[2011] JMCA Crim 52

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 35 & 38/2008

BEFORE: **THE HON MRS JUSTICE HARRIS JA**
THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA

ALBERT ALLEN

MAURICE WILLIAMS v R

Dwight Reece for the applicants

Mrs Karen Seymour-Johnson and Brodrick Smith for the Crown

7 March, 15 April and 14 October 2011

HARRIS JA

[1] The applicants were, on 13 March 2008, convicted in the High Court Division of the Gun Court for the offences of illegal possession of firearm and illegal possession of ammunition. They were sentenced to 10 years imprisonment with respect to each offence. A single judge refused applications by them for leave to appeal against their convictions and sentences. Before us is a renewal of their applications.

[2] At about 10:30 on the night of 11 November 2007, Sergeant Linwall McGhann, Constable Damion Dixon, Constable C. Jones and District Constable Howell were on patrol, proceeding along the Hayes main road towards Lionel Town. On reaching the intersection of New Town Road and Hayes main road a red Suzuki motor car with five men on board was seen travelling on the Hayes main road. The occupants of the car were the driver Winston Rodney, the applicants and two others.

[3] Sergeant McGhann said the police pursued them, drove up beside them and ordered them to stop. The driver obeyed. Sergeant McGhann said he went to the vehicle and instructed the men to alight from it and they complied. He, however, asserted that the car was speeding and he had to chase it for five to six chains for a minute, forcing the driver to stop. He further stated that the applicant Allen came out from the left rear passenger seat while the applicant Williams, alighted from the right rear passenger seat. Another man, Burrell, who was seated in the middle, was the last person to alight from the car. He went on to say that a search of the car was made and a 45 Para Ordance semi-automatic pistol containing a magazine with 12 cartridges was found on the floor of the car behind the driver's seat and at the side where Allen was seated. He also said he found a Uzi 9mm pistol with 14 cartridges on the floor, behind the driver's seat, at the side of the car from which Williams emerged.

[4] Constable Dixon testified that the car with the men was chased for three minutes and the driver was ordered to stop. He stated that the men alighted from the vehicle and he saw Sergeant McGhann take a gun from the floor of the left rear passenger seat and one from the floor to the right of the rear passenger seat.

[5] The applicants made unsworn statements. Allen stated that on the night of the incident, he did not have anything illegal and when he left the vehicle he did not observe any gun on its floor. Williams stated that on the night of the incident, he had requested a ride to attend a party and he did not see a gun in the car on his entering or leaving it.

[6] Winston Rodney testified that he lives in May Pen and is a videographer by occupation. He stated that on the day in question he was booked to videotape a party at Rocky Point. He stated that he left his home at about midday driving a red Suzuki motor car. He proceeded to Lionel Town where he picked up two persons. Thereafter, they went to Salt River where they had fish and festivals. Following this, they returned to Lionel Town where he had a nap. He, thereafter, proceeded to Rocky Point arriving there at about 9:00 pm. On arrival he discovered that the party had not yet started, so he went back to his car. While there, he was approached by Allen who asked him to take him to Hayes to collect some money from a woman. He, Allen, offered to purchase gas. He, having agreed to transport Allen, left Rocky Point with Allen and two other men.

On arrival at Hayes, Allen alighted from the car and went into a yard. He returned with Williams, both approaching the car crouching. This, he stated, aroused his suspicion. He said he was afraid as he could not see the front of their bodies while they were approaching the car. Allen and Williams were seated at the back of the car. Allen was seated to the left and Williams to the right.

[7] He further stated that after Allen and Williams entered the car, he, Rodney, drove off with the intention of going to the gas station as the car needed petrol. On the way, the police stopped them and because of the suspicions which he had harboured about Allen and Williams, he ran from the car towards the police. Two guns were found in the back of the car when it was searched by the police, he said. He related that no guns were in the car before he left Rocky Point.

[8] Two original grounds of appeal filed by the applicants were abandoned. They were granted leave to argue four supplemental grounds of appeal. They, however, abandoned the fourth ground. The supplemental grounds of both applicants are identical. They are as follows:

> "1. The Learned Trial judge erred in not upholding the submission of No-case to Answer made on behalf of the Applicant at the close of the Prosecution's case (Pages 103-112).
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> 2. The Learned Trial Judge erred in finding that the evidence of the accused Rodney strengthened the crown's case when his evidence materially contradicted that of the Crown's main witness.

3. The Learned Trial Judge failed to properly analyze the effect of the discrepancies and inconsistencies between the evidence of Sergeant McGowan [sic] and aspects of his witness statement; as well as the contradictory accounts given by him at different stages of his evidence."

[9] The burden of Mr Reece's submissions is that the evidence adduced by the prosecution is incapable of establishing knowledge, custody and control of the firearms by the applicants. The evidence of Sergeant McGhann, he argued, was riddled with discrepancies and inconsistencies which significantly impaired the prosecution's case as these were mainly with respect to where the firearms were found and where each applicant was seated in the car. Sergeant McGhann, he argued, agreed that Burrell was the last person to have alighted from the motor vehicle, he would have remained in the car prior to being ordered out and would have been in a position to see any firearm or firearms which had been placed in the car, but he, Burrell, said he saw none. He further argued that Sergeant McGhann said in his statement that both guns were found together. However, he testified that one was found on the right and one on the left but also said that the guns were found behind the driver's seat. It was also his contention that he testified that Allen was behind the driver and also said Williams was behind the driver and that Allen emerged from the left rear door of the car as well as from the right, while Williams alighted from the right rear seat.

[10] It was further contended by him that Sergeant McGhann's evidence was at variance with Mr Rodney's on material issues which fundamentally affected

the Crown's case and the learned judge's preference of Mr Rodney's account to Sergeant McGhann's is an unsatisfactory state of affairs. At the end of the Crown's case, the issues, he argued, should have been resolved in favour of the applicant.

[11] Mr Smith, in response, submitted that at the end of the prosecution's case, there was evidence to show that a prima facie case had been made out against the applicants. The guns, he argued, were unconcealed and were large enough to have imputed knowledge of, custody and control by the applicants, who were seated in the back of the vehicle. It was not challenged that Burrell was seated in the middle and although Sergeant McGhann stated that Allen was seated behind the driver's seat, based on the context in which the evidence was elicited, the only inescapable inference to be drawn with reference to where the men were seated would be that they were seated at the rear of the car on either side of Burrell. Although Sergeant McGhann said Allen came from the left rear and from the right rear of the vehicle, he, however, clearly spoke to where the guns were found, he argued. Mr Rodney's evidence, he contended, supported that of Sergeant McGhann where there was a weakness.

[12] At the end of the prosecution's case, no case submissions were made on behalf of the applicants, Mr Rodney and two other men who were passengers in Mr Rodney's car. The learned judge upheld the submissions in respect of the two other men but rejected them in respect of Mr Rodney and the applicants.

Mr Rodney was deemed to be in possession of the firearms and was under an obligation by virtue of section 20 of the Firearms Act to give an explanation for the presence of the firearms in his vehicle. A burden was cast upon him to prove that he had no knowledge of the presence of the firearms in the car and they were not under his custody or control. If he gave good and sufficient explanation to extricate himself, then the Crown had to prove, that the applicants knew of the presence of the firearms in the vehicle and that they were in his custody and control.

[13] The test as to the court's approach in dealing with a no case submission has been eminently enunciated by Lane CJ in ***R v Galbraith*** [1981] 2 All ER 1060 at page 1062 in the following terms:

> "How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed, could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where, however, the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be

> tried by the jury. It follows that we think the second of the two schools of thought is to be preferred.
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> There will, of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

[14] The test encompasses two limbs. The first relates to cases in which the evidence presented by the prosecution fails to disclose that an accused has committed the offence for which he has been charged. The second requires an assessment of the evidence by the trial judge, but at the same time it seeks to preserve the principle that issues of credibility and reliability are matters which fall within the province of the jury.

[15] The existence of inconsistencies and discrepancies arising on the evidence of the prosecution is not in itself sufficient for a case to be withdrawn from the jury. This is so even in circumstances where the judge is of the opinion that the witness was lying. In ***R v Barker*** (1975) 65 Cr App Rep 287 at page 289, Widgery CJ had this to say:

> "Even if the judge has taken the view that the evidence could not support the conviction because of the inconsistencies, he should nevertheless have left the matter to the jury [and he emphasized that] it cannot be too clearly stated that the judge's obligation to stop the case is an obligation which is concerned primarily with those cases where the minimum evidence to establish the facts of the crime has not been called. It is not [he said] the judge's job to weigh the evidence, decide who is telling the truth, and stop the case merely because he thinks the witness is lying. To do that is to usurp the function of the jury."

[16] The foregoing considerations remain applicable even where the witnesses' evidence may have been weakened by discrepancies and inconsistencies. In ***Anand Mohan Kissoon and Anor v The State*** (1994) 50 WIR 266 at 273, George C said:

> "With respect, I do not think that Smith JA meant to say that whenever there are inconsistencies in the evidence on substantial issues it was incumbent on the judge to withdraw the case from the jury. In my opinion it is only in the extreme circumstances of the prosecution's witness as being totally discredited that the judge should take that drastic step. The fact that the inconsistencies have weakened the case is not sufficient."

[17] The strength of the evidence is a matter for the jury. It is not for the judge in giving consideration to a no case submission to make an election by withdrawing from the jury such inferences which are in fact matters for the jury's consideration. In ***R v Jabber*** [2006] EWCA Crim 2694 Moses LJ acknowledged the principle in the following terms:

> "The correct approach is to ask whether a reasonable jury, properly directed, would be entitled to draw an adverse inference. To draw an adverse inference from a combination of factual circumstances necessarily does involve the rejection of all realistic possibilities consistent with innocence. But that is not the same as saying that anyone considering those circumstances would be bound to reach the same conclusion. That is not an appropriate test for a judge to apply on the submission of no case. The correct test is the conventional test of what a reasonable jury would be entitled to conclude."

[18] It is an accepted fact that inconsistencies and discrepancies are commonplace in most cases. Despite this, a judge is not required to ignore the practical realities of assessing whether there is sufficient evidence on which a conviction could be sustained. A judge being guided by the second limb of ***Galbraith***, as well as the foregoing dicta in ***Kissoon v the State, R v Barker*** and ***R v Jabber,*** ought not to find that where on the evidence of a witness or witnesses, inconsistencies and discrepancies are raised, the case should be stopped. Once there is evidence capable of proving the guilt of an accused beyond reasonable doubt, the case should go forward for trial. The judge should evaluate all the evidence and decide whether it is of the requisite standard and with proper directions, a jury could determine the guilt of an accused.

[19] Mr Reece's assault on Sergeant McGhann's evidence relates to the inconsistencies and discrepancies therein, which he contended, were so fundamental that they eroded the prosecution's case and the applicants ought not to have been called upon to answer the case against them. It cannot be denied that there were certain discrepancies and inconsistencies in his evidence as to where the applicants were seated in the car and where the second gun was found. The learned judge, in dealing with Sergeant McGhann's evidence at pages 168 and 169 of her summation, had this to say:

> "Now, Sergeant McGhann testifies that guns were, two guns were taken from the back of the vehicle. He was supported by Constable Dixon that two guns, he removed two guns from the back of the vehicle.

> I accepted Sergeant McGhann's testimony that he, in fact, removed two guns from the back of the vehicle. However, I must state that I believe that Sergeant McGhann is credible and that I can rely on his evidence with regard to the fact that two guns were taken from the back of the vehicle.
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> Now, Sergeant McGhann's testimony, however, with regards to where the accused men were seated, the accused men, Allen and Williams, were seated and where the second gun was removed is at variance with his testimony, his testimony is at variance with his statement, and indeed his examination in chief in that regard is at variance with his cross-examination, that is where Allen and Williams sat in the vehicle. That is whether Williams sat behind the driver or whether he sat on the other side, and also where exactly the second gun was found. There is no question that Burrell sat in the middle.
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> Now, as I stated before the evidence of an accused can support the Crown's case. Now, Mr. Rodney testified, and his evidence must be treated in the same way. Now, in this regard he provided support for Sergeant McGhann that guns were, in fact, two guns were, in fact, removed from the back of the vehicle."

[20] At page 175 she went on to say:

> "I accept the evidence of Sergeant McGhann that two guns were found in the back of the vehicle, and I accept his evidence that these guns were unconcealed. I find that his testimony in that regard is supported by the evidence of Mr. Rodney, whose evidence I accept, that he saw Mr. McGhann removed [sic] two guns from the back of the car."

[21] As can be observed from the foregoing extracts, the learned judge rejected the discrepant parts of Sergeant McGhann's testimony, as to where the applicants were seated and the area of the car from which the second gun was

taken. As the tribunal of the facts, she is entitled to accept such evidence of the witness as she found credible and exclude such evidence as she found incapable of belief.

[22] At the end of the Crown's case, it could not be said that the evidence of Sergeant McGhann was of such quality that he ought to be regarded as a discredited witness so as to destroy the prosecution's case. There was cogent evidence from him and Constable Dixon that the car was stopped by the police and that the car was searched and two guns were found on the floor, at the back. This provided sufficient evidence on which the prosecution could have properly laid a foundation for a finding that a *prima facie* case had been made out and to call upon the occupants of the vehicle to answer the charges against them.

[23] The fact that the learned judge rejected a part of Sergeant McGhann's testimony does not mean that, in arriving at her findings and conclusion, she could not have taken into account other evidence which was available to her, namely that which came from Mr Rodney. She acknowledged that by section 20 (5)(b) of the Firearms Act the owner or driver of a vehicle in which firearms and/ or ammunition are found is deemed to be in possession. She was cognisant of the fact that by operation of this section, a burden is cast on him to give a reasonable explanation for the possession. In discharging this onus, it is only necessary for him to adduce evidence to disprove the presumption on a balance

of probabilities. The learned judge, recognizing that Mr Rodney was an accomplice, expressly warned herself of the dangers of acting on his uncorroborated evidence. Having done so, she satisfied herself that he gave a reasonable explanation for the presence of the firearms in the car.

[24] Mr Rodney's evidence, Mr Reece complained, contained fundamental discrepancies as against Sergeant McGhann's, particularly, as to whether the car was chased by the police or Mr Rodney stopped and ran to the police. The learned judge in dealing with this aspect of the evidence said at pages 1730-174:

> "Now, Mr Rodney told the court that it was not Sergeant McGhann who instructed him to get out the car. He told the court that the police signaled the car to stop and he ran out of the car. Under cross-examination, Mr Reece suggested to him that it was the police who signaled him to stop, and he complied and they ordered him and the other men out of the car. He denied making that statement and he insisted that had he ran [sic] out of the car, as soon as it stopped. Now, whether he was ordered out or he ran out, the uncontroverted evidence is that he came out first, which would tend to support the fact that he was, in fact, eager to get out of the car, as he testified.
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> Now, assuming that he was ordered, that he was told to get out of the car, I do not find that as a discrepancy which affect [sic] the importance of his evidence, that is, as to how the guns got into the car."

[25] At pages 174 and 175 she stated thus:

> "Now, Sergeant McGhann and Constable Dixon testified that the car failed to stop. Sergeant McGhann said the car was chased for a minute, over a distance

> of five to six chains. Constable Dixon said the chase lasted for two to three minutes. Mr. Rodney, on the other hand, denied that there was any chase. I accept the evidence of Mr. Rodney, and I reject the evidence of the officer(s) in regards to a chase."

[26] The learned judge painstakingly reviewed the evidence of the witnesses for the prosecution and that of Mr Rodney. She found Mr Rodney a credible witness, having been impressed with his demeanour. In light of her acceptance of Mr Rodney's evidence, it was perfectly possible for her to have arrived at the conclusion that the applicants were the persons who had knowledge, custody and control of the firearms. His sworn testimony was before the court which the learned judge was at liberty to utilize as strengthening such evidence of Sergeant McGhann as she found credible. She was correct in finding that before the applicants were picked up by Mr Rodney, no guns were in the car. When they were picked up, they entered the car crouching, they having guns in their possession. When the car was stopped by the police, two guns, unconcealed, were found at the back where the applicants were seated. We cannot say that the learned judge was wrong in concluding that the applicants were in possession of the firearms and ammunition in contravention of the Firearms Act.

[27] Accordingly, the applications for leave to appeal against convictions and sentences are refused. The sentences are to commence on 13 June 2008.