[2014] JMCA Crim 55

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 110/2012

BEFORE: THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA (Ag)

CECIL MOORE v R

Glenroy Mellish for the appellant

Miss Annette Austin for the Crown

1, 2 and 19 December 2014

PHILLIPS JA

[1] The appellant was charged on an indictment containing one count of illegal possession and one count of wounding with intent. After a trial which took place on the 28 and 29 November 2012 in the High Court Division of the Gun Court in the parish of Portland, he was convicted and sentenced to 15 years imprisonment on each count. His application for leave to appeal was dismissed by a single judge of this court and he renewed his application before us. After hearing arguments, on 2 December 2014, we made the following order:

> "The application for leave to appeal against conviction and sentence is allowed. The application is treated as the hearing of the appeal. The appeal is allowed. The conviction is quashed and the sentence is set aside. In the interests of justice, a new trial is ordered to take place in the High Court

> Division of the Portland Circuit Court in the next ensuing session."

We promised then to put our reasons in writing and we do so now.

[2] The prosecution's evidence against the appellant, in brief, was that on 17 June 2012 at about 7:00 am, the complainant, a farmer, who lived in Windsor in the parish of Portland, left his house for his farm, which was nearby. On this short journey, he had a machete and two bottles of water. Having arrived at the farm, he decided that he would not be farming that morning, and so he left and was heading back to his house when he heard sounds like gunshots. He looked in the direction of the sounds and saw the appellant, whom he had known prior to that date, with a gun in his hand. He was chased by the appellant and at some point during the chase both men fell. A struggle ensued during which the complainant used the machete he had to chop the appellant in order to escape. It was after his escape that the complainant realized that he had been shot twice. He was taken to the hospital for treatment.

[3] Medical evidence was given confirming that there were two wounds on the complainant's left lower back and right lower thigh which were consistent with gunshot injuries based on their appearance and the fact that a bullet had been removed from his abdomen. There was also evidence from the investigating officer, Detective Constable John Jacobs, that on 17 June upon receiving information, he visited Windsor where he saw a group of men holding a tarpaulin with a male on it, who was later identified as the appellant. The appellant, who was bleeding quite profusely, was placed in the police vehicle and taken to the hospital where he received medical treatment and

was admitted. Detective Constable Jacobs, however, admitted that he saw no gun when he visited the site of the incident.

[4] The appellant gave an unsworn statement from the dock stating that he had been on his way to feed his goats in John's Hall, which is apparently also located in Windsor, when he heard shots being fired and ran for cover. It was at this time that he saw the complainant who chopped him with a machete. There was a physical struggle between the two which resulted in him, the appellant, falling to the ground. The appellant said that the complainant chopped him on the hand and in the head and while this was happening a masked person, who appeared to have a gun in his hand, joined the complainant on the scene. The complainant told this person not to kill the appellant as he, the appellant, was already dying. Both men then left the appellant in the wooded area where he had been attacked and thereafter the appellant managed to walk to the nearby community where he was assisted by the residents and was eventually taken by the police to the hospital. The appellant denied having a gun. The appellant also called one witness on his behalf, but this witness' evidence was impacted by the fact that he appeared to have severe hearing challenges.

[5] Seven grounds of appeal were filed by the appellant as follows:

> "1. That upon hearing that my attorney was not intending to commence trial on that day the judge revoked my bail and placed me in custody despite my not having breached any Bail Conditions.
>
> 2. That my Attorney-at-Law handled my case badly in that he allowed the trial judge to influence his decision to commence trial despite his having stated to the court that he

was not ready to proceed with a trial as he had not had time to interview and take statements from potential defence witnesses, and that he had been under the impression that my matter was before the court for Mention on that dated [sic] (28 November 2012) and he had come to court expecting to set a trial date for sometime in March of 2013.

3. That having commenced trial my attorney was unable to call certain key witnesses in my defence as they were unavailable at such short notice.

4. That the trial was conducted in an atmosphere of obvious animosity between the Judge and my Attorney-at-Law.

5. That the judge seemed to be influenced by irrelevant considerations and proceeded to belittle my attorney, telling him at one state [sic] that he (my attorney) could not think, that he was rude and that he ought to 'return to England' from whence he came.

6. That in his summing-up the judge failed to address the issue of lack of any forensic evidence linking me with the use of any firearm despite the fact that I was in the hands of the police (who took me to hospital) and swabbed my hands almost immediately after the incident occurred on 17 June 2012.

7. That given the circumstances outlined above I do not believe I received a fair trial."

[6] At the hearing of the application, Mr Mellish sought leave of the court to rely on an affidavit sworn to by Mr Forest, attorney-at-law, who represented the appellant at trial, and two affidavits sworn to by the applicant. Mr Mellish also sought and was granted leave to argue the following supplemental grounds of appeal filed in addition to the original grounds:

"a. The learned trial judge's failure to exercise his discretion judicially and grant an adjournment prevented the Applicant from mounting as vigorous a defence as he

was entitled to do by virtue of Section 20(6)(b) and (d) of the Charter of Fundamental Rights and Freedoms.

b. The treatment of Defence Counsel by the Learned Trial Judge, including xenophobic references, created an appearance of bias and hostility and obstructed Defence Counsel in respectfully but forcefully advancing the case for the Applicant.

c. The Learned Trial Judge's conclusion that 'the case brought by the accused does not convince me of his innocence' unfairly and contrary to law places the burden on the accused of proving his innocence. This conclusion may have operate [sic] on the mind of the judge and caused a miscarriage of justice."

[7] However, counsel indicated that he would not be pursuing ground 6 of the original grounds and "c" of the supplemental grounds. In his written submissions, counsel indicated that all the grounds could be conveniently categorised into three groups: grounds 1, 3, 4 and 5 and supplemental ground b - the judge's conduct of the trial causing an obstruction of the defence; ground 2 - competence of counsel; and ground 7 and supplemental ground a - unfair trial involving a breach of the appellant's constitutional rights.

[8] In relation to the grounds concerning the judge's conduct of the trial, counsel relied on **Carlton Baddal v R** [2011] JMCA Crim 6 which, he submitted, approved the principles set out in **R v Hulusi and Purvis** (1974) 58 Crim App R 378. He submitted further that although that case concerned the interventions of a trial judge, the principles apply equally where the conduct of the trial by the judge "made it impossible for defending counsel to do his duty in conducting the defence" or "effectively prevented the defendant or a witness for the defence from telling his story in his own

way". He referred to the affidavit of counsel, Mr Zephaniah Forest, in which Mr Forest deponed that the judge displayed a "nonchalant and even condescending attitude towards [Mr Forest] to the extent that [he] felt deeply offended and somewhat dismayed at the level and obvious lack of respect or regard for [him] or [his client]". Mr Forest further stated that the witness who had been called on behalf of the defence had had difficulty hearing and understanding the questions and the judge had belittled him destroying "whatever little confidence the poor witness had in placing himself at the disposal of the court". Mr Forest also stated that at some point in the proceedings, the judge had berated him and had suggested that he was incapable of thinking and that he should return to England from where he had come.

[9] Mr Mellish submitted that the affidavit evidence was borne out by a careful assessment of certain portions of the transcript. He submitted that it was apparent from the exchange between the judge and Mr Forest that there was annoyance, if not hostility towards defence counsel. Counsel argued that there were some exchanges between the learned judge and defence counsel, which were largely unnecessary. Ridicule, it was submitted, seemed to have been a feature of the case and the frustration of counsel "was crying out through the pages of the transcript". Mr Mellish referred to the affidavit of the appellant filed in this court where the appellant indicated that he observed that the trial was conducted in an atmosphere of "obvious hostility". Counsel further submitted that the nature of the questions put to the defence's witness by the judge only served to reinforce in the mind of the appellant that the trial was unfair and that the judge was biased against him.

[10] Learned counsel submitted that the judge took part in a dialogue recorded in over four pages of the transcript which was a pedantic discussion which served to show only the inexperience of defence counsel and defence counsel's wrong choice of words. This, it was argued, made counsel reticent and flustered and affected counsel's conduct of the trial and may have contributed to the complaint made about the incompetence of counsel.

[11] Mr Mellish relied on **Christopher Belnavis v R** SCCA No 101/2003, delivered 25 May 2005 and submitted that although the interruptions in **Belnavis** were more frequent and the personal insults may have been more direct, the instant case demonstrates the same level of antagonism towards defence counsel. It was submitted that the appellant was thereby deprived of the opportunity of having his case put as forcefully as he deserved.

[12] In relation to the grounds relating to the incompetence of counsel, Mr Mellish highlighted the following areas in which the conduct of defence counsel was being called into question:

i. embarking on the trial of such a serious offence without adequate preparation;

ii. recommending to the appellant that an unsworn statement was appropriate in the circumstances where the appellant was conceding that he was at the scene of the shooting for which he was charged; and

iii. failing to adduce vital evidence, including character evidence.

[13] In relation to grounds raising the issue of unfair trial, it was submitted that defence counsel, Mr Forest, having made his first appearance in the matter in November 2012, had asked for an adjournment because of his unpreparedness. However, the learned trial judge had refused and appears to have used the withdrawal of bail as a means of securing the start of the trial. Mr Mellish submitted that it was unfair of the judge to have revoked the appellant's bail and to not have expected that the appellant might not have felt forced to hurry the trial in an attempt and with the hope of bringing his incarceration to an end. Counsel further submitted that even though the judge appeared to have been willing to grant an adjournment to allow for a witness for the defence to be called, this could not cure the error of refusing to grant the adjournment at the outset which had resulted in a denial to the appellant of the opportunity to put his best case forward.

[14] Counsel relied on **Pauline Gail v R** [2010] JMCA Crim 44 and **R v Delroy Raymond** (1988) 25 JLR 456 submitting that there appeared on the record no reasons given by the judge for his refusal to grant the adjournment and in the absence of any expressed reasons, the court is entitled to infer that the judge had not considered the factors to be taken into account, as adumbrated by Carey JA in **Delroy Raymond,** in deciding whether to grant or refuse an adjournment. Counsel submitted that the constitutional right to a fair trial is sacrosanct and the appearance of its breach required a full and proper explanation.

[15] In response, Miss Austin submitted that it is generally understood that once a person attends court after being granted bail, he surrenders to the jurisdiction of the

court. She submitted that the considerations that appeared to have weighed heavily on the judge's mind was that the witnesses for the Crown were available and there was no other matter on the list for trial. Crown counsel submitted that in the light of the protestations by defence counsel that he had not had an opportunity to interview the witnesses for the defence, an adjournment would not have been unreasonable in the circumstances.

[16] Learned Crown counsel also submitted that it could not reasonably be said that defence counsel was under the impression that 28 November was a mention date. Defence counsel had been served with statements from October and ought to have known that it was a trial date. In relation to interventions by the trial judge, it was conceded that the judge was terse; however, it was argued that the interventions demonstrated that he was seeking to assist defence counsel. Further, all the interventions concerned court procedure. Referring to **Carlton Baddal v R**, Miss Austin submitted that it was therefore for this court to consider "whether the interventions by the learned trial judge were overdone and are seen to have an impact on the trial". Crown counsel submitted finally that since the issue was one of credibility, there ought to be a retrial.

[17] We were of the view that in the light of the exchange between the learned judge and defence counsel set out early in the transcript at pages 14-16, it would be appropriate to consider the last of the three issues first, it having raised the question of an adjournment and whether the appellant had received a fair trial. Before examining

those pertinent portions of the transcript, however, it is first necessary to set out some salient background facts as gleaned from the affidavit of Mr Forest and the appellant.

[18] The appellant was taken into custody on 17 June 2012. According to the appellant, the matter came up before the court on 25 June, 6, 12 and 13 July 2012 and on none of these occasions was the question of bail considered. Mr Forest deponed that having been retained on or about 28 August, he obtained bail on the appellant's behalf on 12 October 2012. Mr Forest stated in his affidavit that when he visited the appellant on 30 August the appellant told him that the matter was set for 28 November 2012 when it would be mentioned. Mr Forest gave the following account of what occurred on 28 November 2012:

> "9. That on 28 November I appeared at the Port Antonio Circuit Court on behalf of the Applicant, expecting to set a date for trial and to ensure disclosure of all relevant papers had taken place. This was my first appearance in court in respect of this matter and my expectation was that I would be able to set a trial date in early March 2013 which would have allowed me sufficient time to secure statements from potential witnesses for the Defence.
>
> 10. That I had been advised by the Applicant that there were a number of persons who had had confrontations with the Complainant historically, and to whom the Complainant had made threats to injure and kill.
>
> 11. Given that there were no other witnesses to the incident in which the Complainant was allegedly injured and the Applicant severely wounded, it was vital to provide the court with evidence which would have pointed towards the Complainant's propensity for violent behavior, to corroborate the Applicant's contention that there was a third person on the scene that day, in the company of the Complainant, and that it was that third person who fired the shots which injured the Complainant.

12. That upon the matter being call [sic] up on the 28 November 2012, and in response to his question as to whether the matter was ready for trial, I indicated to His Honour [sic] Mr Justice D. McIntosh that I was not ready for trial. His Honour [sic] immediately indicated to the Applicant that he was to be returned to custody, without (as I recall) any real attempt to establish the reasons for the Defence not being ready for trial, and despite the Applicant not having breached any bail condition which would have warranted such a decision. In the face of protestations against the obvious unfairness to the applicant His Honour [sic], insisted that the Applicant would remain in custody unless he commenced trial that day.

13. That against my better judgment and on the slim chance of securing the witnesses I needed overnight, I advised the Applicant to commence trial as he was desperate not to be returned to the Port Antonio lock-up. In hindsight, that was the wrong decision as I was unable to secure the presence of any witnesses at such short notice and as it transpired the Applicant was remanded in custody despite our having commenced trial."

[19] Mr Forest's account seems to be borne out by the transcript at pages 14-16:

"HIS LORDSHIP: Are the witnesses here?

OFFICER: Yes, m' Lord. Who is Mr Moore's lawyer – who is supposed to be Cecil Moore's lawyer.

MR FORRESTER [sic]: Are you ready

MR FORRESTER [sic]: No, m' Lord.

HIS LORDSHIP: Why?

MR FORRESTER: This is the first appearance in this matter. We have witnesses to get to be interviewed, m' Lord.

HIS LORDSHIP: What does [sic] witnesses have to do with the matter?

MR FORRESTER: We are not ready, we need some more time.

HIS LORDSHIP: You mean he has something to prove? If he has something to prove you can do that the case is the only case I have on the trial list today.

MR FORRESTER: M' Lord, I came into this matter late. I have not had an opportunity to speak to all the witnesses I am to call. It's unavoidable m'Lord. It's inconvenient to the Court, I apologize.

HIS LORDSHIP: He is in custody, so it doesn't matter.

MR FORRESTER: M' Lord, he is on bail.

HIS LORDSHIP: He is in custody.

MR FORRESTER: Mr More [sic] has already spent the best part of three months in custody.

HIS LORDSHIP: He is in custody, so I think it doesn't really matter, so you can take as long as you want to take to get the case tried.

MR FORRESTER: M' Lord, I must protest.

HIS LORDSHIP: Protest.

MR FORRESTER: This is crossly [sic] unfair, his bail is being revoked for no fault of his own, m' Lord.

HIS LORDHSIP: Protest.

MR FORRESTER: He is entitled to mount a proper defence. If we have not had an opportunity to speak to the witnesses …

HIS LORDSHIP: So go speak to the witnesses, why don't you go protest to them.

HIS LORDSHIP: The matter is for trial today.

MR FORRESTER: M' Lord, that's not the indication I have.

HIS LORDSHIP: I am telling you the matter is for trial today and I am about to [sic] the case, so protest.

MR FORRESTER: M' Lord, with the greatest of respect, the indication that I have …

> HIS LORDSHIP: I tell you what I will do, I will stand down the matter, so you can protest for the rest of the day. Take him down, please."

[20] It is immediately clear from the above that the defence was not in a state of readiness, counsel having indicated that he needed more time to contact the potential witnesses. It could not be said that counsel had not had time to prepare the appellant's defence as it appears that he had been served with the relevant statements by the Office of the Director of Public Prosecutions by letter dated 2 October 2012, which was over a month before the date of trial. It may be that his state of preparation or lack thereof was influenced by his misguided impression that 28 November was a mention date, he having been informed of this by the appellant. However, regardless of the reason for his inability to proceed, it was obvious that he was indicating to the judge that the defence was not adequately prepared. It was therefore left to the judge to consider whether to grant an adjournment, pursuant to the power accorded him under section 6 of the Criminal Justice (Administration) Act, which provides thus:

> "No person prosecuted shall be entitled to traverse or postpone the trial of any indictment presented against him in a Circuit Court:
>
> Provided always, that if the Court, upon the application of the person so indicted, or otherwise, shall be of opinion that he ought to be allowed further time, either to prepare for his defence or otherwise, such Court may adjourn the trial of such person for such time, upon such terms as to bail or otherwise as to such Court shall seem meet, and may respite the recognizances of the prosecutor and witnesses accordingly; in which case the prosecutor and witnesses shall be bound over to attend to prosecute and give evidence at such time, without entering into any fresh recognizance for that purpose."

[21] As was rightly submitted by Miss Austin, the grant of an adjournment is a matter of discretion, as is borne out by section 6. However, it is clear that where the defence needs further time to prepare, this is a circumstance in which the discretion should be exercised in favour of the defence. By the plain words of the section, it would seem that the question of whether the defence in fact needs time to prepare is a matter left entirely up to the judge's assessment.

[22] However, it seems to us that the object of the Act is to achieve fairness in the conduct of the trial. This, we think, would oblige the judge to consider what is said by defence counsel as to the state of readiness of their case, as the defence is best placed to assess and indicate their position in this regard. Of course, based on the history of the matter and the period of time between the commission of the offence, the retaining of the services of counsel and the number of times the matter has been before the court, the judge may well consider that the defence has had sufficient time to prepare and form the view that the defence ought not to be allowed further time. However, in this case, it could not be said that the circumstances were of such that this was a view that could reasonably have been held.

[23] In fact, this aspect of the matter appears not to have been a consideration in the judge's mind, and in our view, the availability of witnesses is a fundamental part of the preparation of the case for the defence. What appears to have been operating on his mind was the fact that the witnesses were present and he had no other matter to be tried on that day. However, in adopting this posture, he completely disregarded all the pertinent factors which a judge should take into account before granting an

adjournment as adumbrated by Carey JA in **Delroy Raymond v R**. In that case, the trial judge had declined to adjourn the appellant's trial to allow him time to obtain legal aid representation. Carey JA at page 458D-E stated:

> "In considering whether an adjournment should be granted, a trial judge is obliged to balance a number of competing factors. The judge would be entitled to consider the number of occasions the matter has been before the Court ready for trial; the availability of the witnesses or their future availability; the length of time between the commission of the offence and the trial date; the possibility that a Crown witness may be eliminated or suborned; whether the defence have had sufficient time to prepare a defence bearing in mind section 6 of the Administration (Criminal Justice) [sic] Act. The list does not pretend to be exhaustive."

[24] In the instant case, the evidence indicates that 28 November 2012 was the first trial date; the offence had been committed on 17 June 2012, a period of five months prior to the date of trial; there was no indication that the prosecution's witnesses would be unavailable or that they would be suborned; and, as stated earlier, defence counsel was indicating that he needed more time to prepare. It is our view that the interests of justice required that an adjournment should have been granted to allow counsel on behalf of the appellant time to properly prepare his defence, and in failing to grant the adjournment, the learned judge had erred. Further, the learned judge appears to have compounded the injustice meted out to the appellant in that without any apparent basis in law, he revoked the appellant's bail, by suggesting that if the matter was not tried on that day, bail would be revoked. It is the law that whenever an accused attends court, he surrenders to the custody of the court and unless there are good reasons for the

revocation of his bail, his bail must then be extended in order for him not to be held in custody. In this case, the appellant had been granted bail in accordance with his right under the Bail Act and the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act. In our view, the appellant's bail ought not to have been revoked unless it was done in accordance with section 6(7) which provides that bail may be revoked in the circumstances set out in section 4, which are the circumstances in which bail would be denied. And in this case, there is nothing on the record which indicated that any of these circumstances existed. The learned trial judge therefore erred in refusing to grant the adjournment which resulted in the appellant being deprived of the opportunity of having his defence properly put, thus resulting in a contravention of his constitutional right to a fair hearing within a reasonable time as guaranteed to him by section 16(1) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act.

[25] The foregoing is sufficient to dispose of the appeal, but we think it necessary to say a brief word on the issue of the incompetence of counsel. Mr Mellish had contacted Mr Forest enquiring of the reason for the decision resulting in the appellant failing to give evidence and no character evidence being adduced during the trial. In his response Mr Forest indicated that the decision in relation to the former had been taken after discussing with the appellant the likelihood that he would not have withstood the cross-examination given the atmosphere in which the trial had commenced and under which it was being conducted. In relation to the latter, the appellant's brother who had been considered to give this evidence, based on his background, would not have been a

credible witness and given the short time in which they had been given to commence the trial, the other witnesses would not have been available.

[26] The approach of this court in these matters where the conduct of counsel is relied on as a ground of appeal was set out with great clarity by Morrison JA in **Leslie McLeod** [2012] JMCA Crim 59 where having examined at great length the authorities on this point, he concluded that what this court is required to do is to consider the impact of the faulty conduct of counsel on the trial and verdict and whether the conduct of counsel is so egregious as to result in a denial of due process to the appellant.

[27] In this case, it appears that unlike the allegations of the appellants/applicants in many of the cases on this area of the law, the appellant was made aware of the option of giving sworn evidence and made the conscious decision with the advice of his attorney not to give evidence. The concern would be whether the advice given by Mr Forest, the attorney, was based solely or in the main on what he perceived to be the hostile environment in the court as against the fact that the issue in the case was credibility and therefore sworn evidence may have played a significant part in the assessment of his defence. Mr Forest also failed to call other witnesses who may have spoken to the appellant's character and the propensity of the complainant to engage in acts of violence. In a case where the issue was one of credibility and there was no other witness as to the events of that evening, it could not be said with certainty that had these witnesses been called and had they given such evidence, that it was inevitable that there would still have been a conviction.

[28] Counsel had been served with all the relevant statements and so he should have been aware that the matter was fixed for trial on 28 November and it was not merely a mention date, even though we recognise that this was his first appearance in the matter. This would have informed his approach to the preparation of the matter. Further, having been told by the judge of the intention to start the trial, he ought to have been in a position to explain with clarity the basis for the adjournment and to have done so forcefully and with conviction.

[29] It is unnecessary for us to address the ground relating to the interventions of the judge. Firstly, the main complaint by counsel for the appellant, that the judge displayed a xenophobic attitude towards Mr Forest, was not disclosed on the record and secondly, because of how we have disposed of the matter, as indicated, we did not consider that it was essential for us to go through such exchanges as there were on the record between counsel and the judge, which exchanges we would say were unfortunate, and certainly unhelpful in the court's process of the efficient disposal of the case and the administration of justice.

[30] Having decided that the appellant had been subjected to an unfair trial, it was then necessary to consider whether a retrial ought to be ordered. Mr Mellish submitted that there had been a breach of the appellant's sacrosanct right to a fair trial and therefore the prosecution ought not to be given a second chance. However, in applying the factors set out by the Privy Council in **Reid v R** [1980] AC 343, we considered that: this was not a case where the prosecution would be getting a second bite at the cherry; the case against the appellant was quite strong although it depended on the credibility

of the complainant; the offences of illegal possession of firearm and wounding with intent are serious and prevalent offences; and there had not been a long time that had passed since the commission of the offences. We were of the view that in all these circumstances, the interests of justice required that the appellant be made to stand trial again.

[31] It was for these reasons that we made the order set out at paragraph [1] herein.