[2013] JMCA Crim 36

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 126/2010

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

CAREY DURRANT v R

Dr Randolph Williams for the applicant

Miss Paula Llewelyn QC, Director of Public Prosecutions, Miss Patrice Hickson and Miss Kerry-Ann Gillies for the Crown

22 and 24 July 2013

ORAL JUDGMENT

BROOKS JA

[1] On 11 August 2008, Miss Colleen Kinear, her son, and the deceased Walter Hamilton were in Miss Kinear's bedroom at Sandshore District, Manchioneal in the parish of Portland. After seeing to bedtime activities for her children, sometime after 8:00 pm, she fell asleep. She was later awakened by Mr Hamilton, whom she described as a social friend. He drew her attention to a noise at her room door. Shortly thereafter, a man came into the room and attacked Mr Hamilton.

[2] She recognized the man to be the applicant, Mr Carey Durrant, who is the father of one of her children. She said that Mr Durrant pushed Mr Hamilton against a wall in the room and there the two struggled. During the struggle, Mr Durrant appeared to be thumping Mr Hamilton. Miss Kinear tried to intervene, attempting to pull Mr Durrant off Mr Hamilton but Mr Durrant pushed her away. When Mr Hamilton's resistance ceased, Mr Durrant turned his attention toward her. He attacked her, stabbing her in the chest. He then jumped on the bed that was in the room, knocked open her window and jumped through the resulting aperture.

[3] Miss Kinear realised that she had been stabbed. She saw Mr Hamilton on the ground bleeding, and then went to her sister's room, which is in the same house, for help. She received assistance and was taken to the hospital where she received treatment. She gave a report to the police while she was in hospital. Mr Hamilton, however, succumbed to his injuries.

[4] At about 2:00 am on 12 August 2008, scenes of crime officers went to Miss Kinear's house and observed the lighting conditions and other circumstances in her room. The officers reclosed the window as part of their attempt to recreate the lighting conditions in the room at the time of the attack.

[5] Mr Durrant was arrested on 18 September 2008. He was tried on an indictment for the offence of murder in the Circuit Court for the parish of Portland. His defence at the trial was a denial of the charge. He gave an unsworn statement in which he said that he did not go to Miss Kinear's home at anytime and that he did not stab anyone.

[6] The jury, by its verdict, rejected Mr Durrant's account and accepted Miss Kinear's. He was convicted on 2 December 2010 and was sentenced by the learned trial judge to serve imprisonment for life at hard labour. He was, however, ordered to serve not less than 25 years before being eligible for parole.

[7] He applied for leave to appeal against his conviction and sentence. His application was considered by a single judge of this court who refused him permission to appeal, but recommended that he be afforded legal aid assistance. Mr Durrant has renewed his application before the court and Dr Williams appeared on his behalf in that regard.

[8] The grounds of appeal which Mr Durrant had originally filed were headed as follows:

1. Unfair trial
2. Lack of evidence
3. Miscarriage of justice
4. Personnel [sic] vendetta

[9] Dr Williams, having reviewed these matters has conceded that the grounds of appeal are without merit. He did indicate that he had some concerns with the fact that the main witness for the prosecution, Miss Kinear, had first pointed out Mr Durrant at the preliminary enquiry. In those circumstances, he argued, that identification may be deemed a dock identification.

[10] Learned counsel conceded, however, that bearing in mind the relationship between Miss Kinear and Mr Durrant, the principle whereby an identification parade should be held only where it would serve a useful purpose (**Goldson and McGlashan v R** [2000] UKPC 9 (23 March 2000)), would apply. There would, therefore, be no point, Dr Williams agreed, in the learned trial judge addressing the jury on the issue of dock identification.

[11] In the instant case, Miss Kinear and Mr Durrant had lived as husband and wife for some four years before they parted company. There is no doubt in those circumstances, therefore, that an identification parade would have served absolutely no purpose. Indeed, it appears that she had given his name to the police at the time she gave her statement, while in the hospital.

[12] It is noted that at the trial much time was spent on the ambient lighting in Miss Kinear's bedroom at the time of the attack. The evidence of the scenes of crime officers was supportive of her evidence that the lighting would have allowed her to view the features of the attacker and to recognise the person if it were someone with whom she was familiar.

[13] It is noted that the learned trial judge, in addressing the jury on the issue of inconsistencies varied somewhat from the guidance given by the authorities, in that he gave his directions in the context of the central issue. He said at pages 298-299 of the transcript:

> "So when you come to address an inconsistency, for example, a witness not saying something on a previous occasion and saying something different on other occasion, you have to ask yourself the question, is this really important having regard to the central issue, or is it something that really is not important? Does this really go to the heart of the case or is this something I can safely overlook and put aside and say it is something relatively minor in the scheme of things. If it goes to the heart of the case, then of course, it would be open to you to say whether this witness is not reliable and this witness is lying when it comes to this important fact and it will be open for you to reject all that witness has to say. On the other hand, [if] it does not go to the heart of the case and it does not affect the central issue, then it will be open to you to regard it as unimportant, something light, something not serious and go on to consider and focus on what is the central issue in the case. I should point out as well, you are not required to accept everything a witness says, or to reject everything a witness says. If you find an inconsistency on [sic] part of the witness' testimony, it is open to you to accept some part of what a witness says and reject another part, you must also bear in mind what is the central issue in this case."

[14] This court, in the case of **R v Lenford Clarke** SCCA No 74/2004 (delivered on 29 July 2005), was somewhat critical of that method of approach. Smith JA, in delivering the judgment of the court, said in respect of this issue:

> "In our view restricting the consideration of inconsistencies to the so-called central issue is not helpful and may indeed be confusing to the jury.
>
> Invariably the so-called 'central issue' in a case involves many material issues. A witness might speak to one or more of these issues. Whether or not an inconsistency is material would, we venture to think, depend on the nature, degree and relevance of the inconsistency. Where, for example, credibility is in issue, discrepancies in respect of peripheral matters may be relevant and thus, we think, material. On the other hand a discrepancy or conflict may be in respect of

> a material issue but its degree de minimis and so insignificant that the discrepancy may properly be regarded as slight or immaterial."

[15] The departure by the learned trial judge, from that guidance, would not, however, have confused the jury in this case and would not have caused a miscarriage of justice.

[16] Having perused the documentation, and having heard from both Dr Williams and the learned Director of Public Prosecutions, for the Crown, we are satisfied that the learned trial judge properly directed the jury on the issues of identification and credibility. He placed those matters squarely before the jury for its consideration and the jury returned its verdict on those bases.

[17] Based on those findings, the application is refused and the sentence imposed must be reckoned as having commenced on 2 December 2010.