

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MR JUSTICE D FRASER JA
THE HON MR JUSTICE BROWN JA**

SUPREME COURT CRIMINAL APPEAL NO 17/2016

ORVILLE WATSON v R

**Robert Fletcher, Russell Stewart and Ms Shadae Bailey for the appellant
Ms Ashtelle Steele and Marvin Richards for the Crown**

5 and 7 June 2023

Constitution of Jamaica – sections 16(7) & (8) – breach of rights to a copy of record of proceedings of the court and to a hearing within a reasonable time – Court of Appeal Rules, rules 3.7, 3.8 & 3.9 – material to be placed before the court in criminal cases.

ORAL JUDGMENT

D FRASER JA

Background

[1] The appellant, Orville Watson, was, on 15 January 2016, found guilty of illegal possession of firearm and two counts of wounding with intent, in the High Court Division of the Gun Court. He was tried by Dunbar-Green J (as she then was), the learned trial judge ('LTJ'). On 5 February 2016 he was sentenced to five years' imprisonment for the illegal possession of firearm and 12 years' imprisonment on each count of wounding with intent. The terms of imprisonment were stipulated to be at hard labour and to all run concurrently. On 6 May 2022 he was granted leave by a single judge to appeal against his conviction and sentence.

[2] On 5 June 2023 after reviewing the transcript and considering the written and oral submissions of counsel, we made the following orders:

- i) It is declared that the right of the appellant under section 16(7) of the Constitution of Jamaica to be given a copy of the record of the proceedings made by or on behalf of the court, has been breached.
- ii) It is declared that the right of the appellant under section 16(8) of the Constitution of Jamaica, to have his conviction and sentence reviewed by a superior court within a reasonable time has been breached by the excessive delay between his conviction and the hearing of his appeal.
- iii) The appeal is allowed.
- iv) As redress for those breaches of the appellant's constitutional rights in these circumstances, the convictions are quashed, the sentences are set aside and a judgment and verdict of acquittal is ordered for each count on the indictment.

[3] We promised then to later outline our reasons. We now do so.

The prosecution's case

[4] The case for the prosecution case is that, at about 12:10 am on 21 March 2012, the 1st complainant, Ackeem Dicks, was at a party when the appellant, Orville Watson, also known as Gary, approached him. The appellant pointed a knife in Ackeem's face and threatened him saying "a dead mi fi dead". At this time Ackeem saw another man, called 'Strado' running in his direction with a silver-looking, spin-barrel gun in his hand.

[5] Ackeem pushed away the appellant's hand and ran. He heard what sounded like gunshots coming from where Strado was behind him. Ackeem continued to run

without looking back. He eventually turned up a pathway where he met up the appellant face to face. The appellant was now holding a gun which appeared to be the same one Ackeem had seen earlier. The appellant shot Ackeem in his stomach. Ackeem rushed at the appellant and they started to "wrestle and tangle up".

[6] Ackeem called out to his mother Philiss Jackson, the 2nd complainant, saying, "lawd Jesus mommy mommy mi get shot". Ms Jackson, having heard the gunshot and the words called out by Ackeem, came out of her house and saw the appellant armed with a gun and Ackeem in a clinch. Ms Jackson was then shot in her foot. She went back inside. Both Ackeem and the appellant fell to the ground. Ackeem heard the appellant telling other men Rappa, Estrada, and two others to take up the gun. Ms Jackson came back outside armed with a machete, which she used to chop the appellant on his shoulder and then dragged Ackeem away. She took him inside the house then to the hospital.

[7] Both complainants knew the appellant before. In the case of Ackeem, for about two years and in the case of Ms Jackson, for about four to five years. There was an electric light on at the outside of the complainants' house where the incident happened, which enabled them to see the appellant.

The defence case

[8] The appellant gave sworn evidence at the trial. Both that evidence and the LTJ's review and treatment of his testimony are absent from the transcript. It can, however, be deduced from the suggestions put to the 1st complainant that the appellant's case is i) a total denial of presence at the scene, having a gun in his possession, being chopped or committing the offences for which he is charged and ii) that the complainants are both mistaken.

[9] Since, however, suggestions are not evidence, it is impossible to say whether those suggestions were confirmed in his sworn evidence, or if there were any other aspects of his evidence in chief or cross-examination, that are relevant to his appeal.

Grounds of appeal

[10] Before this court, counsel for the appellant sought and was granted leave to abandon the initial grounds of appeal, and instead rely on three supplementary grounds, which are set out below:

- i) The right of the applicant, under section 16(8) of the Constitution of Jamaica, to have his conviction and sentence reviewed by a superior court within a reasonable time has been breached by the excessive delay between his conviction and the hearing of his appeal.
- ii) The right of the applicant, under section 16(7) of the Constitution of Jamaica, to be given a copy of the record of the proceedings made by or on behalf of the court has been breached.
- iii) The learned trial judge failed to take into account some critical elements of the prosecution case which impinged on the accuracy and cogency of the identification in the case. This failure denied the appellant a fair consideration of the case against him and a real chance of acquittal.

The summary submissions

Counsel for the appellant

[11] In respect of grounds i and ii counsel submitted that despite a delay of over seven years, critical segments of the trial record are missing without which the court is unable to conduct a fair assessment of the appellant's conviction; the result being that the constitutional rights of the appellant have been breached.

[12] Counsel advanced that the court should, therefore, look at the material available to see whether, in applying the overarching requirement of fairness, the conviction or sentence may be sustained: **Evon Jack v R** [2021] JMCA Crim 31.

Counsel also invited the court to consider rules 3.7, 3.8, and 3.9 of the Court of Appeal Rules that, he submitted, direct the administrative application of the standard implied in the constitutional provisions.

[13] Counsel highlighted that the absent material made it impossible to assess whether, as required, the defence case had been fairly put to and considered by the tribunal of fact, which in this case was the LTJ herself: **David and Watkins v R** 11 WIR 37. Thus the court was unable to determine whether on the defence case: a) there an alibi that required an alibi direction; b) the accused knew the other men mentioned in the transcript; c) there was any information about community conflicts that are relevant; or d) the accused had threatened the witness earlier as alleged.

[14] Counsel additionally complained that the absent material also deprived the court of considering how the LTJ dealt with the requirements of the law in her directions to herself on the issue of recognition.

[15] In respect of ground iii counsel submitted that there were weaknesses in the identification evidence as, whether or not it was a recognition case, the circumstances were difficult, there was scant evidence of the time of observation, the evidence of lighting was weak, there was no visible scarring on the appellant and there were credibility issues which arose on the evidence, which raised the possibility of concoction by association. Counsel argued that, on the parts of the summation available, it was not clear that consideration or adequate consideration had been afforded these issues.

[16] Counsel finally submitted that, applying the sections of the Constitution, the cases and the rules relied on, the appellant could not be afforded a fair review of his trial because of the critical areas of the transcript that are missing. Further he contended that the length of time that has elapsed militate against the court ordering a retrial.

[17] Counsel invited the court to declare that the rights of the appellant under grounds i and ii had been breached, allow the appeal, quash the conviction and sentence and enter a verdict of acquittal for each count on the indictment.

Counsel for the respondent

[18] Ms Steele, for the Crown, conceded that, in respect of ground i, the absence of the complete transcript of the appellant's trial has caused excessive delay in the hearing of this matter, resulting in a breach of the appellant's constitutional rights: **Melanie Tapper v The Director of Public Prosecutions** [2012] UKPC 26; **Evon Jack v R**. Counsel acknowledged that remedies for such a breach range from a public acknowledgment of the breach to the quashing of a conviction. Counsel advanced that for the court to decide which remedy is just, ground ii needed to be considered.

[19] On ground ii counsel submitted that the crucial issue for the court is whether the missing portions of the transcript (the defence case from the notes of evidence and the assessment and recount of the defence's case from the summation) are required to make a determination of the appellant's grounds of appeal: **Delevan Smith and others v R** [2018] JMCA Crim 3 paras. [26] and [27] and **Evon Jack v R** para. [31]. Noting that the consequence of missing evidence has to be dealt with by the court on a case-by-case basis (**Evon Jack v R** at para [34]), counsel reviewed the circumstances and decisions in the following cases to assist the court: **Nordia Duhaney v R** [2023] JMCA Crim 6; **Evon Jack v R**; and **Delevan Smith and others v R**.

[20] Counsel disagreed that, with the available material, the court was unable to determine whether the LTJ warned herself about the dangers of identification even in cases of recognition. Counsel adverted to para. 1 on page 151 coupled with para. 2 on page 155 of the transcript, which she submitted demonstrate that the LTJ warned herself adequately on that point. However, counsel conceded that ground ii had merit, as, without the missing pages, the court will never know the defence's case and whether the evidence of the appellant triggered the need for an alibi or a good character warning.

[21] In respect of ground iii counsel advanced that the LTJ comprehensively considered the issue of identification (pages 145 (para. 6 & 10); 151;153;155;159 of the transcript) and therefore this ground should fail.

[22] Counsel, however, submitted that in light of the constitutional breaches the appellant was entitled to the declarations sought and to have his appeal allowed. Counsel also agreed with the submission of counsel for the appellant that it would not be appropriate for a retrial to be ordered. Though she considered the evidence strong and that a retrial could come on for hearing in a short time, she acknowledged that, as i) the appellant had already "served" seven years out of a 12 years' sentence; ii) the appellant had been on pre-trial remand for three years; iii) the investigating officer was deceased; and iv) the witnesses could not be located, these factors all militated against a retrial being ordered. She cited the case of **Nordia Duhaney v R** in support of her analysis.

Discussion and analysis

[23] There are two striking features about this case. Firstly, both the sworn evidence of the appellant as well as the LTJ's treatment of that evidence are missing. There is, therefore, no material on which the court may assess the defence or whether it was fairly considered and addressed by the tribunal of fact as required: **David and Watkins v R**. This is striking, as, in none of the cases cited by counsel for the Crown, was there a complete absence of material related to the defence case.

[24] In **Nordia Duhaney v R**, notes of evidence were present but the findings of facts were absent. The conviction was quashed on the basis that findings of facts are necessary in a judge alone case to assist the court to determine the appeal. A retrial was ordered. In **Evon Jack v R** where the appellant was convicted of carnal abuse, buggery and indecent assault, only the transcript of the summation was available. The conviction was quashed as it was held that the notes of evidence were necessary to determine whether i) there was adequate evidence for the jury to be sure there had been penetration of the child's anus or her vagina; ii) the evidence or aspects of the

evidence of recent complaint was/were properly admitted; and iii) the directions on important inconsistencies and discrepancies were accurate. No retrial was ordered.

[25] However, in **Delevan Smith and others v R** where the notes of evidence of three of the four witnesses for the Crown were missing, the conviction was nevertheless affirmed. This was the result as the very detailed summation by the trial judge on the law and evidence relating to identification, together with the available evidence on identification, enabled the court to adequately assess and ultimately dismiss the grounds raised in the appeal.

[26] As the missing portions of the transcript that relate to the defence are required to make a determination of the appellant's grounds of appeal, the appellant's right under section 16(7) of the Constitution of Jamaica has been breached: **Evon Jack v R** paras. [20], [42].

[27] The second striking feature of this case is the length of the delay in the appeal coming on for hearing. The appellant has effectively served seven years of a 12 years' sentence (though technically his sentence had not commenced as he was an appellant) after having spent three years on pretrial remand, which was deducted from the 15 years' sentence that was deemed appropriate by the LTJ. As the court when dismissing an appeal invariably orders that any sentence of imprisonment should be reckoned from the date it was imposed, the appellant would soon have been eligible for early release, if there was no impediment thereto, had his appeal been heard within a reasonable time and dismissed. However, due to the unavailability of the complete transcript of the appellant's trial to date, there cannot be a fair determination of whether his conviction was sound. Accordingly, there has been a clear breach of the appellant's constitutional rights under section 16(8) of the Constitution of Jamaica: **Evon Jack v R** paras. [18], [19] and [21].

[28] Given these two striking features, the submissions of counsel for the appellant concerning the constitutional breaches complained of are well founded and appropriately conceded by counsel for the Crown. The long delay, the long period the

appellant has spent imprisoned awaiting his appeal relative to the sentence imposed, and the unavailability of the Crown's witnesses, also correctly inform the united view of counsel, that a retrial in these circumstances would be inappropriate. See **Nordia Duhaney v R** at para. [31].

[29] It is for the above reasons why we made the orders recorded at para. [2].