[2011] JMCA Crim 6

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 104/2008

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

CARLTON BADDAL v R

Oswest Senior-Smith for the appellant

Mrs Ann-Marie Feurtado-Richards and Miss Cadeen Barnett for the Crown

14 December 2010; 4 and 25 February 2011

PANTON P

[1] The complaint in this appeal is as to the conduct of the trial by the learned trial judge. The appellant was given leave to appeal by a single judge of this court on the basis of "the level of involvement in the trial by the judge as tribunal of fact and law".

[2] The appellant was convicted by Sykes J of the offences of illegal possession of firearm (count 1) and shooting with intent (count 2). On the first count, he was sentenced to a term of imprisonment of 12 years; on the second, he was sentenced to 15 years imprisonment with an order that the latter sentence was to be consecutive to that of the former count. The single judge was of the opinion that the consecutive

sentences seemed manifestly excessive, and so leave to appeal was granted also in that regard.

[3] On 14 December 2010, we heard the arguments of counsel and on 4 February 2011 we dismissed the appeal against conviction and allowed the appeal against sentence. The order that the sentences were to run consecutively was quashed and we ordered instead that the sentences are to run concurrently, commencing from 22 August 2008.

[4] The evidence on which the appellant was convicted was to the effect that he shot at Mr Morris Bailey, a taxi driver, at about 2:00 a.m. on 18 August 2007 on the public road at Saint Ann's Bay, in the parish of Saint Ann. Mr Bailey knew the appellant for about three years before the incident and had seen him earlier in the evening at which time the appellant had threatened to burn down his house. The reason for this hostility was not immediately obvious from the record. At the time that the appellant shot at Mr Bailey, they were standing under a street light, and were no more than about 15 feet apart. The appellant, according to Mr Bailey, used the following words while shooting at him, "Pussy hole, me a go done you because you won't stop carry me name go a station".

[5] Mr Bailey ran to the Saint Ann's Bay Police Station immediately after the incident and made a report. At the time of making the report, he gave the appellant's name as "Carl". He said in evidence that he knew the appellant through his (the appellant's) girlfriend. The latter sells "beer and drinks" on the beach and Mr Bailey had from time

to time transported her and her goods to the beach and other places such as dances. An identification parade was held and Mr Bailey identified the appellant from among nine men on the parade as the man who had shot at him on 18 August 2007. Apparently, the parade was held with a view to ascertaining whether the appellant was the person whom Mr Bailey had named as "Carl" to the police. According to Sgt. Elvis Lettman, who conducted the parade, when the appellant was told that he had been positively identified by Mr Bailey, he said: "Me and this man in a war and him say him a go do me something an me never report it. No machete or gun never involve, an a near mi him live". The appellant was arrested by Det. Cons. Garfield McKay. When cautioned, he said: "Officer me chop him, but mi never shoot after him".

[6] During the cross-examination of Mr Bailey by Mr Geddes-Morrison, who appeared for the appellant at the trial, it was suggested that Mr Bailey was vexed with the appellant because every time that he (Mr Bailey) made a report to the police about the appellant, nothing happened. Mr Bailey denied this. It was further suggested to him that he was drinking (presumably alcohol) on the night in question. Mr Bailey replied that he did not drink. It was further suggested to Mr Bailey that he had seen the appellant in a taxi heading out of Saint Ann's Bay before the time that he said the shooting had taken place. This suggestion was also denied by Mr Bailey.

[7] The defence was to the effect that although the appellant and Mr Bailey may have seen each other on the night in question, there was no incident whatsoever between them. There was definitely no question of the appellant discharging a gun. The appellant gave evidence. This, it has to be noted, is a welcome development since

accused persons over the years have regularly ignored the witness box. He said that he and Mr Bailey had been friends but there had been a falling out due to the friendship he shared with Mr Bailey's girlfriend. He denied shooting at Mr Bailey, but said that a few days before the alleged incident, there was a fight between them which had resulted in Mr Bailey receiving an injury. Miss Shadene Forbes, the appellant's girlfriend, also gave evidence. She said that she and the appellant were engaged in selling at "Just Cheers" on the night in question, and that after they had completed their sales, they left together in a taxi.

[8] The learned trial judge was of the view that "the critical issue or the ultimate issue in (the) case (was) one of identification". He quite properly reminded himself of the well-known ***Turnbull*** directions, and identified the question of malice as one of the matters that required his consideration in determining the case. This is how he puts it:

> "And in this case there is the question now of malice because, according to the defendant, this witness knows him so well that he is lying on him and the reason advanced is that the witness has made reports to the police about the defendant and because, according to the defendant, the reports made by the witness to the police have not produced the desired result in the past, he, the witness, has now taken it upon himself to be the instrument now of injustice, that is to say, to tell a deliberate lie on Mr. Baddal. So that is a factor that the court will have to take into account. The defendant, by himself and through his witness, as well is saying he was not there and so also no burden on the defendant to prove anything but nonetheless, he has a right by law to adduce evidence before the court, not in pursuance of some legal obligation, but simply, he has the right to

> put evidence before the court that he believes is of standing and so he has raised the issue of identification squarely, identification from the standpoint that he was not there, and identification in the context that not only was he not there but this witness is lying on him." [p114 – line 9 to 115 line 9 of the transcript]

[9] The learned trial judge recounted the evidence. He observed that there was no doubt that prior to the incident the complainant knew the appellant. He concluded that there was no reason that he could think of to say that Mr Bailey was an untruthful witness. He pondered on the alleged lack of action by the police in respect of the earlier complaints made by Mr Bailey, and asked whether the inaction of the police had emboldened the appellant to "take it a step further" and try to get rid of Mr Bailey as alleged. He rejected the testimony of the appellant and his witness, and said that he was satisfied so that he felt sure that the appellant had pointed a gun and fired it at the complainant while saying that he intended to "done" him.

[10] On the basis of the evidence and the demeanour of the witnesses, the learned trial judge concluded that Mr Bailey was an honest witness who was not mistaken. He found "the lighting circumstances" to be good. Consequently, he convicted the appellant.

[11] Mr Oswest Senior-Smith, for the appellant, abandoned the original grounds that had been filed by the appellant and sought, and was granted, leave to argue the following supplemental grounds:

"1. The Learned Trial Judge's unorthodox participation in the evidence-in-chief of the Virtual Complainant respectfully imbued him with the mantle of Prosecuting Counsel and left him bereft of the necessary distance and required detachment in approaching a proper analysis and assessment of the evidence, thereby rendering the verdicts of guilt not unimpeachable.

2. The sentences imposed were manifestly excessive."

Interventions by the judge

[12] The argument advanced by Mr Senior-Smith in respect of the first ground of appeal was to the effect that the learned trial judge had immersed himself in an unconventional way in the adduction of the evidence. The judge, he said, had asked too many questions while taking over the role of leading the evidence of the main witness for the prosecution. When it was pointed out to Mr Senior-Smith that there was not a word of objection by the appellant's legal representative at the trial, he said it was due to the obvious inexperience of counsel. Mr Senior-Smith submitted that the judge did all the work, and this resulted in the proceedings being unfair. There was no question of the judge having asked questions to clear up ambiguities, he said.

[13] Mr Senior-Smith submitted that the examination-in-chief of the main witness Mr Morris Bailey was conducted primarily by the judge. The sustained and continuous character of the eliciting of the complainant's account, he said, directly affected the quality of the trial. Having adduced the critical evidence on the issue of identification, it was highly improbable, according to Mr Senior-Smith, that the judge would then have

criticized or disbelieved the results of his own efforts. He submitted that the learned trial judge had left "his supervisory perch" and so was no longer able to be objective and fair in evaluating the testimony. Mr Senior-Smith relied on the following cases for support: ***R v Hulusi and Purvis*** (1974) 58 Crim. App. R. 378; ***R v Haniff Miller*** SCCA No. 155/2002 (delivered 11 March 2005) and ***R v Jenkins*** (1986) 83 Cr. App. R. 152.

[14] In her response, Mrs Ann-Marie Feurtado-Richards sought to put the interventions of the judge in their proper perspective. She said that like the appellant, she was relying on **R v Hulusi and Purvis** and **R v Haniff Miller.** In **Hulusi and Purvis**, the appellants were represented by an experienced member of the English Bar. The complaint against the judge was that he made it difficult for defending counsel to conduct the case for the defence in the manner in which it should have been conducted. During the presentation of the case for the prosecution, the cross-examination of the witnesses was frequently interrupted. Suggestions were made by the judge to counsel that he was not performing his duty as counsel. Questions were asked of the witnesses from time to time which indicated that "the judge was acting, so to speak, as an additional prosecuting counsel". When the appellants and their witnesses were called to give evidence, the judge frequently interrupted. In addition, he raised issues which were of no importance in the case. When the witnesses were giving answers to questions which counsel had asked them, the learned judge would quickly intervene and start cross-examining them on their answers. The following principles were distilled from the judgment of Lawton, L J as set out in the headnote:

> "Interventions by the judge during a trial which lead to the quashing of a conviction occur (i) when they have invited the jury to disbelieve the evidence for the defence in such strong terms that the mischief cannot be cured by the common formula in the summing-up that the facts are for the jury, and that they may disregard anything said on the facts by the judge with which they do not agree; (ii) when they have made it impossible for defending counsel to do his duty in conducting the defence; (iii) when they have effectively prevented the defendant or a witness for the defence from telling his story in his own way."

She conceded that there was intervention in the examination-in-chief of the complainant Morris Bailey, but pointed out that during the cross-examination of the said witness, only one question was asked by the judge. Further, she said, there was no intervention in respect of any other witness for the prosecution or in the presentation of the case for the defence.

[15] In ***Haniff Miller,*** counsel for the applicant, in respect of how the learned trial judge had conducted the trial, contended that "on numerous occasions during the evidence-in-chief and cross-examination of the witnesses for the prosecution, he repeatedly and consistently intervened and obstructed the responses of the witnesses and supplied evidence (i.e. put words into the mouths of the witnesses), which was accepted by the said witnesses for the prosecution and formed a part of the evidence" (p. 7). At the hearing of the appeal, it was submitted on behalf of the applicant that the judge had descended into the arena by constantly taking over the role of prosecuting counsel by "examining the witnesses called to give evidence", interrupting counsel's examination of the applicant, and generally preventing the applicant from

telling his story in his own style. The court examined the transcript of the trial and formed the firm view that the interruptions were several in number and that they not only went to the material aspects of the trial, but also "were such as went beyond the bounds permitted to a trial judge". The court then referred to the ***Hulusi and Purvis*** case and concluded that in the circumstances, there had not been a fair trial and the applicant should not be put through the ordeal of another trial. A judgment and verdict of acquittal was entered.

[16] In the instant case, the learned trial judge did indeed ask several questions of the identifying witness, Mr Morris Bailey. However, it is inaccurate for Mr Senior-Smith to say that it was the judge who "adduced the critical evidence on the issue of identification". An examination of the transcript reveals that it was counsel for the prosecution, Miss Dahlia Findlay, who led the witness to the point where he first purported to identify his attacker (p. 6 up to line 17 of the transcript). Further, on pages 16 to 20, counsel for the prosecution led the witness as to the critical details of the identification. There followed a lengthy cross-examination by Mr Geddes-Morrison without any intervention of note by the learned trial judge. The appellant gave evidence and called a witness. Their examination-in-chief and cross-examination also proceeded without any interruptions by the judge.

[17] Although we do not agree with the slant that Mr Senior-Smith would wish us to take as regards the interventions of the learned trial judge in this case, we wish to say emphatically that the interventions were largely unnecessary. 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).

[18] In this case, it cannot be said that there has been any unfairness to the appellant. He and his legal representative were not hindered in any way in the conduct of the trial. He was allowed to give his story in the way he wished. No words were put in the mouth of the identifying witness, and counsel for the prosecution was not substituted by the judge. The case against the appellant was a strong one, and the questions posed by the judge during the evidence of the identifying witness did not in any way make the case appear any stronger; nor did those questions cause any unfairness to the appellant.

[19] In the circumstances outlined and discussed above, we concluded that there was no merit in the grounds of appeal advanced. Accordingly, the appeal against conviction was dismissed. So far as the sentences are concerned, we have repeatedly indicated that factual situations such as existed in this case do not warrant the imposition of consecutive sentences. We take this opportunity to urge trial judges to remind themselves of the principles that guide us in this jurisdiction so far as consecutive

sentences are concerned. It is sufficient, we think, to refer to the most recent decision of this court in that regard: ***Kirk Mitchell v R*** [2011] JMCA Crim 1 – delivered 14 January 2011. Paragraphs [32] –[60] of the reasons for judgment, written by Brooks, JA (Ag) on behalf of the court, are commended to the attention of all judges who preside at criminal trials. There is a place for consecutive sentences, but certainly not where the facts are such as in the instant case. In view of the factual situation, we therefore quashed the order making the sentence on count two consecutive to that on count one, and substituted an order that the sentences on both counts are to run concurrently from 22 August 2008.