[2014] JMCA Crim 6

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 47/2012

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MRS JUSTICE MCINTOSH JA
THE HON MR JUSTICE BROOKS JA

MARCUS LAIDLEY v R

C J Mitchell for the applicant

Miss Paula Llewellyn QC Director of Public Prosecutions and Mrs Christine Johnson-Spence for the Crown

27 and 30 January 2014

MCINTOSH JA

[1] On 11 May 2012 the applicant was convicted before Lawrence-Beswick J in the High Court Division of the Gun Court, on an indictment containing two counts, the first count being for the offence of illegal possession of a firearm and the second for the offence of wounding with intent. That same day he was sentenced to 7 years imprisonment on count 1 and 15 years imprisonment on count 2.

[2] He subsequently applied for leave to appeal against his conviction and sentence on the grounds that

(i) the conviction was against the weight of the evidence;

(ii) the learned trial judge had failed to correctly assess the evidence of the applicant and

(iii) the sentence was manifestly excessive.

His application was however refused by a single judge of this court resulting in the renewal of his application before us.

[3] Briefly, the circumstances which led to his conviction and sentence arose in this way. Sometime between 9:00 and 10:00 on the morning of 11 May 2011 Mr Kavel Dixon and his fiancée, Miss Christine Brousseau, a resident of Canada, were relaxing on the beach in the Grant's Pen area of the parish of St Thomas when they were accosted by a man carrying a gun in his left hand. Mr Dixon recognized the man as the applicant and called him by his alias name "Shotty Mark" but Miss Brousseau was seeing him for the first time though she was able to identify him subsequently. According to both witnesses the applicant raised his left hand with the gun, pointed it in their direction and fired four shots. Mr Dixon got up from beside his fiancée and ran, jumping into the sea as the applicant pursued him, firing more shots at him. The applicant then turned back in the direction from whence he came and left the scene.

[4] Miss Brousseau testified that she was so afraid for her life when the applicant approached them and opened fire that she could not and did not move. Though she remained rooted to the spot where she had been sitting with Mr Dixon, her eyes were fixed on the applicant whose face she had an opportunity to observe for a total of about

55 seconds of the two to three minutes that the entire incident lasted. She noted a peculiarity about the region of his mouth, and that he was wearing sunglasses and a hat with fake braids. She said she saw his face – his cheek bones, his height and the shape of his body. "That's how I recognized him", she said. After the applicant walked away she ran to Mr Dixon's aid and helped him up out of the water. She saw blood dripping from his right leg and his left groin area. He was eventually taken to the hospital in Morant Bay for medical attention.

[5] She said she was questioned for about three hours that same day by the police who took her to the station bare footed and bikini clad and she had given a statement to the police which was recorded and read back to her but which did not contain the details about the applicant's mouth. She added however that when she gave his description to the police she was in a state of shock. When cross-examined during the course of her testimony she accepted that she had looked at the applicant in the courtroom before the commencement of the trial but she said she would never forget the applicant's face and had nightmares about it. She subsequently pointed him out on a computer generated identification parade on 26 August 2011.

[6] Mr Dixon's evidence was that as he sat with his fiancée on the beach that morning and the applicant approached them he recognized him and said "Wha gwaan Shotty Mark". It was then that the applicant raised his left hand with the gun and fired four shots at him. He stood up and on realizing that he had not been injured he ran off but the applicant pursued him, continuing to fire shots at him. In an effort to escape

the gunshots Mr Dixon said he jumped into the sea. While he was in the water he heard the sound of more gun shots and saw two bullets fly over his shoulder so he dived into the water. When the sound of the gunshots ceased he came out of the water with the assistance of his fiancée and discovered that he had received injuries to his right ankle, his left buttocks and the left side of his groin. He was taken to the Princess Margaret Hospital in Morant Bay where he was admitted for one day.

[7] In describing his prior association with the applicant, Mr Dixon said his brother and the applicant were good friends and he would see him at his brother's house eating and watching television and even sleeping in his brother's bed. Prior to the date of the incident he had seen the applicant for more than an hour on 6 May 2011 at a work site. He recalled seeing the applicant perhaps twice before 6 May – as they travelled on the bus from Kingston to St Thomas and could see his face then. He testified that the applicant had a crooked look on his mouth and he demonstrated the applicant's walk to the court which was a feature that he said he also recognized. That day he saw the face of the applicant for about two minutes of the five minutes that the entire incident lasted. He too pointed out the applicant on an identification parade on 26 August 2011.

[8] In cross-examination it was revealed that he had challenges with the computation of time as he was asked about telling the police that the incident lasted for 35 seconds as opposed to the 5 minutes he had given in evidence. When shown his statement he accepted that it did say 35 seconds but said he did not recall saying that. Prosecuting attorney sought clarification later in re-examination and that served to further reveal

the challenges. At one point Mr Dixon said "Oh minutes different from seconds? Oh sorry, minutes" – clearing up his answer that the correct time frame was 5 minutes and not 5 seconds as he had stated at one point.

[9] In further cross-examination he said there were no ill-feelings between him and the applicant whom he would describe as his brother's friend and a passing acquaintance of his although he and the applicant's mother had a good relationship. He disagreed with the suggestion that he did not like the applicant and although at first he denied that in a statement to the police he had said that the applicant had an attitude toward him and was a person who acted as though he was better than other people, when shown the statement he admitted that he did tell this to the police but maintained that that did not cause him to dislike the appellant as he did like him.

[10] The applicant gave evidence on oath. When his attorney asked him to tell the court where he lived his answer was "Grants Pen, St Thomas" and further said that he lived there since December 2006. When asked what work he did his response was "I own a sound system". He testified that he does not go by the alias name Shotty Mark and has never been called by that name. He did not shoot Mr Dixon and the evidence of him carrying a shotgun on the Grants Pen Beach that morning was impossible. His recollection was that on the morning of 11 May 2011 he was at Nine Miles Bull Bay, Bob Marley Beach. The applicant said where he stayed was located near the beach on a lane called Bob Marley Beach. When he was asked what he was actually doing on the beach that morning he said "[W]ell I usually play music but those times I probably woke up or

go for breakfast or something". When asked if he played music that day he said "Yeah – most likely that's what I do".

[11] Notwithstanding the Grants Pen address he had earlier given he said he had been living at Bob Marley Beach since 25/26 April. This no doubt led his attorney to ask him if anything happened why he left Grants Pen for Bob Marley Beach but he said no – it was just the music thing and more crowds being at Bob Marley Beach with more fans and more support. He explained the appearance of his mouth as the result of a gunshot injury he sustained in 2008.

[12] In cross-examination the applicant acknowledged that he knew Mr Dixon since December 2006 and that he was his brother's friend. He agreed that since he was shot he has been somewhat depressed and that he was of the view that at least one of the persons who shot him was from Grant's Pen. He did not agree that it was since he shot Mr Dixon that he left the Grant's Pen area. He knew that it was being said that he had shot Mr Dixon but he did not turn himself in to the police because he had often seen police from the area and they said nothing to him. He had heard about some offensive words being spoken of him by Mr Dixon and he had told his brother that Mr Dixon was throwing words at him. He was offended by the words but he had ways of striking back. He said shooting Mr Dixon was not one of those ways – he meant striking back with his music.

[13] Prosecuting attorney asked the applicant if he wore tested glasses to which he responded positively whereupon it was suggested to him that he was not wearing his tested glasses during the incident with the complainant. He said if he wanted to disguise himself he would take off his glasses but if he did that he could not see. (It is to be recalled here that the prosecution's evidence was of him wearing big sunglasses that morning.)

[14] In her summation the learned trial judge carefully reviewed the evidence of the prosecution and of the defence reminding herself that she must accord the same fair treatment to both. She continued at page 148 of the transcript:

> "His defence is an alibi, in that he says he was elsewhere with his sister but his defence does not impress me. I remind myself that he does not have to prove where he was, rather it is the crown who must prove that he was at that Grant's Pen Beach that morning. I know that even if I do not believe his alibi I must remember that an alibi may be fabricated to bolster a good defence."

[15] Further, on the issue of identification the learned trial judge had this to say:

> "I recognize that one of the main issues is that of identification and I ask myself if each of the witnesses had the opportunity to identify the accused man. The lighting is not in issue as the incident is said to have occurred in the morning at about 9:00. What must be in issue though is whether the assailant's face was sufficiently visible for the witnesses to identify it.
>
> I remind myself of the caution that I must exercise in dealing with identification especially when the case rests on the proper identification of the accused by one or more witnesses. I know it is possible for an honest witness to make a mistaken

> identification and I am well aware of the wrongful convictions which have occurred in the past as a result of such mistakes. I know very well that an apparently convincing witness can be mistaken so too can a number of convincing witnesses and it is because of that knowledge that I examine carefully the circumstances in which the identification by each witness was done or purportedly done".

Her ladyship then went on to apply the **Turnbull** guidelines to the circumstances of the case before her (see **R v Turnbull** (1976) 63 Cr App R 132; [1976] 3 All ER 549) and considered the factors which may have tended to weaken the identification evidence such as Mr Dixon' seeming inability to distinguish between seconds and minutes and his assessment of the viewing time he had to see his assailant's face. She also considered the discrepancy in the evidence of Mr Dixon and his witness as to whether the investigating officer was involved in transporting them to the identification parade and determined that the evidence of Mr Dixon was to be preferred as he was more familiar with the officers than his Canadian fiancée.

[16] In addition to the above, it is clear from her summation that the evidence tending to suggest that malice might have been a factor behind the identification of the applicant as the shooter, had operated on her mind in coming to her determination in this matter. As a judge sitting alone she would not have been required to give a detailed account of all her findings and it was sufficient to indicate that the matter was in her contemplation. The learned trial judge reviewed Mr Dixon's evidence that there was no bad blood between him and the applicant (page 137 of the transcript) and his denial of the suggestion that he did not like the [accused] because he acted as though

he was better than other people. She recalled however that when confronted with his statement to the police Mr Dixon admitted that he had said that "the [accused man] always behave like he was better than people" but maintained that he liked the applicant. In reviewing the applicant's case the learned trial judge also recalled his evidence about the words which he understood that Mr Dixon was "throwing" at him and that he was offended by them. She then said at page 148 of the transcript that she did not accept the applicant's defence and at page 153 said she accepted as true the evidence of Mr Dixon and his witness as to what transpired on the beach that morning which would dispense with any suggestions of improper motive on the part of Mr Dixon. In the end, the learned judge was satisfied that the prosecution had proved its case and felt sure that it was the applicant who was armed with a firearm that morning and who shot Mr Dixon.

[17] Mr Cecil Mitchell, who appears for the applicant, very frankly and commendably advised the court that after perusing the transcript there was no proper argument that he could advance as the evidence, though not overwhelming, was more than sufficient to support the judge's verdict and the judge's summation could not be impugned. This reflects the ruling of the learned single judge who, in refusing the application for leave to appeal, said thus:

> "The issues in the case related to the correctness of the identification of the applicant and the credibility of the two witnesses for the crown who identified him. Both witnesses gave clear and convincing evidence in circumstances where the applicant and one of the witnesses were well known to each other. The learned trial judge's direction on all aspects of the case including identification and alibi were impeccable"

[18] We embrace without reservation the views expressed in paragraph [17] above as we too have found no basis upon which to disturb the verdict of the learned trial judge and would add that in our opinion the sentences imposed are consistent with sentencing guidelines and are in no way manifestly excessive.

[19] Accordingly, the application for leave to appeal his conviction and sentence is refused. His sentence is to be computed as commencing on 11 May 2012.