[2010] JMCA Crim 36

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 110/2008

BEFORE: THE HON. MR JUSTICE HARRISON, J.A.
THE HON. MRS JUSTICE HARRIS, J.A.
THE HON. MR JUSTICE BROOKS, J.A. (Ag)

OTIS BARRETT v R.

Peter Champagnie for the applicant

Mrs Diahann Gordon-Harrison and Brodrick Smith for the Crown

21, 22 and 25 June 2010

BROOKS, J.A. (Ag)

[1] The applicant Mr Otis Barrett was convicted in the Western Regional Gun Court for the offences of illegal possession of firearm and robbery with aggravation. On 11 September 2008, he was sentenced to serve seven years imprisonment in respect of the former and ten years imprisonment, in respect of the latter offence. The sentences were stipulated to run concurrently. He applied for leave to appeal against the convictions and sentences. A single judge of appeal refused leave but Mr Barrett has renewed his application before the court with a view to having the convictions quashed and the sentences set aside.

[2] The convictions arise out of a complaint made to the police by Ms Ann-Marie Powell that she was robbed at gunpoint while she worked at a store which sold cellular telephones, 'phone cards and accessories. This occurred on 16 March 2007, at Grange Hill in the parish of Westmoreland. Ms Powell was the sole attendant in the store at the relevant time.

[3] The essence of the Crown's case was that the applicant entered the store on the morning of the day in question and bought a 'phone card from Ms Powell. He remained in the store while he entered the credit on his cellular telephone and then left. Some 20 minutes later another man entered the store. That man also purchased a 'phone card from Ms Powell, remained in the store while he applied the credit and then left.

[4] A further hour and a half later the applicant returned. He ordered another 'phone card but by the time Ms Powell got up to get the card, another man came into the store. He was the same man who had come in earlier that morning. The second man indicated that he wanted to purchase a cellular phone. Ms Powell asked to be excused while she got change for the applicant for the money which he had tendered.

[5] She went to the back of the store to get the change. While she was there the applicant accosted her and demanded all the money, the 'phones and the 'phone cards. He had a bag for the purpose of

receiving the items. While she obeyed his orders, he produced a gun from the bag, pointed it at her side and told her to "hurry up". He demanded that she remove the cellular telephones from their boxes.

[6] While she was so engaged, she saw the other man in the store removing other items of stock from their respective places. The booty having been secured, the applicant then shut her in the store's bathroom. After a short interval she emerged from the bathroom and both men had gone. She then called the police. The loss, which was in cash, 'phone cards and cellular telephones, totalled approximately $270,000.00.

[7] The police officer, who responded, noticed on his arrival, several boxes strewn about the store. He received a report from Ms Powell.

[8] On 25 May 2007, some two months later, Ms Powell was on duty at the store when a male visitor to the store aroused her suspicion. As soon as he had left, she also exited the store, locked it and went to another store located in the same shopping plaza. From that vantage point she saw the same male visitor coming back up the stairs toward her store. He was accompanied by the applicant. The male visitor came to where she was and as a result of what he said she left the plaza and went to a nearby gas station. On her way she saw the applicant downstairs leaning against a column. She pretended not to have seen him, but from the gas station she observed him and also observed the other man standing

upstairs the plaza. The police arrived and she pointed out the applicant to a police officer. She noticed the applicant start to walk away.

[9] The police officer, a Constable Chambers, testified that he went to the plaza in response to a telephone call. After speaking to Ms Powell he chased and held the applicant. He said that a quick search of the applicant produced nothing. He handed him over to other police officers and went in pursuit of the other man. In fact, he said he went looking for two other men. The result of his quest did not form part of the evidence.

[10] The applicant was taken into custody. The following day, he was arrested and charged for the offences for which he has been convicted. His defence was that of alibi and that Ms Powell was a mistaken witness.

[11] Mr Champagnie, on his behalf, abandoned the grounds of appeal which were originally filed and sought and secured leave to argue three new grounds. We shall set out and address each ground in turn.

Ground 1:

The learned trial judge erred in his treatment of the issue of visual identification in that he failed to adequately consider the applicant's witnesses' evidence in relation to the applicant's physical appearance at the material time of the commission of the offences which evidence was fundamentally different from the physical description given by the virtual complainant at the said time. This resulted in a denial of a fair and balanced consideration of the applicant's case.

[12] The genesis of this ground is that, in her statement to the police, given on 3 April 2007, Ms Powell described the man with the gun as "clean

shaven". In court, the applicant was sporting a beard and moustache. He called two witnesses. His girlfriend, Tasha Stewart, testified that she had known him for some time and that he had always carried himself in that style. His other witness, Merna Buchanan, said that she knew him to wear a moustache and another feature of facial hair. That feature was not adequately described in the transcript of the trial. Ms Buchanan only pointed to its location and the area pointed out was not reduced to words. The prosecution did not suggest to either witness that the applicant had, in March and May 2007 gone about clean shaven.

[13] Mr Champagnie, in dealing with this ground, submitted that the learned trial judge failed to address his mind to the fact that Ms Stewart's evidence went unchallenged. In his written submissions he also said:

> "The result of the unchallenged evidence on this point must reasonably lead to the conclusion that Ms Tasha Stewart's evidence is correct…The learned trial judge in dealing with Ms Buchanan's evidence failed to acknowledge her unchallenged evidence …"

[14] When cross-examined about her statement to the police on this issue, Ms Powell stated that the gunman did not have a beard and moustache. She, however, also said that, at the time of the robbery, the gunman's facial hair "…was low, not clean as in clean, but low". When asked what she meant by "low", she said, "I meant there was hair, but not all bald, like [w]ell bald". Finally she also said that "[In May] He was not

clean shaved like in March." These answers are at pages 35-36 of the transcript.

[15] In addressing the issue in his reasons for judgment, the learned trial judge considered that portion of the evidence as well as the evidence given by both Ms Stewart and Ms Buchanan. It is our view that the learned trial judge carefully and clearly explained his reasoning on the point. He described the issue at pages 126-127 of the transcript, thus:

> "There was the question about whether he is clean shaved or whether he wears a beard and a moustache. She said at the time of the incident the person she saw was clean shaven, and in her statement she said that's the description she gave to the police. In court, the accused wears a moustache, which is continuous around his chin; a beard, not a long beard but right under his chin. He doesn't have side burns at all.
>
> Now, it is put to the witness that because there is a difference between how he looks now in court and how she described him then, that she did not see or did not know who was the person who she alleged held her up with a gun on the 16th of March, 2007. This question about his physical face in this trial, I have to look at, because it's a strong part of the accused, because he brought a witness to support him."

The learned trial judge then went on to outline the evidence of the defence witnesses, which evidence has been mentioned above. He then assessed the issue at pages 128- 129 of the transcript.

> "Now, does that mean the witness [Ms Powell] don't (sic) know him or didn't see him or he was not the person, or does that mean that that is an additional factor that could be a mistake as far as the witness is

> concerned? Well, in relationship (sic) to the beard and moustache, we know that men grow hair and men shave too. And, when men shave, hair grow (sic) back, simple, and sometimes men shave up their beard and moustache as to how they feel...So, the fact that she saw, that is Miss Powell, saw a clean shaved man on the 16th of March, 2007, doesn't mean that that man cannot have a beard or wear a beard as how the accused is describing his beard today. It doesn't mean that at all. **Of course, one has to look at what his witness says that they know him as always wearing that beard so I have to see whether that creates a doubt in my mind, because I have to look at defence's evidence and his witness to see if it creates a doubt in my mind as to whether or not she is mistaken**, and the question that he brings witness or witnesses who are saying, from all the time that they know him he is wearing this moustache it would, or could cause some problem in terms of identification except that the most outstanding - well, the outstanding thing is that his girlfriend - well, she did mention when she was asked how he dressed in terms of beard. The second witness, she mentioned first his hair being plait up, she didn't really mention, as the first did, question of a beard, but it was put straight to Miss Powell and she acknowledged the difference, as a truthful witness, but **she said, even though he is now with the beard and she saw a clean shaven man, she is not mistaken, it was the same person who held her up at gunpoint, and I accept her evidence. She is truthful and I am satisfied that she is not mistaken even though this man is now wearing this beard.** Okay. So, that is the way I deal with the question of the physical description and on the question of mistake." (Emphasis supplied)

[16] The emphasised portion of that quote demonstrates that the learned trial judge did consider the evidence of the appellant's witnesses, concerning facial hair and did not accept it. He preferred the evidence of Miss Powell. We find no fault with his reasoning. It is to be noted that

earlier in his summation (at page 114 of the transcript) the learned trial judge specifically mentioned that Ms Powell had a special reason to remember the applicant. It was that she had seen him twice in one day. It cannot be properly said that because there is unchallenged evidence placed before him, the learned trial judge was obliged to accept that evidence. A tribunal of fact decides what evidence it will accept and what evidence it will reject. The demeanour of the witnesses before it, plays a large part in determining what evidence it, in fact, accepts. The failure of counsel, in cross-examination, to make a suggestion, consistent with counsel's case, and contrary to the testimony of the witness being cross-examined, cannot elevate the un-contradicted evidence to the level that the tribunal of fact must accept it as true. It may certainly carry more weight for the tribunal of fact but it acquires no greater status than that. We reject the assertion to the contrary. In ***Oniel Roberts and Christopher Wiltshire v R*** (SCCA Nos. 37 and 38/2000 – delivered 15 November 2001) this court may be taken to have recognized the authority given to the tribunal of fact to reject any bit of evidence. At page 20 of the judgment, Smith JA (Ag, as he then was) said:

> "Another observation is that where the alibi witnesses have been unshaken and there is no apparent weakness in the alibi evidence to suggest that the alibi might be false then as a matter of logic and common sense the jury should be directed that **they can only reject the alibi if they are sure that the identification evidence is correct**." (Emphasis supplied)

Similar recognition was given in ***R v Michael Rose*** SCCA No. 17/1987 (delivered March 18, 1987). There, this court stated that it was open to the tribunal of fact to accept the testimony of one (prosecution) witness in preference to another, where their testimonies were in conflict. In the instant case, the learned trial judge made it clear that he was sure that Ms Powell was correct. We cannot say that he was wrong in so doing.

[17] As a subsidiary complaint in this ground, Mr Champagnie submitted that the learned trial judge "misquoted Ms Buchanan's evidence to say Ms Buchanan did not mention the applicant having any beard". The record of Ms Buchanan's evidence does not specifically mention a beard. She said, at page 86 of the transcript, that he always had "long hair, that hairstyle and just like that he has – like moustache and a round thing like that, similar to that one. (Indicating)". It is true that the learned trial judge does mention that in court the applicant wore a beard. In the absence of a specific indication by Ms Buchanan to a beard, however, we cannot say that the complaint by Mr Champagnie is well founded. If, indeed, the learned trial judge did err on the point, we find favour with the principle espoused by this court in ***Ian McDonald v R*** (SCCA No. 202/2001 – delivered 31 July 2003). In ***McDonald,*** Panton JA (as he then was) cited, with approval, at paragraph 7A, the following quote from ***R v Wright*** (1974) 58 Cr. App. R. 444:

> "At the end of the day, when the appellant's case is not that the judge erred in law but that the judge erred in his handling of the facts, the questions must be first of all, was there error, and secondly, if there was, was it significant error which might have misled the jury? If this Court has a lurking doubt it is its duty to quash the conviction as unsafe…"

Having regard to the evidence we are not convinced that the error was significant. The learned trial judge clearly considered and rejected the evidence that the applicant had always had a beard.

[18] It is our view that ground 1 fails.

Ground 2:

The learned trial judge erred in that he failed to give adequate consideration to the possibility as to mistaken identity having regard to the discrepancy in the actual height of the applicant as opposed to the height given by the virtual [complainant] to the police.

[19] The issue, giving rise to this complaint by the applicant, is Ms Powell's statement to the police, that the gunman was about five feet seven inches tall. Defence counsel at the trial suggested that the applicant was five feet eleven inches. Mr Champagnie submitted that the learned trial judge recognized the possibility of Ms Powell having been mistaken but did not "view this evidence to the benefit of the defence".

[20] As with the issue of the facial hair, the learned trial judge addressed the matter of the height difference. At page 125 of the record he said:

> "The accused appeared when he stood up, to the court, to be taller than five feet seven, which I have to look at, he could be somewhere at five feet

> ten, at least. Five eleven was put, but it could be somewhere there from what I saw. I don't know. Yes, stand up again let me see you. (accused stands) Maybe five eight, he could be five eight, five feet nine. But, there is, I don't think he is exactly five feet seven, but there may be a 2-inch or 3-inch difference."

The learned trial judge then assessed the relevant evidence:

> "Now, because there is a difference between the height (sic) does that mean that she didn't see the person? I don't find that as a fact. Because, there is a difference in the height as assessed by the court and what she says does that mean that there could be a mistake? It is a factor I look at, there could be a mistake, but I have to ask, is she mistaken? But, the difference, she admits that there can be mistake of the person. So, to that extent I find her a forthright witness; a truthful witness, who still can be mistaken, but at least she was prepared to say "yes, I know that, but I am not making no (sic) mistake about who I saw." So, there was that physical description that could give rise to mistake."

He concluded, at page 129 of the transcript, that he accepted Ms Powell as truthful and that she was not mistaken. It cannot be said that he was "plainly wrong". This ground also fails.

Ground 3:

The learned trial judge erred in law in not warning himself in relation to prejudicial evidence and therefore denied the applicant a fair trial.

[21] The officer who charged the applicant gave evidence in cross-examination to the effect that the applicant was found with a firearm when he was apprehended. Mr Champagnie complained that that evidence was not only improperly prejudicial to the applicant but was

wholly hearsay. He submitted that the fact that the learned trial judge did not address it in his summation means that this court cannot know whether he considered it in his deliberations and dismissed it. If he did consider and reject it, submitted Mr Champagnie, the learned trial judge should have expressly said so.

[22] Mrs Gordon-Harrison, for the Crown, candidly accepted that the testimony was hearsay and that it was desirable that the learned trial judge should have expressly dismissed the inadmissible testimony. Learned counsel submitted, however, that in light of Detective Chambers' testimony that he had searched the applicant and found nothing, the learned trial judge clearly did not give the hearsay any weight.

[23] The relevant portion of the cross-examination follows:

> "Q. You know if a search was ever conducted of Mr. Barrett's person when he was taken into custody?
>
> A. I heard of it.
>
> Q. Nothing was found?
>
> A. I heard a firearm was found
>
> Q. What?
>
> A. I heard a firearm was found in his possession.
>
> Q. When he was taken into custody by Mr Chambers?
>
> A. Yes sir." (page 63 of the transcript)

[24] Where prejudicial statements are allowed into evidence, it is recommended that it is sometimes best not to repeat it. That recommendation is made where the trial judge gives directions to a jury. In the instant case there was no jury. In ***R v O'Neil Lawrence and Carl James*** (SCCA Nos. 82 and 83/2003 – delivered 30 July 2004) this court, admittedly in a case involving a jury, stated at page 14-15 of the judgment:

> "In this regard [the matter of prejudice] there are two issues. The first is an assessment of whether in respect of a fair trial the impugned evidence can be categorized in respect of prejudice, as negligible, possibly, or obviously real. This assessment will, of course be determined within the context of the particular case. If it is negligible, that is, it technically contravenes a purist's criterion without more – then it can be ignored. The second issue is as to the course to be adopted when the risk of prejudice is other than negligible. If there is an obvious real danger then the jury ought to be discharged. The perplexing difficulty attends the "possibly" category. What should the trial judge do in such a particular case? It is a decision to be made in the midst of the unfolding drama on the trial stage. Should such trial judge, if no objection is taken, adopt the stance of passive indifference and preside over the case as if the unsolicited offending evidence had not occurred? Should the trial judge invite submission from counsel as to whether or not the jury should be discharged? This is left to the exercise of the trial judge's discretion with which this court will not lightly interfere: see ***R v Weaver*** [1967] 1 All ER. 277, ***McClymouth (Peter) v R*** [1995] 51 W.I.R. 178…."

[25] In addressing the first issue mentioned in the foregoing quote, we find that the prejudice in the instant case was negligible. The focus of the

learned trial judge was on the incident which occurred on the 16th March and the question of identification which flowed from it. We find that the inference may reasonably be drawn that the learned trial judge recognized and dismissed the impugned bit of testimony for what it was; blatantly prejudicial, inadmissible hearsay. We accept that it would have been happier had he expressly demonstrated that he had done so, but find that there has been no injustice resulting from his failure so to do.

[26] In the event that the prejudice may be said to be not negligible, it may be useful to consider that this was an experienced trial judge, sitting without a jury. We are not inclined, in that context, to find that the prejudicial testimony was dangerous. In the event that it falls into the category of being "possibly dangerous", then we are prepared to accept the exercise of his discretion, perhaps inadvertently done, not to make any further mention of it.

[27] We accept Mrs Gordon-Harrison's submission that, in this instance, the learned trial judge, deemed to know the law, did reject the prejudicial evidence in arriving at the verdict. Ground 3 therefore fails.

Conclusion

[28] In the circumstances, the application for leave to appeal against convictions and sentences is refused. The sentences shall run from 11 December 2008.