[2012] JMCA Crim 45

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 31/2008

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McINTOSH JA

MICHAEL HOLNESS v R

Robert Fletcher for the applicant

Mrs Diahann Gordon-Harrison and Miss Michelle Salmon for the Crown

4, 5 October, 20 December 2010 and 28 September 2012

PANTON P

[1] On 20 December 2010, we refused this application for leave to appeal and ordered that the sentences were to run from 13 June 2008. These are the reasons for our decision.

[2] The applicant was convicted on 27 February 2008, by Jennifer Straw J, of the offences of illegal possession of firearm, illegal possession of ammunition and shooting with intent. He had also been charged with unlawful wounding but was found not guilty as the learned judge was not satisfied as to the quality of the evidence on that charge.

On each of the illegal possession charges, he was sentenced to five years imprisonment and on the shooting with intent charge he was sentenced to eight years. All of the sentences were ordered to run concurrently.

The grounds of appeal

[3] The applicant filed as his ground of appeal a complaint that the verdict was against the weight of the evidence. The single judge of this court who refused the application for leave to appeal expressed the view that the main issue in the case was the credibility of the witnesses and that there was sufficient evidence that the applicant was part of a common design in the discharge of the firearm.

[4] At the commencement of the hearing before us, Mr Robert Fletcher for the applicant sought and was granted leave to abandon the original ground that had been filed by the applicant, and to argue two new grounds crafted by him, namely:

> "i. The learned trial judge misdirected herself with respect to critical aspects of the evidence and in so doing the applicant was denied a fair and balanced consideration of his case and a real chance of acquittal;
>
> ii. The learned trial judge never considered the issue of character raised in the applicant's case. By this omission the applicant was denied consideration of a critical element of his defence."

The allegations

[5] The case for the prosecution was that on 2 August 2006, at some time after 9:40 pm, the applicant was one of four armed men who alighted from a Toyota Coaster bus on Roosevelt Avenue, St Andrew, and fired shots at police officers who had converged on the area as a result of a police radio transmission. The driver of the bus was one of the four armed men, and they were the only persons on the bus at the time.

[6] The men ran in pairs in different directions. They were chased by the police officers. In the end, two of the men were found suffering from gunshot injuries and were taken to the Kingston Public Hospital where they were pronounced dead. The applicant and one of those who died were chased on to Latham Ave. In the process, the police recovered a firearm, six spent shells, as well as a 9mm magazine with six unexpended cartridges. Two of the spent shells were found on the sidewalk and the other four on the roadway in the vicinity of 3 Roosevelt Avenue. The firearm, when examined by the ballistics expert, Superintendent Sydney Porteous, was found to be incapable of discharging a missile and had not recently been fired. The incapacity of the firearm was due to the fact that the hammer, the sear and the connecting arm were missing.

[7] The applicant, who had fallen during the chase, was held and taken to a nearby police station. At about 11:45 pm, his hands were swabbed at a different location for

evidence of gunshot residue. The swabs were placed in four transparent plastic bags and submitted to the Government Laboratory for analysis.

[8] Mrs Marcia Dunbar, government analyst, examined the swabs and found the following in respect of the applicant:

- right palm – gunshot residue at trace level
- back of right hand – no gunshot residue
- left palm – gunshot residue at elevated level
- back of left hand – gunshot residue at intermediate level.

In Miss Dunbar's opinion, trace level indicates a small amount of gunshot residue and would arise from an initial deposit of either the elevated or intermediate level, and with the passage of time and activity, there is a loss of gunshot residue resulting in a level at trace level. It would also arise from being in the direct path of gunshot residue as it is emitted from a fired firearm to the distance of 24 inches; or it could arise from secondary transfer, that is, coming in contact with a surface that has a deposit of gunshot residue. Gunshot residue at an elevated level indicates a high level and would arise from firing a firearm or being in the direct path of the gunshot residue as it is emitted from a fired firearm within a distance of 9 inches. Finally, gunshot residue at intermediate level results from firing a firearm or being in the direct path of the gunshot residue as it is emitted from a fired firearm at a distance of 18 inches.

[9] The applicant was arrested and charged by Detective Inspector Webster Francis. When cautioned, he said, "I did not rob anyone and I never had a gun".

The defence

[10] The applicant gave evidence. He said he was a laboratory technician/computer assistant at the Department of Educational Studies at the University of the West Indies where he was also a student. On 2 August 2006, he said he went to an early evening movie at the Carib Cinema in Cross Roads. He left the cinema sometime between 7:30 and 7:40 pm, and had a meal nearby. A friend of his called him on the telephone. Consequently, he set out on a bus to "downtown" Kingston with a view to collecting a jump-drive from another friend of his. He paid the conductor and sat two seats away from the conductor's seat. By the time the bus had reached "downtown" Kingston most passengers on the bus had disembarked. He saw two armed men enter the bus. One of them had braided hair and the other had on a camouflage outfit and a hat. The man with the braided hair pushed the driver out of the bus while the other robbed the conductor. The applicant acknowledged that he was acquainted with the man in the camouflage outfit as he had seen him a "couple times" in the community called Hermitage.

[11] The applicant said that he tried to get off the bus but the man in the camouflage outfit blocked his path, pointed his gun at him and told him he could not get off at that time. A third man then took over the driving of the bus. He drove to Roosevelt Avenue where the police stopped the bus. At that point in time, the applicant said the man with the braided hair went towards the rear of the bus to see what was happening. He, the applicant, then took the opportunity to force himself through the passenger door on the left side of the bus. After exiting the bus, he heard explosions. He ran on to Latham

Avenue where he stumbled and fell. Seconds later, two officers came and searched him. He said there were two men lying near to him and, on inquiry by police officers, these men said that they had been shot. He then saw an officer shoot one of the two men several times. The applicant said he was taken to the nearby Stadium Police Station, then to an office on Duke Street where his hands were swabbed. He was next taken to the Half Way Tree Police Station and was charged the following day.

[12] The applicant denied being in possession of a gun that night. He denied running with anyone from the bus. He said that he became aware of the presence of someone from the bus being near to him when he had fallen and the police had come up to him.

[13] The applicant called, as witnesses, his older brother and Rev Harold Rhudd to say that he is right-handed. Rev Rhudd also said that he knew the applicant "as a good character".

The judge's findings

[14] In arriving at her verdict, the learned trial judge said:

> "The issue for the court to determine is whether the accused man was one of four men armed with firearms who ran out of a stolen coaster bus on Roosevelt Avenue and engaged in a shoot-out with the police. The court has to decide whether there is credible evidence provided by the prosecution to satisfy this court beyond a reasonable doubt that the accused was armed with a firearm and actually shot at the police. Alternatively, based on the totality of the evidence before the court, the court has to decide whether the prosecution has proved that the accused has acted in concert with other men who were armed with firearms and engaged in a shoot-out with the police."

She referred to section 20(5)(a) of the Firearms Act as providing the basis for her reasoning.

[15] The learned judge then proceeded to list 10 points on which she said the prosecution and the defence were agreed. The points are as follows:

- On 2 August 2006 sometime after 9:30 pm a Toyota Coaster bus was hijacked by gunmen, and the police were alerted.

- The bus was seen in the vicinity of Arthur Wint Drive. It turned onto Roosevelt Avenue and stopped below the intersection with Latham Avenue. Several police vehicles converged on the area.

- Four men, at least two of whom had firearms, came off the bus.

- The applicant was one of the men.

- The applicant ran from the bus on to Latham Avenue, and at some point fell to the ground where the police held and searched him. One of the other men who had come off the bus was also seen on Latham Avenue suffering from gunshot injuries; he was taken to hospital where he was pronounced dead.

- The applicant was dressed in a black sleeveless top and wore a black cap.

- The applicant was pointed out by police witnesses to Detective Francis as one of the four men who ran off the bus.

- At about 11:45 pm, the applicant was taken to the Scenes of Crime office at 34 Duke Street, Kingston,

where his hands were swabbed by Detective Sergeant Campbell, without objection by the applicant.

- Detective Sergeant Campbell secured the swabs in four separate plastic bags and these were submitted to the Government Forensic Laboratory for analysis.

- The government analyst, Mrs Marcia Dunbar, found the presence of gunpowder residue at various levels on the swabs.

[16] It was noted by the court that there was no challenge as regards the judge's listing of these 10 points as being agreed.

[17] In the face of the evidence presented by the prosecution and the denial of active participation in the events by the applicant, the learned judge said it was a matter of the credibility of the Crown's witnesses. She pointed to discrepancies in the evidence of the witnesses and then concluded that Constable Gray was "a very credible witness". Constable Gray was the only witness, she felt, who did not have a difficulty in terms of his capacity to see the faces of the men who came off the bus and who was in a position to observe what was happening.

[18] The learned judge accepted the evidence of the scientific expert in respect of the finding of gunshot residue at the various levels on the swabs taken from the applicant. On the basis of Constable Gray's evidence and that of the government analyst, she found that the applicant did indeed fire a firearm that night. This is how she put it:

"... I have examined the issue, the court has accepted the JSR [sic] evidence and the court is of the opinion

> that based on what the expert has said: either he fired or he was within a certain range of someone who fired. A firearm was not recovered from him but I make the finding that he was one of four men armed with guns and I draw the inference from the evidence which I accepted both from the witness expert and Constable Gray that he had a firearm up to the time he turned on to Latham Avenue. The only other way for Mr. Holness to have that gunpowder residue at that level he would have to be stride by stride with one of the other men who fired. The police have said that he was; he has denied this. At the least it would put him squarely within Section 25 but I make the finding that he was with the four men and he did fire at the police." (p.386-387)

Ground 1

Alleged misdirection by the learned judge of herself on critical aspects of the evidence

[19] Mr Fletcher, quite correctly, said that the case turned on the presence of elevated and intermediate levels of gunpowder residue on the hands of the applicant. The resolution of the question of how the gunpowder residue came on the hands of the applicant became central to the verdict to be handed down, he said. He referred to the opinion expressed by the judge that based on the evidence of the expert the applicant had either fired a firearm or was within a certain range of someone who had fired. The judge had also said (as noted earlier) that the only other way for the residue at that level to have found itself on the applicant's hands was if he had been "stride by stride with one of the other men who fired".

[20] In addition, Mr Fletcher referred us to the following remarks by the learned trial judge at page 370 of the record:

> "There is also issue as to the time of the firing of (sic) the men because some of the witnesses indicate that as the men came off the bus they fired shots. Some indicate that the men ran a little distance before the men heard any firing. The accused man said as soon as he came off the bus he heard firing and he ran. So I do not find that to be a major discrepancy in the case because what is quite clear, and I accept it, is that there was a shoot-out with the police that night."

Mr Fletcher then submitted that by treating with the issue of timing in this way, the learned judge had precluded from her consideration a permutation of the evidence which faced her and the clear inference from those facts, that is, that the gunpowder residue could have come on the applicant's hands in circumstances that are consistent with his own evidence and that of the prosecution. He said, "If the court had found that the men fired when they were all alighting from the bus then transfer of the gun powder residue to the applicant in those circumstances becomes plausible." Further, he contended that if the court found that the men ran before the firing then the physical closeness is still highly relevant to the issue of transfer. Failure to consider these aspects relevant, he submitted, meant that the learned judge had misdirected herself as to evidence that was critical.

[21] Mr Fletcher submitted that the learned judge ought to have considered explicitly whether the account given by the applicant could be consistent with the evidence of the expert witness. Proximity to the men firing, timing and the sequence of the exit of the

men from the bus were critical items of evidence for examination, he said. In this regard, he said, the learned judge had fallen short.

[22] Mrs Diahann Gordon-Harrison, for the Crown, submitted in response that the applicant's arguments were grounded in "theoretical suppositions". She contended that on the applicant's own story it was after he had exited the bus that he heard gunshots and these came from behind him. Furthermore, the closest he came to anyone who fired a gun that night was 12-15 feet. Mrs Gordon-Harrison also pointed to the fact that the prosecution's case was that the firing commenced after the men had left the bus.

[23] In our opinion, there was ample evidence for the learned judge to have concluded, as she did, that the applicant had indeed fired a firearm in a situation where there was a shoot-out between the police and men with illegal guns. The fact that the applicant, when held, was not found with a gun was, in our view, not surprising. On the basis of Constable Gray's evidence, which the judge accepted, there was a period of time when the applicant was out of his sight during the chase. The learned judge, as indicated earlier, expressed herself thus:

> "A firearm was not recovered from him but I make the finding that he was one of four men armed with guns and I draw the inference from the evidence which I accepted both from the witness expert and Constable Gray that he had a firearm up to the time he turned on to Latham Avenue."

It is clear that the learned judge must have also inferred that the applicant threw away the firearm while running. Given the notorious physical and other characteristics of the

city of Kingston, it is not unlikely that the police would have experienced some difficulty in locating and retrieving the firearm. We were satisfied that the learned judge had indeed given due consideration to those areas about which Mr Fletcher complained. She stated quite clearly that she accepted the evidence of Constable Gray and the forensic expert. The complaint in the ground was therefore without foundation.

Ground 2

Non-consideration of the issue of character

[24] Mr Fletcher argued that the element of good character was specifically put on the table through the evidence of Rev Harold Rhudd who knew the applicant "for the past twenty-odd years". Rev Rhudd described him as being "good at education" and "as a good character". He had never seen the applicant "do anything that out of hand to say".

[25] Mrs Gordon Harrison conceded that the issue of good character arose for consideration and that the learned judge ought to have directed her jury mind to the matter. However, she submitted that even if the learned judge had so directed her mind, a conviction would inevitably have resulted. She said that the evidence of visual identification, the almost immediate apprehension of the applicant on the scene as well as the scientific evidence provided a "sufficiency of evidence" to ground the judge's finding of guilt.

[26] The issue of a good character direction has been the subject of several recent decisions of this court. Among them are ***Michael Reid v R*** SCCA No 113/2007 –

(delivered 3 April 2009) and ***Rohan Brown et al v R*** [2010] JMCA Crim 54. The principles that have been affirmed in these decisions include that which states that the failure to give the direction in a case in which the defendant is so entitled will not automatically result in an appeal being allowed.

[27] In the instant case, there is no doubt that the applicant was entitled to a good character direction. The question therefore for determination was whether the learned judge had committed a fatal error in failing to mention that she had addressed her mind to the question of the good character of the applicant. We took note of the fact that the learned judge was sitting alone. Although that fact did not give her the liberty to ignore the matter, we noted that she was not instructing a jury of lay persons, unschooled in the law and so unable (without specific instruction) to see the importance and value of considering the applicant's good character. Having said that, we also took note of an exchange between counsel and the Bench near the conclusion of the examination-in-chief of Rev Rhudd. It is reproduced here:

> "Q. And as well – a reverend and you know Michael through your church, what kind of character you know him to be?
>
> A. I know him as a good character.
>
> MISS SIMMS: M'Lady, I am objecting to this.
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> HER LADYSHIP: Why?
>
> MISS SIMMS: On the basis of the relevance because at no point has character been put on the table.
>
> MISS JOBSON: It is relevant.

HER LADYSHIP: She is entitled if she so wishes."

In our view, this exchange indicates that the learned judge was fully conscious of the fact that the applicant was raising the issue of his good character, and that she considered it a relevant matter given the nature of the evidence before her. In any event, the circumstances were such, given the scientific evidence, that if there was a failing on the part of the judge so far as the good character direction was concerned, we would have applied the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act.

[28] In view of the fact that we found no merit in either ground of appeal, the application was refused as indicated earlier and the sentences ordered to commence on 13 June 2008.