[2012] JMCA Crim 22

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 56/2009

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

NEGARTH WILLIAMS v R

Earl DeLisser for the appellant

Mrs Kamar Henry-Anderson and Miss Michele Salmon for the Crown

21, 28 May and 8 June 2012

BROOKS JA

[1] On 30 September 2003, Christopher Lord, Damion Green and Dwayne Harris went to the vicinity of the appellant's cook-shop. There they had a confrontation with another group of men, in what could be described as a clash of gangs. According to Mr Lord, the appellant came out of his cook-shop and made a call for peace. He, however, on Mr Lord's account, immediately thereafter, took a gun from one of the combatants, went up to Damion Green and shot him. Mr Green ran. The appellant pursued Mr Green and, thereafter, shot him again, several times, killing him on the spot.

[2] The appellant was convicted, on the verdict of a jury, for the murder of Mr Green and on 8 May 2009 was sentenced to imprisonment for life. He was ordered to serve

25 years imprisonment before becoming eligible for parole. His application for leave to appeal against his conviction and sentence was refused by a single judge of this court but was renewed before us.

[3] At the hearing of the application, Mr DeLisser on behalf of the appellant, and Mrs Henry-Anderson for the Crown, were in agreement that the conviction could not stand. The issues raised by learned counsel turned on the credibility of Mr Lord and how they were handled by the learned trial judge.

[4] We came to the conclusion that counsel were correct in their submissions. Accordingly, on 28 May 2012, we ordered as follows:

> (a) the application for leave to appeal is allowed;
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> (b) the hearing of the application is treated as the hearing of the appeal;
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> (c) the appeal is allowed;
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> (d) the conviction is quashed, the sentence set aside, and a judgment and verdict of acquittal is entered.

At that time we promised to put our reasons in writing and now fulfil that promise.

[5] At the appellant's trial for the murder, Mr Lord was the sole eyewitness for the prosecution. Mr Lord was totally discredited by evidence of what he had said at a previous trial about the events at the time of the incident leading to Mr Green's death.

[6] The aspects on which he was discredited are very important. The first was whether he had had a firearm on the evening before the incident and the second was

whether he had had a firearm at the time of the incident. At this trial he denied that he had had a firearm and at a previous trial he had admitted that he had had a firearm. An enormous part of the cross-examination of Mr Lord centred on his previous inconsistent statements. His lack of credibility, it could be said, was the thrust of the defence.

[7] In cross-examination he said that he did not recall having said that he had had a firearm, and then said he did not have any firearm on the day of the killing and had never, in his life, held a firearm. When some of his previous statements were put to him, no explanation was given for the inconsistencies on the point. He was not required to give an explanation for the majority of the previous inconsistent statements, as these were contained in exhibits which were admitted into evidence during the case for the defence. This was after Mr Lord had already left the witness box.

[8] Another important bit of evidence was admitted during the case for the defence. Forensic evidence showed that a test of swabs taken of Mr Lord's hands proved positive for the presence of elevated levels of gunshot residue (GSR). The swabs were taken shortly after the killing had taken place. The significance of that forensic evidence is that Mr Lord had either fired a firearm himself or his hands were within nine inches of a firearm when it was fired. This evidence tended to contradict Mr Lord's denial that he did not have a firearm. It certainly supported his testimony, given at the previous trial, that he did have one. These were aspects on which the defence was relying in order to discredit Mr Lord. The defence was entitled to have them fairly considered.

[9] The learned trial judge erred in his summation of the case in that he did not emphasise for the jury, the magnitude and the gravity of the inconsistency and that the previous statements were also on oath. The learned trial judge gave the jury only an example of the discrepancies and told them that they would have the transcript of the previous inconsistent statements avaliable to take with them to the jury room. In this context the learned trial judge said (at page 469 of the transcript):

> "...remember after the prosecution had closed we had three court reporters who came and gave evidence. They each said that they took verbatim notes of the evidence given by Christopher Lord at the other trial which was being referred to. And certain sections of those notes were tendered as exhibit [sic] to contradict Mr. Lord when he said he did not say certain things or he cannot remember saying certain things and these were tendered as Exhibit 10 through to 32. You will have copies of these, Mr. Foreman and members of the jury, when you retire. You will look at them to see what you make of them."

[10] In dealing with the exhibits tendered through the court reporters, the learned trial judge, by way of example to the jury, referred to an exhibit number and indicated the way in which the exhibit contradicted Mr Lord's testimony. The manner in which he dealt with each exhibit that he chose was less than effective in demonstrating the complaint by the defence of Mr Lord's unreliability. For example the learned trial judge, at page 470 of the transcript, said:

> "I will briefly mention some, if not all, of [the transcripts admitted as exhibits]. Exhibit Ten relates to whether or not he had a gun, there are certain lines which were tendered and he said he still insists that he did not have a gun. Even though the transcript **would suggest** that he told the court that he had a gun.

> Now, Exhibit Eleven also deals with whether or not he had a gun when he went by the cookshop. And it starts out by staying [saying?], Mr. Foreman and members of the jury, that on the second occasion – he said in this transcript that on the second occasion that he went to the cookshop that he did not see Negarth Williams. Remember, he said that he only went two times and he saw Negarth Williams on both occasions. In relation to Exhibit 12, here we have in the transcript of the evidence that he had a gun and it was working." (Emphasis supplied)

[11] The words emphasised in that quotation seem to soften the impact of the evidence which directly challenged Mr Lord's credibility. It was an approach that the learned trial judge would use on several occasions in relation to these exhibits. He used terms such as "would indicate", "would suggest" and "could suggest". In concluding his summation in respect of these exhibits, the learned trial judge said (at page 473 of the transcript):

> "Now, you would find, Mr. Foreman and members of the jury, that these areas of the transcript dealt with the issue that he had a gun. Well, there are others, but the main thing is that, did he have a gun? The transcript would suggest that at some stage he said he had a gun and at some stage he said he did not have a gun.
>
> Now, you have to look at these areas and see if you believe him or not. If you [dis]believe him on that area, is there anything you can believe him on, because the Defence is saying that he is a pathalogical liar, you can't believe him on anything at all. But the prosecution is saying even if you don't believe him on this, it is open to you [to find] that he is truthful and reliable as to other matters. You can accept and use it in relation to those other matters."

[12] In this latter extract as well as in his general directions on discrepancies and inconsistencies, the learned trial judge made it clear that these were issues to be carefully considered and that Mr Lord's credibility was an important matter for the jury to decide upon. It seems to us, however, that because Mr Lord was the sole eyewitness, the learned trial judge should have done two things differently. Firstly, when the contradictory documentation was put into evidence (it having been done during the case for the defence), he should have directed that the document be read to the jury, instead of merely admitting it into evidence by way of an exhibit number.

[13] Had he done so, the gravity and extent of the inconsistencies would have been clearer to the jury and to himself. He would then, in our view, have been more alert to take the next step, which we think, he ought to have taken, which was to have stopped the case at the end of the case for the defence and directed the jury to return a formal verdict of not guilty.

[14] What would, no doubt, have led the learned trial judge to leave the matter to the jury is the fact that Mr Lord's evidence was consistent with the evidence of the pathologist, as to the pattern of the gunshot injuries suffered by the deceased. There was also the important evidence that all the spent shells found on the scene and spent bullets either found on the scene or taken from Mr Green's body, were from a single firearm. Apart from Mr Lord's evidence, there was, however, nothing which linked the appellant to the killing.

[15] The appellant provided no alternative explanation for the scientific evidence mentioned above. In his unsworn statement all that he said was that he had remained inside his shop while "Christopher [Lord] and others were firing shots" and that he knew "nothing of such that Christopher is telling to this Court". He said that he did not come out of his shop. That absence of an alternative explanation, unfortunately, led the learned trial judge to emphasise that aspect of Mr Lord's testimony which conformed with the scientific evidence and to give less emphasis to the discrepancies, than the latter deserved.

[16] Having decided to leave the matter to the decision of the jury, the learned trial judge should have not only read each exhibit which contradicted Mr Lord's testimony, but should not have softened the impact of the contradiction by using terms such as "would indicate", "would suggest" and "could suggest". In our view, he blunted the force of the defence, that Mr Lord was not a witness whose word could be trusted.

[17] We therefore find that the appellant did not have benefit of having the deficiencies in the Crown's case adequately placed before the jury and that the conviction, as a result, cannot stand. Authority for that stance may be found in the cases of **Mills and Gomes v R** (1963) 6 WIR 418, **Ibrahim and another v The State** [1999) 58 WIR 258 and **Eily and others v R** [2009] UKPC 40 which were cited by Mr DeLisser and Mrs Henry-Anderson.

[18] Two decisions of this court are also relevant. The first is **R v Williams and Carter** SCCA Nos 51/1986 and 52/1986 (delivered 3 June 1987). This court made it

clear that, unless the admitted inconsistencies are immaterial, explanations should be given for inconsistencies before the evidence in court can be accepted and relied on in relation to that particular point. It is, however, not for the trial judge to supply the explanation. At page seven of the judgment, Kerr JA said, "There may be a credible explanation but the explanation must come from the witness; it cannot be supplied by well-meaning conjecture."

[19] In the instant case, the learned trial judge reminded the jury of Mr Lord's explanation for being able to remember the incident, but not being able to remember his evidence at the trial. The learned trial judge did not, however, point out that there was no explanation for the discrepancies between Mr Lord's respective testimonies. The learned trial judge did not make it clear that exhibits 10 through 32, represented sworn testimony by Mr Lord, and that if the jury found that he had made those statements, these were inconsistent statements made under oath in each case. The discrepancies were material. Mr Lord's testimony in the previous trial, that he did have a firearm at the time of the killing, was supported by the evidence of the presence of GSR on his hands. That fact was also material.

[20] The second decision of this court is that of **R v Curtis Irving** (1975) 13 JLR 139. The headnote accurately records the reasoning of the court:

> "Although it was the general rule that the credit-worthiness of a witness was a matter to be determined by a jury in a criminal trial, where the sole witness for the prosecution has been so completely discredited by reason of admitted untruths and blatant and unexplained contradictions and inconsistencies as to render his evidence so manifestly

> unreliable that no reasonable tribunal could safely act on it, a trial judge will be well justified in not leaving the case to the jury."

[21] Each of those cases, with the exception of **R v Williams and Carter**, dealt with a sole eye-witness whose testimony had been discredited, and the inadequate explanation, by the trial judge, of the case for the defence. The conviction was quashed in each of those cases. In **R v Williams and Carter**, the discredited witness was not the sole eye-witness, but the principle in respect of inconsistencies, was identified as set out above.

[22] In **Eily and others v R**, their Lordships in the Privy Council, also dealt with a sole eye-witness having an interest to serve. In a case where a man had been bludgeoned to death, the eye-witness had been held at the scene of the killing with blood on his trousers and his footwear. His testimony was that it was other persons who had carried out the act and he gave inconsistent explanations as to how the blood came to be on his apparel. In the instant case, it is, at best, curious, that of the six or so persons, including the appellant, whose hands were swabbed for determining the presence of GSR, it was only Mr Lord's hands which revealed the presence of that substance. The prosecution gave no explanation for the presence of GSR. The learned trial judge did, however, hint that Mr Lord may have had an interest to serve. In addressing the evidence of the investigating officer, the learned trial judge said at page 486 of the transcript:

> "You look to see whether or not it was the passage of time, five years, **or in the case of Mr Lord, was he hiding something to protect himself**: These are things you

> have to look at and if he was telling lies to protect himself, was he telling the truth in other aspects? These are things you have to look at, Mr Foreman and members of the jury." (Emphasis supplied)

[23] Based on what we have said above, the application of the *proviso* was not contemplated. The question which remained, therefore, was whether a new trial ought to be ordered. Both counsel submitted that a new trial would not be appropriate. We agree with counsel in that regard. Mr Lord is the linchpin of the prosecution's case and, in our view, the system of justice ought to be spared Mr Lord.

Conclusion

[24] Mr Lord being the sole witness as to fact at the trial and his credibility having been severely challenged by the defence by way of previous inconsistent statements made by him under oath, the defence was entitled to have its challenge of his testimony at the trial, fairly and forcefully placed before the jury. This was not done by the learned trial judge and for that reason the conviction cannot stand. There was no basis for ordering a re-trial as a new trial would only exacerbate the difficulties with Mr Lord's evidence.

[25] It is for those reasons that we made the orders set out in paragraph [4] herein.