[2013] JMCA Crim 20

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 46/2009

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

ANTHONY SMITH v R

Appellant not appearing and unrepresented

Miss Meridian Kohler and Mrs Paula Archer-Hall for the Crown

8 and 9 April 2013

BROOKS JA

[1] When this appeal came on before us on 8 April, 2013, we ruled as follows:

a. the appeal against sentence is allowed;

b. the consecutive element of the sentence imposed is set aside;

c. the sentences imposed by the learned trial judge shall run concurrently and shall be reckoned as having commenced on 7 April 2009.

We promised at that time, to put our reasons in writing. We now fulfil that promise.

[2] On 30 June 2008 at about 8:50 am, Mr Kerron Williams was abducted while he was driving to work. This occurred near East Street in the parish of Kingston. Three men, armed with firearms, stopped him at gunpoint and commandeered his vehicle. While manhandling him in the vehicle he managed to get hold of one of their guns and shot the man who had had it. That did not deter his captors. They took him to a location in Campbell Town in Kingston where the injured man was sent away for medical treatment.

[3] The remaining two, joined by a third man who was standing at the place where they had stopped, took Mr Williams out of the vehicle and dragged him, still struggling, and by then calling for help, into the yard of an abandoned premises. Fortunately, his struggles were observed, from a distance, by police officers who were quickly onto the scene.

[4] One of the police officers, Corporal Richard Perkins, knew one of Mr Williams' assailants before. The police followed the group into the yard and there accosted the men while they were tying up Mr Williams with a rope. One of the men was, at the time, holding a gun to Mr Williams' head. When the police accosted the men, there was an exchange of gunfire and the three assailants ran leaving behind their victim bloodied, weak and dazed. The police party followed in hot pursuit.

[5] Corporal Perkins chased the man that he had known before. He followed the man to premises on nearby Hampton Street, and into a room there. Corporal Perkins

apprehended the man who was, by then, taking his clothes off while sweating profusely. No weapon was recovered. The police officer took the man back to the place where Mr Williams' vehicle was and there Mr Williams identified that man as one of his assailants. This man was, according to Mr Williams, the one who had joined the original two and who had produced the rope used to help restrain him. The man is Mr Anthony Smith; the appellant in this appeal.

[6] Mr Smith was tried and convicted, in respect of Mr Williams' ordeal, in the High Court Division of the Gun Court on 7 April 2009. For the offence of illegal possession of firearm, he was sentenced to 12 years imprisonment at hard labour and for the offence of wounding with intent, he was sentenced to seven years imprisonment at hard labour. The learned trial judge ordered the sentences to run consecutively. Mr Smith applied for permission to appeal against his conviction and the sentences imposed.

[7] A single judge of this court considered his application, refused permission to appeal against the conviction but granted it in respect of the sentences, citing the consecutive element thereof. Mr Smith did not renew his application before the court, in respect of the conviction, as counsel who was assigned to represent him did not appear. Despite that factor, we did consider the record and the major issue that was raised at the trial, which was the identification of the assailants. Mr Smith denied that he was at the scene of the assault on Mr Williams. He contended at the trial that Mr Williams was mistaken as to his presence at the scene of the offences. Mr Smith also accused Corporal Perkins of fabricating the evidence that placed him, Mr Smith, at that scene. The issues involved turned on questions of fact.

[8] Mr Smith has failed to convince us that the findings of fact by the learned trial judge were obviously and palpably wrong. In **R v William March and Others** SCCA Nos 87, 155, 156 and 157/1976 (delivered 13 May 1977), this court stated that that was the test by which such findings would be assessed. Zacca JA (as he then was), in applying the principle to that case, stated at page five of the judgment:

> "Admittedly there were contradictions and inconsistencies in the evidence of [the prosecution's sole eye-witness] but this Court will only interfere with the verdict of the jury, where any questions of facts are involved, **if the verdict is shown to be obviously and palpably wrong**." (Emphasis supplied)

[9] The learned trial judge, during his summation, assessed all the relevant issues raised during the trial. He reminded himself appropriately about the dangers of visual identification and dealt with the issue of joint enterprise. He identified certain discrepancies between Mr Williams' testimony and that of Corporal Perkins and concluded that Corporal Perkins had a better opportunity of observing the appellant and was in a better position to give a more accurate account.

[10] In the circumstances, we find that the conviction should not be disturbed. We must however, express disappointment that the trial judge was unable to restrain himself from conducting an extensive examination of Corporal Perkins. After expressing dissatisfaction with the manner in which the prosecutor was conducting the examination in chief of Corporal Perkins, the learned trial judge usurped the prosecutor's role and took over the examination in chief.

[11] The record of the trial shows that the prosecutor commenced the examination in chief at page 79 of the transcript. From pages 83 through to 98 of the transcript, the learned trial judge conducted an uninterrupted examination of the witness. The learned trial judge's demonstration of how to conduct an examination in chief ended with the following exchange with the prosecutor, at page 98 of the transcript:

"HIS LORDSHIP: Yes. Yes, [Madam Prosecutor]

[PROSECUTOR]: Thank you, m'Lord…."

The prosecutor ended the examination in chief at page 100.

[12] In **Carlton Baddall v R** [2011] JMCA Crim 6, Panton, P reminded trial judges that leading evidence is not a part of their duty. The learned President said at paragraph [17] of his judgment:

> "**We also take this opportunity to remind trial judges that it is no part of their duty to lead evidence, or to give the impression that they are so doing. Where interventions are overdone and they are seen to have had an impact on the conduct of the trial, this court will have no alternative but to quash any resulting conviction**. Trial judges should therefore be always mindful of the likely result of their conduct. However, the judge is not expected to be a silent witness to the proceedings. There is always room for him to ask questions in an effort to clarify evidence that has been given, or "to clear up any point that has been overlooked or left obscure" (**Jones v National Coal Board** [1957] 2 All ER 155 at 159G)." (Emphasis supplied)

We wholly endorse those comments.

[13] It cannot but be of concern that having conducted that exercise with Corporal Perkins, the learned trial judge, during his summation, expressed preference for this

witness, whom he had examined. We do not find that there was a miscarriage of justice in the instant case, but must remind trial judges that objectivity may unconsciously be lost if they conduct extensive examination of witnesses. In the event that there is a jury present, such conduct may well give the jury the impression that the trial judge is siding with one side or the other of the contest.

Sentence

[14] Having dealt with the appeal against conviction, we now turn to the appeal against the sentences imposed. The trial in the instant case occurred before the decision in **Kirk Mitchell v R** [2011] JMCA Crim 1, nonetheless, **Mitchell** referred to previously decided cases which emphasised that consecutive sentences are inappropriate where the offences involved arise out of a single transaction. It is expected that, by now, trial judges would be aware of this guideline and that this error in sentencing will become extinct. As the offences in the instant case arose out of one transaction, the consecutive element of the sentence should be set aside and the sentences ordered to run concurrently.

Conclusion

[15] It is for those reasons that we made the orders that are set out at paragraph [1] above.