/2017

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA

BRIAN SMYTHE v R

Leroy Equiano for the applicant

Leighton Morris and Ms Trichana Gray for the Crown

31 October, 30 November 2017 and 13 March 2018

BROOKS JA

[1] Mr Brian Smythe has filed an application for leave to appeal against his conviction on 22 May 2013, on an indictment for two counts of murder. He also applied for leave to appeal against sentences which were imposed on him on 19 July 2013. His application was refused by a single judge of this court. Mr Smythe has not only renewed his application before the court but has also applied for the admission of fresh evidence in the consideration of his application for leave to appeal. It is his application to admit the fresh evidence which will be considered below.

[2] He had been convicted along with another man, Mr Collin Gordon. Mr Gordon has also applied for leave to appeal against his convictions and sentences.

[3] The essence of the prosecution's case against Messrs Gordon and Smythe was that they were among a group of men that, on 6 September 2009, ambushed four men who were travelling in a car along Latore Avenue in the Waltham Park community in the parish of Saint Andrew. The attackers corralled the vehicle's occupants into a yard along that road, accused them of being members of a rival gang, and shot three of them, two fatally. The two who lived to tell the tale were the eyewitnesses for the prosecution.

[4] Prior to the commencement of the trial, one of the survivors, Mr Andre Duncan, had identified Mr Smythe as being among the attackers on that fatal evening. The identification took place at an identification parade, held for the purposes of investigating the killings along Latore Avenue.

[5] An important element of the prosecution's case, for these purposes, is that, although some of the attackers had handguns, one of them had a 12 gauge shotgun. Mr Duncan, testified that he only saw one shotgun at the premises that evening. It was about 2½ feet long. The person that had it, he said, was very aggressive. Mr Duncan testified that Mr Smythe was the person who had the shotgun.

[6] The defence at the trial of Messrs Gordon and Smythe, was that they took no part in the events that occurred along Latore Avenue that night. Mr Gordon testified that he was asleep at premises at Latore Avenue, when a commotion woke him. He,

thereafter, merely observed what was taking place. Mr Smythe gave an unsworn statement in which he said that he was innocent. The issue of whether Mr Smythe had been correctly identified was the main one joined between him and the prosecution at the trial.

The fresh evidence

[7] The fresh evidence sought to be adduced is from Mr Shomari Mendez. His affidavit was to the effect that on 6 September 2009, he returned home late in the night. He was then living at number 3 Latore Avenue. Mr Mendez deposed that as he approached the premises he saw a man run out from there, "shouting for murder". He thought that it was a joke until he saw a man, whom he knew before, as "Chinaman", running behind that man. Chinaman had a long gun, like a rifle, in his hands.

[8] Mr Mendez deposed that he knew Mr Smythe before that night. He said, in his affidavit, that, on that night, he was certain that "the person [he] saw with the long gun or riffle [sic] was Chinaman" (paragraph 20 of his affidavit).

[9] Mr Mendez stated in his affidavit that he entered the premises and saw a man lying on the ground with two other men standing over him. He knew the two men, respectively, as "Willy Bounce" and "Skittman". He said that he saw "Cripple", that is Mr Gordon, sitting in his wheelchair in the yard. He called to Mr Gordon and went inside his, Mr Mendez', quarters, where he remained until the next morning. It was only in the afternoon of the following day that he learned that persons had been killed the previous night.

[10] He explained the reason for the late proffering of this evidence. He said that he had been threatened by Chinaman after the incident and he left the community and went to live in the rural town of Mandeville. It was only after hearing of the death of Chinaman several years later that he returned to the Waltham Park area. He had not heard that Mr Smythe had been convicted for the killings that occurred on 6 September 2009. He had heard that "Cripple", and someone named "Ninety" had been found guilty and imprisoned for the killings. He did not know that Mr Smythe was the person referred to as "Ninety".

[11] He said that upon returning to the community, someone connected to Mr Smythe, on hearing that he had witnessed the incident on 6 September 2009, asked him to give his information to Mr Smythe's attorney-at-law. He did so. His affidavit, which was placed before this court, was the result of that process.

[12] The court read Mr Mendez' affidavit. On 31 October 2017, after hearing submissions from learned counsel for Mr Smythe, Mr Equiano, and learned counsel for the Crown, Ms Gray, the court decided that it would hear oral testimony from Mr Mendez, *de bene esse*, that is, to hear his testimony in order to determine whether his fresh evidence was capable of belief.

[13] The hearing took place on 30 November 2017. Mr Mendez' affidavit was treated as his examination in chief and he was cross-examined by Mr Morris for the Crown. The court reserved its decision to consider whether or not to admit Mr Mendez' affidavit

evidence as fresh evidence. It would only be admitted if it satisfied the established three tests concerning the admission of fresh evidence.

The relevant law

[14] The statutory authority given to this court to admit fresh evidence at the stage of an appeal is contained in section 28 of the Judicature (Appellate Jurisdiction) Act. The section authorizes this court, in determining an appeal, to order the examination of witnesses, where that examination is necessary for the determination of the appeal. The section states, in part, as follows:

> "28. For the purposes of Part IV and Part V [which deal with the jurisdiction in criminal cases], the Court may, if they think it necessary or expedient in the interest of justice–
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> (a) order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to them necessary for the determination of the case; and
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> (b) if they think fit, order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in [sic] manner provided by rules of court before any Judge of the Court or before any officer of the Court or justice or other person appointed by the Court for the purpose, and allow the admission of any depositions so taken as evidence before the Court; and
>
> ..."

[15] The judgment of Lord Parker CJ in **R v Parks** [1961] 3 All ER 633 provides guidance in giving effect to that statutory authority. In construing legislation, similar in terms to section 28, Lord Parker stated at page 634:

> "...As the court understands it, the power under s 9 of the Criminal Appeal Act, 1907, is wide. It is left entirely to the discretion of the court, but the court in the course of years has decided the principles on which it will act in the exercise of that discretion. Those principles can be summarised in this way: **First**, the evidence that it is sought to call must be evidence which was not available at the trial. **Secondly**, and this goes without saying, it must be evidence relevant to the issues. **Thirdly**, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this court to decide whether it is to be believed or not, but it must be evidence which is capable of belief. **Fourthly**, the court will after considering that evidence go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial." (Emphasis supplied)

[16] It was stated in **Mario McCallum v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 93/2006, App No 78/2008, judgment delivered 18 June 2008, that the party seeking the admission of fresh evidence had to satisfy all of the first three requirements identified in the above extract taken from **R v Parks**.

[17] The law in relation to fresh evidence was also considered in a decision of the Privy Council in **Clifton Shaw and Others v R** [2002] UKPC 53; (2002) 61 WIR 368. Their Lordships, at paragraph [27] of their judgment, approved the principles set out in **R v Sales** [2000] 2 Cr App R 431 as being the correct approach to considering applications to adduce fresh evidence. In **Sales** Rose LJ stated, at page 438:

> "...Proffered fresh evidence in written form is likely to be in one of three categories: plainly capable of belief; plainly incapable of belief and possibly capable of belief. Without hearing the witness, evidence in the first category will usually be received and evidence in the second category will usually not be received. In relation to evidence in the third

> category, it may be necessary for [the] Court to hear the witness *de bene esse* in order to determine whether the evidence is capable of belief."

[18] In **Sales**, the court heard the fresh evidence "*de bene esse*" but found that it was incapable of belief and therefore inadmissible to undermine the safety of the conviction. The appeal was therefore dismissed. There was a similar result in **Omar Neil v R** [2015] JMCA Crim 30, where the chief prosecution witness sought, years after the conviction, to recant the evidence that she gave at the trial.

[19] In **Patrick Taylor v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 85/1994, judgment delivered 24 October 2008, Panton P, relying on the decision in **R v Pendleton** [2001] UKHL 66; [2002] 1 All ER 524, stated that there were two tasks which this court should undertake in circumstances where there is an application for fresh evidence and it hears oral testimony. The first task, he said, is to decide whether or not to accept the fresh evidence. The second task is to decide whether or not to allow the appeal. In executing this second task the court has to go on to consider what effect the fresh evidence would have on the minds of the members of the court and not the effect that it would have had on the minds of the jury, "so long as the Court [of Appeal] bore very clearly in mind that the question for its consideration was whether the conviction was safe, and not whether the accused was guilty" (paragraph 19 of **Patrick Taylor v R**). If it would not have affected the minds of the Court of Appeal, the court should dismiss the appeal.

[20] **Orville Murray v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 176/2000 judgment delivered 19 December 2008 is another decision of this court which utilised the approach used in **Patrick Taylor v R**. In both those cases, the fresh evidence was rejected and this court found that the verdict of the jury was not unreasonable. There was therefore, no miscarriage of justice.

Application of the law to the instant case

[21] Mr Mendez' evidence would have satisfied the first and second tests set out by Lord Parker in **R v Parks**. It can fairly be said, based on Mr Mendez' explanation that he was in Mandeville, and did not know that Mr Smythe was on trial, that Mr Mendez' evidence was not available to Mr Smythe at the time of the trial. It may also be said that the proffered evidence would be relevant to the issues joined at the trial.

[22] The evidence, however, fails the third test. It is plain that Mr Mendez' affidavit evidence is not capable of belief. It is noted that in his affidavit, Mr Mendez deposed that he was certain that the person that he saw with the long gun, or rifle, was "Chinaman". In his oral testimony, however, unlike in his affidavit evidence, Mr Mendez did not communicate any certainty of the identity of the person that he saw with the rifle.

[23] He stated at various points early in cross-examination that he saw "Chino man" running behind the man who had called out "murder". Later in the cross-examination, however, Mr Mendez was less definitive. The following extracts from the transcript of his evidence demonstrate this point. The first is from pages 24-25:

"Q. One of the first questions I asked you was, did you know where Bryan Smythe was and you said you don't know, so what you are here to tell us then sir, is that you didn't see Bryan Smythe?

A. I don't know who I saw, but I know Bryan is short and I saw a tall person, when dem ask me now, I said a tall person.

Q. Effectively though, you cannot tell us whether or not Bryan Smythe was there that night at all, you can't say?

A. Yes, sir.

SINCLAIR-HAYNES, JA: So, you are saying that you are not sure if he was there that night?

A. Yes, sir [sic].

SINCLAIR-HAYNES, JA: Is it that you never saw him?

THE WITNESS: Some of the persons in mask, ma'am."

[24] The next extract from the cross-examination reveals the following exchange at pages 25-26 of the transcript:

"Q. Would you also agree with me that in the same way you can never come here and tell us all the persons who were there, in the same way you could never come here and tell us all of the weapons that were there too?

A. Yes, sir."

[25] The third extract is from page 34 of the transcript:

"Q. Respectfully Mr. Mendez, as we stand here, you cannot say one way or another where Bryan Smythe was?

A. No, sir."

[26] Finally, there were further questions from the bench. These are recorded at pages 35-37 of the transcript:

"QUESTIONS BY THE COURT

SINCLAIR-HAYNES, JA: The man that you saw running, why you say it's Chino Man?

THE WITNESS: The physique, same like how you see me, tall and slim.

SINCLAIR-HAYNES, JA: So, it's only the body why you can say?

THE WITNESS: Yes, ma'am.

SINCLAIR-HAYNES, JA: What about the face, you never saw the face and you never knew where Mr. Smythe was, so how do you know that it wasn't Mr. Smythe?

THE WITNESS: That's the whole point, I am not saying it was him or it wasn't him, I am saying what I saw.

SINCLAIR-HAYNES, JA: So you are saying that you can't say if it was Mr. Smythe or Chino Man?

THE WITNESS: Just hear me out one minute, please. You a hear mi please? Where I live, mi try know people by dem body and dem walking, soh if that person run past, mi can know seh it's that person.

SINCLAIR-HAYNES, JA: So, you are saying that from the physique, that it was Chino Man; so from the physique, could you say that it wasn't Mr. Smythe?

THE WITNESS: No, ma'am.

SINCLAIR-HAYNES, JA: But it could have been Mr. Smythe?

THE WITNESS: Yes, ma'am." (Underlining as in original)

[27] In the light of the way in which it was undermined by his oral testimony, it cannot be said that Mr Mendez' affidavit evidence is capable of belief. The application for it to be admitted and considered as part of the appeal must therefore be refused.

[28] The rejection of Mr Mendez' evidence would not automatically mean that Mr Smythe's application for leave to appeal would be dismissed. He has other proposed grounds of appeal which have to be considered. Counsel will be heard in that regard.

[29] We thank counsel on both sides for their assistance with respect to this aspect of the case.

Order

[30] The application to admit fresh evidence is refused.