[2015] JMCA Crim 23

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 97/2012

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

KENRICK DAWKINS v R

Oswest Senior-Smith and Miss Ayana Royes instructed by Oswest Senior-Smith and Company for the applicant

Miss Keisha Prince for the Crown

22 June and 9 October 2015

BROOKS JA

[1] On 22 August 2012, the applicant, Mr Kenrick Dawkins, was convicted in the High Court Division of the Gun Court, being held in the parish of Saint Ann for the offences of illegal possession of a firearm and wounding with intent to cause grievous bodily harm. He was sentenced, on 30 August 2012, to 10 years imprisonment in respect of the illegal possession and 12 years imprisonment in respect of the wounding.

[2] Mr Dawkins' application for permission to appeal against the convictions and sentences were considered by a single judge of this court, who refused his application. He has renewed his application before the full court. As part of his submissions in

support of the renewed application, Mr Senior-Smith argued on Mr Dawkins' behalf that the prosecution's evidence, regarding an identification parade said to have been held in respect of Mr Dawkins, and the learned trial judge's treatment of the matter of the identification parade rendered the conviction unsafe. Learned counsel also submitted that the directions that the learned trial judge gave himself in respect of the defence of alibi were inadequate and that as a result the defence was not properly considered. In the circumstances, Mr Senior-Smith argued, the convictions should be quashed and the sentences set aside.

[3] Because of the view that we have taken of the application, only a brief summary of the respective cases of the Crown and Mr Dawkins will be outlined.

The Crown's case

[4] It was alleged that on 4 December 2011 at about 12:30 am, the virtual complainant, Mr E (hereinafter also called the complainant), was at his restaurant in Ocho Rios, Saint Ann with his girlfriend and business partner Miss J when a man carrying a gun came into the premises. The man was wearing a handkerchief covering the bottom half of his face. On seeing him, Miss J ran outside of the premises by way of the rear doorway and shut the door behind her, leaving the complainant and the gunman inside the restaurant. She and an employee braced the door to prevent the man from following her.

[5] The gunman then pointed the gun at the complainant's face and demanded money. A struggle ensued between the gunman and the complainant during which the

gunman pointed the gun at the complainant's abdomen and shot him to his left side causing a wound that bled. During the struggle, the handkerchief being worn by the gunman fell from his face and the complainant recognised the gunman as a person whom he knew before. After the shot was fired, the gunman ran out of the restaurant and escaped.

[6] The matter was reported to the police. About two months later, the complainant saw the assailant in Ocho Rios and informed the police of his whereabouts.

[7] The complainant testified that he later attended an identification parade at which he pointed out Mr Dawkins to be the assailant. The prosecution did not, however, adduce any evidence from any police officer as to the conduct of an identification parade in which Mr Dawkins was the suspect. The prosecutor informed the learned trial judge that he would not call the relevant officer as a witness.

The case for the defence

[8] Mr Dawkins, in his defence, gave an unsworn statement in which he denied committing the offences for which he was charged and raised the defence of alibi. He said that at the time of the commission of the offence he was at his home in Shaw Park, Ocho Rios. He said that he was told of the incident by his girlfriend. He said that people who knew him knew that he would not have committed such an offence.

[9] He called two witnesses in support of his defence. They each testified that they saw someone other than Mr Dawkins running away from the scene of the shooting.

The decision in the court below

[10] At the close of the trial, the learned trial judge pointedly addressed a number of issues in his summation and recognized at the outset what the defences were. This is demonstrated at page 138 at lines 14-20 of the transcript where he said:

> "The defence is simple one, I was not there, it was not me, and secondly, that it was someone else so the defence which is run is of two modes. One is an alibi in respect to [sic] the evidence of the accused himself and identification in respect to [sic] the two witnesses called by the accused."

[11] Having identified these defences and after making findings of fact as to the credibility of the witnesses, the learned trial judge accepted the evidence of the complainant as to the identity of the assailant.

Grounds of appeal

[12] Mr Senior-Smith argued, with leave, four supplemental grounds of appeal in support of this application:

1) The directions on the central issue of identification were insufficient and deficient, which divested Mr Dawkins of a fair trial.
2) The learned trial judge inadvertently misquoted the evidence thereby occasioning prejudice to Mr Dawkins.
3) The learned trial judge's directions on Mr Dawkins' defence of alibi were inadequate and amounted to a

non-direction resulting in inevitable prejudice to Mr Dawkins.

4) Mr Dawkins' defence was denigrated by a course of inductive reasoning by the learned trial judge.

Analysis

[11] Mr Senior-Smith argued each of those grounds with vigour. This analysis will, however, only be concerned with two of the issues raised. The first is the evidence concerning the identification parade and its consequences in the trial. The second is the alibi evidence. These issues will be considered separately.

a. The identification parade

[12] Two elements of the treatment of the evidence concerning the identification parade are significant. The first concerns the evidence which the prosecution sought to adduce about the parade. Mr E testified, in his evidence in chief, that he attended an identification parade and pointed out Mr Dawkins. It was, however, during cross-examination that Ms J testified that she also attended an identification parade and pointed out Mr Dawkins.

[13] The prosecutor not only did not seek to adduce any evidence through Ms J as to the holding of an identification parade, but also decided not to call the police officer who was in charge of the conduct of the parade. He seemed to have considered the police officer to be a "formal witness". The prosecutor informed the trial judge that he

had informed defence counsel of the intention not to call the police officer and that the defence counsel had "no difficulty" (page 76 of the transcript).

[14] It must be said that the prosecutor was in error in considering the police officer who conducted the identification parade, to be a "formal witness". The tribunal of fact, whether it be a jury or a judge sitting alone, must be convinced of the fairness of any identification parade on which an accused person was placed. The police officer who has conduct of the parade is an important witness in that regard. The failure to call the police officer in this case, was not a minor slip. It may be said, however, that the omission may have been ameliorated by the fact that defence counsel who appeared for Mr Dawkins at the trial, had also represented Mr Dawkins at the time that the parade was conducted. He had no objection to the prosecutor's decision not to call the relevant police officer.

[15] The second significant element is the learned trial judge's treatment of the evidence concerning the identification parade. During a submission that there was no case to answer, the learned trial judge proposed, and defence counsel accepted that it was appropriate to treat the identification by Ms J, as a dock identification. The transcript, at page 77 records their exchange thus:

> "HIS LORDSHIP: Instead of taking the first witness let's dispose of the second witness. We dispose of the second witness in that the evidence you have in respect of the second witness is basically a dock identification, yes.
>
> [DEFENCE COUNSEL]: Yes, M'Lord.
>
> HIS LORDSHIP: So we only concentrate on [Mr J], all right."

[DEFENCE COUNSEL]: Grateful M'Lord...."

[16] The learned trial judge found that there was a case to answer. Despite his earlier indication concerning Ms J's identification, the learned trial judge, in his summation, seemed to have used a different approach to that identification. Page 153 of the transcript reports him as saying:

> "...and although it has not been explored, [Ms J] did say that she identified him on an identification parade when asked by Defence Attorney."

The learned trial judge also said (at page 155 of the transcript):

> "[Ms J], she also pointed him out on an identification parade."

[17] Miss Prince for the Crown submitted that nothing flowed from the learned trial judge's reference at page 153 to Ms J's testimony. Learned counsel submitted that Mr Senior-Smith was asking this court to speculate as to what had occurred at the identification parade. She submitted that the identification parade forms (which were not tendered into evidence) confirmed that both Mr E and Ms J had pointed out Mr Dawkins at the respective parades at which they were the witnesses.

[18] Miss Prince is, with respect, not on good ground with this submission. She has not addressed the main point of complaint, which is the radical shift in position by the learned trial judge. This was a serious lapse by him. We are confident that it was a lapse and not as a result of any sinister motivation. Nonetheless, having lulled defence counsel into the view that Ms J's testimony would be treated as a dock identification, it

was inimical to Mr Dawkins' case for the learned trial judge to regard that testimony as if it were better than a dock identification. In light of the fact that he went on to find the witnesses as to the facts of the incident to be witnesses of truth, this court must be in some doubt as to the extent that the learned trial judge's conclusion of guilt was based on his misapprehension of the effect of Ms J's evidence.

[19] The doubt entertained by the court requires that the conviction be quashed. Before considering the consequence of that action, it is important to consider the issue of the alibi directions.

b. Alibi

[20] It is clear that the learned trial judge recognised at the beginning of his summation what the defences were. He, however, did not give himself any specific directions on the defence of alibi. Mr Senior-Smith complained that this was a material error in the summation. Learned counsel submitted that the learned trial judge failed to direct himself that even if he rejected Mr Dawkins' alibi he was obliged to return to assess the prosecution's case as sometimes false alibis can misguidedly be used to bolster genuine defences.

[21] Although Mr Senior-Smith's observation is correct as to the omission by the learned trial judge, the judge was not obliged to give himself that direction. This is because Mr Dawkins made an unsworn statement asserting that he was at his home at the time of the offence. He did not adduce any evidence to support his statement as to where he was at that time.

[22] It is important to note that a trial judge is only required to give a direction on the defence of alibi where there is evidence that the accused was at some other particular place or area at the time of the commission of the offence. Evidence which merely asserts that he was not at the place where the offence was committed does not raise the defence of alibi (see **Roberts and Wiltshire v R** SCCA Nos 37 and 38/2000 (delivered 15 November 2001)).

[23] It is also important to note that an unsworn statement as to presence at some other particular place or area, at the relevant time, does not, by itself constitute evidence which obliges the trial judge to give the direction on alibi. In **Mills, Mills, Mills and Mills v R** (1995) 46 WIR 240, the Privy Council considered a statement by this court that an alibi direction need not be given where there is no evidence of an alibi. An unsworn statement as to the accused's whereabouts at the time the offence was committed was not considered to be such evidence. Their Lordships said at pages 247-8:

> "In the present case the judge did not give [the standard recommended alibi] direction. However, he did direct the jury in the following terms:
>
> > 'Mr Arthur Mills and the two sons, Garfield and Julius, they say that we were not present. We were elsewhere. Alibi. Now, a person can't be in two places at one and the same time. Although they have raised the alibi, they don't have to prove the alibi. The prosecution must satisfy you that they were present, they were not, as Mr Mills said, at some lady's house talking, or as the boys said, in their house with their mother.'

> Counsel submitted that this direction was insufficient and that there was a material failure to direct the jury properly. The Court of Appeal had rejected a similar argument as misconceived. The Court of Appeal observed:
>
> > 'Where an accused makes an unsworn statement, no such directions [i.e. about the impact of the rejection of the alibi] can or should be given. The jury is told to accord to such statement such weight as they fully consider it deserves.'
>
> The last sentence reflects the guidance given by the Privy Council in *Director of Public Prosecutions v Walker* (1974) 21 WIR 406 at page 411. Counsel submitted that the Court of Appeal erred."

[24] At the end of their analysis of the principles raised in **DPP v Walker** (1974) 21 WIR 406, which was cited in the above extract, concerning the value of unsworn statements, their Lordships rejected "counsel's submissions regarding the judge's direction about the alibi defences put forward in the unsworn statements". Their Lordships made it clear, therefore, that there is no obligation on a trial judge to give the standard directions concerning an alibi if the accused does not give sworn testimony and does not call any witness to speak to an alibi.

[25] That approach, concerning unsworn statements which raised an alibi, was repeated in **Sheldon Brown v R** [2010] JMCA Crim 38, where the dictum in **Mills** was set out at paragraph [15]. The approach was, however, not followed in **Barrington Taylor v R** [2013] JMCA Crim 35, where the view was expressed that "where an alibi might be rejected due to inherent weaknesses, ordinarily there should be a warning

that a false alibi is not in itself proof that a defendant was not where the identifying witness placed him" (paragraph [33] of the judgment).

[26] Harris JA, who delivered the judgment of this court in **Taylor**, accepted that it was an omission by the trial judge in that case to have failed to mention that a false alibi could support a genuine defence. The learned judge of appeal held that the omission did not amount to a substantial miscarriage of justice. She did not, however, address the question of whether the unsworn statement affected the trial judge's obligation. It seems that she did not draw a distinction between sworn testimony and an unsworn statement in that case.

[27] The assessment by Harris JA, although very helpful in considering the juxtaposition of the prosecution's case as against a defence of alibi, cannot be held to be a departure from the ruling of their Lordships in **Mills**. The ruling in **Mills** must continue to be followed. Mr Senior-Smith's complaints concerning the alibi directions, or lack thereof, by the learned trial judge, cannot be accepted.

Whether a new trial should be ordered

[28] Where it is of the view that a conviction must be quashed, this court is empowered to order a new trial by section 14(2) of the Judicature (Appellate Jurisdiction) Act. The section states as follows:

> "Subject to the provisions of this Act the Court shall, if they allow an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial at such time and place as the Court may think fit."

[29] In deciding whether to order a new trial, the Judicial Committee of the Privy Council in **Reid v R** (1978) 27 WIR 254 identified the competing interests which should be considered. The headnote accurately sets out the reasoning and finding of the court. It states in part:

> "(ii) The interest of justice that is served by the power to order a new trial is the interest of the public that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing up to the jury.
>
> (iii) It is not in the interest of justice that the prosecution should be given another chance to cure evidential deficiencies in its case.
>
> (iv) Where the evidence against the accused was so strong that any reasonable jury if properly directed would have convicted the accused, prima facie the more appropriate course is to apply the proviso and dismiss the appeal.
>
> (v) Among the factors to be considered in determining whether or not to order a new trial are: (a) the seriousness and prevalence of the offence; (b) the expense and length of time involved in a fresh hearing; (c) the ordeal suffered by an accused person on trial; (d) the length of time that will have elapsed between the offence and the new trial; (e) the fact, if it is so, that evidence which tended to support the defence on the first trial would be available at the new trial; (f) the strength of the case presented by the prosecution, but this list is not exhaustive."

[30] Lord Diplock, in delivering the judgment of the Board, made it clear that the decision to order a new trial would depend on the circumstance of each case. He also stressed the duty placed on the prosecution to get it right the first time. He said at page 257:

> "...There are, of course, countervailing interests of justice which must also be taken into consideration. **The nature and strength of these will vary from case to case**. One of these is the observance of a basic principle that underlines the adversary system under which criminal cases are conducted in jurisdictions which follow the procedure of the common law: it is for the prosecution to prove the case against the accused. It is the prosecution's function, and not part of the functions of the court, to decide what evidence to adduce and what facts to elicit from the witnesses it decides to call....
>
> It would conflict with the basic principle that in every criminal trial it is for the prosecution to prove its case against the accused, if a new trial were ordered in cases where at the original trial the evidence which the prosecution had chosen to adduce was insufficient to justify a conviction by any reasonable jury which had been properly directed. In such a case **whether or not the jury's verdict of guilty was induced by some misdirection of the judge at the trial is immaterial; the governing reason why the verdict must be set aside is because the prosecution having chosen to bring the accused to trial has failed to adduce sufficient evidence to justify convicting him of the offence with which he has been charged. To order a new trial would be to give the prosecution a second chance to make good the evidential deficiencies in its case** – and, if a second chance, why not a third? To do so would, in their Lordships' view, amount to an error of principle in the exercise of the power under s 14 (2) of the Judicature (Appellate Jurisdiction) Act 1962." (Emphasis supplied)

[31] These considerations have been approved in a number of recent Privy Council cases such as **Nicholls v R** [2000] UKPC 52; (2000) 57 WIR 154, **Bennett and Another v R** [2001] UKPC 37; [2001] 5 LRC 665 and in judgments handed down by this court, such as **R v Sergeant** (2010) 78 WIR 410. These authorities also suggest that the weight to be attached to the factors stated in **Reid v R** depends on the particular facts of each individual case.

[32] In balancing the considerations stated in **Reid v R**, it must be acknowledged that Mr Dawkins has suffered by having the matter hanging over him for about four years. It must also be acknowledged that he has been in custody for the last three years. Mr Dawkins has, however, been charged with a serious offence which is very prevalent in our society. Care must be taken that persons charged with such offences are tried by a jury and are not acquitted as a result of a technical blunder by the judge. This point was reinforced by this court in the recently decided case of **Beres Douglas v R** [2015] JMCA Crim 20.

[33] There is, however, the failure of the prosecution to adduce the evidence of the conduct of the identification parade that the complainant states that he attended. In **Nicholls**, the Privy Council ruled that a retrial should not be ordered where it would give the prosecution an opportunity to fill gaps in the case that it presented in the previous case. Their Lordships said at page 163 of the West Indian Reports:

> "It is an error in principle to give the prosecution a second chance to make good deficiencies in its case; see *Reid v R* (1978) 27 WIR 254 at 258, per Lord Diplock. In the present case the failure of the prosecution to adduce expert evidence on the significance of the bullet wounds is an integral part of the reasoning of their lordships which justified the quashing of the conviction. It would be wrong to permit the prosecution through Dr Bascombe-Adams or another expert to make good this deficiency. And a new prosecution without such evidence would in all probability fail either at trial or on appeal to the Court of Appeal or to the Privy Council...."

[34] It may be said that in this case the prosecution may attempt to shore up its case against Mr Dawkins, were a new trial to be ordered, by adducing the evidence of the

police officer who conducted the parade. It is doubted that the aspect of the identification parade evidence should be seriously disadvantageous to Mr Dawkins. The fact is that he was represented by counsel at the identification parade and any attempt to improperly misrepresent the conduct of the parade could be challenged based on the evidence secured from that counsel.

[35] The other complaints raised by Mr Senior-Smith against the integrity of the conviction mostly turn on errors said to have been committed by the learned trial judge. He did, however, argue that there were serious discrepancies that existed. It may be said that nothing occurred in the trial of this case that has severely compromised the evidential integrity or the strength of the prosecution's case. It is true that this case depends solely on the identification evidence of the complainant but it is also true that he gave credible identification evidence in the trial. Consequently, after weighing all these factors, it seems that the scale has tipped towards ordering a new trial.

Summary and conclusion

[36] The learned trial judge's treatment of the identification parade evidence resulted in uncertainty as to the evidence on which he relied in arriving at his decision. He informed counsel that he would have approached the evidence by Ms J as if it were a dock identification. When he came to do his summation, he however, treated it quite differently. In the circumstances the trial was compromised, and the conviction cannot stand.

[37] In considering the consequence of quashing the conviction, it must be borne in mind that the trial of persons charged with serious crimes is necessary to improve and sustain public confidence in the justice system. Consequently, in the absence of significant evidential deficiencies in the prosecution's case and based on the fact that there has not been any substantial prejudice to the accused, the interests of justice demand that there be a new trial.

[38] Based on the above reasoning, the application for leave to appeal is granted, the hearing of the application is treated as the hearing of the appeal. The appeal is allowed, the convictions are quashed and the sentences set aside. In the interests of justice a new trial is ordered before a different judge of the High Court Division of the Gun Court.