[2011] JMCA Crim 56

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 49/2009

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCINTOSH JA

CALVIN ROSE v R

Miss Althea McBean for the applicant

Miss Maxine Jackson for the Crown

10 June and 11 November 2011

HARRIS JA

[1] Before us is a renewed application by the applicant Calvin Rose for leave to appeal against conviction and sentence, a single judge having refused him leave so to do. He was convicted in the Home Circuit Court on 21 August 2009 for the murder of Neville Morgan. He was sentenced to life imprisonment and it was ordered that he should not become eligible for parole until he has served 25 years.

[2] The evidence upon which the prosecution placed reliance came from its main witness, Richard Creary, who stated that the applicant was his friend, who he had met in 1998 or 1999 and that they were members of the same gang.

[3] At about 11:00 a.m. on the morning of 31 August 2000, Mr Creary said he was on his way to his friend Heath's house at 32 Whitehall Avenue, which is opposite to the deceased's house, when he heard five explosions. Soon after, he saw the applicant and another man, Raymond Mitchell, both armed with guns running from the deceased's yard. The applicant, who was about 20 feet away, turned and looked at him, at which time he saw his face for about 10 seconds. The men then went next door to the house of one of their friends called Jubba. While Mr Creary was passing Jubba's house, he saw the applicant and the other men on the verandah rejoicing and conversing. The applicant was heard to have said, "We get the pussy." Jubba then went over to the deceased's house and soon after he returned to his house.

[4] About five minutes after the shooting, the police arrived. After their arrival, Mr Creary went over to the deceased's house where he saw him lying in a pool of blood. As soon as they departed, the applicant approached Mr Creary and told him that he should "know" and "why". He interpreted this to mean that if he made a report about the incident he would be killed. The following day he went to a chicken and chips restaurant where he saw the applicant, Mitchell and other men. He, Mr Creary, is known as Fowlie. Mitchell said to him, "Fowlie you

fe know wha you a do you noh." He understood this to mean that Mitchell was issuing a threat to him. Mr Creary also said that on the day prior to the deceased being shot, he overheard a conversation between Mitchell and others that the deceased was an informer and he should die.

[5] A report surrounding the death of the deceased was not made to the police by Mr Creary until 24 September 2003, three years after the incident. He explained that he had not done so for fear of his life. However, he said he made the report because he was shot by Sean Dixon, the applicant's friend, and that he had given "up all the criminals them". In cross-examination he denied that the report against the applicant was born out of malice.

[6] The investigating officer, Sylvannus Ellison, said that he collected a statement from Mr Creary but his endeavours to collect statements from other persons proved futile. He further stated that he had known the applicant for three years. When he informed him that he was pointed out on the identification parade, upon caution, he said "A mi fren Fowlie point me out?"

[7] Mr Dennis Needham, a retired police officer, testified that he conducted the identification parade and that the nine participants were chosen by the applicant and his attorney-at-law. He inquired of the applicant if he had any objections with respect to the parade. He informed him that he had none. He said that after the parade had ended and the witness had left, he told the

applicant that he had been identified. The applicant then said, "A cook up ting. A di boy Fowlie, a informer and a get money."

[8] The evidence of Dr Pawar who conducted the post mortem on the body of the deceased was adduced through Dr Prasad. He stated that Dr Pawar's examination revealed that there were five gunshot wounds to the body of the deceased: one to the back of his head, one to his left shoulder, one to his right shoulder blade, one to the right posterior chest and one to the right forearm. The cause of death was multiple gunshot injuries. He said that death was instantaneous.

[9] The applicant gave sworn evidence. He said he lives in Portmore and he knows Cameron Lane where he has relatives who he began visiting in December 2001. He denied knowing Mr Creary. He said he became aware of Mr Creary's name as 'Fowlie" while he was in custody. He denied knowing 32 Whitehall Avenue, Jubba and Mitchell. He also refuted having knowledge of the chicken and chips restaurant and denied that he told the police that "A cook up thing, di boy Fowlie a informer and a get money." He said he told "the corporal say is 'cook up' thing, dem a try cook me up with a man down White Hall".

[10] The applicant, having abandoned the original grounds of appeal, was given leave to argue three supplemental grounds.

Ground 1

> "The evidence presented to the Court at the trial of this matter was insufficient to ground a conviction of [sic] murder."

Although admitting that this is a case based on circumstantial evidence, Miss McBean argued that the evidence adduced does not point to one direction which is conclusive of the applicant's guilt. The witness, she argued, saw a group of men running from the deceased's yard to Jubba's house but did not see who shot and killed the deceased. He merely relied on words spoken before and after the incidents, she submitted. The learned judge, she argued, placed greater weight on the circumstantial evidence than it warranted and although he indicated that it was a case of circumstantial evidence, he failed to direct the jury that if the circumstances do not point to one direction, then it would have enured to the applicant's benefit. He, having not done so, the applicant was deprived of the benefit of an acquittal, she argued.

[11] It was Miss Jackson's submission that there was sufficient evidence to sustain a conviction and the learned judge had given adequate directions on inferences and on circumstantial evidence. This was a recognition case as the applicant was known to Mr Creary from 1999 and he had a peculiar laughter which Mr Creary was able to recognize, she argued. She submitted that Mr Creary looked and saw what happened. He was 14 feet away, although he may have been frightened. He was not in the range of fire and further, shortly after the shooting he saw the deceased's body.

[12] We agree with Miss Jackson that there was ample evidence upon which a conviction could have been secured. The applicant was well known to Mr Creary who was a member of a gang led by the applicant. At the time of the shooting, Mr Creary heard five shots. Dr Prasad said he found five gunshot wounds on the deceased's body. The applicant, who was armed with a gun, was one of the men who Mr Creary saw running from the deceased's house after the shots were fired. He saw the men on Jubba's verandah and heard the applicant rejoicing over the death of the deceased. Subsequent to this, Mr Creary went to the deceased's yard where he saw his body. Shortly after the police left, the applicant issued a threat to Mr Creary that he must be "know" and "why". Mitchell, another member of the applicant's gang, also threatened him. Inferentially, both must be regarded as death threats.

[13] A further assault directed at the learned judge's summation was that, having made a finding that the witness was not mistaken, he effectively found that there was no mistake as to the identification of the applicant. This, Miss McBean categorized as being inappropriate. This complaint was with reference to the following directions given by the learned judge at page 307 of his summation, lines 2 – 13:

> "The witness has told you that the reason he bare his chest, so to speak, is because he was a member of the gang which consisted of the accused and others and he had been shot and this is what caused him to be giving these reports, albeit, some three years later to the police officers. Do you accept that, or is it that he is a machiavellian and is cruel? Or as the Defence

> said, he is telling a lie on the accused? Because this is not a situation where he is mistaken about who he saw coming out of the premises."

[14] The learned judge's statement that the witness was not mistaken as to who he saw coming out of the premises is not a finding. This, Miss Jackson said, was a comment. It cannot be read in isolation of the preceding sentences in the foregoing extract. The learned judge recounted such parts of the witness' evidence as were relevant to his delay in making the report. He drew to the jury's attention the fact that there was not only the delay but also that the witness had been shot which resulted in his making the report. It cannot be ignored that he invited the jury to decide what they made of it. We agree with Miss Jackson that the only reasonable interpretation which could be placed on the impugned statement, in the context in which it was made, was that, although somewhat misplaced, it was a comment.

[15] We will now move to the further complaint that the learned judge's directions on circumstantial evidence were defective. Miss McBean acknowledged that the learned judge gave certain instructions on the law of circumstantial evidence but said he failed to direct the jury that if all the circumstances do not point to one direction, then the applicant should be acquitted.

[16] Miss Jackson, in response, argued that although the learned judge failed to tell the jury that if they found that the evidence did not point to one direction

they should find the applicant not guilty, he had given adequate directions on the burden and standard of proof and as a consequence, the omission would not be fatal to the conviction.

[17] The learned judge in dealing with circumstantial evidence directed the jury in the following terms at pages 293 and 294:

> "… And let me tell you this, circumstantial evidence consists of this: When you look on all the surrounding circumstances you find such a series of under signed, unexpected, coincidences that a reasonable person will find to judge and is compelled to one conclusion. All the circumstances relied on, must point in one direction and one direction only, and that direction must be to the guilt of the accused. If the circumstantial evidence falls short of that standard, if it does not satisfy that standard, if it leaves gaps, then it is of no use at all. Circumstances may point to one conclusion, but if one circumstance is not consistent with guilt, it breaks the whole thing down. You may have circumstances inconsistent [sic] with guilt, but equally consistent with something else. That is not good enough. What you want is a range of circumstances which points only to one conclusion and to all reasonable mind, that conclusion, mainly the guilt of the accused."

[18] There is no rule of law requiring a special direction on circumstantial evidence failing which a trial would be rendered unfair: see **McGreevy v DPP** [1973] 1 All ER 503; **R v Kenneth Myrie** SCCA No 217/2001 delivered on 20 December 2004. In our view, the learned judge demonstrated that he applied the relevant principles surrounding circumstantial evidence and gave sufficient directions on the law. The fact that he did not inform the jury in such terms as contended for by Miss McBean does not in any way adversely affect his

directions on circumstantial evidence. His directions that, if one circumstance is inconsistent with guilt then "it breaks the whole thing down" and if the evidence leaves gaps it falls short of the standard and would be useless, would obviously satisfy the need for any further directions, bearing in mind that the learned judge had satisfactorily directed the jury on the burden and standard of proof. This ground fails.

Ground 2

> "The learned trial judge did not adequately direct the Jury on the issue of identification which was made in difficult circumstances."

[19] Miss McBean submitted that the difficult circumstances under which the identification was made related to the state of mind of the witness as he was frightened. The directions in respect of the identification were inadequate as they did not meet the requirements when the learned judge said that the witness was not mistaken, but this ought to have been a finding of the jury, she argued.

[20] Miss Jackson argued that the circumstances under which the applicant was identified could not be said to be difficult. She submitted that there was sufficient evidence of identification and the fact that the witness was frightened would not have prevented him from recognizing the applicant.

[21] In this case, the Crown would have relied on circumstantial evidence and not on evidence of visual identification. The learned judge pointed out the

circumstances surrounding the evidence of identification to the jury, but failed to bring to their attention the classic ***Turnbull*** warning. It would not have been desirable for him to have warned them of the dangers of convicting on visual identification and of the reasons associated with such warning. Taking into consideration that the central issue in this case is credibility and the fact that the circumstantial evidence was very strong, his failure to give the jury a warning on identification would not render the conviction flawed.

Ground 3

> "The learnt [sic] trial Judge failed to adequately deal with the issue of malice on the part of the Crown [sic] witness as raised by the applicant."

[22] It was argued by Miss McBean that Mr Creary, being the only witness as to fact, having made a report against the applicant three years after the incident, there being a history of ill will between them, the learned judge ought to have expressly warned the jury of the danger of convicting the applicant. The learned judge's directions in dealing with the issue of malice, she argued, were somewhat confusing and may have been prejudicial to the applicant. In directing the jury, the question is not whether the evidence on identification is satisfactory but whether a warning should be given as to any possible motive arising out of any malice which existed between the applicant and the witness and this the learned trial judge failed to bring to the jury's attention, she argued.

The case of ***R v Carl Peart*** SCCA No 108/1988 delivered on 7 February 1990 was cited by her in support of the submissions.

[23] Although conceding that the learned judge did not give full directions as to the question of malice, Miss Jackson argued that the witness' account for the delay and his explanations for it were given in the presence of the jury who had assessed him under cross-examination. She submitted that if this court is of the view that a direction as to malice should have been more comprehensive, the evidence being overwhelming, the *proviso* should be applied.

[24] As can be observed, the learned judge directed the jury on the question of the witness' delay in reporting the incident in such terms as stated in the extract from his summation to which reference has been made in paragraph [13] hereof. In dealing further with the issue at page 311 lines 1 – 6; page 321 lines 2 – 25; and page 322 lines 1 - 7 and lines 12 to 25, he said:-

Page 311 lines 1-6:

> "Well, he said he was fearful. He says he was fearful, but you bear in mind the comments of learned counsel for the defence, that here is a situation where no report was made for a period of three years. He said not a word for that period."

Page 321 lines 2 – 25:

> "Bear in mind what learned counsel for the defence has said, that this thing has happened and he never said a word. What counsel is saying is that in these situation is this unusual in Jamaica [sic]. Are people fearful to communicate to the police? The police officer said that when he went there, there were

some thirty persons around and you will recall that Creary in giving his evidence you know, said that the time, shortly after the men ran across the road, there were persons at the top of the road, about three court rooms away, so there may very well, one may very well think there could be other persons who knew who those men were, if any men at all ran go [sic] anywhere. The police said they made an attempt and nobody made a report. It's a matter for you whether that sounds farfetched, or whether that sounds reasonable, given what you know.

He was cross-examined. He told the court yesterday that he had come to Whitehall Avenue between 1998 and 1999. The Crown's case was put to him and it was suggested to him that it's a lie he is telling, so it's not a matter of any mistake."

Page 322 lines 1 – 7 and lines 12 – 25

1-7 "In fact, what counsel – when I look at my notes, I am now recollecting what counsel suggested to him, that is not nobody making a mistake, is a lie you telling on the accused, although there is no reason outside of what we have already referred to, why he should come and tell this lie."

12-25 **"**You must remember that and I keep reminding you of this, that the accused man has raised an alibi in this, he wasn't there. He wasn't in the area at the time.

Well, Mr Creary in cross-examination admitted that he didn't make a report until September, 2003, and that Kimani had shot him. He said it wasn't – in cross-examination he said it wasn't only the accused man he gave up, he gave up all the criminals. "I gave up all the criminals to the police". And he denied that his evidence against this accused man is because of any malice and he admitted that he had been a witness in another case in respect of this accused man and in that case the accused was found not guilty."

At page 323 lines 2- 10 he continued by saying:

> "… He said they were found not guilty. The court – they were guilty, but the court did not find them guilty, that is what he says and he denies that this has anything to do with revenge. It's not a revenge because he was shot; told us the circumstances under which he gave his statement to the police. He gave his statement to the police, to four police officers in 2003."

[25] In ***R v Peart*** the defence was one of an alibi. The issue of visual identification was germane to the Crown's case. Although there was good and sufficient evidence of identification of the appellant, the learned trial judge failed to warn the jury of the dangers of convicting on the uncorroborated evidence of identification of a sole witness who had lied on the appellant in order to implicate him. The appeal was allowed. At page 4 of the judgment Carey JA said:

> "Obviously where, as in the present case, the unreliability of the evidence is suggested to be due to deliberate falsehood, the reason for the warning will be altogether different from the case of the honest but mistaken witness. In that sort of case, the jury should be told that the credibility of the witness or witnesses is being challenged and accordingly the reasons being put forward as the motive for lying, must be scrutinized with some care."

[26] ***Peart*** is distinguishable from the case at bar. In that case the defence of alibi was raised and visual identification was the fundamental issue. In the case under review, the applicant did not advance an alibi. He denied having known 32 Whitehall Avenue and merely stated that he could not recall where he was at the material time. Where an accused asserts that he was not at a particular place when an offence was committed, this is insufficient to raise the defence of an

alibi - see **R v Roberts and Wiltshire** SCCA Nos 37 and 38/2000, delivered on 15 November, 2001. The Crown's case was substantially dependent on circumstantial evidence. Such evidence was indeed exceptionally strong. It was unquestionably overwhelming. Accordingly, a conviction could have been sustained in reliance on that evidence only. However, it may be that the learned judge ought to have given a specific warning to the jury as to whether the witness' delay in making the report to the police could have arisen by reason of malice, particularly in light of the defence counsel's suggestion that the witness had lied.

[27] The learned judge brought to the jury's attention the witness' three year delay in making the report. He did not fail to remind them that the witness was shot before making the report. He also informed them of the reasons given by him for the delay. It is clear that he had left for their consideration the question whether the witness could have been lying. Accordingly, it does not appear that there would have been the necessity for the learned judge to have given an express warning that the witness could have been moved by malice in making the report.

[28] However, even if the failure of the learned judge to have given a specific warning is considered a non direction, we cannot say that the jury would have arrived at any other conclusion. They had seen the witness, had an opportunity to observe his demeanour and to determine whether he was a witness of truth,

and obviously they found him credible. We are satisfied that the conviction was not unsafe and consequently the applicant would not have suffered any substantial miscarriage of justice. In those circumstances, we would have been prepared to apply the proviso.

[29] The application for leave to appeal against conviction and sentence is refused. The sentence is to commence on 21 November 2009.