[2021] JMCA Crim 47

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MR JUSTICE BROWN JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 92/2018

ANTHONY BROWN v R

Miss Zara Lewis for the appellant

Mrs Lenster Lewis-Meade for the Crown

28 September and 1 October 2021

BROWN JA

[1] The appellant was convicted on an indictment charging him with two counts of illegal possession of firearm, one count of illegal possession of ammunition and one count of murder, before G Brown J ('the learned judge') and a jury, in the Home Circuit Court on 8 May 2018, after a trial which lasted five days. On 16 November 2018, he was sentenced to concurrent terms of imprisonment of five years on each of the counts for illegal possession of firearm, three years on the count for illegal possession of ammunition and imprisonment for life on the count for murder. In respect of the latter count, he was ordered to serve 29 years before becoming eligible for parole.

[2] A single judge of this court granted his application for leave to appeal against his convictions and sentences. However, his convictions for the offences under the Firearms Act were not challenged before us.

[3] The appellant listed what amounts to seven grounds of appeal in his application for leave to appeal. Those grounds are reproduced immediately below:

> "i. Misidentity by the Witness: That the prosecution witness wrongly identified him as the person or among any person [sic] who committed the alleged crime.
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> ii. Lack of Evidence: That the prosecution failed to present to the Court any 'concrete' piece of evidence (material, forensic or scientific) to link him to the alleged crime of [sic] which he was subsequently convicted for [sic].
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> iii. Conflicting Testimonies: That the prosecution witness presented to the Court conflicting and contrasting testimonies which amount to perjury thus call into question the soundness of the verdict.
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> iv. Unfair Trial: That the evidence and testimonies upon which the learned trial judge relied on for the purpose to [sic] convict him lack facts and credibility thus rendering the verdict unsafe in the circumstances.
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> v. That the learned trial judge failed to give adequate direction to the jury regarding the inconsistent and contradictory testimonies as presented by the prosecution witness.
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> vi. Miscarriage of Justice: That the prosecution and the learned trial judge failed to take into consideration the argument of his defence attorney as it relates to his whereabout [sic] on the date of the alleged crime.
>
> vii. That he was wrongfully convicted for a crime he knew nothing about and could not have committed."

[4] In addition to these grounds, the appellant's attorney-at-law, Miss Zara Lewis, filed seven supplemental grounds. She sought and obtained leave to argue the supplemental

grounds, together with the original grounds filed by the appellant. The following are the supplemental grounds:

> "1. The learned trial judge failed to deal, adequately, with specific weaknesses in the visual identification evidence and failed to address, sufficiently, the material inconsistencies that cast doubt on the reliability of the said visual identification evidence. Consequently, the learned trial judge failed to assist the jury adequately or properly and this deprived the Appellant of a fair trial and resulted in a substantial miscarriage of justice.
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> 2. The learned trial judge erred in law in directing the jury as to how to treat the evidence of the Prosecution witness vis-à-vis their previous inconsistent statements or inconsistencies. This was a material misdirection particularly as the learned trial judge did not assist the jury by highlighting the weaknesses in the Crown's case due to the said inconsistencies. The Appellant was, therefore, denied a fair trial and this led to a grave miscarriage of justice.
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> 3. The learned trial judge only rehearsed [the] evidence in a round-about and global way and therefore erred in law by failing to give adequate and appropriate directions in relation to the visual identification evidence pursuant to the principles enunciated in **R v Turnbull** [1977] QB 224.
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> 4. The learned trial judge failed to instruct the jury as to how to treat with the fact that the witness, Rohan Sewell, was as a matter of law a witness with an interest or purpose of his own to serve or, at least to alert them to that probability, and further assist them as to the caution with which to assess the evidence of such a witness.
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> 5. The learned trial judge erred in law in rejecting the no case submission.
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> 6. The delay in bringing the case to trial was a breach of the Appellant's constitutional right to a fair hearing within a reasonable time as is guaranteed by the Charter of Rights enshrined in our Constitution.
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> 7. The sentence imposed by the learned trial judge was manifestly excessive, considering the Sentencing Guidelines

> for Use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 (the Sentencing Guidelines). The learned trial judge therefore fell into error because he failed to take into consideration some of the factors relevant to sentencing [sic] of convicted persons."

Supplemental ground 6 was abandoned during the course of the hearing of the appeal.

Background

[5] Detective Corporal Ransford Durrant ('Det Cpl Durrant') was shot and killed on the morning of 17 December 2012 shortly after he entered a shop in Windsor Heights in the parish of Saint Ann. The report of the pathologist, which was admitted into evidence as agreed facts, revealed one entrance wound on the left side of his face at the outer angle of his left eye. The bullet penetrated his skull and went downwards, exiting on the upper part of the right side of his chest. His skull showed penetrating fractures. The interior surface of his brain was contused (bruised). The roof of the left orbital cavity (eye socket) of the skull and the right maxillary bone (upper jaw) were fractured. His immediate cause of death was as a result of cranio-cerebral injuries due to a gunshot wound to the head.

[6] On the morning of the shooting, one spent 9mm cartridge casing was recovered from the public or buyer side of the shop by personnel from the constabulary's Technical Services Division, Scenes of Crime. This spent casing was parcelled, labelled and taken to the Institute of Forensic Science and Legal Medicine ('IFS&LM') for ballistics testing.

[7] His killer or killers remained at large until 3 January 2013 at about 12:30 am, when detectives from the Spanish Town Criminal Investigation Branch, acting on information, went to the vicinity of the Angels Plaza and signalled a motor truck to stop. The driver complied. The rear of the truck was laden with goods and partially covered by tarpaulin. Upon removing some of the goods, the appellant and another man (his co-accused) were found. They were ordered from the truck. The appellant was searched and a firearm, which had a magazine containing five rounds of ammunition, was removed from the region of his groin (crotch). These items were submitted to the IFS&LM for ballistics testing.

[8] Detective Sergeant Mike Henry, ballistics expert attached to the IFS&LM, testified that there was a ballistics match between the firearm recovered from the appellant and the spent casing recovered from the shop in Windsor Heights. He outlined for the jury the process by which this was done. Therefore, the appellant was found in possession of the firearm from which the fatal bullet was fired, killing Det Cpl Durrant.

[9] The prosecution also relied upon eyewitness testimony from Rohan Sewell, to whom Det Cpl Durrant was previously known, that it was the applicant who was Det Cpl Durrant's assailant. Rohan Sewell, a resident of the parish of Saint Ann, testified that he knew the appellant as "Bow" and "Kevin" for about five years from Saint Ann's Bay. He would see the appellant one or two times, mostly in the day, at an area of Saint Ann's Bay called "Ghetto". Mr. Sewell, however, did not know any of the appellant's relatives. He had never spoken to the appellant.

[10] Rohan Sewell's evidence was that on 17 December 2012, at about 9:00 am, he was walking to a shop in Windsor Heights. En route, he noticed two persons, one of whom was Det Cpl Durrant. The other person (the man held with the appellant and his co-accused) was sitting by a church, counting money, while Det Cpl Durrant was approaching on foot through a gully. Mr Sewell walked past where this other man was to a standpipe that was in the vicinity of the shop. He stood at the standpipe and was facing the shop, which was about the distance of the length of a cricket pitch away (66 feet).

[11] About this time, Mr Sewell noticed that Det Cpl Durrant had walked past the shop. Det Cpl Durrant used his cellular telephone then turned back and entered the shop. After Det Cpl Durrant entered the shop, Mr Sewell heard one, then a second loud explosion, both of which sounded like gunshots. After the first explosion, Det Cpl Durrant stumbled outside the shop and fell on his back. After the second explosion, he saw the appellant go over to where Det Cpl Durrant was lying on his back, and removed a chain from his person. The appellant then went across a football field.

[12] During cross-examination, Mr Sewell said he never knew the appellant by his proper name, Anthony Brown. It was the police who told him the appellant's name at the identification parade, about two months after the incident. He said he gave the police the name Kevin o/c Bowie. According to Mr Sewell, the police was showing him pictures when he saw the name "Anthony Brown" below it. He insisted he never saw the picture, only the name below it. Closely cross-examined on this point, Mr Sewell maintained that what he saw was the name "underneath a blank picture" and "just a blank thing [with his name]". Crossed-examined further, he explained that the appellant's correct name came to be in his statement (given on the day following the incident) because the police had asked if he knew "Anthony Brown", aka "Kevin".

[13] It was suggested to Mr Sewell that he was not at the "ballfield" that morning and that he was telling lies on the appellant. Both suggestions were denied.

[14] That suggestion foreshadowed the appellant's defence. He made an unsworn statement. In that unsworn statement, he said he was 30 years of age and was called "Throat bwoy". He was a higgler in the Brown's Town market and a part-time fisherman. He gave his address as 7 Wharf Road, Saint Ann's Bay. He did not dispute the circumstances in which he came to be in the custody of the police. However, he denied that when he was searched a firearm was removed from his person. The only things he had on his person were a Dell cellular telephone and money. He, along with the other men who were on the truck, were placed to lie on the ground while the police searched the truck.

[15] After about 25 minutes, a member of the police party announced that a gun had been found. The appellant saw a policeman with a gun. The police enquired who the gun belonged to but no one answered. Following on that, the appellant and the other men were taken to the Spanish Town Police Station.

[16] Some days later he was told that he would be charged for the firearm and also placed on an identification parade for a murder which occurred in Saint Ann. He had no

problem with the identification parade. He knew nothing about the murder of Det Cpl Ransford Durrant. He had neither intention nor reason to commit such an act. They (the witnesses) came and told lies on him. He ended by saying the courtroom was the first place that he saw Rohan Sewell as in the cell was dark and he could not see Sewell's face, at the time he was pointed out.

[17] By agreement between the prosecution and the defence, the statement of Detective Constable Rockhue Montgomery was read into evidence. In that statement, Detective Constable Montgomery confirmed the evidence led by the prosecution that the appellant, and his co-accused Lewis, were found amidst the bags of rice and flour being conveyed on the truck. However, Detective Constable Montgomery only spoke of the five rounds of ammunition on Lewis. His statement was silent as regards the allegation that a firearm was recovered from the person of the appellant.

Issues

[18] The grounds of appeal raise five discrete issues. The original grounds one to five and supplemental grounds one to three, principally concern the learned judge's treatment of the identification evidence. The first issue is whether the learned judge failed to direct the jury in accordance with the **Turnbull** guidelines? Specifically, did he warn the jury of the special need for caution before acting on the evidence of the sole eyewitness, Rohan Sewell, and draw to their attention possible weaknesses in the identification evidence? Secondly, was the witness Rohan Sewell a witness with an interest to serve, requiring the learned judge to direct the jury accordingly? Thirdly, did the learned judge err in not upholding the submission of no case to answer? Fourthly, if the answer to the first and third issues is in the affirmative, and the answer to the second issue is in the negative, should the conviction be quashed? Fifthly, if the answer to the fourth issue is in the negative, is the sentence manifestly excessive?

Issue 1: Whether the learned judge failed to direct the jury in accordance with the Turnbull guidelines?

[19] It has long been established that where the case for the prosecution depends wholly or substantially upon the correctness of visual identification, which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting in reliance upon that evidence (see **R v Turnbull** [1977] QB 224). This warning, or an adapted variant of the warning is required even where the defence is not that the witness is mistaken but is fabricating the evidence against the defendant. That is, where the issue is credibility (see **Joel Brown and Lance Matthias** [2018] JMCA Crim 25).

[20] As the prosecution conceded, the learned judge did not warn the jury as required by the **Turnbull** guidelines. The learned judge was therefore in error when he left the case to the jury to be decided purely on the basis of credibility without a consideration of whether the eyewitness was mistaken.

[21] The collateral issue of the learned judge's failure to specifically bring to the jury's attention the weaknesses in the identification is without merit. In fairness to the learned judge, he adverted to the distance the witness was from the deceased and the appellant, more than once in his summation. There was no evidence of the length of time the witness had the appellant under observation. It has been said repeatedly by this court that the important point is the opportunity to view the assailant, to be drawn from the circumstances. In the view of this court neither the fact that the police told the witness the appellant's proper name nor that he was shown the name on an otherwise blank piece of paper can properly be regarded as a weakness in the identification evidence in the circumstances of this case. The evidence is that the name of the appellant played no part in the identification of the appellant. At the police station, on the night he was "arrested", the witness was asked whether he knew "Anthony Brown aka Kevin". The witness answered that he only knew the appellant as Kevin.

[22] In relation to the lighting where the informal parade was conducted, the evidence was that, that area of the cell block was well-lit. That evidence remained unchallenged at the close of the case for the prosecution. The assertion of the appellant in his unsworn statement could not render the issue of lighting at the cell block a weakness in the identification evidence requiring directions from the learned judge. In fact, there was no weakness in the evidence, properly so called, which the learned judge was required to bring specifically to the attention of the jury.

[23] Aside from the alleged weaknesses, Miss Lewis, in oral arguments, contended that the learned judge did not identify crucial inconsistencies. It was her submission that, in not identifying crucial inconsistencies, along with not abiding by the **Turnbull** guidelines, the conviction ought to be quashed. Our perusal of the transcript revealed that the learned judge not only gave adequate directions on inconsistencies but also pointed out several for the jury's consideration. For example, at page 309 line 12 to page 310 line 12, the learned judge highlighted that whereas Rohan Sewell said after the deceased staggered outside, the appellant went over him and fired one shot, the pathologist only found one gunshot injury. The learned judge went on to remind the jury of the distance from which the witness made that observation and also that there was blood in the shop which supported the witness' testimony that the deceased was first shot inside the shop.

[24] The answer to the overarching burden of the first issue is therefore in the affirmative.

Issue 2: Was the witness Rohan Sewell a witness with an interest to serve, requiring the learned judge to direct the jury accordingly?

[25] In her written submissions, Miss Lewis contended that the learned judge had a duty to direct the jury that the evidence of Rohan Sewell was to a probability tainted by an improper motive, that is, to exonerate himself, as he knew that he was under suspicion for the same offence for which he gave his statement.

[26] A trial judge is required to give the jury a warning about the possibility of an improper motive in cases where there is evidence which demonstrates this possibility. Perhaps the best known example is the accomplice who testifies on behalf of the prosecution. The circumstances which may require the trial judge to give this warning are varied (see **Jason Lawrence v The Queen** [2014] UKPC 2). In **R v Makanjoula and R v Easton** [1995] 3 All ER 730, it was left to the discretion of the judge whether to give the warning and where he decides to give the warning, counsel should be invited to address the court in the absence of the jury, before closing addresses.

[27] Respectfully, the ground is misconceived. Miss Lewis was hard-pressed to support the conclusion in her submission, by reference to the evidence, that Rohan Sewell was a witness with an interest to serve. The fact of his "arrest" at the time he gave his statement seemed to be the only foundation for the submission. The evidence showed that he was not under arrest when he gave his statement. Neither was he under suspicion, as alleged in the submissions. The learned judge was therefore under no duty to warn the jury that Rohan Sewell might have had an improper motive.

Issue 3: Did the learned judge err in not upholding the submission of no case to answer?

[28] In her written submissions Miss Lewis argued that the learned judge was wrong not to uphold the no case submission within the context of a case involving disputed visual identification, from a single eyewitness who had an interest to serve. The variances in the witness' testimony was a proper basis on which the case should have been withdrawn from the jury.

[29] The principles relevant to a submission of no case to answer are by now trite. See **R v Galbraith** [1981] 1 WLR 1039. Mrs Lenster Lewis-Meade, for the Crown, correctly submitted that all the issues arising on the prosecution's case sounded in the vein of credibility. This falls squarely within the ambit of limb (2)(b) of **Galbraith**. Accordingly, there is no merit in this ground.

Issue 4: Should the conviction be quashed?

[30] Should the conviction be quashed in light of the learned judge's failure to direct the jury according to the **Turnbull** guidelines? The dispositive question is, has the failure to follow the **Turnbull** guidelines resulted in a verdict that is either unsatisfactory or unsafe, upon a consideration of all the evidence? (see **Turnbull**, at page 231). If the identification evidence is of exceptional good quality the conviction will be upheld, notwithstanding the learned judge's failure to direct the jury along the contours of the **Turnbull** guidelines (see **Raymond Hunter v R** [2011] JMCA Crim 20 and **Fitzroy Salmon v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 147/2007, judgment delivered 25 July 2008).

[31] The evidence in this case shows, firstly, this was more a case of recognition than the identification of a stranger, the appellant was previously known to the eyewitness for five years and had last seen him a mere half an hour before the incident when they passed each other closely in the gully. Secondly, the eyewitness had more than a fleeting glance of the appellant. Although no time was given, the witness described enough activity for a reasonable jury to have concluded that he had a sufficient opportunity to view the appellant. Thirdly, the lighting was of good quality as it was at about 9:00 am. Fourthly, there was nothing obstructing the witness' view of the appellant. Fifthly, the witness made his observation of the appellant from a safe distance away from the attack, although he said he was frightened by the event. Sixthly, the witness gave his statement the day following the incident in which he identified the appellant as the assailant. Seventhly, the identification evidence is supported by the ballistics evidence matching the recovered spent cartridge casing from the scene with the firearm found in the appellant's possession. Eighthly, the witness' original identification of the appellant was confirmed at the informal identification parade.

[32] These features of the identification evidence have led us to the view that they constitute a "cumulative potency" and that the failure to follow the **Turnbull** guidelines

did not result in a substantial miscarriage of justice. Therefore, the conviction cannot fairly be said to be either unsatisfactory or unsafe (see also **Freemantle v R** (1994) 31 JLR 335). Therefore, although the point has to be decided in favour of the appellant, we are inclined to dismiss the appeal since no miscarriage of justice was occasioned. We are constrained therefore to apply the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act.

Issue 5: Was the sentence manifestly excessive?

[33] The complaint in relation to the sentence imposed was that the learned judge focused primarily on the principle of deterrence and therefore failed to consider the appellant's propensity for rehabilitation and that he failed to address the fact that the appellant is the father of a young child. It was also argued that the learned judge failed to take into account the views of the persons in the community in which he lived and the fact that the appellant was employed.

[34] Counsel for the appellant Miss Lewis also submitted that the sentence was manifestly excessive when compared to the sentences of 20 and 15 years imposed in **Lescene Edwards v R** [2018] JMCA Crim 4 and **Daniel Robinson v R** [2010] JMCA Crim 75 respectively.

[35] Counsel also pointed out that the starting point in **Lescene Edwards** was 25 years which was reduced to 20 years based on, amongst other things, the previous good character of the appellant in that case.

[36] These two cases are not similar to the instant case. In **Daniel Robinson**, the appellant pleaded guilty to the offence of manslaughter and had one previous conviction for possession of ganja which the court referred to as a "minor offence".

[37] In relation to **Lescene Edwards v R**, the appellant was a police officer with a previous good character.

[38] Turning to the period to be served before being eligible for parole, in **Lescene Edwards** this court held, at para [133], that "… it should be noted that the period usually ordered to be served prior to eligibility for parole, for the offence of murder, ranges from 15-45 years …"

[39] The learned judge in this case chose 35 years as the starting point, which is within the normal range of periods of sentences ordered to be served before parole eligibility for murder. The learned judge then deducted the time spent by the appellant in custody awaiting trial. The learned judge did not demonstrate that he had considered the mitigating and aggravating factors relevant to the appellant.

[40] In the light of the circumstances and bearing in mind the principles set out in **R v Ball** (1951) 35 Cr App R 164 (as cited in **Meisha Clement v R** [2016] JMCA Crim 26) we would review the sentence imposed by the learned judge. Having reviewed the sentence, we would reduce the starting point to 33 years.

[41] The aggravating factors would be that he has four previous convictions and that he committed these offences after escaping custody. This would increase the period to be served before parole eligibility to 39 years. For the mitigating factors we would subtract four years, making the period 35 years. This would be further reduced by the time spent in custody which was almost six years, the appellant would therefore have to serve 29 years. In the light of the above we are of the view that the stipulation that the appellant should serve 29 years before being eligible for parole is not manifestly excessive. For clarity, it should be said that the sentences imposed on the other counts were not challenged, a position we unhesitatingly endorse.

[42] In the light of the conclusions above it is hereby ordered as follows:

1. The appeal against conviction and sentence is dismissed.
2. The convictions and sentences are affirmed.

3. The sentences are reckoned to have commenced on 16 November 2018.