JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 105/2009

BEFORE: THE HON. MR JUSTICE PANTON, P.
THE HON. MR JUSTICE MORRISON, J.A.
THE HON. MR JUSTICE BROOKS, J.A. (Ag.)

DOUGLAS GREY v R

Richard Small for the appellant

Miss Kathy-Ann Pyke and Greg Walcolm for the Crown

12 and 16 April 2010

BROOKS, J.A. (Ag.)

[1] The appellant Mr Douglas Grey was convicted in the High Court Division of the Gun Court on 30 September 2009 on all three counts of an indictment which charged him with the following offences:

Count 1 – Illegal Possession of a Firearm
Count 2 – Shooting with Intent
Count 3 – Wounding with Intent

He was sentenced to five years imprisonment on each count. The sentences were ordered to run concurrently. He applied for leave to appeal against the conviction and sentence. A single judge of appeal

refused leave to appeal against the conviction but granted leave as against sentence. Mr Grey has therefore renewed his application before the court in respect of conviction and pursues his appeal against sentence.

[2] The evidence accepted by the learned trial judge, in brief, was that during an altercation in the early hours of the morning of Saturday February 10, 2007, between the appellant Mr Grey and another motorist, Mr Locksley Braham, the appellant used his licensed firearm to shoot at Mr Braham. One of the missiles from the weapon pierced the driver's door of Mr Braham's vehicle, while another struck Mr Damion Gilpin, an innocent bystander who was some distance away from the altercation.

[3] The factor which is the genesis of the complaint against the conviction is that there were significant differences between the statement given by Mr Gilpin to the police and the evidence which he gave at the trial. That fact, by itself, is not unusual but Mr Richard Small, on behalf of the appellant, submitted that the nature of the variations was such that it must have been clear to the prosecution beforehand that Mr Gilpin intended to vary from his written statement and in those circumstances it was incumbent on the prosecution to have, prior to the commencement of the trial:

a. secured a further statement from Mr Gilpin, and,

b. provided that statement to the defence.

[4] Failure to do so, submitted Mr Small, was a breach of the spirit of section 12 of the Gun Court Act and of the common law in Jamaica regarding disclosure of the Crown's case to the defence, prior to the trial. Learned counsel submitted that even if the prosecution was not aware of Mr Gilpin's intent, its conduct of the examination in chief, the shift having become apparent, was such that the defence was placed at an unfair disadvantage and that the court, not having been in possession of the written statement, was not aware of the quantum shift that Mr Gilpin had made.

[5] This court has, therefore, to decide whether the prosecution's approach was such that it resulted in an unfair trial for the appellant.

[6] Mr Small is undoubtedly correct that if the prosecution is aware, before a witness testifies, that that witness will give evidence which is significantly different from that which his statement to the police or his deposition discloses, then the prosecution should secure a statement from the witness concerning the new material and supply that statement to the defence. This was made clear by the Privy Council in ***Linton Berry v R*** (1992) 29 JLR 206. Their Lordships said at page 212 I:

> "Since the defence must be given a copy of the statement of (sic) proposed witness who has not made a deposition, it must follow that, if a Crown

> witness' evidence is intended to depart significantly from his deposition and to be based on his statement to the police, it is the duty of the Crown to give the defence a copy of that statement in advance of the hearing. An analogy is the need to serve a notice of intention to adduce additional evidence of a witness who has already given evidence in the committal proceedings."

[7] So what was it in Mr Gilpin's testimony that was so different from his written statement? Learned counsel has quite helpfully itemized the differences; the more significant ones are:

a. The relative positions of the two vehicles differed between the accounts;

b. On the account in the statement, the appellant, known before to Mr Gilpin as "Douggie", fired his weapon while inside his vehicle, while in his testimony he said that the appellant alighted from his car and fired the shots while standing;

c. The number of explosions differed between the two accounts. In the statement, Mr Gilpin mentions only one explosion.

[8] Mr. Small submitted that whereas the statement was more in accord with the defence's version (especially the position from which the appellant fired), Mr Gilpin's testimony more accorded with that of Mr Braham. This was therefore, Mr. Small submitted, a clear (and improper)

attempt by the prosecution to harmonize the evidence of the two witnesses as to the facts. There were, however, still some differences between the two testimonies.

[9] The view may properly be taken that the majority of the variations between Mr Gilpin's witness statement and his testimony do not materially affect the matter. Firstly, it is not disputed that Mr Gilpin was present at the scene and was shot. Secondly, it is not in dispute that the appellant fired two shots, one of which hit Mr. Braham's vehicle and the other hit Mr Gilpin. Thirdly, there is no dispute that Mr. Braham's vehicle was blocking the appellant's at the relevant time.

[10] The real point of dispute between the prosecution and the defence is whether the appellant did exit his vehicle and fire the shots from a position outside of the vehicle. That variation from the statement was clearly brought to the attention of the learned trial judge who weighed it and preferred the testimony of Mr Braham to that of Mr Gilpin.

[11] The learned trial judge was entitled to accept the testimony of one prosecution witness as against the other, as was determined in the judgment of this court in ***R v Michael Rose*** SCCA No. 17/1987 (delivered March 18, 1987). It is not surprising that the learned trial judge accepted Mr Braham's testimony in preference to Mr Gilpin's. The latter's explanation for the variation between the testimony and the statement

was that he was intoxicated when he gave the statement. That is not a credible explanation, given the fact that some 36 hours had passed between the time of the injury and the time of his giving the statement. Much of that time was spent at the hospital where Mr Gilpin was treated for his injury.

[12] It does not seem that the prosecution had any prior indication of Mr Gilpin's intention to vary from his written statement. There is really nothing to support Mr Small's submission to that effect. Mr Walcolm, for the Crown, submitted that questions posed in examination in chief by Crown counsel at the trial, indicated that the prosecution was also taken unawares by Mr Gilpin's testimony. Mr Walcolm pointed us to two specific questions which, he submitted, demonstrated the point:

> "Q. So you saw the man go back into his car?
>
> A. Yes
>
> Q. And reversed?
>
> A. Yes"

[13] The questions may well be considered neutral, that is, not giving an indication either way.

[14] When it became apparent that he was giving a somewhat different account, it was not such as to allow the prosecution's counsel to treat him as hostile and to cross-examine him.

[15] Section 15 of the Evidence Act stipulates that a party producing a witness shall not be allowed to impeach the credit of that witness but in the event that the witness' testimony proves adverse, that party may seek to contradict him with the leave of the trial judge. The fact that a witness proves unfavourable, but is otherwise not hostile, to the party producing him does not entitle that party to seek to contradict him. Such a course may only be undertaken with the leave of the trial judge. In ***Kayvon McPherson v R*** SCCA No. 87/2004 (delivered April 7, 2006), this court, in providing guidance to trial judges on this issue said, at page 5:

> "In exercising their discretion whether or not to accede to an application to treat a particular witness as hostile, trial judges should be guided by the provision of the common law."

After citing two cases on the point, the court approved the following excerpt from Article 147 of *Stephen's Digest on the Law of Evidence,* as setting out the common law rules:

> "*Unfavourable and Hostile Witnesses:* If a witness called by a party to prove a particular fact in issue or relevant to the issue fails to prove such fact or proves an opposite fact the party calling him may contradict him by calling other evidence, and is not thereby precluded from relying on those parts of such witness's evidence as he does not contradict.
>
> If a witness appears to the judge to be hostile to the party calling him, that is to say, not desirous of telling the truth to the Court at the instance of the party calling him, the judge may in his

> discretion permit his examination by such party to be conducted in the manner of a cross-examination to the extent to which the judge considers necessary for the purpose of doing justice.
>
> Such a witness may by leave of the judge be cross-examined as to - (1) facts in issue or relevant or deemed to be relevant to the issue; (2) matters affecting his accuracy, veracity, or credibility in the particular circumstances of the case; and as to (3) whether he has made any former statement, oral or written, relative to the subject-matter of the proceeding and inconsistent with his present testimony…
>
> In the case of a witness who is treated as hostile, proof of former statement, oral or written, made by him inconsistent with his present testimony may by leave of the judge, be given in accordance with Articles 144 and 145."

[16] The above quotation would seem to suggest that Mr Gilpin would not be likely to be treated as a hostile witness. In the unlikely event that the prosecutor would make such an application, it would be within the learned trial judge's purview, despite the fact that he was not in possession of the statement, to point out to the prosecutor that there was at least another witness as to fact to be called. The circumstances do not lend themselves to such an application being successful. The evidence and the variations were, as it were, "grist for the mill" of defence counsel.

[17] Learned defence counsel cross-examined Mr Gilpin on the critical points of the departure, namely the position of the cars and the

appellant's position when he fired the shots. These aspects were clearly placed before the learned trial judge for his contemplation. He carefully contemplated it at pages 106-107 and pages 115-116 of the record and made a finding in favour of Mr Braham's testimony as being more credible than Mr Gilpin's. That finding would support the view that even if the prosecution were aware, beforehand, of Mr Gilpin's intention to depart from the content of his statement and had made the defence aware of that intention, it would have made no difference to the outcome of the trial.

[18] Mr Small submitted that the shift by Mr Gilpin would have taken the defence counsel by surprise and the defence would have been disadvantaged by the result. It would seem, however, that this situation was standard procedure for any defence counsel who was prepared to cross-examine a witness. The point must be also made, that it was very experienced and competent counsel who appeared for the defence at trial. There is, with respect, no merit to the complaint. It is not correct, therefore, to say that the appellant was deprived of a fair trial.

[19] On the question of sentence, the complaint is that the sentence of 5 years on each count is manifestly excessive.

[20] Offences of the nature of those with which the appellant is charged normally attract sentences of between 10 and 15 years imprisonment

when committed by persons who are not licensed to carry a firearm. The fact that the appellant was a licensed firearm holder is not the only distinction from the majority of the cases which come before our courts. The appellant was 50 years of age at the time of conviction. It was his first offence and the circumstances giving rise to the offence were unusual.

[21] The learned trial judge specifically took these matters into account and has halved or reduced to a third the usual sentences. The sentences cannot be said to be manifestly excessive. Although the learned single judge granted leave to appeal against sentence, the Privy Council decision of ***Llewelyn DaCosta v R*** (1990) 27 JLR 118 demonstrates that there is precedent for this level of sentence in these circumstances. Mr DaCosta, using his licensed firearm, shot at one man and wounded another during a dispute over the improper parking of cars. The similarity to the instant case is striking. He was convicted of the offences of illegal possession of a firearm, shooting with intent and wounding with intent to do grievous bodily harm and was sentenced to serve 4 years imprisonment at hard labour on each count. The sentences were stipulated to run concurrently. The convictions were contested in this court (**R v Llewellyn DaCosta** SCCA No. 179/87, delivered March 25, 1988) and at the Privy Council, but it does not appear that any complaint was made of the sentences.

[22] The prevalence of firearm offences since 1987, when Mr DaCosta was convicted, justifies the increase from four years to five in the instant case.

[23] The application for leave to appeal against conviction is refused. The appeal against sentence is dismissed. The sentences are affirmed and shall run from 30 December 2009.