[2018] JMCA Crim 40

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 24/2016

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE P WILLIAMS JA

CAREY SCARLETT v R

Leroy Equiano for the applicant

Ms Paula Llewellyn QC, Director of Public Prosecutions, and Ms Devine White for the Crown

25 October and 2 November 2018

BROOKS JA

[1] This is an application by Mr Carey Scarlett for leave to appeal from his convictions and sentences for illegal possession of firearm and wounding with intent to do grievous bodily harm. He was convicted on 9 February 2016 in the Western Regional Gun Court. On 19 February 2016, the learned trial judge, Gayle J, sentenced him to 15 years and 25 years imprisonment at hard labour for the respective offences. The sentences were ordered to run concurrently.

[2] A single judge of this court considered and refused Mr Scarlett's application, but he has renewed it before the court. The grounds of appeal that he advanced are set out below:

> "(a) **Misidentity [sic] by the Witness: -** that the prosecution witness wrongfully identified me, as the person or among any persons who committed the alleged crime.
>
> (b) **Unfair Trial:** That the evidence upon which the learned trial judge relied on [sic] for the purpose to convict me lack [sic] facts and credibility thus rendering the verdict unsafe in the circumstance.
>
> (b) **Lack of Evidence:** That the prosecution witness failed to put forward any piece of scientific, [ballistic], or material evidence to link me or any persons who committed the alleged crime.
>
> (c) **Miscarriage of Justice:** that the court failed during the trial to upheld [sic] the no case submission."

[3] At the hearing of the application Mr Equiano, appearing for Mr Scarlett, submitted that he could not properly advance any arguments to impugn the convictions. He did, however, with the permission of the court, add a fifth ground of appeal. The fifth ground was that the "sentence of the court was manifestly excessive".

[4] After considering Mr Equiano's submissions, the written submissions prepared by the learned Director of Public Prosecutions and Ms White, for the Crown, and the further oral submissions made by Ms White, we made the following orders on 25 October 2018:

> "1. The application for leave to appeal against conviction is refused.

2. The application for leave to appeal against sentence is granted.

3. The hearing of the application is treated as the hearing of the appeal.

4. The appeal is allowed and the sentence of 25 years [imprisonment] in respect of count two is set aside and a sentence of 18 years is substituted therefor.

5. The sentences are to run concurrently.

6. The sentences are to be reckoned as having commenced on 19 February 2016."

We promised at that time to put in writing our reasons for our decision. This is the fulfilment of that promise.

The convictions

[5] The prosecution's case against Mr Scarlett was that on 20 November 2014, at about 9:30 pm, Mr William Wright was about to leave his house in Spot Valley in the parish of Saint James. The lights on the outside of the house were burning. He was in the process of locking up his house when he saw a man approaching him. He recognized the man as someone whom he knew before as "Tingling". Tingling pointed a 9mm pistol at Mr Wright, who attempted to knock it away. The gun went off and Mr Wright was shot in the hand.

[6] Mr Wright backed away from the man, watching him as he reversed. He got as far as his vehicle, which was parked near to the house. He ducked behind the vehicle. The man fired more shots. Mr Wright then ran. He heard more shots from behind him

and, while he ran, he was shot in the side and lower buttocks. He continued to run until he got to safety.

[7] He was taken to hospital where he was admitted and spent eight days being treated for his wounds.

[8] The investigating officer, Detective Corporal Orane White, visited Mr Wright's home that night. He observed the ample electric lighting that Mr Wright had described as being in place, on the outside of his house, at the time of the attack. The police officer also saw a spent cartridge casing in Mr Wright's yard. He testified that he swore out a warrant for Mr Scarlett's arrest and when he became aware that Mr Scarlett had been taken into custody he arranged for an identification parade to be held.

[9] On 31 December 2014, Mr Wright pointed out Mr Scarlett on an identification parade as being Tingling, the man who had shot him.

[10] At the trial, Mr Wright testified that he had known Mr Scarlett for about 10 years, and in fact, since Mr Scarlett was a school boy. At that time, Mr Wright drove a taxi, and Mr Scarlett would be one of his passengers. Mr Wright said that since that time he would see Mr Scarlett twice to three times per week and had last seen him the morning of the day of the attack.

[11] Mr Scarlett gave sworn testimony at the trial. He denied being at Mr Wright's house or shooting him. He testified that on the night that Mr Wright was shot, he, Mr Scarlett, was at friends' house where he cooked for a group of them and they all

socialized. He said that he had heard the shots and saw a police car pass by, but he did not leave the premises.

[12] He said that he was being maliciously and falsely accused. The reason that he ascribed to these false charges was that he had made a complaint to the Independent Commission of Investigations (INDECOM) in November 2014 about the conduct of a police officer. That police officer was, at the time, stationed at the same police station as the investigating officer in Mr Wright's case.

[13] Mr Scarlett called two witnesses to support his alibi. They were persons who said that they lived at the house at which Mr Scarlett said he was on the night that Mr Wright was shot. They said that Mr Scarlett did not leave the premises at any relevant time that night.

[14] There was no dispute that Mr Wright had known Mr Scarlett before as "Tingling". The issue before the learned trial judge, which he properly acknowledged, was whether the circumstances existing at the time of the shooting would have allowed Mr Wright to have made a reliable identification of someone whom he had known before. The credibility of all the witnesses, both for the prosecution and the defence, was also a major issue for the learned trial judge to resolve. The learned trial judge correctly reminded himself of the burden and standard of proof and demonstrated his understanding of those principles when, even after rejecting Mr Scarlett's alibi, he went on to state his analysis of the prosecution's case.

[15] On the issue of the circumstances of the visual identification, the learned trial judge gave himself the correct directions on the dangers of visual identification and the method of testing the evidence in respect of such identification. After carrying out that test, he had no difficulty finding that there was:

a. good lighting from a number of electric lights;

b. a close distance between the attacker and Mr Wright, at one stage the two were within touching distance;

c. sufficient time for observing the attacker's face which was not covered or obstructed in any way;

d. previous acquaintance with the attacker to allow for recognition; and

e. ample opportunity to see and recognise the attacker despite the stressful circumstances.

[16] The learned trial judge found that Mr Wright was a credible witness. He accepted his testimony as true. Conversely, however, he found that he could not accept the testimony of Mr Scarlett and his witnesses. Despite reminding himself of the principles attending Mr Scarlett's evidence of his good character, the learned trial judge rejected Mr Scarlett's alibi. The learned trial judge identified a number of differences between the respective testimonies of Mr Scarlett and the other defence witnesses as to:

a. the time that Mr Scarlett was cooking;

b. the food that he was cooking and the method of preparation;

c. the persons who had purchased the food for cooking and when; and

d. the time that the shots were heard.

[17] It must be stated, however, that these differences were elicited by questions which were asked by the learned trial judge. He asked Mr Scarlett 22 questions, a second witness, Mr Venton Miller, 37 questions and the third defence witness, Mr Michael Miller, nine questions, all concerning the matters mentioned above among others. The questions were all asked of each witness without a break. It may fairly be said that the learned trial judge tested Mr Scarlett's alibi.

[18] The circumstances of this trial are very reminiscent of those in **Carlton Baddal v R** [2011] JMCA Crim 6. In that case, the judge, who was presiding over a case in the High Court Division of the Gun Court, asked a number of questions of prosecution witnesses. On an appeal from the resulting conviction, counsel for Mr Baddal complained that the judge had descended into the arena and become an advocate for the prosecution.

[19] This court, in that case, considered the complaints but found that the judge's conduct was not unfair to Mr Baddal's case. Panton P, in giving the judgment of the court, said at paragraph [18]:

> "In this case, it cannot be said that there has been any unfairness to the appellant. He and his legal representative were not hindered in any way in the conduct of the trial. He was allowed to give his story in the way he wished. No words were put in the mouth of the identifying witness, and counsel for the prosecution was not substituted by the

> judge. The case against the appellant was a strong one, and the questions posed by the judge during the evidence of the identifying witness did not in any way make the case appear any stronger; nor did those questions cause any unfairness to the appellant."

[20] Similar comments may be made in the present case. The learned trial judge, despite his many questions, did not impede the presentation of Mr Scarlett's defence. It bears repeating, however, that trial judges must be mindful of their role and the appearance of their conduct during a trial. Again, the comments of Panton P in **Baddal v R** bear repeating. He said:

> "[17] ...We also take this opportunity to remind trial judges that it is no part of their duty to lead evidence, or to give the impression that they are so doing. Where interventions are overdone and they are seen to have had an impact on the conduct of the trial, this court will have no alternative but to quash any resulting conviction. Trial judges should therefore be always mindful of the likely result of their conduct. However, the judge is not expected to be a silent witness to the proceedings. There is always room for him to ask questions in an effort to clarify evidence that has been given, or 'to clear up any point that has been overlooked or left obscure' (**Jones v National Coal Board** [1957] 2 All ER 155 at 159G)."

[21] It is also to be noted that the learned trial judge did not specifically remind himself that even a wrongly accused person may put forward a false alibi. There is, however, no requirement to use any special form of words. The trial judge is, however, required to remind the jury or, in this case, himself, that the burden of proof lies on the prosecution to disprove the alibi. This court repeated that point in **R v Brown (Gavaska), Brown (Kevin) and Matthews (Troy)** (2001) 62 WIR 234. It said, in part, at pages 241-242:

> "It is not obligatory for the trial judge to use any special words. He must in clear and unequivocal terms direct [the jury] that an accused does not have to prove that he was elsewhere at the material time; see *R v Baillie* [1995] 2 Cr App Rep 31."

[22] The learned trial judge in this case did not lose sight of the fact that the burden of proof remained on the prosecution. He is recorded as saying, in part, at page 104 of the transcript:

> "The accused put forward an alibi when he gave his sworn testimony. It is for the Prosecution to disprove that alibi."

[23] A close examination of the transcript does not reveal any other error being made by the learned trial judge. Based on that examination, it must be said that there is no merit in any of Mr Scarlett's grounds of appeal complaining about the convictions. Mr Equiano is correct in adopting the stance that he did.

The sentence

[24] In preparing for the sentencing exercise, the learned trial judge had ordered and received a social enquiry report. His antecedent report and the social enquiry report showed that Mr Scarlett had no previous convictions, but the social enquiry report was mostly unfavourable to him. It revealed, to say the least, that his community had a poor opinion of him.

[25] The learned trial judge, in passing sentence, stressed the breach of Mr Wright's entitlement to safety at his home. He bore in mind that Mr Wright's injuries were serious. In examining Mr Scarlett's peculiar circumstances, the learned trial judge took

into account the fact that Mr Scarlett had no previous convictions. Although specific accusations of wrongdoing were levelled at Mr Scarlett, according to the social enquiry report, the learned trial judge indicated that he would not take into account some of the negative things that were conveyed by the report. He did not elaborate on which items it was that he had declined to consider.

[26] Mr Equiano submitted that in considering sentence the learned trial judge was obliged to consider a number of factors. These included:

a. the statutorily imposed minimum sentence for the offence of wounding with intent;

b. the gravity of the offence;

c. the aggravating and mitigating factors relating to the offence and the offender, respectively; and,

d the usual range of sentences imposed for those offences.

[27] Learned counsel argued that the sentence imposed for wounding with intent was outside the normal range. He complained that the learned trial judge did not "demonstrate how the various factors were applied that caused [him to impose] a longer than normal sentence". Mr Equiano argued that the statutory minimum should be substituted in this case.

[28] The submissions on behalf of the Crown were along similar lines. Learned counsel helpfully cited a number of cases involving the sentence for the offence of

wounding with intent. They submitted that the sentence imposed by the learned trial judge was outside of the normal range of sentences for this offence. The submissions accepted that the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 (the Guidelines) did indicate that the normal range of sentences, for the offence of wounding with intent, was 15-20 years. Learned counsel submitted, however, that the decided cases suggested that the normal range of sentences for the offence of wounding with intent using a firearm would be 15-17 years.

[29] The submissions of counsel for both sides, concerning the learned trial judge's approach are well made. It is to be noted, however, that there is no complaint concerning the sentence for the offence of illegal possession of firearm.

[30] Although the learned trial judge was obliged to honour the fact that there was a minimum statutory sentence to be imposed for the offence of wounding with intent, he did not demonstrate that he took into account the normal range of sentences for that offence. His omission allows this court to examine afresh, the sentence imposed for the offence of wounding with intent.

[31] In 2010, an amendment to the Offences Against the Person Act, introduced, by section 20(2), a minimum sentence of 15 years for the offence of wounding with intent by the use of a firearm. Since the imposition of that statutory minimum sentence, and since the sentence in this case was passed, the Guidelines were formulated. The Guidelines state that the usual range of sentences for this offence is 5-20 years. That

range would also include non-firearm offences. The fact that there was a statutorily imposed minimum sentence necessarily means that, for wounding with intent, using a firearm, the low end would be 15 years. The high end of the normal range, would, of course, be 20 years.

[32] Very few cases in respect of this offence involve sentences exceeding 20 years. In **Kevin Tyndale v R** [2012] JMCA Crim 58, a sentence of 30 years that was imposed for wounding with intent using a firearm, was not disturbed by this court. It seems however to be an exception to the general trend. In **R v Michael White** [2010] JMCA Crim 4, a sentence of 25 years for wounding with intent, using a firearm was reduced on appeal, to 18 years. In that case, the victim was a police officer who had previously identified Mr White as the perpetrator of another offence. One of the reasons for the reduction of the sentence was to compensate for the time that Mr White had spent in custody awaiting trial. In **Brian Shaw v R** [2010] JMCA Crim 34, Mr Shaw was sentenced to 18 years imprisonment for the firearm wounding of a man, who was crippled as a result of the attack. It is recognised that in those cases the offences were committed before the imposition of the statutory minimum sentence.

[33] The cases that predated the imposition of the statutory minimum sentence for this offence would only not be relevant if they were sentences below 15 years. Those for 15 years and above may still assist in any analysis of an appropriate sentence. Those below 15 years would have been rendered immaterial by the statutory intervention.

[34] Counsel for the Crown pointed us to the cases of **Joel Deer v R** [2014] JMCA Crim 11, **Evon Johnson v R** [2014] JMCA Crim 43 and **Travana Proudlove v R** [2017] JMCA Crim 39. The appellants in all these cases had been convicted for wounding with intent with the use of a firearm. In **Evon Johnson v R**, the sentence imposed at first instance was 20 years each for the offences of illegal possession of firearm and wounding with intent. The sentences were reduced, on appeal, as has been indicated in the table below.

[35] Four other cases have also been brought to our attention, namely, **Orville Campbell v R** [2014] JMCA Crim 14, **Marcus Laidley v R** [2014] JMCA Crim 6, **Kemar Sharma v R** [2015] JMCA Crim 6 and **Logan Nelson v R** [2015] JMCA Crim 11. All involved wounding with intent using a firearm. The sentences imposed in these six cases were:

Case (year of offence)	**Firearm Sentence**	**Wounding Sentence**
Kemar Sharma v R (2008)	10 years	16 years
Joel Deer v R (2011)	7 years	15 years
Evon Johnson v R (2011)	10 years	17 years
Proudlove v R (2011)	3 years	15 years
Orville Campbell v R (2011)	15 years	15 years
Marcus Laidley v R (2011)	7 years	15 years
Logan Nelson v R (2011)	7 years	15 years

[36] The normal range of 15-17 years for the offence of wounding with intent, using a firearm, as suggested by learned counsel for the Crown, would not be an inaccurate

assessment using that limited analysis. The Guidelines must, however, have been informed by a wider canvass of the relevant cases and therefore should not be ignored or undermined. The normal range for that offence must, therefore, be considered to be 15-20 years.

[37] The sentence of 25 years, imposed by the learned trial judge for wounding with intent is, therefore, well outside of the normal range. There is nothing in the circumstances of the case that justifies such a huge departure from the norm. It is true that Mr Wright was seriously injured, but no more so than some of the other victims in the cases listed above. The sentence in this case must be held to be manifestly excessive and should be reduced. The nature of the injuries, and the fact that Mr Wright was attacked at his home would, however, warrant a sentence above the floor of the normal range, despite the fact that this was Mr Scarlett's first offence. A period of 18 years would, therefore, not be inappropriate.

[38] It may be gleaned from the data in the above table, that the sentence of 15 years, imposed by the learned trial judge, for the offence of illegal possession of firearm in this case, although on the high side, is not unprecedented. Mr Equiano was right not to complain about that sentence. That was the sentence imposed for that offence in **Orville Campbell v R** and in **R v Michael White**. In the latter case, this court did not disturb the sentence for the offence of illegal possession of firearm when it reduced the sentence for the wounding with intent offence. That aspect of the sentences imposed should not be disturbed in this case. It must also be borne in mind that the sentence for

the illegal possession of firearm offence will run concurrently with the sentence for the wounding with intent, which cannot be less than 15 years.

Conclusion

[39] It is for those reasons that we made the orders that were set out at paragraph [4] above.

[40] We are grateful to counsel for both sides for their assistance but must commend the learned Director and her junior, Miss White, for their comprehensive written submissions rendered in assisting the court in its assessment of this case. The submissions are evidence of significant effort on their part. Our failure to refer to several of the authorities cited by them is not an indication of any disregard for their efforts or of the value of the submissions.