[2012] JMCA Crim 57

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 75/2009

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA

WILBERFORCE MATTISON v R

Gladstone Wilson for the applicant

Mrs Karen Seymour Johnson and Broderick Smith for the Crown

8, 10 March, 15 April 2011 and 20 December 2012

DUKHARAN JA

[1] The applicant was convicted and sentenced in the High Court Division of the Gun Court held in Kingston on 8 July 2009, for the offences of illegal possession of a firearm and shooting with intent. He was sentenced to 10 years and 14 years imprisonment respectively with sentences to run concurrently.

[2] An application for leave to appeal conviction and sentence was considered on 28 December 2010 by a single judge of this court who refused leave. This is a renewal of that application.

[3] We heard arguments on 8 and 10 March 2011 and reserved our decision to 15 April 2011 when we dismissed the application, with sentences to commence from 8 October 2009. We promised to put our reasons in writing, and this we now do.

Prosecution's Case

[4] The relevant facts of the prosecution's case are that on 13 June 2007, at about 11:00am, a team of 10 police officers went to 2 Dennis Avenue in Gregory Park, St Catherine. They were divided into two teams. One team which included Corporal Steven Taite approached the premises from the front, while the other team approached the premises from the rear and included Corporal Rodney Matthews and District Constable Jason McKay. The team which approached the premises from the rear walked along a lane that was at the back of the premises.

[5] On the arrival of the police team that went to the front, two men including the applicant were seen standing in the yard. Corporal Taite shouted at the men who pulled guns from their waistbands, pointed them in the direction of the officers and fired at Corporal Taite and his team. The fire was returned in the direction of the men who ran off in separate directions. The applicant ran towards the rear of the premises. The other man was subsequently discovered suffering from gunshot injuries with a firearm beside him.

[6] While at the back of the premises, Corporal Matthews and District Constable McKay saw the applicant running towards them from the direction of the front of the premises where they had heard explosions. Corporal Matthews observed a firearm in the hand of the applicant. Both officers were alongside a fence outside the premises when they saw the applicant. As the applicant reached near the officers he fired the firearm in their direction. The officers took cover while Corporal Matthews returned the fire. The applicant managed to escape. The applicant was subsequently apprehended and pointed out on an identification parade where he was charged for illegal possession of firearm and shooting with intent.

[7] District Constable McKay testified that he knew the applicant before the date of the incident as he used to see him from about the year 2000 at the stables at Caymanas race track. On the date of the incident he said the applicant came as close as 10 feet from the fence where he was. He was able to see him for about 10 seconds and saw his face and entire body. Corporal Matthews pointed out the applicant on an identification parade.

Defence Case

[8] The defence of the applicant is one of denial. He denied that he had a gun or that he shot at the police.

Grounds of Appeal

[9] Mr Wilson abandoned the original grounds of appeal except ground 5, which reads "that the verdict was unreasonable having regard to the evidence". He sought and was granted leave to argue the following supplemental grounds:

> "1. That the learned trial Judge failed to establish that she had jurisdiction by using the evidence of Corporal Taite which was later rejected-to dismiss three (3) of (5) counts on the indictment.
>
> 2. That the Learned Trial Judge in her summing up disregarded important elements of the evidence which showed significant difficulties of identification brought out in [sic] cross-examination of both Matthews and McKay. This lack of thorough judicial treatment denied the appellant [sic] of a fair and balanced consideration of the evidence in this case.
>
> 3. Although there is no evidence that Cpl. Matthews indicated exactly where he was standing in the lane before and during the shooting (although asked), the learned Trial Judge invited the witness to identify from a photograph taken from inside the yard where he said he was looking over the fence from outside.
>
> 4. The evidence of Cons. McKay does not comport with Count 5 on the Indictment.
>
> 5. …
>
> 6. That the learned trial judge should have voluntarily recused herself from trying the case after admitting knowing a key witness and his family in circumstances where the evidence of the said witness was expressly accepted to convict the appellant [sic]. It is this specific action of the judge that could lead to the perception that judicial bias was present."

[10] Mr Wilson sought to argue grounds 1, 3, 4, 6, 2 and 5 in that order.

Ground 1

> "1. That the learned trial Judge failed to establish that she had jurisdiction by using the evidence of Corporal Taite which was later rejected-to dismiss three (3) of five (5) counts on the indictment."

[11] It was submitted by Mr Wilson that the learned trial judge failed to establish that she had jurisdiction when she rejected the evidence of Corporal Taite on three counts on the indictment in which a firearm was used. She also rejected the evidence of identification of the applicant by Corporal Taite.

[12] The applicant was originally charged on an indictment containing five counts, which were as follows:

(1) illegal possession of firearm,

(2) illegal possession of ammunition,

(3) shooting with intent,

(4) illegal Possession of firearm,

(5) shooting with intent.

The prosecution was relying on two shooting incidents close to each other involving the applicant. In relation to counts 1 to 3, the learned trial judge stated at page 303 of the summation:

> "… having looked at Corporal Tate's [sic] evidence, I find that as regards that incident at the front involving Corporal Tate and he said the other officer, Morgan was with him and he said two men shot at him. I am not satisfied so that I feel sure that he was being [sic] able to make an accurate

> and true identification of this accused man. And that is as regards Corporal Tate [sic], because he was the witness who spoke about what was happening in the shooting at the front of the premises. So in relation to counts 1, 2 and 3, I find the accused man not guilty in relation to those three counts of the Indictment."

The applicant, however, was convicted on the remaining two counts.

[13] It is clear that this appeal relates to the shooting incident involving Corporal Matthews and District Constable McKay. It is therefore the evidence given by these police officers that would be relevant to the learned trial judge in deciding whether she had jurisdiction to try the offences in question. The learned trial judge, in her summation, recounted the evidence given by both officers and concluded that she in fact had jurisdiction to try the matters. This is what the learned trial judge said at pages 285 - 286 of the transcript:

> "So that, in relation to Counts 1, 2 and 3 I have evidence to satisfy me that I have jurisdiction in relation to Counts 4 and 5. The evidence of Corporal Matthews and District Constable McKay is that the accused man shot at them and as he shot at them he ran at the back of the premises. They said that they saw the firearm in his hand and they said that they heard loud explosions near to the police officers and they said that this object was pointed at them and they heard loud explosions sounded [sic] like gunshots. So that in those circumstances I am satisfied that I have jurisdiction to try the Counts as well as Counts 4 and 5 of the Indictment" (emphasis added)

The fact that the learned judge rejected the identification evidence of Corporal Taite has no effect on this issue. It is therefore our view that this ground has no merit.

[14] It can be seen therefore that the learned trial judge was not satisfied that Corporal Taite was in a position to properly identify the applicant as it related to counts 1, 2 and 3.

Ground 3

> "3. Although there is no evidence that Cpl. Matthews indicated exactly where he was standing in the lane before and during the shooting (although asked), the learned Trial Judge invited the witness to identify from a photograph taken from inside the yard where he said he was looking over the fence from outside."

[15] On this ground, Mr Wilson submitted that because Corporal Matthews failed to indicate exactly where he was standing in the lane before and during the shooting, the learned trial judge ought not to have invited the witness to identify his location from a photograph tendered as an exhibit.

[16] It was Corporal Matthews' evidence that while he was in the lane at the rear of the premises, he looked over the fence that bordered the property and saw the applicant running towards him and his colleague's direction. He also stated that after the shooting subsided, he chased the applicant down the lane. It is therefore not accurate for counsel to submit that Corporal Matthews had failed to indicate where he was standing during and after the shooting.

[17] In our view, the learned trial judge was merely seeking clarification from a witness as to where he was standing. Corporal Matthews had already indicated where he was in the lane relative to the premises. The important question was assessing the

distance from where he said he was, to where he had said he saw the applicant running towards him. The exhibit in question did not show the location of the lane so it would not have assisted the court in addressing this complaint of counsel. However, it was relevant in showing the learned trial judge where Corporal Matthews was when he said that he saw the applicant. We are therefore of the view that this ground is without merit.

Ground 4

> "4. The evidence of Cons. McKay does not comport with count five on the indictment."

[18] It was submitted by Mr Wilson that because no warheads were found and because there was no evidence of damage to the surrounding structures in the immediate location of the shooting at the back of the premises, then a charge of shooting with intent could not be sustained.

[19] We are not in agreement with counsel on this ground. The offence of shooting with intent does not require proof that surrounding structures are destroyed or the finding of warheads. While this would give rise to a much stronger conclusion of a shooting, the lack of such evidence is not conclusive that there was no shooting. In the absence of such evidence, a trial judge may have to depend on circumstantial evidence. Corporal Taite, in his evidence, testified that he heard explosions coming from the back of the premises. The learned trial judge found this fact to be a credible statement and used it to come to the conclusion that there was in fact a shooting incident at the back

of the premises as described by Corporal Matthews and District Constable McKay. This certainly was not an unreasonable conclusion. We see no merit in this ground.

Ground 6

> "6. That the learned trial judge should have voluntarily recused herself from trying the case after admitting knowing a key witness and his family in circumstances where the evidence of the said witness was expressly accepted to convict the appellant [sic]. It is this specific action of the judge that could lead to the perception that judicial bias was present."

[20] On this ground, Mr Wilson submitted that the learned trial judge failed to recuse herself voluntarily from trying the case, after having admitted that she knew the prosecution's key witness (District Constable McKay). This, he said, gave rise to the suggestion of judicial bias. He referred to the cases of **Locabail (UK) Ltd v Bayfield Properties Ltd** [1999] EWCA Civ 3004, **Alexander Morrison and Anor v AWG Group Limited and Anor** [2006] EWCA Civ 6 and **R v Alan I** [2007] EWCA Crim 2999.

[21] In response, Mr Smith for the Crown submitted that the learned trial judge indicated that she did not know the witness very well but knew his father. She indicated that she did not have a difficulty in hearing the case. He further submitted that the defence reassured the learned trial judge that there was no issue in her presiding over the case. He submitted that the defence counsel had not shown that there was any real danger of bias and that even if she knew the witness, that was not enough to show real bias.

[22] In **Locabail (UK) Ltd v Bayfield Properties Ltd**, the court set out guidelines about when a judge should recuse himself/herself for reasons of bias, apparent bias or perceived bias. The court ruled that a real danger of bias might arise if there were a personal friendship or animosity with any member of the public involved in the case and whose credibility would be significant in the decision of the case. The proximity of the relationship is therefore an important consideration in deciding whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. The issue of proximity is also important in a small country such as Jamaica where it is not uncommon to know of somebody who is affiliated with someone you know. It cannot be denied that the learned trial judge indicated that she knew the father of District Constable McKay (page 8 of the transcript) and that she did not know the witness very well. The witness was therefore not a person with whom the learned judge was personally acquainted. It is clear therefore that such a situation would not lead to a conclusion of apparent bias.

[23] Further, it was also stated in **Locabail** that if the judge had made an appropriate disclosure to the parties of matters which may give rise to a real danger of bias, and a party chooses not to raise an objection to the judge hearing or continuing to hear the matter, that party would be estopped from complaining that the matter disclosed of gives rise to a real danger of bias. In the instant case, counsel's failure to object to the learned trial judge hearing the matter amounted to acquiescence on his part. Further, in light of his indulgence in having the learned trial judge preside over the case, he cannot now justifiably complain.

[24] Mr Wilson referred to **Alexander Morrison and Anor v AWG Group Limited and Anor**. However, that case is clearly distinguishable from the instant case. In that case the trial judge said, "Our children are friends and we have dined with each other on a number of occasions." In that case, a witness was well known to the judge and their families had dined together. It was held that it would be unacceptable for the judge to continue sitting.

[25] It is therefore clear that in the instant case, the learned trial judge did not know the witness that well and indicated that fact to counsel for the defence who never raised the issue. Accordingly, a reasonable bystander being apprised of all the facts would not accuse the learned trial judge of bias. We are of the view that there is also no merit in this ground.

Ground 2

> "2. That the Learned Trial Judge in her summing up disregarded important elements of the evidence which showed significant difficulties of identification brought out in [sic] cross-examination of both Matthews and McKay. This lack of thorough judicial treatment denied the appellant [sic] of a fair and balanced consideration of the evidence in this case."

[26] Mr Wilson's complaint on this ground was that the learned trial judge was very selective in what evidence to accept and what to reject instead of dealing with the legal consequences of the whole evidence, on the same facts, given by these witnesses. He submitted that the court should not 'cherry pick' the evidence in favour of the Crown or defence. He further submitted that there were several weaknesses in the identification

evidence given by Corporal Matthews and District Constable McKay which should have been considered by the learned trial judge. In sum, these are some of the weaknesses put forward by Mr Wilson that should have been considered by the learned trial judge:

(1) The credibility of Corporal Matthews when he claimed to have seen the applicant was brought into issue when he gave an unsatisfactory response to the question whether he knew 2 Dennis Avenue before.

(2) There was a contradiction between Corporal Matthews and District Constable McKay on the issue of where the premises is located in relation to the lane.

(3) There was a clear inconsistency between Corporal Matthew's evidence and his previous statement in that in his evidence he said, "As I looked over the zinc fence I heard a barrage of gunshots and I saw the accused man running towards me", but he failed to mention this in his previous written statement.

(4) The judge did not deal with sufficiency, the evidence of District Constable McKay when he testified of a recent sighting of the applicant. No corroborating evidence was put forward by the Crown to support this recent sighting in circumstances where the applicant was saying that he was in custody around the time the witness said that he had seen him.

(5) The learned trial judge failed in her summation to analyse the glaring disparity between the description of the incident related by Corporal Taite on the one hand and Corporal Matthews and District Constable McKay on the other hand. Both accounts are incongruous with each other and cannot be reconciled.

Counsel referred to the cases of **R v Shippey** [1988] Crim LR 767 and **R v Wilbert Daley** SCCA No 188/1986 delivered on 13 July 1988.

[27] Where identification is a live issue, a trial judge ought to be guided by the **Turnbull** guidelines. Both in **R v Turnbull** [1976] 3 WLR 445 and **R v Oliver Whylie** [1977] 25 WIR 430, it has been held that in such cases the judge should deal adequately with the strength and weaknesses of the identification evidence. However, there is no requirement for the judge to make a 'list' of the weaknesses in the identification evidence. The essential requirement is that the weaknesses should be critically analysed where this is appropriate. In her summation, the learned trial judge (at pages 299 - 301) took great care in analysing the circumstances in which the identification of the applicant came to be made. She referred to the circumstances in which District Constable McKay said he identified the applicant. Since District Constable McKay had also said in his evidence that he had known the applicant before, the learned trial judge also looked at how the constable came to know the applicant and the frequency of the constable seeing the applicant. At pages 292-293 of the summation, the learned trial judge further looked at the circumstances in which Corporal Matthews came to have identified the applicant including the identification parade itself.

[28] A judge sitting alone is entitled to accept or reject the evidence given by witnesses. In this case, the learned trial judge accepted the quality of the identification evidence of both Corporal Matthews and District Constable McKay. In our view, both witnesses had sufficient time to see the applicant as the conditions were favourable to render a clear identification of the applicant.

[29] After a careful analysis the learned trial judge, in our view, took a balanced view of all the witnesses' evidence and also came to the conclusion that the identification evidence of Corporal Taite was not enough to convict the applicant on the charges related to the incident. We are therefore of the view that there is no merit in this ground.

Ground 5

> "5. That the verdict was unreasonable having regard to the evidence."

[30] Mr Wilson in his written submission on this ground submitted that the learned trial judge dealt only once with any question put by defense counsel to four witnesses at the trial. He further submitted that no mention was made of five exhibits submitted and accepted into evidence on behalf of the applicant, in circumstances where other exhibits for the Crown figured prominently in what made the court feel sure. The summation by the learned trial judge, he said, was substantially, if not totally, about the Crown's case.

[31] Mr Smith, for the Crown, in his response submitted that the learned trial judge examined all the exhibits in the case and was mindful of them. He said the court rejected the defence and accepted the prosecution's case. He referred to the case of **R v Joseph Lao** (1970] 12 JLR 1238.

[32] A judge's summation should be looked at in the light of the course and conduct of the trial and the matters raised by the Crown and defence respectively - see **R v Blackburn** [1955] 39 Cr App Rep 84.

[33] The identification of the applicant and the credibility of the witnesses were the main issues to be dealt with in the case. The learned trial judge, as stated before, adequately dealt with both issues and did not fail to consider the issue of identification in accordance with the **Turnbull** guidelines. The identification evidence of the prosecution's witnesses was readily accepted by the learned trial judge and she gave no weight to the unsworn statement of the applicant. We also see no merit in this ground.

[34] For the foregoing reasons, as stated, we dismissed the application.