[2024] JMCA Crim 31

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE DUNBAR GREEN JA

SUPREME COURT CRIMINAL APPEAL NO COA2021CR00038

REVALIENO GUNTER v R

Leroy Equiano for the appellant

Jeremy Taylor KC and Ms Kathrina Watson for the Crown

6, 9 June 2023 and 27 September 2024

DUNBAR GREEN JA

Introduction

[1] On 3 May 2021, the appellant was convicted by Sykes J (as he then was) ('the learned trial judge'), in the High Court Division of the Gun Court, for the offences of illegal possession of firearm and shooting with intent (counts one and three in the indictment). He was acquitted on count two.

[2] On 27 May 2021, the learned trial judge sentenced the appellant to 12 years' imprisonment for illegal possession of firearm, and 15 years' imprisonment for shooting with intent. The sentences were ordered to run concurrently.

[3] On 26 May 2022, a single judge of this court granted an extension of time within which to file an appeal and leave to appeal conviction. Among the reasons for granting leave were that the learned trial judge did not warn himself in the way this court has come to expect of trial judges, did not speak to the issue of jurisdiction or to the nuances of the effect of an unsworn statement and failed to specifically speak to the fact that each offence should be separately considered.

[4] On 6 and 9 June 2023, we heard the appeal and made the following orders:

> "(i) The appeal against conviction is dismissed.
>
> (ii) The convictions are affirmed.
>
> (iii) The sentences are to be reckoned as having commenced on 27 May 2021, the date on which they were imposed."

[5] We promised to provide written reasons and do so now.

Background

The prosecution's case

[6] On Friday, 10 November 2017, at about 2:15 pm, a party of policemen went to a point along the Clarendon Park main road in the parish of Clarendon, acting on information about a particular motorcar ('the motorcar'). Detective Constable Leonard Ramsay, Constable Jermaine Evans, Detective Inspector Marvin Brooks, Deputy Superintendent Garfield Taylor, and Constable Odaine Provost were among the members of the party. The policemen observed the motorcar approaching, headed in the direction of May Pen. The driver was signalled to stop, and he complied. A man, wearing a white merino and a pair of jeans pants, was seen exiting the rear of the motorcar armed with a chrome-coloured or silver-looking revolver. He fired gunshots in the direction of Constables Leonard Ramsay and Odaine Provost who were standing close together on the right side of the roadway in the direction of May Pen. The policemen were discrepant as to whether the shots were fired at the time the man was exiting or after he had exited the right rear door of the motorcar.

[7] The policemen returned gunfire, and the man quickly re-entered the motorcar. When the shooting ceased, the appellant (attired in a white merino and jeans pants), the appellant's girlfriend and the driver came out of the motorcar. It was observed that the appellant had been shot in the back of his right leg and the driver in his back, shoulder and right leg.

[8] Detective Inspector Marvin Brooks searched the motorcar and found a chrome-coloured .357 Magnum firearm on the floor in the right rear section. Both the driver and the appellant accused each other of having been in possession of it.

[9] At the May Pen Police Station, Constables Ramsay and Evans pointed out the appellant to Sergeant Dennis Biggs, the investigating officer, as the person who had fired shots when the motorcar came to a stop. The appellant was cautioned, and he made no statement.

The appellant's case

[10] The appellant gave an unsworn statement from the dock. He denied having been in possession of a firearm and firing at the police. His explanation of the incident was that he and his girlfriend were travelling in a taxi which was stopped by the police. As he put out his right foot, to exit the taxi, gunshots were heard. He went back inside the taxi, but, this time, sat in the front with his girlfriend. When the firing stopped, he exited the taxi.

[11] He indicated to the learned trial judge that the taxi driver had pleaded guilty to the charges of illegal possession of firearm and illegal possession of ammunition.

The learned trial judge's decision

[12] As indicated above, the learned trial judge accepted the testimonies of the Crown witnesses as regards the offences of illegal possession of firearm and shooting with intent (counts 1 and 3) but found the evidence insufficient to support the charge for illegal possession of ammunition (count 2).

The appeal

[13] At the commencement of the hearing of the appeal, counsel for the appellant, Mr Equiano, sought and was granted permission to abandon the original grounds of appeal and argue, instead, the following three supplemental grounds:

"i. The Learned Trial Judge erred in his analysis of the evidence as to whether the Appellant exited the motorcar or was about to exit the motorcar. The learned judge found that this discrepancy for facts [sic] on the Crown's case did not matter. This was the most essential element of the Crown's case and required a determination as to the possession [sic] of the Appellant if he was to have assault [sic] the police officers and as to how the Appellant was injured.

ii. The Appellant's unsworn statement was his account of the event. The Learned Trial judge gave scant regard to this evidence and failed to analyse and contrast it with evidence of the Crown witness as to whether the narrative of the Crown witnesses is inherently incredible. This botched analysis deprived the Appellant of a fair trial.

iii. The Learned Trial Judge did not demonstrate in his summation that each offence was separately considered. These become even more important on the fact that a firearm was found in the motor vehicle and another person had accepted responsibility and the effect of this fact on each count of the indictment. This failure on the part of the Learned trial judge deprived the Appellant of a fair trial."

Ground i: whether the learned trial judge erred in his analysis of the evidence as to whether the appellant exited the motorcar or was about to exit the motorcar, and was wrong in his conclusion that the discrepancy on the Crown's case, in this regard, did not matter

Summary of submissions

For the appellant

[14] Mr Equiano took issue with the learned trial judge's finding that it was insignificant whether the appellant had alighted the motorcar or had only attempted to do so. He submitted that it was the most essential element of the Crown's case and was critical to determining whether the incident could have happened in the manner purported by the policemen, and explained how the appellant had been injured. Counsel also faulted the learned trial judge's conclusion that the Crown witnesses were unified in their evidence that the appellant had only attempted to exit the motorcar. This, he submitted, was not supported by the evidence since Constable Ramsay testified that the appellant had

completely alighted the vehicle when he fired, whilst Constable Evans and Inspector Brooks testified that he had only attempted to do so.

[15] That erroneous conclusion, counsel contended, meant that the learned trial judge must have rejected Constable Ramsay's evidence as to how the alleged assault had taken place, and given that neither Constable Evans nor Detective Inspector Brooks gave any evidence that the appellant fired shots at Constables Ramsay and Provost, there was no evidentiary support for the offence of shooting with intent. Counsel further argued that the learned trial judge misrepresented the evidence when he stated, in his findings of fact, that the firearm was pointed in the direction of Constable Evans.

[16] Relying on **R v Joseph Lao** (1973) 12 JLR 1238, counsel submitted that these errors were sufficiently material to deprive the appellant of a fair trial.

For the respondent

[17] King's Counsel, Mr Taylor, appearing for the Crown, submitted that the appeal turned essentially on the question of how the incident unfolded and the attendant issues of credibility and reliability of the witnesses for the Crown. He maintained that these were matters strictly within the purview of the learned trial judge, as the tribunal of fact. Consequently, King's Counsel argued, this court should be reluctant to disturb the findings of fact unless it is shown that the learned trial judge misdirected himself on facts or arrived at conclusions which were not supported by the evidence. **Watt v Thomas** [1947] AC 484, 487-488; **Everett Rodney v Regina** [2013] JMCA Crim 1; **Dodrick Henry v Regina** [2013] JMCA Crim 2; and **Queen v Crawford** [2015] UKPC 44 were relied on.

[18] It was also contended that there was ample reliable evidence and a significant degree of consistency among the prosecution's witnesses as to fact. In the main, the learned trial judge took account of relevant matters and was correct in his assessment of the evidence and conclusions. Even had he been incorrect that the witnesses were unified in their evidence as to the appellant's position when he fired at the policemen, or had put

Constable Ramsay in the class of witnesses who said the appellant attempted to exit the car, that error did not go to the root of the prosecution's case, and was not so significant as to give rise to reasonable doubt. It would not have undermined the learned trial judge's conclusion as to guilt. King's Counsel submitted that it was the firing of the gun, not the shooter's position, that was critical, as the learned trial judge had correctly found.

Discussion

The appellate court's approach to the determination of questions of fact by a trial judge

[19] It is clear from his summing up that the learned trial judge considered the main issue to be credibility, including conflicting evidence on the Crown's case as to the position of the appellant when he allegedly fired at the police. This was a question of fact for his determination.

[20] It is well established that this court should be reluctant to interfere with a trial judge's determination on the facts, unless the judge acted on a wrong principle of law, misapprehended the evidence or facts or took into account irrelevant matters (see **Watt v Thomas**, at pages 487-488; **Everett Rodney v R** (citing **Joseph Lao v R**), para. [22]; and **R v Sealy** [2016] 88 WIR 70, at para. [46]).

[21] In **Royes v Campbell and Another** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 133/2002, judgment delivered 3 November 2005, page 18, Smith JA put it this way: "It is now an established principle that in cases in which the Court is asked to reverse a judge's findings of fact, which depend upon his view of the credibility of the witnesses, the Court will only do so if satisfied that the judge was 'plainly wrong'".

[22] We are mindful that there is a qualitative difference between a trial judge seeing and hearing from witnesses directly and an appellate' court's impression of those facts derived from transcription. This is the essence of the Privy Council's guidance in **Queen v Crawford** [2015] UKPC, at para. 9: "an appellate court should recognise the very real disadvantage under which it necessarily operates when considering…a finding only on

paper". The caution is underscored in the following principle from **Benmax v Austin Motor Co Ltd** [1955] AC 370 at 375, which the Board quoted with approval:

> "…it is only in rare cases that an appeal court could be satisfied that the trial judge has reached a wrong decision about the credibility of a witness…Evidence may read well in print but may be rightly discounted by the trial judge or, on the other hand, he may rightly attach importance to evidence which reads badly in print…"

How the learned trial judge dealt with the evidence about the appellant's position

[23] At page 5, line 21 to page 6, line 5 of the transcript, Constable Ramsay is reported to have said:

> "When the vehicle stopped, I, along with Constable Odaine Provost, approached that vehicle from the right of that vehicle when a man dressed in white merino, blue jeans pants **came out of the vehicle** [emphasis added], brandished a firearm, pointed it in our direction, and -- then I heard two loud explosions. In fear of my life, I pointed my firearm and fired three rounds in the direction from where the gunman was."

[24] At page 9, lines 3-7, he continued: "I approached – approaching the vehicle, and the man with the gun came out from the back passenger side of the vehicle – back right passenger side..." And at page 11, line 10, he stated, "**I saw his whole body. He came out of the car**" (emphasis added).

[25] Under cross-examination, Constable Ramsay also stated that he saw the gun in the man's hand when his full body was out of the car and that he heard the explosion two to three seconds afterwards. The estimated distance between them was 15 feet.

[26] Conversely, Constable Evans, who was on the side of the road opposite to where Constables Ramsay and Provost were, said at page 32, line 5 to page 34 line 8 of the transcript:

> "By the time the vehicle stopped I was at the rear left of that motor vehicle...In an attempt to open the rear left door, after

> the vehicle stopped I heard the other door - a door from the other side of that said motorcar opened ...the rear right hand side...I could see the other door open, on the other side...I saw a man dressed in a white merino, a chrome-looking revolver in hand...Constables L Ramsay and O Provost were standing on the other side of the vehicle... And the man with a chrome gun in hand - revolver in his hand - **attempted to exit the motor vehicle** [emphasis added] and fired two shots in the process.... In a bid to save my colleagues' lives ... I discharged one round from my service pistol, in the direction of the man with the revolver in hand...I heard other explosions and took cover."

[27] When asked if the man had exited the motorcar, Constable Evans answered, "No, he did not".

[28] At page 56, line 11 to page 57 line 14, Detective Inspector Brooks, who was also on the opposite side of the road, testified as follows:

> "I was positioned on the left side of the road. The vehicle passed me…The driver stopped the vehicle and immediately after I saw the right rear door ...opened, and the gentleman in the dock…**attempted to come from the door with a firearm in his hand** [emphasis added]...I was ...[by] estimation about fifteen to twenty feet away from where the vehicle came to a complete stop.... I heard explosions, gunshots fired...I took cover with [sic] by crouching..."

[29] However, at page 58, line 7, he continued: "**I saw the accused man exit the door with a firearm in his hand.**.." (emphasis added). But, at page 64, line 21, he went back to his original position: "…The **man attempted to exit** the vehicle with the firearm in his hand..." (emphasis added). At page 64, line 25 to page 65, line 1, when asked by the prosecutor if the man exited the motorcar, his response was, "Not entirely".

[30] The appellant's statement from the dock was more in line with Constable Evans' account that he had only attempted to exit the motorcar. At page 90, lines 2-8 of the transcript, the appellant stated that he was about to exit the motorcar when explosions were heard, and he "**put back [his] foot inside the car** (emphasis added)."

[31] The learned trial judge treated with the conflict on the Crown's case in this way. At page 104, lines 12 – 19 of the transcript, he said:

> "But he [referring to Constable Evans] said he heard and saw what was happening, but I must say that in the overall context of this case nothing of great significance turns on whether he saw the door opened [sic] or heard the door opened [sic]. The critical thing is whether or not he happened to open the left rear door, and did he see the things that he said he saw, and the man with the chrome gun..."

[32] At page 107, lines 5-11, he said:

> "So the differences here then between Mr Evans and Mr Ramsay is [sic] no in the presence or absence of guns, but whether or not Mr Evans [evidently meaning the appellant] actually came out of the vehicle and then fired. That was Mr Ramsay's account or is it that he was attempting to get out of the vehicle and then he fired".

[33] Then, at page 110, lines 25 through to page 111, line 6, the learned trial judge made this statement:

> "Now, as to whether he [the appellant] **came completely out of the car, as Mr Ramsay suggested, or attempting to come out of the car, as Mr Evans testified**, **in my view that difference is not significant** [emphasis added]. It is the kind of differences between the police officers that one expects in cases of this nature."

[34] Continuing at page 112, lines 6-13, the learned trial judge sought to explain what he meant by that remark:

> "So, the question really is, at the end of the day, was he shooting at the police? That is the critical question, as alleged by the Crown. Or is it a case where the police being in this heightened sense of anticipation, having regard to the information that they received, as the door opened, fired the firearm. That was in the context of the case."

[35] The learned trial judge then referenced the evidence of Detective Inspector Brooks as to whether the appellant had exited the car, and made the following finding, at page 126, lines 1-14 of the transcript:

> "So, what do I make of all this? One, I take note of the differences in the police officers' report, and these differences now relate largely or more exclusively to whether Mr Gunter came out of the vehicle completely, or he attempted to come out of the vehicle, **and they seemed to be unified there was an attempt, not a full exit**; he had this firearm. That's what Mr Ramsay is saying. This is what Mr Brooks is saying. And the police officer who said he went on the left, that is Mr Evans, he is saying that the man attempted to come out of the vehicle, and he saw the firearm when he opened the left rear." (Emphasis added)

The learned trial judge's conclusion contrasted with his earlier accurate articulation of the difference in the police witnesses' accounts, including at page 123, lines 16-18 of the transcript, where he said: "So we have Mr Brooks and Mr Evans speaking to the attempt, and Mr Ramsay is saying that it is not an attempt".

[36] In the circumstances, we accept Mr Equiano's submission that the learned trial judge was plainly in error when he said that the police witnesses "seemed to be unified there was an attempt, not a full exit" since that statement was not supported by the evidence. Constable Ramsay was unequivocal in saying that he saw the appellant exit the motorcar fully before he fired at the police. Constable Evans, by contrast, said that the appellant had only attempted to exit, and Detective Inspector Brooks equivocated.

[37] However, as the authorities make plain, the critical question is the effect of the error; specifically, whether the erroneous conclusion amounted to a miscarriage of justice. The test is whether there would have been a verdict of not guilty had the misstatement not been made or the wrong conclusion arrived at. In **R v Wavel Richardson, Michael Williams o/c Everton Simpson** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 240 and 241/2002, judgment delivered 8 November 2006, at page 7, the test was stated in this way: "a mis-statement of the

evidence or a misdirection as to the effect of the evidence must be such as to make it reasonably probable that the jury would not have returned a verdict of guilty if there had been no misstatement" (see also **Stafford and Carter v The State** [1998] 53 WIR pages 422-423, applying **Woolmington v Director of Public Prosecutions** [1935] AC 462, 482). The test applies equally in bench trials.

[38] It is also well settled that the error must be of sufficient materiality to affect the tribunal's decision and undermine its conclusion (see for example, **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21). Only factual errors that are "substantially material" will result in an overturning of a conviction. In **Michael Reid v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 113/2007, judgment delivered 3 April 2009, para. 44 (v), Morrison JA (as he then was) gave the following guidance:

> "The focus by this court in every case must be on the impact which the errors... have had on the trial and verdict. Regard must be had to the issues and the other evidence in the case and the test ultimately must always be whether the jury, properly directed, would inevitably or without doubt would have convicted..."

[39] We note that having arrived at the erroneous conclusion, the learned trial judge went on to meticulously recount the evidence, again noting the discrepancy and indicating that it was not significant to the central issue of whether the appellant brandished a firearm and shot at the police constables. At page 127, lines 8-19 of the transcript, he summarised his position thus:

> "I am satisfied, so that I feel sure, that the firearm recovered by the police after the shooting subsided was the firearm in the hands of Mr Gunter. That firearm was pointed in the direction of Constable Leonard Ramsay and Constable Jermaine Evans [sic]; the differences in the police's evidence as to whether full exit, entry, exit, partial exit, understandably the circumstances, those differences are not sufficient, in my view, for me to say that this was an entirely unreliable account

> being given by the police officers. In fact, it is not unusual in cases like this for witnesses to differ from the fundamentals of the story had not changed and the details, variation, yes, but not sufficient for me to say that this is the product of concoction."

The reasoning here makes it patently clear that the erroneous conclusion was not a significant factor in the learned trial judge's ultimate finding about the guilt or innocence of the appellant.

[40] The learned trial judge's approach to the evidence about the appellant's position, when he allegedly fired at the police, did not sit well with Mr Equiano. Counsel's primary submission was that it was critical to the Crown's case whether the appellant was purportedly out of the motorcar or had only attempted to get out when he allegedly fired shots at the police, and hence the question, posed by him, in his submissions: if the appellant was attempting to exit the motorcar at what point would he have been able to point a firearm at the officers who were approaching from the rear right-hand side of the motorcar?

[41] Counsel's question seemed to have been predicated on the view that an assailant's entire body had to be outside a motorcar for him to shoot at persons approaching from the rear of the motorcar. However, such a conclusion, we believe, was entirely for the tribunal of fact in the instant case, based on the entirety of the evidence and the issues to be decided. Suffice it to say, from our reading of the evidence, neither of the two police witnesses who spoke to an attempt, explained precisely what was meant by that description of the appellant's action. They spoke to the door of the motorcar being opened by the appellant, seeing him with a gun and hearing explosions. Their evidence suggested that the firing took place after the door of the motorcar was opened. Significantly, the appellant said, in his unsworn statement, that he had placed his right foot outside of the car and then withdrew it. The injury to the appellant's right foot was consistent with that body part being outside the motorcar proximate to the police firing. There was also evidence that the gun was found in the vicinity of where the appellant had originally been positioned in the right rear seat of the motorcar.

[42] These aspects of the evidence were expressly considered by the learned trial judge, who seemed to have accepted that the appellant was seen at the door of the motorcar where he was capable of firing at the police.

[43] In assessing the evidence, the learned trial judge was entitled to accept or reject the whole or any aspect of it, depending on whether he found that the particular witness was credible and his evidence reliable, and to draw reasonable inferences from the evidence accepted. This court will, therefore, not speculate about issues of facts that were the remit of the learned trial judge. The fact that the appellant's unsworn statement aligned with one aspect of the prosecution's case - that he only attempted to exit the motor car - was not found by the learned trial judge to be conclusive of guilt or innocence, and that was a finding he was entitled to make.

[44] Although the learned trial judge did not expressly give himself the standard direction on how to approach the discrepancy, it was clear from his reasoning that he had an appreciation of what the direction entails, including making up his mind about the materiality of the discrepancy, and deciding whether, despite it, the prosecution had proved its case to the requisite standard. In his analysis, he highlighted the discrepancy and then dismissed it as being insignificant. Based on the evidence, we cannot say the learned trial judge was plainly wrong in making that determination. Further, having taken that approach, there was no need to expressly accept or reject the evidence of any of the police witnesses as regards whether the appellant had exited or only attempted to exit the motorcar. In fact, he expressly rejected that kind of analysis. We, therefore, do not accept Mr Equiano's submission that the learned trial judge did not demonstrate how he treated with the discrepancy on the prosecution's case about how the shooter was positioned.

[45] On the other hand, we accept King's Counsel's submission that there was ample and convincing evidence, with a significant degree of consistency, on which the learned

trial judge could properly find that the prosecution had proved its case. This included agreement on both sides (prosecution and defence) that, at the very least, a part of the appellant's body was outside the motorcar, proximate to when the shots were allegedly fired at the police. In the circumstances, we cannot say that but for the error, the appellant would have been acquitted.

The misstatement of the evidence regarding the person at whom the firearm was allegedly pointed

[46] In agreement with Mr Equiano, we note that neither Constable Evans nor anyone else gave evidence that the firearm was pointed at him as the learned trial judge recounted. There was no evidence that the appellant fired in the direction of Constable Evans. That constable was not in the line of fire. Constable Evans' evidence was that he opened the left rear door when the appellant attempted to leave through the right rear door, he saw a firearm in the hand of the appellant, heard explosions, fired one round from his service weapon, heard other explosions and then took cover by a light post. In summarising the evidence, the learned trial judge substituted the name Constable Provost with Constable Evans. This was clearly a mistake with the names since the learned trial judge had correctly stated the evidence earlier in his summation at page 123, lines 16-18 of the transcript.

[47] Having examined the misstatement in the context of the whole summation, including instances where the learned trial judge correctly stated the evidence or demonstrated an appreciation of the evidence, we believed there was no prejudice caused to the appellant.

[48] In the circumstances, we were unable to find a basis on which to accept the submissions advanced on behalf of the appellant that the learned trial judge erred in the analysis of the evidence, resulting in a miscarriage of justice.

[49] For these reasons ground one failed.

Ground ii: whether the learned trial judge failed to direct himself on or consider and give weight to the unsworn statement

Summary of submissions

For the appellant

[50] The appellant contended that the learned trial judge gave scant regard to his unsworn statement. It was argued that the learned trial judge did not demonstrate how he treated with it, along with the evidence of Constable Evans and Detective Inspector Brooks that the appellant never exited the motorcar. Mr Equiano pointed, as well, to the evidence of injury to the appellant's right ankle, which he argued was consistent with the appellant's statement that he had only put his right foot out the motorcar to get out. The verdict was an indication that the learned trial judge did not accept or believe the appellant's version, but he provided no rationale for rejecting it, counsel argued. The learned trial judge's analysis, therefore, deprived the appellant of a fair trial.

[51] Counsel also argued that the internal inconsistency in the prosecution's case as to whether the appellant exited the motorcar negated Constable Ramsay's evidence that a gun was pointed and fired at himself and Constable Provost. Further, a carefully analysed unsworn statement would have resulted in a favourable verdict for the appellant. Counsel relied on **Alvin Dennison v R** [2014] JMCA Crim 7.

For the Crown

[52] Mr Taylor submitted that this court should be guided by **Director of Public Prosecutions v Leary Walker** [1974] 21 WIR 406 and **Alvin Dennison v R**. In treating with the issue of self-directions in bench trials, King's Counsel drew a distinction between visual identification cases and other cases, pointing out that the unsworn statement does not fall within the special class of directions where the trial judge's omission to expressly state the principles and/or give the/a standard direction, would result in any miscarriage of justice to an appellant. **Cecil Medder v R** (unreported), Court of Appeal, Jamaica,

Supreme Court Criminal Appeal No 161/2000, delivered 5 July 2002, and **Dioncicio Salazar v The Queen** [2019] CCJ 15 (AJ) were relied on.

Discussion

[53] This being a bench trial, the learned trial judge was not obligated to give himself detailed directions as would be necessary for a jury of lay persons who are presumed to be unfamiliar with legal principles and practices (see **Kirk Mitchell v R** [2011] JMCA Crim 1 at paras. [18] - [19] and [22]). In **Shaun Cardoza and Lathon Hall v R** [2023] JMCA Crim 19, at para. [26], F Williams JA makes a similar observation, buttressed by this extract at para. 29 in **Dioncicio Salazar v The Queen**:

> "…a judge sitting alone and without a jury is under no duty to 'instruct', 'direct', or 'remind' him or herself concerning every legal principle or the handling of evidence. This is in fact language that belongs to a jury trial (with lay jurors) and not to a bench trial before a professional judge where the procedural dynamics are quite different…As long as it is clear that in such a trial the essential issues of the case have been correctly addressed in a guilty verdict, leaving no room for serious doubts to emerge, the judgment will stand."

[54] The exception to this general approach, as Mr Taylor rightly pointed out, would be cases where the main issue is visual identification of the assailant, in which case "inscrutable silence" by a judge will result in the quashing of a conviction (see **R v Locksley Carroll** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 39/1989, judgment delivered 25 June 1987).

[55] There is no need to dwell on the legal principles, save to say that the learned trial judge is taken to be familiar with the express right of an accused under Section 9(h) of the Evidence Act to make an unsworn statement from the dock, and the requirement, at common law, that a jury be told that they are to consider it, decide on its value, and give it such weight as they think it deserves (see **Alvin Dennison v R**, **Director of Public Prosecutions v Leary Walker**, and page 256, para. 17-2(5) of the Supreme Court of Judicature of Jamaica Criminal Bench Book 2017).

[56] Mr Equiano made no reference to any authority in which it was stated that a judge sitting alone had a duty to expressly direct himself on the unsworn statement. Neither were we able to find any such authority. Like Mr Taylor, we have deduced from the authorities, including **Alvin Dennison v R**, that the specific direction has always been tailored to giving a jury guidance.

The learned trial judge's treatment of the unsworn statement

[57] The main distinguishing element between the appellant's unsworn statement and the prosecution's case was whether the appellant brandished a gun and fired at the police. As indicated earlier, this was a question of fact for the learned trial judge. At pages 96-97 of the transcript, immediately after reciting the counts in the indictment and directing himself on the burden of proof, the learned trial judge recalled, almost verbatim, the unsworn statement and then remarked:

> "There is not much contest between the Crown...and the Defence as to the broad outlines: namely, a car stops; the car had in two males; the driver calling to Mr Gunter (the appellant) and the female; the police fired – that much is clear; and the two males were injured. The question now is the circumstances that led up to this."

[58] The learned trial judge went on to review what he said was the "Crown's perspective". At page 112, lines 6-13 of the transcript, after assessing the evidence of the Crown witnesses and contrasting aspects of the defence, the learned trial judge specifically referred to the appellant's case again. He then reviewed the cross-examination of Constable Ramsay and, again, recalled the defence's theory that no one fired at the police. He continued, from page 113, line 6 to page 114, line 12, as follows:

> "He was cross-examined about the number of police officers in uniform, and that is part now of the Defence theory that a significant number of police officers, obviously in uniform, was a remarkable individual who had been driven in that situation or having been driven into that situation will now attempt to shoot his way out of it. And so, this was cross-examination to demonstrate the inherent incredibility of the case advanced

> by the Crown....And so, again, this is to advance the Defence case theory that – one of the reasons they say there were a number of police officers, but at the very least Mr Ramsay was 15 feet away. His gun was already in hand. Unless Mr Gunter was visually impaired, this would have been obvious to him. So, it defies logical common sense for him now to, with significant numbers of police officers there ...that the police officer with gun in hand 15 feet from the car. Then you have from the Defence perspective another police officer from the other side of the road, gun in hand as well, other persons who are attempting to shoot their way out of those circumstances. Those circumstances, effectively, is that the prosecution case is simply incredible."

[59] In reviewing and analysing the evidence, including other aspects of the cross-examination, the learned trial judge constantly juxtaposed the defence's theory of the case with that of the prosecution. See further, on page 117, lines 11-25 of the transcript, where he stated:

> "All of this to suggest that the prosecution case is such that the court should have serious reservation about [sic], in the context now of the Defence theory of information that the police had: have firearm on board; him coming into the car; uniformed police officers, at least 15; man 15 feet away; man seeing police officer with a firearm right and left, and then attempting to shoot his way out, is just too remarkable, especially if it appears that the girlfriend was there. That's what the Defendant is saying. She was there, so it was just the girlfriend, and why would he seek to endanger the life of his girlfriend in that way and in those circumstances."

[60] Also, at page 119, lines 10-22 of the transcript, the learned trial judge, in reviewing the evidence of the investigating officer, Constable Biggs, recalled the case for the appellant:

> "And on 15th of November now the following charges with Mr Gunter...cautioned him, and in the caution he said, 'a di driver own' and Mr Gunter is saying that his unsworn statement is consistent with that. The driver entered a plea...He is asserting that he, Mr Gunter, had no gun, no firing at the police. In any event, the man who is responsible for the gun

> had accepted responsibility for it; he is not guilty of any of the charges here...

[61] After a comprehensive review of the evidence and the defence's case, including the core elements of the unsworn statement, the learned trial judge went on to make certain findings about the deployment of the police officers and why they were at the location, the stopping of the motorcar, the actions of the appellant in relation to the right door having been opened, and the recovery of the firearm after the shooting had subsided. He then concluded that the firearm that was recovered had been in the hand of the appellant, and that it was pointed by him in the direction of police constables.

[62] The learned trial judge concluded, at page 128, lines 7-22 of the transcript, that he felt sure the prosecution's account was not a manufactured one and that, "…Mr Gunter's account[was] not accepted by [him]…", reinforcing that he had taken cognizance of the unsworn statement and rejected it.

[63] Given the depth of his analysis, we do not accept Mr Equiano's submission that the learned trial judge did not give any reason for rejecting the appellant's defence. His reasons clearly lay in the fact that he dismissed the issue of whether it was only one foot or the entire body of the appellant that was outside the motorcar as insignificant. And, at page 127 of the transcript, the learned trial judge stated that he accepted the prosecution's case that the appellant opened the right door, the firearm that was recovered was in his hand, and he pointed it in the direction of two of the policemen. The learned trial judge also indicated that the differences in the prosecution's case were insufficient to undermine the prosecution's case. The reasoning and conclusion here demonstrated that the learned trial judge placed little or no weight on the unsworn statement.

[64] Based on the foregoing, we believed that the summation did not bear out the appellant's complaint that the learned trial judge paid scant regard to the unsworn statement. At the outset, the learned trial judge not only called attention to the unsworn statement but did so immediately after stating that it was the prosecution's burden to

prove the case. That was the learned trial judge's first indication that he recognised the right of the appellant to give an unsworn statement. It was evident from the contrasting of the defence and prosecution cases, throughout his reasoning, that he recognised his duty to consider the contents of the unsworn statement and make up his mind as to whether it had any value, weighed against the entire body of evidence before him. He had no duty to go beyond what was required by law, particularly to direct himself on every legal principle (see **Dioncicio Salazar v The Queen**).

[65] For these reasons, ground two also failed.

Ground three: whether the learned trial judge failed to demonstrate in his summation that each offence was separately considered and whether any such failure deprived the appellant of a fair trial

Summary of submissions

For the appellant

[66] Mr Equiano pointed to the counts in the indictment as being distinct and requiring separate consideration, which he said was not done, save for count 2, which was dismissed. Counsel took issue with remarks by the learned trial judge, at page 127, lines 8-24 of the transcript, which he said were suggestive of the conclusion that "if the man had the gun, then he must have pointed it at the police".

[67] Counsel submitted further that the variance in accounts given by the policemen did not support the shooting charge. That count required its own careful analysis, counsel argued. This was particularly so as the driver had already taken responsibility for possession of the firearm. Counsel pointed out that if the shooting charge had not been proved, there would have been implications for the verdict concerning the possession charge. Therefore, the failure to examine the offences separately deprived the appellant of a fair trial, he submitted.

For the Crown

[68] Relying on **Everton Clarke v R** [2017] JMCA Crim 31, King's Counsel submitted that where a defendant faces more than one count, the tribunal of fact must be directed to consider each count separately and return a separate verdict on each. He argued that the clearest indication that the trial judge considered the evidence separately was in relation to count two, on which the appellant was found not guilty. He referred to page 128, lines 17-19 of the transcript, where the learned trial judge noted: "The only thing is that two spent shells and one is charged in the possession of ammunition—actual ammunition and not spent shells". King's Counsel submitted that this statement demonstrated an appreciation of the evidence and the need to consider the evidence in support of each count separately.

[69] It was argued further that, although the learned trial judge did not expressly advert to separate treatment of the counts, this was a case in which the evidence as it relates to counts one and three was the same or very similar. The learned trial judge, therefore, did not have to advise himself separately on those counts, because, as a matter of logic, his verdicts were likely to be the same in relation to them. Accordingly, there was no miscarriage of justice.

Discussion

[70] In a bench trial, the trial judge must be shown to have considered the evidence relative to each count separately and give a verdict on each count relative to the evidence proved. This is consistent with the requirement affirmed in **Everton Clarke v R**.

[71] The learned trial judge did not expressly give himself the standard direction that each count in the indictment must be considered separately. However, in this instance, there was no miscarriage of justice because, contrary to Mr Equiano's contention, the learned trial judge demonstrated, through his reasoning, that the three counts in the indictment were separate offences requiring proof of their respective elements beyond reasonable doubt, and that counts one and three shared certain elements - that the appellant was in custody and control of the firearm and had the intention to possess it

(see **Regina v Alphanso Robinson** (1991) 28 JLR 236). At page 127, lines 4-11 of the transcript, the learned trial judge satisfied himself in relation to count one as follows:

> "I am satisfied, so that I feel sure, that the left – the right rear door he opened and that the person who was engaged in opening that door was indeed Mr Revalieno Gunter. I am satisfied, so that I feel sure, that the firearm recovered by the police after the shooting subsided was the firearm in the hand of Mr Gunter."

[72] Given the circumstances accepted by the learned trial judge, it would not have mattered to his decision about count one that the driver pleaded guilty for possession of a firearm. The evidence, he accepted, pointed to a separate finding of possession based on the alleged handling of the firearm, in the circumstances, by the appellant.

[73] Further, in respect of count three, which charged shooting with intent, it required proof that the firearm was fired in the direction of the police constables, with intent to cause them bodily harm. So, if count one failed, count three would also necessarily fail. Thus, the learned trial judge stated, at page 127, lines 11-13 of the transcript: "That firearm was pointed in the direction of Constable Leonard Ramsay and Constable Jermaine Evans [the evidence indicated Constable Odane Provost] …". There was also evidence before the learned trial judge that Constable Ramsay feared for his life and returned gunfire.

[74] The learned trial judge was, therefore, shown to have accepted that important particulars of count three were proved, those being that the appellant had used the gun in his possession to fire at the police with the requisite intention. In the circumstances, there was no fusion with counts one and three, as Mr Equiano submitted.

[75] Yet again, at page 128, lines 14-19 of the transcript, the learned trial judge distinguished the counts. In finding that count two was not proved, he said:

> "So, I'm satisfied so that I feel sure that the Crown has established Count 1 and Count 3, but not count 2. The only thing is that two spent shells and one is charged in the

> possession of ammunition---actual ammunition and not spent shells." (The evidence pointed to spent casings as against 'actual ammunition')

[76] We, therefore, accepted the submissions on behalf of the Crown that, although there was no express reference to the duty to consider the counts separately, the learned trial judge did consider the evidence in relation to each separately and distinctly.

[77] For these reasons, ground three failed.

Conclusion

[78] It was for these reasons that the orders mentioned at para.[4] were made.