[2024] JMCA Crim 41

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MR JUSTICE D FRASER JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 56/2014

JEROME PALMER v R

Keith Bishop and Janoi Pinnock for the appellant

Ms Donnette Henriques and Ms Debra Bryan for the Crown

7, 9 November 2022 and 29 November 2024

Criminal Law – Unreasonable delay in production of transcript – Breach of right to a hearing within a reasonable time – Appropriate redress – Whether actual prejudice needs to be demonstrated to justify a reduction in sentence due to delay – Constitution of Jamaica, section 16(8)

D FRASER JA

The application and appeal

[1] This matter has come before the court as a renewed application for permission to appeal against conviction and as an appeal against sentence. This follows the single judge's refusal of the application for leave to appeal against conviction, but his grant of permission for the appellant to appeal against the sentences imposed. This was to facilitate examination by the court of whether, any, and if so, what redress should be afforded the appellant for the eight-year delay in the production of the trial transcript.

The case at trial

[2] The case against the appellant at trial was that on Christmas Day 2012, at about 9:00 pm in the community of Jones Town in the parish of Saint Andrew, while armed with a gun, the appellant chased and shot the complainant, Christopher Morris. The

complainant felt his right leg go numb, and he fell on Crooks Street. The appellant came over the complainant, fired other shots at him and then robbed him of his gold chain and pendant, valued at $150,000.00, before making his escape. The complainant received four gunshot wounds to (i) his right thigh, (ii) his left upper arm, (iii) his belly above his navel and (iv) behind his ear, exiting under his chin.

[3] The complainant was hospitalised and, on his discharge, made a report to the police. On 5 February 2013, the complainant pointed out the appellant as his assailant on a video identification parade. In his defence at trial, the appellant denied involvement in the attack on the complainant. He raised an alibi and also complained that after he was taken into custody, a policeman took his photograph with a cellular phone.

[4] On 20 May 2014, the appellant was convicted on all three counts on the indictment. On the same day, he was sentenced to imprisonment at hard labour for each of these offences as follows: illegal possession of firearm — 15 years; wounding with intent — 20 years; robbery with aggravation — 12 years. The sentences were ordered to run concurrently.

The application for leave to appeal

[5] The appellant filed four grounds in his notice of application for permission to appeal dated 28 May 2014. They were as follows:

> "**Misidentify by the Witness: -** That the prosecution witnesses wrongfully identified me as the person or among any persons who committed the alleged crime.
>
> **Lack of Evidence: -** That the prosecution failed to present to the court any "concrete" piece of evidence (material forensic or scientific) evidence to link me to the alleged crime.
>
> **Unfair Trial: -** That the evidence and testimonies upon which the learned trial judge relied on [sic] for the purpose to convict me, lack [sic] facts and credibility, thus rendering the verdict unsafe in the circumstances.

> **Miscarriage of Justice: -** That the court wrongfully convict [sic] me for a crime I knew nothing about and could not have committed."

[6] The transcript of the trial for use in the application and appeal was received in the Court of Appeal on 16 June 2022.

The submissions of counsel

[7] In his written submissions on behalf of the appellant, Mr Bishop indicated that "[f]ollowing a scrupulous perusal of the transcript of notes and considering the relevant law", he concurred with the single judge of appeal that leave should not have been granted in respect of the conviction, but was appropriately granted to appeal sentence. Accordingly, he had been instructed by the appellant to abandon his appeal against conviction but to proceed with his appeal against sentence to argue the following sole ground:

> "That the learned sentencing Judge failed to demonstrate, at the sentencing hearing, how she arrived at the sentences imposed on the appellant."

[8] However, at the hearing, counsel indicated that after further perusal of the transcript, he was of the view that while the learned trial judge may not have demonstrated that she followed the relevant guidelines in arriving at the sentences imposed, they were within the accepted range for those types of offences, especially in light of the facts of this case and hence were not excessive. Accordingly, he declined to advance any argument that the sentences were excessive. This approach was in keeping with the well-established principle that there must be both a failure of the sentencing judge to adhere to the appropriate methodology as well as a resulting sentence that is manifestly excessive or lenient, that will require this court to interfere with the sentence imposed: **Oshane Forbes** [2022] JMCA Crim 57.

[9] Mr Bishop, however, submitted that, as there was no indication that the learned trial judge had deducted the time the appellant had spent on pre-sentence remand, that

period (agreed with counsel for the Crown as one year and four months) should be deducted from the sentences imposed.

[10] Regarding the issue of the delay in the hearing of the appeal, occasioned by the production of the trial transcript taking eight years, counsel for the appellant initially submitted that given the circumstances of this case, it did not appear that the delay would provide a basis for the further reduction in sentence of the appellant. However, after reflection, he requested and was permitted to make further submissions. He subsequently adjusted his position and contended that, in light of the eight-year delay and the clear acknowledgment and acceptance that there has been a breach of the appellant's constitutional right to a hearing within a reasonable time, the sentence of the appellant should be reduced by between two to four years. He relied on the cases of **Melanie Tapper, Winston McKenzie v R** (unreported), Court of Appeal, Jamaica, Resident Magistrates Criminal Appeal No 28/2007, judgment delivered on 27 February 2009; **Melanie Tapper v Director of Public Prosecutions** [2012] 1 WLR 2712; **Taito v R** [2002] UKPC 15; **Julian Brown v R** [2020] JMCA Crim 42; **Evon Jack v R** [2021] JMCA Crim 31; **Lincoln Hall v R** [2018] JMCA Crim 17 and **Attorney General's Reference: R v Manning** [2020] All ER(D) 44 (May).

[11] In written submissions, counsel for the Crown concurred with the view that the convictions were unassailable in light of the evidence and the summation of the learned trial judge, which adequately addressed all the issues raised, in particular the issues of identification and credibility. Counsel also advanced that while the sentences were not manifestly excessive, they should be adjusted to account for the time the appellant spent on pre-sentence remand.

[12] Ms Henriques, for the Crown, expanded on the position expressed in the written submissions that it would be unreasonable to submit that eight years post-conviction delay due to the late production of the transcript was acceptable. In a carefully nuanced argument, counsel contended that the remedy for unreasonable post-conviction delay, which was entirely attributed to the State, should not automatically result in a reduction

of sentence. She maintained that it was important to examine the circumstances in every case to determine whether, apart from the prejudice inherent in the delay, there was actual prejudice suffered by a defendant, that would require a reduction in sentence as redress. She pointed out that the appellant presented no affidavit evidence alleging actual prejudice occasioned by the delay.

[13] Counsel further submitted that if a reduction in sentence was not linked to actual prejudice, but was granted as of course, once unreasonable post-conviction delay attributed to the State was established, a defendant may benefit from an unjustified reduction. As such, principles of sentencing to include those of deterrence and the protection of society, which may have guided the sentencing judge in the determination of the sentence imposed, could be undermined. Counsel, therefore, posited that, in the circumstances of this case, a public acknowledgement of the established constitutional breach, would provide adequate redress. Counsel relied on the cases of **Timothy Smith v R** [2022] JMCA Crim 40; **Melanie Tapper v Director of Public Prosecutions** as well as the cases of **Jahvid Absolam et al v R** [2022] JMCA Crim 50; **Tussan Whyne v R** [2022] JMCA Crim 42; **Curtis Grey v R** [2019] JMCA Crim 6; and **Techla Simpson v R** [2019] JMCA Crim 37.

Discussion and analysis

The application for leave to appeal against conviction

[14] We agree with both counsel for the appellant and counsel for the Crown that there is no merit in the original grounds of appeal filed against conviction. It is sufficient for us to adopt the ruling of Brooks P, the single judge who considered the appellant's application for leave to appeal against conviction, where he said:

> "The learned trial judge was faced with the issues of identification and credibility. She gave herself the requisite warnings in respect of both. She also addressed the issue of the difference in appearance between the attacker and the applicant in respect of the facial hair. The learned trial judge held that those characteristics may be acquired in a short time

> and so did not find that the issue affected Mr Morris' credibility. She also found that there was no taint to the identification parade.
>
> It cannot be said that the learned trial judge, who saw and heard the witnesses, was wrong in her assessment of the evidence. For those reasons, the convictions cannot properly be disturbed."

The appeal against sentence

[15] Turning to the appeal against sentence, there is also common ground between the appellant and the Crown, that, in keeping with well-established authority, the appellant is entitled to full credit for any time spent on pre-sentence remand which has not been specifically deducted from the sentence passed by the learned trial judge (see for example **Meisha Clement v R** [2016] JMCA Crim 26 at para. [34]). That period is agreed to be 16 months.

Post-conviction delay

[16] The final issue to be addressed is the most significant in this appeal: what redress should be afforded the appellant, for the eight-year delay in the production of the trial transcript? A defendant charged with a criminal offence enjoys a bundle of three constitutional rights by virtue of section 16(1) of the Constitution of Jamaica. These are the rights to (a) a fair hearing; (b) by an independent and impartial court established by law; and (c) within a reasonable time: **Porter and another v Magill** [2002] 1 All ER 465; **Attorney General's Reference (No 2 of 2001)** [2004] 2 AC 72; **Mervin Cameron v R** [2018] JMFC FULL 1.

[17] It is now settled law that where there is a breach of a defendant's constitutional right to a fair hearing within a reasonable time caused by excessive delay, that defendant is entitled to appropriate redress. Quite rightly, in our view, counsel for the Crown has acknowledged that the delay in the appellant's appeal coming on for hearing, occasioned by the eight-year wait for the production of the trial transcript, constitutes a breach of the appellant's constitutional right to have his convictions and sentences reviewed by a

superior court within a reasonable time. This is so as the reasonable time guarantee extends to all stages of the adjudication process. While there is agreement between the parties that there has been a breach, there is divergence regarding the appropriate redress.

[18] A convenient place to start the discussion is by examining the case of **Melanie Tapper v Director of Public Prosecutions,** which was cited by counsel on both sides. In that matter, in a joint trial with two other defendants, the appellant was convicted of fraudulently causing money to be paid out and sentenced to 18 months' imprisonment at hard labour. One of the other defendants was also convicted of a number of offences with the other being acquitted. Both the appellant and the other defendant who was convicted appealed to this court. There was post-conviction delay of over five years, wholly attributable to the Crown, before the appeals came on for hearing. After referring to section 20(1) (now section 16(1)) of the Constitution and a number of authorities, Smith JA, writing for this court, held that "such delay without more, constitutes a breach of the defendants' constitutional right to a hearing within reasonable time". The remedy for that breach was the reduction in the sentence to 12 months as compensation for the delay. Additionally, based on the mistaken understanding that the appellant had contributed to the payment of a substantial sum of money to the complainant as restitution, the reduced sentence was suspended for one year.

[19] On further appeal only by the appellant to the Judicial Committee of the Privy Council, the Board upheld the decision of this court and endorsed the principle outlined in the **Attorney General's reference case** [2004] 2 AC 72 that (i) the failure of a public authority to have a criminal charge determined within a reasonable time constituted a breach of the defendant's right to a hearing within a reasonable time; and (ii) the appropriate remedy for such breach depended on the nature of the breach and all the circumstances of the breach, including the stage at which the breach occurred. Paragraph 24 of the **Attorney General's reference case** was quoted, and the following section of that paragraph highlighted:

> "If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgment of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant. Unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all, it will not be appropriate to quash any conviction."

[20] The statement of principle of Smith JA that inordinate delay, without more constitutes a breach of a defendant's constitutional right to a hearing within reasonable time has, however, in recent years, been re-evaluated and qualified in light of the 2011 amendment to the Constitution, which from sections 13 to 20 incorporated the current Charter of Rights and by which the former section 20(1) became section 16(1).

[21] Section 13(2) of the Constitution provides:

> "Subject to sections 18 and 49, and to subsections (9) and (12) of this section, and **save only as demonstrably justified in a free and democratic society** –
>
> (a) this Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section and in sections 14, 15, **16** and 17; and
>
> (b) Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges or infringes those rights." (Emphasis added)

[22] In **Julian Brown v R**, based on section 13(2) and dicta in the cases of **Flowers v The Queen** (2000) 57 WIR 310 and **Bell v The Director of Public Prosecutions** [1985] AC 937 ('**Bell v DPP**'), McDonald-Bishop JA (as she then was), writing for this court, opined that inordinate delay by itself could not establish that there had been a breach of section 16(1). The relevant circumstances of each case had to be investigated. The length of the delay had to be assessed along with considerations of (i) whether the defendant had asserted and established that *prima facie* the State was responsible for the delay, and if so, (ii) whether there was any demonstrably justified reason for that delay established by the State. If the defendant satisfies (i) and the State does not satisfy

(ii), it is only then that the constitutional breach would be established and the issue of the appropriate remedy for that breach falls to be determined.

[23] In **Timothy Smith v R,** one of the grounds of appeal was that the delay of the trial and appeal breached the appellant's constitutional right to a fair trial within a reasonable time, contrary to section 16(1). There was pre-trial delay of five years and a post-trial delay of almost four years. Reliance was placed on the judgment of the Judicial Committee of the Privy Council in **Flowers v The Queen** in which dicta from the case of **Barker v Wingo** applied in **Bell v DPP** outlined the factors to be assessed when considering the sixth amendment to the Constitution of the United States (a rough equivalent to former section 20(1) now section 16(1)), in the context of delay. At para. 45 of **Flowers v The Queen**, it is stated:

> "The factors are: the length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. In *Bell* the Board acknowledged the relevance and importance of these four factors, stating that the weight to be attached to each factor must however vary from jurisdiction to jurisdiction and from case to case."

[24] In **Timothy Smith v R**, in respect of the pre-trial delay, this court noted that the appellant had failed to both establish the reasons for the delay, and raise the issue in the court below, as he was required to do. Regarding post-trial delay, the period was not considered inordinate.

[25] In the instant case, the fact that the State is responsible for the delay is not in issue. Production of transcripts are the duty of the State, and the applicant plays no role therein (see **Evon Jack v R** at para. [20] where section 16(7) of the Constitution is rehearsed). There is thus no onus on the applicant to establish the reasons for the delay. There has also been no attempt to suggest that the delay of eight years in this context is demonstrably justifiable. In these circumstances, the concession of the Crown that the breach of the reasonable time guarantee was established is appropriate. That led us to

the singular bone of contention identified — what is the appropriate remedy for this delay?

[26] It will need to be determined (i) whether the length of the delay by itself dictates a particular remedy irrespective of any specific prejudice; or (ii) whether in light of the third and fourth factors specified in **Flowers v The Queen,** the impact of the breach should influence the nature of the remedy deemed appropriate. A brief review of the cases cited will reveal the considerations that operated in each.

[27] In **Jahvid Absolam et al v R**, the transcript took seven years to be produced, a delay wholly attributed to the State. Though the convictions for illegal possession and robbery with aggravation were upheld, the appellants' convictions for larceny were set aside. Following the case of **Techla Simpson v R,** in which a reduction of two years from his sentence was granted for the pre-trial delay of eight years, two years were similarly deducted from the sentences of the appellants in **Jahvid Absolam et al v R**. In **Tussan Whyne v R**, there was a pre-trial delay of eight years. In the absence of affidavit evidence in support of the competing assertions on who was at fault for the delay, the court took the view that the delay was "equally contributed to by both parties" and deducted one year from the appellant's sentence as the appropriate remedy. In **Curtis Grey v R**, the redress for a delay of four years pre-trial (contributed to by both the Crown and the defence) and a further four-year delay in the hearing of the appeal due to awaiting the transcript, was a reduction of sentence of one year.

[28] In cases involving pre-trial delay either solely or coupled with post-trial delay, the third factor from **Bell v DPP** that was adopted in **Flowers v The Queen**, that of the assertion of the right to trial within a reasonable time, assumes significance in a way it cannot in cases such as the instant one dealing with post-trial delay. By its nature, a case that raises the issue of post-trial delay presents no opportunity for prior assertion of the right before the hearing of the appeal.

[29] The fourth factor, prejudice to the defendant, is, however, of paramount importance in the instant case. In **Bell v DPP**, Lord Templeman, writing for the Board, in quoting from **Barker v Wingo**, outlined the considerations regarding prejudice to the accused in these terms:

> "Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defence will be impaired. Of these, the most serious is the last…"

[30] In the cases reviewed, at least one or more of the factors that generate prejudice were evident. Significantly, in all the cases reviewed, the appellants challenged their convictions. Actually, in **Jahvid Absolam et al v R**, the appellants were partially successful in that challenge. Thus, in all these cases it could be said that the appellants harboured expectations or hopes of acquittal either at trial (where the delay was pre-trial) or on appeal (where the delay was post-trial) or at both stages of the adjudication process where there was delay at each stage. On appeal, they may also have contemplated a reduction of sentence even if their convictions were upheld. They were, therefore, subject to "anxiety and concern" as they awaited the next stage of proceedings.

[31] That reality is, however, conspicuously absent in the instant case in which the appellant, at the hearing, did not challenge either the safety of his convictions or his sentences as manifestly excessive. While he engaged the formality of an appeal, there is therefore no indication that he entertained any realistic expectation of success on his appeal, beyond the important "administrative adjustment" to take account of time spent on pre-sentence remand. The appellant was convicted of very serious offences, described by the learned trial judge as "particularly brutal". The harshest sentence of 20 years' imprisonment at hard labour was reserved for the offence of wounding with intent because, as the learned trial judge observed, the appellant, "stood over the gentleman

and shot him while he was lying…on his back, in a helpless state, having shot him already".

[32] Thus, this being a case where it has been acknowledged by the appellant and his counsel and determined by the court both that the convictions were safe and the sentences were not manifestly excessive, the conduct of the appellant's appeal was in no way prejudiced by the delay in the production of the transcript. Further, as the adjusted sentences (after deduction of the period spent by the appellant on pre-sentence remand) will be ordered to run from the date sentences were initially imposed and will still have some time to run, the delay will not result in the appellant spending any unjustified time in custody.

[33] We therefore agree with Ms Henriques, learned counsel for the Crown, that in the circumstances of this case, where actual prejudice has not been demonstrated, redress in the form of a reduction of sentence for delay would be unjustified. A public acknowledgement of the breach is the indicated remedy.

[34] Accordingly, we make the following orders:

i) The application for leave to appeal convictions is refused.

ii) The appeal against sentences is allowed.

iii) The respective sentences of imprisonment imposed for the offences of illegal possession of firearm (15 years), wounding with intent (20 years) and robbery with aggravation (12 years) are set aside, to allow for credit to be given for the period of 16 months which the appellant spent on pre-sentence remand. Substituted therefor are the following terms of imprisonment: illegal possession of firearm — 13 years' and eight months; wounding with intent — 18 years' and eight months; and robbery with aggravation — 10 years' and eight months.

iv) The sentences are to be reckoned as having commenced on 20 May 2014, the date the appellant was originally sentenced, and are to run concurrently as ordered by the learned trial judge.

v) It is hereby publicly acknowledged, with regret, that the right of the appellant under section 16(8) of the Constitution of Jamaica to have his convictions and sentences reviewed by this court, within a reasonable time, has been breached by the excessive delay between his convictions and sentencing and the hearing of his appeal.