[2022] JMCA Crim 66

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MR JUSTICE D FRASER JA

SUPREME COURT CRIMINAL APPEAL NO COA2019CR00046

JERMAINE KESSON v R

Obiko Gordon instructed by Frater, Ennis & Gordon for the applicant

Miss Kathy-Ann Pyke for the Crown

30 November, 2 and 16 December 2022

STRAW JA

Introduction

[1] On 21 January 2019, the applicant was convicted in the High Court Division of the Gun Court for the offences of illegal possession of firearm contrary to section 20(1)(b) of the Firearms Act and shooting with intent contrary to section 20(1) of the Offences Against the Person Act. He was sentenced on 5 April 2019 to serve seven years and 10 months imprisonment for the offence of illegal possession of firearm and 15 years and 10 months imprisonment for the offence of shooting with intent. The sentences were ordered to run concurrently. The applicant sought leave to appeal against both his conviction and sentence. This application was considered and refused by a single judge of this court. The applicant renewed his application for leave to appeal against his conviction. Mr Gordon, on behalf of the applicant, indicated that there would not be a renewal of the application for leave to appeal against sentence.

[2] On 2 December 2022, we made the following orders:

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

2. The sentences are to commence as of 5 April 2019, the first date on which they were imposed, and are to run concurrently."

[3] We promised that the reasons for our decision would follow in writing. We now fulfil that promise.

Background

[4] The prosecution relied on the evidence of two witnesses, namely Constable Dane Biggs and Inspector Damion Butler. Constable Biggs testified that, on 30 November 2016, he and Inspector Butler went on inquiries in the Greendale area, in Spanish Town in the parish of Saint Catherine. At the material time, he was assigned to the Spanish Town Police Station. In carrying out these inquiries, they travelled in an unmarked service vehicle and Inspector Butler was driving. Constable Biggs testified that, whilst travelling in an easterly direction along the Twickenham Park main road, he heard loud explosions. These explosions were coming from in front of the service vehicle. He then observed two men with firearms. One of the men had low-cut hair and was dressed in a yellow T-shirt and the other had dreadlocks. They both had handguns and constable Biggs stated that it appeared that they were firing at each other.

[5] Upon seeing this, Inspector Butler drove the service vehicle onto an off-road, that ran parallel to the Twickenham Park main road. The man with dreadlocks ran in the opposite direction to which the vehicle was headed and the man with the low-cut hair ran into a tyre shop, behind a container. Constable Biggs testified that he identified the man with low-cut hair and wearing the yellow T-shirt, as the applicant, whom he knew before as Jermaine Kesson. He was able to see Mr Kesson's face. This observation of the applicant was made for a period of about 10 seconds. After the applicant ran into the tyre shop, Constable Biggs heard more loud explosions. At that time he and Inspector Butler were about 25 meters away from the tyre shop.

[6] Subsequently, the applicant emerged from behind the container and ran onto a "ball field" that was adjacent to the tyre shop. Constable Biggs and Inspector Butler then

pursued the applicant on foot and shouted out to him "Police!". The applicant then turned around and discharged the firearm at Constable Biggs and Inspector Butler, who returned fire. During this exchange, Constable Biggs testified to being able to see the applicant's face because the applicant turned around, although he was running. Constable Biggs described that the applicant was "trotting" and not running quickly. He estimated that at this time he was about 20 meters away from the applicant. Inspector Butler then shouted, "Kesson", at which point the applicant fired at the officers a second time. The applicant was then about 25 meters away from Constable Biggs.

[7] The applicant then went into a bushy area on the "ball field", following which, another man, who was shirtless, came from the bushes and also proceeded to fire a gun at the police. The officers again returned fire. In the exchange of gunfire, neither the applicant nor any of the other men were apprehended and Constable Biggs and Inspector Butler returned to the service vehicle. Constable Biggs testified that the entire incident, from the time of the shooting between the applicant and the man with dreadlocks, to when the applicant escaped into the bushes, was about three minutes. He also estimated that he saw the applicant's face for a total of 15 seconds.

[8] Efforts were made by Constable Biggs and Inspector Butler, on the same day of the incident, to locate the applicant at his home in the New Nursery community, but he was not seen.

[9] Constable Biggs stated that he was able to observe the applicant's face on the day of the shooting incident because it was daytime, there was sunshine and there was nothing obstructing his view of the applicant's face.

[10] When asked by the prosecutor how long before the incident he knew the applicant Constable Biggs said, "to the best of my knowledge I processed him in 2015". Further, when asked how long he knew the applicant for, he said that he knew the applicant for about a year. He stated further that he saw the applicant about three times during the course of that year and that he also knew him by the alias "Tear Up".

[11] On 27 February 2017, approximately three months after the incident, Constable Biggs said he saw the applicant at the entrance of his home community in New Nursery, and that upon seeing him, he pointed him out to other members of his police team and then apprehended him. Under cross-examination, Constable Biggs was not challenged as to his knowledge of the applicant and he was merely challenged to say that he did not see the applicant firing shots on the relevant date.

[12] Inspector Butler's testimony accorded with that of Constable Biggs. He also testified to knowing the applicant before the date of the incident and that he knew the applicant since 2015, for about a year. He testified to having seen him on several occasions and at least five times before the incident. He said that he was able to see the applicant's face clearly on the date of the incident. He also confirmed that it was daytime and that the area was well-lit and there was nothing preventing him from seeing the applicant's face. At the material time, the applicant would have been some 15 to 20 meters away from him. Inspector Butler also testified that he would have seen the applicant's face when the applicant spun around and fired shots at them. He saw the applicant's face for about 10 seconds. Under cross-examination, it was suggested to Inspector Butler that he did not know the applicant and in response, Inspector Butler said, "I knew him. I knew him very well" (page 29 of the transcript). No identification parade was held at any time.

[13] The applicant gave an unsworn statement in which he presented an alibi, indicating that he was at work at the time of the incident.

Grounds of appeal

[14] The applicant sought and was granted permission to abandon the original grounds of appeal that were filed and to argue supplemental grounds as follows:

> "i) The Learned Trial Judge erred in accepting that the identification with respect to both eyewitnesses was one of recognition when the evidential basis for recognition was not properly established by the Crown with respect to either witness.

ii) The Learned Trial Judge failed to appreciate that the identification with respect to eye witness Detective Constable Dane Biggs was one of confrontation identification, and thus did not address the dangers of relying on confrontation identification in her summation of the evidence.

iii) The Learned Trial Judge in her summation of the evidence demonstrated a lack of proper appreciation of the inherent weakness in the identification evidence of both witnesses, particularly as it concerns the conditions and circumstances under which the purported identification took place.

iv) The Learned Trial Judge erred in concluding that the failure to hold an identification parade with respect to eyewitness Inspector Damion Butler did not result in any injustice, thereby rendering the conviction herein unsafe."

[15] Based on these grounds of appeal, it was apparent that the entirety of the applicant's grouse concerned the sufficiency and reliability of the identification evidence.

Submissions

[16] Mr Gordon, for the applicant, submitted that the learned trial judge erred in accepting that the identification by both eyewitnesses was one of recognition, when the evidential basis for so finding, was lacking. Mr Gordon highlighted that there was no evidence as to the nature or circumstances of the previous sightings of the applicant by the witnesses, in order to enable the court to properly assess the strength of the witnesses' knowledge of the applicant. In relation to Inspector Butler, Mr Gordon also took issue with the learned trial judge's finding that there was no injustice caused by the failure to test Inspector Butler's identification of the applicant by way of an identification parade. According to Mr Gordon, this was an erroneous finding which arose from the learned trial judge's error in accepting that there was satisfactory evidence as to recognition. Reliance was placed on the case of **Kevin Williams v R** [2014] JMCA Crim 22.

[17] Learned counsel did point out, however, that as it related to Constable Biggs, there was no challenge under cross-examination of the assertion that he knew the applicant,

although Inspector Butler was so challenged under cross-examination. Mr Gordon stated that despite the lack of a challenge, the Crown still had to discharge its evidential burden to properly support a case of recognition. This was especially so in this case, as the identification was made in difficult circumstances.

[18] The issue of confrontation identification raised in ground two was quite sensibly, not pursued by Mr Gordon.

[19] Mr Gordon submitted that the evidence of identification was less than satisfactory on a whole. He pointed to 10 areas of difficulty relating to the identification evidence, beginning from the point at which the officers first saw the two men shooting at each other. We do not propose to set out all 10 areas but will highlight a few.

[20] Mr Gordon noted that the identification was first made by the officers when they were in a moving motor vehicle and that the distance given was some 25 meters away, which equates to approximately 82 feet. Mr Gordon asserted that this distance, which was less than ideal, was not highlighted by the learned trial judge.

[21] No evidence was led as to how the officers were able to see the men after they had turned onto an off-road and no evidence is given as to the men's posture during the exchange of gunfire. No evidence was led to demonstrate that it was the same man who ran into the tyre shop, that had emerged from the tyre shop.

[22] Mr Gordon described the overall evidence leading up to the identification as very general. Further, that the circumstances were not ideal as the police were being shot at and had to give chase. It was therefore reasonable to expect that they may have been taking evasive action. In those circumstances, one would have expected the learned trial judge to highlight these issues and explain how they were resolved in favour of the prosecution.

[23] In relation to Inspector Butler, Mr Gordon says his evidence was even weaker, as he had been told by Constable Biggs that the man who ran into the tyre shop was

Jermaine Kesson. He was therefore operating under the influence of the information supplied to him by Constable Biggs. It was therefore not independent. This issue was not dealt with by the learned trial judge in her summation.

[24] Mr Gordon submitted that all the conditions taken together, the identification could be properly characterized as "fleeting" and therefore not proper to support a conviction.

[25] Miss Pyke, on behalf of the Crown, whilst accepting that the evidence of recognition was less than satisfactory, submitted that the learned trial judge was nonetheless correct in accepting that the identification, in this case, was one of recognition. This was especially so in the case of Constable Biggs, who, Miss Pyke pointed out, gave evidence of "processing" the applicant in the year prior to the incident. The act of processing the applicant meant that Constable Biggs would have had the applicant under observation for a considerable period of time and dialogued with him, such that this was adequately supportive of recognition. Moreover, Constable Biggs, as a police officer, was trained to take note of a person's physical features. The learned trial judge could therefore rely on the evidence of Constable Biggs, so as to feel sure that he had correctly recognized the applicant.

[26] Miss Pyke also pointed to the circumstances of the identification, namely that it was daytime and both witnesses testified to the day being sunny. Further, that both witnesses testified to seeing the applicant's face for at least 10 seconds. As such, although Inspector Butler's evidence as to recognition was not as strong, it could still be relied upon as he would have had sufficient time to see the applicant. Further, his evidence was not undermined by the absence of the identification parade, given this was a case of recognition.

[27] With respect to the assertion of confrontation identification, Miss Pyke refuted this assertion by pointing out that the encounter between Constable Biggs and the applicant was co-incidental and there was no deliberate act on the part of the police to cause

identification in the circumstances. Reliance was placed on the case of **Courtney Lawes v R** [2011] JMCA Crim 55.

[28] Miss Pyke disagreed that the learned trial judge failed to demonstrate an appreciation of the weaknesses inherent in the identification evidence.To the contrary, the learned trial judge's summation clearly illustrated that she directed her mind to the weaknesses and properly assessed them. According to Miss Pyke, the learned trial judge was faithful to the principles as stated by Downer JA in the case of **R v Simpson, R v Powell** [1993] 3 LRC 63, in that she had heeded the necessary warnings.

[29] In the circumstances, Miss Pyke has asked that this court affirms the convictions.

Discussion

[30] The issues raised by the grounds of appeal are:

1. Was there sufficient evidence on which to base identification by recognition?

2. Did the learned trial judge err by not considering that identification by confrontation arose in the evidence of Constable Biggs?

3. Did the learned trial judge properly analyse and consider the weaknesses existing in the identification evidence?

4. Should the learned trial judge have concluded that the identification by Inspector Butler was unreliable since no identification parade was held?

Issue 1 – Recognition evidence

[31] There ought to be sufficient evidence as to the circumstances of a witness' prior knowledge of a defendant, in order to conclude that the identification was one of recognition and that it would be sufficient to warrant the absence of an identification

parade (see **Kevin Williams v R** paras. [19] and [20]). The Crown led little to no evidence in relation to each specific set of circumstances under which both Constable Biggs and Inspector Butler would have seen and/or interacted with the applicant, prior to the incident. However, the evidence from Constable Biggs was the strongerin this regard. Constable Biggs indicated that he knew the applicant before as, "to the best of [his] knowledge, [he] processed him in 2015". Crown Counsel did not press for any details of this processing. It appears that Crown Counsel thought that any further evidence elicited on this point may have been more prejudicial than probative. However, evidence as to Constable Biggs' interaction with the applicant, relevant to identification evidence, would have been admissible. For example, Constable Biggs could have been asked about the length of time of the processing and for how long he would have seen the applicant's face during this time and whether they conversed. Any prejudicial effect would have been outweighed by the probative value and would, in fact, would have been useful. The court is mindful however that caution would have had to be taken to ensure to avoid prejudice to the applicant, as much as possible, arising from any questions regarding the circumstances relevant to this processing (see **Adrian Forrester v R** [2020] JMCA Crim 39 at para. [195]). The learned trial judge did, in fact, warn herself that no adverse inferences were to be drawn in relation to Constable Biggs' evidence on the point of processing the applicant.

[32] In relation to the type of evidence that may be permissible (in support of identification), in circumstances where the evidence to be disclosed may have the effect of causing prejudice to an accused person in the conduct of his defence, the case of **Orville Brown v R** [2010] JMCA Crim 74 is instructive. At paras. [27] – [30], Phillips JA examined several cases in which this issue arose, and in which it was determined that the factual context and narrative surrounding an identification, may well be relevant, even if it may have some prejudicial effect, so long as it can be shown that the probative value of the evidence outweighed the prejudicial effect. At para. [30] Phillips JA stated:

> "It is therefore patently clear that evidence can be led and will be considered relevant and admissible if providing a background

> against which the offence was committed and particularly if it is adduced to strengthen the visual identification…"

This was one such case in which the prosecution couldhave led further evidence with respect to Constable Bigg's recognition of the applicant, notwithstanding that in so doing, it was disclosed that the applicant had had a previous encounter with the law. Although the evidence did not provide background relating to the previous processing offence, it provided background of Constable Biggs' knowledge and previous encounter with the applicant.

[33] In any event, the limited evidence that was led, sufficiently supported Constable Biggs' knowledge of the applicant, whom he also knew by the name "Tear Up". He was not challenged under cross-examination as to his knowledge of the applicant (a fact conceded by Mr Gordon). The learned trial judge indicated that she took the absence of any challenge to this fact to mean that the applicant "is accepting that Constable Biggs knew the man before". This case is, therefore, distinguishable from **Kevin Williams v R**, as, in that case Williams heavily challenged the evidence of the Crown's witnesses as to their previous knowledge of him. Based on this distinguishing feature, it would not have been necessary for an identification parade to be held in respect of Constable Biggs in the circumstances.

[34] By contrast, the evidence of Inspector Butler as to his previous knowledge of the applicant would have been on more shaky ground, albeit, the learned trial judge accepted that both witnesses knew the applicant previously. There was no evidence from Inspector Butler as to any particular interaction with the applicant, so as to anchor his evidence of recognition. He was also challenged under cross-examination concerning his previous knowledge of the applicant.

[35] However, while there may be misgivings concerning the evidence of recognition by Inspector Butler and the learned trial judge's reliance on his evidence in the absence of an identification parade, it is our view that there was sufficient evidence from Constable Biggs, on which the learned trial judge could have relied. In addition, the circumstances

in which the applicant was identified on the day of the incident facilitated good recognition and identification.

[36] Ground one therefore fails.

Issue 2 - Confrontation identification

[37] Mr Gordon was correct not to pursue this ground, as Constable Biggs' pointing out of the applicant, on 27 February 2017, did not amount to confrontation identification (see **Tesha Miller v R** [2013] JMCA Crim 34).

[38] This ground of appeal therefore fails.

Issue 3 - Analysis of the weaknesses in the identification evidence by the learned trial judge

[39] The learned trial judge, in her summation, demonstrated a proper appreciation of and addressed her mind to the weaknesses in the identification evidence. It is noted that she:

i) gave herself the requisite warning as adumbrated in **R v Turnbull** [1977] QB 224;

ii) warned herself to carefully examine the circumstances of the identification;

iii) considered weaknesses in the identification evidence, for instance — she acknowledged that the two police officers did not state the circumstances under which they saw the applicant on any previous occasion to include the length of time, day or night, or distance; she noted that no identification parade was held; she noted that the evidence in those circumstances was less than desirable but on the totality of the evidence, she accepted the evidence of the police officers that they knew the applicant before. She noted that Constable Biggs did not specifically state the distance that he was

from the applicant when he first saw him, but said he was able to see the man's face; she acknowledged that the applicant was moving or running at the time he left the tyre shop, but that this fact was not of such a nature as to render the evidence unreliable. She considered that the witnesses would have first seen the applicant while they were in their motor vehicle and driving and that no evidence was given in relation to the speed of the vehicle at the time. However, she indicated that bearing in mind all the circumstances of the sightings, this was not critical.

iv) found that an identification parade would have been appropriate for Inspector Butler, but that no injustice resulted.

[40] It is clear, therefore, that the learned trial judge acknowledged and assessed the weaknesses in the identification evidence, but she accepted the evidence of the police officers as to the identification of the person that they saw. Based on the length of time, in particular, that Constable Biggs would have seen the applicant's face (a total of 15 seconds), the learned trial judge was entitled to accept this evidence as adequate for the purposes of identification. There was support for the length of time for viewing the applicant's face from Inspector Butler who spoke to seeing the applicant's face for 10 seconds. This could not be considered to be a "fleeting glance" and while they would have been fired upon, this was not one continuous activity. The applicant is said to have turned and fired, then continued running. He would then have turned and fired a second time. Further, Constable Biggs had recognized the applicant as Jermaine Kesson before any exchange of gunfire.

[41] With respect to the distance of 25 metres, although the learned trial judge did not note this distance as a weakness in the identification evidence, she commented on the distance multiple times during her summation. She was, therefore, mindful of the distances from which the identifications were made. Evidently, however, the learned trial judge did not consider this distance to be so great as to prevent an accurate identification

of the applicant. We would certainly agree with the learned trial judge that a distance of 25 metres , in broad daylight, with nothing obstructing the view of the witnesses, was a safe distance from which a proper identification could have been made, especially in respect of a recognition. It is also noted that the entirety of the observation by the officers did not take place from a distance of 25 metres, as at one point they were 20 meters away from the applicant, which is approximately 66 feet.

[42] The learned trial judge stated that she found the witnesses to be impeccable, honest, truthful, and that there were no discrepancies or inconsistencies brought out in their evidence. She concluded that they were not mistaken in their identification of the applicant. The evidence of Constable Biggs in relation to recognition and identification was therefore properly relied upon by the learned trial judge.

[43] This ground of appeal fails.

Issue 4 - Absence of an identification parade with respect to Inspector Butler

[44] The learned trial judge considered the evidence of prior knowledge by the Crown witnesses (on pages 50 to 56 of the transcript). She accepted that the failure to hold an identification parade, where the suspect denies that he is known to the witness, will result in a miscarriage of justice. She commented that there was a lack of evidence concerning the prior circumstances under which both witnesses had seen the applicant, and, that this was less than desirable. She considered, however, that Inspector Butler testified that on the same afternoon of the incident, he and Constable Biggs visited the New Nursery community and went to the home at which the applicant was known to stay. The learned trial judge accepted, therefore, that Inspector Butler knew the applicant before the incident. It was under those circumstances that she concluded that an identification parade would have been appropriate in relation to Inspector Butler, but that no injustice resulted in the failure to hold one.

[45] However, in our view, it was not adequately established that an identification parade would have served no useful purpose in relation to Inspector Butler. We do accept,

however, that there was no injustice to the applicant, as the evidence of Constable Biggs was sufficient in relation to the identification of the applicant.

[46] This ground therefore fails.

Conclusion

[47] For the above reasons, we concluded that the renewed application for leave to appeal against conviction ought to be refused, as the conviction of the applicant is properly supported by the evidence. Thus, we made the orders stated at para. [2] above.