[2015] JMCA Crim 17

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 2/2011

BEFORE: THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA (AG)

AARON LEWIS v R

Dwight Reece for the appellant

Miss Keisha Prince for the Crown

8 and 31 July 2015

BROOKS JA

[1] Mr Aaron Lewis, the appellant in this case, was on 8 October 2010, convicted in the High Court Division of the Gun Court for the offences of illegal possession of firearm, inflicting grievous bodily harm and robbery with aggravation. The learned trial judge, Edwards J, sentenced him on 26 October 2010, to 10 years imprisonment in respect of the offence of illegal possession of firearm, five years imprisonment in respect of the offence of inflicting grievous bodily harm and 10 years imprisonment in respect of the offence of robbery with aggravation. He was given leave by a single judge of this court to appeal in respect of these convictions.

[2] We heard Mr Lewis' appeal on 8 July 2015 and dismissed it. We confirmed his conviction and sentence and ordered that his sentence be deemed to have commenced on 26 November 2010. We promised to put our reasons in writing and now fulfil that promise.

[3] The events which led to Mr Lewis' arrest and trial for these offences occurred on 18 March 2009. The account of Mr Omar Anderson, one of the security guards on duty at the Caymanas Golf and Country Club, was that at about 8:40 pm that day, four masked men, two armed with guns and the others with a knife and a chopper respectively, invaded the premises. They accosted and tied up Mr Anderson and the other security guard, who was on duty there, beat them and robbed them of cellular phones and cash. After their various activities at the premises, the four men went away, but, as providence would have it, they left a bag behind.

[4] The contents of the bag included items identifying Mr O'Neil Williams. His photograph, his uniform from his workplace and a payslip with his name were inside it. He was, sometime later, arrested and charged for the offences and pleaded guilty thereto. He also gave a statement to the police in which he identified the other persons whom he said were also involved in the robbery. As a result of that statement Mr Lewis, was arrested. He was indicted for the offences mentioned above, as well as for three other offences. He was acquitted at the trial in respect of those other three.

[5] Mr Williams testified for the prosecution at the trial. He had, by then, been already sentenced for the offences, for which he had pleaded guilty. He testified that

he and Mr Lewis were co-workers. They worked as security guards. On the evening that the offences were committed, Mr Lewis had introduced him to two other men and invited him to come along with them "to pick up something from one yout" (page 14 of the transcript). One of the men was Mr Lewis' brother Craig. The other man was called "Quwan". The four went to the Caymanas Golf and Country Club where, according to Mr Williams, although he was taken by surprise as to the true nature of the venture, he played a minor part, while the others were involved in the activities that took place. On his account there were only two weapons, one gun and a chopper. Craig had the firearm and Quwan had the chopper.

[6] Mr Williams testified that Mr Lewis did not have a gun and was not being aggressive to the guards. It was Craig who was the aggressive party and the beating of the guards was "mostly" done by Craig. There were a number of discrepancies between Mr Williams' testimony and that of the security guard, Mr Anderson, who was left battered and bleeding from the beating.

[7] Detective Corporal Smith testified that after he arrested Mr Lewis, Mr Lewis admitted to him, after being cautioned, that he was present at the time of the offences. Mr Lewis' account as to who was the initiator of the robbery plan, was however, very different from Mr Williams'. According to Detective Corporal Smith's testimony, Mr Lewis said "Mr. Smith, mi mek a big mistake, a force Oneil dem force mi fi guh rob the golf club" (page 146 of the transcript). Detective Corporal Smith did not reduce the admission to writing so as to have Mr Lewis sign confirming it.

[8] Mr Lewis gave an unsworn statement at the trial. He accepted that Mr Williams and he were co-workers but denied being involved in the robbery. He said both Mr Williams and Detective Corporal Smith had grievances against him. The import of his statement was that their accounts implicating him were false. He called no witnesses.

[9] In this appeal, Mr Reece, on behalf of Mr Lewis, filed four supplemental grounds of appeal, in place of Mr Lewis' original grounds. He sought and received permission to argue those grounds. They are:

1. That the learned trial judge erred in not upholding the submission of no case to answer made on behalf of the appellant.

2. That the learned trial judge erred in law in placing reliance on the evidence of the main witness for the Crown despite finding manifest inconsistencies and discrepancies which were serious and went to the root of the Crown's case.

3. That the learned trial judge erred in law in relying on evidence amounting to an oral confession without ruling on the voluntariness of same.

4. That the learned trial judge erred in finding that the oral confession given to the investigating officer had the

effect of corroborating the evidence of the discredited accomplice.

Mr Reece, however, only relied on grounds two and three. They will be assessed below.

Ground two

[10] Learned counsel submitted that the learned trial judge, having found several inconsistencies in the evidence of Mr Williams, ought not to have concluded that she was entitled to accept a part of his testimony. Mr Reece submitted that she should have rejected Mr Williams' testimony in its entirety and that her failure to do so rendered the convictions unsafe.

[11] He accepted that the learned trial judge gave herself the correct warning in respect of treating Mr Williams as an accomplice. However, he submitted, her jury mind could not have properly come to the conclusion that Mr Williams' testimony, concerning Mr Lewis' presence at the time of the robbery, was credible. As a result the conclusion was improper and unsafe.

[12] Miss Prince, on behalf of the Crown, submitted that the learned trial judge not only gave herself correct warnings in respect of treating with the evidence of an accomplice but undertook a careful assessment of the evidence, particularly the inconsistencies in Mr Williams' testimony, as well as the discrepancies with that of Mr Anderson, the security guard. Having done so, learned counsel submitted, the learned trial judge was entitled, having had the opportunity to see and hear the witnesses and to assess their demeanour, to have arrived at the conclusion that she did.

[13] Miss Prince submitted that, in the circumstances, this court should not interfere with the findings of fact by the learned trial judge. She relied on the authority of **R v Andrew Peart and Garfield Peart** SCCA Nos 24 & 25/1988, delivered 18 October 1988, where it was said that it is the materiality of the discrepancies which would determine whether a witness' credit is destroyed or severely impugned. The court said at page 5 of that judgment:

> "We would observe that the occurrence of discrepancies in the evidence of a witness, cannot by themselves [sic] lead to the inevitable conclusion that the witness' credit is destroyed or [severely] impugned. It will always depend on the materiality of the discrepancies...."

[14] It is to be noted that Mr Williams was severely taxed in cross-examination about certain inconsistencies between his statement to the police and his testimony in court. Although he rejected suggestions that he had made certain assertions in his statement to the police, those portions of the statement which were said to be inconsistent were not placed into evidence. The police officer who recorded that statement did, however, testify that he accurately recorded in the document what Mr Williams had told him. He testified that he read the statement over to Mr Williams, after which Mr Williams signed it as being true and correct.

[15] The difficulties in the prosecution's case before the learned trial judge were, therefore, mainly the discrepancies between the testimonies of Mr Williams and Mr Anderson. She identified these difficulties at page 210 of the transcript:

> "Now, there are several discrepancies and inconsistencies in the evidence of Oneil Williams and between the evidence of Williams and Anderson, some are slight some are serious. I

> consider the evidence whether the men were masked to be serious. I consider the issue of how many guns were present to be as serious…."

[16] The learned trial judge then went on to identify the main issue concerning Mr Williams' credibility and to assess it. She did so at pages 212 - 213 where she said:

> "The question I must ask myself is, does this mean that he is totally unreliable? And the number of inconsistencies that were found in his evidence cannot be reliable [sic] upon, due to my finding that his explanation is not credible. So these pieces of evidence I can make no finding of facts upon him. He places Aaron on the scene, but he don't [sic] place his own and Aaron's participation in the incident to a great extent. The question for the Court is, why would he lie and place Aaron on the scene then make his participation, that is, Aaron's participation minimal? He told the Court Aaron did not handle a gun, although the evidence of the other Prosecution witness is that there were two guns. He said Aaron wasn't violent; even though the other Prosecution witness said all four were violent.
>
> Again, I am mindful that he is an accomplice. Accomplice who has pleaded guilty and who is serving a sentence, desputes [sic] the discrepancies and inconsistencies, I do not believe that this evidence is totally unreliable or, indeed, that it is unreliable in its entirety. I accept that there were four men who conducted the robbery and this is supported."

[17] She gave herself the appropriate warning concerning Mr Williams' testimony since he was clearly to be treated as an accomplice and having done so she concluded her treatment of his testimony. She was entitled to accept a part and to reject a part of Mr William's testimony. She accepted the portion that placed Mr Lewis on the scene at the time of the offences. She found that that testimony, although lacking in corroboration from any other person said to be present at the time of the commission

of the offences, was in fact corroborated by Detective Corporal Smith's testimony of what Mr Lewis told him under caution. She said at pages 217-218 of the transcript:

> "…Now, this case stands or falls on the Prosecution's witnesses, as I said, despite the discrepancy in the evidence of Williams, I do not reject his evidence in totality. He is an accomplice and I bear in mind the caution. But he said there were four of them on the robbery and I find I can accept, on the totality of the evidence of all the Prosecution's witnesses that there were four men. He placed Aaron Lewis on the scene as one of the four men and in this regard, he has never diverted from that bit of evidence. Indeed, he attempted to make both himself and Mr. Lewis appeared to be less a participant in the robbery than Craig. But, he pleaded guilty and he is serving his sentence. I find that his evidence as to the fact of Aaron Lewis participating is not totally uncorroborated, I find the evidence of Smith that Lewis confessed to being a part of the robbery as corroborative of William's [sic] evidence, I accept that the words that Detective Smith told this court was said by Aaron Lewis, was indeed so said…."

[18] In dealing with cases in which witnesses are said to be accomplices, it is incumbent on the trial judge to warn the tribunal of fact that, although it may do so, it is dangerous to convict on the evidence of an accomplice without there being corroboration of that evidence (see page 16 of **R v David Gordon** SCCA No 161/2001 (delivered 12 December 2002)). This warning was required in the case of Mr Williams, who clearly had some criminal participation in the events which were the subject of the trial. The learned trial judge gave herself that warning at pages 198-199 of the transcript:

> "…The Prosecution's witness, Oneil Williams, was one of the four robbers and he pleaded guilty and was sentenced. Indeed, he came to this court to give evidence for the Prosecution from…Prison.

> Therefore, I must warn myself even at this initial stage of the dangers of acting on the evidence of an accomplice, which Williams would be or would have been [if there] is no corroboration. Indeed, it would be unsafe to act on such evidence….the fact of he [sic] being an accomplice detracts greatly from his credit."

[19] The learned trial judge having given herself the requisite warning mentioned in the quote above, cannot be faulted in coming to the conclusion that she did. There was no issue, based on the evidence of Mr Anderson, that all four invaders participated in the beating and robbery. The essence of the issue which was before the learned trial judge was Mr Lewis' denial of being present at the time of the commission of the offences and his contention that Mr Williams was falsely implicating him in those events because of grievances which Mr Williams bore against him. The learned trial judge rejected that defence. She said at page 219 that she accepted that Mr Lewis was present at the time of the robbery. She said:

> "…I reject the evidence of the accused that he was not [sic] part of the robbery and that the two witnesses bear grievances toward him. I accept the evidence of Williams that Aaron Lewis was a part of the robbery and despite the fact of him being an accomplice, I do not find him to be totally discredited and I find that there is independent testimony, both direct and circumstantial, which indicates that he [sic] was part of the robbery. I have pointed out that those are in the confession and in the conduct of accused, himself. I accept on the totality of the evidence that Aaron Lewis was amongst a group of men, four men, in all who were armed with guns, held up and robbed O'neil Anderson of his cellphone and wallet with cash and in the process inflicted grievous bodily harm on him. I therefore find him guilty on all three counts…."

These are findings of fact and as there was credible evidence to support them, there is no basis on which this court may properly disturb them. This ground therefore fails.

Ground three

[20] Mr Reece sought to argue that the learned trial judge ought to have addressed the issue of the voluntariness of the oral statement, said to have been made by Mr Lewis to Detective Corporal Smith, before accepting his evidence that the statement had been made. Because of the manner in which the trial was conducted in regard to the statement, learned counsel was, however, prudent in not pursuing this ground.

[21] The principle in respect of admission statements is that if the accused denies making or signing the statement then the issue of admissibility does not arise and it is a question of fact for the jury as to whether it was made. Authority for this statement may be found in **Ajodha v The State** [1981] 2 All ER 193. Lord Bridge of Harwich, who gave the opinion of the Privy Council, said at pages 201-202:

> "...
>
> It may be helpful if their Lordships indicate their understanding of the principles applicable by considering how the question should be resolved in four typical situations most likely to be encountered in practice.
>
> ...
>
> 4. On the face of the evidence tendered or proposed to be tendered by the prosecution, there is no material capable of suggesting that the statement was other than voluntary. The defence is an absolute denial of the prosecution evidence. **For example, if the prosecution rely on oral statements, the defence case is simply that the interview never took place or that the incriminating answers were never given;** in the case of a written statement, the defence case is that it is a forgery. **In this**

> **situation no issue as to voluntariness can arise and hence no question of admissibility falls for the judge's decision. The issue of fact whether or not the statement was made by the accused is purely for the jury**…." (Emphasis supplied)

[22] In this case, the issue of voluntariness did not arise. Counsel appearing at the trial for Mr Lewis did not object to the admission of the statement on the basis of the absence of voluntariness. The suggestion that was made to Detective Corporal Smith in cross examination was that Mr Lewis did not make the statement. It is recorded at pages 154-155 of the transcript:

> "Q. Suggest to you that the accused told you that Oneil Williams would only call his name because Williams is blaming him Aaron and his brother, Craig, for the robbery having gone bad.
>
> A. I am hearing that for the first time.
>
> Q. Suggest to you, you see, sir, that at no time did Mr. Lewis tell you that Oneil forced him to take part in this robbery?
>
> A. He told me so at the Portmore Police Station CIB office."

[23] Mr Lewis did not address the issue in his unsworn statement. In the circumstances, the question of voluntariness did not arise and there was no basis on which the learned trial judge should have addressed that issue.

[24] This ground also fails.

[25] It is based on that reasoning that we arrived at the decisions that are set out at paragraph [2] above.