[2011] JMCA Crim 57

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO 25/2010

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE HIBBERT JA (Ag)

WESTON BROWN v R

Trevor Ho-Lyn instructed by Ho-Lyn, Ho-Lyn & Morris for the appellant

Miss Paula Llewellyn QC, Director of Public Prosecutions and Miss Michelle Salmon for the Crown

31 May, 10 June and 25 November 2011

PANTON P

[1] The appellant herein, a constable in the Jamaica Constabulary Force, was convicted in the Resident Magistrate's Court for the parish of Trelawny on 18 June 2010, of the offence of unlawful wounding and sentenced on 25 June 2010 to a term of imprisonment for 12 months. He gave verbal notice of appeal and subsequently filed a written notice of appeal with a single ground of appeal which reads:

"…the Learned Resident Magistrate erred in fact and law and the verdict is unreasonable and cannot be supported by the evidence."

The supplemental grounds of appeal

[2] Upon the receipt of the notes of evidence, the appellant filed five supplemental grounds of appeal which the court gave his attorney-at-law Mr Trevor Ho-Lyn, permission to argue at the hearing before us on 31 May 2011. The supplemental grounds are as follows:

"a) That the Learned Resident Magistrate failed to demonstrate in her reasons for judgment that she appreciated the full importance of section 13 of the Constabulary Force Act and the relevant sections of the Road Traffic Act and she failed to properly consider the conduct of the Appellant in that context and she thereby misdirected herself on the application of the law to the facts of the case.

b) That the Learned Resident Magistrate failed in her reasons for judgment to disclose any proper analysis of the medical evidence available and relied instead on the descriptions of the injury by the complainant who was an untrained lay person thereby failing to fully assess the defence in relation to the injury and the Appellant's credibility.

c) That the learned Resident Magistrate misdirected herself in assessing the defence advanced by the Appellant by placing improper emphasis on speculative issues with regard to how the first shot missed and in addition failed in her assessment to apply the proper standard of proof to the defence.

d) That the learned Resident Magistrate misdirected herself with regard to the character evidence of the

Appellant and thereby failed to properly consider the defence.

e) The Learned Resident Magistrate failed in her consideration of the appropriate sentence all the mitigating factors instead she focused on a punishment designed primarily to discourage others and thereby did not consider properly the context in which the incident occurred."

The decision on appeal

[3] At the conclusion of the hearing of the appeal, we reserved our decision which we gave on 10 June 2011. We dismissed the appeal and affirmed both the conviction and the sentence. In view of the fact that the appellant had been on bail throughout, the sentence was ordered to commence immediately the decision was handed down. We promised then to put our reasons in writing. This we now do.

The case for the prosecution

[4] The evidence presented by the prosecution was uncomplicated. It was to the effect that six cyclists, including the complainant Roxroy Reid, were riding on the road from Wakefield to Deeside on 17 November 2005. Mr Reid was apparently some distance behind the other five riders. On reaching the main road at Blackwin, he came upon a police radio car with two police officers. A search of the riders who were ahead of him was in progress. As Mr Reid was riding past them someone in the radio car called out, "Oye! Man, stop deh!". Mr Reid did not stop. The police car chased him while he made manouevres to keep them at bay. Eventually, after the car had hit his bicycle's back wheel, he jumped from the bicycle and ran across a playfield. The appellant who was in uniform chased Mr Reid. At the sound of what he thought was a

gunshot, Mr Reid stopped and raised his hands in the air, apparently in an act of surrender. The appellant "draped" Mr Reid by his collar, hit him in his head with a gun and asked him what was it that he had which had caused him to run. The appellant then pushed the gun in the region of Mr Reid's abdomen and fired a shot. Mr Reid fell. The appellant placed Mr Reid in the car and took him to the Falmouth Hospital after a brief stop at the Falmouth Police Station.

[5] Mr Reid received an injury in the region of his abdomen. He had "a small hole around 3 inches left above [his] belly button and a small hole at right back". The learned Resident Magistrate, Her Hon. Mrs Icolin Reid, noted that the complainant had a long surgical scar in the region of the abdomen. Mr Reid was transferred to the Cornwall Regional Hospital where he was admitted for a period of five days. He was not under guard at the hospital. However, no sooner than he was released from the hospital, he was served with summonses alleging that he assaulted the constable with a knife, and that he had ganja in his possession. Mr Reid was duly tried and acquitted. He denied that he had ganja in his possession, or that he attacked the appellant with a knife.

[6] Miss Barbara Reid and Mr Clive Williams also gave evidence for the prosecution. They said they had witnessed the chase, the firing of the gun, the hitting of Mr Reid's head and the shooting that took place thereafter. They verified that Mr Reid had nothing in his hands during or after the chase.

[7] A medical certificate signed by Dr Michael Godfrey confirmed that he saw and examined Mr Reid at the Falmouth Hospital on 17 November 2005 and that he ordered his immediate transfer to the Cornwall Regional Hospital for treatment. He noted that there was a serious injury to the abdomen and that the injury was consistent with infliction by a projectile at close range. Dr Godfrey was "unsure of the extent of [the] internal injuries". There was ballistic evidence confirming the discharge of the appellant's firearm, and there was evidence from the Government Analyst to the effect that gunshot residue was present on the lower left front of the shirt that Mr Reid was wearing at the time of the incident.

The defence

[8] In his defence, the appellant said that while he was standing on the road, had signaled all the cyclists to stop but Mr Reid had disobeyed the signal. He went into the police car and chased him. During the chase, Mr Reid abandoned the bicycle and ran across a playfield. The appellant stopped the car and chased Mr Reid on foot. According to the appellant, Mr Reid dropped a black plastic bag which he [the appellant] took up. While he was taking up the bag, Mr Reid removed a knife from his waist and "tried to stab" the appellant who pulled his firearm and fired two shots in Mr Reid's direction. Mr Reid fell. The appellant took the knife from him and escorted him to the police station and then to the Falmouth Hospital. The appellant said that he handed over the knife to Det Cpl Jones.

[9] Sgt Zelpha McIntosh attached to the Bureau of Special Investigations was assigned to investigate this case. She recorded statements from the witnesses and

received the firearm used by the appellant in the incident. It is significant that no knife was produced at the trial and there was no mention of a knife having been handed over by Cpl Jones or anyone else to Sgt McIntosh. Indeed, no questions were asked of her in this regard and Cpl Jones did not give evidence.

The findings of fact

[10] The learned Resident Magistrate, after a very long and detailed review of the evidence, made 32 specific findings of fact. They included the following:

1. Roxroy Lee, the complainant, was not riding with the group of five men stopped by the appellant;

2. the complainant was signaled to stop, but disobeyed;

3. the appellant pursued the complainant in the police vehicle;

4. the complainant, after the wheel of his bicycle had been hit by the vehicle, alighted and ran across a playfield;

5. the appellant chased the complainant and fired a shot from his revolver during the chase;

6. the complainant stopped, turned around and raised both hands "in the air";

7. the appellant used his firearm to hit the complainant in his head, injuring him, and thereafter deliberately fired a shot into the complainant's abdomen;

8. Miss Reid and Mr Williams, who witnessed the incident, were witnesses of truth;

9. the complainant was unarmed and did not throw a bag on the ground;

10. the appellant did not tell the complainant that he had seen him with ganja, or a knife; and

11. the complainant did not at any time attack the appellant;

Section 13 of the Constabulary Force Act

[11] Mr Ho-Lyn complained that the learned Resident Magistrate did not give consideration to the effect of section 13 of the Constabulary Force Act. That section reads:

> "The duties of the Police under this Act shall be to keep watch by day and by night, to preserve the peace, to detect crime, apprehend or summon before a Justice, persons found committing any offence or whom they may reasonably suspect of having committed any offence, or who may be charged with having committed any offence, to serve and to execute all summonses, warrants, subpoenas, notices, and criminal processes issued from any Court or Criminal Justice or by any Justice in a criminal matter and to do and perform all the duties appertaining to the office of a Constable…"

According to Mr Ho-Lyn, the learned Resident Magistrate did not appreciate the importance of the section and its relevance to the issues in the case, and she failed to place in context the events leading to and including the incident. The appellant, he said, was entitled to pursue the complainant in view of his failure to stop when ordered so to do. It was the duty of the learned Resident Magistrate, said Mr Ho-Lyn, to focus on the incident from the point of view of the appellant as a police officer, rather than concentrating on the question of his credibility.

[12] We do not see how the learned Resident Magistrate can be faulted for focusing on the credibility of the appellant and the witnesses for the prosecution. The defence provided by section 13 is only relevant if the appellant's version is credible. There is no doubt that he was pursuing the complainant after the latter had broken the law, but that by itself does not provide a cloak for doing what the prosecution witnesses said the appellant did. Having fired his weapon and secured the attention of the complainant who stopped and raised his arms indicating that he was unarmed, there was no credible evidence to justify the use of the firearm in the manner in which it was used by the appellant. The complainant did absolutely nothing that could have caused the appellant to feel threatened or obstructed in the execution of his duty as an officer. In the circumstances, section 13 was of no assistance in determining the matter, although it is clear that the learned Resident Magistrate did give the matter serious consideration. Indeed, her reasons for judgment show that she considered relevant decisions of this court on the interpretation of the section. Her consideration of the case was full and unimpeachable so this ground as well as ground (c) dealing with the assessment of the defence and the standard of proof are really without merit.

The medical evidence

[13] In respect of the medical evidence, Mr Ho-Lyn took issue with the finding of the learned Resident Magistrate that the appellant "deliberately put the gun under the belly of the Complainant and shot him. The area where the Complainant got shot was burned". The issue, he said, was that the appellant had said that the complainant was 4 to 5 feet from him and advancing, whereas the complainant said the gun was placed

on his abdomen. Mr Ho-Lyn chided the magistrate for accepting the version presented by the complainant in the absence of evidence from the doctor as to the presence of powder burns. We are of the view that the learned Resident Magistrate was entitled to make the finding she made, once she preferred the evidence of the complainant. In any event, the medical certificate stated that the firing of the shot had taken place at close range and that is in keeping with the evidence accepted by the learned Resident Magistrate. That evidence included the evidence of Clive Williams who said that the incident occurred at about 11:00 a.m. and that he saw the appellant "fire a shot in his [the complainant's] belly". His evidence while being examined in chief was to the following effect: "I say belly because it is down where I see him put the gun" (p.16). In cross-examination, he said: "After this I saw him push the gun towards his belly. When I heard the explosion police was still holding unto Roxroy. Police put gun in Roxroy belly. They were standing very close to each other".

In the circumstances, we found no merit whatsoever in this ground.

[14] To return to ground (c) for a moment, it will be recalled that the complaint there was that the learned Resident Magistrate misdirected herself by failing to apply the proper standard of proof to the defence. In assessing the defence, the learned Resident Magistrate said that in considering the appellant's case, she had to look at it objectively, bearing in mind that "an officer is entitled to use reasonable force to defend himself when he is under attack". Mr Ho-Lyn submitted that the subjective standard as advanced by ***Solomon Beckford v R*** [1988] 1 AC 130 was the appropriate standard. He quoted from the headnote to that case which states that the

test for self-defence was that a person could use such force in the defence of himself or another as was reasonable in the circumstances as he honestly believed them to be. Mr Ho-Lyn conceded that in the instant case, it was not being said that the appellant had a mistaken belief of the facts. Nevertheless, he insisted that the learned Resident Magistrate should have still addressed her mind to the question of honest belief. We were of the view that although the learned Resident Magistrate said that she had to look at the appellant's case objectively; it did not mean that she applied the objective test that preceded ***Beckford***. Indeed, the words that followed in her statement gave a clear indication that she applied the ***Beckford*** test. She made specific reference to the appellant's position as an officer who would have been entitled to use reasonable force to defend himself from an attack. The learned Resident Magistrate went on to find that there was no attack, and there was no impending attack. In addition, she was impressed by the veracity of the witnesses for the prosecution whereas she tagged the appellant as untruthful. In the circumstances, the verdict was inevitable.

Alleged misdirection as regards the character evidence

[15] The complaint in this regard was that the learned Resident Magistrate did not demonstrate how she applied the character evidence where there were fundamental disputes of fact, and why she would have preferred the prosecution's evidence to the character evidence. This complaint is unjustified. In assessing the evidence of Rev Courtney Walters, the learned Resident Magistrate remarked that the evidence of previous good character was only one of the relevant factors to be considered. She also indicated that this evidence supported the defence in its position that the

appellant was the sort of person who would not have shot an unarmed man unless he the appellant was acting in self-defence. However, at the end of the day, it should not be forgotten that the learned Resident Magistrate was required to make a finding in keeping with her assessment of the credibility of the witnesses. The good character of an accused person comes to nought if the evidence clearly shows that he did what was alleged with the necessary mens rea. In this case, that was the position.

Sentence

[16] Mr Ho-Lyn submitted that the sentence of 12 months imprisonment was manifestly excessive. He observed that the learned Resident Magistrate did not conduct a discussion of the sentencing options; nor did she demonstrate why an immediate term of imprisonment was the appropriate sentence. According to Mr Ho-Lyn, there was a disregard of the sentencing guidelines for magistrates, as set out in Blackstone's Criminal Practice. Those guidelines, he said, required the learned Resident Magistrate to consider the aggravating and mitigating factors and then demonstrate the weight she attached to each. The injury, Mr Ho-Lyn said, was not life threatening and so given the previous good character of the appellant, and the fact that he was acting in the course of his duties, a suspended sentence of imprisonment would not have been inappropriate.

[17] It has to be noted that to be a member of the constabulary, one has to without a criminal conviction. So, such an individual starts off with good character in his or her favour. However, it does not follow that the good character will act as a bar to the imposition of an immediate term of imprisonment on such a person when a conviction

is recorded. The circumstances of each case will determine the appropriate sanction to be imposed. In this respect, the learned Resident Magistrate cannot be faulted. She considered the position of the appellant, the situation of the complainant and the circumstances that gave rise to the commission of the offence. She noted that the appellant was sworn to "protect, serve and re-assure the citizens of this country". She found that the appellant abused his authority in a manner that "could have cost the young man his life". She concluded that it was her belief that a message ought to be sent to the appellant "and other police officers like himself" that this form of abuse would not be tolerated and that the consequences would be serious for an offender.

[18] It is a notorious fact that the level of violence administered over the years to unarmed citizens by those sworn to serve and protect is alarming. This is a very important factor that has to guide sentencers. The appellant ought to consider that he was very fortunate to have been charged merely with the offence of unlawful wounding. The proper charge in a situation such as this is one of wounding with intent to do grievous bodily harm. If that had been done, he would have faced a sentence measured in years, rather than months.

[19] In the circumstances, we found that there was no merit in the appeal against conviction or sentence. Consequently, we ordered the dismissal of the appeal and the taking of the appellant into custody.