[2015] JMCA Crim 4

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 48/2012

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA (Ag)

ANDREW STEWART v R

Ravil Golding for the applicant

Mrs Suzette Whittingham-Maxwell for the Crown

4 and 26 February 2015

SINCLAIR-HAYNES JA (Ag)

[1] The applicant was convicted by Gayle J in the High Court Division of the Gun Court in the parish of Clarendon on 27 April 2012, for the offences of illegal possession of firearm and shooting with intent. He was sentenced to seven years imprisonment for illegal possession of firearm and to nine years imprisonment for shooting with intent.

[2] The applicant's application for leave to appeal against his conviction and sentence was considered on paper by a single judge of this court on 16 April 2014 and refused. Therefore, as is his right, the applicant now renews his application before the full court.

The grounds of appeal

[3] At the hearing of the application counsel sought and was granted leave to withdraw the original grounds of appeal filed by the applicant and to rely instead on the supplementary grounds set out below:

> "(1) That the Learned Trial Judge fell into error when he failed to withdraw the case from the jury and direct them to enter a formal verdict of not guilty ie., he failed to uphold the submission of **NO CASE** to answer thus depriving the Applicant of a decision of acquittal in his favour.
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> (2) The Learned Trial Judge fell into error in that he failed to properly assess the virtual complainant's evidence which was contradictory and out of reason and all common sense thus rendering it tenuous and inherently weak. See R v Colin Shippey 1988 C.L.R p 767."

The case for the prosecution

[4] It was 7:00 pm on 12 December 2010. The complainant, Mr Stanford Bola, his father and son were on the veranda which was to the back of their house. A man walked towards him and shot him on the right side of his chest. Mr Bola grabbed his attacker's foot causing him to fall. Although his assailant injured his right shoulder he was still able to hold unto him. His attacker fired at him a second time but missed. His attacker then used the gun to burst his head.

[5] At that point, the complainant tried to wrestle the gun from his attacker, who bit him on his right hand causing him excruciating pain. The complainant was unable to get

the gun but he bit the attacker below his right shoulder. The complainant did not release his grasp of his attacker.

[6] The complainant's 84 year old father came to his assistance, sitting on the attacker and holding onto his throat. His attacker threatened to burst his father's head and, as a result of this threat, they released him. The attacker walked away. The complainant walked behind his attacker to the gate and took up a stone but was unable to throw it because of the pain he was experiencing. The attacker walked through the gate and headed left. The complainant told his father, who was then in the kitchen, that the assailant was Andrew. Approximately one month after, the complainant attended an identification parade and identified the applicant as his attacker.

The defence

[7] At the close of the Crown's case, counsel for the applicant made a submission of no case which was rejected by the learned judge. The applicant testified. His defence was an alibi. He told the court that he was elsewhere that night. He was at Race Course, Cosmo Garden, with his girlfriend. He had gone there to purchase "ganja and' cigarette". He spent about two hours at Race Course square and then he went to a dance at 'Nilely' Park. The learned judge rejected the accused's defence of alibi.

Ground 1- That the learned judge fell into error when he failed to withdraw the case from the jury and direct them to enter a formal verdict of not guilty ie., he failed to uphold the submission of no case to answer thus depriving the applicant of a decision of acquittal in his favour.

[8] Mr Golding submitted that the issue of credibility goes to the very heart of the case. The complainant's evidence, he submitted, was incredible and fundamentally self contradictory. No explanation or credible explanation was given by the witness for the contradictions. In the circumstances, the learned judge ought to have withdrawn the case from his 'jury mind'.

The learned judge's treatment of counsel's submission of no case to answer

[9] In making the no case submission, Mr George Clue, who appeared for the applicant at the trial, referred to and relied on the inconsistencies which were contained in the exhibits as the basis for his assertion that the reason the complainant has accused the applicant of injuring him was that acrimony existed between the parties. He drew the judge's attention to the fact that the complainant's evidence was that he had stopped speaking to the applicant in 2006-2007 but he has not provided any reason. Mr Clue submitted that the applicant had provided the answer which was on account of the incident with Ian Reid also called 'Bad Indian' in 2006. That is, the fact that he, the complainant had testified against 'Bad Indian' who is the applicant's friend. Accordingly, Mr Clue submitted, the complainant was "*so discredited under cross-examination that he is not reliable".* For the Crown, Mrs Sharon-Milwood Moore's response was essentially that the inconsistent statements were extraneous to the instant case and that they were issues of credibility which were properly for the judge's "jury mind".

The applicable law

[10] That the judge's response was brief, is an understatement. He said: "*Mr Clue, who will determine the issue of credibility?"* It is settled law that it is the jury's role to decide whether the presence of inconsistencies discredits the witness and whether reliance ought not to be placed on his evidence. A judge may, however withdraw a case from a jury if the evidence is so manifestly unreliable that a jury, properly directed is incapable of rendering a verdict of guilt without irrationality.

[11] The oft cited statement of Lord Lane CJ in **R v Galbraith** [1981] 1 WLR 1039 is regarded by the learned authors of Blackstone's Criminal Practice 1999 as the leading authority on the test a trial judge should apply in determining whether an accused should be called upon to answer the case against him. At page 104 2B-D of the judgment he said:

> "How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury…."

> There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

[12] The unexplained inconsistencies concerned matters which were tangentially related to the shooting and wounding of the complainant. The important issue which arose was motive: whether the complainant has blamed the applicant because of his close friendship with 'Bad Indian'. The Crown's case was not, in our view, rendered manifestly unreliable by the presence of those inconsistencies. Those were matters of credibility which were properly for the determination of the judge in his role as jury. There were other evidence on which a jury could have, if properly directed, arrived at a verdict of guilt without irrationality.

[13] Although Mr Golding in his written submissions regarded the issue of credibility as posing "*a greater problem*", we will nevertheless consider that the issue of identification was also problematic. Counsel Mr Clue, during his submission to the learned judge that the accused man had no case to answer, questioned whether the complainant was uncertain as to who injured him but has blamed the accused because of his friendship with Ian Reid whom the complainant had testified against in a Gun Court matter. Close scrutiny of the complainant's evidence regarding his identification of the applicant is necessary in the circumstances. The applicant was well known to the complainant. Indeed he knew him for about 15 years. The complainant's evidence, which was supported by the investigating officer's, was that a fluorescent light was on the veranda.

[14] It is important to enumerate times and circumstances under which he was also able to see the applicant's face:

(1) at the point he attempted to disarm the applicant by getting on top of him;

(2) at the point his father attempted to assist him;

(3) at the point the applicant spoke; and

(4) whilst they bit each other, that is; whilst the applicant bit him on his right hand and when the complainant bit him on his right shoulder.

The complainant's identification of the applicant could not be considered as tenuous. We find no merit in this ground.

Ground 2 - The learned trial judge fell into error in that he failed to properly assess the virtual complainant's evidence which was contradictory and out of reason and all common sense thus rendering it tenuous and inherently weak.

Was the complainant's evidence properly assessed by the learned trial judge?

[15] The issues at trial were identification and credibility. Under cross-examination, the complainant categorically denied the following suggestions which were put to him:

(1) that he had a cousin who was in prison called 'Bad Indian';

(2) that he knew Ian Reid (otherwise called 'Bad Indian');

(3) that he had attended court in 2006 in respect of a robbery which occurred at his house and testified against his cousin ('Bad Indian');

(4) that he and his father were injured as a result of that incident;

(5) that he told the police that Ian Reid is now in prison as a result of that robbery; and

(6) that Ian Reid was sentenced to prison.

[16] The complainant's statement to the police was read to him in which he said, "…*in which both of me and my father was injured. As a result Ian Reid received a prison sentence".* He denied giving the police that statement. He was confronted with his statement which he signed. He admitted that his father was injured but he denied the portion which stated that he knew one of his (Andrew's) friends to be Ian Reid otherwise called 'Bad Indian'. In the face of his signed statement he denied stating that:

> "Ian Reid is now in prison as a result of a robbery which was committed at my home in either, 2006 or 2007 in which both of me and my father was [sic] injured. As a result Ian Reid received a prison sentence."

He was resolute that he did not tell the police that "Andrew keeps bad company" and that Andrew, "*was involved in a lot of wrongs and keep a lot of bad company".*

[17] He insisted that he had no cousin named Ian Reid who was a good friend of Andrew. He agreed that he was shot but denied that he made the allegations against the applicant because he believed that he and Bad Indian were friends. The investigating officer however confirmed that the complainant gave the aforementioned statements which he denied giving. The inconsistent statements were tendered into evidence.

The judge's treatment of the inconsistencies

[18] Mrs Suzette Whittingham-Maxwell submitted that the learned trial judge, in his summation, accurately and sufficiently addressed his mind to the issues. Mr Ravil Golding however said he has not. He submitted that although the inconsistencies do not relate to the main issue, they ought to have been taken into consideration and the judge ought to have demonstrated that he knew the law. In reviewing the complainant's evidence the learned judge said:

> "He said he don't know about any cousin in prison.
> He said he never attend Court and give any evidence against any cousin. He said he don't know 'bad indian'. He said he don't know Ian Reid. He said he give a statement. The statement was shown to him. He said he read it back, signed it. He said he never know 'bad indian' as the friend of this accused man. He never said Ian Reid is in prison for robbery.
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> The statement was shown and part of it became Exhibit 1. The witness said he never said it to the police, but it is in the statement. Exhibit 2 turned out to be the part where he said he never said to the police that Ian Reid is in prison. It turned out that it is in the statement.
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> He said he don't know about Andrew Stewart keeping any company. He said he never said that. Exhibit 3 turned out that it is in the statement that he said he knows that Andrew is involved in a lot of wrongs and keeps a lot of bad company.
> …
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> … I don't know if they are Ian Reid's family. Say he don't know if Ian Reid and Buya are good friend [sic] and he said is from 2007 the last time he talk to the accused. Said he never gave any evidence in any gun matter in May Pen. Said he never attend court in 2006 and 2007 and he said that he is a truthful person and then he said he is positive that is Andrew Stewart who shoot him that night. Said he don't

> know about any robbery at his house and Ian Stewart is serving time and in 2007 he lives at Kemps Hill. Didn't know about his father being injured in 2006 and 2007."

[19] At page 122 he said:

> "I must pay attention to any discrepancies or inconsistencies that might arise on the evidence. I recognize that discrepancies and inconsistencies can either be slight or serious. I recognize that I may accept the whole or part of a witness's testimony or I may reject a part or reject the whole."

Also at page 142 he said:

> "When it comes to the question of credibility, the Court must look at a person's demeanour, their body language and the question of inconsistency and discrepancy. The Court can reject a part in a witness' evidence and accept a part. The Court can accept a witness' whole evidence and reject the whole. On the issue of inconsistency, where there are in these [sic] case, but do these inconsistencies go to the root of this case. I find that these inconsistencies do not go to the root of this case."

[20] Indeed the inconsistencies remain unexplained. The mere regurgitation of the inconsistencies cannot be considered as adequate. In delivering the advice of the Board in the Belizean case of **Ellis Taibo v R** (1996) 48 WIR 74, 84 Lord Mustill said: "*But in a marginal case such as this the evidence needed to be scrutinized, and not simply rehearsed, if a verdict founded on it was to be safe*". It is important to point out that the impugned summation was in respect of a shirt with which was allegedly worn and discarded by the appellant because *it bore traces of the murder.*

[21] The complainant was found to be lying in respect of his statement to the police about 'Bad Indian' being involved in a robbery at his house. The thrust of the defence

was that the complainant blamed the applicant because 'Bad Indian' was a close friend of the applicant.

[22] Without adverting to the unexplained inconsistencies, the learned judge accepted the complainant's evidence as to what transpired on the night the he was shot. In fact, he surprisingly said that he found the complainant to be "a witness of truth", although he did not specify on which issue. He was entitled to find the complainant truthful on certain issues even if his evidence, in other areas, was impugned. It is, however, difficult to understand how, in light of the unexplained inconsistencies, the learned judge could have declared the complainant a truthful witness without qualification.

[23] It is settled law that notwithstanding the presence of inconsistencies in the Crown's case, depending on the particular facts, a tribunal of fact is entitled to convict. In the absence of any reasonable explanation for the inconsistencies, a jury must be informed that the previous inconsistent statements are not substantive evidence. A judge is required nevertheless to tell the jury that the presence of the previous inconsistent statement might lead them to conclude that the testimony is unreliable. (See **Mustapha Ally v The State** (1972) Criminal Appeal No 45/1972 (Guyana)).

[24] In the Guyanese Court of Appeal case of **The State v George Mootoosammy and Henry Budhoo** (1974) 22 WIR 83, the evidence of the doctor who attended to the complainant shortly after he was injured, conflicted with the complainant's evidence as to whether he knew the identity of the persons who severed his hands. In dealing with the inconsistency in that case, Haynes JA, as he then was, said:

> "It is axiomatic that it is the exclusive function of the jury to assess the credibility or otherwise of evidence before them and to weigh it. As was said by O'Halloran, J in **R v Flett** (1943) 2 DLR 656: "The jury are judges of *all the facts and not only some* of the facts." In my opinion, a judge should endeavour to ensure that the jury realises the adverse weakening effect unexplained substantial and significant contradictions should have on the credibility of a witness and the weight of his evidence."

[25] That statement was cited with approval by George CJ in **Anand Mohan Kissoon and Rohan Singh v The State** (1994) 50 WIR 266 at page 275 of the decision. In **R v Colin Shippey**, [1988] CLR 767, Turner J found that the inconsistencies in the complainant's evidence were substantial and so required a warning to the jury of the effect of the inconsistencies and an indication of the difficulty and danger in acting on evidence of that quality.

[26] In the instant case the learned judge's role was both as judge and jury. Whilst it is true that a judge sitting as both judge and jury is assumed to be conversant with the legal principles, he must nevertheless demonstrate that he applied those principles. The learned judge failed to demonstrate that he was cognizant of the adverse effect of the unexplained inconsistencies in the complainant's evidence. No indication is given as to whether he considered the weakening effect the unexplained inconsistencies may have had on the complainant's evidence. Indeed there is not the slightest indication that his mind was adverted to those vital issues.

[27] Rowe P in **R v Locksley Carroll** (1990) 27 JLR 259, 265, in revisiting the matter in respect of a judge sitting alone in the Gun Court, found it necessary to review a

number of cases in which the issue was dealt with not only by the Court of Appeal but also by the Privy Council. He enunciated:

> "This Court considered these Privy Council decisions in R v George Cameron [1989] SCCA 77/88 (unreported) a case of a judge sitting alone in the Gun Court and we said concerning a judge's summation.
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> > 'What is impermissible is inscrutable silence. What is of critical importance here is not so much the judge's knowledge of the law but his application. Even if there is a presumption in his favour regarding the former there is none as to the latter'.
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> …
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> ...To what extent, Mr Small asks, is it open to this Court to examine whether a trial judge has heeded his own warning in the assessment of the evidence? In a long line of cases, some of which were brought to our attention by Mr. Small, this Court has consistently maintained that a trial judge is required to give a reasoned decision in the cases determined by him. We said in *R v Dacres* (supra) that:
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> > 'By virtue of being a judge, a Supreme Court Judge sitting as a judge of the High Court Division of the Gun Court in practice gives a reasoned decision for coming to his verdict whether of guilt or innocence. In this reasoned judgment he is expected to set out the facts which he is expected to set out the facts which he [sic] finds to be proved and when there is a conflict of evidence, his method of resolving the conflict.'
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> In *Leroy Sawyers and Others v. The Queen* [1980] R.M.C.A. 74/80 (unreported), we endeavoured to give some of the practical reasons why a reasoned judgment was necessary. An accused person, we said, was entitled to know what facts were found against him and when there were discrepancies and inconsistencies in the evidence, just how the trial judge

resolved them. We did not then refer to the public which has an equal interest in understanding the result of a trial so that it can have confidence in the trial process. Ultimately the Court of Appeal which has the duty to re-hear the case based on the printed evidence and the judgment of the trial judge wishes to be assisted by the thought processes of the trial judge. In 1988, Carey, J.A., in delivering the judgment of the Court in R v. Clifford Donaldson and Others, S.C.C.A. 70, 72, 73/86 (unreported) re-affirmed the attitude of this Court when he said:

> 'It is the duty of this Court in its consideration of a summation of a judge sitting in the High Court Division of the Gun Court to determine whether the trial judge has fallen into error either by applying some rule incorrectly or not applying the correct principle. If then the judge inscrutably maintains silence as to the principle or principles which he is applying to the facts before him, it becomes difficult if not impossible for the Court to categorise the summation as a reasoned one.'

And the most recent decision indicating the Court's mind on this subject is contained in the judgment of R. v George Cameron [1989] S.C.C.A. 77/99 where Wright, J.A., said:

> 'He (the trial judge) must demonstrate in language that does not require to be construed that in coming to the conclusion adverse to the accused person he has acted with the requisite caution in mind. Such a practice is clearly in favour of consistency because the judge will then be less likely to lapse into the error of omission whether he sits with a jury or alone.' "

Effect of the judge's non-direction

[28] The issue at this juncture is whether the inconsistencies are central to the issue or merely peripheral. The question therefore is: was the issue of what transpired with 'Bad Indian' in 2006 vital? In **Mootoosammy**, the inconsistency went to the heart of

the case. The issue was the identity of the persons who had dismembered the complainant. The identification of his assailants was indispensable to the finding of guilt of the accused persons. In **Shippey** the complaint against the accused was rape. The complainant's evidence regarding the rape was riddled with inconsistencies and the judge observed that her behavior was also "wholly inconsistent with her allegation of rape".

[29] The inconsistencies in the instant case are not in respect of what transpired the night the complainant was shot and wounded. They do however concern motive. The applicant asserts that he stands accused because of the 2006 incident which involved 'Bad Indian'. Although it cannot be considered a core matter, it is nevertheless a vital issue which deserved more than the perfunctory attention it was accorded by the learned trial judge. The issue of the complainant's motive was put forward by the applicant and the judge was obliged in the circumstances to address it.

[30] But has his non-direction resulted in a miscarriage of justice? The police statement contained all the material that could support the applicant's assertion that the complainant was motivated by ill-feelings harboured by the complainant against him on account of the previous matter. That matter involved a person well known to both of them. The complainant's evidence to the court constituted a repudiation of his statement. The judge was, in the circumstances, expected to not only determine but demonstrate whether he believed the complainant was lying on those issues. The troubling question remains: was the complainant lying about who shot him? The

learned judge failed to consider the impact of the unexplained inconsistencies on his testimony regarding what happened that night.

[31] Had the learned judge demonstrated that he applied the law by giving himself the required warning, it would have been entirely within his purview to accept some aspects of the complainant's evidence and reject others. The Privy Council decision of **Ashwood**, **Gruber and Williams v R** (1993) 43 WIR 294 erases any doubt that a judge of fact is entitled to dissect evidence which he considers credible from impugned portions. The head note of that case adequately deals with the issue.

It reads:

> "Where leading witnesses for the prosecution are shown in certain respects to be unreliable in relation to matters which are not supportive of nor connected to the main case for the prosecution and their mistakes or untruths are brought to light in order to undermine their credit or throw doubt on their evidence of identification, the effect of these matters on the credit of the witnesses and on the acceptance of their evidence of identification are matters for the jury to decide with appropriate help from the trial judge in the summing up."

[32] In respect of the identification of the applicant, the learned judge examined and assessed the circumstances under which the identification was made. Recognizing the importance of visual identification and the attendant dangers, he adequately gave himself the **Turnbull** warning. He has however, failed to properly assess the evidence in its totality by failing to consider the impact of the complainant's impugned credibility on the veracity of his identification evidence. Additionally, he has failed to demonstrate

that he took into consideration the relevant principles. In the circumstances, we have come to the conclusion that there is merit in this ground of appeal.

Disposition

[33] The application for leave to appeal is granted. The hearing of the application is treated as the hearing of the appeal, which is allowed.

The issue now arises whether the matter should be sent back for re-trial in light of the judge's non-direction. The charges against the applicant are serious. It is a well established principle that guilty persons ought not to avoid the consequence of their act because of an error by the judge in conducting the trial or during his summation to the jury.

[34] The court is however of the view that it is not in the interest of justice to order a re-trial. The Crown's case is so inextricably bound up with the credibility of the complainant that no useful purpose would be served. Evidence has emerged which severely impaired the complainant's credibility. Any further examination of the complainant would only serve to further degrade the complainant's evidence. In any event, the prosecution ought not to be given an opportunity to attempt to rehabilitate the complainant.

[35] The conviction and sentences are set aside and the court directs the entry of a judgment and verdict of acquittal.