**[2017] JMCA Crim 39**

**JAMAICA**

**IN THE COURT OF APPEAL**

**SITTING IN LUCEA, HANOVER**

**SUPREME COURT CRIMINAL APPEAL NO 21/2014**

**BEFORE: THE HON MISS JUSTICE PHILLIPS JA**
**THE HON MR JUSTICE BROOKS JA**
**THE HON MRS JUSTICE MCDONALD-BISHOP JA**

**TRAVANA PROUDLOVE v R**

**Chumu Paris for the appellant**

**Ms Paula Llewellyn QC and Stephen Smith for the Crown**

**5, 6 and 8 December 2017**

**BROOKS JA**

[1] On 11 August 2011, Mrs Lilleith Harris-Warren was sitting in a vehicle in her yard engaged in the curious act of eating baby powder, when she noticed three men standing in the yard. They were close together. One of them shot her, resulting in her receiving multiple injuries. The men then ran away. Mrs Harris-Warren said that the appellant, Mr Travana Proudlove, was one of the three men, but that he was not the one who fired the weapon.

[2] Arising from that incident, Mr Proudlove was convicted on 24 January 2014, for the offences of illegal possession of firearm and wounding with intent. He was sentenced on 28 February 2014 to serve three years imprisonment for the offence of illegal possession of firearm and 15 years imprisonment for the offence of wounding with intent.

[3] He was given permission by a single judge of this court to appeal against his convictions.

[4] Learned counsel, Mr Chumu Paris, argued three grounds of appeal. Two were formulated by counsel, namely:

> (a) "The Learned Trial Judge's consideration of the identification evidence was deficient", and
>
> (b) "The Learned Trial Judges [sic] summation on the law of Secondary Participation was inconsistent with the current position in law rendering her findings unreasonable and unsupported by the evidence".

[5] The third ground of appeal was one of Mr Proudlove's original grounds. As reformatted by Mr Paris, it reads:

> "...the court failed to recognise the facts based on the witness [sic] testimonies that she acted out of malice, thus compromising my innocence and calls into question the sincerity of the verdict."

[6] The basic elements of the prosecution's case were that the virtual complainant, Mrs Harris-Warren, was in the yard of her residence at about 11:00 pm. She was sitting in a van enjoying her baby powder when she saw the three men. She

recognised them as persons she knew before. One of them she knew by name. He is the appellant, Mr Proudlove, but she knew him as Jovan Proudlove. The second person, she knew by his association, and called him "Fishy Grandson". She did not remember the third man's name.

[7] It was Fishy's grandson who had the gun. He shot her behind her right ear and she fell into the van. She heard other explosions, felt stinging to her body and then after hearing a discussion, footsteps running away.

[8] She got up, went to her house and was taken from there to the hospital where she was treated for serious injuries.

[9] Mr Proudlove denied being present or being in any way involved in the shooting.

**First ground - The summation in respect of identification**

[10] Mr Paris argued that the learned trial judge's consideration of the identification evidence was deficient. He submitted that the learned trial judge in assessing the circumstances of the opportunity for viewing the assailants failed to apply a critical approach to the evidence. He noted that the learned trial judge seemed to have accepted and taken into consideration Mrs Harris-Warren's evidence that she observed the three men for two to three minutes. That testimony, learned counsel submitted, was clearly inaccurate based on the narrative of the events. He argued that the time would have been no more than about five seconds. He accepted that it would have been longer than a fleeting glance, but that it was one made in difficult circumstances and therefore an unreliable one.

[11] Learned counsel submitted that the reliability of Mrs Harris-Warren's claimed recognition was further compromised by the fact that she did not recognize the voices that she heard immediately after the shooting and while she lay in the van. That failure, he argued, suggests that the assailants were not the persons that she thought they were.

[12] We do not agree with Mr Paris in respect of these points. Whereas, it is true that the learned trial judge did not specifically assess the accuracy of the time given by Mrs Harris-Warren, the learned trial judge had before her a clear case of recognition. The evidence was such that the witness would have seen men whom she knew before. The first sighting was not one which would have been stressful. She testified that having seen the men she stood up, turned and took a step toward them. This was before a firearm was produced. The learned trial judge was entitled to find that the visual identification in those circumstances was reliable.

[13] Mr Paris' submission concerning the voices lacks the necessary foundation of evidence of prior acquaintance with the voices of either Mr Proudlove or Fishy's grandson.

[14] Neither the prosecution nor defence asked the witness whether she knew the voices of those men. Mr Paris submission calls for an unsubstantiated assumption. It cannot assist Mr Proudlove.

[15] Accordingly, this ground fails.

**Second ground – the summation on common design**

[16] Mr Paris relied on the fairly recent decision of the Privy Council in **Ruddock v R** [2016] UKPC 7 along with **R v Jogee** [2016] UKPC 8. In a single judgment encompassing both cases, their Lordships dealt with the liability of secondary parties to an offence. In that judgment, their Lordships stressed the need for the prosecution to prove that an accessory provided intentional assistance or encouragement for the offence that was actually committed by the principal.

[17] Mr Paris submitted that the prosecution's evidence did not support anything other than Mr Proudlove's presence and therefore it failed to meet the standard set in **Ruddock v R**.

[18] The flaw in Mr Paris' submission is that section 20(5)(a) of the Firearms Act creates a situation which places an evidential burden on persons in the company of another, who is in possession of a firearm. The subsection states:

> "In any prosecution for an offence under this section –
>
> (a) any person who is in the company of someone who uses or attempts to use a firearm to commit –
>
> (i) any felony; or
>
> (ii) any offence involving either an assault or the resisting of lawful apprehension of any person.
>
> shall, **if the circumstances give rise to a reasonable presumption that he was present to aid or abet the commission of the felony or offence aforesaid**, be treated, in the absence of reasonable excuse, as being also in possession of the firearm;
>
> ...." (Emphasis supplied)

[19] We agree with the submissions of Mr Smith, for the Crown, that this ground should fail. In this case, the evidence is that Mr Proudlove appeared in the yard at the same time as the shooter. He stood beside the shooter as the shooter fired. Immediately after the shooting, a voice said "whaappen unnoo done" (page 15 of the transcript). The term "unnoo" is understood in this country to be the plural of "You", that is, referring to more than one person. The reply then given was "you nuh see the woman dead" (page 16 of the transcript). After that, the three men left together - There was no act or word of disassociation with the act of shooting.

[20] The learned trial judge was entitled to find that the persons there were on a joint enterprise to do serious bodily harm to Mrs Harris-Warren.

[21] Mr Proudlove did not seek to explain his presence as being innocent. He denied being present. The learned trial judge was entitled, as she did, to reject his statement and accept the evidence of Mrs Harris-Warren as to his presence. The circumstances would fall within the provisions of section 20(5)(a)(i) of the Firearms Act and Mr Proudlove would not only be guilty of illegal possession of firearm, but also of the offence of wounding with intent.

[22] Thus this ground fails.

**Third Ground – the assessment of credibility in the context of the possibility of malice.**

[23] Mr Paris argued that the learned trial judge, in considering the evidence of identification, failed to assess the evidence that suggested the possibility that Mrs Harrris-Warren was motivated by malice to falsely identify Mr Proudlove as being one of the assailants.

[24] Learned counsel argued that the learned trial judge mentioned the incident from which malice could have been inferred, but failed to analyse it.

[25] He relied on **R v Carl Peart** (1990) 27 JLR 13 as authority for the requirement of the first instance tribunal not only to mention the source of possible malice, but to scrutinize it with care.

[26] We cannot agree with Mr Paris.

[27] The learned trial judge did assess the credibility of Mrs Harris-Warren and tested it, among others, in the context of the possibility of malice. She said at pages 107-108 of the transcript:

> "A very live issue in this case is credibility. I have noted the following areas of the evidence which relate to this issue. Note carefully, this list is not meant to be exhaustive. I will start with [Mrs Harris-Warren's] evidence."

[28] While assessing Mrs Harris-Warren's evidence in that context, the learned trial judge said at page 109:

> "[Mrs Harris-Warren] in her evidence in chief stated that there was no bad blood between herself and Joven [sic]

> prior to the incident. In cross-examination she said that her daughter Sasha Kay had told her that Joven had boxed her on that same day. She was also told that her son Derron had been beaten up by some boys and she admitted that hearing of these two incidents made her upset.
>
> In re-examination she said that her daughter had spoken to her about the two incidents on the same day that [Mrs Harris-Warren] was shot and that prior to that date there was no issue between her family and Joven."

[29] The learned trial judge assessed the other evidence adduced by the prosecution. She also assessed Mr Proudlove's unsworn statement in the context of credibility, having given him the benefit of a good character warning in that context.

[30] The learned trial judge concluded this assessment on page 112 of the transcript with the following words:

> "I now reach the point where I have gone through the evidence presented by the Crown and the statement given by the [appellant]. I have had the opportunity of seeing and hearing the witnesses and the accused. [Mrs Harris-Warren] has impressed me as being a truthful and honest witness...."

[31] For these reasons ground three also fails.

**Conclusion**

[32] We are grateful to both counsel for their helpful submissions, we however find that the evidence adduced before the learned trial judge was adequate to enable her to convict Mr Proudlove. She properly addressed her mind to the various issues and there is no reason to disturb her findings or decision.

[33] The sentences imposed are consistent with the normal range and therefore there was no reason to disturb them. There was, rightly, no argument in respect of the appeal against sentence. As a result, the orders are:

1. Appeal dismissed.
2. Convictions and sentences affirmed.
3. Sentences are to be reckoned as having commenced on 28 February 2014.