[2014] JMCA Crim 29

JAMAICA

IN THE COURT OF APPEAL

SITTING IN LUCEA HANOVER

SUPREME COURT CRIMINAL APPEAL NO 27/2011

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE BROOKS JA

NASH LAWSON v R

Roy Fairclough for the applicant

Miss Paula Llewellyn QC, Director of Public Prosecutions and Mrs Lori-Ann Cole-Montaque for the Crown

9, 10 December 2013 and 13 June 2014

PANTON P

[1] On 10 December 2013, we ordered as follows:

> "Application for leave to appeal granted. The hearing of the application is treated as the hearing of the appeal which is allowed. The convictions are quashed and the sentences set aside. A new trial is ordered to take place as soon as possible."

At the time of making the order, we promised to put our reasons in writing. This is a fulfilment of that promise.

The matter for determination

[2] The applicant was tried on 15 February 2011 in the Western Regional Gun Court presided over by Donald McIntosh J. The charges were: illegal possession of firearm (count one) and assault (count two). The applicant pleaded not guilty and his trial proceeded in the usual manner. At the end of the prosecution's case, Mr Martyn George Thomas, attorney-at-law, who appeared for the applicant, made a no case submission. The response of the learned trial judge to that submission and the conduct of the proceedings thereafter formed the basis of the application before us, given that the applicant changed his plea to one of guilty.

[3] Upon entry of the pleas of guilty, the learned trial judge imposed fines of $400,000.00 or four years' imprisonment (count one) and $100,000.00 or 12 months' imprisonment (count two). A single judge of this court refused the application for leave to appeal on the ground that there was nothing in the transcript to indicate that the applicant had been forced to change his plea to one of guilty. In addition, the learned single judge said that the fines could not be said to be manifestly excessive.

The grounds of appeal

[4] The grounds of appeal were as follows:

(1) Unfair trial
(2) Forced abandonment of not guilty plea
(3) Manifestly, unreasonable and oppressive sentence

In support of grounds one and two was an affidavit filed by Mr Thomas.

The relevant facts

[5] At the end of the prosecution's case, Mr Thomas addressed the learned judge thus:

> "At this time, I ask you not to call upon the accused, because at this time, it cannot be reconciled, at the time it is said the firearm was pointed. .."

The learned judge said in response:

> "I don't understand you, because I don't know why you say that."

He went on to add that unless the witnesses were to say certain things, then there would be no basis for the irreconcilability of which Mr Thomas spoke. Counsel then said:

> "Very well, m'Lord. The accused man will give his evidence from the box."

The learned judge then said:

> "Good for him. Just one moment. Could you take him outside for me?"

[6] The record shows that the applicant left the courtroom at 2:39 pm. There followed an "off the record" moment in the proceedings during which the learned judge engaged in a discussion with Mr Thomas. Counsel for the Crown, in an affidavit, described this discussion as being "in such a way so as to guide counsel, Mr Thomas on his way forward". The court rose at 2:41 pm and resumed at 2:43 pm. On the resumption, Mr Thomas, in addressing the learned judge, asked for the applicant to be re-pleaded. The judge said, "very well". The registrar re-pleaded the applicant who

pleaded guilty to count one and not guilty to count two. The registrar repeated the particulars of count two to the applicant who then pleaded guilty.

[7] At this stage, the transcript reveals the following exchanges:

> "HIS LORDSHIP: Mr Lawson, let's get one thing very, very clear. Nobody is making you do anything. So, if you are not sure of what you are doing, you might as well tell me now. Are you sure you want to plead guilty?
>
> ACCUSED: Sir?
>
> HIS LORDSHIP: Simple question.
>
> ACCUSED: Repeat the question, Your Honour.
>
> HIS LORDSHIP: Are you sure you want to plead guilty?
>
> ACCUSED: Yes.
>
> HIS LORDSHIP: Very well. So, what you have done is the one sensible thing that you could have done, because the complainant's evidence was clear and lucid and convincing and his evidence indicated, whether it was for 30 seconds, ten seconds or one second, you point a firearm at him. And when he made this report in the presence of the police, you never say you never do it and that is when you had your first opportunity."

The affidavits of the attorneys

[8] Mr Thomas' affidavit, dated 17 March 2011, reads thus, in part:

> "1. …
>
> 2. I am an Attorney-at-law admitted to practice in the several Courts of the island since November, 2008.
>
> 3. That on the 15th day of February 2010 I represented the accused Nash Lawson who had been charged with

the offences of Illegal Possession of Firearm and Assault at Common Law, at his trial in the Western Regional Gun Court situated in Montego Bay Saint James.

4. …

5. That at the close of the Crown's case a submission of no case to answer was made by defence counsel on behalf [of] the accused Lawson which did not find favour with His Lordship.

6. That I then outlined the three options open to the Defendant following as closely as I was able to, the formula used by Judges in advising the unrepresented, I asked for Nash Lawson's choice and was met by a query of which I thought was best for him. I Considered, in all the circumstances a sworn statement to be the best choice and so informed Nash Lawson.

7. That upon entering the witness box and taking the Bible in his right hand, about to be sworn the Learned Trial Judge remarked that Counsel had better know where he is going and the accused had better convince his Lordship.

8. I confess that I had taken this as an indication as to how his Lordship was thinking and formed the view that if the accused was convicted by the Honourable court as constituted that a custodial sentence would have been imminent.

9. That his Lordship then afforded Nash Lawson the opportunity to have dialogue with counsel.

10. That based on what had transpired I again outlined the three options open to the Defendant following as closely as I was able to, the formula used by Judges in advising the unrepresented.

11. That in addition to this I advised Nash Lawson that based on what had transpired it seemed as if His Lordship had at that stage already formed an opinion as to what took place on the day in question and that Nash Lawson ought to again consider his three options.

12. That I asked for Nash Lawson's choice and was again met by a query of which I thought was best for him. I considered, in these circumstances, that a plea of Guilty to be the best choice but instructed the Defendant that the final decision was his.

13. That the defendant at that point expressed a feeling of great confidence as to his ability to satisfy the learned trial Judge of his innocence but expressed some amount of fear that based on his Lordship's remarks, it was a chance that he was not willing to take as he had to think about his young children and his wife who depend on him for support."

[9] As indicated earlier, counsel for the Crown at trial, Mr Alwayne Damian Smith, also swore an affidavit. In it, he said:

"6. I do recall that the LTJ asked the police officers in Court to take Mr. Nash [sic] from the Courtroom. Further, that after Mr. Nash [sic] exited the Courtroom, the LTJ engaged Counsel, Mr. Thomas further on the merit of his case (in keeping with his no case submission). At no time did the LTJ indicate to Counsel, Mr. Thomas his view on the evidence and consequence thereof. It was clear to me that the LTJ was discussing the evidence with the applicable legal principles and was doing so (as it appeared to me) in such a way so as to guide Counsel, Mr. Thomas on his way forward. Subsequently, I recall Mr. Thomas requesting of the LTJ a brief moment to speak with his client. The request was granted and the Court rose.

7. I do recall that subsequent to the adjournment Mr. Nash [sic] was taken to the Courtroom and I observed him in dialogue with his Counsel, Mr. Martyn Thomas. Shortly after, Counsel Mr. Thomas then shared with me that his client was going to plead [sic] guilty to the offences; however he (Mr Lawson) was concerned about being sentenced to imprisonment. To this end, I asked Counsel, Mr. Thomas whether he had received Mr. Lawson's fresh instructions in writing regarding his intention to change his plea. Counsel, Mr. Thomas answered in the affirmative."

The submissions

[10] Before us, Mr Roy Fairclough submitted that the applicant was deprived of the right to a fair trial by a combination of two circumstances:

1. the failure of his attorney-at-law to defend his cause fearlessly due to either lack of experience or knowledge; and

2. the erroneous and unlawful orders made by the learned trial judge with the intention of extracting a plea of guilty.

Mr Fairclough submitted that it was unlawful for the learned trial judge to have ordered the removal of the applicant from the courtroom during the trial, and to have directed that the proceedings thereafter not be recorded. He pointed to the non-resistant attitude of the applicant's attorney-at-law, ascribing it to inexperience or fear. There was also, he said, a possibility that Mr Thomas may have been confused by the developments, and so the applicant was deprived of proper representation.

[11] In respect of the applicant's absence from the courtroom and the direction that there should be no record of the proceedings during that period, Mr Fairclough

submitted that it may be inferred from Mr Thomas' affidavit that two things were impressed on Mr Thomas:

1. That a verdict of guilty was inevitable; and
2. That if the applicant did not change his plea to guilty,he would receive a custodial sentence, whereas he could expect a fine if the plea was one of guilty.

In his written submissions, Mr Fairclough expressed himself thus:

> "Whatever may have transpired between Bench and Bar in the silence its effect on Counsel for the Defendant was obvious: Mr. Thomas was convinced (para 8 to 13 inclusive) that prison awaited his client if he persisted in his wish to satisfy the Judge of his innocence."

[12] Mr Fairclough conceded that the record shows that the applicant told the learned judge that he was not being forced to do anything, and expressed the wish to plead guilty. However, he submitted that there still remained the "silence" in the record during the absence of the applicant. When, said he, the veil of secrecy was lifted, Mr Thomas was heard asking that the applicant be re-pleaded. This was against the background that prior to the applicant's removal from the courtroom, the applicant had indicated his wish to give evidence and had actually entered the witness box. The situation was one, Mr Fairclough submitted, that left the observer with a feeling of disquiet. He urged the court to conclude that there was a sufficiency of doubt as regards the voluntariness of the plea of guilty. Consequently, the convictions ought to be quashed and a new trial ordered.

[13] In their written submissions, the learned Director of Public Prosecutions and her junior conceded that removing the applicant from the courtroom was an irregularity. However, it was contended that the irregularity did not affect the voluntariness of the plea of guilty. There was no need to look beyond the plea, which was entered after the applicant had heard all that the prosecution had to offer.

[14] The learned Director, in her oral submissions, elaborated on the written submission that there was no improper conduct on the part of the learned trial judge. She said that there was no material from which it may be implied that the judge extracted a plea of guilty from the applicant. However, she said, "trial judges should be urged not to do the unusual". She submitted that an accused is always entitled to be present at all aspects of his trial, except, for example, where he disrupts the proceedings. In the instant case, she said, the learned trial judge turned the courtroom into a chambers hearing but it was most unfortunate that he did so while barring the court reporter from recording the proceedings.

The law

[15] There were two issues in the case – firstly, the exclusion of the applicant from the proceedings, and secondly, the subsequent change of plea.

Exclusion of the applicant

[16] A person on trial for a criminal offence has a right to be present throughout all aspects of his trial. He also has a right to hear and see all that is taking place in respect of his trial. Lord Chief Justice Reading of England, in ***R v Lee Kun*** [1916] 11

Cr App R 293, a case which proceeded without the accused sufficiently understanding the language (English) in which he was being tried, expressed the principle thus at page 300:

> "The reason is that the trial of a person for a criminal offence is not a contest of private interests in which the rights of parties can be waived at pleasure. The prosecution of criminals and the administration of the criminal law are matters which concern the State.
>
> Every citizen has an interest in seeing that persons are not convicted of crimes and do not forfeit life or liberty except when tried under the safeguards so carefully provided by the law. No trial for felony can be had except in the presence of the accused, unless he creates a disturbance preventing a continuance of the trial. (See Stephen's Digest of Criminal Procedure, p. 194, and Rex v Berry, 104 L.T.J 110, per Wills J., 1897). Even in a charge of misdemeanour there must be very exceptional circumstances to justify proceeding with the trial in the absence of the accused. The reason why the accused should be present at the trial is that he may hear the case made against him, and have the opportunity, having heard it, of answering it. The presence of the accused means not merely that he must be physically in attendance, but also that he must be capable of understanding the nature of the proceedings."

[17] ***R v Lee Kun*** may be described as an exceptional case; however, the principle holds true in all instances, that an accused is not to be excluded from any portion of his trial unless there are very good reasons. There may be circumstances during a trial when a judge and counsel for the defence and the prosecution need to confer in

chambers in the absence of the accused. On such occasions, it is important that a court reporter be present to record what transpires.

The change of plea

[18] An accused person is entitled to change his plea at any stage of his trial. However, no pressure should be brought to bear on him to bring about such a result. The decision of the English Court of Appeal in the case **R v Turner** [1970] 2 All ER 281 is demonstrative of this principle. The head note reads thus:

> "The appellant pleaded guilty to the theft of his own car from garage proprietors who had a lien on it. On the second day of his trial his counsel advised the appellant that a change of plea might result in a non-custodial sentence, but that, if the trial proceeded and an attack was made on police officers accusing them of complete fabrication (which were the appellant's instructions), the appellant's previous convictions would be put before the jury and he ran the risk of going to prison. After a long discussion the appellant's counsel said that he wanted to discuss the matter with the trial judge. When he returned he told the appellant as his own personal opinion that there was a very real possibility that, if he was convicted by the jury and an attack had been made on the police officers, with his previous convictions he might receive a sentence of imprisonment, but that, if at that stage he pleaded guilty, he must take counsel's word that he would receive a sentence not involving imprisonment. The appellant was repeatedly told that the choice was his, but nothing was done to disabuse him of the impression, which he later confirmed he had formed, that counsel was repeating the trial judge's views. Ultimately the appellant retracted his plea and the jury returned a formal verdict of guilty. On appeal,

> **Held** – There was no evidence that the appellant's counsel exceeded his duty in advising the appellant to plead guilty; nevertheless, as the appellant might have thought that his counsel's views were those of the trial judge, in which case it was really idle to think that the appellant had a free choice in retracting his plea of not guilty, the proper course was to treat the plea of guilty as a nullity, with the result that there was a mistrial and an order should be made for a venire de novo."

Conclusion

[19] We recognize that the courts are burdened with cases alleging breaches of the Firearms Act, and that trial judges are hard pressed in their efforts to ensure speedy trial of the matters before them. It is against this background that we viewed the actions of the learned trial judge in attempting to abridge the proceedings. He was well-intentioned. However, we found that he erred when he did not allow the applicant to give evidence after he had entered the witness box. The error was exacerbated by the exclusion of the applicant from the courtroom while the judge engaged in a private conversation with the applicant's attorney-at-law in relation to the further progress of the case. The applicant was the person most likely to be affected by any decision relating to the case; he was the person on trial. Therefore, he ought to have been present at every step of the way unless there were compelling reasons to exclude him from the courtroom. An examination of the transcript does not reveal any such reason.

[20] The discussion between the learned trial judge and counsel for the applicant resulted in confusing signals being transmitted to the applicant as regards the appropriateness of his maintenance of a plea of not guilty. In the end, he changed his

plea to one of guilty. We were not satisfied that the change was freely made, given the circumstances leading up to it.