[2022] JMCA Crim 68

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MR JUSTICE D FRASER JA
THE HON MISS JUSTICE SIMM0NS JA

SUPREME COURT CRIMINAL APPEAL NO 21/2015

DESMOND LAWRENCE v R

Leroy Equiano for the applicant

Miss Ruth-Anne Robinson for the Crown

8 and 9 December 2022

ORAL JUDGMENT

D FRASER JA

Introduction

[1] On 30 March 2015, the applicant, Mr Desmond Lawrence, 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 of the Offences Against the Person Act. On the same day, he was sentenced to seven years' imprisonment for the offence of illegal possession of firearm and 15 years' imprisonment for the offence of shooting with intent.

The case for the prosecution

[2] The case for the prosecution in summary is that on 6 October 2013, between 2:15 pm and 2:30 pm, the complainant, Romero Errar, was walking on the road in the vicinity of the intersection of Beeston Street and Love Lane in the parish of Kingston, when he

heard "click, click, click", behind him. He looked around and saw a man he knew before as Desmond (the applicant) pointing a gun at him. Then the complainant heard "blou, blou, blou", which sounded like gunshots and then three more sounds of "click, click, click". The complainant heard the applicant say, "Pussy yuh fi dead". The complainant fell and then got up and ran past his father who was close by at a shoemaker's shop playing cards.

[3] The complainant testified that the applicant was known to him for over a year prior to the incident and that they used to drink liquor and smoke weed together. He said the applicant was someone he would call to. He indicated that he had seen the applicant on 3, 4 and 5 September and had last seen him before the incident the very morning of 6 September. The complainant further indicated that at the time of the incident, when he looked over his shoulder after he heard the clicking sound, he saw the applicant at a distance of 25 feet away and that at one point he actually looked into the applicant's eyes. He pointed out the applicant on an identification parade on 16 October 2013.

[4] The complainant's father, Sydney Errar, also gave evidence for the prosecution. At the time of the incident, he was sitting among some men playing cards at a table on Beeston Street, beside the shoemaker's shop. He indicated that the complainant ran past, hit the table and said "Daddy" and he saw the applicant, who he knew as Dezzy or Desmond, behind the applicant. The applicant uttered three expletives and said "Boy you fi dead" and then he heard about four or five shots go off. He said the applicant passed him at a distance estimated at 9 feet when he was passing to fire the shots. The applicant also passed him on his way back to Love Lane at a distance estimated at about 4 to 5 feet. He saw the applicant sideways when he passed him first and then front way when he was returning towards Love Lane. He estimated that he saw the applicant's face for a total of a minute and a half to two minutes. The learned trial judge, however, noted in her summation that he admitted in cross-examination to holding his head down at some point to avoid being seen by the assailant. Mr Errar indicated that he had known the applicant more than six months before the incident as he would see him all the while

down Love Lane, but he was not a person he would talk to. He pointed out the applicant on a video identification parade on 16 October 2013.

[5] The applicant was arrested on the same day of the incident, 6 October 2013, when he attended the Kingston Central Police Station to report on a condition of bail in another matter. On 17 October 2013, the applicant was charged with the offences of illegal possession of firearm and shooting with intent. On caution he said, "a which boy say me shoot after him?"

The case for the defence

[6] The applicant gave sworn evidence and he denied being in the community at the time of the shooting. His evidence was that he had left the community at about 1:00 pm with his friend Corey Baker and that, before being picked up by Baker, he was with his baby and Ms Nindia James, the baby's mother, at her home. Both Corey Baker and Ms James gave evidence in support of the applicant's alibi. In cross–examination, the applicant admitted knowing both the complainant and his father but maintained they were not persons he spoke to.

The application for leave to appeal

[7] On 10 April 2015, the applicant filed an application for permission to appeal against conviction and sentence on the prescribed Form B1, which stated the following grounds:

> "a. Misidentify by the Witness: That the Prosecution Witness wrongfully identified me as the person or among any persons who committed the alleged crime.
>
> b. Lack of Evidence: - That the Prosecution failed to present to the court any "concrete" evidence (material forensic or scientific) evidence to link me to the alleged crime.
>
> c. Unfair Trial: That the evidence and testimonies upon which the Learned Trial Judge relied on for the purpose to convict me, lack facts and credibility thus rendering the verdict unsafe in the circumstances.

> d. Miscarriage of Justice: - That the court failed to recognize the fact that I had nothing to do with the alleged crime for which I was wrongfully convicted of."

[8] His application was refused by a single judge of this court on 30 July 2018.

The renewed application

[9] Counsel for the applicant, in advancing the applicant's renewed application, indicated in his written submissions that the two substantive issues in this matter were identification and credibility. He observed that the learned trial judge accepted the Crown's witnesses as being credible and rejected the evidence of the applicant and his witnesses. He submitted that once the learned trial judge accepted the Crown's witnesses as being credible, the issue was now whether the identification evidence was sufficient to support a conviction and whether the necessary legal caution was taken by the learned trial judge in her analysis of the evidence and final decision.

[10] He candidly indicated that having examined the learned trial judge's summation he could find no fault with her approach and analysis of the facts. He submitted that the learned trial judge properly addressed the legal issues and clearly demonstrated her appreciation of the inherent dangers associated with visual identification. He, therefore, did not advance any argument in support of the original grounds of appeal which challenged the applicant's conviction.

[11] Mr Equiano, however, sought and obtained the court's leave to appeal against the sentences and to advance the following supplemental ground of appeal:

> "Breach of the applicant's constitutional rights for a trial within a reasonable time: The applicant filed Notice of Appeal on April 10, 2015 and the hearing of the appeal is delayed by more than seven years through no fault of the applicant."

Submissions

Counsel for the applicant

[12] Counsel for the applicant relied on Chapter III of the Constitution of Jamaica (Charter of Fundamental Rights and Freedom) Section 16(1), which states:

> "16(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

[13] He pointed out that in **Evon Jack v R** [2021] JMCA Crim 31, Brooks P stated that:

> "The term "hearing" has been accepted as incorporating, not only trials, but also post-conviction proceedings. That interpretation was established even before the promulgation of the Charter. The Privy Council, in **Tapper v Director of Public Prosecutions of Jamaica** [2012] UKPC 26; [2012] 1 WLR 2712 ('**Tapper v DPP**'), endorsed that position, saying at paragraph 9 of its judgment:
>
> > '…the Court of Appeal [of Jamaica] accepted, and there is no dispute, that [the right to a fair hearing within a reasonable time by an independent and impartial court established by law] extends to post-conviction delay.'"

[14] Counsel submitted that the applicant having been arrested on 6 October 2013, he has remained in custody ever since. He was convicted and sentenced on 30 March 2015. On 10 April 2015, he signed a prescribed Court of Appeal Form B1. Counsel complained that the applicant was not credited with the time spent in pre-sentence detention and that more than seven years have elapsed between the filing of the notice of appeal and the hearing of the appeal. He contended that none of the delay can be attributed to the applicant.

[15] He observed that though what constitutes a "reasonable time" is not stated in the Constitution, the term has been interpreted in decided cases. In that regard, he cited

Melanie Tapper v The Director of Public Prosecutions [2012] UKPC 26, where a period of five years' delay between sentence and the hearing of the appeal was deemed as excessive and a constitutional breach.

[16] Counsel pointed out that in this court's decision in **Techla Simpson v R** [2019] JMCA Crim 37, a delay of eight years between conviction and appeal was deemed a constitutional breach and in **Tussan Whyne v R** [2022] JMCA Crim 42, this court held that an eight-year pre-trial delay was a constitutional breach.

[17] Counsel, therefore, submitted that the applicant is constitutionally entitled to have his appeal heard within a reasonable time. He emphasised that a delay of seven years between conviction and the hearing of this appeal is a breach of the applicant's constitutional right to have his case determined by an impartial court within a reasonable time

[18] Counsel submitted that possible remedies included a declaration that the applicant's constitutional right had been breached and also a reduction in the sentences. He cited the case of **Jahvid Absolam et al v R** [2022] JMCA Crim 50, where this court granted a reduction in sentence of two years as the remedy for a post-conviction delay of eight years.

[19] He asked that this application for leave to appeal be granted, that the hearing of the application be treated as the hearing of the appeal, the appeal be allowed and the applicant's sentences adjusted in light of the constitutional breach.

Counsel for the Crown

[20] In response, counsel for the Crown submitted that, in effect, the applicant had two grounds of appeal. Ground one, which complained about the constitutional breach caused by the seven-year delay in the hearing of the appeal, and ground two being that the applicant had not been credited with time spent in custody awaiting trial.

[21] Concerning the first issue, counsel's written submissions focussed mainly on pre-trial delay while the challenge of the defendant was geared towards post-conviction delay. However, in her oral submissions, she contended that given the circumstances of this case there was no evidence of any undue delay suffered by the applicant. It was further submitted that the applicant was not prejudiced in any way, neither was there any miscarriage of justice.

[22] Regarding the failure of the learned trial judge to give credit for the time spent by the applicant in custody awaiting trial, Crown Counsel cited the case of **Daniel Roulston v R** [2018] JMCA Crim 20 where the court at para. [17], adopted the principle outlined in **Meisha Clement v R** [2016] JMCA Crim 26, that credit should be given for time spent in custody awaiting trial.

[23] Counsel also cited **Omar Green v R** [2022] JMCA Crim 58, where McDonald-Bishop, JA said at para. [15]:

> "This court has established in several cases that it does not have the jurisdiction to go below the statutory minimum to make allowance for time spent in pre-sentence custody (see for example **Ewin Harriott v R**). Consequently, the sentence of 15 years '[sic] imprisonment at hard labour on count three for the offence of shooting with intent cannot be disturbed."

[24] It was pointed out that, consequently, the applicant in **Omar Green v R** was credited for the two years and six months he spent in custody awaiting trial, in respect of the offences of illegal possession of firearm and assault with intent to rob, but was not similarly credited in respect of the offence of shooting with intent.

[25] Crown Counsel acknowledged that, in the case at bar, the applicant spent one year and four months in custody before the trial commenced. She submitted that the applicant ought to have been credited for the time spent in custody awaiting trial in relation to the sentence imposed for the offence of illegal possession of firearm. She advanced that the sentence of seven years' imprisonment on that count should be set

aside and a sentence of five years and eight months' imprisonment be substituted therefor.

[26] Regarding the count for shooting with intent in respect of which the statutory minimum sentence of 15 years' imprisonment was imposed based on previous authority, Crown Counsel maintained that the court was not at liberty to disturb that sentence.

Analysis

The application for leave to appeal against conviction

[27] With regard to the conviction of the applicant for the offences of illegal possession of firearm and shooting with intent, we are in full agreement with the stance taken by counsel for the applicant, who declined to advance any arguments on the initial grounds filed.

[28] As noted by the learned single judge of appeal, who refused leave to appeal, and whose opinion we unhesitatingly adopt:

> "The primary issues in the case for the consideration of the learned trial judge, in the light of the applicant's defence of alibi, were the correctness of the civilian witnesses' purported recognition of the applicant and the credibility of the prosecution's witnesses on the one hand, and that of the applicant and his witnesses, on the other.
>
> The learned trial judge gave herself the requisite directions in law on all critical aspects of the case, in particular, the evidence relating to visual identification/recognition and the defence of alibi. The summation reveals that she approached her assessment of the evidence with the caution required by law. There is no basis on which her directions in law and findings of fact can justifiably be impeached.
>
> The verdicts are, therefore, reasonable, having regard to the evidence and so the conviction for each offence is safe and cannot justifiably be disturbed by this court."

The application for leave to appeal against sentence

[29] Turning now to the application for leave to appeal against sentence, it is useful to note at the outset that, as stated by Edwards JA in **Tussan Whyne v R,** at para. [94], "time spent in pre-trial custody and redress for a breach of the right to a fair trial within a reasonable time are two discrete issues".

[30] In relation to the first of those two discrete issues, it is now well settled that a convicted defendant should be given full credit for time spent in pre-sentence custody, and that it is not sufficient for the trial judge to merely indicate that such custody was "taken into account" in determining the sentence: see for example **Daniel Roulston v R**; **Meisha Clement v R**; **Callachand and Another v State** [2009] 4 LRC 777 and **Romeo Da Costa Hall v The Queen** [2011] CCJ 6 (AJ).

[31] However, as pointed out by counsel for the Crown, this court has also held that such credit for pre-sentence custody may not be applied, where to do so would result in the sentence falling below a statutory minimum: see **Omar Green v R** and **Ewin Harriott v R**.

[32] In very brief sentencing remarks, the learned trial judge made no reference to the one year and four months the applicant spent in custody. Therefore, in keeping with the authorities cited, on count one, where the applicant was sentenced for illegal possession of firearm, the applicant should be credited with the time spent in pre-sentence custody. He would, however, be unable to benefit from a similar credit on count two, where he was sentenced to the statutory minimum for the offence of shooting with intent.

[33] With regard to the second discrete issue, redress for a breach of the right to a fair trial within a reasonable time, it is important to have regard to the history of the matter in this court to provide the background for appropriate analysis.

[34] An examination of the court file has revealed that, after the applicant was convicted, on 10 April 2015, he applied for the grant of legal aid for an attorney to be

assigned to him. Notice of his application for permission to appeal his conviction and sentence was received in this court on 24 April 2015. On that same date, the transcript was requested by the Registrar of this court from the Clerk of Court at the Gun Court. On 26 July 2017 this court received the transcript. On 28 July 2017, a letter was sent by the Registrar of this court to the Registrar of the Supreme Court for the attention of the Gun Court Registry, indicating that the transcript was incomplete due to the absence of certain documents. On 30 July 2018, leave to appeal conviction and sentence was refused by a single judge of this court. On 20 September 2018, the applicant was notified of the decision of the learned single judge of appeal refusing his application for leave to appeal against both conviction and sentence.

[35] The next significant event for these purposes occurred on 12 November 2021, when it was noted that the file was found in a drawer for cases "taken off list" where it had been misfiled. There was no notice of hearing seen either on the file or on the computer system. On 13 September 2022, the applicant was initially assigned an attorney at law. That assignment, however, proved to be inconvenient and he was reassigned present counsel on 10 November 2022. The matter was then set for hearing on 5 December 2022.

[36] Section 16(1) of the Constitution of Jamaica provides as follows:

> "16(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

[37] As pointed out by counsel for the applicant the term "hearing" encompasses both trials and post-conviction proceedings: see **Melanie Tapper v The Director of Public Prosecutions** and **Evon Jack v R**.

[38] An allegation by an applicant that his constitutional right to a fair hearing within a reasonable time has been breached, requires the conduct of a careful examination of the

circumstances and effect of the allegation. As stated by Edwards JA in **Tussan Whyne** at para [81]:

> "In the case of **Flowers v The Queen**, the Privy Council considered several factors which it found relevant in assessing whether an appellant's right had been breached. These include the length of the delay, the reason for the delay, the assertion of Charter rights by the appellant, and the prejudice to the appellant. A long period of delay, the Board said, would be 'presumptively prejudicial' and ought to trigger an inquiry into the other factors."

[39] It was noted in the case of **Julian Brown v R** [2020] JMCA Crim 42, which reviewed several relevant cases on this issue that, "for there to be a breach of section 16(1) of our Charter, there must be evidence that the delay complained about is due to the action or inaction of organs of the State" (see para [86]).

[40] The transcript of the trial was initially received in this court two years and four months after the applicant was sentenced, but was then incomplete. There is no indication when it was completed, however, the ruling of the learned single judge of appeal was made on 30 July 2018. The time absorbed until the file was found in a drawer, seems to have been the result of the file being misplaced. After the file was located, the matter appears to have been set for hearing based on the normal processes and schedule of this court.

[41] In the circumstances, the resulting seven-year delay, no part of which can properly be attributed to the applicant, appears to be "presumptively prejudicial". The question then arises whether the applicant has suffered actual prejudice occasioned by this delay.

[42] In **Flowers v The Queen**, in the context of a complaint of pre-trial delay, the Judicial Committee of the Privy Council also noted that the right to a fair trial within a reasonable time, sought to avoid prejudice to a defendant by preventing oppressive pre-trial incarceration; minimising anxiety and concern of the defendant; and most importantly, limiting the possibility that the defence would be impaired. None of those

factors are, however, demonstrated to be relevant in this case which is being considered in the context of post-conviction delay.

[43] Therefore, regarding prejudice to the applicant, counsel submitted that the applicant having a pending application for leave to appeal would have been deprived of participating in certain rehabilitative programmes reserved for persons serving a sentence, in which category the applicant did not fall, because of his outstanding application. He also emphasized that if the court accepted that the applicant's constitutional right had been breached, he maintained that the appropriate remedy was a reduction of sentence notwithstanding the existence of the statutory minimum sentence applicable to the offence of shooting with intent at count 2. He outlined that if the applicant received a reduction of two years, he would be eligible for early release in a matter of months.

[44] Of paramount importance is that the transcript of the applicant's trial was made available within a reasonable time. By 30 July 2018, the learned single judge of appeal had provided her ruling dismissing the applicant's application for permission to appeal conviction and sentence. The applicant was informed of this decision under two months later. He therefore would not have had any "anxiety" premised upon a reasonable expectation of a successful appeal, that was stymied by the administrative mishap which later befell the file. The situation may have had a different colour if, for example, the transcript had been unavailable, or the learned single judge had ruled that leave to appeal should have been granted. In both of those scenarios the applicant might well have had some anxiety — in the first instance concerning the absence of progress in the application and in the second, he would be an appellant anxious (in the sense of being eager) for his matter to be heard, with an expectation of at least some success at the appeal hearing.

[45] Significantly, also, there was no affidavit evidence from the applicant to support counsel's assertion of actual prejudice. In the circumstances of this case, where the presumption of innocence has been removed, there is no death sentence hanging over the applicant's head and delay has not jeopardised his ability to effectively advance his

appeal, post-conviction prejudice is not as easy to infer as in the case of pre-trial prejudice. It is worth reinforcing the fact, that, from 2018 the applicant knew he had no viable ground to argue against conviction and that the sentences were not manifestly excessive. This in a context where one of the counts on which he was convicted was subject to a statutory minimum sentence which he, in fact, received.

[46] The fact of the statutory mandatory minimum sentence is, therefore, not a feature of concern in these circumstances, the applicant having been the beneficiary of quite lenient sentences, given the seriousness of the offences and the overwhelming evidence deployed against him. These are points of some moment given counsel's reliance on the case of **Jahvid Absolam et al v R,** in which the appellants were successful in having their convictions overturned on one of the counts on the indictment.

[47] Therefore, in all the circumstances of this case, while the court acknowledges and regrets the delay apparently caused by an administrative oversight in the court's registry, the court does not find that a breach of the applicant's constitutional right to a fair hearing within a reasonable time, has been established.

[48] In the premises, the application for leave to appeal sentence is allowed only in order to permit the applicant to receive credit on count one of the indictment, which charges him with the offence of illegal possession of firearm, for the one year and four months he spent in pre-sentence custody.

Disposition

[49] Accordingly, the orders of the court are as follows:

i) The application for leave to appeal conviction is refused.

ii) The application for leave to appeal sentence is allowed, in part, and the hearing of the application for leave to appeal sentence is treated as the hearing of the appeal.

iii) The sentence of seven years' imprisonment on count one for the offence of illegal possession of firearm is set aside and substituted therefor is a sentence of five years and eight months' imprisonment, having credited the appellant with the period of one year and four months, he spent in pre-sentence custody.

iv) The sentence of 15 years' imprisonment on count two for the offence of shooting with intent is affirmed.

v) The sentences are to be reckoned as having commenced on 30 March 2015, the date they were imposed and are to run concurrently.