[2020] JMCA Crim 32

JAMAICA

IN THE COURT OF APPEAL

SITTING IN LUCEA IN THE PARISH OF HANOVER

SUPREME COURT CRIMINAL APPEAL NO 107/2009

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE F WILLIAMS JA

ALBERT EDMONDSON v R

Ronald Paris for the applicant

Jeremy Taylor and Janek Forbes for the Crown

18, 22 June 2018 and 31 July 2020

F WILLIAMS JA

Background

[1] This application for leave to appeal arises from the appellant's conviction on 15 September 2009 for the offences of: (i) illegal possession of firearm; and (ii) wounding with intent. He was convicted in the High Court Division of the Gun Court holden in Kingston by a judge sitting alone. On 15 September 2009 he was sentenced to 10 years' imprisonment for illegal possession of firearm and 20 years' imprisonment for wounding with intent. The sentences were ordered to run concurrently and were to be served at hard labour.

[2] An application for leave to appeal against conviction and sentence was refused by a single judge of this court on 22 June 2011. The appellant renewed his application before us, as is his right.

[3] At the end of the hearing of the application we made the following orders:

> "i. The application for leave to appeal against conviction and sentence is granted.
>
> ii. The hearing of the application is treated as the hearing of the appeal.
>
> iii. The appeal is allowed.
>
> iv. The convictions are quashed and the sentences set aside.
>
> v. Judgments and verdicts of acquittal entered."

[4] With apologies for the delay, this judgment is a fulfilment of our promise, made then, to provide brief reasons for making these orders.

The prosecution's case

[5] The case presented by the prosecution was that, around 1:00 am on 3 January 2004, the virtual complainant, a police constable stationed at the Trinityville Police Station in the parish of Saint Thomas, and who had been at the station on duty, left the station for a nearby shop, where he received certain information. As a result, he drove to a certain area, parked his car in a concealed location, secreted himself at a particular vantage point and waited. Whilst waiting there, he saw the appellant approach and called out to him. The appellant is then said to have fired several shots at the virtual complainant who returned the fire with his licensed Taurus 9mm firearm. The appellant escaped in a nearby river. The virtual complainant was shot in the leg.

[6] Around 3:00 am on the same day a pastor took the appellant to the Trinityville Police Station. The investigating officer, who spoke with him there, observed that he had a wound to his leg. The appellant is alleged to have said to the investigating officer: "Officer a ting guh dung". He was asked if he had a gun and he is alleged to have said: "Yes, mi choe it in di riva". He was taken to the hospital where he was treated. His hands were swabbed twice the same morning and he was later charged with the offences for which he was eventually convicted.

The appellant's case

[7] The appellant made an unsworn statement in which he denied being armed with a firearm on the night in question and shooting the virtual complainant. He stated that he was passing sound-system speaker boxes in the general area of where the virtual complainant said the shooting occurred, when he realised that he was being shot at and ran away to the river to avoid being killed. He stated that, while trying to escape, he realised that he had been shot and injured. He denied using the words attributed to him by the investigating officer.

The grounds of appeal

[8] By way of Criminal Form B1 filed on 16 September 2009, the appellant appealed against his conviction and sentence on the basis of four grounds:

> "(a) **Misidentify by the Witness**:- That the prosecution witness wrongfully identified me as the person or among any persons who committed the alleged crime.
>
> (b) **Lack of Evidence**:- That the evidence upon which the Learned Trial Judge relied on for the purpose to convict

me lack facts and credibility, thus rendering the verdict unsafe in the circumstances.

(c) **Mis-representation by Attorney**:-That I was not adequately and sufficiently represented by the Attorney assigned to me during the trial. Hence my innocence was compromised.

(d) **Unfair trial**:- That the judge based is [sic] summing up on my previous conviction, resulting I been convicted for a crime I did not commit."

(Emphasis as in original)

[9] Counsel for the appellant argued only grounds (a), (b) and (d). Grounds (a) and (b) were argued together.

Ground (a): misidentification by the witness

[10] On behalf of the appellant, Mr Paris began his submissions by posing the following question and making the following statement:

"**1. Was the Learned Trial Judge correct in stating in her summation at page 106 of the Transcript that since there was no challenge by the Applicant to Constable Richards' evidence that the Applicant was present there that night then a fortiori identification was not the most important issue in this matter.**

That the real question was whether or not Her Ladyship believed that the Applicant did have a gun and did in fact shoot at Constable Richards; it being highly unlikely that somebody else shot at him that night in that same vicinity at the same time."

(Emphasis as in original)

Ground (b): lack of evidence

[11] Similarly to ground (a), on this ground Mr Paris posed the following questions:

> "**1. What is the evidence relied upon by the Learned Trial Judge in arriving at her conclusion that she ought to believe Constable Richards and not the Applicant as to whether the Applicant was present where Constable Richards said that he was as against whether the Applicant was present where he said that he was and as to whether the Applicant was present at the time armed with a firearm with which he fired shots at Constable Richards.**
>
> **2. What is the nature of the evidence presented by the Prosecution to ground the charges laid against the Applicant."** (Emphasis as in the original)

Summary of submissions for the appellant

[12] The main submission in relation to ground (a), ("misidentify by the witness") which really has to deal with identification or recognition, was that the opportunity for the virtual complainant to have recognized the person he said was the appellant was "a very small window of opportunity". The evidence disclosed that the entire incident, from the time the virtual complainant stated that he recognised the appellant walking in his direction on Trinityville Main Road to the time when he was shot, elapsed over 15-20 seconds. Counsel submitted that the circumstances in which the identification was made were extremely difficult and, as such, the learned judge erred in her conclusion that identification was not the most important issue.

[13] Further, it was submitted that the virtual complainant was not to have been believed – not even in relation to the geography of the area – that is as to whether the incident occurred in Mount Lebanus or Trinityville, as he gave conflicting evidence on that matter as well. It was submitted that the evidence as to where the virtual complainant stood as he observed the appellant, lacked clarity, as, at points, he seems to have moved

from what he described as his "vantage point". The only possible vantage point was either darkness or behind the sound boxes behind which the appellant said that his attacker had been standing.

[14] There were also other matters that were cause for concern, the submission went, for example, the virtual complainant could not say what hand the applicant had used to fire the gun and how many shots were fired. There was also no evidence as to the seizing of the virtual complainant's firearm for testing – in particular to ascertain from which gun came the bullet fragment that injured the virtual complainant in the leg. The submission continued that the appellant's conviction was based partly on an assumption (with no supporting proof) that the bullet fragment came not from the virtual complainant's gun, but from the gun the applicant stated that he did not have. Issue was also taken with the evidence of the presence of gunshot residue on the hands of the virtual complainant. In the first place, it was submitted, it was only on the defence's case that any evidence of gunshot residue arose or was presented. Also of significance, it was submitted, was the fact that the highest level of concentration of gunshot residue was on the appellant's right hand, which, it was admitted, was deformed.

[15] Counsel also made the submission that there was no evidence presented to the court in explanation of several items which were recovered about two chains away from the scene of crime, that is, a pair of black leather slippers, a black ganzie, a plastic bag containing 10 spent cartridge casings, a cellular phone with blood spots and a cap. There was no evidence that the blood was sent for analysis or testing or that a comparison was conducted on the spent cartridge casings found.

[16] Counsel also raised objection to the use of the name "Ally" which, he submitted, the learned judge had used to bolster what she regarded as the correct identification of the applicant by the virtual complainant. Counsel submitted that the use of that name to support the identification was erroneous, as the evidence in the case reflected no such reference to the applicant by the virtual complainant.

Summary of submissions for the Crown

[17] In relation to ground (a), the Crown submitted that the ground ought to fail for the reason that the evidence submitted at the trial sufficiently met the required standard to demonstrate that there was a positive identification beyond a reasonable doubt. Further, the learned judge had properly and adequately highlighted and considered the salient features of the identification evidence. It was further submitted that the appellant having in his unsworn statement placed himself at the scene, the primary issue was one of credibility. Accordingly, the learned judge gave consideration to the primary issues of whether the appellant did in fact have a gun and had used it to shoot and injure the virtual complainant at the time of the incident.

[18] Additionally, Crown Counsel submitted that these grounds ought to fail as the learned judge, in accepting that the appellant had correctly been identified, had coherently set out the elements of the offences and the evidence in support of the commission of each. In the circumstances of the case, it was submitted, there was enough evidence to warrant a conviction, as the virtual complainant testified convincingly, giving direct evidence that he had seen the applicant with a firearm and that the applicant had used that firearm to shoot him in his leg. Additionally, Crown Counsel argued,

reasonable inferences could be drawn from the recovery of the five spent shells, the injury to the virtual complainant's leg and the presence of gunshot reside on the appellant's hand.

Findings of the learned judge

[19] Page 103 of the transcript, lines 10 to 14, contains a part of the summation of the learned judge relevant to the issue of identification. There she stated in relation to the virtual complainant's testimony:

> "He tells of seeing the accused man, Albert Edmondson, someone he said he knew before and, indeed there was no challenge to this. There was evidence of this officer that he knew Mr. Edmondson from 1998."

[20] Further, at page 105, lines 21 to 24 she added that:

> "The court has to be satisfied to the requisite criminal standard that Albert Edmondson was the person with the firearm, who wounded Constable Richards."

[21] Page 106 of the transcript contains the bulk of the learned judge's summation treating with the issue of identification. She there states that:

> " Constable Richards gave evidence as to how he was able to identify his assailant that night but as the matter -- as the evidence came in this matter, there was no challenge to the officer's evidence that Edmondson was there that night and, indeed, in his unsworn statement, Mr. Edmondson describes being in that general area that night, although he speaks to a dance going on and sound boxes being out, which the officer cannot recall to be so. But Mr. Edmondson, at no time, denied being the person there that night and, indeed, he speaks of being pounced upon by an unknown assailant who shot him, resulting in his receiving injuries. So, to my mind, identification is not the most important issue here in this

> matter. The question is whether or not I believe that Mr. Edmondson did, in fact, have a gun, and did, in fact, shoot at Constable Richards, it being highly unlikely that somebody else shot at him that night in that same vicinity at that same time to which Constable Richards speaks.
>
> Constable Richards speak of knowing Mr. Edmondson, 'Ally', well. He says he has known him from 1998, called to him by his alias; said he saw him at a distance of 15 feet; he describes the reflection of the street light assisting him in seeing Mr. Edmondson and in observing Mr Edmondson pull his firearm from his waistband and fired several shots at him."

[22] Then at page 118, lines 1 to 8, she is recorded as having found that:

> "…there is no dispute that the incident took place, Mr Edmondson places himself in the general area. He said he got 'shot up' and Constable Richards has admitted firing shots in the direction of the person who had shot at him, from which I can infer that it was, indeed, Constable Richards who shot Mr. Edmondson that night."

[23] The learned judge also found that there had been no explanation by the defence to account for the presence of gunshot residue on the appellant's hand. The learned judge was also cognizant of the fact that the only expended shells recovered from the scene were of the 9mm calibre but noted that not all firearms expended their shells.

[24] In relation to the alleged deformity of the applicant's right hand, the learned judge found that the defence had failed to address that issue and that the evidence presented on the prosecution's case did not exclude the possibility of the appellant being able to use his right hand.

Discussion

[25] When the prosecution's account, which was presented at the trial, is considered in tandem which the case for the defence, it becomes clear that, on the morning in question, there was an incident in which gunshots were fired. Both the appellant and the virtual complainant purport to have been in the vicinity of where the shooting occurred. Each stated that he was injured during the shooting. However, the significant feature of both accounts, is that each person making the allegation, claims to have been the target of the shooting. On one hand, the virtual complainant stated that he returned fire while on the other hand the appellant stated that he did not have a gun.

[26] The appellant, in his unsworn statement, did not agree that the virtual complainant had correctly identified him as the other person involved in the shooting incident. However, neither does he deny that he was present at the scene of the shooting. Rather, he puts forward a factual narrative limiting his involvement in the shooting to his being attacked. In the light of that narrative, it would have been unlikely for him to maintain that he was not in some way involved in an incident in that area. Further, from the evidence, the learned judge drew the inference that the appellant had been shot by the virtual complainant.

[27] When the evidence is considered in its entirety, it would not have been unreasonable for the learned judge to have treated with the issue of identification in the manner that she did. It is clear from her summation that she appreciated that identification must be properly established on the evidence. She did not dispense with the necessity of identification but rather, in the light of how the evidence had unfolded,

having resolved that issue, she concluded that it was of greater significance, at that point, to assess whether the appellant had in fact possessed a gun and had used it to shoot and injure the virtual complainant.

[28] The issue with her summation arises from her several references to "Ally". Counsel for the appellant is correct in his assertion that the transcript does not reveal that the virtual complainant in his evidence referred to the appellant by the name "Ally". Instead, what is reflected in the transcript is a reference to the appellant by his first name "Albert". However, in the light of her treatment of that aspect of the evidence, this incorrect reference would not by itself have been sufficient to undermine her finding that identification was properly established.

[29] However, the effect of the issues raised above, must also be evaluated in the light of the other evidential and investigatory deficiencies in the prosecution's case as highlighted in the submissions of counsel for the appellant. Among the circumstances of the case, were the following factors: (i) the virtual complainant contradicted himself in relation to the location of the incident, (ii) the virtual complainant's evidence lacked details in relation to certain aspects of the shooting; (iii) no firearm was recovered, possession of which could be attributed to the appellant; (iv) no ballistic testing was conducted on the virtual complainant's licenced firearm or on the spent shells found at the scene; (v) the spent shells found at the scene were those ejected from the virtual complainant's licensed firearm; (vi) there was no testing of the "warhead" or bullet recovered from the virtual complainant's ankle to see from which gun it came; and (vii) there was no forensic analysis of the blood spots found on items recovered near to the scene.

[30] The concerns raised by the presence of the above circumstances increase in significance by the fact that there were divergent factual narratives between the prosecution and defence's case. Consequently, the issue of credibility would have loomed large, and needed to have been carefully resolved.

[31] Important parts of the testimony of the virtual complainant (as recorded at page 4 lines 7 to 9), that are necessary to outline certain essential features of the Crown's case are recounted below:

> "Whilst waiting at a vantage point, I saw Albert Edmondson, travelling in a southwardly direction along the Trinityville main road."

[32] At page 8, lines 9 to 11:

> "He is coming closer to me….I called out to him and told him to stop".

[33] At page 9, lines 15 to 17:

> "As I was about to walk towards Mr. Edmondson, he pulled a firearm from his waistband and fired several shots at me."

[34] The learned judge would have had to consider the above evidence in addition to the appellant's unsworn statement (recorded at page 48, lines 7 to 8 of the transcript), to the effect that:

> "On the night in question I was walking down the street coming down the road.

At page 49, lines 2 to 5:

> "As I turn to the bridge I don't know, but, for some strange reason I look behind cause I realise that somebody was standing beside the box and for some moment."

Lines 10 to 12:

> "So as I pass the person for some strange reason I felt that strong-when I look around I don't see him so I spin."

Lines 14 to 16:

> "So I turn sideway and looking, the next thing I know is that I saw some flashes."

Lines 18 to 19:

> "Saw some flashes and I try to run away…"

[35] Clearly, as demonstrated by these extracts from the transcript, there were different factual contentions coming from each side. As a result, the circumstances of this case were such that the guilt of the appellant depended significantly on which version of events the learned judge believed. This was a case in which the evidence for the prosecution as to what had occurred, rested solely on the testimony of the virtual complainant. The virtual complainant was, however, unable to provide certain detailed and necessary information as to the circumstances of the alleged firing of the gun by the applicant. That fact was further aggravated by the absence of forensic and ballistic evidence to lend support or disprove either the prosecution's or defence's case.

[36] This was also a case in which the court could have benefited greatly from the results of a more diligent and comprehensive investigatory process. However, as the complaints raised by the appellant's counsel tend to demonstrate, the investigatory process was wholly inadequate and fell short of giving the court sufficient assistance in properly distilling the various contentions and coming to conclusions in keeping with the

criminal standard of proof. The absence of the result of the scientific analyses of the pieces of evidence collected from close proximity to the scene of the shooting, the spent shells and bullet fragment recovered from the virtual complainant's ankle denied the court the opportunity of obtaining expert evidence to assist it getting a true picture of the events as they had unfolded.

[37] These considerations are even more unsettling when viewed in conjunction with the learned judge's failure to state in the summation how she resolved the contradictions in the virtual complainant's evidence regarding where his mother resided and the exact place where the incident had occurred. The court is mindful that not all discrepancies and contradictions are sufficiently material to undermine a conviction. Carey P (Ag, as he then was) in the case of **R v Andrew Peart and Garfield Peart** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 24 and 25/1986, judgment delivered on 18 October 1988, at page 5 stated that:

> "we would observe that the occurrence of discrepancies in the evidence if a witness, cannot by themselves lead to the inevitable conclusion that the witness' credit is destroyed or severely impugned. It will always depend on the materiality of the discrepancies."

[38] Carey JA, subsequently, (at page 9) in the case of **R v Fray Diedrick** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 107/1989, judgment delivered on 22 March 1991, opined on the approach to be taken by trial judges in their summation regarding issues of discrepancies and inconsistencies:

> "The trial judge in his summation is expected to give directions on discrepancies and conflicts which arise in the

> case before him. There is no requirement that he should comb the evidence to identify all the conflicts and discrepancies which have occurred in the trial. It is expected that he will give some examples of the conflicts of evidence which have occurred at the trial, whether they be internal conflicts in the witness' evidence or as between different witnesses."

[39] We are of the view that how the learned judge resolved the important contradictions in this case would have impacted her decision to accept and believe the virtual complainant over the applicant. Credibility was such a critical issue in this case that, where contradictions arose that were material and would have affected the witness' credibility, it behoved the learned judge to have demonstrated how these were resolved. Regrettably, this the learned judge failed to do. This renders the verdict unsafe.

Ground (d): unfair trial

[40] In contending that there had been an unfair trial, the following assertions were posited in an attempt at making out this ground of appeal:

> "**1. The failure of the Crown to protect the rights of the Applicant with respect to its presentation of the physical evidence and the unfair admission of evidence against the Applicant with particular reference to:**
>
> **(a) the prejudicial issue of whether the [Applicant] at the time was wanted by the Police**
>
> **(b) the admission into evidence of statements allegedly made by the [Applicant] to the Investigating Sub-Officer not under caution and in the presence of Pastor Cruickshank and**
>
> **(c) the admission into evidence (omitted to be led by the Crown) through leading questions asked of the Investigating Sub-Officer by the**

Learned Trial Judge vide page 39 of the Transcript lines 2 to 7."

(Emphasis as in original)

Summary of submissions for the appellant

[41] Counsel for the appellant submitted in relation to ground (d) that unsubstantiated prejudicial evidence was led about the appellant having been wanted by the police. Counsel also sought to take issue with the admission into evidence of statements, which were alleged to have been made by the appellant, which were not elicited under caution. Further, counsel contended that evidence given of certain alleged admissions made by the appellant (which he denied making) should, if they were to have been accepted, have been taken after caution.

Summary of submissions for the Crown

[42] Crown Counsel acknowledged that a fair trial is a sacrosanct aspect of the criminal law process, but contended that in this case, the appellant had failed to establish that his trial was unfair. It was the Crown's position that, although the evidence elicited that the appellant was wanted by the police was prejudicial, it did not operate to vitiate the conviction. That was so as the witness was warned not to give prejudicial information against the appellant and the summation of the learned judge demonstrated that the prejudicial evidence had not operated on her mind in determining the guilt of the appellant.

[43] It was acknowledged that it was troubling that no caution had been administered to the appellant. However, Crown Counsel was of the view that, with respect to the lack

of a caution administered to the appellant, no real weight was placed on the self-incriminating statements made by him. It was submitted that the evidence heavily relied on by the learned judge was that which came from the virtual complainant. Accordingly, the appellant was not prejudiced by the self-incriminating statements so as to render his trial unfair.

[44] With regard to the submission that there was an improper application of the standard of proof by the learned judge in relation to whether the appellant was able to use his disabled hand, Crown Counsel argued that this did not represent a finding of fact as that comment came at the end of the summation, consequent to the learned judge's finding that the appellant had shot and injured the virtual complainant.

[45] In relation to the evidence that there was gunshot residue on the appellant's hand, the Crown submitted that, whereas that evidence had been led on the defence's case, and not the prosecution's, the defence had omitted to produce an explanation for the presence of the gunshot residue. Accordingly, it had been open to the learned judge to find that there was gunshot residue on the appellant's hand and that it was he who had shot the virtual complainant.

[46] Crown Counsel also addressed the issue of sentencing, submitting that the applicant was appropriately sentenced in line with the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017.

Discussion

[47] The statements complained of under this heading originate from statements purported to have been made by the applicant as well as statements from other witnesses. The investigating officer gave evidence for the prosecution that while at the Trinityville Police Station he had an opportunity to speak with the appellant. He testified that the appellant, who was in the rear seat of a motor car, appeared to be injured, with his head resting in a woman's lap. His further evidence (recorded at page 36 of the transcript, lines 23 to 25) is that he asked the appellant what had happened, to which the appellant replied:

> "Officer a ting guh dung."

[48] The investigating officer then stated that he enquired of the appellant if he had had a gun, to which the appellant replied (recorded at page 37, line 1):

> "Yes, mi choe it in di riva"

[49] It was further revealed in his evidence that the appellant was thereafter escorted to the hospital where he was later charged and cautioned. The officer stated that prior to being cautioned, the appellant stated that:

> "Officer, you know how it guh, a long time yu a look fi mi."
> (recorded at page 39, line 5-7 of the transcript)

Upon being cautioned the appellant is recorded to have said nothing further.

[50] It is noted that through questions emanating from the bench, it also became apparent that, at the time the appellant presented himself at the police station, a report would already have been received from the virtual complainant. Further, the investigating

officer stated that the appellant was previously known to him. On the evidence, we can glean several facts which would have impacted the statements purported to have been made by the appellant: (i) the statements were in response to questions asked by the investigating officer, (ii) the appellant had not been cautioned at the time of questioning; (iii) and a report had already been received from the virtual complainant.

[51] The Judges' Rules require a police officer to caution a person whom he has reasonable grounds to suspect has committed an offence before putting to him any questions, or further questions, which relate to that offence. The investigating officer, having already received a report from the virtual complainant, would have had reasonable grounds to suspect that the appellant had committed an offence. Consequently, the appellant ought to have been cautioned before questions relating to the offence were put to him. However, this was not the case. The self-incriminating statements purported to have been made by the appellant are quite damning and would have been the only other evidence extraneous to the virtual complainant's testimony that put the appellant in possession of a gun.

[52] The officer, having already received a report from the virtual complainant, ought to have cautioned the appellant before any questions were asked of him. Based on the circumstances of the case, these factors would have negatively affected the fairness of the trial.

[53] The appellant in his unsworn statement had also made statements which amounted to stating that he was wanted by the police. The learned judge in her

summation appreciated that, in order for these statements to be admissible, any prejudice caused to the appellant should be outweighed by the probative value of these statements. In her summation, she interpreted these statements made on the defence's case as providing a reasons or motive for the virtual complainant to have lied. In that sense, there would have been probative value to these statements outweighing prejudice to the appellant, which would have properly allowed them to be admitted.

[54] Notwithstanding that, however, we are of the view that the cumulative effect of the issues previously discussed in this application to a significant extent negatively affected the ultimate verdict of the court, such as, to render the verdict unsafe.

[55] Further, we had regard to the principles emanating from the case of **Dennis Reid v The Queen** (1978) 16 JLR 246 and to the consideration that the decision to order a retrial is dependent on the particular facts of the case. In view of the nature of the issues raised herein, in particular, the length of time that had passed between the date of the incident (January 2004) and the date of the appeal (June 2018), we were of the view that this would not be an appropriate case for a re-trial. Accordingly, we made the orders indicated at paragraph [3] and no retrial was ordered.