[2014] JMCA Crim 14

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 102/2011

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE MANGATAL JA (AG)

ORVILLE CAMPBELL v R

Lord Anthony Gifford QC and Vernon Daley for the applicant

Mrs Lisa Palmer Hamilton and Mrs Tracy-Ann Robinson for the Crown

18 and 21 March 2014

PANTON P

[1] This is an application for leave to appeal against convictions and sentences recorded in the Western Regional Gun Court presided over by Straw J from 12 to 15 December 2011. The charges were illegal possession of firearm and wounding with intent. The sentences were 15 years imprisonment on each count which were ordered to run concurrently. A single judge of this court, having examined the transcript of the proceedings, refused the application which has been renewed before us. The single judge formed the view that the main issues in the case were identification and credibility and concluded that the learned trial judge had properly directed herself on them, having carefully considered the applicant's statement and his alibi.

The evidence presented by the prosecution

[2] The prosecution's case was that on 13 January 2011, Mr Melvin McKellop, a farmer of Rock Spring, Hanover, was shot and injured by the applicant. The incident occurred at about midday outside Mr McKellop's farm hut. He was approached by three men whom he knew before. The applicant, who is also known as Rough Head, was one of these men. He, while holding a gun in his hand, said to Mr McKellop, "don't say a word". One of the other men, called Bower, asked Mr McKellop where was the herb that he had. Mr McKellop responded that he had none. The third man, called Night Dew, said that Mr McKellop was not speaking the truth, and he demanded that Mr McKellop give him the herb. Mr McKellop maintained that he had none, and Night Dew told the applicant to shoot Mr McKellop.

[3] When told to shoot Mr McKellop, the applicant demurred saying that Mr McKellop was a "good youth." Thereupon, Night Dew told the applicant to give him the gun. However, the applicant went in front of Mr McKellop and hit him in his forehead with the gun, while admonishing him with the words, "tap tell lie". Mr McKellop pushed the applicant who then pulled back the hammer of the firearm and pointed it in Mr McKellop's face. Mr McKellop pushed away the applicant's hand and the firearm went off injuring Mr McKellop's left thumb. The applicant's companion, Bower, intervened by shielding Mr McKellop and telling the applicant not to kill Mr McKellop. The latter shoved Bower resulting in both Bower and the applicant falling to the ground. Mr McKellop ran but was chased and held by Bower. They wrestled and apparently

sensing that Mr McKellop was getting the better of him, Bower called out to Night Dew and the applicant for assistance.

[4] Bower and Night Dew held Mr McKellop's hands and the applicant placed the gun at the right side of Mr McKellop's face and discharged it. Mr McKellop smelt sulphur and felt dizzy. Bower released him and he ran. While running, Mr McKellop heard three more explosions and was hit in the region of the left elbow. He continued running and hid in the bushes until he was out of danger.

[5] Eventually, Mr McKellop went to his sister's residence and his brother-in-law arranged for him to be transported to the Savanna-la-mar Hospital. After being there for a short time, he was visited by Detective Corporal Calbert Forrester from the Green Island Police Station who took a statement from him. In his statement to Corporal Forrester, Mr McKellop mentioned the names of the three attackers. He suffered injuries to his thumb, elbow and face and spent approximately two weeks in the hospital.

[6] Dr Wai Thu testified that he examined Mr McKellop on 13 January 2011 at 2:25 pm. The doctor found that "he had a gunshot wound to the right cheek", "a bullet entrance and exit wound over the right cheek", as well as two gunshot wounds (one entrance and the other exit) on the inner aspect of the left elbow joint. The left upper eyelid and right cheek were swollen, and there was a superficial abrasion on the forehead. The doctor also found that Mr McKellop had a jagged laceration on the left thumb, "[j]ust the end of the left thumb." From his experience, he said that, that

injury was "a gunshot wound tangentially through the thumb". The injury to the elbow has resulted in the fourth and fifth fingers not functioning properly, seeing that the ulnar nerve has been damaged.

[7] In cross-examination, Dr Thu said that it was hard to tell if there was gunpowder deposition on any of the injuries as only a forensic doctor could say that. He said he saw no heat burn surrounding the injuries. His understanding of a heat burn was "the redness and the warmest area around a wound" resulting from the velocity and the heat from the bullets that caused the wound. He said it was possible for a heat burn to result from a firearm being discharged very close to or touching an object. As regards the thumb injury, he was asked if the injury was consistent with anything else apart from a gunshot. He said in response: "The clinical examination could be injury from, well … anything else not only from gun". He added: "It could be gunshot or it could be any other sharp object that could injure, it can be described as a sharp weapon – so I cannot surely see [sic]". The doctor went on to make a similar qualification in respect of the injuries to the cheek and the elbow. He said that those injuries could even have been caused by something "like a big screwdriver".

[8] On 8 March 2011, Detective Corporal Forrester saw the applicant at the Morgan's Bridge Police Station in Westmoreland and cautioned him as regards the allegations made by Mr McKellop. The applicant responded, "Mi nuh shoot nobody". An identification parade was held on 16 March 2011 and the applicant was pointed out by Mr McKellop as the person who had shot him. Detective Corporal Forrester arrested and charged the applicant on 19 March 2011.

The defence

[9] The applicant made an unsworn statement in which he said that on the day in question he was at his cook shop at Jerusalem Mountain, Westmoreland. He said however that while at his shop Bower had come to him and told him that Mr McKellop had stolen his (Bower's) "herb seed" so he had taken two friends and beaten Mr McKellop and left him in the bushes. According to the applicant, he asked Bower if the police would be looking for him for beating Mr McKellop, but Bower said that that would not be so as he (Bower) had hidden Mr McKellop when he was "wanted" by the police. He said Bowen did not mention anything about a gun being involved.

[10] Miss Jennifer Tomlinson of Jerusalem Mountain gave evidence that she saw the applicant at his cook shop shortly after midday. She spent five minutes at the shop. She has known the applicant for approximately 20 years but she does not know that he farms ganja. However, she knows that Bower does. She said she knew of no short cut to Mr McKellop's yard. In fact she said she knew of no short cut in that area at all.

[11] Mr Norel Clarke lives in Jerusalem Mountain. He rears goats. He also gave evidence on behalf of the applicant. He said he saw the applicant at the cook shop at about 12:30 pm. In his opinion, the distance between the cook shop and where Mr McKellop lived is about 45 minutes on foot. In cross-examination, however he said that using a short cut it would take one and a half hours from the cook-shop to Mr McKellop's "bush", a term used for a small farm.

The summation

[12] In summing up the case and reasoning her decision, the learned judge first determined the question of jurisdiction by narrating the evidence that pointed to the presence and use of a firearm during the incident. She focused on the description of the firearm given by Mr McKellop and the length of time that he viewed it, that is, seven minutes. She also mentioned the fact that the witness said that he heard explosions and smelt sulphur coming from the discharge of the firearm. Having completed her review, including Dr Thu's evidence, she said that she accepted that a firearm had been used to inflict the injuries on Mr McKellop.

[13] The learned judge next identified the major issue in the case as that of identification. She gave herself the necessary ***Turnbull*** warning in respect of identification, noting the time of day and the fact that the parties knew each other well. She also noted that this was not a 'fleeting glance' situation.

[14] The next matter that was considered by the learned judge was the alibi put forward by the applicant. She indicated that she recognized that there was no duty on the applicant to prove anything; rather, that the burden was on the prosecution to make her feel sure of its case. In considering the alibi, she gave full consideration to the evidence of the witnesses called on the applicant's behalf. In the final analysis, the learned judge rejected the alibi and found in favour of the prosecution. She concluded her reasoning by addressing the applicant thus:

> "I find that the Crown has proven beyond a reasonable doubt, sir, your guilt and I find you guilty on both counts of the indictment."

The grounds of appeal

[15] Before us, Lord Gifford QC abandoned the sole original ground alleging "Unfair trial" that had been filed by the applicant. He was however granted leave to argue three supplementary grounds, instead. These are as follows:

> "1 The learned judge erred in law in that she failed to apply the proper standard of proof to the issue whether the complainant had been shot with a firearm. The learned judge examined the evidence on this issue only in relation to the question of jurisdiction, and determined that she had jurisdiction by applying a lesser standard of proof than proof beyond reasonable doubt.
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> 2. The learned judge erred in not giving any or any adequate consideration to the serious weaknesses in the prosecution case on the issue whether it was proved beyond reasonable doubt that a firearm had been used, namely:
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> a) The complainant said that he was shot in the left thumb, but the doctor who gave evidence said that the injury could be a gunshot or any other sharp object which could injure;
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> b) The complainant said that the appellant put a gun to the side of his face and fired it, but the doctor said that the injuries to the face were also consistent with infliction by a pen or a big screwdriver;

c) The complainant said that he was shot above the left elbow as he ran, but the doctor said that the injuries to that elbow were also consistent with a pen or a big screwdriver.

d) The doctor found that there was no heat burn surrounding any of the injuries, as would possibly be produced if the firearm was very close to the point of injury;

e) The complainant said that five shots in all were fired, but Detective Corporal Forrester who visited the scene found no spent shells.

f) There was no other evidence to support the complainant's account of events.

3. The learned judge erred in her treatment of the defence witness Jennifer Tomlinson, who gave evidence of alibi, in that she described her evidence as to the issue of short cut (between the appellant's cook shop and the complainant's house) as evasive, whereas the witness had stated clearly and repeatedly that she knew of no short cut."

Submissions

[16] In making his submissions, which were oral as well as written, learned Queen's Counsel Lord Gifford for reasons of convenience, argued grounds 1 and 2 together for ground 1 alleges that the learned judge had applied a lesser standard of proof than beyond reasonable doubt in determining whether Mr McKellop had been injured as a result of the use of a firearm by the applicant. In ground 2 the complaint is that the judge did not adequately consider the weaknesses in the prosecution's case, given the nature of the doctor's evidence.

[17] Lord Gifford QC submitted that the evidence of the doctor did not support the case for the prosecution that the complainant had been shot. Indeed, he said that the doctor's evidence established that "it was possible that none of the injuries were [sic] inflicted by a gun". Lord Gifford QC said that it was remarkable that none of the injuries can be said for sure to have been by gunshot. Moreover, he asked this court to take note of the fact that Mr McKellop, though allegedly shot at close range, received only minor injuries. It is astonishing, he said, that Mr McKellop survived.

[18] Learned Queen's Counsel criticized the approach taken by the judge in dealing with the issue of the firearm firstly and only as a jurisdictional matter, and then not returning to it in assessing the substance of the evidence in determining whether it was in fact a firearm that had been used, allegedly by the applicant. He submitted that the learned judge, by merely saying that she accepted, or was satisfied by, the evidence that a firearm was used, was doing no more than applying the civil standard of proof to this, a criminal matter. The learned judge, he said, ought to have applied the criminal standard of proof, and if she had done so, the decision might have been different. Lord Gifford QC relied on the following passage from the judgment of Lord Bingham CJ in ***Derek William Bentley (deceased)*** [2001] 1 Cr App R 307 at page 324, para 42:

> "The courts have consistently insisted on the need for a clear direction to the jury on the standard of proof, and have consistently held that a mere reference to being "satisfied" without a reference to being sure, or being satisfied beyond a reasonable doubt, was inadequate."

[19] Finally, on the question of the quality of the evidence presented, Lord Gifford drew our attention to the fact that five shots were fired but not one spent shell was recovered on a subsequent search. He commented that the learned judge had not mentioned this in her summation.

[20] Mrs Tracy-Ann Robinson, for the prosecution, submitted that Straw J fully appreciated the need to be satisfied that it was a firearm that was used to inflict the injuries on Mr McKellop, and had adequately addressed her mind to the issue. Mrs Robinson relied on several pronouncements by this court as regards the quality of evidence necessary for a determination as to whether an object is a firearm for the purpose of a trial in the Gun Court.

[21] In ***Regina v Alex Simpson and Regina v McKenzie Powell*** (SCCA Nos 151/1988 and 71/1989 – delivered 5 February 1992) Downer JA in delivering the reasons for judgment on behalf of the court said:

> "… the trial judge sitting without a jury must demonstrate in language which does not require to be construed that he has acted with the requisite caution in mind and that he had heeded his own warning. However, no particular form of words need be used. What is necessary is that the judge's mind upon the matter be clearly revealed." (p.13)

[22] We have thoroughly examined the transcript of the proceedings before Straw J and we are satisfied that she had ample evidence to find that a firearm was used by the applicant to injure Mr McKellop. There was the evidence of the sight of the bullets in the chamber, the explosions, the smell of sulphur, and indeed the nature of the injuries

noted by the doctor. It must not be forgotten also that this incident occurred in the middle of the day, and that Mr McKellop is a mature person who testified that he knew guns before that day. As Carey JA said in ***R v Christopher Miller*** (SCCA No 169/1987 – delivered 21 March 1988), "It must be extremely difficult now-a-days to find a person who doesn't know a gun when he sees a gun."

[23] As regards the evidence of the doctor, there is nothing unusual in his stating that the injuries could have been committed by something else. Quite often in criminal proceedings, doctors do state that injuries may have been committed by a variety of instruments. In the instant case, however, Dr Wai Thu gave clear evidence as to entry and exit wounds. In addition, at page 41 lines 3-5 of the transcript he was specific in saying, "… the clinical examination tell you that this is a gunshot wound". Dr Thu was also very clear that several questions asked of him would be more properly directed to whom he described as "the forensic surgeon" (for example, at page 39 lines 17 and 18). This was an indication of his limitation so far as experience and training are relevant. He said that there are three grades for medical officers, and he was at the time in grade 1 (the lowest). He was qualified in Burma in 2007 and came to Jamaica a year later. He had up to that point attended to between 15 and 20 gunshot injuries in Jamaica. It is understandable why he would at that stage of his career be prepared to defer to "the forensic surgeon". The cases, on proper consideration and interpretation, indicate that it will not always be necessary for there to be forensic evidence to determine whether a firearm had been used to commit an offence. If the tribunal of

fact is satisfied that the individual describing the instrument is knowledgeable (as to what is a gun) and is credible, that is sufficient.

[24] On the question of the learned judge's use of the word "satisfied", without adding the need to be sure, or beyond reasonable doubt, a distinction has to be made as regards a judge sitting alone and one directing a jury. As Downer JA said in ***Simpson and Powell***, "It is important to reiterate that a judge's reasoning requires a different treatment from a summing-up to a jury" (p. 8). The judge sitting with a jury must so instruct the jury that there can be no doubt as to the extent to which the jury needs to be satisfied. In the case of a judge sitting alone, the summation as a whole is to be looked at to see whether there was a demonstration of an appreciation of the standard of proof required. In the instant case, there can be no clearer indication that the learned judge appreciated the position, than by her final words directed to the applicant.

Ground 3

[25] This ground challenges the fact that the learned judge rejected the evidence of both witnesses called on behalf of the applicant in support of the alibi. The learned judge found that Ms Tomlinson was "somewhat evasive in relation to the issue of shortcut and, she was somewhat defensive as she gave her evidence". She also rejected Mr Clarke's testimony on the basis that she found him to be a "witness of convenience". Lord Gifford QC submitted that the learned judge made an unfair criticism of Ms Tomlinson. In his view, the evidence of these witnesses was strong and ought not to have been rejected without more cogent reasoning by the learned judge.

[26] We are guided by the established principle that an appellate court ought not to lightly overturn a trial judge's findings of fact – see ***Industrial Chemical Co. (JA) Limited v Owen Ellis*** (1986) 23 JLR 35. Straw J saw the witnesses as they gave their evidence. She was in the best position to determine from their demeanour as well as the content of their evidence whether they were speaking the truth. She assessed them and found them wanting in this respect. She was "not impressed with either of them" (p. 166 lines 13 and 14). The learned judge was careful to point out that that fact was however insufficient to ground a finding of guilt. She stated that she had to go back to the Crown's case and having done so, she concluded that Mr McKellop was simple, but credible.

[27] In the circumstances, the application for leave to appeal is refused and the sentences are to run from 15 December 2011.