[2022] JMCA Crim 51

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MISS JUSTICE SIMMONS JA

SUPREME COURT CRIMINAL APPEAL NO 71/2014

SHANE COKE v R

Mr Leroy Equiano for the applicant

Ms Kathy-Ann Pyke and Ms Jameila Simpson for the Crown

5 October 2022

P WILLIAMS JA

[1] This is a renewed application by Mr Shane Coke, ('the applicant') for permission to appeal his conviction and sentence for the offences of illegal possession of firearm and robbery with aggravation. For these offences, he was sentenced on 27 June 2014 to 12 years' imprisonment at hard labour and 10 years' imprisonment at hard labour respectively. A single judge of this court on 1 October 2018 refused his application for leave to appeal and, as is his right, the applicant now renews it.

Factual background

[2] The factual background of the circumstances that gave rise to the applicant's arrest and charge for the offences is not in dispute. On 4 April 2013, sometime after 6:30 pm, there was an armed robbery at a restaurant in the corporate area. Miss Antoinette Clarke

('the complainant') was held up at gunpoint and robbed of her cellular phone and cash in the amount of $1,000.00. There were three participants in the robbery but only one man approached the complainant armed with a gun, relieved her of her cellular phone, tied her hands behind her back, then came in front of her and demanded money of her. She replied that she only had $1,000.00 in the top pocket of her shirt. He took it from her pocket and again asked for money to which she responded that she had no more. He then proceeded to "feel her up" before taking her to another room, ordering her to kneel and then left with the other robbers. The witness indicated that she was familiar with one of the robbers but did not know the man who had been armed with the gun and who had actually relieved her of her items.

[3] On 20 April 2013, the complainant attended a video identification parade and pointed out the applicant as the man who had robbed her. At the trial, the applicant gave an unsworn statement in which he denied robbing anyone and denied having a gun. The significant issue for resolution at trial, therefore, was the correctness of the identification of the applicant as the robber. Before us, Mr Equiano was granted permission to abandon the grounds originally filed and argue three supplemental grounds.

Supplemental grounds

Ground 1-The Learned Trial Judge erred in law by not upholding the no case submission made on behalf of the applicant at the trial.

[4] The first ground challenged the learned trial judge's failure to uphold a no case submission, which was made at the end of Crown's case. In his submission, Mr Equiano contended that the evidence of identification was wanting, in that the complainant, in court, had described the applicant as having "pretty eyes", yet admittedly had not included that description in the statement given to the police. Further, the complainant had stated that she had seen the applicant for three seconds, which he contended was insufficient time for identification of a stranger.

[5] In response, Ms Simpson submitted that considering the circumstances of the case in its entirety include those relating to the issue of identification, namely good lighting, the robber coming within touching distance of the complainant, no facial obstruction, evidence existed which was sufficient to allow the learned trial judge to conclude that the matter ought to be left to her jury mind.

[6] It is well settled that the critical factor for consideration of a no case submission in an identification case, where the real issue is whether the eye witness had a proper opportunity to make a reliable identification of the accused, is whether the material upon which the purported identification was based was sufficiently substantial to obviate the ghastly risk of mistaken identification. The trial judge is entitled to rule that the case should be left to the jury, even where the circumstances relating to the identification were not ideal (see **Herbert Brown and Mario McCullum v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 92 & 93/2006, judgment delivered 21 November 2008 and **Larry Jones v R** (1995) 47 WIR 1).

[7] We are satisfied that there was sufficient evidence presented by the Crown that justified the learned trial judge concluding that there was a case to answer. Ground 1 accordingly failed.

Ground 2- The Learned Trial Judge in her summation appendage facts that were contrary to the evidence and by so doing the Applicant was deprived of a fair trial.

[8] Mr Equiano submitted that the learned trial judge fell into error when she considered the narrative of how the incident had occurred and concluded that the incident lasted for more than a fleeting glance.

[9] Ms Simpson, in response, contended that the learned trial judge was correct in considering the narrative and referred to several decisions from this court and the Privy Council where this approach was found to be appropriate. Mr Equiano noted, in commenting on the authorities referred to by the Crown, that they all related to circumstances where there was some ambiguity as to time. He pointed out that there

was none such in this case, since the complainant was precise in the time she gave for her observation of her assailant.

[10] There was no complaint as to the learned trial judge's application of the guidelines given in **R v Turnbull** [1977] 1 QB 224, which govern cases where there is a challenge to the correctness of the identification evidence. The learned trial judge conducted an entirely fair and accurate assessment of the opportunities the witness would have had to observe her assailant. We cannot agree that she should be faulted for having done so in circumstances where what the complainant had given was an estimate of the time for which she observed the face of her assailant.

[11] The learned trial judge cannot, therefore, be held to have erred when after conducting this exercise she found that the witness had sufficient opportunity to see her assailant and to correctly identify him thereafter at an identification parade. The learned trial judge also cannot be said to have erred in inferring from the facts of the narrative as to the times the applicant stood in front of the complainant and within touching distance of her, that the complainant would have had an opportunity to see his face. This cannot be said to be an unreasonable inference in the circumstances.

[12] It must be noted also that the learned trial judge dealt appropriately with the issue of the complainant's description of the applicant as having "pretty eyes", given her admission that it was not until she saw him in court that she noticed his "pretty eyes". There was no evidence as to what this meant such that it could be regarded as a distinguishing feature that she had failed to mention in her statement to the police.

[13] We are satisfied that the learned trial judge did not "appendage" or append any facts that were contrary to the evidence and we are satisfied that her dealing with the matter was such that the applicant was not deprived of a fair trial. Ground 2 therefore accordingly failed.

Ground 3 -The delay between conviction, filing of the appeal and the time set for the hearing of the appeal is inordinately long and is in breach of the Applicant's Constitutional right to trial within a fair time.

[14] It is to be noted that, in his written submissions, Mr Equiano contended that the applicant, who was sentenced on the 19 June 2014, filed his notice of appeal on 7 July 2014. The endorsement on the transcript showed that it was received on the 15 December 2018 with the single judge decision dated the 1 October 2018. Further, in his written submissions Mr Equiano noted that he could not advance any reason why this appeal was just coming on for hearing but that the delay was not the fault of the applicant. He contended that the State is fully responsible and should bear responsibility for the delay. He contended that the applicant is a first time offender and would be entitled to a remittance of sentence that would have made him eligible for early release on 18 June 2022. Further, because of his appellate status, the applicant was deprived of the benefit of the development programmes offered. Counsel therefore urged that there had been a breach of the applicant's constitutional right to a fair trial within a reasonable time. Before us, Mr Equiano stepped back from the initial written submissions that the applicant be offered some compensation and requested a declaration that the breach had occurred.

[15] It is indeed correct that the time line after the transcript was received was as Mr Equiano outlined except that the applicant had been sentenced on 27 and not 19 June as stated in his submissions. The single judge having made the decision on 1 October 2018, the matter came on for hearing in July 2019. It was, on that occasion, noted that the applicant did not have any legal representation and the single judge had declined from granting him legal aid because the applicant had expressly stated in his application for leave that he did not wish legal aid assignment. The matter was stood down so enquiries could be made of the applicant as to his legal representation The court was advised that the applicant indicated that he had erred in thinking that the attorney who appeared for him at his trial would have continued to represent him at the appeal and he was indeed requesting legal aid assignment.

[16] Our records indicate that Mr Equiano was in court with another matter on that date and he accepted an assignment at that time.

[17] The delay thereafter from 2019 was due to the failure to have the applicant sign the legal aid application form and have the relevant certificate sent to Mr Equiano. This was corrected in August 2022 and the matter was before us on the first available date.

[18] In the circumstances, this delay amounting to some three years was caused by the court. However, we are not of the view that it was inordinate in the scheme of things or in the reality that exists.

[19] Mr Equiano, however, indicated that he was not only speaking to this period and urged the court to also take into consideration the time between the trial and when the transcript was prepared. When that is done, there was an additional four years' delay between July 2014 and December 2018. This meant that the entire delay post-conviction amounted to some seven years.

[20] That delay, this court views as inordinate and, as such, we will hold that there was indeed a breach of the applicant's constitutional right under section 16(1) of the Constitution of Jamaica for which he is entitled to a remedy. We also note, as the counsel for the Crown quite properly brought to our attention, the fact that at the time of sentence, the applicant did not benefit from a consideration of the time spent in custody pre-trial of one year and 16 days. We further acknowledge that, from records available to the court, the applicant became entitled for consideration for early release on 26 June 2022 (not 18 June as Mr Equiano had stated). In these circumstances, any reduction of the sentence at this time given the order that we are about to make may not be necessary.

[21] Mr Equiano did not advance any arguments in relation to the sentences and therefore we consider that the appeal against sentences was not pursued.

[22] Ultimately, therefore, this then is our decision in the matter. The orders are as follows:

1. The application for leave to appeal conviction and sentence is refused.

2. The sentence shall be reckoned to have commenced as of 27 June 2014.

3. It is declared that the post-conviction delay is inordinate and the right of the applicant under section 16(8) of the Constitution of Jamaica to have his conviction and sentence reviewed by a superior court within a reasonable time has been breached by this delay.

4. As a further remedy for the breach, provided that the applicant is not serving another term of imprisonment for another offence and that there is no other basis under the Corrections Act for him to remain incarcerated, he is to be released forthwith.