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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 179/80

BEFORE: THE HON. MR. JUSTICE CARBERRY, J.A.
THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE ROSS, J.A.

WILLIAM BEECH V. REGINA

Mr. Hugh Small for appellant.

Mr. W. Alder for the crown.

November 5; December 18, 1981

CARBERRY, J.A.:

This application for leave to appeal from conviction in the High Court Division of the Gun Court, before Wolfe, J. on the 7th and 14th November, 1980 on charges of illegal possession of a firearm and of ammunition on the 10th July, 1980, together with an application for leave to call further evidence therein came before us on the 5th November, 1981, when both applications were refused. We promised to put our reasons into writing, and do so now.

Though the case presented three unusual features, we found ourselves unable to grant either application. The case was a by-product of the general elections held in 1980.

It appears that on the evening of the 10th July, 1980, Mr. Rohan Skyers, a justice of the peace, parish councillor, and candidate for the Parliamentary seat for the constituency of South West Clarendon went to a village in his constituency called Woodside located off the Pleasant Valley Road. He went to meet some of his constituents and to hold a public meeting.

Mr. Skyers was the owner of a licensed firearm and held a permit which allowed him to carry it in public. It was a Smith & Wesson .38. The appellant William Beech was at that period employed to drive Mr. Skyers, and drove him to this meeting. The entourage included Mr. Vin Bennett, a pharmacist, also a justice of the peace and a parish councillor.

Mr. Skyers had his firearm with him earlier that day when he attended a meeting of the Parish Council. It seems clear that he must have taken it with him when he went to Woodside: what is in dispute is whether he still had it on his person when during the course of that afternoon or evening the police visited his meeting and effected a search of persons present.

The police evidence, given by Detective Corporal Walker and supported by Constable Maurice Blake, was to the effect that they were attached to the Flying Squad, C.I.B. area Headquarters in Mandeville. While on patrol in this area in their police vehicle they came across the group of people attending on Mr. Skyers, whom they estimated to be about 25 persons odd (Mr. Skyers puts them at about 80 to 100). They stopped to investigate, were met by Mr. Skyers whom they knew, and that they told him that they wished to search the crowd. Skyers said "alright, alright" and the police group then attempted to line up the persons present and to effect search. Messrs. Walker and Blake stood by watching others of their party conduct the search, and their evidence is that Mr. Skyers was duly "frisked" for weapons, possibly the earliest person so searched, and that nothing was found on him then. Walker and Blake were at different vantage points. Both assert that after Skyers had been searched they noticed that he went up to the line where other members of the crowd were waiting to be searched, went behind (his driver) the appellant Beech, quietly lifted up the back of Beech's shirt, took therefrom a firearm which he then placed in his own waist under his own shirt. Both Walker and Blake noticed this incident and rushed towards the two men. Blake held Skyers and drew out the firearm.

Blake asked Beech if he had a licence for the firearm, and Mr. Skyers intervened to say that he had a licence and produced his firearm licence or booklet.

It was the police case then, that whether Mr. Skyers was licensed to carry this firearm or not, (and it is not now in dispute that he was so licensed), at the moment of their search the firearm was being carried by his driver Beech, and that Beech was not so licensed, and therefore was guilty of the offences with which he was charged, and for which he has been convicted, with the resultant mandatory sentence of imprisonment for life on both offences (the firearm and the ammunition in it).

Beech's defence was a denial of the police evidence that he had ever had the firearm, or that he handed it to Mr. Skyers or allowed him to retake it as alleged by the police. He said in effect that the police had wrongly accused him of giving the firearm to Skyers. Skyers had had it all the time.

Mr. Skyers supported this evidence. The gun in question was his, he had a licence to carry it and was carrying it at the time of the police search, as he had throughout the day. The gun had been found on him during the search; he had produced his licence, but nevertheless the police had accused Beech of having it and of having just given it to him. Beech was charged with illegal possession of the firearm, and he himself had been charged with a breach of the terms of his licence, i.e. allowing an unlicensed person to carry it. This he stated was "totally impossible, because I never let my firearm be carried by anybody else." It will be seen from this that Mr. Skyers rejected the suggestion that might have been made that as the candidate, upon whom the constituents were pressing, he had thought it safer to let his driver (close to him) hold the firearm for safe keeping while he addressed his meeting. It is not therefore necessary to speculate as to what the position would have been in law, had those been the facts.

Further evidence in support of the defence version was given by Mr. Vin Bennett, J.P. and fellow parish councillor who was also present.

So far there were two unusual features of the case as these Gun Court cases go: first the firearm was a licensed firearm, and secondly the person licensed to carry it was close by, within arms length, and was the employer of the person on whom it was alleged the firearm was found.

The learned trial judge, who had the advantage of seeing and hearing the witnesses whose evidence is available to us only on the printed page, regarded the case as one purely of fact. He observed that Mr. Skyers was himself about to be tried as a result of this incident before the Resident Magistrate's Court for the parish of Clarendon (for permitting Beech to carry his gun) and he therefore regarded him as a person with an interest to serve and whose evidence must therefore be carefully examined. On the basis of his demeanour he held Mr. Skyers was not a witness of truth, and so too for Mr. Bennett. He accepted the evidence of the police and convicted Beech, with the prescribed result: imprisonment for life.

Basically then the appeal involved a question of fact only, and there was evidence to support the conviction, if it was believed. Before us the defence pointed out that as the case developed much turned on the effectiveness of the earlier police search of Skyers: it was suggested that this was brief and perfunctory and had failed to find the firearm that Skyers had had on him even then. Further that the policeman who conducted that earlier search though known to the crown, had not been called: it was suggested that this left a gap in the crown's case. The point is arguable but ultimately of little weight.

The third unusual feature of this appeal lies in the sequel to this case. Skyers, as was noted before, was himself charged before the Resident Magistrate's Court for the parish of Clarendon on a charge of breaching the conditions of his firearm licence by

permitting Beech to have possession of it on the 10th July, 1980. This charge arose out of the same incident. The same witnesses gave evidence for the police, but on this occasion the Constable who had originally "frisked" Skyers when the police search first commenced, one Constable Pryce, was called and gave evidence. Skyers was tried before His Honour Mr. Raymond Alexander at May Pen on tne 18th May and 4th June, 1981, and was acquitted. The Resident Magistrate is reported as entertaining doubt as to what happened that afternoon.

In a sense it is obviously unsatisfactory that two complementary charges arising out of the same incident should result in life imprisonment for the servant and acquittal for his master. But each Court is entitled to, and in fact obliged to give its best consideration to the evidence put forward before it, and there is no reason in law why they may not reach different conclusions.

It was sought in the appeal before us to present under the heading of an application to call fresh evidence not only the fact that disparate verdicts had been arrived at, but a faint suggestion that there might have been differences on small points of detail between the evidence that one of the two policemen gave before the Gun Court in November, 1980, and that which he gave before the Resident Magistrate in May and June, 1981.

The application was made under Section 28 (a), (b) and (c) of the Judicature (Appellate Jurisdiction) Act. That section, or the relevant portions of it, corresponds almost exactly with the provisions of Section 9 of the U.K. Criminal Appeal Act of 1907.

There have been over the years a long series of cases which explore the way in which the Court of Appeal exercises its discretion to permit fresh evidence to be given at the appeal stage of a criminal case.

The cases are discussed in the 3rd. Edition of Halsbury's Laws of England, Vol. 10 Criminal Law, pages 532-3 Paragraph 978: Examination of Witnesses and Fresh Evidence; (The 4th Edition Vol 11:

Criminal Law, paragraph 642: Fresh Evidence on appeal, discusses the English position since the amendment made by the Criminal Appeal Act, 1968, which has altered the previous position under the 1907 Act). They are also discussed in the 11th Edition of Phipson on Evidence, (1907) paragraphs 1626-7 (discussing both the old and new position) and see also the 39th Edition Archbold (1976) page 606 paragraph 889: Leave to call additional evidence (also discussing the changes made by the 1968 Act as against the 1907 Act).

Because Jamaica has not altered its law, as the U.K. did in their 1968 Criminal Appeal Act, we are concerned with the pre 1968 cases. These are exemplified in the remarks of Lord Goddard, C.J. in R. v. McGrath (1949) 2 All E.R. 495 at 497D:

> "But it is well established that this court will not hear further evidence unless it is shown that the proposed witnesses were not available at the trial, or that some point which could not have been foreseen arose at the trial on which the evidence would have been material."

and in those of Lord Parker, C.J. in R. v. Parks (1961) 46 Cr. App. R. 29 at page 32:

> "It is only rarely that this court allows further evidence to be called, and it is quite clear that the principles upon which this court acts must be kept within narrow confines, otherwise in every case this court would be in effect asked to effect a new trial. As the court understands it, the power under section 9 of the Criminal Appeal Act, 1907, is wide. It is left entirely to the discretion of the court, but the court in the course of years has decided the principles upon which it will act in the exercise of that discretion. Those principles can be summarised in this way:
> First, the evidence that it is sought to call must be evidence which was not available at the trial.
> Secondly, and this goes without saying, it must be evidence relevant to the issues.
> Thirdly, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this court to decide whether it is to be believed or not, but evidence which is capable of belief.
> Fourthly, the court will, after considering that evidence, go on to consider whether there might have been a reasonable doubt in the minds of the jury, as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial."

To those two statements should be added the observations of Widgery, J. in R. v. Flower (1966) 1 Q.B. 146; (1965) 3 All E.R. 669 at 671; (50 Cr. App. R. 22) with regard to what may happen when the Court

does hear the fresh evidence, citing page 671 F-G-I of the All England Report:

> "Having heard the fresh evidence and considered the reliability of the witness, this court may take one of three views with regard to it.
>
> (a) If satisfied that the fresh evidence is true and that it is conclusive of the appeal, the court can, and no doubt ordinarily would, quash the conviction.
>
> Alternatively, if not satisfied that the evidence is conclusive, the court may order a new trial so that a jury can consider the fresh evidence alongside that given at the original trial.
>
> (b) The second possibility is that the court is not satisfied that the fresh evidence is true but nevertheless thinks that it might be acceptable to and believed by a jury, in which case as a general proposition the court would no doubt be inclined to order a new trial in order that that evidence could be considered by the jury, assuming the weight of the fresh evidence would justify that course.
>
> (c) Then there is a third possibility, namely that this court, having heard the evidence, positively disbelieves it and is satisfied that the witness is not speaking the truth. In that event, and speaking generally again, no new trial is called for because the fresh evidence is treated as worthless and the court will then proceed to deal with the appeal as though the fresh evidence had not been tendered."

The principles discussed in these three cases have been considered and adopted by this Court, with varying results, and I mention some of the cases.

In R. v. Page (1967) 10 J.L.R. 79; 11 W.I.R. 122, this Court followed the principles enunciated in R. v. Parks (supra) heard the evidence and quashed the conviction as "unsafe" (at issue was the question of identification of the accused).

In R. v. Charles Dudley (1968) 10 J.L.R. 549 this Court applied both R. v. Parks and R. v. Flower, and with regard to a witness who now came forward and admitted that he had done the wounding (he had given evidence at the trial merely to the effect that the appellant had not done the wounding because he had no knife): this Court refused to regard this addition to his evidence below as falling within the concept of "fresh evidence" not available before.

In R. v. Preston Williams (1974) 12 J.L.R. 1314 this Court followed R. v. Parks and R. v. Flower and rejected the proposed fresh evidence: it was not credible.

In R. v. Cyril Smith (1974) 12 J.L.R. 1578 this Court again applied R. v. Flower and its own judgment in R. v. Page (supra) and allowed the fresh evidence to be given, found it credible, and conclusive and quashed the conviction. (At issue was whether the appellant was correctly identified as one of three men who robbed the complainant: the additional evidence was from the complainant's "lady friend" present at the robbery, who positively swore that the accused was not one of the three men and who had not given evidence below, as she had not known that accused had been arrested and tried for that offence).

Applying these principles to our instant case, it is not suggested that Constable Pryce who gave evidence at the trial of Skyers, but not at that of Beech, was not available at Beech's trial. The defence complain that the crown did not call him, but there seems to have been nothing to stop them from doing so. In any event it is not suggested that the evidence he could have given would in any way have been contradictory of the police evidence given at Beech's trial.

It does sometimes happen that the fresh evidence is directed at showing that a crown witness has on a subsequent occasion after the trial given evidence that was contradictory of the evidence he gave in the case under appeal, or that he had subsequently admitted that the evidence he gave at the trial of the case under appeal was false.

In these cases this evidence of what happened subsequent to the trial is not caught by the embargo on calling evidence that might have been called at the trial. It is however often caught by the principle that it must be credible: the courts have shown an unwillingness to believe crown witnesses who come forward and state that their former evidence was false, they are now telling the truth: see for example R. v. Flower (supra). There are however cases in which the court has entertained evidence that a crown witness has subsequently

admitted his evidence was false: see for example R. v. Hullett (1922) 17 Cr. App. R. 8 and R. v. Thomas (1959) 43 Cr. App. R. 210.

The Courts have been unwilling to hear evidence offered after the trial by other persons who come forward to declare that the accused is innocent and that some other named person is guilty: see for example R. v. Rowland (1947) K.B. 460; 32 Cr. App. R. 29 where the Court refused to hear the evidence of a man confessing to the murder with which the appellant was charged, but intimated it should be referred to the Home Secretary for investigation. And see also R. v. Dallas (1971) Cr. L.R. 90 where the Court rejected as hearsay the evidence of someone who claimed to have overheard another person boasting of having committed the offence. The fresh or further evidence offered must itself be admissible.

Unavailability of the evidence at the trial has occasionally been waived where medical evidence as to the cause of death in a murder case which might perhaps have been obtained for the trial only becomes effectively available afterwards: see R. v. Ward (1922) 17 Cr. App. R. 65 and R. v. Lomas (1969) 1 All E.R. 920 and R. v. Merry (1970) 54 Cr. App. R. 274; (1971) Cr. L.R. 91 (bloodstains on accused's clothes: an alternative source).

None of these cases however assist the appellant in this case. There is no suggestion that any of the police witnesses have subsequently admitted that the evidence they gave in his case was false in any material particular. The most that has been suggested is that the evidence of one witness given in the second case in May/June 1981 had a slight difference with his evidence given six or seven months earlier in this case. This might well have been expected, and did not have the significance sought to be attached to it and did not materially alter the effect of the evidence as a whole.

What remains however is that on evidence which was substantially similar two charges arising out of the same incident have produced two different results. The result of the second trial, that of Skyers, cannot, so far as the courts are concerned, affect the

result reached in the earlier trial, that of Beech. The evidence offered, as it was heard and seen may have caused one judge to entertain a doubt, the benefit of which he gave to the accused, while that offered before another on a different occasion did not, unfortunately for the accused Beech, have that effect.

Since the hearing of this appeal our attention has been drawn to the case of R. v. James (1971) Cr. L.R. 476. A short (one and a half pages) report that we have not been able to trace elsewhere for a fuller account. Briefly, the complainant claimed to have been the victim of a multiple rape by four men. Only the appellant had been traced and identified. His defence was "consent", that it was an orgy, not a rape. Subsequent to his conviction and pending the hearing of his appeal a second man was identified and charged with his part in the same incident. He was acquitted; the trial judge in effect stopping the case against him when the complainant gave evidence of previous sexual experience which conflicted with her original statement. The appellant, the first man tried, now sought at his appeal to call the second man (who had been acquitted) and the two others involved to give evidence before the Court of Appeal. All three had in a sense been available before, though there had been an understandable reluctance on their part to come forward and give supporting evidence for the appellant: (they might have joined him in the dock). The report notes that their evidence would not normally have been admitted: it was available at the trial. However, after noting that an inconsistent result in a later trial was not of itself a ground for setting aside the verdict in an earlier trial, and considering whether the proper course was to leave the matter to the Secretary of State, the U.K. Court of Appeal decided to intervene and decided that it could and should say that the conviction was unsafe.

There is no indication in the report of the extent to which the complainant's evidence in the second case was discredited, save that it had the effect on the trial judge of his inviting the jury to stop the case. No such suggestion has or apparently could be made

in the appeal before us. It is also worth bearing in mind that under the U.K. Criminal Appeal Act, 1968, Section 2: Grounds for allowing Appeal under Section 1:

> "..... the Court of Appeal shall allow an appeal against conviction if they think -
> (a) that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory; or ....."

While the Jamaican Judicature (Appellate Jurisdiction) Act (following closely the wording of the U.K. Criminal Appeal Act, 1907) provides in Section 14(1):

> "The Court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence....."

There is a difference in the latitude or scope for intervention allowed to the two Courts of Appeal under their respective sections, which may become crucial in particularly difficult cases. This however is not one.

It could not be said that in this case the verdict of the judge of the Gun Court was "unreasonable" or "cannot be supported having regard to the evidence". Nor could it, we think, be said to be "unsafe" or "unsatisfactory". The results of the earlier and later trials are inconsistent: but that alone could not lead to this Court applying to the result reached in this case any of the criteria for upsetting the verdict under our own Act or that of the United Kingdom. Nor has any startling or compelling difference emerged, so far as we are aware, in the evidence offered between the earlier and the later case. We have consequently refused leave to appeal, and to offer fresh evidence. The appellant, if he is so minded, must seek relief elsewhere from the appropriate executive authority.