[2010] JMCA Crim 52

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 91/2009

BEFORE: THE HON. MR JUSTICE PANTON, P.
THE HON. MRS JUSTICE HARRIS, J.A.
THE HON. MR JUSTICE BROOKS, J.A. (Ag)

FABIAN DONALDSON v R

L. Jack Hines for the applicant

John Tyme and Ms Kelly-Ann Boyne for the Crown

19, 20 and 30 July 2010

BROOKS, J.A. (Ag)

[1] On 24 July 2009, the applicant Mr Fabian Donaldson was sentenced to imprisonment for life at hard labour and it was directed that he not be considered as being eligible for parole until he had served twenty years imprisonment. This was after a jury, sitting in the Home Circuit Court, had found him guilty of the offence of murder.

[2] The applicant sought to appeal against the conviction and sentence but a single judge of appeal refused him leave. On 20 July 2010 we refused his renewed application and ordered that his sentence must

be reckoned as having commenced on 24 October 2009. We then promised to put our reasons, for so doing, in writing. We now fulfil that promise.

[3] The prosecution's case was that on Sunday 25 February 2007, two friends and housemates, Ryan Boyd and Dwayne Francis, were at home at 16B Brentford Road in Saint Andrew. They were repairing a perimeter fence at the premises. Mr Boyd's girlfriend Tamesha, stood nearby, observing them work. Mr Francis' testimony was that while they were so engaged, the applicant, with a small black handgun in hand, approached them.

[4] Mr Francis said that the applicant was previously known to him for some time, as the applicant used to live at those very premises, and that he, Francis, would see him almost every day.

[5] Mr Francis said words were exchanged between the applicant and Mr Boyd. He, Francis, enquired of the applicant as to the cause of the dispute between Boyd and himself but the applicant did not answer. The next thing that occurred, according to Mr Francis' testimony, was that the applicant fired a shot.

[6] The fact that the explosion was so close and so loud, caused Mr Francis to turn away. Tamesha fled. Mr Francis then heard three more

gunshots. When he looked back, Mr Francis saw Mr Boyd lying on the ground, with blood on his shirt and he was groaning. The applicant was by then walking back through the gate of the premises.

[7] Mr Francis said that he left the premises to go and get assistance to take Mr Boyd to the hospital and while walking through a passage to leave, he saw the applicant along with another man. He said that the applicant, with gun in hand, spoke to him about his mission and he, Francis, told him that he was going to get a vehicle to take Mr Boyd to the hospital.

[8] Mr Francis did get assistance and Mr Boyd was taken to the hospital where he received treatment. Boyd, however, died by the following morning.

[9] The applicant was arrested some time later. He was placed on an identification parade where Mr Francis identified him as the perpetrator of the killing.

[10] The defence was one of alibi. The applicant made an unsworn statement and said he was nowhere near the scene of the killing at the time that it occurred. He said he did not know anything about the incident. He said that at the time of the incident, he was at Ivy Road,

sitting and talking with three girls. It was while he was there that he heard about the shooting. He said that he did not do any shooting.

[11] He called a witness: one of the girls with whom he said he was. She stated that all four of them were together at a park at Ivy Road watching television from early morning until early afternoon, when the applicant left. She testified that they heard about the shooting while the applicant was still at the park.

[12] Apart from the issue of alibi there was also a point of dispute between the prosecution and the defence as to the hairstyle the applicant sported up to the date of the commission of the offence and whether he was known by the name "Country". The prosecution, through Mr Francis and the investigating officer Detective Sergeant Gunter, asserted that the applicant was known by the name "Country". Those witnesses also testified that the applicant wore his hair in dreadlocks up to the date of the killing. On the other hand, it was suggested on behalf of the applicant, and his witness testified, that he was not known by that name and that he had his hair cut low at all material times.

The submissions

[13] Mr Hines, for the applicant, submitted that whereas the learned trial judge dealt with the manner in which the jury should treat the applicant's unsworn statement, she did not specifically direct the jury how to deal

with testimony of the applicant's witness, concerning the alibi. In learned counsel's submission, that testimony was unshaken.

[14] Mr Tyme, for the Crown, emphasised the strength of the case for the prosecution. He submitted that not only had the learned trial judge dealt adequately with the question of visual identification, but had also dealt properly with the issue of the alibi. He submitted that the conviction should not be disturbed.

Analysis

[15] The important aspects of a direction on alibi are:

a. that the defence of alibi means the accused says that he was not at the scene of the crime when it was committed;

b. that he does not have to prove that he was elsewhere at the time and does not have to bring witnesses to support his alibi;

c. that it is the prosecution which has to prove, so that the jury feels sure, that he was at the scene of the crime;

d. that even if the jury concludes that the alibi was false, that does not by itself entitle them to convict the defendant; they should return to the Crown's case and determine if it convinces them, and

e. they should be aware that a false alibi is sometimes invented to bolster a genuine defence.

[16] In the instant case, the learned trial judge dealt with the issue of alibi at more than one place in the summation. At pages 260-261 of the transcript, she said:

> "So, Mr. Foreman and members of the jury, what Mr. Donaldson, the accused, is saying in his Defence is that he was not there and, therefore, he could not have done what Mr Francis said he did. His defence is what is called an alibi.
>
> Now, an alibi is the answer which the accused puts forward and the burden of proof, in the sense of establishing the guilt of the accused, rests throughout on the Prosecution. The fact that the accused has put forward an answer in the form of alibi, he does not, in law, assume any burden of proving the answer. So, if you believe the alibi, he is not guilty. If you are in doubt about it, he is not guilty. He has however, called a witness, 'Punky', to establish this alibi. He is not obliged to do that. You have heard what I said because if, Mr. Foreman and members of the jury, if you accept the evidence of Mr. Francis, if Mr. Francis' evidence makes you satisfied, so that you feel sure, that this accused was at Brentford Road at 11 o'clock on Sunday morning, the 25th of February, 2007, and shot Ryan Boyd, then the Prosecution would have discharged its burden because he cannot be in two places at the same time. So, that is how the Prosecution is able to discharge the burden of proof on it. You have to go back to the Prosecution's case and look at it and see what you make of it because, as I said, he can't be in two places at the same time and he has set up an alibi."

[17] Mr Hines submitted that that direction was only aimed at the applicant's unsworn testimony. At page 263 of the transcript, the learned

trial judge is recorded as having given further general directions on alibi before recounting the evidence of the applicant's witness. She said:

> "Mr. Foreman and members of the jury, yesterday when he (sic) took the adjournment I had just completed the direction on alibi because that is the defence which was raised by the accused man. And I told you that the accused puts forward this defence, but the burden of proof in the sense of establishing the guilt of the accused, rests throughout on the Prosecution. And the fact that the accused has put forward an answer in the form of alibi, he does not in law assumes (sic) any burden of proving that answer, because if you believe the alibi, he is not guilty. If you are in doubt about it, he is not guilty.
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> This accused has, in effect, go (sic) a little further as to call a witness to prove and to substantiate the alibi that he raised. And that witness, he didn't have to call that witness, but he has and it is his right to do so. So, I will deal with her evidence, Samantha Allwood known a (sic) 'Punkie'."

[18] Having faithfully recounted the essence of the witness' testimony in chief, the learned trial judge, before turning to the evidence on cross examination, said, at page 267 of the transcript:

> "The offence, according to the evidence was committed between 11:00 and 12:00 in the day. So that, she is, in her evidence, providing an alibi for the accused because, if, in fact, he was at the community centre from 8:00 to 2:00 that day, he could not have been at Brentford Road firing shots at Brian (sic) Boyd or anybody else for that matter. So it is a matter for you, Mr. Foreman and Members of the jury, what you believe, whose evidence you accept."

[19] After having completed the examination of the witness' testimony, the learned trial judge said, at page 268:

> "Basically, that was her evidence. As I said, it is a matter of what you accept of the facts of the case. If you believe the accused, then you must acquit him. If you disbelieve him, that does not entitle you to convict him. You must go back to the prosecution's case and see whether you are satisfied and feel sure about it before it is open to you to convict. If you have a reasonable doubt then it must be resolved in favour of the accused and he must be acquitted. It is only if you are satisfied so that you feel sure, on the case presented by the prosecution that you are entitled to convict the accused."

[20] The direction on alibi recommended by The Judicial Studies Board in England includes the following statement on alibi:

> "...Even if you conclude that the alibi was false, that does not by itself entitle you to convict the defendant. It is a matter which you may take into account, but **you should bear in mind that an alibi is sometimes invented to bolster a genuine defence**." (Emphasis supplied)

The learned editors of the collection of specimen directions cited the unreported case of ***R v Askins*** CA, (95/7300/Z5) as a case where a conviction was quashed as a result of a failure to give the warning set out in that quotation. In ***R v Turnbull and another*** [1976] W.L.R. 445 at page 449 D-F, the English Court of Appeal gave guidance to trial judges in respect of directions to be given in respect of alibi. In that judgment it was said:

> "The jury should be reminded that proving the accused has told lies about where he was at the material time

> does not by itself prove that he was where the identifying witness says he was."

[21] It is true that the learned trial judge did not give the portion of the direction which was highlighted above. Nor did she specifically address the fact and implications of the sworn alibi evidence from the applicant's witness. These omissions would amount to a misdirection of the jury on the point. We, however, find that, the quotations cited above from the summation, and the summation taken as a whole, would have clearly brought to the attention of the jury, the issue of alibi and the manner in which they should have treated with that issue. This included the important fact that the burden rested on the prosecution in respect of that issue.

[22] The fact that the learned trial judge did not specifically mention the manner of treating the testimony of the witness called to support the alibi, is not fatal to an otherwise commendable summation. The jury could not have been in any doubt that they would have had to have rejected, as untrue, the evidence of the defence witness before going back to examine Mr Francis' testimony.

[23] Finally, we find that the evidence in respect of the identification was very strong and cogent. The jury returned their verdict in 44 minutes, which is an indication that they were sure of the veracity of Mr Francis'

testimony. For that reason, we find that there has been no substantial miscarriage of justice and that this is a proper case in which to apply the *provisio* to section 14 of the Judicature (Appellate Jurisdiction) Act.

Conclusion

[24] It is for those reasons that we ruled that the application was refused and the applicant's sentence must be reckoned as having commenced on 24 October 2009.