[2012] JMCA Crim 54

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 24/2011

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA

BRANDON CAMPBELL v R

Leroy Equiano for the appellant

Mrs Lisa Palmer Hamilton and Mrs Denise Samuels-Dingwall for the Crown

29, 31 October and 15 November 2012

BROOKS JA

[1] Mr Brandon Campbell was convicted by Sykes J, on 26 February 2009, in the Gun Court of the offences of illegal possession of a firearm and assault with intent to rob. He was acquitted of the offence of illegal possession of ammunition. He was sentenced to 12 years imprisonment at hard labour in respect of the firearm count and five years in respect of the assault with intent to rob. The learned judge ordered that the sentences should be served consecutively.

[2] Mr Campbell applied for leave to appeal against his conviction and sentence. A single judge of this court refused his application in respect of the conviction but granted

him leave to appeal against the consecutive nature of the sentences. Mr Equiano argued the appeal before us, on his behalf.

[3] On 31 October 2012 we made the following orders:

> "The application for leave to appeal is allowed and the hearing of the application is treated as the hearing of the appeal. The appeal against conviction is allowed in part, the conviction in respect of the count of assault with intent to rob is set aside and a verdict of acquittal is entered in its stead. The conviction and sentence in respect of the illegal possession of firearm are affirmed and Mr Campbell's sentence is to be reckoned as having commenced on 27 May 2009."

At that time we promised that our reasons in writing would follow shortly. We now fulfil that promise.

The evidence

[4] The evidence which the Crown placed before the court below, and which the learned trial judge accepted as truthful, demonstrated Mr Campbell's misfortune in choosing a victim as brave and tenacious as the virtual complainant, Mr Gifford McKenzie. As will be shown below, the prosecution and the society, by virtue of the recovery of the firearm, have benefitted from Mr McKenzie's bravery.

[5] It was Mr McKenzie's evidence that on 22 July 2008, at about 10:00 pm, while operating his taxi-cab along Spanish Town Road, in the parish of Saint Andrew, he picked up a male passenger in the vicinity of Seaview Gardens. As was Mr McKenzie's wont, the roof light in the vehicle was on and remained on as a security measure. Similarly, as a standard safety measure, he constantly observed his passenger along the

journey. That journey took them along Spanish Town Road to the intersection with Hagley Park Road and along Hagley Park Road to its junction with Mahoe Drive where the passenger indicated his wish to disembark.

[6] According to Mr McKenzie, he stopped the vehicle and looked through his driver's side window with a view to making a U-turn to return to the intersection with Spanish Town Road. While in that position, he was waiting to hear the passenger's door close in order for him to be on his way. The expected sound did not come and Mr McKenzie looked around just in time to see the passenger pull a firearm and point it at his side.

[7] Mr McKenzie reacted with dramatic effect. He let go of the steering wheel and grabbed the gun. He struggled with his assailant and in attempting to wrest the firearm away from him, bit him on the hand and on the shoulder as the miscreant tried to escape from the vehicle. His tenacity won the day and the assailant fled leaving the weapon. Mr McKenzie was not left unscathed, however. The severity with which he bit the attacker caused his gums to bleed severely.

[8] Despite his injury, Mr McKenzie pursued the assailant and, while chasing him, a shot was discharged from the firearm that was in Mr McKenzie's hand. The bullet hit a bystander who raised an alarm and Mr McKenzie abandoned his chase of the miscreant.

[9] The police attended the scene and a report was made. Mr McKenzie and the bystander were taken to the hospital where Mr McKenzie's injury was assessed as requiring dental services and he was quickly released. He was taken to the Hunts Bay

Police Station. There, while giving his statement to the police, Mr Mckenzie saw his attacker being brought in by police personnel. He immediately pointed out the man to the police as being the person who had attacked him.

[10] According to Mr McKenzie, the man was dressed in the same clothing, including a white or pale jacket with a hood and had the same "chiney-bump" hairstyle that he had earlier that night. The man, who proved to be the appellant, Mr Campbell, also bore injuries on his hand and signs of blood on his jacket in the region of his shoulder.

[11] In addition to Mr McKenzie's evidence, there was the evidence of Sergeant Christopher Mattis who testified that, in answer to a transmission, he went to the junction of Hagley Park Road at about 10:50 on the night of 22 July 2008. There he received a report and he and other officers conducted a search of the neighbourhood. While searching, he noticed a man under a truck in nearby premises. At his command, the man emerged from under the vehicle and Sgt Mattis noticed that the man, Mr Campbell, had blood on his right hand and shoulder and was dressed in a "white...sweater type thing with a hoodie over it that goes on your head".

[12] Mr Campbell's explanation to Sgt Mattis, for being under the truck, was that, "A dog rush mi and mi run go under the truck goh hide." Sgt Mattis took him to the CIB room at the Hunts Bay Police Station where, as mentioned before, Mr McKenzie, being fortuitously present, pointed Mr Campbell out as the attacker.

[13] Mr Campbell was arrested and charged. Subsequent tests by a ballistics expert, on the weapon which Mr McKenzie had surrendered to the police, confirmed that it was capable of firing deadly missiles.

The grounds of appeal

[14] Three grounds of appeal were originally filed by Mr Campbell personally, namely:

> "1. **Misidentify** [sic] **by the Witness:-** That the witness wrongfully identified me as the person or among any persons who committed the alleged crime.
>
> 2. **Unfair trial: -** That the evidence and testimonies upon which the Learned Trial Judge relied on [sic] for the purpose to [sic] convict me, lack [sic] facts and credibility thus rendering the verdict unsafe in the circumstances.
>
> 3. **Lack of Evidence:-** that the prosecution failed during the Trial to put into evidence any piece of substansive [sic] evidence to link me to the alleged crime.

In addition to those grounds, Mr Equiano sought and obtained permission to argue an additional ground, namely, "The sentence of the court was manifestly excessive."

[15] Mr Equiano, although not abandoning the original grounds, concentrated his submissions on two areas. He argued firstly, that the evidence did not support a conviction for assault with intent to rob. Secondly, learned counsel argued, the sentences imposed were excessive.

[16] For the reasons which shall, hereafter, become apparent, we found no merit in ground one. Grounds two and three were considered together in the submissions made

by Mr Equiano in respect of the evidence concerning the assault with intent to rob. These latter grounds are the ones which we shall assess.

Proof of the intention to rob Mr McKenzie of his motor car

[17] In respect of his first point, Mr Equiano highlighted the particulars of offence for the relevant count on the indictment proffered against Mr Campbell, by the Crown. The particulars stated:

> "**Brandon Campbell**, on the 22nd day of July, 2008 in the parish of St. Andrew assaulted Gifford McKenzie with intent to rob him of a Grey 1993 Nissan Sunny Motor Car Registered 6885 EX." (Emphasis as in original)

Learned counsel submitted that in light of the evidence that no words were used by the attacker and that his only gesture was to point the firearm at Mr McKenzie's side, there was not sufficient evidence to support the count as framed. Mr Equiano argued that, in those circumstances, any number of inferences could have been drawn. He gave as examples, kidnapping, robbery of Mr McKenzie's money or forcing Mr McKenzie to drive to some other location.

[18] Learned counsel relied, in support of his submissions, on the cases of **R v Hussein** [1978] Crim LR 219 and **R v Bozickovic** [1978] Crim LR 686. Both cases concerned accused persons breaking into property with intent to steal. In **Hussein** the property was a motor car and in **Bozickovic** it was a private flat. Nothing was taken in either case. In both cases an intention to steal was denied. Both were acquitted on the basis that, as was expressed in **Bozickovic**, "by bringing the charge the Crown undertook to prove an intent to steal as an ingredient of the charge. There was no

evidence sufficient to provide any proper basis for the inference that [the accused] intended to deprive [the owner] of any item of property" (see page 687).

[19] Both decisions were criticised by the learned editors of the Review. They, however, thought that the decision in **Hussein** may have been justified on the basis that the prosecution had alleged an attempt to steal specified items (see pages 687-8).

[20] Mrs Palmer Hamilton, for the Crown, disagreed with Mr Equiano's stance. She submitted that the inference was one to be drawn by the tribunal of fact. She pointed to the fact that the most likely inference was that the passenger's door was open at the time that the firearm was brandished. This inference, she said, was required by Mr McKenzie's evidence that he was waiting on the passenger's door to be shut before moving off.

[21] On that evidence, Mrs Palmer Hamilton submitted, the inferences concerning anything but robbery, is excluded. On learned counsel's submission, the inference to be drawn was that the attacker intended to rob Mr McKenzie of his money, his car or both. She argued that the attacker had had ample opportunity to abduct Mr McKenzie before the car had reached the spot where the struggle occurred. She pointed out that the men had already travelled together for some distance before getting to that spot and it was at the attacker's request that Mr McKenzie had stopped the car. Learned counsel submitted that Mr McKenzie's evidence that he was waiting for the door to be closed justified that interpretation of the evidence.

[22] Mrs Palmer Hamilton then pointed to the learned trial judge's careful consideration of the point in his summation and his references to previously decided cases that indicated that it was the tribunal of fact which had to draw the appropriate inferences in the circumstances. There was sufficient evidence, Mrs Palmer Hamilton submitted, to allow the learned trial judge to draw the inference that he did.

[23] The Crown faces a real difficulty in respect of this count because, in the absence of evidence to support an intention to take the motor car, it was not open to the court to convict for the offence of common assault (see Archbold, Criminal Pleading Evidence and Practice, 36th ed. para 1777). The learned authors of Archbold cite the case of **R v Woodhall** (1872) 12 Cox 240, in support of that principle. In **Woodhall**, Messrs Woodhall and Wilkes were indicted for feloniously assaulting Joseph Glover "with intent to rob and steal from his person certain money". The jury found them guilty of the assault but not of the intent to rob. Denman J (as he then was) considered the verdict and said, in part:

> "...the finding on this indictment in fact amounts to a verdict of not guilty, and that it is not competent for the Court, where the charge is one of assault with intent to rob, to convict and sentence the prisoners if the jury find them guilty only of a common assault...."

The Crown, in the instant case, did not, as it could have done, adopt the option of adding to the indictment, a separate count for common assault.

[24] In **Parfait's case**, referred to in Volume 1 East's Pleas of the Crown at page 416, the court made a similar decision. Mr Parfait was indicted for assaulting Thomas

Wheston on the highway with a pistol, with intention to rob him. The evidence was that Mr Parfait only held the pistol toward Mr Wheston and bid him stop. No demand or motion was made to Mr Wheston. East records the 1748 decision thus:

> "By Lord C. J. Willes; a man who is dumb may make a demand of money, as if he stop a person on the highway with a pistol, and put his hat or hand into the carriage, or the like but in this case as the prisoner only held a pistol at the coachman, but said nothing to him but "stop;" that was no demand of his money as the act requires, and therefore it was not within the act: and Chappel J. according, the prisoner was acquitted by the direction of the court, without entering into his defence."

[25] In assessing the contending submissions in the instant case, it must be observed that an appellate tribunal will not lightly disturb a finding of fact made by the tribunal charged with that duty. The reason for that approach is that the tribunal of fact had the opportunity of seeing and hearing the witnesses; a privilege which is denied the appellate tribunal. It is also to be observed that whereas it is for the tribunal of fact to draw inferences, there must be evidence on which the inference may be based.

[26] Guidance on the point may be found in **R v Horace Willock** SCCA No 76/1986 (delivered 15 May 1987), where this court addressed the issue of summations by a judge sitting alone in the High Court Division of the Gun Court. Bingham JA (Ag) (as he then was), at page 5 of the judgment of the court, spoke to the advantage that the tribunal of fact had over the appellate tribunal by virtue of having seen and heard the witnesses. The learned judge of appeal, however, added a *proviso*. He said:

> "...Provided therefore, that on an examination of the printed record, there existed material evidence upon which there

> was a sufficient basis for the learned trial judge to come to the decision at which he arrived, there should be no reason for this court to interfere with the decision at which he arrived."

[27] The appellate court may also consider, in perusing the transcript, whether the material is such that the tribunal of fact had no advantage over it, as to the existence of the relevant evidence or the question of interpretation of that evidence. The instant case seems to be one which allows this court to decide whether the evidence exists.

[28] In this regard, the relevant portions are at pages 33-34 and 37-38 of the transcript. At pages 33-34 it is recorded:

> "HIS LORDSHIP: Now, when he pulled the firearm, had you made the U-turn yet?
>
> THE WITNESS: No, I eventually hold the steering like this (he indicates), and my head was out the window and I was listening for the door to shut, so I looked 'round, and when I looked 'round, there was the gun at my side. I was wondering how he don't come out the car yet, because I was listening for the door to shut, so I look."

[29] After describing the ensuing struggle and his biting of the assailant, Mr McKenzie described how he got out of his vehicle. He said at pages 37–38:

> "HIS LORDSHIP: Who was outside?
>
> THE WITNESS: He was outside.
>
> HIS LORDSHIP: Outside of what?
>
> THE WITNESS: Out of [sic] car, **he pulled his door**, step out back way, and while me holding the gun like this (he indicates), so me eventually step over the emergency and

> goh over both seats, and that is when I get out side [sic]."
> (Emphasis supplied)

[30] As in **R v Woodhall** and in **Parfait's case**, no words were exchanged and the assailant made no gesture to support his pointing of the firearm. It appears that Mr McKenzie's reaction was too swift for the assailant. Unlike Mrs Palmer Hamilton's submission, however, the portion of the last quote which has been emphasised, indicates that the passenger's door was still shut when the firearm was first pointed. Whereas the words "I was listening for the door to shut" requires an inference that the door had been opened, the phrase "he pulled his door", in Jamaican parlance, requires no inference. It is describing the specific act of opening the door. That specific act means that all of the options mentioned by Mr Equiano, and any other permutations thereof, were still open to the assailant, prior to Mr McKenzie's holding on to the firearm.

[31] In his summation, the learned trial judge, in his usual thorough approach, cited the requirement of proof of the intent to rob. He also referred to the cases of **R v Trusty and Howard** Volume 1 East's Pleas of the Crown 418 and **R v Sharwin** Volume 1 East's Pleas of the Crown 421. He then said at page 112–114 of the transcript:

> "So what [the cases] seem to be saying then, is that it is not necessary that the person actually says give me your money or words to that effect. What the Court needs to do is to look at the circumstances, and see what inference can be drawn.

> Now, it seems that the [Crown] seems to be suggesting that when persons go out and behave like this, one of the inferences or perhaps the inference that the Court ought to draw, to see that they went out there with the intent to rob, since that would appear to be the most likely intent that they would have in behaving in this manner. So that is a correct inference to be drawn from the passage there and the prosecution seems to be saying that if at 10:15 at night, yes, a gentleman gets into a taxi and brandishes a firearm at some point, pointing it at the driver of this taxi, it would seem that his intent would be to rob the taxi man since in the circumstances there is no other likely intent that he is to or he may have. And so, that was how the Prosecution is putting forward its case here....
>
> So turning back to the indictment...in respect of count 3, based upon the passage from Archbold, also (and what is said there, 1 East Pleas of the Crown), I am satisfied so that I feel sure that the evidence produced by the Prosecution can sustain count 3 of this indictment..."

[32] Despite the learned trial judge's careful approach, it does not seem that he directed his attention to the subject matter of the intention to rob, namely the motor car. Mrs Palmer Hamilton's submission also fails to distinguish between the intention to take the motor car as opposed, for instance, to taking Mr McKenzie's money.

[33] The prosecution did not seek to amend the indictment to remove the specific stress on the motor vehicle. Neither was any application made at the hearing of the appeal. Mrs Palmer Hamilton did, however, point the court to its power, under section 20 of the Criminal Justice (Administration) Act, to amend any defect in criminal proceedings. The section does seem to suggest that the power would be triggered by an application. It states:

> "It shall be lawful for the Supreme Court and the Circuit Court, and every Judge thereof, at all times to amend all defects and errors in any proceeding in criminal cases, whether there is anything in writing to amend by or not, **and whether the defect or error be that of the party applying to amend or not**; and all such amendments may be made upon such terms as to the Court or Judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing proceeding the real question in issue shall be so made. This section shall apply to the Court of Appeal and to proceedings in criminal cases on appeal to that Court as it applies to the Supreme Court and to proceedings in criminal cases in that Court." (Emphasis supplied)

[34] In light of the fact that other possibilities existed as to Mr Campbell's intention at the time of pointing the weapon at Mr McKenzie, it would be safer not to invite the Crown to apply for the amendment. This is despite the fact that East, in his discussion of the point at page 417 of his work, observed that, "the unfortunate sufferer [Mr McKenzie in this case] understands the [non-verbal assault] language but too well". In response to East's comment, it may be observed that regardless of the victim's understanding, some translation into evidence must be made in order for the tribunal of fact to infer the nature of the assailant's intent.

[35] In the circumstances the more appropriate decision is to state that in the absence of any evidence concerning the intention to take the vehicle, and in the absence of any amendment of the indictment, the tribunal of fact, with respect, could not have drawn the inference that the vehicle was the object of the assailant's focus.

[36] The cases cited by the learned trial judge make it clear that each case must be decided on its own circumstances. In the circumstances of this case, it would seem that the conviction on this count is unsafe as not being supported by the evidence. It should, therefore, be quashed and a verdict of acquittal substituted.

[37] That acquittal did not, however, deprive the learned trial judge of his jurisdiction as it was still open to him to convict for the offence of illegal possession of firearm as he had done. In respect of that count the evidence was compelling, if not overwhelming. Mr McKenzie's evidence placed the item, even if briefly, in the hands of Mr Campbell and confirmed Mr Campbell's knowledge and his intention to possess. Mr McKenzie's evidence concerning the attacker's use of the gun, the discharge of the weapon and its impact on the bystander, coupled with the opinion of the ballistics expert, was ample material upon which the learned trial judge could find that the count of illegal possession of a firearm had been proved.

The sentences

[38] We now turn to the complaint about the sentences. Mr Equiano first submitted that the sentence of 12 years for the offence of illegal possession of firearm was excessive. He pointed to the fact that Mr Campbell had no previous convictions and that, at the time of his conviction, he was a young man of 20 years.

[39] Mr Equiano next submitted that the consecutive sentences were inappropriate where the offences were committed, as in the instant case, within the same transaction. He quite properly cited, in support of that principle, the cases of **R v**

Walford Ferguson SCCA No 158 of 1995 (delivered on 26 March 1999) and **Kirk Mitchell v R** [2011] JMCA Crim 1. In light of the decision concerning the count of assault with intent to rob, the submission need not be considered in detail. We need only say that we agree with Mr Equiano.

[40] With regard to the count for the illegal possession of the firearm, the learned trial judge carefully assessed the seriousness of the offence, especially in the circumstances of the instant case. In light of those circumstances, the sentence cannot be said to be manifestly excessive. Admittedly, it is on the higher side of the range of sentences usually imposed for this offence, but it is still within the range. It should not be disturbed.

[41] It is for those reasons that we made the orders set out in paragraph [3] above.