[2020] JMCA Crim 53

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 31/2018

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

CHEDDEAN BLACK v R

Leroy Equiano for the appellant

Ms Kathy-Ann Pyke and Ms Debra Bryan for the Crown

11 and 18 December 2020

FOSTER-PUSEY JA

[1] On 30 January 2018, the appellant, Cheddean Black, was convicted in the High Court Division of the Gun Court holden at May Pen in the parish of Clarendon, before Daye J ("the judge"). This was for the offences of illegal possession of firearm and illegal possession of ammunition. On 5 April 2018 he was sentenced to four years' imprisonment at hard labour for the illegal possession of firearm offence and 18 months' imprisonment at hard labour for illegal possession of ammunition.

[2] His application for leave to appeal against his convictions and sentences was reviewed by a single judge of this court on 29 June 2020. The application for leave to appeal against his convictions was granted. The single judge of appeal expressed the

view that it was not necessarily "an inescapable inference that the applicant had exclusive control of the premises, bearing in mind the fact that there was a watchman who had keys and access to the premises" in which the illegal items were found.

[3] We heard this appeal on 11 December 2020. On that date, the court ordered as follows:

> "(1) The appeal is allowed.
>
> (2) The convictions for illegal possession of firearm and illegal possession of ammunition are quashed and the sentences are set aside.
>
> (3) Judgment and verdict of acquittal entered."

These are the brief and promised reasons for the court's decision.

The grounds of appeal

[4] The original grounds of appeal dated 19 April 2018 were:

> (1) "**Misidentity by the Witness:** That the prosecution witness wrongfully identified me as the person or amoung [sic] any person who committed the alleged crime.
>
> (2) **Lack of evidence:** That the prosecution failed to present to the court any "concrete" piece of evidence (material, forensic or scientific) to link me to the alleged crime of which I was wrongfully convicted for.
>
> (3) **Unfair trial:** That the evidence and testimonies upon which the Learned Trial Judge relied on for the purpose to convict me lack facts and credibility thus rending [sic] the verdict unsafe in the circumstances.
>
> (4) **Miscarriage of Justice:** That I was wrongfully convicted for a crime I knew nothing about and could not have committed.

> B That the prosecution failed to recognised [sic] the fact that I had nothing to do with crime, am just a builder of the country, not a destroyer. Hence the conviction is unsafe in the circumstances."

[5] By notice of application filed on 2 December 2020, the appellant sought leave to abandon the original grounds of appeal and to instead argue the following supplementary grounds of appeal:

> 1. "The Learned Trial Judge erred in law by finding the Appellant Guilty of Possession of Firearm and Ammunition on the basic [sic] that the Appellant was in occupation and control of the premises and therefore knowledge can be reasonable [sic] be inferred. This was despite the LTJ findings that other persons had access to the premises.
> 2. The Verdict of the court is not supported by the evidence that was adduced and the Judge's own analysis and findings."

[6] Permission was granted to the appellant to argue these supplemental grounds of appeal.

The case for the prosecution

[7] The Crown relied on the evidence of four witnesses. Inspector Glen McGill, Inspector Malachi Rodney and Detective Constable Dwayne Willie testified at the trial. The statement of Detective Corporal Robert Webster was read into the record as an agreed document.

[8] The evidence of the prosecution was that on 17 July 2015, having received information, the police sought and obtained a search warrant under the Firearms Act for premises at 149 Hibiscus Road, Bushy Park in the parish of Clarendon.

[9] On arriving at the premises, the police officers saw a vehicle parked in front of it. A house there was under construction or renovation. It was later ascertained that the vehicle belonged to the appellant, who had opened the door to the house, to admit the police. Under a staircase inside a room in the building, described as a ministorage or closet area, the police found a black DKNY bag containing a submachine gun, along with a magazine loaded with 12 rounds of ammunition, as well as a knife. The door to the ministorage or closet area was not locked with a key. When cautioned, the appellant said "Bossy, is a set up thing this".

[10] Inspector McGill testified that the appellant told him, upon his enquiry, that he occupied the room. This room had, among other things, a bed, dining table, refrigerator, items of male clothing, a television, DVD player and a fan. Inspector McGill also stated that the appellant told them that he was living at the said address, and produced a driver's licence with the address 149 Hibiscus Close, Bushy Park. Later on his testimony, Inspector McGill said that when the appellant was asked whether he owned the firearm that had been found, the appellant said "No, Bossy, a nuh fi mi, mi just stay here sometime."

[11] The police also found a ballistic vest in an unfinished cupboard in the kitchen. The firearm and knife were processed for fingerprint potentials. While the results revealed several smudges, no fingerprint impressions could be lifted.

[12] Two other persons, a woman and a man, were also at the premises when the police conducted their search. They were also charged, but successfully made no-case submissions. No such submission was made on behalf of the appellant.

The defence

[13] The appellant gave sworn evidence and said that he lived at Treadlight District in the parish of Clarendon. He said that, although his driver's licence had the address 149 Hibiscus Close, Bushy Park, he had never lived at the address. He obtained that driver's licence in 2015 at a time when he had entered into an agreement to purchase that property. He did not end up purchasing the property after he was arrested there on 17 July 2015.

[14] The owner of the property did not live there. The appellant said that he was doing masonry work at the property, had left certain tools at the property the day before, and had returned there to pick up some tools. On the previous day when he had entered the property, it was after he had contacted the watchman by telephone. On the day when the police came, 17 July 2015, the appellant states that he had gained access to the premises as the watchman, Christopher Baker, was there when he arrived. Mr Baker had, however, left the premises to make a purchase at the time when the police arrived. The appellant denied having keys for the property. He stated that he had begun work at that property since 2014 and several other persons worked on the property.

[15] The appellant testified that he did not have anything to do with the clothes or the furniture which were seen in the house.

[16] In so far as the two other persons that the police also found there that morning were concerned, the appellant had picked them up on his way to the property. He said he did not know anything about a gun being at the premises, he did not know of the ballistic vest being there and had not put it there. He had never accessed the ministorage room under the staircase and in which the firearm and ammunition had been found. He denied saying ""Bossy, is a set up thing this".

The summing up

[17] The judge found, among other things, that the appellant was staying at the property, was connected to the premises in terms of occupancy, was a purchaser in possession, that the other persons at the premises were there under the appellant's direction and that the applicant had exclusive control.

[18] He accepted that other workmen would have access to the property from time to time, but found that this would be in a controlled way and subject to the watchman.

[19] At pages 298-299 of the transcript the judge stated:

> "… [It] is evidence of a man who have control of that premises and the point I am making is exclusive control, not the people there. **He talks about a watchman, the prosecution didn't challenge him about a watchman at all, that a watchman- and he gives the name of this person but that's the person he contacts. He is an intelligent man, he has somebody there to look after the premises and to account to him.** The watchman, how does he come there, the watchman going let him there? Why would the watchman let him there? On what authority? On the authority of who, [the registered owner] Miss Dana? It couldn't be right.

> He is on the strength of who he is. He said, 'I am coming there' on the strength of who he is, that is what manner he comes there, **it's not the watchman place and I don't hear of the watchman having any internal access to this place although watchmen, I cannot speculate, they don't necessarily stay in boundaries but that wouldn't mean that a watchman don't have control and of course, sometimes some of these persons on the night duty can go inside and do certain things,** that is true but then we would come to the other part of the staircase. Did [the appellant] have complete knowledge of this place inside and outside? He seeks to distance himself…" (Emphasis supplied)

[20] In addition, at pages 301-302 of the transcript the judge said:

> "Now he mention [sic] some other people there, in his evidence and he raised the issue of access. Well I have dealt with the question of the watchman but he is saying up to 10 or 15, well, if a house is under construction you have different workmen. I accept that, different trades man and some trade men have multiple skills but eventually one or two things they concentrate on, he is a mason, you have others and he talks about a system there. Okay, so, he, with his trade skill, other workmen would be there during the time that work would be going on but it's not as loose as they just come and go as they like because I do not assess [the appellant] that way, that he could be at a place where he is buying, construction is going on at that place and he comes freely back and forth **and workmen can come and go as they like and you had a watchman there, that he could tell that he is coming there.** They could do it behind his back by conspiracy but he is a [sic] intelligent man, the moment something arise he would, 'Wait, what is this, how men coming in back and forth after work is done.' **The men don't sleep there, the men don't live there, they would have to come during the hours and a watchman is there and the watchman know him as a person that he can allow there so I don't dispute the fact that workmen would be there, right**." (Emphasis supplied)

[21] The judge addressed the question as to whether the appellant knew that the gun was on the premises in the mini storage area or closet in this way, at page 304 of the transcript:

> "**I agree it is not a place that is wide open**, that doesn't take away from the fact. **I agree that the gun was found in a bag there, it doesn't have a lock and key, but I agree that he has access to the place, downstairs there and on that staircase**. Tools were there. And as a workman that he uses tool. So I agree that he has access to that area they call the mini-store area and the Crown call it a closet area, even though the bag, the black bag, **I find he had knowledge. I draw the inference and I do not find that he has rebutted the inference of knowledge from occupancy**." (Emphasis supplied)

[22] In concluding, the judge stated at pages 305-306 of the transcript:

> "**So, on the totality of the evidence, I find the Crown has satisfied me that [the appellant] had occupancy, control, and exclusive at the time** and he was not a temporary man just staying at the premises 149, like a workman, just have things there, he is not, yes, he is a mason and he does his mason work and takes his tools and he goes to other places, I accept that. He is a [sic] industrious person in that sense, but is not like he had the minimum connection as a workman to the place. It was his place. In the circumstances…I find him guilty, the Crown has satisfied me so that I feel sure. **I find him guilty of possession of firearm that is the sub-machine gun and possession of the ammunition. He had occupancy and control and I draw the inference that he had knowledge and he has not rebutted the knowledge by his explanation that he has given to this court.** And I don't find him guilty because I don't believe him. I find him guilty because I accept the Crown has proven the case to me strongly, satisfied so that I feel sure. That's it." (Emphasis supplied).

The appellant's submissions

[23] Mr Equiano addressed both grounds of appeal together on the basis that the same points would support the two grounds. The gravamen of his submission was that, in light of the fact that the judge had accepted that persons other than the appellant had access to the premises, and the unchallenged evidence of the presence of a watchman on the premises, who according to the evidence had left just prior to the arrival of the police that morning, it was not an inescapable inference that the appellant knew that there was a firearm on the premises.

The respondent's submissions

[24] Ms Pyke emphasised that once a judge found that there was physical custody, it was a matter for the judge to assess all the surrounding circumstances to determine whether there was 'knowledge'. Counsel argued that the judge found that the watchman did not have internal access, and that the appellant did not enter the premises with the permission of the watchman but on his own authority.

[25] Counsel submitted that the judge examined the law, outlined the facts that would be required to satisfy the legal requirements of the law, the explanations given by the appellant as well as issues of fact which arose for determination. Having done so, the judge was entitled to come to his findings based on his assessment of the evidence and his observation of the witnesses. Furthermore, the judge drew inferences as he was entitled to do. Counsel emphasised the deference which should be paid to the findings of the judge, he having seen and heard the witnesses. The verdict was therefore not unreasonable. She relied on the cases of **Heron Plunkett v R** [2015] JMCA Crim 32,

Roger Ferguson v the State (unreported), Court of Appeal, Trinidad and Tobago, Crim App No 007 of 2014, judgment delivered 16 December 2016 and **Alrick Williams v R** [2013] JMCA Crim 13.

Discussion

[26] There is no gainsaying that this court attaches great weight to the findings of fact of a judge who has tried a matter without a jury. This is because the judge has seen and heard the witnesses, and was in an ideal position to assess the reliability and credibility of the witnesses. If, however, the judge has made an error in law, if there is no evidence to support a particular conclusion, or it appears that the judge has failed to appreciate the weight and bearing of circumstances admitted or proved, then this court can disturb the findings made. Similarly, if a judge drew an inference, and on the evidence it is clear that it was not an inescapable inference, this court can disturb findings arrived at on the basis of that inference.

[27] In the instant case, the judge considered circumstantial evidence, and arising from all the facts that he found proved, made an inference that the appellant knew that the bag with the weapons was on the premises.

[28] In **Sophia Spencer v R** (1985) 22 JLR 238 at page 243, Carey JA, in outlining the guidance to be provided to a jury on the matter of the drawing of inferences, said as follows:

> "We would have expected the jury to be told at some point in the summing up, something such as:

> 'Having ascertained the facts which have been proved to your satisfaction, you are entitled to draw reasonable inferences from those facts to assist you in coming to a decision. **You are entitled to draw inferences from proved facts, if those inferences are quite inescapable. But you must not draw an inference unless you are quite sure it is the only inference which can reasonably be drawn'**." (Emphasis supplied)

To date, this guidance remains good law, and would also bind a single judge hearing a matter without a jury.

[29] In our view, with due deference to the judge, he erred when he drew an inference that the appellant knew that the gun and ammunition were on the premises. The judge also erred when he stated that there was no evidence that the watchman had internal access to the premises. There was no dispute that a watchman was at the premises, and there was no dispute that this watchman would be the one facilitating access to the building. Since the watchman had keys to the building, there was no basis on which the judge could conclude that the watchman had no internal access. In addition, since the watchman kept the keys for and would therefore have had access to the building, it was not appropriate for the judge to draw the inference that the appellant knew that the bag, which was not in plain sight, but in a closet, was there with the firearm and ammunition. This is because, in all the circumstances, this inference was not the only inference which could have been reasonably drawn, it was not "inescapable". We therefore agreed with the submissions made by Mr Equiano that the verdict was unreasonable as it was not supported by the evidence.

[30] It was for the above reasons that we arrived at the decision outlined in paragraph [3] above.