[2023] JMCA Crim 3

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 13/2013

CARLOS REID v R

Leroy Equiano for the applicant

Miss Syleen O'Gilvie for the Crown

16 January 2023

ORAL JUDGMENT

MCDONALD-BISHOP JA

[1] On 5 December 2012, Mr Carlos Reid ('the applicant') was tried and convicted in the High Court Division of the Gun Court for the Corporate Area on an indictment that charged him with the offences of illegal possession of firearm (count one) and wounding with intent (count two). On 25 January 2013, he was sentenced to 15 years' and 20 years' imprisonment at hard labour on counts one and two, respectively. The sentences were ordered to run concurrently.

[2] The prosecution's case was that on 12 September 2011, the applicant unlawfully had in his possession a firearm that he used to shoot and wound Mr Demetri Barrett ('the complainant') with intent to cause him grievous bodily harm.

[3] The prosecution led evidence that at about 6:30 pm on that day, the complainant was walking home from work when he was approached by the applicant at 8 Miles, Bull Bay in the parish of Saint Andrew. The applicant was armed with a shotgun which the

complainant described as being "rather tall" and resembled "what the security guards normally carry". With the gun pointing towards the chest region of the complainant, the applicant uttered the words "you fi dead" and fired at the complainant who was about one meter away. The complainant was shot in his right hand as he raised it to protect his face. The complainant ran off but was chased by the applicant who continued behind him uttering "yuh fi dead".

[4] The complainant testified that while running, he saw the applicant heading towards him in the company of another man who was also armed with a gun. However, the complainant managed to escape to his house where he called the police by telephone. The police came and assisted him to the hospital where he was admitted for two to three weeks undergoing surgery to his right hand. It was observed in court, as noted on the transcript, that two fingers on the complainant's right hand (the "pinky and ring fingers") were fused. It was also observed that the "ring finger" was bent and could not be straightened and the "middle finger" was partially bent. These deforming injuries, the complainant said, resulted from the shooting.

[5] The applicant was subsequently pointed out by the complainant on a video identification parade. The complainant said he knew the applicant for about eight to nine years prior to the shooting but only knew him by the alias "Striker". The applicant was subsequently arrested and charged for the offences of illegal possession of firearm and wounding with intent. He made no comment when cautioned by the police.

[6] At trial, the applicant gave an unsworn statement from the dock denying involvement in the shooting. He raised an alibi defence stating that at the time of the shooting he was by his neighbour's yard assisting the neighbour in building a table. He called no supporting witness. The court rejected his alibi and he was convicted and sentenced on the strength of the prosecution's case.

[7] The applicant applied for leave to appeal against his convictions and sentences on the following grounds:

"(1) **Misidentity by the Witness:** - That the prosecution witness wrongfully identified me as a person or among any persons who committed the alleged crime.

(2) **Lack of evidence:** - That the prosecution failed during the Trial to present to the Court any piece of "Material", Scientific, ballestic [sic] or forensic evidence to Link me to the alleged crime.

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

(4) **Mis-Carriage of Justice:** - That the police failed to carry out any full investigation into the alleged crime, thus comproming [sic] my innocence in charging me for a crime I did not commit, which subsequently resulted in my conviction."

[8] The court notes that no ground was stated concerning the sentences. Nevertheless, the applicant's application for leave to appeal both conviction and sentence was considered by a single judge of this court who refused it. The applicant subsequently renewed his application before this court, as he is entitled to do.

[9] As it relates to the application for leave to appeal conviction, Mr Equiano, counsel for the applicant, acknowledged the challenge in advancing any plausible legal argument in support of the grounds of appeal challenging the conviction. Counsel indicated that he has the concurrence of the applicant to advise the court that there is no arguable ground that could be forged on the applicant's behalf, whether in addition to or in substitution for the grounds of appeal originally filed. Counsel recognized that the main issues in the case were credibility and identification and admitted that the learned trial judge, having accepted the complainant as credible, had demonstrated that he appreciated the dangers inherent in the evidence of visual identification and gave himself the necessary warnings regarding the need for careful examination of such evidence.

[10] Counsel for the Crown, Miss O'Gilvie, expressed similar views and agreed that there were no arguable grounds upon which the convictions could be challenged.

[11] The court accepts the position of both counsel that the convictions are unimpeachable as was also noted by the learned single judge. The critical issues in the case, for the learned trial judge's consideration, were the correctness of the complainant's purported visual identification, in the form of recognition of the applicant, and the credibility of the complainant. We find that the learned trial judge gave himself the requisite directions in law on all critical aspects of the case, particularly concerning the evidence of visual identification and the treatment of the evidence of the prosecution's sole witness as to fact. The identification evidence was strong and the learned trial judge demonstrated faithful adherence to the guidance laid out in **R v Turnbull and others** [1976] 3 All ER 549 in determining its reliability.

[12] The court also finds that the lack of material scientific, ballistic or forensic evidence to link the applicant to the commission of the offence is not fatal to the conviction. The learned trial judge noted the absence of expert medical evidence as a deficiency in the prosecution's case. However, he accepted the complainant as a witness of truth regarding, among other things, the use of a firearm in the commission of the offence and the nature and extent of his injuries.

[13] We, therefore, conclude that the evidence before the learned trial judge was sufficient to support the conviction of the applicant on both counts of the indictment and so the verdicts are reasonable, having regard to the evidence presented by the prosecution, and the applicable law. Accordingly, there is no basis on which the learned trial judge's reasoning and conclusion can justifiably be impeached. The concession of the applicant, made through counsel, Mr Equiano, was rightly made.

[14] Consequently, the application for leave to appeal conviction must be refused.

[15] With respect to the applicant's application for leave to appeal sentence, Mr Equiano applied for and was granted leave to add a ground of appeal challenging the sentence,

in terms that, the sentence is manifestly excessive. The sole argument presented by counsel on the applicant's behalf was that the learned trial judge failed to demonstrate any mathematical deduction for the one year and three months spent by the applicant in pre-sentence custody. Counsel submitted that, in keeping with the accepted authorities, the sentences must be adjusted to reflect the time spent by the applicant in pre-sentence custody.

[16] Counsel for the Crown agreed that consistent with the applicable principles of law, the applicant would be entitled to have his full period of pre-sentence incarceration taken into account in the court's determination of the appropriate sentence.

[17] The court finds that the learned trial judge did not apply the authorities, which have established that a defendant is entitled to full credit for time served. This is understandable because the sentencing of the applicant pre-dated the authorities from this court, which have established that the court must give full credit for the time spent in pre-sentence custody. We note in particular the guidance of the court in **Meisha Clement v R** [2016] JMCA Crim 26 where, at para. [34], this court adopted the principle enunciated by the Privy Council in **Callachand and Anor v The State** [2008] UKPC 49, that:

> "... any time spent in custody prior to sentencing should be taken fully into account, **not simply by means of a form of words but by means of an arithmetical deduction** when assessing the length of the sentence that is to be served from the date of sentencing." (Emphasis added)

[18] Having reviewed the transcript against the background of these authorities, we find that although the learned trial judge indicated by a form of words that "time in custody must weigh heavily and must be deducted from any possible sentence that the court is going to give", he failed to demonstrate arithmetically that the applicant received full credit for the one year and three months he spent in pre-sentence custody. Additionally, the learned trial judge did not state in clear terms that he appreciated exactly how long the applicant was in custody prior to being sentenced. What he noted was that

the applicant was "in custody for more than a year" after stating that the applicant had been in custody "the entire time since [he was] apprehended". Therefore, we cannot state with any certainty that the applicant was given full credit for the actual time he spent in pre-sentence custody.

[19] Accordingly, although the sentences imposed on the applicant, in and of themselves, cannot be said to be manifestly excessive, the failure of the learned trial judge to demonstrate arithmetically that he gave full credit for the time spent by the applicant in pre-sentence custody is an error in principle. This error has rendered the sentences imposed on the applicant wrong in law. Therefore, we would set aside the sentences in order to give the applicant full credit for the one year and three months he spent in pre-sentence custody to which he is lawfully entitled.

[20] In the result, we would refuse the application for leave to appeal conviction in light of the abandonment of the grounds of appeal supporting the application. However, we would allow the application for leave to appeal sentence in order to make allowance for the failure of the learned trial judge to arithmetically demonstrate that he had given full credit to the applicant for the one year and three months spent in pre-sentence custody. For this reason, we would treat the hearing of this application as the hearing of the appeal against sentence and allow the appeal against sentence.

Disposition

[21] Accordingly, the court orders as follows:

1. The application for leave to appeal conviction is refused.

2. The application for leave to appeal sentence is granted and the hearing of the application is treated as the hearing of the appeal against sentence.

3. The appeal against sentence is allowed.

4. The sentences of 15 years' imprisonment at hard labour imposed for the offence of illegal possession of firearm, and 20 years' imprisonment at hard labour imposed for the offence of wounding with intent are set aside and substituted therefor are the following sentences:

    (i) On count one, for the offence of illegal possession of firearm, 13 years and nine months' imprisonment at hard labour having taken into account the one year and three months spent in pre-sentence custody.

    (ii) On count two, for the offence of wounding with intent, 18 years and nine months' imprisonment at hard labour having taken into account the one year and three months spent in pre-sentence custody.

5. The sentences are to be reckoned has having commenced on 25 January 2013 and are to run concurrently as ordered by the learned trial judge.