[2022] JMCA Crim 36

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MRS JUSTICE G FRASER JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 70/2016

RAHEEM ELLIS v R

Sanjay Smith for the appellant

Mrs Sharon Milwood Moore, Miss Alexia McDonald and Miss Tashell Powell for the Crown

15, 16, 17 June and 1 July 2022

G FRASER JA (AG)

[1] The appellant, Raheem Ellis, was charged on an indictment which contained two counts. Count one was for illegal possession of firearm and count two for robbery with aggravation. He was tried before Graham-Allen J ('the learned trial judge') sitting alone in the High Court Division of the Gun Court for the parish of Kingston. On 8 June 2016, he was convicted on both counts. The learned trial judge sentenced the appellant, on 4 July 2016, to 10 years' imprisonment for count one, and 12 years' imprisonment for count two, to run concurrently.

[2] On 8 February 2021, a single judge of this court refused the appellant's application for leave to appeal his convictions and sentences. This was the appellant's renewed application for leave to appeal against his convictions and sentences.

[3] On 17 June 2022, we considered the submissions of counsel and the relevant authorities, and made the following orders:

"1. The application for leave to appeal against conviction is refused.

2. The application for leave to appeal against sentence is granted.

3. The hearing of the application for leave to appeal against sentence is treated as the hearing of the appeal against sentence.

4. The appeal against sentence is allowed in part.

5. The sentence imposed in the court below is affirmed but the appellant is to be given credit of 16 months for time spent on remand prior to sentencing hence the sentences to be served by the appellant are:

   (a) in respect of count one, eight years and eight months; and

   (b) in respect of count two, ten years and eight months.

6. The sentences shall be reckoned as having commenced on 8 June 2016."

[4] In keeping with our promise to provide them, these are our reasons.

Background

[5] On 1 November 2013, at about 5:10 pm, the complainant, Mr Kamal Spence, was stationary on his motorbike at the intersection of Tulip Lane and Chestnut Lane, in the parish of Kingston. The complainant, who operated a business delivering liquid petroleum cooking gas, was waiting to deliver a cylinder of gas. He observed a man he knew by the name "Amoy" exiting a yard on Tulip Lane. Amoy approached him, and when he was at an arm's length distance from him, Amoy pulled a gun from his waistband and pointed it in the complainant's face. He then "used a 'P' word" and said "don't move". Amoy got closer to the complainant and pulled his gold chain, valued at $80,000.00, from his neck. He instructed the complainant to "ride now", which he did.

[6] It was the complainant's evidence that he knew Amoy and his mother for approximately 15 years and that they shared a cousin. He would see Amoy on a daily basis, and he last saw him the day before the incident. At the time of the robbery, he had an unobstructed view of Amoy's face as well as his hand, which held a "silver-looking gun", for 10 seconds. He identified Amoy, at the trial, as being the appellant, Mr Raheem Ellis.

[7] The complainant did not report the incident until the following day. He testified that the delay in reporting was due to his concern for the possible consequences for himself and his business. He, however, decided to "go forward with it" and so he visited the Denham Town Police Station the following day. The incident was reported to Detective Jeffrey Howe.

[8] Detective Jeffrey Howe ('the investigating officer') was called as a witness for the Crown. He testified that at the time of the incident he was stationed at Denham Town Police Station. The complainant, who he said he did not know prior to the incident, attended the police station and made a report to him. Based on the complainant's statement, the investigating officer along with members of the Divisional Intelligence Unit ('DIU') picked up a number of persons, including Amoy, who was "known to the police". The investigating officer identified the appellant at the trial as being Amoy.

[9] The investigating officer informed the appellant that he was a suspect in a case of robbery with aggravation and illegal possession of firearm he was investigating. He brought the appellant to the lock-up and advised him that he would be placed on an identification parade. Subsequent to the identification parade, the results of which were not before the court, the appellant was charged.

[10] During cross-examination, the investigating officer stated that he had known the complainant for two and a half years. Defence counsel enquired whether he made an entry in the Station Diary when the report was made identifying the appellant as the suspect. He could not, however, recall if he did so. The investigating officer explained

further that they use a "Crime Diary" and "Morning Crime", the latter of which is written and sent electronically to the DIU. It was his evidence that he noted the name "Amoy" as the suspect in the Morning Crime report but not in his personal notebook.

[11] In his defence, the appellant gave an unsworn statement from the dock. He said that, on 8 November 2022, he stepped out of his yard on Regent Street when a police officer he knew by the name of "Indian" called to him. He was taken to the Denham Town Police Station, where the police officer checked his file and released him. On his way out of the office, another police officer stopped him and asked his name. He responded, "Raheem Ellis" and then the police officer said, "…no, what dem call yuh?" to which he replied, "Amoy". That police officer then asked another police officer to "bring him down to the lock-up…". The appellant did not know the reason for his detention. Approximately four weeks later, he was escorted to the Central Police Station to do an identification parade.

[12] The appellant denied that he knew the witness for 15 years. He asserted that he met the complainant on 1 November 2013, when he went to a yard at the behest of a man called "Omar". There he saw "a syndicate of man in the yard". Omar then made a telephone call and said, "… come look if you si di man wey rob yuh". The complainant arrived on his motorbike, parked and went into the yard. The complainant, he said, was looking around the yard at the faces of the men when one man stood up and pointed at him and said, "…see him deh, a him rob yuh". The complainant looked at him, ran out of the yard, and rode off on his motorbike. It was as a result of that scenario that the appellant said he was incorrectly identified as the perpetrator of the offences.

The appeal

[13] Counsel for the appellant, Mr Sanjay Smith, sought and was granted leave to abandon the original grounds of appeal and argued instead three supplemental grounds of appeal. The supplemental grounds of appeal, as amended are:

> "(i) That the Witness misidentified the [appellant] ('Identification of the appellant').
>
> (ii) The Learned Trial Judge erred by accepting the Investigating Officer as credible and calling on the [appellant] to answer ('Credibility of the investigating officer').
>
> (iii) The Learned Trial Judge at sentencing, failed to give credit to [sic] time spent on remand ('Credit for time spent on remand')."

Discussion

Identification of the appellant

[14] The issue of the correct identification of the appellant as being the person who committed the offences is undoubtedly critical to this matter. It was Mr Smith's contention, on behalf of the appellant, that the complainant was mistaken when he identified the appellant as the perpetrator of the offences. In support of that view, he contended that there was evidence of uncertainty in relation to that identification. For instance, counsel highlighted the absence of the name "Amoy" from the Crime Diary, subsequent to receiving the complainant's report. This, he said, is peculiar since the appellant was allegedly known to both the complainant and the investigating officer. To this end, he relied on the case of **Michael Freemantle v R** (1994) 45 WIR 312 to emphasize the long-established principle that an honest witness can be a mistaken witness.

[15] In an effort to discredit the complainant's evidence that he knew the appellant and his mother for 15 years, counsel questioned why it would take one week to apprehend the appellant, who was not in hiding, if he was known to the complainant and the investigating officer. Additionally, counsel argued that if the complainant and the appellant shared a mutual cousin, the complainant should have known the appellant by his full name, not an alias. Mr Smith also took issue with the fact that an identification parade was held. He submitted that in circumstances where the complainant and appellant were allegedly known to each other, it would not be useful. For those reasons, counsel criticized the learned trial judge's finding that the complainant was a credible

witness and contended instead that his evidence should not have been accepted as truthful.

[16] Crown Counsel, Miss Alexia McDonald, submitted that there was sufficient material upon which the learned trial judge, acting as the tribunal of fact, could properly have found that the appellant was correctly identified by the complainant. The learned trial judge, she contended, applied the principles enunciated in **Turnbull v R** [1976] 3 All ER 549 which was demonstrated in her summation where she warned herself of the special need for caution, as well as the need to consider all the circumstances under which the identification was made. Thereafter, she found that the complainant was not mistaken and that he was a truthful witness. Counsel further submitted that the accuracy of the complainant's identification of the appellant was not affected by the absence of the appellant's name from the Crime Diary. The cases of **R v Jones and White** (1976) 15 JLR 20 and **Shawn Allen v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 7/2001, judgment delivered 22 March 2002, were cited in support of that submission.

[17] From the outset, it became clear to us that counsel, Mr Smith, was conflating two separate issues, those being, the correctness of the identification and the credibility of the investigating officer. The complainant, being the sole eye witness, was the only witness that could speak to the identification of the appellant. The investigating officer, who was not present at the time of the incident, could not therefore offer any assistance to the court relating to that issue.

[18] The learned trial judge had correctly identified in her summation the issues in dispute, she said:

> "The main issues for adjudication by the Court are: One, the identity of the perpetrator of that robbery. Two, whether the eye witnesses [sic] for the Crown is to be believed. Three, whether he is mistaken, or indeed not being truthful in his testimony."

[19] Upon considering the complainant's evidence, we agree with Crown Counsel that there was ample evidence from which the learned trial judge could have accepted that the complainant's identification of the appellant was correct. For instance, the complainant testified that he:

a. knew the appellant for approximately 15 years;

b. knew the appellant's alias name "Amoy";

c. shared a mutual cousin with the appellant;

d. knew the appellant's mother for about the same period of 15 years; and

e. would see the appellant on a daily basis (and had last seen him the day before the incident) because of the operations of his business.

[20] The circumstances of the purported identification were that:

a. the incident occurred during the daytime;

b. the perpetrator was in close proximity to the complainant, which was demonstrated at an arm's length distance and at one point even closer;

c. the complainant had an unobstructed view of the perpetrator's face for 10 seconds; and

d. the perpetrator was not wearing anything to cover his head or face.

[21] Significantly, in cross-examination, there was no challenge to the complainant's evidence that he knew the appellant and his mother for 15 years or that they shared a mutual relative. Also, the appellant admitted that his alias was "Amoy". In fact, there was no evidence before the learned trial judge challenging the complainant's credibility as to

his familiarity with the appellant. Accordingly, it was open to her to treat the issue of the identification of the perpetrator as a case of recognition, as advanced by the prosecution.

[22] The learned trial judge outlined her treatment of the identification evidence as follows:

> "I remind myself that I must be cautious when considering the evidence, because experience has shown that any witness who has identified a person can be mistaken, even when the witness is honest and sure that he is right. Such a witness may seem convincing, but may be wrong. This is true even though a witness knows the person well and says that he has recognized that person. The witness could still be mistaken. I remind myself that I can only rely on the identification evidence if I am sure that it is accurate. I need to consider carefully all the circumstances in which the accused was identified, so I must ask myself, for how long could Mr. Kamal Spence see the person he says was the accused and in particular, how long could he see the person's face; how clear was Mr. Spence's view of the person, considering the distance between them, the light, any object or people getting in the way, or any distractions; had Mr. Spence ever seen the accused before the incident. If so, how often and what circumstances. I must look to see if there are any weaknesses in the identification evidence, or if there is any evidence which, if I accept it, might undermine the identification evidence."

[23] She not only gave herself the **Turnbull** directions, but she directed her jury mind to consider the weaknesses in the identification evidence. She also addressed the identification parade and noted that there was no evidence as to its outcome. The learned trial judge found that, in any event, in the circumstances of the case, it would not have served a useful purpose.

[24] Whereas the circumstances of the identification were ideal, the appellant's defence was that he was not the perpetrator, and so the complainant was mistaken. As such, the learned trial judge's decision ultimately hinged on whether or not she found the

complainant to be a credible witness and accepted his evidence as being the truth. She had this to say:

> "Having considered all the circumstances in this case, having closely observed the demeanour of the witnesses, I accept the evidence of the prosecution witnesses. I reject the unsworn statement of the accused. I find as a fact that the accused was armed with a firearm and robbed Mr. Kamal Spence, that Mr. Kamal Spence knew who is [sic] perpetrator was. I find as a fact that the witnesses for the Crown are believable and that Mr. Kamal Spence was not mistaken and that he was a truthful witness."

[25] The learned trial judge accepted the complainant's evidence as to identification and was satisfied that he correctly identified the appellant as the perpetrator. For the foregoing reasons, her findings in this regard cannot be impugned. At the hearing of the appeal, Mr Smith candidly conceded this ground. Accordingly, ground one failed.

Credibility of the investigating officer

[26] The appellant sought to challenge the learned trial judge's finding that the investigating officer was a credible witness for the prosecution. In arguing this, counsel Mr Smith highlighted inconsistencies in the investigating officer's evidence, such as his evidence, in one instance, that he did not know the complainant before. Under cross-examination, he responded in the affirmative when asked if he had previously said that he knew the complainant, and his further evidence in cross-examination that he knew the complainant for two and a half years since being stationed at the Denham Town Police Station.

[27] Counsel also took issue with the credibility of the investigating officer's evidence since he did not name the appellant as the perpetrator in the Crime/Station Diary or his notebook. If the appellant was known to the complainant and the investigating officer, counsel submitted, it was peculiar that the perpetrator would be referred to as "a man" in the Crime Diary. Consequently, he submitted that the learned trial judge fell into error by failing to properly examine the inconsistencies and discrepancies in the evidence of

the investigating officer. As such, it was contended that the investigating officer's credibility was destroyed. This, he said, weakened the prosecution's case and rendered the conviction unsafe.

[28] Miss McDonald began her submissions on behalf of the Crown by contending that the learned trial judge, in exercising her judicial mind, correctly called upon the accused to answer the charges. In addressing that point, Crown Counsel referred to the oft-cited cases of **R v Galbraith** [1981] 1 WLR 1039 and **Herbert Brown and Mario McCallum v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 92 & 93/2006, judgment delivered 21 November 2008. It was argued that the inconsistencies which arose on the prosecution's case were matters for the tribunal of fact and sufficient material was presented to enable the learned trial judge to determine the appellant's innocence or guilt.

[29] The absence of the appellant's name from the Crime Diary could not, alone, reasonably impugn the credibility of the investigating officer, counsel submitted. His evidence was based on the complainant's report, further to which, he went in search of "Amoy". The investigating officer stated that he was not sure if the appellant's name was noted in the Crime Diary, and so she argued that it could not be said that the entry in the Crime Diary contradicted his evidence. Nor could it be said that the identification of the appellant was discredited. This was especially so in circumstances where the complainant was the only witness as to fact.

[30] We agreed with Mr Smith that the investigating officer was at times inconsistent and unsure about certain matters. However, we wish to point out that the issue taken with the Crime Diary was not, in our view, one of those occasions. The investigating officer maintained throughout his evidence that he did not recall writing the name "Amoy" in either the Station Diary or Crime Diary. His evidence was that he noted that name in the Morning Crime report, which was sent electronically to DIU. Accordingly, the absence of the name "Amoy" in the Station Diary or Crime Diary cannot be regarded as an inconsistency. Furthermore, there is nothing on the record to indicate that the relevant

Morning Crime Report was presented to the court to support or refute the investigating officer's evidence in that regard.

[31] That being said, the crucial issues for our consideration were how the learned trial judge treated with the investigating officer's inconsistent evidence and how those inconsistencies impact the safety of the conviction.

[32] The learned trial judge reviewed the investigating officer's evidence and assessed it against the backdrop that the prosecution bore the burden of proof and that the standard was that of being beyond a reasonable doubt. She appreciated that there were inconsistencies in his evidence and made specific mention of his admission that he made a mistake regarding the date on which he received the complainant's statement and corrected himself by stating that he indeed took the statement on 2 November 2013. Additionally, she reiterated the investigating officer's conflicting evidence as to whether he previously knew the complainant. The learned trial judge did not, however, indicate how she treated with the inconsistencies in his evidence, such as whether they were slight or serious and what impact, if any, they had on the investigating officer's credibility and the case as a whole. In this respect, her summation was less than ideal.

[33] Nevertheless, the learned trial judge stated that, having observed his demeanour and how he responded to questions by the prosecutor and defence counsel, she was of the view that the investigating officer "… gave frank answers to questions asked of him…". She ultimately accepted the evidence of the prosecution witnesses as indicated in the extract from the summation reproduced at para. [24].

[34] Bearing in mind the inconsistencies in the investigating officer's evidence, we are of the view that it was open to the learned trial judge to accept him and his evidence, in part, or as a whole, as being credible. Whereas she failed to adequately demonstrate how she treated those inconsistencies, we find that, in the circumstances, they did not discredit the identification evidence. The prosecution's case was founded on the evidence of the complainant, who was the sole eyewitness. The complainant's evidence of his

familiarity with the appellant was not at all challenged through cross-examination and was only belatedly disputed from the dock. Further, there was no evidence of a collusion between the prosecution's two witnesses or malice to register reasonable doubt. As such, it could hardly be said that the investigating officer's evidence advanced the prosecution's case as it relates to the central issue of the correct identification of the perpetrator, only the complainant's evidence could have done so. Accordingly, the matters with which counsel took issue did not, in our view, weaken the prosecution's case or render the conviction unsafe. Mr Smith also conceded this ground at the hearing. Therefore, the second ground also failed.

Credit for time spent on remand

[35] The appellant's opposition to the sentences, was narrowed to the issue of the learned trial judge's failure to give him credit for time spent on remand. Mr Smith relied on the case of **Meisha Clement v R** [2016] JMCA Crim 26 in support of his contention that the appellant, having been in custody between 25 January 2016 and 4 July 2016, should have been given the full credit of the six months he spent on remand. The resulting sentence, if credit was to be given, he submitted, should be nine years' and six months' imprisonment on count one and 11 years' and six months' imprisonment on count two. Crown Counsel agreed with Mr Smith's submissions that the learned trial judge should have credited the appellant for the time he spent on remand prior to sentencing. Crown Counsel, however, informed us that that time was 15 months and 10 days and not six months as had previously been indicated.

[36] The learned trial judge would not have had the benefit of the sentencing principles set out in **Meisha Clement v R** since this matter preceded it. However, the principle that full credit should be given for time spent in custody pending trial and/or sentencing was addressed in the Privy Council cases of **Callachand and Another v State** [2008] UKPC 49 and **Ajay Dookee v The State of Mauritius and Another** [2012] UKPC 21, as well as the Caribbean Court of Justice case of **Romeo Da Costa Hall v The Queen** [2011] CCJ 6 (AJ). In **Callachand and Another v State**, Sir Paul Kennedy stated:

> "…In principle it seems to be clear that where a person is suspected of having committed an offence, is taken into custody and is subsequently convicted, the sentence imposed should be the sentence which is appropriate for the offence. It seems to be clear too that any time spent in custody prior to sentencing should be taken fully into account, not simply by means of a form of words but by means of an arithmetical deduction when assessing the length of the sentence that is to be served from the date of sentencing …"

[37] Notwithstanding the above, that case went on to establish that there is a discretion to deviate from that rule in certain circumstances. A judge must, however, give reasons for departing from that rule. However, there was no indication in the learned trial judge's summation that she credited the appellant with the pre-sentencing time in determining the sentence. In the absence of reasons for her deviation from the general rule, we find that the learned trial judge was obligated to give the appellant due credit for the time he spent in custody on pre-sentence remand. Accordingly, the appeal against the sentences was allowed in part, and we credited the appellant with 16 months for the time he spent on remand.

Conclusion

[38] In light of the foregoing, we made the orders at para. [3] above.