[2012] JMCA Crim 38

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 42/2009

BEFORE: THE HON MRS JUSTICE HARRIS P (Ag)
THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE HIBBERT JA (Ag)

JERMAINE JOHNSON v R

Hugh Wilson for the applicant

Miss Meridian Kohler, Mrs Lavern Walters & Garica Kelly for the Crown

6, 10, 13 & 16 February 2012

ORAL JUDGMENT

HARRIS, P (Ag)

[1] On the 17 February 2009, the applicant Jermaine Johnson was convicted in the High Court Division of the Gun Court on two counts of an indictment. On count one, he was charged with illegal possession of firearm and count two charged him with wounding with intent. He was sentenced on 27 March 2009 to 12 years imprisonment on both counts. It was ordered that the sentences should run concurrently. An application made by him for leave to appeal against conviction and sentence having been refused by a single judge, he now renews that application before us.

[2] The Crown, through its main witness the complainant, Mr Samora Nelson, adduced evidence that about 5:00 pm on 28 March 2006, he was walking along Track Pathway in Arnett Gardens when he was accosted by three men, two of whom were armed with firearms and one with a knife. The applicant was one of those armed with a firearm. The man with the knife, Anthony Richards was jointly charged with the applicant. The applicant was known to the complainant for 25 years and he had known him as "Leimo" . They lived in the same community and the complainant had at times spoken with the applicant. The complainant would see him frequently and had last seen him one month prior to the incident when both were involved in a confrontation at the Tony Spaulding Complex.

[3] On the afternoon of the incident, on reaching a blind corner along the path on which the complainant journeyed, the men pulled him around the corner and proceeded to kick him. The two who were armed with the guns pointed them at him and the applicant told him that he intended to kill him. The applicant who was standing less than an arm's length away from him shot him in his face. After receiving the shot the complainant ran off and was shot in his neck. During the interlude, Richards used the knife to cut the complainant. The incident, the complainant asserted, lasted five minutes during which time he said he was looking directly in the applicant's face. After having been shot, he said that he ran to a taxi stand from where he took a taxi to the hospital.

[4] Sometime in 2008, the complainant went to the Denham Town Police Sstation where he said the applicant was taken from his cell by a superintendent of police who asked him if it was the applicant who had shot him. He answered in the affirmative. Later, on 1 April 2008, he attended an identification parade which was held for Richards. Following this, on 5 April 2008, he attended an identification parade where he pointed out the applicant. Three of the participants who were involved in the identification parade which was held for Richards were also included in that which was held for the applicant. The evidence revealed that the applicant and Richards were different in complexion, height and build and Richards appeared to have been older than the applicant.

[5] In cross-examination, the complainant was challenged as to the statements he had given to the police which conflicted with his testimony. In examination-in-chief, he said that he was kicked against a wall and that there was a verbal exchange between him and the men but under cross-examination he denied that he had told the police that the men forced him against a wall and that he took out his buck knife and faced them as they tried to kick him.

[6] In examination-in-chief he said that he was on his way to his mother's house to visit his new-born son. He denied, under cross-examination, that he had told the police that he had left his mother's house in Angola to watch a football match in Texas and on arrival there the game had not started so he returned to stay with his son and the mother of his child and went back to Texas when he thought the game had started.

[7] It was his evidence in chief, that he was unable to say whether a shoot out occurred between the police and the persons who shot him. In cross-examination, he denied that he told the police that he ran to Ninth Street and while there waiting on transportation to take him to the hospital, the men and police were engaged in a shoot out.

[8] There was evidence from Dr Donald Burke who examined the complainant on 29 March 2006. On examination, he observed that he had a wound approximately 1 cm in diameter, to his cheek which extended into his mouth fracturing his right upper molar. He also saw a wound to the left side of his neck. In his opinion the injuries were as a result of gunshot wounds.

[9] The applicant gave an unsworn statement. He stated that he lived at 532 Jovlin Park, Arnett Gardens and that on 28 March 2006, he was in town purchasing a suit to wear to a party. He denied being involved in a confrontation with the complainant and denied being involved in a dispute with him on any occasion.

[10] The following grounds of appeal were filed:

> "(a) **Misidentify by the witness:-** That the prosecution witness wrongfully identified me as the person or among any persons who committed the allege [sic] crime.
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> (b) **Lack of evidence**:- That the prosecution failed during the trial to forward any material evidence to substantiate the alleged charges that were preferred against me.

(c) **Improper police procedure:-** That the police caused my identity to be exposed to the prosecution witness before the official I.D., thus, compromising my innocence.

(d) **Unfair Trial:-** That the evidence and testimonies upon which the Learned Trial Judge relied on for the purpose to convict, lack facts and credibility, thus, rendering the verdict unsafe in the circumstances."

[11] Mr Wilson informed the court that he could not find any appealable ground to argue. He stated that, having perused the transcript of the proceedings more than once, he was unable to find any fault with the summation. This concession having been made by him, he was requested to inform the applicant of the course he proposed to adopt and had on 13 February 2012 informed the court that he had done so but the applicant has asked him to make a request of the court that the transcript be examined by another attorney-at-law. We adjourned the matter for Mr Wilson to inform the applicant that the court intended to proceed to determine the application. Today, Mr Wilson informed the court that he had carried out our instruction.

[12] The learned judge, sitting alone, was empowered to adjudge the facts of the case and determine what facts she accepted. She demonstrated that in light of **R v Turnbull** [1977] QB 224; [1976] 3 All ER 549, she was aware of the cautious approach that she should adopt in cases of visual identification which is a critical issue in this case. She acknowledged that she could not place reliance on the identification parade in which the applicant was said to have been pointed out by the complainant as supporting evidence of the identification. It was her finding that the matter of the

confrontation at the police station and the use of three participants on the parade held in respect of the applicant, which were used at the co-accused's identification parade, rendered the identification parade of the applicant unfair.

[13] With great care, she carried out a detailed analysis of the evidence of identification and in dealing with the question as to the time within which the complainant would have had the opportunity to view the applicant, based on the narrative of the events. She recognized that the complainant would not have viewed the applicant's face for five minutes but found that he would have had sufficient time to do so. It was also her finding that the complainant was at a close distance to the applicant, which was supported by the evidence of Dr Burke who spoke to the absence of burning on the wounds, showing that the applicant was more than 2 to 3 feet away from the complainant.

[14] She was mindful of the inconsistencies which arose and found that they, being immaterial, did not affect the complainant's credibility. She did not fail to take into consideration the defence of alibi raised by the applicant which she rightly rejected.

[15] We are firmly of the view that the learned judge properly directed herself on all issues arising in the case. In accepting the evidence of the complainant, we cannot say that she was wrong in so doing.

[16] There being no reason to regard the conviction unsafe, the application for leave to appeal against conviction and sentence is refused. The sentences should commence on 27 June 2009.