[2014] JMCA Crim 20

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 95/2010

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE MANGATAL JA (Ag)

NORICK BROOKS v R

Miss Jean Williams for the applicant

Mrs Paula-Rosanne Archer-Hall for the Crown

Harrington McDermott instructed by the Director of State Proceedings for the Attorney-General

7, 8 and 10 April 2014

ORAL JUDGMENT

BROOKS JA

[1] This is an application by Mr Norick Brooks for permission to appeal against conviction and sentence in the Western Regional Gun Court held in Montego Bay on 20 November 2010. Mr Brooks was refused permission to appeal by a single judge of this court but he has renewed his application before this panel of the court.

[2] He was convicted of the offences of illegal possession of firearm, robbery with aggravation and shooting with intent. The learned trial judge sentenced him to 15 years imprisonment in respect of each of the offences of illegal possession of firearm and robbery with aggravation and 20 years imprisonment in respect of the offence of shooting with intent. All sentences were ordered to run concurrently.

The evidence

[3] The convictions arise out of allegations which were accepted by the tribunal of fact that on 13 November 2009, in pursuance of a "sting operation", the complainant Mr Anthony Barrows and Corporal Gregory Van Reil went, by car, to Flower Hill in the parish of St James at about 5:00 pm. Mr Barrows was an executive at the telephone service provider Digicel while Corporal Van Reil was in plain clothes and acting in his official capacity in the attempt to capture the subjects of the "sting operation".

[4] They had in the car with them, a bag with $250,000.00, together with four cellular phones. A party of police officers was to have been travelling behind them, but at some distance, as "back-up". The police were present in order to nab the persons who had been in prior telephone contact with Mr Barrows and whom he was scheduled to meet. The arrangement that Mr Barrows had had with those persons was to deliver the contents of the bag to them.

[5] Mr Barrows and Corporal Van Reil met, as was prearranged, with one of the persons with whom Mr Barrows had had prior telephone contact. This meeting took place at a point along the roadway in Flower Hill. The evidence was that the person

with whom they met was the applicant Mr Brooks who was not known to them before. He had signalled their car to stop, they said, but not knowing him they did not stop. Mr Barrows, the driver of the car, then received a telephone call and as a result turned the car around and went back to the spot where Mr Brooks was. Mr Barrows then stopped the car, came out and spoke with Mr Brooks. Corporal Van Reil remained seated in the car during that exchange.

[6] Mr Brooks, the evidence continued, produced a firearm, and at gun point, demanded the bag from Mr Barrows, who, after trying initially to delay the hand-over, eventually gave it to him. The expected backup of police officers was slow in coming and when Mr Brooks was joined by another man, who took the bag from him, and both seemed to be leaving the scene, Corporal Van Reil alighted from the car and challenged them. There was an exchange of gunfire between the men and Corporal Van Reil, and the men then fled.

[7] When the backup arrived, a search of the area revealed Mr Brooks lying injured in bushes nearby. He was taken to hospital where he told the police that he had accompanied two men to collect money but they did not have any guns and did not fire at the police. He said, both to the investigating officer, Corporal Green, at the hospital, and in his evidence at the trial, that it was not he who had collected the bag from Mr Barrows.

[8] At the trial, Mr Brooks' defence was that he had gone with two friends, Junior and John, to collect money for work that they told him that they had done in connection

with a Digicel cellular tower site. He testified that he waited with them for some two hours at the pre-arranged spot as he was hoping to get some of the money that they expected to collect.

[9] He said that he saw when Junior signalled to a passing motor car and eventually spoke with the persons in that car. Junior received a bag from one of the occupants of the car and, when he was on his way back to where Mr Brooks and John were, Mr Brooks heard shots being fired from the direction of the vehicle. He started to run but he was shot in his back and fell to the ground.

[10] He said that after lying there for some time, police officers, in searching the area, found him. He testified that when they turned him over he heard someone say, "The wrong man you shoot and di man nuh have no gun". He was eventually taken to the hospital where he was interviewed by Corporal Ulette Lewis-Green. He maintained that none of the three, that is Junior, John or he, had any guns or fired at the occupants of the car.

The grounds of appeal

[11] In his application for permission to appeal, Mr Brooks filed three grounds of appeal against the conviction. They are as follows:

> "(a) Unfair trial
>
> (b) There were [sic] no crime scene investigation to conclude if there was a shoot-out that took place.
>
> (c) Further grounds of appeal will be filed by my Attorney at Ms. Jean M. Williams of Shop # 8, 12 Hagley Park Road, Kingston 10."

[12] Miss Williams, who appeared on behalf of Mr Brooks, filed five additional grounds of complaint against the conviction and sentence. They are as follows:

> "1. The conviction is unreasonable and cannot be supported by the evidence.
>
> 2. The Learned Trial Judge erred in law when he allowed the indictment to be amended to include the charge of Shooting with Intent.
>
> 3. The Learned Trial Judge in his summation failed to demonstrate how the inconsistencies between the two main witnesses were reconciled.
>
> 4. The Constitutionality of mandatory minimum sentences [sic].
>
> 5. The sentence of the Court was manifestly excessive."

Learned counsel formally abandoned the second complaint, but, at the invitation of the court she formulated a further ground of complaint as follows:

> "The learned trial judge misquoted and misapplied the evidence and came to a conclusion adverse to the applicant, and in all the circumstances the conviction should be quashed."

The complaint of the misquoting of the evidence

[13] It is the complaint about the misquoting of the evidence with which we shall first treat. It was Mr Brooks' clear evidence that it was his friend Junior who had gone down to the road and stopped the car and had received the bag from a man who had come out of the car. He said, at page 204 of the transcript, that while waiting, he saw a silver vehicle coming. The evidence then continued:

"Q Yes?

A Junior go down the road.

Q Yes?

A And stopped the vehicle.

Q Yes?

A The vehicle didn't stop, it go and turn and come back.

Q Yes [sic].

A Then it stop.

Q Yes?

A Junior was down there, a man come out and him [sic].

...

Q So, Junior went down there, yes?

A And the man open the back and hand him di bag.

Q Yes?

A Junior turn and come towards us.

Q Yes [sic].

A He reach to us and we turn around.

Q Yes?

A And then the vehicle move a little bit the engine start and it moving just a little bit.

Q Yes [sic].

A And then the window wind down and shots start fire.

...

Q You know where the shots were coming from?

A The front of the vehicle.

Q So, when you heard the shots start firing, did you do anything?

A I start to run and I get shot.

Q You got shot where?

A In my back."

Mr Brooks maintained that stance in cross-examination. It was specifically suggested to him that it was not Junior but he who had approached the car. He disagreed with the suggestion (pages 230-231 of the transcript).

[14] Despite that evidence, the learned trial judge in his summation, stated that it was Mr Brooks' evidence that it was he, Mr Brooks, who had waved down the vehicle, spoken to the occupant and received the bag from the occupant. The learned trial judge did this at three different places in the summation. The first place at which the learned trial judge dealt with this aspect of Mr Brook's evidence is at pages 261-262 of the transcript**:**

> "Mr. Brooks took the commendable position of having given sworn evidence he indicated that on the day in question the 13th of November, 2009, he went to visit his friends John and Junior. They indicated that they were going somewhere to collect money from [sic] Digicel man. He think [sic] there was bushing and he said on cross-examination he expect that they were getting something like $900,000.00. **He indicated that all the circumstances, that he was there on the side of the road, he waved the vehicle, the vehicle passed him and turned around came back**

> **and he admitted that he collected a bag** [sic] **what he assumed was money**. He was walking down the pathway with others and he heard the car the Suzuki which he identified, start-up and then a man in the car passenger side apparently, fired at them and he indicated that he was lying down when the police came and searched." (Emphasis supplied)

[15] The second area of the transcript where the learned trial judge also addressed Mr Brooks' defence, is to be seen at pages 262-263 of the transcript:

> "The issue of identification is not important well, not in this case as Mr. Brooks clearly indicates, one, that he was present at the scene; **that he went and collected the money and collected the bag with money**, and he was the one who was actually shot and who he identified there. So there was no question as to whether he was the man who went down there and took the bag from Mr. Barrows and the man who Mr. Van-Reil says, both Mr. Barrows and Mr. Van-Reil think [sic] it was necessary, indicated that this gentleman, they identified the person they saw." (Emphasis supplied)

[16] The third place at which the learned trial judge addressed that aspect of Mr Brooks' testimony is at pages 264-265 of the transcript:

> "This is a matter in which he would like the court to believe that he went on a trip with his friends to collect some money, some $900,000 for what he thought was bushing. I think counsel for the Crown exposed that lie very well in terms of the cross-examination, not knowing these persons to be contractors but believing that they would get money just like that and also that the transaction for money would be on what was by all counts [sic] a lonely road **and he Mr. Brooks who was not involved in this thing went to speak with these people while his friends were behind in the bushes**." (Emphasis supplied)

[17] Undoubtedly, therefore, the learned trial judge did misquote Mr Brooks' evidence. The question for this court is whether this error on the part of the learned trial judge should affect the conviction. Miss Williams' submission was that the conviction should be quashed as a result.

[18] Mrs Archer-Hall, on behalf of the Crown, submitted that the conviction should stand. She argued that this case clearly turned on the principle of a common design by Mr Brooks and other persons to carry out the offence of robbery with aggravation, being armed with firearms and using those firearms to shoot at their victims. In that context, learned counsel submitted, the identity of the person who took the bag from Mr Barrow is immaterial, as the act of any of the parties involved in the common design would be the act of the others. Learned counsel argued that the principle of common design was a live issue at the trial and it was addressed by the learned trial judge in his ruling in respect of a no case submission which was made on behalf of Mr Brooks.

[19] Mrs Archer-Hall submitted that it was clear that the learned trial judge had accepted the testimonies of Mr Barrows and Corporal Van Reil that it was Mr Brooks, who, dressed in a white shirt, white shorts and a white cap, had approached Mr Barrows, pointed a gun at him and taken the bag from him, and that Mr Brooks was in that very same garb when he was found in the bushes after having being shot. She further submitted that the learned trial judge had clearly rejected, as untrue, Mr Brooks' explanation for being at the location. In those circumstances, learned counsel submitted, the error by the learned trial judge would not be fatal to the conviction.

[20] In addition to these submissions Mrs Archer-Hall cited the case of **Rupert Anderson v R** PCA No 51/1970 (delivered 13 July 1971) in support of the principle that this court should not disturb a conviction in a case in which there has been a misquoting of the evidence if "a reasonable jury, after being properly directed would, on the evidence properly admissible, without doubt convict" (page 5 of **Anderson**).

[21] Mrs Archer-Hall's submissions on this point do not consider an important point. It is that in approaching the summation in the way that he did, the learned trial judge failed to fairly consider a critical part of Mr Brooks' case, that is, that he was an innocent observer and by-stander to the events that occurred. It has long been understood, in law, that mere presence at the scene of a crime is not sufficient to incriminate a person in a common design prosecution. If authority is required for that proposition, it may be found in **R v Coney** (1882) 8 QB 534 and **R v Dennie Chaplain and Others** SCCA Nos 3 and 5/1989 (delivered 16 July 1990). The learned trial judge, in outlining the evidence of Mr Brooks as he did, compromised Mr Brooks' case. In wrongly stating that Mr Brooks had admitted to being an active participant in the taking of the bag from Mr Barrows, the learned trial judge seriously nullified an important part of the defence.

[22] It cannot therefore be said that the learned trial judge gave fair consideration to the defence. It is true that the learned trial judge stated that he believed the testimony of Mr Barrows and Corporal Van Reil that Mr Brooks was the person who had approached their vehicle and spoken to Mr Barrows. It would, however, have been easier to arrive at that decision if the tribunal of fact was of the view that there was an

admission by Mr Brooks to that aspect of the prosecution's case. He did not, for instance, have to grapple with Mr Brooks' testimony that Junior was wearing a white shirt or with the issue of identification of the person who had approached the car.

[23] It is also true that the learned trial judge found, as incredible, Mr Brooks' case that he was going with his friends to collect money and was expecting to receive a portion of that money, merely as a result of having waited with them for it to arrive. That case would have been made the more incredible by the learned trial judge's understanding that Mr Brooks became an active participant in the collection of the money, for which he had not worked, and from people with whom he had had no connection.

[24] It cannot be said that Mr Brooks' case received fair consideration. In those circumstances, the fairness of the trial was compromised. The question as to whether the learned trial judge would have convicted Mr Brooks even if he had properly understood the case for defence cannot be definitely answered in the affirmative. This is a different situation from that in a case such as **Rupert Anderson v R**, where a misquoting of a portion of the prosecution's case results in the strengthening of the prosecution's case. The difference is that, in this case, the defence's case has not been fairly put to the tribunal of fact.

[25] The consequence of the learned trial judge's error is that the conviction should be quashed and the sentence set aside. This is, however, not a case in which a verdict of acquittal could be substituted. The evidence on the prosecution's case was very

strong against Mr Brooks. The offences with which he was charged are very serious offences and it is in the interest of the public that such matters should be tried. Appellate courts have stressed that a verdict of acquittal should not be entered "merely because of some technical blunder by the judge in the conduct of the trial or in his summation to the jury" (see **Reid v R** [1979] 2 All ER 904 at page 908g; (1978) 27 WIR 254).

[26] In considering whether to order a new trial it must be borne in mind that Mr Brooks was convicted over three years ago, however, this would seem to be a case to which their Lordships, in **Reid v R**, referred at page 909 (a-c):

> "In cases which fall between the two extremes [where the accused is clearly to be acquitted or inevitably to be convicted] there may be many factors deserving of consideration, some operating against and some in favour of the exercise of the power. The seriousness or otherwise of the offence must always be a relevant factor; so may its prevalence; and, where the previous trial was prolonged and complex, the expense and the length of time for which the court and jury would be involved in a fresh hearing may also be relevant considerations. So too is the consideration that any criminal trial is to some extent an ordeal for the defendant, which he ought not to be condemned to undergo for a second time through no fault of his own unless the interests of justice require that he should do so. The length of time that will have elapsed between the offence and the new trial if one be ordered may vary in importance from case to case, though having regard to the onus of proof which lies on the prosecution lapse of time may tend to operate to its disadvantage rather than to that of the defendant. Nevertheless there may be cases where evidence which tended to support the defence at the first trial would not be available at the new trial and, if this were so, it would be a powerful factor against ordering a new trial."

[27] Having come to that conclusion in respect of the complaint about the misquoting of the evidence, it is unnecessary to address the other complaints raised by Miss Williams, except for a brief word in respect of the sentences that were imposed.

The constitutionality of the minimum sentence

[28] Miss Williams noted that the learned trial judge, when considering the appropriate sentence for Mr Brooks, felt himself bound to impose a minimum sentence of 15 years imprisonment for each of the offences. Learned counsel submitted that prescribed minimum sentences deprived the judiciary of a function with which it was endowed by the Constitution.

[29] Mr McDermott, representing the Attorney General, did at very short notice, provide the court with very useful submissions in respect of the complaint that the sentences imposed in this case were unconstitutional. Mr McDermott submitted that minimum sentences are not in themselves unconstitutional. He argued that where there is a challenge to a sentence, arising from legislation imposing a minimum sentence, as being cruel and inhuman punishment, the question is whether the sentence is grossly disproportionate to the offence committed.

[30] Learned counsel submitted that whether a sentence is grossly disproportionate is a value judgment for this court. He cited the cases of **Patrick Reyes v R** [2002] 2 AC 235, **R v Smith** [1987] 1 SCR 1045; 40 DLR (4^{th}) 435 and **The State v Vries** [1997] 4 LRC 1 in support of his submissions.

[31] Because of the decision to which we have arrived in respect of Mr Brooks' first complaint, we need not decide the constitutional issue but must thank Mr McDermott for his very thoughtful and useful submissions. It must be noted, however, as this offence was committed before the passage of the amendment to the Firearms Act, which imposed the minimum sentence regime for firearm offences, the minimum sentence imposed by that Act would not apply (see section 16(11) of the Constitution of Jamaica and **Albert Huntley v Attorney-General and Another** (1994) 46 WIR 218). The learned trial judge was therefore, in error in considering that he was bound to impose the minimum sentence in each case.

Conclusion

[32] In conclusion, therefore, we find that the learned trial judge's misquoting of Mr Brooks' evidence during his summation, was a fatal error and as a result the orders are as follows:

a. The application for permission to appeal is granted.
b. The hearing of the application is treated as the hearing of the appeal.
c. The appeal is allowed.
d. The convictions are quashed and the sentences set aside.
e. A new trial is ordered.