[2014] JMCA Crim 15

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 117/2010

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE MORRISON JA
THE HON MS JUSTICE LAWRENCE-BESWICK JA (Ag)

NICHOLAS LEVY v R

Robert Fletcher and Mrs Nadine Atkinson-Flowers for the applicant

Miss Paula Llewellyn QC and Miss Melissa Simms for the Crown

4 and 5 November, 20 December 2013 and 28 March 2014

MORRISON JA

[1] This application for leave to appeal against conviction and sentence was heard on 4 and 5 November 2013. On 20 December 2013, the court announced that the application would be refused and directed that the applicant's sentence should be reckoned from 8 November 2010. These are the reasons for this decision.

[2] The applicant was jointly charged with another ('the co-defendant') for the murder of Mr Neville Harris ('the deceased') on 26 November 2005. Their trial commenced before Beckford J and a jury in the Circuit Court Division of the Gun Court for the parish of Kingston on 21 October 2010. At the close of the case for the prosecution, the co-

defendant was discharged by the jury on a formal verdict of not guilty, a no case submission made on his behalf having been upheld by the judge. However, on 8 November 2010, the applicant was convicted of murder and sentenced to imprisonment for life, with a stipulation that he should serve 21 years before being eligible for parole. His application for leave to appeal was considered and refused by a single judge of appeal on 22 December 2010 and the applicant accordingly renewed the application before the court itself.

[3] The case for the prosecution was that, at about 7:20 pm on 26 November 2005, the applicant shot and killed the deceased. The primary evidence identifying him as one of the deceased's assailants was given by the wife of the deceased, Mrs Winsome Jacobs-Harris. The applicant having by his unsworn statement denied any knowledge of the deceased's murder, the principal issue at the trial was whether he had been correctly identified by Mrs Jacobs-Harris.

[4] Mrs Jacobs-Harris' evidence was that she had known the applicant for some 30 years, since he was born; that they had lived in the same community during all that time; that she knew his parents and siblings; that they would all visit each other's homes; that she and others would call him by the nickname 'Fattalous'; and that she had last seen him the day before her husband was killed. She testified that, on the night of the killing, from a distance of about 14 feet, she saw when, having "draped" the deceased in the back of his merino, the applicant pulled a gun from his waist and shot him. The area was well lit at the time and she was able to observe the applicant's face for about five minutes. Shortly after the deceased was shot and while he lay

bleeding and motionless on the ground, Mrs Jacobs-Harris spoke to the applicant, who told her, apparently referring to the deceased, "Him tink him can diss a man 'bout here". Her response was, "…Is all right Nicholas, you kill Ears, you kill Ears" ('Ears' being the name by which the deceased was known). At this point, Mrs Jacobs-Harris testified, she and the applicant were within touching distance of each other and she was able to see him "[f]rom him face go right down". The deceased was then taken to the hospital by Mrs Jacobs-Harris' sister, Miss Dinna Hamilton, and another person. Mrs Jacobs-Harris had not seen Miss Hamilton on the scene during the incident in which the deceased was shot, but only noticed her "after everything finish".

[5] In addition to Mrs Jacobs-Harris' evidence, the prosecution relied on nine signed pages of a deposition taken at the preliminary enquiry from Miss Hamilton. As at the date of the preliminary enquiry, the applicant had not yet been charged and the co-defendant was at that time the only defendant before the court.

[6] The circumstances in which the deposition was taken were as follows. After Miss Hamilton had been examined-in-chief before the learned Resident Magistrate on 30 January 2006, and after cross-examination by the then defendant's counsel had commenced, the preliminary enquiry was adjourned for continuaton on 10 February 2006. Before the adjournment was taken, the Resident Magistrate's note of the evidence which Miss Hamilton had already given, comprising nine pages, was read over to her and she was invited to make such alterations or corrections as she might wish. Thereafter, without making any corrections, Miss Hamilton duly signed the Resident Magistrate's note of the evidence. When the preliminary enquiry resumed before the

Resident Magistrate on 10 February 2006, cross-examination of Miss Hamilton continued, but was interrupted when an objection was taken by prosecuting counsel to a question put to her by counsel for the defence. As a result, Miss Hamilton was asked to wait outside the courtroom while the objection was ventilated. After the Resident Magistrate had ruled on the objection, Miss Hamilton was called, but did not answer. In fact, she appears to have disappeared completely and her evidence at the preliminary enquiry was never completed. So in the end, the Resident Magistrate's note of the evidence which Miss Hamilton had given under further cross-examination on 10 February 2006 was never signed by her.

[7] Pursuant to section 31D of the Evidence Act, the nine signed pages of the Resident Magistrate's note of Miss Hamilton's evidence ('the partial deposition') were admitted at the trial, over vigorous objection by the applicant's counsel. The partial deposition represented the evidence which she had given in examination-in-chief on 30 January 2006 and such of her cross-examination as had been completed that day. In that evidence, Miss Hamilton stated that, on the evening of 26 November 2005, she was in the company of her sister and her niece when she saw the co-defendant and the applicant, whom she had known for over 10 years previously and to whom she referred by name, coming in her direction. She saw the applicant, point a "shine gun" at the deceased, she heard "blow, blow" and then she saw the deceased run off holding his chest. She later assisted in taking the deceased to the hospital, where he was pronounced dead by a doctor.

[8] In his defence, the applicant made a brief unsworn statement, in which he acknowledged knowing the deceased, who, he said, was not only a friend of his father, but also a friend of his. However, as we have already indicated, he denied any knowledge of the deceased's murder ("I don't know nothing about this murder or know nothing about they say me have a gun").

[9] After full and careful directions from the judge on the issue of identification, the applicant was convicted and sentenced in the manner already indicated.

[10] When the renewed application for leave to appeal came on for hearing, the applicant's counsel sought and was granted leave to argue two supplemental grounds of appeal, in substitution for the grounds originally filed by the applicant himself. The first ground was based on the events described at paras [5]-[7] above, while the second complained about the sentence imposed by the learned trial judge:

> "1. The Learned Trial Judge's admission of the deposition (partial) of Dinna (Diana?) Hamilton was erroneous and in effect was so gravely prejudicial to the applicant Nicholas Levy so as to outweigh any probative or corroborative value.
>
> 2. The sentence is excessive in all the circumstances."

[11] On the first ground, Mrs Nadine Atkinson-Flowers, who appeared with Mr Robert Fletcher for the applicant, submitted that the learned judge ought not to have admitted a part only of the cross-examination of Miss Hamilton and that, this having been done, the jury was deprived of material upon which to assess her evidence. In the result, it was submitted, a fair picture of Miss Hamilton's evidence was not presented to the jury: the partial deposition, as well as the Resident Magistrate's note of such of Miss

Hamilton's cross-examination as had taken place on 10 February 2006, ought to have been admitted. Mrs Atkinson-Flowers also directed our attention to section 28(a) of the Judicature (Appellate Jurisdiction) Act, under the provisions of which she invited the court to order production of the Resident Magistrate's note, so that we could form our own view of its effect.

[12] Mrs Atkinson-Flowers further submitted that, because Miss Hamilton had absented herself from the continuation of her cross-examination, the discrepancy between her evidence and that of Mrs Jacobs-Harris as to whether she was present at the scene of the shooting had remained unexplored. And, further still, the admission of the partial deposition was prejudicial to the applicant, who had not been before the court at the preliminary enquiry.

[13] Miss Melissa Simms for the prosecution submitted that, in the absence of any evidence (from, for example, the Resident Magistrate, the Clerk of the Court or counsel for the defence) vouching for the accuracy of the unsigned portions of Miss Hamilton's evidence, the trial judge had correctly exercised her discretion by refusing to admit those portions in evidence. But, it was further submitted, if the court were to form the view that the judge's admission of the partial deposition only was unfair to the applicant, an examination of the parts of Miss Hamilton's cross-examination that were not admitted would reveal nothing that would support the applicant's defence. In these circumstances, it was submitted, the admission of those parts of the Resident Magistrate's note would have had no material effect on the outcome of the trial. In any event, it was submitted finally, the trial judge gave adequate directions to the jury on

the need for care in assessing Miss Hamilton's evidence, given that they were not able to observe her demeanour or to see how she withstood cross-examination.

[14] Section 31D of the Evidence Act provides that:

> "…a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if it is proved to the satisfaction of the court that such person –
>
> (a)…;
>
> (b)…;
>
> (c)…;
>
> (d) cannot be found after all reasonable steps have been taken to find him;…"

[15] As a guide to the application of this section, both sides placed reliance on the decision of the Court of Appeal of England and Wales in ***R v Charles McGillivray*** (1993) 97 Cr App R 232. That case was decided under section 23(1) of the UK Criminal Justice Act 1988, which was in its terms substantially similar to section 31D of the Evidence Act. The court held that the statement of a deceased person, which he had confirmed before his passing to be an accurate record of what he had said, but which he had been unable to sign because of a physical disability, was in law a statement made by a person in a document and as such was rightly admitted by the judge under section 23.

[16] However, Watkins LJ, delivering the judgment of the court, spoke (at page 238) of the need for "very great caution" when it was sought by the Crown to invoke section

23, "…and by the trial judge, whose task it is to ensure that the balance of fairness is maintained in the trial". Thus, to quote Watkins LJ himself in the earlier case of ***R v Blithing*** (1983) 77 Cr App R 86, 90, "…where a heavily prejudicial statement which could not be challenged by cross-examination [is] sought to be admitted, a plea for exlcusion ought to succeed if the judge concludes that it would be simply unfair to a defendant to admit it". These dicta find an echo in section 31L of the Evidence Act, which provides that a statement otherwise admissible under section 31A-31J may nevertheless be excluded by the trial judge if in her opinion its prejudicial effect outweighs its probative value.

[17] We were clearly of the view that, in the interests of maintaining the "balance of fairness" at the trial of this case, the learned trial judge ought to have admitted the entire deposition into evidence. This would have afforded the jury, as Mrs Atkinson-Flowers submitted, a view of the full picture; and the fact that Miss Hamilton had not signed some of the pages could have been more than adequately dealt with by an appropriate word of caution in the summing up.

[18] In considering what impact the judge's failure to adopt this course might have had on the verdict of the jury, it seemed to us that this was a case in which the court should exercise its power under section 28(a) of the Judicature (Appellate Jurisdiction) Act. As this court explained in its recent decision in ***Gaynair Hanson v R*** [2014] JMCA Crim 1, para. [12], section 28(a) confers a discretionary power, which the court should exercise "[i]f it was plainly made out that justice required it" (per Walton J in ***R v Perry and Harvey*** (1909) 2 Cr App R 89, 92, in a comment on section 9 of the English

Criminal Appeal Act, the obvious legislative forebear of section 28(a), which was subsequently approved by the Court of Appeal in ***R v Lattimore and Others*** (1975) 62 Cr App R 53). We therefore ordered the production of the unsigned portion of Miss Hamilton's deposition, so as to allow us to form our own view as to the impact, if any, that it might have had on the applicant's trial and the verdict.

[19] In the parts of her deposition which were admitted and read to the jury, Miss Hamilton postively identified the applicant as being present on the evening in question shortly before the deceased was shot. She said that she saw the co-defendant hand a gun to the applicant, who then pointed it at the deceased and fired two shots. Up to the point when the cross-examination was suspended on 30 January 2006, Miss Hamilton had given some evidence about the lighting, distances and her prior knowledge of the applicant.

[20] When the cross-examination of Miss Hamilton resumed on 10 February 2006, she again spoke of the applicant's presence on the night in question, repeating some of the detail which she had already given about his having been given the gun by the co-defendant. When Miss Hamilton was pressed on the contents of the statement which she had given to the police after the incident, the learned Resident Magistrate recorded her as having said this:

> "On Saturday 26th November 2005, my sister Babs and I were sitting in front of the shop. I did say that I saw my brother-in-law Ears walking towards Spanish Town Road. I did say that Nicholas and Jabba began to walk fast in the direction that Ears was. I did say that Ears bent a corner and both Nicholas and Jabba walked fast behind him. When Ears

bent the corner, I could not still see him. He did not get shot around the corner. When he got shot he ran around the corner, not true that he bent the corner before he was shot. I did not tell the police that Ears get shot before him bent the corner. He did get shot before he bent the corner.

I agree that I did not see when Ears got shot. I did not see when Nicholas and Jabba shoot Ears, I didn't see when he fired. I saw Ears running and holding hereso [sic] (indicates chest). I saw them Nicholas and Jabba running behind Ears and I heard blow-blow and saw him holding his chest that's how I know. Ears [sic] back was turned to them but he was holding his chest

Suggesting – you are not speaking the truth about the incident.

Answer - I am talking the truth

Question - Did you say in your statement I saw when [the co-defendant] put the gun in his son's Nicholas hand. Nicholas and Jabba began to walk fast into [sic] the direction where my brother-in-law Ears was.

Answer - Yes I did

Question - Did you go on to say 'Ears bent a corner and both Nicholas and Jabba walked fast behind him and suddenly I heard three shots.'

Answer - I did not say to the police that it was when he bent the corner he get shot. I said that he got shot and then run off and bent the corner. I did not say three shots, I say [sic] two shots.

Question - Did you say to the Court on the last occasion you were here, 'After [the co-defendant] handed Nicholas the gun, Nicholas stepped away from his father and come right to the bar front.'

Answer - I did say this.

I did say that same time Ears pass Nicholas at the bar front and was heading to Spanish Town Road direction and when Ears pass Nicholas, I hear two shot 'Blow – Blow' long after him pass him."

[21] At this point, the learned Resident Magistrate's note indicated that Miss Hamilton was asked to step outside while an objection to a question asked in cross-examination was taken and that, after the ruling, it appeared that she had left the building and could not be located. It is in these circumstances that the answers recorded in the foregoing paragraph as having been given by Miss Hamilton came to be neither read over to, nor signed by, her.

[22] But, from the Resident Magistrate's note of Miss Hamilton's answers, it is clear that, to the extent that what was said by her in the truncated cross-examination is of any relevance, she confirmed (i) the applicant's presence at the scene of the killing; (ii) that he was armed with a gun; and (iii) that he and others were seen, first walking, and then running behind the deceased at around the time when the sound of gunshots was heard and the deceased was seen holding his chest. Accordingly, although, as we have already indicated, we considered that complete fairness to the applicant in these circumstances required that the entire deposition should have been placed before the jury for their consideration, it seems to us that Miss Hamilton's answers in cross-examination would not have assisted him in his defence that he had been wrongly identified as one of the participants in the events which led to the death of the deceased.

[23] It is against this background that we came to the conclusion that this was a fit case for the application of the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act, pursuant to which this court can, "notwithstanding that [it is] of opinion that the point raised in the appeal might be decided in favour of the appellant,

dismiss the appeal if [it considers] that no substantial miscarriage of justice has actually occurred". Even putting on one side what Miss Hamilton was recorded as having said at the preliminary enquiry (bearing in mind that there was, as Mrs Atkinson-Flowers pointed out, a discrepancy between her account and that of Mrs Jacobs-Harris, who testified that Miss Hamilton was not on the scene at the time of the shooting), the evidence of identification against the applicant was very strong. In these circumstances, it seemed to us that the jury "would inevitably have come to the same conclusion upon a review of all the evidence" (per Lord Hope in ***Stafford v The State*** [1999] 1 WLR 2026, 2029).

[24] As regards sentence, although the applicant filed a ground challenging the sentence imposed by the trial judge as being excessive, this issue was not, quite properly in our view, pursued with any vigour in argument before us. There was certainly no basis upon which to suggest that the stipulation that the applicant should serve 21 years before parole for an unprovoked and cold-blooded murder was manifestly excessive.

[25] These are the reasons for the order of the court, as set out at para. [1] above.