[2013] JMCA Crim 8

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 59/2009

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE HIBBERT JA (Ag)

NAVARDO LAMPART v R

Ernest Smith for the appellant

Miss Dahlia Findlay for the Crown

3 October 2011 and 8 February 2013

DUKHARAN JA

[1] The appellant was convicted and sentenced in the High Court Division of the Gun Court, held in Clarendon after a trial which commenced on 11 May and ended on 20 May 2009, for the offences of illegal possession of a firearm and shooting with intent. He was sentenced to 10 years and seven years respectively with sentences to run consecutively.

[2] A single judge of this court refused the application for leave to appeal against conviction on the basis that the case turned entirely on issues of credibility, which the

learned trial judge resolved in favour of the prosecution as he was entitled on the evidence to do. However, the application for leave to appeal sentence was granted. This is a renewal of the application for leave to appeal conviction.

[3] On 3 October 2011, we heard arguments when we refused the application for leave to appeal the convictions. However, the appeal against sentence was allowed in part, in that, the consecutive element in the sentence was set aside, and instead, the sentences on both counts were ordered to run concurrently and to run from 20 August 2009. We promised then to put our reasons in writing and this is a fulfillment of that promise.

Prosecution's Case

[4] The prosecution relied on section 20 (5)(a) of the Firearms Act in order to prove that although the appellant himself had not been in actual possession of a firearm, by virtue of that section, he ought to be treated as being in possession. The prosecution had to show: that the applicant was in the company of the principal offender and that the principal offender must have used the firearm to commit the offence; the existence of circumstances which gave rise to the reasonable presumption that he was present to aid and abet the commission of such offence; and the absence of reasonable excuse.

[5] The relevant facts are that on 19 January 2009, at about 10:00am, Constables Davion Lindsay and Jarrett Walker were on patrol in a marked police vehicle along Howard Avenue, May Pen, in the parish of Clarendon. Both officers observed a speeding green and black station wagon motor car. There were two men in the back

and the driver alone in the front. The police followed the speeding car and attempted to pull it over by flashing their blue lights, honking the beacon horn and asking them to stop, using the Public Address System installed on their vehicle. The police finally caught up with the speeding vehicle which was in a line of traffic. Constable Lindsay came out of the police car and approached it when it sped off. What followed was a chase that involved many of the streets in May Pen and a period when the police lost sight of the vehicle in the Western Park area. There was a reappearance of the car on Glenmuir Road a few minutes later. The chase continued when the speeding vehicle collided with another vehicle and continued travelling until it ended on a dirt road up a hill. The vehicle then came to a stop.

[6] Constable Lindsay said he saw two men alighting from the two rear doors. He heard explosions coming from the direction of the men, who fired at them. Constable Lindsay said he returned the fire with his M16 rifle.

[7] There was another attempt by the driver of the car to speed away. This time he did not get very far as he crashed into a stone. Constable Lindsay said he saw a man come out of the driver's seat and run towards the bushes. He chased him and the man shouted, "Mi get shot, mi get shot". He was apprehended and he said, "Ah taxi mi ah run, mi no know them." This man is the appellant. He was taken to the May Pen hospital for treatment where he was subsequently arrested and charged for illegal possession of a firearm and shooting with intent.

Defence

[8] The appellant gave evidence in his defence. His defence was that he was alone in his car and that he was on Stork Street and not Howard Street as the police said. He admitted to fleeing from the police, but not via the route in the evidence given by the police. He said he was trying to get to Buck Common where his relatives were living. His reason for trying to evade the police was that his cover note (insurance) had expired and the police would seize his car for operating a robot taxi. He also feared that he would be accused of having something illegal in his possession if the police were to apprehend him.

[9] The appellant called three witnesses in his defence. The evidence given by these witnesses concerned what happened subsequent to the apprehension of the appellant and would not have assisted the appellant in the rebuttal of the prosecution's case.

[10] The first witness for the defence was Marcia Lampart. She said the appellant is her nephew. On 19 January 2009, he ran towards her with his hands in blood and said to her, "Auntie look what dey do to mi hand dem and ah don't do anything." She said he was eventually put in a police car and taken away.

[11] The second witness for the defence was Omar Rhoden. He told the court he knew the appellant from school days. On 19 January 2009 he saw him at Stork Street in May Pen and they discussed the sale of a phone to him (the witness). After that, the appellant drove off alone in a car.

[12] The third witness was Wavelyn Daley. She testified that she is a bartender living in Bucks Common and she knows the appellant. She said on the day in question she saw him driving and as he passed her gate she heard explosions. Shortly afterwards, she saw him coming out of the car crying and saying, "Them shot mi, them shot mi." She saw two police officers. She never saw anyone else come from the appellant's car.

Grounds of Appeal

[13] Mr Smith, for the appellant, abandoned the original grounds, sought and was granted leave to argue three supplemental grounds which are as follows:

> "(1) That the Learned Trial Judge did not address the contradictions in the evidence of Constable Damion Lindsay on the question of the 'man' who alighted from the left rear door of the car driven by the appellant.
>
> At page 14, lines 18 to 25 [sic] person was dressed in burgundy type short [sic].
> At page 23, lines 1 and 2 [sic] person [sic] dressed in white t-shirt.
> Such a contradiction points to the fact that no person came from the rear of the vehicle.
>
> (2) That the Learned Trial Judge failed to address the physical evidence from Detective Sergeant Garth Michelin where the vehicle was damaged by gunshots which clearly shows that if any person was in the back seat of the car such person or persons would have been shot in the upper torso.
>
> (3) That the sentence of ten and seven years respectively to run consecutively imposed on the appellant was harsh and excessive."

Ground 1

[14] The complaint of Mr Smith was that the learned trial judge failed to address the contradictions and discrepancies in the evidence given by Constable Lindsay, in particular, at page 14 of the transcript, lines 18-25, which read:

> "Q. You said that you weren't able to see the person on the right as good as you saw the person on the left. And did you notice anything about the person on the left that exited from the right rear?
>
> A. He was in some burgundy type of shirt.
>
> Q. Can you say what happened to the man on your left after you heard the gunshot?"

In the first two lines on page 23, the witness referred to the man on the left as wearing a white t-shirt.

[15] Mr Smith submitted that such a contradiction pointed to the fact that no one came from the rear of the vehicle.

[16] Guidance as to the amount of detail necessary in a judge's summation when he is the arbiter of fact has been given by this court in **R v Junior Carey** SCCA No 25/1985 (delivered 31 July 1986), where the court refuted a suggestion that the trial judge had a duty to minutely go through each piece of viva voce evidence for the record. As Campbell JA stated at page 8:

> "The learned trial judge is not statutorily required to do any such thing even though a desirable practice has developed which it is hoped will be continued of setting out salient

> findings of fact which is of inestimable value should an appeal be taken."

Clearly, the trial judge is therefore not bound to sum up every discrepancy, real or apparent.

[17] This case rested on the credibility of the accounts of the incident advanced by the prosecution's witnesses and those of the defence. The learned trial judge clearly accepted the prosecution's account while rejecting the defence. There was evidence on which he was entitled to do so. We see no merit in this ground.

Ground 2

[18] Mr Smith submitted that the learned trial judge did not address the physical evidence from Detective Sergeant Garth Michelin where the vehicle was damaged by gunshots, which shows that if anyone was in the back seat of the car, the person or persons would have been shot in the upper torso. He further submitted that the physical evidence suggested that no one except the applicant exited from the vehicle.

[19] The learned trial judge did make reference to this particular evidence in his summation at page 126 when he stated, in relation to Detective Sergeant Michelin's evidence, "He observed the car and observed a bullet hole in the left rear of the passenger door. … he observed that the left rear door window was shattered." The learned trial judge found the version put forward by the defence that there was no shootout, as lacking credibility and was satisfied so as to feel sure that the witnesses for the prosecution were truthful and credible. This ground also lacks merit.

Ground 3

[20] It was submitted that the consecutive element in the sentences imposed by the learned trial judge was manifestly excessive as the offences charged related to one and the same transaction. Counsel cited **Kirk Mitchell v R** [2011] JMCA Crim 1.

[21] This court has said on a number of occasions that usually if the offences arise out of the same incident, the court will order that the sentences are to run concurrently, that is, to be served together.

[22] The learned trial judge justified the imposition of consecutive sentences on the view that "gunmen and their supporters, if they are guilty, are a public health hazard, hazardous to everybody's health, so what to do with public health hazard, quarantine them". The learned trial judge noted the seriousness of the charges against the appellant although he did not seek to make any distinction in mitigation between primary and secondary offenders.

[23] In **Kirk Callender v R** SCCA No 101/2008 (delivered 29 September 2008) the appellant was convicted on four counts on an indictment charging him with illegal possession of a firearm, abduction, rape and buggery. He was given respective sentences of 15, seven, 15 and five years with the sentence on the fourth count to run consecutively to the rest. This court ordered all the sentences to run concurrently. Similarly, in **Kenneth Christie v R** SCCA No 181/2006 (delivered 19 June 2009) the court, having made adjustments to the sentences for illegal possession of firearm, robbery with aggravation and indecent assault, ordered that the sentences on all three

counts of the indictment were to run concurrently and not consecutively, as the trial judge had ordered.

[24] **Kirk Mitchell v R** was another case in which the appellant was convicted on an indictment which charged him with three counts including illegal possession of firearm, shooting with intent and wounding with intent. The sentences imposed by the learned trial judge were seven, 15 and 15 years on each respective count. The two 15 year sentences were to run concurrently but the seven year sentence was to run consecutively.

Brooks JA (Ag) (as he then was) did an extensive survey of the Jamaican as well as some English authorities before distilling a number of applicable principles such as:

> "a. Where offences were all committed in the course of the same transaction, including the average case where an illegally held firearm is used in the commission of an offence, the general practice is to order the sentences to run concurrently with each other – (**Walford Ferguson** [SCCA No. 158/1995 delivered 26 March 1999]).
>
> …
>
> f. Even where consecutive sentences are not prohibited, it will usually be more convenient, when sentencing for a series of similar offences, to pass a substantial sentence for the most serious offence, with shorter concurrent sentences for the less serious ones (**Walford Ferguson**).
>
> g. Although it is unlikely to be the case, in matters being tried in the superior courts, if the maximum sentences allowed by statute, do not adequately address the egregious nature of the offences, then consecutive

> sentences, still subject to the 'totality principle' may be considered – (**R v Wheatley** [1983) 5 Cr R(S) 417], **R v Harvey** [2006] 2 Cr App (5) 47])."

[25] These principles demonstrate that the usual course in cases such as the instant one is not to impose consecutive sentences unless there is some element of the offences that is so egregious as to attract that kind of sanction. Even when this is the case, the sum of all the sentences must be scrutinized under the rigour of the totality principle in order to ensure that "viewed globally, the sentence is still not manifestly excessive" (**R v Delroy Scott** [1989] 26 JLR 409).

[26] The learned trial judge did give reasons for imposing consecutive sentences. However, his reasons in the circumstances do not justify the imposition of having the sentences run consecutively.

[27] As stated, we refused the application for leave to appeal against conviction but allowed the appeal against sentence in part.