[2022] JMCA Crim 57

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MR JUSTICE FRASER JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CRIMINAL APPEAL NOS 73/2016

OSHANE FORBES v R

Miss Tameka Menzie for the applicant

Miss Donnette Henriques and Miss Debra Bryan for the Crown

7 and 9 November 2022

STRAW JA

Background

[1] Oshane Forbes, the applicant, having been convicted in the High Court Division of the Gun Court on 21 April 2016, of two counts of illegal possession of firearm and one count each of illegal possession of ammunition and assault, sought leave from this honourable court, to appeal his convictions and sentences. Leave having been refused by a single judge of this court, Mr Forbes has renewed his application for leave before this court, as he is entitled to do.

[2] Arising from these convictions, on 24 June 2016, Mr Forbes was sentenced to serve seven years' imprisonment on each count of illegal possession of firearm, five years for illegal possession of ammunition, and 12 months for assault. The sentences were ordered to run concurrently.

The Crown's case

[3] At trial, it was the evidence of the complainant that, on 15 June 2014, he visited a property at John Crow Lane, Old Harbour, which property comprised the foundation of a dwelling house, that was gifted to him by his sister, to complete. Whilst there, he

saw two men whom he did not know before, including the applicant. A controversy ensued. The other man chopped at the complainant with a machete, wounding him, whereas the applicant brandished a firearm and, along with the other man, chased the complainant.

[4] With respect to identification, the complainant testified that he was able to see the applicant as it was daytime. After the controversy ensued and he was chopped by the other man, the complainant said that the applicant "run down near to him and pulled a firearm". He first saw the men, it was estimated, at 32 feet away. He saw the face of the applicant at that time and, at the time the applicant pulled the firearm, the applicant was to the right of him and he was still seeing his face. According to the complainant, at the time the applicant pulled the gun at him, he saw his face for nine to 10 seconds. So the complainant first saw the applicant's face when he went on the scene and also when he rushed up beside him with the gun. Nothing blocked the complainant's view of the two men.

[5] The complainant ran to the Old Harbour Police Station where he made a report. Subsequently, on 18 June 2014, the complainant went back to the police station to give his written statement. On that occasion, he saw the applicant coming into the police station and pointed him out to the police. The applicant had attended the station as part of his bail conditions, in an unrelated matter. The police attempted to apprehend the applicant who ran from the station but was eventually caught and detained by the police. When he was brought back to the police station, he was told of the allegations against him and cautioned. On caution he said, "Bossy, a drop him drop and cut him hand. No man nuh chop him". The applicant was then formally arrested and charged and, when cautioned a second time, he said, "A bun him a try bun down mi house. A two time now. Him come fi bun down mi house an mi rush him. A two time now him light mi house".

[6] On that same day, a search warrant was obtained by the police to search the applicant's house. He led the police, which included Constable Garfield Edwards and the investigating officer, Constable Andre Thompson, to a residence at John Crow Lane for which he had a key and used same to obtain entry. The premises were

searched and a firearm was found, in which there was one round of ammunition. Upon being cautioned by the police, the applicant admitted to owning the firearm and further admitted that he did not have a firearm license for same.

The defence

[7] At the trial, the applicant gave an unsworn statement in which he denied having any knowledge of the incident and denied living at the address at which the gun was found.

Grounds of appeal

[8] On behalf of the applicant, Miss Menzie sought and received the court's permission to abandon the original grounds of appeal that were filed and to argue the following supplemental grounds:

> "GROUND 1
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> The Learned Trial Judge erred:
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> a) when she failed to hold that the circumstances of the visual identification of the Applicant was [sic] poor and ought not to be relied upon;
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> b) in her summation when she failed to identify the weaknesses in the identification evidence and she applied a higher standard not justified by the evidence or the law to enable her to accept that; and
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> c) in failing to warn herself on the dangers of acting upon uncorroborated evidence of visual identification.
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> GROUND 2
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> The Learned Trial Judge failed to address the weaknesses of the complainant's and the witnesses [sic] credibility.
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> GROUND 3
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> The Learned Trial Judge erred in accepting the geographical jurisdiction of the Court.

GROUND 4

The failure of counsel for the Applicant to discharge his duty to raise the issue of good character of the Applicant which led to a miscarriage of justice.

GROUND 5

The sentence imposed is manifestly excessive."

Submissions

[9] With respect to ground one, Miss Menzie submitted that the circumstances and the quality of the initial identification evidence were weak and that visual identification by the complainant over a period of nine to 10 seconds was inadequate. This was especially so in circumstances where the applicant was previously unknown to the complainant. Miss Menzie asserted that the uncorroborated evidence of the complainant, by its very nature was unreliable and therefore required the learned trial judge to adequately warn herself of the dangers, which she failed to do.

[10] Reliance was placed on the case of **Goldson and McGlashan v R** (2000) 56 WIR 444, in order to assert that the learned trial judge failed to warn herself of the weakness in the Crown's case arising from the failure of the police to hold an identification parade. Ultimately, Miss Menzie submitted that the learned trial judge's directions and warnings to herself were inadequate and coupled with the weak identification evidence, the verdict was manifestly unreliable. Reliance was also placed on the case of **R v Alex Simpson and McKenzie Powell** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 151/1988 & 71/1989, judgment delivered 5 February 1992.

[11] On the other hand, the Crown contended that there was no merit in this ground as the learned judge addressed all the relevant issues affecting the identification of the applicant, including the failure to hold an identification parade. Further that there is no requirement for the court to have given a specific warning concerning the uncorroborated identification evidence and that the warning, as contained in **Turnbull v R** [1977] QB 224, is sufficient.

[12] Regarding ground two, Miss Menzie complained that issues were raised in relation to the credibility of both the complainant and the Crown witnesses, which were not brought out in the learned trial judge's summation. She submitted that the learned trial judge did not adequately address these issues with the result that the evidence was manifestly unreliable.

[13] By contrast, Miss Henriques, on behalf of the Crown, submitted that an assessment of the manner in which the learned trial judge reviewed the evidence and dealt with the inconsistencies and discrepancies, demonstrates that there was no error in treating with the analysis which could cause this court to interfere with the conviction. Miss Henriques cited the case of **Sadiki Heslop v R** [2021] JMCA Crim 48.

[14] On ground three, Miss Menzie contended that the learned trial judge erred in accepting the geographical jurisdiction of the court. This submission was made on the basis that the complainant was unable to state the parish in which the incident occurred and therefore did not place the constituent elements of the offences within the jurisdiction of Jamaica. She cited section 5(2) of the Gun Court Act and stated that the complainant in his evidence did not place the matter within the realm of jurisdiction over which the learned trial judge presided. Neither did the evidence of Constables Edwards or Thompson assist to place the circumstances within an identifiable parish in order to determine the jurisdiction.

[15] Conversely, although Miss Henriques also relied on section 5 of the Gun Court Act, she stated that the court had the necessary jurisdiction to try the matter.

[16] Miss Menzie did not strongly pursue ground four, which ground asserted that counsel for the applicant failed to discharge his duty to raise the issue of good character. This is in light of the absence of any affidavit evidence from the applicant to support this ground. The Crown also pointed to the lack of any affidavit evidence setting out the instructions given by the applicant to his attorney, which may not have been acted on.

[17] Miss Menzie did state, however, that the learned trial judge failed to give a direction as to the relevance of the applicant's good character to his credibility. In this regard Miss Henriques highlighted that the applicant, by raising his good character in his unsworn statement was entitled only to the propensity limb of the good character direction, which the learned trial judge gave. Further and in any event, based on the strength of the evidence against the applicant, a direction on the credibility limb would have been to no avail.

[18] On ground five, in contending that the sentences imposed were manifestly excessive, Miss Menzie stated that the learned trial judge failed to take into account the applicant's good antecedent report, in the passing of sentence. She cited the case of **Horace Kirby v R** [2012] JMCA Crim 10. Miss Menzie took particular issue with the sentence passed for the offence of illegal possession of firearm.

[19] Miss Henriques refuted this contention and stated that the sentences passed by the learned trial judge were not excessive such as to warrant any interference by this court and that they were in keeping with the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines'). This is notwithstanding the fact that the mathematical calculations and detailed outlining was not done.

Analysis

Identification evidence (Ground 1)

[20] The complainant did not know the applicant before. But, based on the evidence, he was able to see the applicant's face for nine to 10 seconds at the time the firearm was brandished. He would have also seen the applicant during the time that the quarrel ensued. He saw the applicant three days later at the police station and pointed him out to Constable Thompson.

[21] The learned trial judge correctly addressed the issue of identification and confrontation on pages 212 to 214 and page 221 of the transcript. She gave the requisite **Turnbull** warning and considered all the elements relevant to ensure the sufficiency of the identification evidence. Further, having considered the

circumstances under which the applicant was identified at the police station, the learned trial judge stated that, although no identification parade was held, she was satisfied that the identification was made without any contrived assistance from the police (see **R v Errol Haughton and Henry Ricketts** (1982) 19 JLR 116 and **R v Tesha Miller** [2013] JMCA Crim 34). She concluded that she was satisfied that the complainant had sufficient opportunity to observe the applicant on the day of the incident. We observe no error in the judge's assessment of this evidence. We find that there is no merit in this ground.

Weaknesses, Inconsistencies and Discrepancies (Ground 2)

[22] The learned judge considered the issue of the credibility of all the Crown witnesses (on page 214 of the transcript). Also, she identified areas of inconsistencies and discrepancies (on pages 215 to 217 of the transcript). This consideration included possible weaknesses in the complainant's evidence as to the opportunity to view the applicant's face at the time he (the complainant) would have been running from the scene, the time he gave his statement to the police, and the description of the firearm he saw in the hand of the applicant (this description differed somewhat from the firearm recovered at the dwelling place of the applicant). She concluded that these inconsistencies and discrepancies did not affect the complainant's evidence. She also considered the gaps in the evidence of Constable Edwards in relation to the physical description of the applicant's dwelling house and concluded that these did not go to the root of the Crown's case. Also, that Constable Thompson's credibility was not affected at all. Based on the evidence before her, it was open to her to come to those conclusions.

[23] This ground of appeal also fails.

Geographical jurisdiction of the Gun Court (Ground 3)

[24] We find there is no merit in this ground. Both incidents took place at John Crow Lane in Old Harbour which is within a parish boundary in Jamaica. Section 5(2) of the Gun Court Act grants jurisdiction to the High Court Division of the Supreme Court to try relevant offences whether committed in Kingston or Saint Andrew or any other parish, save for offences committed in the geographical jurisdiction of the Regional

Gun Court (Western), which extends to the parishes of Saint James, Hanover, Trelawny and Westmoreland; as well as wherever other Regional Gun courts may be established. The learned trial judge would have been able to take judicial notice that Old Harbour was not situated in the Western Gun Court Division, and, was indeed within the parish of Saint Catherine.

[25] In any event, the learned trial judge would have had the evidence of Constable Thompson (see page 104, line 3 and page 109 of the transcript) that the Old Harbour Police Station is situated in the parish of Saint Catherine and that John Crow Lane was also situated in Old Harbour.

Incompetence of counsel (Ground 4)

[26] The issue of the incompetence of counsel is also without merit. The applicant has not submitted any affidavit evidence complaining that his counsel failed to advise that it was open to him to call witnesses to his good character. The complaint is only made in the form of a ground of appeal but without any supporting affidavit evidence. In any event, the applicant benefitted from a good character direction on the propensity limb, which was all he was entitled to, since he only gave an unsworn statement (see page 220 of the transcript and the cases of **Michael Reid v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 113/2007, judgment delivered 3 April 2009 and **Horace Kirby v R** [2012] JMCA Crim 10).

Sentencing (Ground 5)

[27] The learned judge considered the normal range of sentences for illegal possession of a firearm, which is seven to 15 years. She then identified the minimum sentence of 10 years, which is described in the Sentencing Guidelines as the usual starting point. She had identified the aggravating and mitigating factors prior to her reference to the normal range. The primary aggravating factor was the prevalence of firearm offences in the society (which offences are considered to be serious). She then took into account as mitigating factors, (1) the age of the applicant (22 years old at the time of the offence, and 24 years old at sentencing), (2) the fact that he had no previous convictions, and (3) the fact that he was employed, that he had good antecedents and a favourable social enquiry report.

[28] Having then identified the usual sentence, the learned trial judge went below that point to impose a sentence of seven years in relation to both counts 1 and 3 (the offences of illegal possession of a firearm). This is actually the lower end of the range and cannot be deemed to be manifestly excessive.

[29] In relation to count 2, the usual sentence for the offence of assault is twelve months, which is the maximum (see section 43 of the Offence Against the Persons Act). The learned judge was therefore within the range of penalties which could have been imposed.

[30] In relation to count four (illegal possession of ammunition), the normal range as well as the usual starting point is the same as for illegal possession of firearm. The learned judge imposed five years. While this court has, on some occasions, adjusted the penalty imposed for this offence depending on the quantity of ammunition recovered, the penalty imposed by the learned judge is still in line with the usual range.

[31] It is now well established that in order for this court to interfere with a sentence imposed by a trial judge, it must be demonstrated that there was an error in the application of the principles relevant to sentencing and further that arising from such error, the sentence imposed was either manifestly excessive or manifestly lenient (see **R v Ball** (1951) 35 Cr App R 164 and **Alpha Green v R** (1969) 11 JLR 283). This position was captured fully in the now oft-cited case of **Meisha Clement v R** [2016] JMCA Crim 26.

[32] Based on the above analysis, we are not of the view that the learned trial judge erred in principle and as such arrived at a sentence that was manifestly excessive. We see no basis to interfere with the sentences imposed.

Conclusion

[33] It is for the above reasons, we concluded that there is no merit in the grounds of appeal. The application for leave to appeal conviction and sentence will therefore be refused. The following are the orders of the court:

1. Application for leave to appeal conviction and sentence is refused.

2. The sentences are reckoned to have commenced as at 24 June 2016, the date on which they were first imposed.