[2013] JMCA Crim 61

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 105/2012

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA

LEROY ANTHONY FEARON v R

Mrs Valerie Neita-Robinson and Ravil Golding for the applicant

Miss Paula Llewellyn QC Director of Public Prosecutions and Miss Kerri-Ann Gillies for the Crown

Harrington McDermott instructed by the Director of State Proceedings for the Attorney General

27 November and 19 December 2013

BROOKS JA

[1] On 28 August 2012 Mr Leroy Anthony Fearon was convicted on an indictment in the High Court Division of the Gun Court for the offences of illegal possession of firearm and shooting with intent to do grevious bodily harm. On 11 October, the learned judge who conducted the trial, sentenced Mr Fearon to serve three years imprisonment at hard labour in respect of the offence of illegal possession of firearm. In respect of the offence of shooting with intent, the learned judge stated that, because his hands were tied, he was obliged to impose a sentence of 15 years imprisonment at hard labour.

[2] The latter sentence was against the learned judge's own inclination. In passing sentence he candidly stated that if he had had the leeway, the sentence that he would have given "would have been nowhere near fifteen years". He was obliged to impose that sentence, however, because of the stipulation in section 20(2) of the Offences Against the Person Act, that a person convicted of shooting with intent to do grevious bodily harm should be liable to a term of imprisonment not being less than 15 years.

[3] Mr Fearon applied to this court for permission to appeal against his conviction and sentence. In respect of the conviction, he complained that the learned trial judge erred in finding that the evidence substantiated a charge of shooting with intent. In respect of the sentences, he contended that the statute requiring a minimum sentence was unconstitutional, as being so disproportionate to the circumstances of the case that it amounted to inhuman and degrading punishment, which is proscribed by section 13(6) of the Charter of Fundamental Rights and Freedoms in the Jamaican Constitution.

[4] We heard his application on 27 November 2013. It was argued by Mr Golding and was opposed by Miss Gillies on behalf of the Crown. We also received very helpful written submissions from Mr McDermott of the Attorney General's Chambers in respect of the constitutional point. After hearing the submissions we then ordered as follows:

a. The application for permission to appeal is allowed.

b. The hearing of the application is treated as the hearing of the appeal.

c. The appeal is allowed.

d. The conviction is quashed, the sentences are set aside and a judgment and verdict of acquittal entered.

At that time we promised to put our reasons in writing and now fulfill that promise.

The grounds of appeal in respect of the conviction

[5] Mr Fearon originally filed one ground of appeal against conviction. It stated:

> "The verdicts of guilty of illegal possession of firearm and shooting with intent are against the weight of the evidence."

On his behalf, Mr Golding sought and obtained permission to argue two supplemental grounds of appeal with regard to conviction. They were:

> "[The] Learned Trial Judge erred in law in finding that the evidence substantiated shooting with intent."

> "[The] Learned Trial Judge's finding that the virtual complainant was a witness of truth on whose testimony the Court could rely is not supported by the totality of the evidence."

[6] Because of the view that we have taken of this appeal, it will only be necessary to consider the original and the first of the supplemental grounds. These shall be considered together after an outline of the basic elements of the evidence that was tendered before the learned trial judge.

The factual background

[7] On 8 May 2011, at about 5:00 pm, the virtual complainant, Mr Owen Thomas, drove his motor car along the Half-Way-Tree Road, in the parish of Saint Andrew, in such a way that it collided with the motor car that Mr Fearon was driving. Both drivers briefly exited their vehicles and agreed to exchange particulars. Instead of getting his

documents, Mr Thomas went into his vehicle and drove away, heading north along Half-Way-Tree Road. Mr Fearon gave chase in his own motor vehicle.

[8] Not far away, Mr Thomas' progress was halted by a traffic light at the junction of Half-Way-Tree Road and Chelsea Avenue. Mr Fearon drove up and positioned his vehicle so as to block Mr Thomas from going forward. When the light changed to green, Mr Thomas reversed and went around Mr Fearon's vehicle, knocking it again in the process. He continued north along Half-Way-Tree Road with Mr Fearon driving behind.

[9] During this stage of the chase Mr Fearon, a licenced firearm holder, pulled his firearm and fired it. Mr Thomas turned left from Half-Way-Tree Road unto Grove Road with Mr Fearon in pursuit. They travelled along Grove Road in that manner until Mr Thomas crashed his car into another motor-car and eventually came to a halt against a utility pole. Mr Fearon drove past without stopping. He went to the Half-Way-Tree Police Station where he made a report. While he was there, Mr Thomas came there accompanied by police personnel. Mr Thomas pointed out Mr Fearon to the police. Mr Fearon handed over his firearm to the police and he was eventually arrested and charged for the offences for which he was convicted.

The evidence concerning the shooting

[10] Mr Fearon was indicted for the offence of illegal possession of firearm on the basis that he had used his licenced firearm to commit an offence, namely shooting with intent. It is critical, therefore, to examine the evidence concerning the shooting in

order to determine whether the prosecution had succeeded in establishing the offence of shooting with intent. That evidence is set out at four places in the transcript of Mr Thomas' evidence, two in the examination in chief and two in the cross-examination.

[11] The first relevant bit of evidence came when Mr Thomas who, after stating that he drove off the second time, testified that he looked in his rear view mirror and "saw the object [the firearm] come up" (page 10 of the transcript). Thereafter, this is what is recorded at page 12 of the transcript:

"Q:	Did you see somebody do something?
A:	Yes, sir.
HIS LORDSHIP:	Who you see do what?
A:	Mr. Fearon shoot after me.
HIS LORDSHIP:	Why do you say he shot at you.
A:	He shoot at the car actually."

The second extract appears at page 14. By then Mr Thomas had testified that he had seen a firearm in Mr Fearon's hand and had heard two explosions. The evidence is:

"Q:	This object resembling a firearm, which direction was it pointing?
A:	Directly at my car.
Q:	Directly at your car?
A:	Yes."

The third extract appears at page 27 of the transcript and is a record of a portion of the cross-examination of Mr Thomas. Counsel for Mr Fearon had suggested to Mr Thomas

that there was another person in Mr Thomas' vehicle who had pointed a shine object resembling a firearm at Mr Fearon. The following exchange then occurred:

> "MR MITCHELL: Suggesting that you, you are saying it didn't happen, suggesting to you when this passenger pointed the object, he is on Grove Road, points the object toward Fearon, it is at that time Mr. Fearon discharged his firearm at your vehicle, not at you, at your vehicle.
>
> HIS LORDSHIP: What is your answer?
>
> A: No, sir, that never happened.
>
> MR MITCHELL: No, what?
>
> A: That didn't happen, it was before I turned on to Grove Road."

The fourth extract is from page 28 of the transcript, still during the cross-examination:

> "MR MITCHELL: Suggest to you that at no time Mr. Fearon pointed any firearm at you.
>
> A. No time on Grove Road?
>
> Q. I am suggesting that at no time at all did Mr. Fearon point a firearm at you.
>
> HIS LORDSHIP: You are saying that Mr. Fearon didn't point any firearm at you?
>
> A: Not on Grove Road.
>
> HIS LORDSHIP: He didn't say anything about Grove Road.
>
> A: Yes, sir, he pointed a firearm at the car."

It appears from, at least the last exchange, that the learned trial judge appreciated the difference between the necessity for the prosecution to prove that Mr Fearon had

pointed a firearm at Mr Thomas. Mr Thomas, for his part sought to make a distinction between a pointing at the car and a pointing at him.

[12] The investigating officer testified that when he saw Mr Thomas' vehicle along Grove Road, he saw a hole in the left rear section of the vehicle. Later, when the vehicle was more closely examined, a bullet was retrieved from its trunk or boot. He said that when he received Mr Fearon's firearm from him, a spent shell was stuck in the ejection port. According to the officer's testimony, Mr Fearon told him that Mr Thomas was the passenger in that vehicle at the time of the shooting.

[13] In his testimony, Mr Fearon said that after Mr Thomas drove off a second time, he saw another man in the car with a shine object resembling a gun. He said that the other man pointed the object at him and he became frightened. He testified that out of fright, and with the intention of slowing down Mr Thomas' vehicle, he fired a shot at the left rear tyre of that vehicle. He said that he fired only one shot. He said that he did not point the firearm at anyone and did not intend to shoot any of the people in the car.

[14] An exchange with the prosecuting attorney during the course of closing submissions made it clear that the learned trial judge was also alive to the fact that the prosecution was obliged to prove a specific intent in order to establish its case. The prosecuting attorney, in speaking to the issue of intent, addressed the learned trial judge about the "likely consequences of [Mr Fearon's] action in [sic] regard to pointing

the firearm at the motor vehicle". It is in that context that the following appears at page 83 of the transcript:

"HIS LORDSHIP: You charged him on the indictment?

MR. WALCOLM: My Lord?

HIS LORDSHIP: He has [a] specific intent.

MR. WALCOLM: Yes, My Lord.

HIS LORDSHIP: Like the consequences don't come into that.

MR WALCOLM: My Lord.

HIS LORDSHIP: Not a matter of whether or not he was reckless.

MR. WALCOLM: Very well My Lord.

HIS LORDSHIP: You didn't charge him for being reckless, you charged him for having a specific intent.

MR. WALCOLM: Very well, My Lord. I am guided.

The issue of intent was, as the learned trial judge appreciated, as important to the prosecution's case as it was to Mr Fearon's defence. That issue is also important to the analysis of the ground of appeal concerning the conviction.

The summation

[15] In analysing the evidence, the learned trial judge rejected Mr Fearon's testimony. Mr Fearon had contradicted himself on the issues of whether or not he was angry at the time that he fired and whether or not he was upset when Mr Thomas had hit his car the second time. The learned judge also believed the investigating officer's testimony that

Mr Fearon had told him that Mr Thomas was not driving the vehicle at the relevant time. He accepted Mr Thomas as a witness of truth and accepted that he was alone in his vehicle at the time of the shooting.

[16] That rejection of Mr Fearon's tesimony, however, seems to have caused the learned trial judge to overlook the need for the prosecution to establish the elements of the offence, particularly the element of Mr Fearon's intent. The learned trial judge's omission seemed to have stemmed from the fact that he did not specifically remind himself of the burden and standard of proof required in criminal cases. He also did not remind himself that even if he rejected the evidence tendered by the defence, he was obliged to re-examine the prosecution's case to determine if it had succeeded in satisfying the requisite burden and standard. He did speak about going "back to the circumstances under which the shot was fired" and to "the circumstances of the case", but it is not clear that he meant a return to the prosecution's case.

[17] In addition to those omissions the learned trial judge erred, during his summation, in his recounting of the evidence concerning the shooting. He said at page 100 of the transcript:

> "…[Mr Thomas] said as he proceeded towards [sic] Half Way Tree, he observed that Mr. Fearon took from some part of the car or his body what appeared to be a firearm and pointed [it] **in his direction**. He said he heard two explosions and he accelerated away and then turned along Grove Road…" (Emphasis supplied)

[18] The learned trial judge also made an error in recounting the evidence concerning Mr Thomas' pointing out Mr Fearon to the police. Whereas, in that regard, Mr Thomas

had said at page 18 of the transcript, "…The person at the front desk asked me if I see the person that the shooting took place and I pointed him out", the learned trial judge said at page 101 of the transcript:

> "…[Mr Thomas] [said] when he went to Half Way Tree Police Station, he saw the accused man, Mr. Fearon, and indicated to the police officer that this was the man **who shot at him**."

It is true that the investigating officer did say in that context, "[Mr Thomas] say [sic] see di man de weh fire shot after mi in a mi car", but the learned trial judge was, quite properly, focussing on Mr Thomas' evidence in that context rather than the investigating officer's. His reference resulted, therefore, in a misquoting of the evidence.

Analysis

[19] By those errors, we find that the learned trial judge did not analyse the critical aspects of the prosecution's case, namely, the evidence concerning the shooting and that concerning Mr Fearon's intent. Had he done so he would have recognised that the prosecution had failed to adduce evidence of a shooting at Mr Thomas or circumstances in which the requisite intent could have been properly inferred.

[20] What the learned trial judge said in his summation in respect of those critical issues is recorded at pages 112-113 of the transcript:

> "Now, having so accepted Mr. Thomas and rejected Mr. Fearon's evidence as to whether or not a person was in the car who had what appeared to be a firearm, **I go back to the circumstances under which the shot was fired**. From the circumstances of the case, which Mr. Fearon eventually admitted, he was quite – he was angry because

> of what transpired and I think, understandably so. **In my findings, based on the evidence, and I draw the inference, it is as a result of his anger why he fired this shot. I reject what he said that he fired at the wheel and this shot was fired at the car to do injury to Mr. Thomas who had collided with his car twice and refused to stop to exchange particulars**. Having made these findings, therefore, I find that the accused man, Mr Fearon, did shoot at Mr. Thomas and the only inference that one could draw in those circumstances when the man fired the firearm at another person, is that he intended to cause him very serious or grievous bodily harm. I, therefore, find that the particulars of Count 2 had been made out." (Emphasis supplied)

Unfortunately, the learned trial judge did not state why he found that Mr Fearon had fired with the intent to do injury to Mr Thomas. Whereas anger would have prompted Mr Fearon to fire the shot, it requires a further consideration to conclude that the shot was fired at Mr Thomas and with the intent to do him serious bodily harm.

[21] In **R v Steane** [1947] 1 All ER 813, the need to prove a specific intent in cases such as the instant case, was highlighted. The headnote accurately summarises the point made by the English Court of Appeal in that case. It states, in part:

> "Where the essence or a necessary constituent of an offence is a particular intent, that intent must be proved by the Crown just as much as any other fact necessary to constitute the offence, and the burden of proving that intent remains throughout on the prosecution.
>
> If the prosecution prove an act the natural consequences of which would be a certain result and no evidence or explanation is given, then the jury may, on a proper direction, find that the accused is guilty of doing the act with the intent alleged, but if on the totality of the evidence there is room for more than one view as to the intent of the accused, the jury should be directed that it is for the prosecution to prove the intent to the jury's satisfaction, and if, on a review of the whole evidence, they either think that

> the intent did not exist or are left in doubt as to the intent, the accused is entitled to be acquitted."

A similar point was made in **R v Belfon** [1976] 3 All ER 46 where the English Court of Appeal, in dealing with a case of wounding with intent stressed that recklessness as to the result of an action did not amount to the necessary intent to prove that offence.

[22] We find that Mr Golding is correct in his submission that for the prosecution to have properly succeeded in the circumstances of this case, it ought to have adduced evidence that, when the shot was fired, it was "a virtual certainty or at least highly probable that [Mr Thomas] would have been shot or suffered injury". The evidence in respect of the shooting did not achieve that standard.

[23] Cases of shooting at persons, especially police officers, while they are inside motor vehicles are not unusual. In the vast majority of those cases, the circumstances are such that there is no doubt that the person firing, intended to hit the occupant or occupants. In those cases also, as was pointed out in **R v Steane**, "no evidence or explanation is given", for the shooting. In the instant case, however, the situation is very different. It is not without significance that Mr Fearon was travelling behind Mr Thomas' vehicle. Mr Thomas' evidence is that it was through his rear view mirror that he "saw the object [the firearm] come up" (page 10 of the transcript). He was driving at the time and so he was not able to see the firearm properly. He said at page 19 in that regard:

> "I glimpsed it because I was driving so I glimpsed it, I had to be driving, I don't directly look at it, I glimpsed it."

It is perhaps, by reason of that "glimpse", that Mr Thomas corrected himself to say that Mr Fearon had fired at the car and not at him.

[24] Mr Thomas' testimony is that Mr Fearon was about 15 to 20 yards away from him at the time of the explosions. When he pointed out the distance, it was estimated as being 30 feet. The relative position of the cars, the "glimpse" and the distance, when all taken into account, do not support an inference that Mr Fearon must have fired at Mr Thomas with intent to do him grievous bodily harm. The learned trial judge, it appears, drew that inference despite the fact that there was no evidence to that effect or evidence of circumstances that serious gunshot injury was, at least, highly probable, from Mr Fearon's firing of his weapon. In this regard, we find that the learned trial judge erred.

[25] It is for those reasons that we found that the conviction was flawed and should be set aside. Having so found, it was unnecessary to have analysed the submissions concerning the statutory minimum sentence.

[26] We, nonetheless, wish to bring it to the attention of the executive and the legislature that the Attorney General, in his submissions through Mr McDermott, has concerns about the constitutionality of the minimum sentence in this area. Mr McDermott submitted that the application of the sentence was not generally outrageous to ordinary standards of decency. He, however, accepted that in the circumstances of this particular case, the sentence may be said to be disproportionate to the circumstances of the alleged offence and the particular offender.

[27] It is not inconceivable, however, that other licensed firearm holders may, in an uncharacteristic fit of rage, commit an offence of shooting at, or even wounding, another person. The spectre of a mandatory minimum sentence of 15 years imprisonment on such a person, who, more than likely, as a licensed firearm holder, would be a person with excellent antecedents, is very likely to have at least two effects. Firstly, it is likely to increase the burden on the courts in terms of the number of cases to be tried, as such a sentence dissuades pleas of guilty. Secondly, in the event of a conviction it is likely that there would be a constitutional challenge to that sentence. It may, therefore, be time for the legislature to have a second look at that provision.

Conclusion

[28] Although the learned trial judge rejected Mr Fearon's sworn account of the events leading to his discharge of his licenced firearm, he was obliged before coming to his decision to examine the prosecution's case to determine whether it had adduced evidence to establish the elements of the offences that were charged. He erred in failing to do so. Mr Thomas, having said that Mr Fearon fired at the car, thereby drawing a distinction to a shooting at him, did not satisfy a critical element of the count on the indictment charging Mr Fearon with shooting at Mr Thomas with intent to do him grievous bodily harm. Such a shooting could not have reasonably been inferred in the circumstances of the case. Mr Fearon, not having been proved to have committed that offence, could not thereafter, as a licensed firearm holder, have been convicted for illegal possession of a firearm. Both counts on the indictment would, therefore, fail.