[2012] JMCA Crim 21

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 129 and 130/2009

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA

ROHAN HERBEN
ROBIN BUTLER v R

Mrs Nadine Atkinson-Flowers for the appellant Herben

Robert Fletcher for the appellant Butler

Mrs Caroline Hay and Mrs Denise Samuels-Dingwall for the Crown

30 April and 25 May 2012

BROOKS JA

[1] On 13 November 2009, the appellants, Messrs Rohan Herben and Robin Butler, were convicted of the offences of illegal possession of firearm and robbery with aggravation. This was on an indictment, which charged them jointly, along with a third man, Mr Kimanie Mitchell, for those offences. In addition, Mr Butler alone was charged, on a third count on the indictment, for illegal possession of ammunition. He was also convicted of that offence. Mr Mitchell was acquitted after a submission of no case to answer was made on his behalf.

[2] These convictions resulted from a trial in the High Court Division of the Gun Court presided over by D.O. McIntosh J sitting without a jury. Messrs Herben and Butler were each sentenced to serve nine years imprisonment at hard labour on each of the first two counts. Mr Butler was sentenced to serve three years on the third count. All sentences were ordered to run concurrently.

[3] A single judge of this court refused the appellants' application to appeal against their convictions but granted permission to appeal against their respective sentences. The appellants have, however, renewed their applications before us and counsel, on their behalf, advanced concise submissions in respect of these matters.

[4] The main issues raised by the grounds of appeal were, firstly, whether the learned trial judge's summation in respect of the issue of visual identification was adequate; secondly, whether there was an impermissible confrontation of the appellants with the complainant in respect of the robbery; thirdly, whether the learned trial judge acted consistently in acquitting Mr Mitchell but convicting Mr Butler; and fourthly, whether questions asked of Mr Butler, by the learned trial judge, revealed a pre-disposition against that appellant. Each issue will be addressed in turn, but first an outline of the facts is necessary.

The factual background

[5] The convictions arose out of a series of events which occurred on 22 January 2007. At about 11:30 pm that day, Mr Anthony Dale, a taxi driver, was approached by a man who sought to charter the vehicle for a trip to the Mona campus of the University

of the West Indies. After agreeing a fee for the trip, the man boarded the vehicle and the pair travelled to the destination in about 13 minutes.

[6] On entering the campus, the passenger indicated that he wished to go to a particular section near to the playing-fields. They negotiated a further fee and they proceeded toward that section. While going to that location Mr Dale noticed a vehicle travelling behind his. At a particular point, the passenger indicated a spot at which he wished to be let off. Mr Dale stopped and the passenger handed him a $1000.00 bill. Mr Dale was in the process of finding change when the man pulled a firearm, pointed it at him and said, "[t]aximan, let us co-operate".

[7] The man did not get a chance to go further. Mr Dale, a licensed firearm holder, pulled his own firearm. The man grabbed on to the weapon and a struggle for Mr Dale's firearm ensued. During the struggle Mr Dale's weapon was discharged. What happened next is important in respect of the formulation of the indictment. The man shouted, "[o]onu come help me nuh man, oonu come help me nuh man". He, however, had not been injured; neither was Mr Dale.

[8] The attacker managed to wrest the firearm from Mr Dale's grasp and exited the vehicle, taking Mr Dale's weapon with him. He ran to the other vehicle, which had been travelling behind Mr Dale's but had stopped about a chain away, and boarded it. That vehicle, a white Nissan motor car, immediately drove away.

[9] Mr Dale went to a nearby security post and made a report. Instructions were given by radio and he was also given certain instructions. As a result, he drove,

somewhat cautiously, it appears, to the exit gate for the campus; a gate called the "Post Office Gate" or the "Gibraltar Gate".

[10] Constable Gary Wallace was, that night, stationed at the police post located on the university's campus. He testified that, based on information that he received that night, he went to the Post Office Gate. He drove up behind a white Nissan motor car with three men aboard. The vehicles stopped. Constable Wallace alighted from his vehicle and as he did so, he noticed that the driver of the Nissan was bending to his left. He told the men to come out of the vehicle and they complied.

[11] It was at about this time that Mr Dale arrived at the Post Office Gate. When he got there, he saw some cars by the gate, which gate had been blocked by the campus security officers. Three men were standing by one of the cars. Two police officers and campus security officers were also present. Mr Dale made a report and pointed out to the police, one of the three men, as being his assailant. This was the appellant, Mr Herben. On the issue of identification, evidence was given of the assailant's clothing and general description.

[12] Although it was a point of dispute between the prosecution and the defence, the learned trial judge accepted Constable Wallace's evidence that, whilst they were all at the gate, he searched the three men and the white Nissan motor car. During a search of the Nissan motor car the constable found, he testified, beneath the floor mat at the driver's position, a black plastic bag. He opened the bag and found that it contained 11

rounds of 9mm cartridges. There is no dispute, however, that the appellant, Mr Butler, was the driver of the vehicle.

[13] The three men and the Nissan were taken to the police post on the campus. Mr Dale also went to the post. A scenes-of-crime officer was summoned and he swabbed Mr Dale's hands as well as the hands of the three men from the Nissan. Messrs Herben, Butler and Mitchell were then arrested and charged. No firearm was found.

[14] Forensic tests of the swabs, mentioned above, revealed the presence of gunshot residue (GSR) on the hands of all four men. All were at the intermediate level of intensity on one or other of their respective hands. In this regard, the forensic officer, Mrs Marcia Dunbar, testified that:

> "Intermediate level of gunshot residue will arise from being in the path of gunshot residue as it is emitted from a firearm within a distance of eighteen inches. It could also arise from firing a firearm or being in the direct path of gunshot residue as it is emitted from a fired firearm within a distance of nine inches which would result in the higher level of gunshot residue being deposited and with activity and elapse of time there is lost [sic] of gunshot residue or redistribution of gunshot residue to the intermediate level."

The significance of that evidence is that each of those men was in the path of GSR as it was emitted from a firearm or firearms. The incident in Mr Dale's car would only have accounted for GSR on the hands of Messrs Dale and Herben. GSR at trace levels was also found. That lower level, according to Mrs Dunbar, could have resulted from touching a surface, such as a firearm which had been recently fired, which had the substance thereon.

The summation on visual identification

[15] Mrs Atkinson-Flowers, on behalf of Mr Herben, argued that the learned trial judge erred in that he failed to give a full warning as to the dangers of visual identification and failed to deal adequately with the weaknesses in the identification evidence. Learned counsel accepted that the learned trial judge did not have to give himself a warning on every single aspect of the visual identification evidence but argued that, in the instant case, he ought to have done more than he did. She pointed to the fact that the learned trial judge did not speak to the point of the possibility of an honest witness being mistaken. Learned counsel relied on the decision of **R v George Cameron** (1989) 26 JLR 453, in support of her submissions.

[16] We cannot agree with learned counsel on this point. There is no requirement to use any special formula of words for addressing the issue of visual identification. In the instant case, the learned trial judge did identify the issue as a live issue. He did so at pages 173 – 174 of the transcript:

> "The real issue in the case against Dale [sic] has to do with the identification of him which the Prosecution says is not mistaken but which the Defence maintains is mistaken, flawed and not in keeping with evidence of visual identification. So this Court must warn itself of the dangers in accepting evidence of visual identification as in this case."

Implicit in that statement is the concept of an honest witness being mistaken. It will also be seen below, that the learned trial judge did have that concept within his contemplation, in dealing with the issue of identification.

[17] In **R v George Cameron**, this court overturned a conviction on the basis that it found that the trial judge, in that case, did not consider the dangers inherent in visual identification evidence. In the instant case, however, the learned trial judge did identify the various elements involved in visual identification and pointed out what he considered to be weaknesses in that evidence. He considered the fact that Mr Dale did not know Mr Herben before and the fact that it was night.

[18] The learned judge also considered the other aspects of visual identification. In particular, he addressed the matter of the lighting, firstly, in respect of the point at which the prospective passenger approached the taxi and secondly, in respect of the fact that the roof light of the vehicle was illuminated throughout the journey. He spoke to the time during which the fare was negotiated, Mr Dale's need to carefully observe any prospective passenger at that hour of the night, the time for the trip to the university campus and that Mr Dale testified that, during the transactions on the campus, "he was penetrating the passenger".

[19] The learned trial judge also considered, as supplementing the visual identification, the fact that GSR was found on Mr Herben's hands. He, however, placed that evidence in context. He said at page 177 of the transcript:

> "...the finding of gun powder residue on his hands does support this evidence [of the gun being fired in the car] but more importantly [Mr Dale's] ability to have seen and recognized his assailant that night was quite clearly demonstrated. Not only was he able to see his victim [sic] he says, but he saw him a few minutes later probably about ten minutes later when he went to the security post at Gibraltar gate, so that **this Court is satisfied that the identification of the accused man Herben is not**

> **mistaken and that the convincing witness Mr. Dale is a witness of truth whose evidence this Court accepts unreservedly**." (Emphasis supplied)

[20] The learned trial judge thus, having demonstrated his cognizance of the reality that an honest witness could be, nonetheless, mistaken, the complaint by learned counsel is, with respect, ill-founded.

Whether there was impermissible confrontation

[21] Mrs Atkinson-Flowers also complained that the learned trial judge did not address the issue of improper confrontation of the appellants by Mr Dale. She pointed to the fact that, in his written statement to the police, Mr Dale had said that, at the security post, he "was told to go by the front gate". He denied, however, that he was told that some men had been held at that gate. Learned counsel relied on the case of **R v Errol Haughton and Henry Ricketts** (1982) 19 JLR 116, in support of her submissions.

[22] In response to these submissions, Mrs Hay, for the Crown, argued that the issue, for resolution by the learned trial judge, was the location at which Mr Dale pointed out Mr Herben. The defence placed that event as occurring at the police post and not at the gate. She pointed out that the learned trial judge accepted that the identification took place at the gate. Learned counsel submitted that the evidence, led by the prosecution, was that Mr Dale was not assisted in any way in identifying Mr Herben and that the learned trial judge accepted that evidence.

[23] We agree with Mrs Hay's submissions. At page 163 of the transcript, the learned trial judge indicated that he did consider the issue of improper confrontation. He said:

> "In respect to [sic] Mr. Dale, the Defence were saying that the identification by him should be regarded as (1) suspect, because he was seeing these men, when he saw these men they were talking to the police and there is suggestion that he did not identify the person he said who robbed him then and there but at the Police Station he said that it was another one of the men and later on, **no doubt when prompted by the police**, perhaps, he said it is a particular accused person." (Emphasis supplied)

[24] The learned trial judge accepted Mr Dale as a witness of truth with regard to the event at the Gibraltar Gate. We do not find his failure to specifically resolve the issue of confrontation, to be fatal to this conviction. The **Haughton and Ricketts** case cited by Mrs Atkinson-Flowers is distinguishable from the instant case because, in that case, it was accepted that a police officer had called the complainant's attention to the suspect. In the instant case, it was someone at the security post who directed Mr Dale to the Gibraltar Gate. He saw the men there and, on his account, as accepted by the learned trial judge, it was he who pointed out Mr Herben. There was no improper action by the police.

[25] We, respectfully, disagree with Mrs Atkinson-Flowers on this point.

Whether the learned trial judge acted consistently

[26] Mr Fletcher, on behalf of Mr Butler, conceded that there was no argument that he could usefully advance in respect of Mr Butler's conviction in respect of the illegal possession of ammunition. He submitted, however, that, in respect of the robbery with

aggravation, the evidence against Mr Butler was indistinguishable from that against Mr Mitchell. According to Mr Fletcher, if it were not a mistake to acquit Mr Mitchell, then the decision in respect of Mr Butler is irreconcilable. If, however, he continued, the decision to acquit Mr Mitchell was an error, it demonstrates a less than thorough approach by the learned trial judge. In either event, learned counsel submitted, Mr Butler ought to have the benefit of the inconsistency.

[27] In our view, Mr Fletcher has overlooked a vital bit of evidence distinguishing the case against Mr Mitchell from that against Mr Butler. The difference is that Mr Butler was the driver of the motor car, which followed the taxi while Mr Herben was a passenger therein, waited while the robbery occurred and then took Mr Herben away, immediately after the robbery. Mr Mitchell's presence in the getaway car may or may not have been accidental. He was entitled to have the benefit of that doubt. As the driver thereof, Mr Butler's presence was, however, most definitely, deliberate. There was, therefore, ample evidence on which the learned trial judge could have found that Mr Butler was "a part of the conspiracy to rob" and that "he was in illegal possession of a firearm and that he was a look-out man, aiding and abetting the commission of robbery with aggravation" (see page 180 of the transcript). This distinction compels us to reject Mr Fletcher's submission on this point.

The questions asked of Mr Butler, by the learned trial judge

[28] Mr Fletcher also pointed to the fact that the learned trial judge asked 57 questions of Mr Butler. According to Mr Fletcher, although the large number of questions is not, by itself objectionable, the purpose of the questioning in this instance

was to establish the appellant as being a liar. Learned counsel submitted that that is not a course to be taken by a trial judge and the questions in the instant case, showed a pre-disposition to find the appellant guilty.

[29] Mrs Hay pointed out that the authorities show that it is not the fact that the trial judge asks many questions, which detracts from the fairness of a trial. Smith JA, in delivering the judgment of this court in **Omar Bolton v R** SCCA No 72/2002 (delivered 28 July 2006), stated that what is "critical is the quality of the interventions".

[30] In the instant case, however, as in **Bolton v R**, the learned trial judge did not intervene during the questioning by counsel for either side. He asked his series of questions after defence counsel had re-examined Mr Butler. We find that the learned trial judge was seeking to ascertain Mr Butler's movements while on the university campus. The questions were not hostile. It is unlikely that any cloud, obscuring perception and objectivity, would have been generated. We disagree with Mr Fletcher that the questions showed bias on the part of the learned trial judge.

[31] We would, nonetheless, remind trial judges of the admonition given by Lord Greene MR, in **Yuill v Yuill** [1945] 1 All ER 183. The learned Law Lord said at page 189 A:

> "A judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a judge who himself conducts the examination. If he takes the latter course he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he

> deprives himself of the advantage of calm and dispassionate observation."

[32] We, of course, accept and adopt that advice, for these purposes, but are mindful that, in the search for truth, trial judges are entitled to be proactive. We also would remind trial judges of the admonition given in the judgment of Panton P, in **Carlton Baddal v R** [2011] JMCA Crim 6. In giving the judgment of this court, the learned President said at paragraph 17:

> "Trial judges should therefore be always mindful of the likely result of their conduct. However, the judge is not expected to be a silent witness to the proceedings. There is always room for him to ask questions in an effort to clarify evidence that has been given, or 'to clear up any point that has been overlooked or left obscure' (**Jones v National Coal Board** [1957] 2 All ER 155 at 159G)".

Balance is, therefore, required.

The sentences imposed

[33] One final issue needs to be discussed: the matter of the sentences imposed. Mrs Atkinson-Flowers submitted that the approach of the learned trial judge to the character witnesses called on behalf of Mr Herben, after his conviction, was disdainful of those witnesses. According to her "[s]uch cursory treatment suggests that the positives that the character witnesses brought were not taken into account". Learned counsel, nonetheless, conceded that the sentences imposed were not excessive.

[34] The main things which learned counsel complained about were firstly, that the learned trial judge, in an exchange with one of the character witnesses, told her that Mr Herben was a liar. The learned trial judge said, in this regard, at page 195:

> "But he is a lier [sic]. He is an encourageable [incorrigible?] lier [sic]. It is all front and pretence. That is what I find about Herben…."

[35] The second aspect of the learned judge's approach, which Mrs Atkinson-Flowers submitted was objectionable, was his asking of Mr Herben's sister what Mr Herben had told her about the incident.

[36] Learned counsel did not cite any authorities to support her submissions. We, however, do not agree that the learned trial judge was disdainful of the witnesses. His statement about Mr Herben's veracity only reflected what he had said about him during his summation of the case. In the end, we agree that the sentences imposed did not exceed the norm in respect of offences of that type and certainly, nothing was said on Mr Herben's behalf, which would have influenced the learned trial judge to impose a sentence which was below the norm. We do not find any merit in this complaint.

[37] Still on the issue of the sentences, it is to be noted that the learned single judge of this court, who had granted leave to appeal in respect of the sentences imposed, observed that the copy of the indictment appended to the transcript, seemed to indicate that Mr Herben had been sentenced in respect of count three concerning the illegal possession of ammunition. The learned single judge was of the view that the matter needed clarification. We, however, do not find it unclear but agree that the relevant portion of the back of the indictment could have been more specific. It had only indicated that the sentence, in respect of that count, was three years

imprisonment at hard labour, without specifying who was to serve that term. Of course, it was only Mr Butler who was charged with that offence.

Conclusion

[38] In conclusion, we find the evidence presented by the prosecution amounted to a strong case against Messrs Herben and Butler. The learned trial judge identified the relevant issues, including visual identification, and dealt with them adequately. His findings concerning the identification of Mr Herben, by Mr Dale, were consistent with the evidence given by Mr Dale and Constable Wallace. He was entitled to find, as he implicitly did, that there was no unfairness attending that identification.

[39] On these bases, we find that the applications for leave to appeal against conviction should be refused. The appeals against the sentences are dismissed. For the avoidance of doubt, however, we state that the sentence for each appellant, in respect of count one for illegal possession of a firearm, is nine years imprisonment at hard labour. The sentence in respect of count two for each appellant, for robbery with aggravation, is nine years imprisonment at hard labour and the sentence in respect of Mr Butler on count three, for illegal possession of ammunition, is three years imprisonment at hard labour. All sentences shall run concurrently and shall run from 3 March 2010.