[2014] JMCA Crim 44

JAMAICA

IN THE COURT OF APPEAL

SITTING IN LUCEA, HANOVER

SUPREME COURT CRIMINAL APPEAL NO 8/2012

BEFORE: THE HON. MR JUSTICE PANTON P
THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE BROOKS JA

ANDRE BROWN v R

Ronald Paris for the applicant

Miss Paula Llewellyn QC, Director of Public Prosecutions, and Mrs Lori-Anne Cole-Montaque for the Crown

12 December 2013 and 24 October 2014

PANTON P

[1] The applicant was convicted on 20 December 2011 of the offences of illegal possession of firearm and shooting with intent by Straw J, who sentenced him to two concurrent terms of 15 years imprisonment. His application for leave to appeal did not find favour with the single judge of appeal, so he renewed it before us.

[2] The single judge expressed the opinion that the trial judge had correctly identified the issues in the case, they being credibility and identification, and had made a "commendably careful analysis of the evidence relating to these issues".

The case for the prosecution

[3] The case presented by the prosecution was that on 22 April 2011, at about 10:30 pm, the applicant and two other men were on a footpath in the town of Savanna-la-mar. Some police officers, including Constables Duan Barrett and Franceco Powell were on foot patrol in the area. While proceeding from Ricketts Avenue to Segree Street, they took a footpath. Constable Barrett was in front. He signaled that they should stop. After looking intently to his right for a while, he then spoke to the members of the police party. Thereafter, they separated into two teams – one to approach the men, the other "to serve as our cutoff". One of the men in the company of the applicant handed the applicant a firearm which he placed in his waistband. On being addressed by the police, the applicant opened fire at them and ran. The men who were with him also ran. The police chased them but did not succeed in apprehending any of them.

The defence

[4] The applicant denied knowledge of the incident. In an unsworn statement to the judge, he said: "I know nothing what the police officer lock me up for…Nothing further". He called his girlfriend as a witness. She gave evidence of taking photographs of the location on 16 December 2011, that is, four days before the conviction of the applicant on these charges.

The judge's finding

[5] The constables swore that they knew the applicant before the night of the incident. The learned trial judge was most impressed by their evidence, and found that they spoke truthfully, honestly and accurately when they said that they knew the applicant, and that he had shot at the police party.

The grounds of appeal and submissions

[6] The applicant filed grounds of appeal alleging:

(1) faulty identification;

(2) insufficient evidence;

(3) unfair trial; and

(4) miscarriage of justice

No arguments were advanced in respect of grounds three and four. However, Mr Ronald Paris for the applicant made extensive submissions in an effort to challenge the findings of the learned trial judge so far as they relate to the credibility and reliability of the witnesses. Mr Paris also submitted that the identification of the applicant was flawed due to the failure of the investigators to hold an identification parade.

[7] Mr Paris referred to the evidence of the two constables and submitted that they contradicted themselves in material particulars, and so failed to present to the court a truthful account of the incident. According to him, the constables gave different versions of the event.

[8] Mr Paris complained that the splitting of the patrol into two different teams was a strange action as before the division there was no evidence of criminal dealings by the men. This complaint has to be viewed in the light that had such evidence been given, it would have been the source of a further complaint that the learned trial judge had been influenced by inadmissible prejudicial evidence. It is perhaps not without significance however that the defence elicited evidence that the applicant was taken into custody on 23 April 2011 and questioned over the next two weeks in respect of other charges. He was also placed on an identification parade in respect of another matter [pages 114-116 of the record]. The inference from the evidence coming out of the cross-examination is that the applicant was indeed a known person of interest to the police thereby accounting for the splitting of the police party into two teams. The position though is that this was not a consideration that operated on the mind of the learned trial judge. Mr Paris said also that there was no evidence to indicate why the police were unable to cut off the fleeing men. The simple fact is that the applicant and his cohorts were speedier than the police officers.

[9] Mrs Lori-Anne Cole-Montaque, for the Crown, submitted that the learned trial judge did take note of the absence of any evidence apart from that of the constables implicating the applicant. According to Mrs Cole-Montaque, the learned trial judge had credible evidence which entitled her to convict the applicant.

[10] Having examined the transcript of the evidence carefully, we cannot say that we have noticed any significant differences between the evidence of Cons Barrett, and that of Cons Powell. The learned trial judge, as the sole arbiter of facts, was in the best position to determine the credibility of the witnesses. The summation indicates that she took full advantage in this respect as she set out clearly the factors that influenced her decision-making process.

[11] The learned trial judge found that the constables "basically gave consistent evidence in relation to what took place that night" [p.140 lines 23 & 24], and did not think that they "manufactured the shooting incident" [p. 143 line 16]. In respect of the bringing of the firearm into play, she said that she "found the account of the witnesses …cogent and compelling" [p. 145 lines 22 – 24], and accepted that "they were fired upon that night" [p. 146 line 1]. In the circumstances, there is no basis to disturb the convictions on this score.

[12] The other ground of complaint relates to the identification of the applicant. Mr Paris submitted that an identification parade ought to have been held as the evidence of prior knowledge was not of sufficient quality as to make an identification parade unnecessary. In his view, what had taken place was a dock identification and the learned trial judge did not address the situation in her summation. Mr Paris added that the learned trial judge did not address the weaknesses of the identification in a coherent manner. An identification parade, he said, would have been an opportunity for the police to test if the recognition was correct.

[13] Mr Paris cited in support of his submissions, the cases **Goldson & McGlashan v The Queen** [2000] UKPC 9, **Aurelio Pop v R** [2003] UKPC 40, and **John v The State of Trinidad & Tobago** [2009] UKPC 12. There can be no issue as to the principles in these cases. However, they do not support the applicant's cause at this time. In **Goldson**, the Privy Council said it was in no position to say that the evidence of identification was weak. In **John**, the majority concluded that on a true analysis of the evidence, an identification parade "would have served less purpose not only than in either *Pop* or *Pipersburg* but also than in *Goldson* itself" [para 25]. In both **Goldson** and **John**, the appeals were dismissed on the question of identification. In **Pop**, however, the Privy Council said that the evidence was more than usually open to criticism, and so the conviction was quashed.

[14] The evidence accepted by the learned trial judge indicates that Constable Barrett had known the applicant for two years, whereas Constable Powell had known him for approximately a year before the incident. In keeping with their stated knowledge of the applicant, the officers named him in a report at the Savanna-la-mar Police Station on the very night of the incident, as the individual who had shot at them. The report was made within an hour of the incident. Constable Jeffrey Charlton who visited the scene of the shooting on the same night gave evidence that the area had been well-lit.

[15] The learned trial judge noted that the photograph taken by the police on the night of the incident showed a clear picture of a light bulb on the eave of the building in the vicinity of the location of the applicant. There were also lights on either side of the

shop. The judge, after giving herself the standard Turnbull direction, found that the lighting was sufficient, and that the sighting of the applicant was not in the mode of a fleeting glance. She also noted that the applicant had not denied the witnesses' evidence that they knew him prior to the incident.

[16] The complaint as regards the failure of the police to hold an identification parade seems to stem from a misunderstanding of the law on the point. Mrs Cole-Montaque's submission that there was no need for an identification parade in this case is well-founded. She said that once there is an assertion of prior knowledge by the witness of an accused, there is no need for a parade. This was a case of recognition, and the learned trial judge was correct in her treatment of the matter, said Mrs Cole-Montaque.

The law

[17] It is sufficient to state the law as summarized in **Mark France and Rupert Vassell v The Queen** [2012] UKPC 28. It reads thus:

> "28. It is now well settled that an identification parade should be held where it would serve a useful purpose *R v Popat* [1998] 2 Cr App R 208, per Hobhouse LJ at 215 and endorsed by Lord Hoffmann giving the judgment of the Board in *Goldson and McGlashan v The Queen* (2000) 56 WIR 444. In *John v State of Trinidad and Tobago* [2009] UKPC 12, 75 WIR 429 addressing the question of how to assess whether an identification parade would serve any useful purpose, Lord Brown considered three possible situations: the first where a suspect is in custody and a witness with no previous knowledge of the suspect claims to be able to identify the perpetrator of the crime; the second where the witness and the suspect are well known to each other and neither disputes this; and the third where the witness claims to know the suspect but the latter denies this. In the first of these instances an identification parade will obviously serve a useful purpose. In the

> second it will not because it carries the risk of adding spurious authority to the claim of recognition. In the third situation, two questions must be posed. The first is whether, notwithstanding the claim by a witness to know the defendant, it can be retrospectively concluded that some contribution would have been made to the testing of the accuracy of his purported identification by holding a parade. If it is so concluded, the question then arises whether the failure to hold a parade caused a serious miscarriage of justice – see *Goldson* at (2000) 56 WIR 444, 450."

The Privy Council held that there being no challenge to the witness' claimed prior knowledge of France, the holding of an identification parade would have served no useful purpose. They held also that in the case of Vassell, it was at least very doubtful that any useful purpose would have been served by holding a parade. In any event, they said, it could not be plausibly suggested that the failure to hold an identification parade had caused a serious miscarriage of justice.

Conclusion

[18] In the instant case, there being no denial by the applicant of the witnesses' claimed knowledge of him, an identification parade would have served no useful purpose. The learned trial judge being satisfied that the evidence was credible and reliable in respect of the identification of the applicant, there is no basis to disturb the convictions that have been recorded.

[19] In the circumstances, the application for leave to appeal is refused and the sentences are to run from 20 December 2011.