[2019] JMCA Crim 31

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 15/2013

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

ANDRAE MICHAEL JACKSON v R

Miss Nancy Anderson for the applicant

Miss Keisha Prince and Joel Brown for the Crown

7 March 2018 and 4 October 2019

PHILLIPS JA

[1] Mr Andrae Michael Jackson (the applicant) placed an application for leave to appeal convictions and sentences before us. He had been convicted on 14 February 2013 of illegal possession of a firearm, two counts of wounding with intent and robbery with aggravation, before Daye J, in the High Court Division of the Gun Court. He was sentenced to 10 years', 14 years' (on both counts of wounding with intent) and 16 years' imprisonment at hard labour, respectively. He sought to challenge his convictions and sentences on the basis that the learned judge failed to give false alibi and good character directions; utilised and accepted statements made by a witness that had never been called to give evidence; failed to give adequate consideration to various

discrepancies and the impact they would have on the issue of credibility; and imposed manifestly excessive sentences. His application for leave to appeal those convictions and sentences was refused by a single judge of this court, and so the application was renewed before us.

[2] On 7 March 2018, after hearing submissions from counsel for the applicant and the Crown, we made the following orders:

> "1) Application for leave to appeal against conviction is refused.
>
> 2) Application for leave to appeal against sentence is allowed and the hearing of the application is treated as the hearing of the appeal.
>
> 3) Appeal against sentence is allowed in part and the sentence on count 4 is set aside and a sentence of 15 years imprisonment at hard labour is substituted therefor.
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> 4) The sentences on counts 1-3 are affirmed.
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> 5) Sentences are reckoned as having commenced on 4 February 2013."

[3] This judgment fulfils our promise to reduce our reasons into writing.

Background

[4] On 3 December 2011, sometime after 11:00 pm, Mr Damion Bradshaw was driving a motor truck along Lothian Avenue, in the parish of Saint Andrew. He was on his way to visit one 'Mr Timberwalley' to hand over cash that Mr Bradshaw had received after making deliveries on Mr Timberwalley's behalf to various parts of the island. Mr

Bradshaw was accompanied on the said motor truck by Mr Jamar Cummings, who is a stevedore.

[5] Whilst trying to manoeuvre around various large potholes along Lothian Avenue, Mr Bradshaw saw two men emerging from Lothian Avenue with nine millimetre guns in their hands. He identified the applicant as one of the men. He knew the applicant before and had ample opportunity to identify him. Mr Bradshaw indicated that the other man was called 'Magnum' and that he had seen him once before the incident. Mr Bradshaw then spoke to Mr Cummings, stopped the motor truck, put it in reverse and began to reverse rapidly. The men fired shots into the motor truck wounding both Mr Bradshaw (on the left side of his chest, left side of abdomen and his right thigh) and Mr Cummings (on his head, two on his left thigh, and one on his right thigh). Mr Bradshaw stooped under the steering wheel of the motor truck to escape from the gunshots. The motor truck drove over something, skidded and stopped.

[6] One of the two men entered the motor truck and took a knapsack from a safe located inside the truck. The knapsack contained $300,000.00. The men then left. The police were called and both Mr Bradshaw and Mr Cummings were taken to the Kingston Public Hospital where they were admitted for some time.

[7] Mr Bradshaw later indentified the applicant at an identification parade.

[8] The applicant gave evidence in his defence. He indicated that at the time when the incident occurred he was at home with his girlfriend, Ms Peaches Flowers-Henry.

While he admitted that he knew Mr Bradshaw prior to the incident, he denied being present when the incident unfolded.

[9] Ms Flowers-Henry testified on the applicant's behalf. Although there were discrepancies between her evidence and that of the applicant as to how the night of 3 December 2011 played out, she nonetheless indicated that the applicant was at home with her in bed at around 11:00 pm that night. She further stated that they slept together and he could not have left the bed without her knowledge.

[10] The learned trial judge, having accepted the evidence of Mr Bradshaw, convicted the applicant and sentenced him as stated in paragraph [1] above.

The issues on appeal

[11] Based on the grounds of appeal advanced and the submissions of counsel on both sides, this appeal raised five main issues:

(i) was a false alibi direction required in the circumstances of the instant case (ground 1);

(ii) did the learned trial judge err in relying on the evidence of a witness who had not been called to testify, and whose statement had not been tendered and admitted into evidence (ground 2);

(iii) did the learned trial judge attach sufficient weight to the discrepancies in Mr Bradshaw's evidence which could have affected his credibility (ground 3);

(iv) did the learned trial judge err in failing to give a good character direction (ground 4); and

(v) were the sentences imposed on the applicant manifestly excessive (ground 5)?

Was a false alibi direction required (ground 1)

[12] The applicant's counsel, Miss Nancy Anderson, submitted that upon her review of the learned judge's summation, he clearly rejected the applicant's evidence and that of his witness, and so rejected his alibi. Accordingly, she submitted that, based on the principles outlined in **Michael Ewen v R** [2016] JMCA Crim 19, the learned trial judge ought to have given himself a false alibi warning, and that his failure to do so was a misdirection that was crucial and fundamental to the entire case. Miss Keisha Prince for the Crown submitted that, as was the case in **Oniel Roberts and Christopher Wiltshire v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 37 and 38/2000, judgment delivered 15 November 2001, a false alibi direction was not required in the instant case, since the learned trial judge did not reject the applicant's alibi, but had clearly found that the strength of the Crown's case had diminished the applicant's alibi.

[13] Having reviewed the learned trial judge's summation with regard to the applicant's alibi defence, we agreed with the submissions advanced by Miss Prince on this point. The learned trial judge from the outset acknowledged that the applicant was indeed denying that he was present or had participated in the incident, and that he was raising an alibi defence. He also gave adequate directions on the burden and standard

of proof. The learned trial judge thoroughly assessed the evidence of the witnesses for the Crown, and indicated that he accepted Mr Bradshaw's evidence that he recognised the applicant, whom he had known for 18 years prior to the incident, and that he had sufficient time, lighting and distance in which to identify him. He also thoroughly assessed the applicant's evidence and that of his girlfriend, Ms Flowers-Henry. He did not accept her evidence that the applicant was at his home with her sleeping the entire night at the time of the incident, as he believed Mr Bradshaw.

[14] Indeed, this court in **Roberts and Wiltshire v R** stated that "a false alibi warning would make no sense in a case ... where the only rational basis for the rejection of the alibi is the fact that the jury is otherwise convinced of the correctness of the identification evidence". The learned trial judge was clearly impressed with Mr Bradshaw's evidence with regard to his identification of the applicant. He referred to the fact that Mr Bradshaw stated, and the applicant himself agreed, that they knew each other for 18 years prior to the incident, and that they would play football together. He also examined the circumstances in which the identification was made and found them to be adequate. Since the learned trial judge had accepted the correctness of Mr Bradshaw's identification of the applicant, in his view, the prosecution would have succeeded in disproving the applicant's alibi. In those circumstances, a false alibi direction would have "made no sense", and the learned trial judge would not have erred in failing to give one. Ground 1 therefore failed.

Placing reliance on statements made by a witness who did not testify at trial and whose statement had not been tendered and admitted into evidence (ground 2)

[15] The learned trial judge in his summation mentioned the fact that the applicant was apprehended by Detective Sergeant Paul Robinson, and that when Sergeant Robinson informed him of the allegations made against him, he denied it from the outset. Miss Anderson's complaint about this was that the learned trial judge's use of that statement was unfair to the applicant, as Detective Sergeant Robinson was never called as a witness so he could be subject to cross-examination. Miss Prince submitted that perhaps pages were missing from the transcript. But, she also submitted that, even without Detective Sergeant Robinson being called as a witness, the Crown's case would not have been diminished, and the applicant would not have been subjected to any prejudice, since the applicant himself had mentioned Detective Sergeant Robinson, and the learned trial judge had used that bit of evidence to bolster the applicant's alibi.

[16] Miss Anderson's premise for this ground is most likely factually flawed. It is to be noted that, in trials in the High Court Division of the Gun Court, the presiding judge is not provided with any statements, which will be used by the prosecution in the presentation of its case.

[17] Our review of the transcript has revealed nothing which indicated that Detective Sergeant Robinson had testified or that a statement from him was tendered and admitted into evidence. However, it is highly likely that Detective Sergeant Robinson testified but his evidence was omitted from the transcript, which appears to be in some disarray.

[18] The transcript suggests that the trial started on the morning of 2 February **2012**, but the **2012** reference is an obvious error. Mr Bradshaw gave evidence during that session. However, the afternoon session of the same day, where Mr Bradshaw's evidence is continued, is said to have been on 4 February 2013 for both the morning and afternoon sessions. The following day's proceedings are dated 5 February 2013 for both the morning and afternoon sessions. Those proceedings end at page 165 showing that Detective Sergeant Robinson was bound over to attend the following day. What appears on the next page of the transcript, page 165(B), is erroneously dated 2 February 2013, as it is in fact the proceedings during the morning of 7 February 2013, as the afternoon session of that day is dated 7 February 2013.

[19] It seems that the proceedings on 6 February 2013 are entirely omitted from the transcript. Crown Counsel spoke on page 165(B) to having five prosecution witnesses. The transcript only reveals the testimony of four, namely Messrs Bradshaw and Cummings, Detective Corporals Roger Reid and Kemoi Gouldbourne. Defence counsel, during the course of discussion at the start of the proceedings on 7 February 2013, spoke of being in the fourth day of the trial. It appears that only Detective Sergeant Robinson's evidence was taken on 6 February 2013.

[20] Another factor which gave credence to the view that Detective Sergeant Robinson's evidence was omitted from the transcript was that the learned trial judge made reference to statements made by him. At page 281, he stated that Detective Sergeant Robinson had formed the view that Mr Timberwalley was the owner of the motor truck. At page 283 of the transcript he stated that Detective Sergeant Robinson

spoke to Detective Sergeant Reid after arresting the applicant. He made reference to the fact that Detective Sergeant Robinson saw spent shells at the scene of the incident at page 301.

[21] In any event, the learned trial judge's reference to evidence from Detective Sergeant Robinson was used to either bolster the applicant's case (where he spoke of the applicant's initial denial) or indicate a flaw in the Crown's case (relating to who was the actual owner of the truck). Accordingly, we fail to see how evidence that was patently favourable to the applicant could have prejudiced his case in any respect, or rendered his trial unfair. Therefore that ground of appeal also failed.

Weight placed on discrepancies in Mr Bradshaw's evidence (ground 3)

[22] Miss Anderson contended that although the learned trial judge had referred to various grounds upon which Mr Bradshaw's credibility was being challenged, there were several other grounds for challenge to his credibility that the learned judge failed to explore and failed to regard with sufficient weight. She identified three main grounds for such a challenge: (i) his testimony as to how well he knew the applicant; (ii) the discrepancies between his evidence and that of Mr Cummings; and (iii) discrepancies between his statement and his testimony regarding his wounds. Miss Prince reminded the court that there was no requirement in law for a trial judge to detail every discrepancy and make a determination in respect of each such discrepancy. She further submitted that the learned trial judge did not merely mention the discrepancies in the instant case, but he conducted a detailed assessment of those discrepancies which he

viewed as material. His findings in that regard should therefore not be lightly interfered with.

[23] While trial judges are not expected to identify and analyse every inconsistency and discrepancy that arises during a trial, he or she must endeavour to mention those inconsistencies or discrepancies that may severely undermine the Crown's case (see **Morris Cargill v R** [2016] JMCA Crim 6).

[24] In the instant case, the learned trial judge, in our view, conducted a thorough assessment of all the material areas in which discrepancies arose that could have impacted Mr Bradshaw's credibility. He examined the claim by Mr Bradshaw that he was the owner of the truck, when Detective Sergeant Robinson had formed the view that Mr Timberwalley owned the truck, and found that that did not destroy his credibility because he stated that there was no documentary evidence adduced to show who the owner of the truck was. He examined the differences between Mr Bradshaw's testimony and that of Mr Cummings with regard to the length of time that the incident lasted, and indicated that he preferred Mr Bradshaw's evidence, since his injuries were less severe, and at no time did he lose consciousness.

[25] The learned trial judge also noted that Mr Bradshaw's credibility was challenged on the basis of various omissions from his statement, but these did not operate to diminish his credibility. One such omission was the fact that Mr Bradshaw had never mentioned in his statement that he was shot in his chest and abdomen, but he had testified to those injuries. The learned judge indicated that the defence was not

asserting that Mr Bradshaw was never injured, and no medical evidence was put into evidence by either the Crown or the defence as to where Mr Bradshaw was injured. He further noted that blood was found at the scene, spent shells were recovered and the appellant had spent some time in the hospital. He therefore found that Mr Bradshaw was injured to his chest and abdomen as a result of the shooting, and the failure to mention those injuries in his statement did not render his evidence in that regard incredible.

[26] The learned trial judge thoroughly explored the discrepancies that could have affected Mr Bradshaw's identification of the accused, and found that they did not destroy the Crown's case. The learned judge pointed specifically to a discrepancy that arose between Mr Cummings' account of the incident and that of Mr Bradshaw, specifically as it related to the time that the incident lasted. He found that Mr Bradshaw's evidence was more credible as, after Mr Cummings was shot, he was in and out of consciousness and so his ability to witness the incident would have been limited. The learned judge found that both the applicant and Mr Bradshaw knew each other for a number of years since they had both accepted that they had lived in the same community, on the same road, for some time and they also played football together. The learned trial judge had also refused to place any reliance on Mr Bradshaw's identification of the appellant by his voice, mainly because of a demonstration by the defence involving the applicant and two other men who Mr Bradshaw admitted to playing football with for some time, but was unable to identify them by their voices. However, he found Mr Bradshaw was unlikely to have been mistaken in his

identification of the appellant due to the quality of the identification evidence led, and the fact that Mr Bradshaw and the appellant knew each other for years prior to the incident.

[27] It is evident that the learned trial judge properly identified, analysed and weighed the inconsistencies and discrepancies that were material in the instant case. It cannot therefore be said that he erred in that regard, and so the ground of appeal related thereto was also found to be without merit.

Absence of a good character direction

[28] Miss Anderson contended that the applicant was entitled to a good character direction since he had no previous convictions, gave sworn evidence and had also raised evidence of his good character when he said that he went to school and had a girlfriend. Miss Prince submitted that evidence of the applicant's good character was not raised and, even if it had been raised, it would not have been fatal to the conviction in all the circumstances of this case.

[29] Evidence of a defendant's good character includes matters such as a solid employment record, faithful discharge of family duties or evidence of his general reputation (see Halsbury's Laws of England, 2015, Volume 27 at paragraph 605). In **Teeluck (Mark) and John (Jason) v The State of Trinidad and Tobago** (2005) 66 WIR 319, at page 330, Lord Carswell stated that a defendant's good character must be distinctly raised by direct evidence from him, or evidence given by witnesses on his behalf, or by eliciting it through cross-examination of Crown witnesses. In **Bruce**

Golding and Damion Lowe v R (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 4 and 7/2004, judgment delivered 18 December 2009, Morrison JA (as he then was) said "where a defendant's good character has been distinctly raised by him, the defendant is entitled to a standard good character direction containing [the] two limbs".

[30] Having perused the transcript there was no indication that the applicant's good character was ever raised. In his sworn testimony he was focused on his denial and his alibi, and did not speak to his general reputation. Ms Flowers-Henry did not speak to his good character nor did she say anything which highlighted his good character. The Crown witnesses were not cross-examined as to the applicant's good character. Good character having not been raised, the applicant would not therefore have been entitled to a good character direction. In any event, even if he was so entitled and a good character direction had not been given, it would not necessarily have been fatal to the conviction (see **Jagdeo Singh v The State** [2005] UKPC 35). As a consequence, this ground of appeal was found to be without merit and failed.

Were the sentences imposed manifestly excessive

[31] Counsel for the applicant submitted that the sentences imposed on the applicant were harsh and manifestly excessive since no consideration was given for the time spent in custody awaiting trial, the applicant's good character, and, in reliance on **Melanie Tapper v Director of Public Prosecutions** [2012] UKPC 26, the delay between the hearing of the trial and his appeal. Crown Counsel, in response, stated that the sentences imposed were not harsh or manifestly excessive as the applicant was not

sentenced to the mandatory minimum sentence for wounding with intent; and further, in the light of **Melanie Tapper v DPP**, a delay of two years was not inordinate.

[32] It is indeed true that a delay of two years, while long, could not be considered inordinate in the light of **Melanie Tapper v DPP**, in which the delay was five years. No consideration could be given to the applicant's character as it was never raised. It was revealed, during the sentencing exercise, that the applicant had no previous convictions. However, the sentence imposed of 10 years imprisonment at hard labour for illegal possession of firearm cannot be said to be manifestly excessive as it is well within the normal range that could be given for that offence. The applicant received a sentence of 14 years' imprisonment at hard labour on each count of wounding with intent. That sentence is below the statutory minimum of 15 years' imprisonment, and so was not found to be manifestly excessive. He was sentenced to 16 years' imprisonment at hard labour for robbery with aggravation which carries a statutory maximum of 21 years' imprisonment at hard labour.

[33] We cannot, in all those circumstances, say that the sentences imposed on the applicant were manifestly excessive. However, pursuant to **Callachand and Another v The State** [2008] UKPC 49 and **Romeo Da Costa Hall v The Queen** [2011] CCJ 6 (AJ), the applicant should have received full credit for time spent in custody. He was arrested on 13 January 2012, and he was convicted and sentenced on 14 February 2013, and so would have been in custody for approximately one year and two months. The applicant was therefore entitled to a reduction by one year of the sentence of 16 years' imprisonment at hard labour imposed for robbery with aggravation.

Conclusion

[34] In all these circumstances, the applicant was not entitled to a false alibi or good character direction. He was not prejudiced by the learned trial judge making reference to the evidence of Detective Sergeant Robinson. All the material discrepancies and inconsistencies in the instant case were thoroughly analysed and weighed by the learned trial judge. The sentences imposed could not be said to manifestly excessive, but the applicant would have been entitled to a reduction in his sentence for the time he had spent in custody prior to being convicted. It is for all these reasons that we made the orders referred to in paragraph [2] herein.