[2011] JMCA Crim 7

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 45/2008

BEFORE: THE HON. MR JUSTICE PANTON P
THE HON. MRS JUSTICE HARRIS JA
THE HON. MR JUSTICE MORRISON JA

KAMAR MORGRIDGE v R

Mrs Dionne Meyler-Reid for the applicant

Jeremy Taylor and Brodrick Smith for the Crown

10, 13 January and 25 February 2011

PANTON P

[1] On 10 and 13 January 2011, we heard this application for leave to appeal and refused it. We then ordered that the sentences were to run from 25 June 2008. We promised to put our reasons in writing, and this we now do.

[2] The applicant was convicted in the High Court Division of the Gun Court, held in Kingston, of the offences of illegal possession of firearm, robbery with aggravation and wounding with intent and sentenced on 25 March 2008 to concurrent terms of imprisonment as follows:

Illegal possession of firearm – 10 years

Robbery with aggravation- 15 years

Wounding with intent - 15 years

The prosecution's case

[3] The substance of the case for the prosecution was that the applicant, on 9 August 2006, while armed with a firearm for which he had no licence, robbed Miss Odette McFarlane, a constable, of a Smith and Wesson .38 revolver and used same to inflict a wound to her left thigh with intent to do her grievous bodily harm. She was hospitalized for five days. On 23 October 2006, Cons. McFarlane pointed out the applicant from a row of nine men on an identification parade at the Hunt's Bay Police Station.

[4] The incident involving Cons. McFarlane took place at a residence at in Washington Gardens, shortly after midday on 9 August 2006. She had been outside removing clothes from a line when the applicant scaled a wall, entered the premises and forced her at gunpoint into her bedroom while demanding money from her. She, during the next minute and a half, walked backwards into the bedroom with the applicant advancing menacingly towards her. While in the bedroom, she reached for her own firearm which was under a pillow on her bed. The applicant held her hand with the firearm and succeeded in relieving her of it while she wrestled with him. The applicant discharged the firearm, injuring the constable and then made his exit.

[5] Two days after the incident, Cons. McFarlane, while still hospitalized, gave a statement to Detective Sergeant. Claudia Green who conducted investigations which led

to the arrest of the applicant. He was placed on an identification parade which was held under the direction of Inspector Everton King. Following his identification, the applicant was charged; whereupon, he said, "Miss Green, a no mi, a Penwood Road man dem".

The defence

[6] The applicant gave evidence. He said that he lived in an area of Kingston 11, known as Waterhouse. He denied the allegations of the prosecution in respect of the incident on 9 August 2006. Indeed, he denied even knowing the adjacent community of Washington Gardens where the constable lived, although he himself had lived in Waterhouse for all of his 26 years. On the day in question, he said that at the relevant time, he and five or six other persons were clearing a plot on which he intended to build a shop. He was, he said, unable to do the manouevre that the constable said he had used in scaling the wall, as his left hand has been partially disabled since he received a gunshot injury in 2003. On 13 October 2006, he was arrested by the police while he was accompanying his pregnant "baby mother" to a bus stop. He said that the police accosted him saying that he loved being on the road, and it would be better for him if he were to "see road and can't go on it". He was placed on an identification parade after Det. Sgt. Green had visited the station shortly after his arrest. He said that he had overheard her speaking to someone on the telephone, remonstrating with that person thus: "How yuh neva tell mi seh him have a scar eena him face?" The clear inference that the applicant hoped would be drawn was that the sergeant had been in

communication with the complainant on the question of there being a scar on the face of the robber, but that had not been mentioned when the complaint was made.

[7] At the identification parade, the scar was covered but the complainant asked that the covering be removed; upon its removal, the complainant identified the applicant as the perpetrator of the acts against her on 9 August 2006. He admitted telling the Det. Sgt. after she charged him that she should go and look for the "Penwood Road man dem".

[8] The applicant called witnesses in his defence but there were significant differences between his evidence and that of these witnesses as regards the duration of the work activities on the plot referred to earlier, and the number of persons present and participating therein.

The findings

[9] The learned trial judge, having assessed the witnesses, found that they, in collaboration with the applicant, had put forward 'a false alibi' in an attempt to deceive the court. The efforts of the applicant and his witness Andrew Powell to convince the court that they did not know, and had never been to, the nearby community of Washington Gardens did not find favour with the learned trial judge. On the other hand, she found that the complainant had correctly identified the applicant. She found that the complainant was familiar with the use of guns, and so was able to identify what it was that she saw the applicant with on the day in question. In any event, the learned trial judge continued, even if what the applicant first had in his hand was an imitation

firearm, he had used it to commit an offence; and it had been adequately described as a firearm for the purposes of the Firearms Act. She found that he pointed the firearm at the constable, putting her in fear. She also found that the applicant relieved the constable of her firearm, and when leaving the scene fired it thereby injuring her in the left thigh.

The appeal

[10] A single judge of this court considered the applicant's application for leave to appeal and refused it. He noted that the learned trial judge had directed herself fully and accurately on identification and credibility, and had resolved the contested issues of fact in favour of the prosecution, as she was entitled to do based on the evidence.

[11] In his application for leave to appeal, the applicant listed the following as his grounds of appeal:

> "(a) **Mis-identity by the Witnesses**: That the prosecution witness wrongfully identified me as the person or among any person who committed the alleged crime.
>
> (b) **Lack of Evidence**: That the prosecuting Counsel failed during the trial to produce any piece of substantive evidence to link me to the alleged crime.
>
> (c) **Unfair Trial**:- That the evidence upon which the learned trial judge relied for the purpose to convict me lack facts and credibility thus rendering the verdict unsafe in the circumstances."

[12] Mrs Dionne Meyler-Reid, attorney-at-law for the applicant, filed what she termed "revised/refined grounds of appeal" and was granted permission to argue same. These revised grounds did not in any significant way change the substance of the applicant's complaints as formulated in the original grounds. Indeed, the arguments were advanced under two main headings: lack of evidence of the commission of the offences, and identification. However, Mrs Meyler-Reid abandoned the ground that alleged that there had been an "unfair trial". This abandonment was proper in the circumstances as by no stretch of the imagination could it be said that the applicant had anything but a fair trial.

Lack of Evidence - credibility

[13] Mrs Meyler-Reid questioned the credibility of the complainant's evidence that the applicant had scaled a wall of over six feet in height with a gun in his hand. To her, this feat is "virtually impossible". Further, Mrs Meyler-Reid said, it appeared that the gun the applicant had when he came over the wall vanished into thin air as no mention was made of it later. In addition, she questioned why a man with a gun would have threatened to cut someone's throat, as the complainant testified that the applicant had done.

[14] In relation to findings of fact, it has to be stressed once again that an appellate court does not lightly interfere with a trial judge's findings of fact. The trial judge, having seen the witnesses give their evidence during examination-in-chief and under cross-examination, is regarded as best placed to determine issues of credibility in this regard. In any event, we did not find anything strange or unusual about the evidence of

the complainant for it to be categorized as impossible. The question of the plausibility of the evidence is for the trial judge and no one else.

The firearm

[15] As regards the charge of illegal possession, Mrs Meyler-Reid posed the question as to which gun was found in the applicant's possession. She said that there was no evidence to meet the requirements of the Firearms Act as there had not been sufficient description of the object said to have been in the hand of the applicant. She said that at page 14 of the transcript, the witness merely said:

> "I saw the gun, I know gun, I handled gun myself."
>
> "I saw the extended part, that, he held the handle, and I saw the other section."
>
> "It was shine, very shine, chrome like, look very new."

These descriptions, she said, did not meet the minimum standard. In this regard, Mr Jeremy Taylor, Deputy Director of Public Prosecutions, for the Crown, submitted that the description given by the witness was sufficient for the purpose of the Firearms Act and referred to ***The Queen v Christopher Miller*** (SCCA No. 169/87 – delivered 21 March 1988) and ***Regina v Paul Lawrence*** (SCCA No. 49/89 – delivered 24 September 1990). In ***Miller,*** the firearm was described in these terms: "The mouth was brown coloured resembling small arms that policemen carry". Carey JA in delivering the judgment of the court, said:

> "In our view, that is ample evidence. It is not necessary to give detailed descriptions of the firearms,

> because it must depend on the intelligence and the power of observation of the witness; it must be extremely difficult now-a-days to find a person who doesn't know a gun when he sees a gun. Insofar as we are concerned, the evidence that was put forward … was more than ample."

In ***Lawrence,*** a robbery of a quantity of tapes and recorders and a television set took place at a video club at Lancaster Road, St Andrew. The perpetrators were two men including the applicant Lawrence. The witnesses were two young female employees of the video club. The applicant and his accomplice had advised them that there was a hold-up, had demanded that they were to hand over what property they had, and that they were to make no noise. In order to ensure compliance with the demands, the applicant had "partly removed his shirt so that the handle of a gun which was stuck into his waist could be clearly seen". In giving evidence, the witnesses said that they saw what appeared to them to be a firearm stuck in the waist of the applicant. One of the witnesses also said that she was particularly familiar with firearms as her relatives were police officers and from time to time carried guns in her presence. The trial judge rejected a no-case submission and held that "the evidence supported the inference that the applicant was armed with either a real firearm or at the least an imitation firearm". Rowe, P in delivering the judgment of the court dismissed the argument as to the insufficiency of the description of the firearm by simply saying in respect of the judge's finding: "With this conclusion we entirely agree". In the instant case, the evidence that was given came from the mouth of a member of the constabulary and was ample so far as compliance with the Firearms Act is concerned.

[16] Mrs Meyler-Reid further said that the evidence of the witness "must be put against the background that it is not the 'gun' that the assailant was armed with that delivered the injury to her as she was shot with her own gun based on her testimony". In her written skeleton argument, she concluded her argument thus:

> "Therefore, if he was convicted of Illegal Possession of Firearm for the firearm that he allegedly took to the scene, same would be an unsafe verdict as there is no evidence before the Court capable of saying that what was in the hand of the assailant was indeed a firearm capable of discharging deadly bullets or even an imitation firearm. … – that is the actus reus of the offence. In the circumstances there was absolutely no proof before the Court that whatever the assailant may have had in his hand was in fact a firearm."

The flaw in Mrs Meyler-Reid's argument is easily seen when it is considered that she conceded that there was evidence of the applicant having taken a gun from the constable and having shot her with it! She could hardly have been arguing that for the applicant to have been properly convicted, there ought to have been another count for illegal possession in view of the evidence that there were two guns on the scene – one which was used to assault the complainant while money was being demanded, and the other being the complainant's gun which was removed from its holster and used to injure her. Mrs Meyler-Reid's argument also overlooked the learned trial judge's finding that the first firearm may have been an imitation, and that possession and use of such a firearm in the circumstances described by the complainant is prohibited under the Firearms Act.

[17] Section 25 of the Firearms Act provides thus:

> "25 (1) Every person who makes or attempts to make any use whatever of a firearm or imitation firearm with intent to commit or to aid the commission of a felony … shall be guilty of an offence against this subsection.
>
> (2) Every person who, at the time of committing or at the time of his apprehension for, any offence specified in the First Schedule, has in his possession any firearm or imitation firearm, shall, unless he shows that he had it in his possession for a lawful object, be guilty of an offence against this subsection and, in addition to any penalty to which he may be sentenced for the first mentioned offence, shall be liable to be punished accordingly.
>
> (3) …
>
> (4) …
>
> (5) In this section –
>
> …
>
> 'imitation firearm' means anything which has the appearance of being a firearm within the meaning of this section whether it is capable of discharging any shot, bullet or missile or not."

The evidence of the complainant was that the applicant had what appeared to be a gun in his hand. He menaced her with it while demanding money. He relieved her of her own gun and shot and injured her. If what the applicant entered the premises with was not a real gun, it is immaterial as he would have at least assaulted the complainant with the object while he held it on her prior to using her own firearm to injure her. He would

also have used the imitation firearm to rob her of her own firearm. Section 37(1)(a) of the Larceny Act provides that:

> "(1) Every person who -
>
> (a) being armed with any offensive weapon or instrument, or being together with one other person or more, robs, or assaults with intent to rob, any person;
>
> …
>
> shall be guilty of felony, …"

Value of the firearm

[18] The final submission made by Mrs Meyler-Reid, in her effort to show that there was a lack of evidence to prove the charges, was that there was no proof of the value of the item robbed. In the skeleton arguments filed by her, she wrote:

> "The Larceny Act speaks in its definition section about the ingredients to be proved to establish that something was stolen. One of the key ingredients is that the item must be of value. The mark of $10.00 is used. In this case the assailant is alleged to have robbed a firearm for which no value was given."

According to Mrs Meyler-Reid, "an item cannot be robbed or stolen in whatever circumstances if it has no value", and in the instant case value was of the essence of the offence. Mr Taylor submitted that the provisions in the Larceny Act as to value are restricted to certain types of larceny and definitely have no application to the offence of robbery with aggravation. He referred to sections 14, 18, 21, 53 and 55 of the Larceny

Act which deal with larceny of articles of specific monetary values, and provide for specific penalties depending on the value of the item stolen.

[19] We are of the view that Mrs Meyler-Reid is mistaken in her thinking as to the need for the prosecution to prove the value of an item (in this case, a firearm) that has been stolen in a case of robbery with aggravation. The Larceny Act provides as follows in section 3:

> "3. For the purposes of this Act –
>
> (1) a person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof:
>
> (2) …
>
> (3) everything which has value and is the property of any person, … shall be capable of being stolen:"

It is this provision as to 'value' in subsection (3) which has led to the misunderstanding on the part of Mrs Meyler-Reid. However, the 36th edition of Archbold Pleading Evidence and Practice in Criminal Cases, paragraph 1534, clarifies the position. This edition treats with the long-repealed English Larceny Act of 1916 which contained provisions that are identical to our Larceny Act. It reads:

> "**1534. Value of the thing stolen.** No statement need be made as to the value of the property stolen except in those cases where value or price is of the essence of the offence … And although, to make a thing the subject of larceny, it must be of

> *some* value, yet it need not be of the value of any coin known to the law: ***R. v. Morris***, 9 C.& P. 349. *Cf*. ***R. v. Edwards***, 13 Cox 384, C.C.R., *ante,* § 1528. Where value is the essence of the offence, sufficient articles must be named in the indictment to amount in value to the sum necessary to constitute the offence: ***R. v. Forsyth***, R. & R. 274."

The point as to value was therefore wholly unmeritorious.

Identity

[20] Mrs Meyler-Reid was very critical of the evidence of identification. She pointed to the fact that the complainant was in the process of taking clothes off the line in the yard and so this would have obscured her view. In addition, the complainant gave evidence of the presence of an ackee tree which, in Mrs Meyler-Reid's view, would have added to the obstruction. According to the submission, when these factors are added to the time that the incident lasted, there was no substantial opportunity for proper identification. On the other hand, Mr Taylor submitted that there was nothing to obscure the view of the complainant. In his view, the circumstances of the sighting of the applicant by the complainant were quite favourable in that the incident occurred during daylight, and the parties were at close range, a little more than arm's length at times, for approximately three minutes. All the elements for making a proper identification were present, he said.

[21] We agree with the submissions of Mr Taylor, and we find that the evidence was in keeping with, and the learned trial judge demonstrated an appreciation of, the strictures of ***Turnbull.***

[22] As stated earlier, the complainant asked for the removal of the covering from the faces of the persons in the identification line-up. Thereafter, she identified the applicant who had a scar on his face, and was the only one who had such an identifying feature. Mrs Meyler Reid sought to put forward an argument in respect of this occurrence. However, it seems that she eventually retreated in the face of the lack of quality in the point being made. However, she did make the point that the complainant had not mentioned anything about a scar in her evidence in chief; and she added that this was important given the conversation that the investigating officer was reported by the applicant as having had with someone unknown as to the failure of the individual at the other end of the telephone line to mention the existence of a scar. Mrs Meyler-Reid submitted that these circumstances indicate that the witness had not noticed a scar and so the identification was questionable. We viewed the matter as deserving of serious consideration, and adjourned until 13 January 2011 for the prosecution to produce the original statement of the witness for our perusal. The statement was produced. We observed that the witness had indeed mentioned the scar to the police at the first opportunity. There was therefore absolutely no basis for the concerns expressed by Mrs Meyler-Reid in this regard.

[23] It was for the foregoing reasons that we refused the application and ordered that the sentences are to run from 25 June 2008.