[2012] JMCA Crim 48

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 54/2009

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McINTOSH JA

KIRKLAND COOKE & KEVIN BRAMWELL v R

L. Jack Hines for the first named applicant

Gladstone Wilson for the second named applicant

Miss Claudette Thompson for the Crown

3 March, 28 July 2011 and 28 September 2012

MORRISON JA

[1] On 17 March 2008, after a trial before Campbell J in the High Court Division of the Gun Court in Port Maria, St Mary, both applicants were convicted of the offences of illegal possession of firearm, for which they were each sentenced to seven years' imprisonment, and wounding with intent, for which they were each sentenced to 10 years' imprisonment. In addition, the second named applicant was convicted of the

offence of assault at common law, for which he was sentenced to five years' imprisonment. The order of the court was that all sentences should run concurrently.

[2] On 25 August 2008, a single judge of this court refused applications by both applicants for leave to appeal against these convictions and in due course the applications were renewed and heard by the court itself. On 29 July 2011, the applications for leave to appeal were refused and the applicants' sentences were ordered to run from 29 June 2009. These are the court's reasons, with profuse apologies for the delay, for the refusal of the applications.

[3] The charges against the applicants (who were originally charged jointly with a third man, Godfrey Powell, who was discharged on a submission of no case at the end of the case for the prosecution), arose out of an incident on 17 May 2008 in the Fort George Road area of Annotto Bay. For ease of reference, we will refer to the applicants as Messrs. Cooke and Bramwell, respectively. The prosecution called three witnesses as to fact, Carlos Davis ('Carlos'), who was 13 years old at the time of the incident; Carlos' father, Neville Davis ('Neville'); and their cousin Marvin Fairweather (who was also known as 'Proffie').

[4] Shortly after midnight on the morning in question, these three gentlemen left home on a crab catching expedition in the vicinity of the train line at Cross Roads. Carlos had a crab bag in his hand, while Proffie carried a cutlass and a lit flashlight. Neville was empty-handed. At a certain point, the men encountered Mr Cooke and, Carlos testified, Proffie's "flashlight mussi shine in a [his] face". Despite an immediate

apology from Proffie, he and Mr Cooke ended up cursing each other as they both walked along the line. Carlos was behind them and Neville was beside him.

[5] The next thing that happened, Carlos told the court, was that Mr Cooke reached into his pocket and emerged with a gun in his gloved right hand. Then saying, according to Carlos, "a long time him fi dead", Mr Cooke pointed the gun in the direction of Proffie's face and fired a shot. Proffie then chopped at Mr Cooke, causing him to step back and fall, whereupon Proffie chopped at him again and the cutlass flew out of his hand. Proffie then ran "down" on Mr Cooke and, bending down over him, held on to him. Asked if he had ever seen a gun before that night, Carlos answered that he had not, but described what he saw Mr Cooke with as having a "handle", which "come down so and the top part come down so". When Mr Cooke shot at Proffie, Carlos said "it made a loud sound".

[6] At this point, according to Carlos, a girl named Kadian (who was not called as witness) summoned some other men, while Neville stood over Proffie and Mr Cooke, who still had a gun in his hand, and exhorted them "fi done". A number of other men ("nuff man"), including Mr Bramwell, came onto the scene and one of them (Mr Godfrey Powell, known to the witness as 'Warny') fired a shot. This man then put the gun in Neville's chest, whereupon Carlos "boxed" the gun from his hand, causing it to fall to the ground. It was then picked up by Mr Bramwell, who used it to hit Proffie in his face. Proffie then pushed Mr Cooke back onto Mr Bramwell and told Carlos to run, which he did, and he was in turn followed by Neville and Proffie himself. As they ran, shots were still being fired, more than five shots in all.

[7] Carlos emphatically denied the suggestion put to him by Mr Cooke's counsel in cross-examination that Proffie was armed with a gun that night. He also denied that Proffie and Neville were in fact attempting to rob Mr Cooke as they stood over him. He maintained that Mr Cooke was armed with a gun.

[8] Proffie confirmed that Mr Cooke, whom he had known for a long time before, had a gun in his hand that night. He was familiar with guns, having seen "police with them gun all the while". He also confirmed that Mr Cooke had pointed the gun at him, that a shot was fired from the gun, that he had chopped after Mr Cooke and that they had begun to fight each other. Further, Mr Bramwell came onto the scene and "push the gun in a me face and crack it but it never bus". He had known Mr Bramwell for many years, "from school days". It was while he and Mr Cooke were wrestling with each other that he pushed Mr Cooke off and Mr Cooke "bus a shot and it fly through one foot".

[9] Later that night, Proffie was taken to the Annotto Bay Hospital, where he saw Mr Cooke having a wound to his face attended to. In due course, Proffie's foot was also "dressed".

[10] For his part, Neville also confirmed that Mr Cooke had produced a gun that night. He was familiar with guns, having seen "policeman with gun...businessman with gun...bad man with gun just the same way". He too said that Mr Cooke had fired a shot and that Proffie had chopped at him with a cutlass, which flew from his hand. He

confirmed his own role as an attempted peacemaker and added the detail that Mr Cooke had "pure blood on him".

[11] Detective Corporal Donovan Brown testified that, at about 1:10 on the morning of 17 May 2008, Carlos, Neville and Proffie had attended at the Annotto Bay Police Station and made a report to him. He observed that Proffie was bleeding from a wound to his right ankle, as also a bruise under his left eye. There was also a bite mark on his left arm (in cross-examination Corporal Brown accepted that the bite mark was on Proffie's right arm). He took Proffie to the Annotto Bay Hospital for treatment and there he saw Mr Cooke, who was previously known to him, being treated by a doctor. When informed of the report that Proffie had made, Mr Cooke said (after caution), "A rob him come fi rob mi and him chop mi."

[12] That was the case for the prosecution, whereupon, unsuccessful no case submissions having been made on behalf of the applicants, Mr Cooke elected to give sworn evidence, while Mr Bramwell chose to remain silent.

[13] On the night in question, Mr Cooke testified, he was on his way home, accompanied by his girlfriend Kadian, after paying a visit to his cousin. As he walked along the train line, with his girlfriend walking behind him, he saw a bright light shining in his face and said, "A who dat dung de soh a shine light pon mi?" He then heard a noise say, "Don't move sir", and next felt a hand grabbing on to him from behind. When he spun around, he saw Proffie, with whom he had grown up and attended the same school in Annotto Bay. There being no answer to his enquiry, "Weh dis fa, my

youth?", he felt "cold steel" in the back of his head and heard another voice behind him say, "Don't move." This man, when he saw him, was someone whose face was also known to him, although he did not know him by name. The man was armed with a gun, which Mr Cooke tried to take from him and, during the "wrestling" which ensued, he heard an explosion, which is when he recognised that a shot had been discharged from the gun. He then felt a chop, "pon my neck come 'round to my eye" and, spinning around again, saw Proffie coming at him with a cutlass. As Proffie continued to chop at him, Mr Cooke said, he put up his left hand defensively, receiving another injury as a result, and he fell to the ground. Proffie then came "down at" him, still armed with the cutlass and, as they resumed "wrestling", he bit Proffie's hand in an effort to get him to release the cutlass, which he did. As he (Mr Cooke) "cried out for murder and help", the other man came to Proffie's assistance and Proffie forcefully took his "chapareeta" from his hand and took away his wallet and his phone. As others then started to arrive on the scene, Proffie and the other man ran away, after which further explosions were heard.

[14] Mr Cooke told the court that he was then taken to the Annotto Bay Hospital, where his wound was stitched and he also saw and spoke to Corporal Brown. His hands were swabbed and he was in due course transferred to the Kingston Public Hospital. He was not armed with a gun; neither did he shoot anyone that night.

[15] As we have indicated, Mr Bramwell elected to remain silent and neither he nor Mr Cooke called any witnesses.

[16] In summing up the case, Campbell J regarded credibility and identification as the critical issues as regards the cases against Messrs Cooke and Bramwell respectively. He accordingly spent some time in his summation on the issues of discrepancies and inconsistencies on the one hand, and identification on the other. After a full and careful review of the evidence, supported by an appropriate ***Turnbull*** warning, Campbell J found both applicants guilty and sentenced them, as already indicated at paragraph [2] above.

[17] On behalf of Mr Cooke, Mr Hines sought and was granted leave to argue three supplemental grounds of appeal, as follows:

> "1. The learned Judge erred in that he failed to treat with the evidence of the applicant KIRKLAND COOKE that his hands were swabbed (see page 520 lines 14-18 of transcript) in that (a) there is no evidence that the swab was tested and consequently no result of the test, this in a situation where the applicant's evidence was that he had no gun and had not fired any shots and (b) these failures of the crown denied the applicant the opportunity of a fair trial as guaranteed under section 20(1) of the Jamaica [sic] Constitution as he was unable to put his full defence at the trial.
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> 2. The learned trial judge erred in that he failed to properly treat with the offence of wounding with intent and that the injury was a gunshot injury and that there was no medical evidence to corroborate and to ground the offence (a [sic] is required by law). He further erred in his stated belief that because the defence did not raise the issue, this changed or affected the sole duty of the Crown to prove all the ingredients of this offence and that stands in law without exception.
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> 3.The learned trial judge erred in that the Crown [sic] witnesses [sic] evidence was not trustworthy, (in particular

the evidence of Carlos Davis) and did not have the required credibility."

[18] On behalf of Mr Bramwell, Mr Wilson also sought and was granted leave to argue three supplemental grounds of appeal, which were as follows:

> "1. That the judge's conduct of the voir dire was inadequate to establish what is required by s.20 of the Child Care and Protection Act. If this requirement is not fully satisfied, then the evidence of **Carlos Davis** would be unsworn and therefore must be corroborated by some independent evidence implicating the Appellant [sic].
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> 2. That the inconsistencies and contradictions pregnant in evidence from [sic] Crown [sic] witnesses were not resolved by the learned trial judge in his summation, and as a result, his verdict did not comport with the evidence of each witness or of the 3 civilian witnesses combined.
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> 3. That the judge erred in law and in fact when he upheld a no-case submission with respect to the presence and/or involvement of Godfrey Powell (Warny) in the incident, but on evidence from the same witness, found Bramwell guilty."

[19] Mr Hines in due course abandoned ground one and concentrated his efforts on the remaining two grounds. On ground two, the submission was that, it being the responsibility of the prosecution to prove its case beyond a reasonable doubt, the learned trial judge ought to have had regard to the absence of any expert medical evidence to corroborate Proffie's evidence that he had received a gunshot injury to his foot. Mr Hines observed that in his summing up the trial judge seemed, on the one hand, to be indicating that medical evidence was needed to prove a gunshot injury, but,

on the other, to have shifted the burden of proof from the prosecution by suggesting that it might not be necessary in this case because "nobody denied it".

[20] On ground three, Mr Hines referred us to the evidence of Carlos, Proffie and Neville to make the point that, although they each gave different accounts of what happened on the night of 17 May 2008, the judge did not deal with the various discrepancies appropriately. These matters went to the credibility of the witnesses, which was the crucial issue in the case, and the judge was therefore obliged to give them proper consideration in the summing up.

[21] For Mr Bramwell, Mr Wilson also abandoned ground one, after it was pointed out to him by the court that the record showed Carlos to have been over 14 years of age at the time of the trial (he was born on 25 February 1995, and the trial commenced on 19 March 2009). In any event, the learned trial judge did in fact conduct a voir dire in this case and determined on that basis that Carlos was competent to give sworn evidence. From this, it followed that section 20 of the Child Care and Protection Act, which sets out the circumstances in which the evidence of a "child of tender years" (as defined in section 20(3)), giving evidence not under oath, may be received, had no relevance to the instant case. On ground two, Mr Wilson joined Mr Hines in the submission that Campbell J had failed to analyse the various discrepancies and inconsistencies so as to demonstrate the manner in which he had resolved them in finding the applicants guilty. And on ground three, Mr Wilson directed our attention to the evidence against Mr Powell, who had been discharged by the judge on a no case submission, and Mr

Bramwell, who had been found guilty by the judge, to make the point that these were inconsistent outcomes.

[22] The court did not find it necessary to hear from the Crown in response to Mr Hines' ground two. However, taking Mr Hines' ground three and Mr Wilson's ground two together, Miss Thompson for the Crown referred us to several passages from the learned trial judge's summing up in which the question of discrepancies and inconsistencies had been dealt with. She submitted that, while the judge did not enumerate the discrepancies separately, he nevertheless indicated how he resolved them. In any event, such differences as there were went to matters of detail only and did not detract from the fact that the witnesses all essentially spoke to the same event.

[23] As regards Mr Wilson's complaint of inconsistent verdicts in respect of Messrs Powell and Bramwell, Miss Thompson took us in detail through the evidence against each of them, to demonstrate that there was a basis for the judge's making of a distinction between them. In these circumstances, Miss Thompson submitted, there was no inconsistency in the verdicts.

[24] Mr Hines' complaint about the absence of expert medical evidence to support the charge of wounding in respect of the gunshot injury to Proffie can be shortly dealt with. Carlos' evidence was that he saw when Mr Cooke took out a gun and "shoot him in his foot" (referring to Proffie). Proffie's evidence was that, he having pushed him off, Mr Cooke "spin round and bus the gun...him bus a shot and it fly through me foot". After Proffie had made a report at the police station, he was taken to the hospital, where, he

said, "dem dress me foot". Although it was specifically suggested to Proffie by Mr Cooke's counsel, in cross-examination, that, "all I am saying, is not Kirkland Cooke shoot you", it was not suggested that Proffie had not been shot or that he had not received the injury which he described. In addition to Proffie's evidence, there was Neville's evidence that, after the incident, he had observed Proffie's foot and seen "where the shot hole go through the 'crepe' side here soh and go through the ankle", and further, that blood was coming from the hole in Proffie's foot. That evidence was also unchallenged.

[25] In these circumstances, it seems to us that the learned trial judge cannot be faulted for this comment:

> "...of some note is that they said they heard the guns being discharged and Mr 'Proffy', Mr Fairweather, he has said he was shot in his ankle, Mr Davis says that when he looked, he described what he saw there and although there was no doctor brought here to say that what he observed was a gunshot wound, nobody denied it. There was no contention raised before me, although it is the duty of the prosecution to prove all the counts of the ingredients [sic], that it was [not] a gunshot injury he received to his ankle. No contest [was] raised before me."

[26] In our view, the learned judge was fully entitled to conclude, as fact finder in this case, that, taking into account that it was the duty of the prosecution to prove all ingredients of the offence, Proffie had indeed sustained a wound in the sense required by law; that is, that the continuity of the skin had been broken. The judge was also

entitled to accept on the evidence before him, in our view, that the injury had been inflicted by a gun.

[27] In their grounds three and two respectively, both Messrs Hines and Wilson make essentially the same complaint, which is that the various discrepancies in the Crown's case were not adequately dealt with and/or resolved by the judge in his summing-up. There can be no doubt that "as in most criminal trials", as the learned trial judge himself put it, "you are going to have these inconsistencies, especially when the incident that we speak about would have happened last year". Thus, although Carlos placed Mr Bramwell on the scene, Neville did not. And, as Mr Wilson pointed out, Carlos' evidence also differed from that given by Proffie in respect of Mr Bramwell's role in the events of that night. In addition, Proffie's evidence was not free from challenges, inconsistencies between his evidence at trial and his earlier statement to the police (notably, as to who it was that had put a gun to his face) having been highlighted in cross-examination. Indeed, so inflamed was Proffie by the vigour with which he was cross-examined, that he exclaimed at one point, when asked to look at his police statement, "Me no haffi read no statement, me have me statement in a my head".

[28] There were also differences between the accounts of Carlos, Neville and Proffie as to how the last mentioned came to be shot by Mr Cooke, Carlos saying that it was, "when time him shoot, same time 'Proffie' chop him", while Proffie's evidence was that "A when mi run off, di man run mi dung and shoot me thru mi foot".

[29] Neville, for his part, had Mr Cooke turning in the direction of Proffie, with a gun in his hand and poised to fire, when Proffie first chopped at him with the cutlass. The cutlass appears to have hit Mr Cooke's hand holding the gun and "a shot fire when time the cutlass hit the gun". Mr Cooke then lifted his hand with the gun, as though to fire, when Proffie chopped at him again, catching him this time in the area of the jawbone on the right side of his face. Then followed a chase, with Mr Cooke trying to turn around, when Proffie chopped at him again and the cutlass flew out of his hand. Proffie then "grab up" Mr Cooke and they started to wrestle, at which point, Neville said, "now me hear another shot fire off again".

[30] There can be no doubt that, as Mr Hines submitted, these discrepancies and inconsistencies in the evidence went to the credibility of the witnesses for the prosecution and accordingly required careful consideration by the judge. Campbell J was not unaware of his responsibilities in this regard. On the question of inconsistencies, the judge asked himself whether they were an indication of "wicked invention", or that there was no "planning [or] rehearsal" by the witnesses of the evidence that they were to give beforehand.

[31] Thus, the judge continued –

> "...the question certainly in the first instance, it is primarily one of credibility because what the defence is saying, there are so many inconsistencies, so many contradictions, witnesses contradicting themselves...The court then...has to look extraordinarily clearly at those inconsistencies and contradictions to say whether, in fact, they are material or immaterial, serious and profound or not so serious, that the

> witnesses ought not to be believed on the points, or not to be believed at all.
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> Because in every criminal cases [sic] as I have indicated, you are going to have these contradictions and these inconsistencies and discrepancies. Although in this case there were several. Were they fundamental? Were they material or immaterial?"

[32] Against this background, the judge then undertook a detailed review of the evidence, including that given by Mr Cooke in his own defence. He rejected the latter, finding it "amazing on this version that the man who got shot was the man who had the gun". He went on to find as a fact that Proffie was injured "as a result of being fired on" by Messrs Cooke and Bramwell and, in the result, found both applicants guilty.

[33] It is a fact that, as Mr Wilson complained, the learned trial judge did not indicate in so many words the manner in which he resolved the various discrepancies and inconsistencies on the Crown's case, no explicit findings of fact having been made by him. Such findings are usually desirable and, as this court said in ***R v Junior Carey*** (SCCA No 25/1985, delivered 31 July 1986, page 8), "of inestimable value should an appeal be taken". However, it is also necessary to bear in mind this court's further observation in ***R v Horace Willock*** (SCCA No 76/1986, judgment delivered 15 May 1987, page 5), which was as follows:

> "...the absence of reasons or findings in the summation would not necessarily provide a basis for disturbing the verdict of the learned trial judge, who as the tribunal of fact, had the clear and distinct advantage of seeing and hearing the witnesses at the trial and of weighing and assessing the demeanour of the witnesses...Provided therefore, that on an examination of the printed record, there existed material

> evidence upon which there was a sufficient basis for the learned trial judge to come to the decision at which he arrived, there should be no reason for this court to interfere with the decision at which he arrived."

[34] In the instant case, certainly as regards the position of Mr Cooke, the issue of credibility between himself and Proffie was sharply drawn. It was entirely a matter for the trial judge, as the trier of fact, to determine which version should be accepted. In coming to a conclusion on this issue, the judge was obliged to consider the impact of the inconsistencies and discrepancies, whether they were immaterial or, as he put it, profound; to accept so much or reject so much of each witness' testimony as he thought fit; and, importantly, as Campbell J himself recognised, to have regard to the demeanour of the witnesses for the prosecution as well as the defence, whom he had had the opportunity of observing and assessing as they gave evidence. It is clear that he was particularly impressed by the witnesses for the prosecution, observing that they were "not men who was [sic] on any robbing venture, they had gone to crab bush". The judge considered that the contradictions and inconsistencies in the evidence of the witnesses "flowed in this intense moment where 'Proffy' clearly has made up his mind that he, armed with his machete, he is going to be defending himself". We cannot say that the judge was wrong in this assessment of the evidence.

[35] Mr Wilson's final ground (ground three) complained that the judge erred in, having upheld a no case submission in respect of the third defendant at trial, Mr Godfrey Powell, nevertheless found Mr Bramwell guilty on the same evidence. Mr Powell was the man identified by Carlos as 'Warny', who was his cousin and, on his

account, one of the men who came onto the scene after the struggle between Mr Cooke and Proffie had begun. Warny was the man who, Carlos testified, had "put di gun inna me father ches" and from whose hand he (Carlos) had "boxed" the gun. Asked for how long he had seen Warny's face, Carlos' response was that it was "[n]ot longer that half an hour", and that he had been able to see his face from a light at the gate of the yard as he came through it.

[36] When Proffie gave evidence, he identified Mr Bramwell as the man who had stuck a gun in his face. There was also a third man there, he said, whose name he did not know, never having spoken to him before, although he knew him "from long time because the whole a we use to go a school". This man he identified in court as Mr Powell. He saw 'Warny' that night, but he only got a look at his face by a "bulb light" for about 10 seconds when he passed him running. He had last seen him about two months before the incident. When Proffie was cross-examined, it turned out that in his statement to the police Mr Bramwell was the only other person apart from Mr Cooke whom he said was previously known to him. Although he said that he had known Mr Powell from school days, it appeared that Proffie, who had left school at age 15, was actually 12 years older than Mr Powell.

[37] Neville's evidence was that he did not know the man who pointed a gun in his face before that night, but he identified the man in court as Mr Powell. It appeared in cross-examination that the description that he had given to the police of the third man, the one who had stuck the gun in his face, did not match Mr Powell's actual appearance

[38] It is on this state of the evidence against Mr Powell that the learned trial judge acceded to the no case submission made on his behalf. The judge in his very brief reasons for dismissing the charges against Mr Powell expressed "some unease about the opportunities", in the light of the "very many areas of conflict, not only within the witness themselves [sic], individually, but...against each other".

[39] There were clearly questions surrounding the opportunity that all three witnesses had had to identify Mr Powell, Proffie's previous knowledge of him and the fact that his identification by both Proffie and Neville amounted to dock identification. The evidence of identification of Mr Bramwell, on the other hand, stood on an entirely different footing, as Miss Thompson pointed out in her careful and extremely helpful submissions. Carlos' evidence was that Mr Bramwell, although not known to him before, was one of Proffie's "long time fren dem" and that sometimes when he visited Proffie's yard he would see Mr Bramwell just leaving. On the night in question, he had been able to observe Mr Bramwell's face for about two minutes. In the case of Proffie, Mr Bramwell was known to him (and this was not challenged) for a "[w]hole heap of years...from school days"; he was able to observe him in good light ("...the moonlight and this hundred watt bulb...bright up the whole a weh we deh and from down a the bottom and you can see where them a come from"); and although he only saw his face for about two seconds, Mr Bramwell was actually right in front of him and had poked him in his eye with the gun.

[40] In these circumstances there was plainly a basis, in our view, for the learned trial judge to have made a distinction between the cases of Messrs Powell and Bramwell.

The latter having been called upon to answer the case against him, it was a matter for the judge's jury mind to consider whether the prosecution had discharged its burden of proof, and we cannot see any basis for disturbing his conclusion.

[41] It is for these reasons that we came to the decision to dismiss the applications for leave to appeal, all the grounds of appeal argued on behalf of the applicants having failed.