[2015] JMCA Crim 2

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 94 AND 97/2011

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE MANGATAL JA (Ag)

RASHEME MENDEZ
TIO BAMBERRY v R

William Hines for the applicant Mendez

Dr Randolph Williams for the applicant Bamberry

Miss Maxine Jackson for the Crown

30, 31 July, 12 August, 19 December 2014 and 6 February 2015

DUKHARAN JA

[1] Both applicants were convicted in the Home Circuit Court in Kingston on 7 November 2011, on an indictment charging them with the offences of murder. They were each sentenced on 16 November 2011 to imprisonment for life with a recommendation that they serve a term of imprisonment of 40 years before being eligible for parole.

[2] Both applicants applied to a single judge of this court who refused leave to appeal conviction and sentence. It was the view of the single judge that the main issues in the case were identification, credibility and alibi, which were dealt with adequately by the learned trial judge. This is a renewal of that application before us. On 19 December 2014 we refused the applications for leave to appeal and ordered the sentences to commence from 16 November 2011. These are our promised reasons for that decision.

[3] The relevant facts are that on Monday, 31 August 2009, at about 6:05 pm, in the parish of St Andrew, the sole eye witness, Deno Shand was at home at 9 Wint Road when the deceased Norman Thomas o/c "Johnny Five" came there to see him. The deceased left the premises about 15 minutes later. The witness was standing at a concrete wall which was estimated by him to be about four meters and some inches high. The deceased then left to a shop at 12 Wint Road when he was approached by both applicants at premises number 14 Wint Road. Both applicants, who had guns, opened fire at the deceased. The applicant Mendez o/c "sheedy" said to the deceased "dah pussy hole deh mustn't live, you know dah bwoy yah fi dead". Both applicants then left the scene and went down the road. The deceased received a total of 12 gunshot wounds. On 15 October 2009, the applicant Bamberry was charged for murder following a question and answer session held in the presence of his attorney. A video identification parade was held in which the applicant Mendez was positively identified by the witness. He was also charged with the offence of murder.

[4] Dino Shand, told the court that he was standing by a wall (estimated in court to be about four and a half feet high) cutting down a tree when he saw two men approach the deceased and start to shoot him all over his body. He, the witness was about 15 to 20 metres away. The incident lasted a bit under a minute. He knew both men before that day. He knows the applicant Bamberry as "Pops" and has known him from he was seven years old. They live in the same community. Although he had not spoken to him, the last time he saw him was two days prior to the incident walking along with the other man, who is the other applicant. He knew Bamberry's mother, sister and his fiancée and they all live in the same community.

[5] The other man, the witness knew as "Sheedy" and he was the applicant Mendez. He knew him between five to six years and had seen him moving back and forth in the community.

[6] The witness testified that he saw the faces of the men clearly and there was nothing obstructing his view. The witness said he attended an identification parade on 2 June 2010 at the Central Police Station in Kingston. He identified the applicant Mendez by photograph disclosed by a computer.

[7] The medical evidence given by the pathologist indicated 12 entry wounds from gunshots without gun powder deposition. The cause of death was multiple gunshot wounds.

[8] The investigating officer, Detective Sergeant Dennis Simpson testified that he went to the scene of the shooting of the deceased where he made observations and spoke to residents of the community. On 6 October 2009, he received certain information and went to the Hunts Bay Police Station in Kingston. The applicant Bamberry was pointed out to him. He was asked if he was Tio Bamberry, otherwise called "Pops" to which the applicant answered in the affirmative. Sergeant Simpson identified himself to Bamberry and told him that he was investigating the murder of the deceased and that he, the applicant was involved in the killing. When cautioned, Bamberry said "Oh, the little youth what dem kill round a Wint Road". Sergeant Simpson told him it was his intention to have a question and answer interview done with him. This was duly carried out with 71 questions being asked of Bamberry in the presence of his attorney, Mr Earl Delisser. Sergeant Simpson said that no force, threats or physical abuse was meted out to him. He was subsequently charged for murder. When cautioned he said, "Mi nuh have nothing fi sey".

[9] Sergeant Simpson also testified that on 17 May 2010, he received certain information and went to the Hunts Bay Police Station where the applicant Mendez was pointed out to him. Sergeant Simpson identified himself to the applicant and told him of information received and that he was involved in the murder of the deceased on 31 August 2009 along Wint Road in Kingston. When cautioned, Mendez said, "A over Angels a Spanish Town mi a come from pon a taxi and mi aunty call and tell mi say man dead pon Wint Road." A question and answer interview was subsequently done

with the applicant Mendez. Subsequently, an identification parade was held where Mendez was positively identified as one of the men who shot the deceased.

The defence

[10] Both applicants gave unsworn statements. Tio Bamberry said:

> "My name is Tio Bambury and I live in the Olympic Garden area, in Kingston 11. In the evening of the 31st of August, 2009 … I was in the area watching some 'ballers' playing football. I heard gunshots on Wint Road and I went there and saw a yute call 'Johnny 5' lying on the ground. I had nothing to do with his death. I remain [sic] on the scene when the police came. I know [sic] the yute very well and I have [sic] no reason to do him anything. That's it."

[11] Rasheem Mendez said:

> "Good morning.
>
> My name is Rasheme Mendez. I live at 23 McHenley Crescent. Age 24. I have never been convicted…. I am not a murderer and I didn't murdered (sic) 'Johnny 5'. On August 2009, 31st, I went by my sister house in Spanish Town, in a scheme call [sic] Angels in Spanish Town.... I went by my sister house and talking and talking with my sister… we are [sic] glad to see each other. I turn [sic] to her and sey, It's getting late, mi a goh bring ova di baby now. At dat time, about 6:30, ah take a taxi from my sister house. In di taxi ah get a phone call from mi auntie, sey, "whey yuh deh?" "Mi sey, "Mi inna a taxi a come from ova 'Nicky' wid di baby". As a dun talk to mi auntie, mi baby madda call mi and said, "My yout bring mi pickney come and make haste and come off a di road, a pure shot a fire inna di place". A reach mi baby mother house about 7:15. Ah never leave di house dat night until the next morning. I am not a murderer and I didn't murder 'Johnny 5'."

Rasheme Mendez

[12] The defence of both applicants was one of alibi. Mr Hines, for the applicant Mendez, abandoned the original grounds of appeal, sought and was granted leave to argue supplemental grounds which are as follows:

> "1. The Learned Trial Judge erred in that she failed/misdirected the jury on the good character evidence adduced by the Applicant or how they ought to approach such evidence. This misdirection resulted in a miscarriage of injustice.
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> 2. The Appellant did not receive a fair trial as evidence favourable to him was not adduced/incorrectly adduced at trial.
>
> 3. The learned trial judge erred when she told the jury that-
>
> (i) "Although there is no burden or duty on the accused person to say anything to you to try and prove their innocence, they **may attempt** to do so, and they **may attempt** to do so and succeed then you must find them not guilty. If their **attempt** has left you in a state of doubt you must find them not guilty". (transcript page 299 lines 7-13) [Emphasis]
>
> (ii) "I think there [sic] three pieces of police statement and the reason why they do that is **to attack or weaken** the credibility of Dino Shand in your eyes. That is what he is attempting to do". (Transcript page 344 line 11-15) [Emphasis]
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> 4. The learned trial judge erred in imposing a period of forty years imprisonment before the applicant is

> eligible for parole which period was manifestly excessive in the circumstances."

Ground one

> **The learned trial judge erred in that she failed/misdirected the jury on the good character evidence adduced by the Applicant or how they ought to approach such evidence. This misdirection resulted in a miscarriage of injustice.**

[13] Mr Hines submitted that the applicant in his unsworn statement said that he had never been convicted and that he is not a murderer and never murdered the deceased. He said that the learned trial judge failed to give the standard directions on the relevance of good character in relation to propensity and that he was entitled to it.

[14] Miss Jackson, for the Crown, conceded that Mendez having stated in his unsworn statement that he had never been convicted ought to have benefitted from the propensity limb of the good character direction. She however submitted that this is a case where the proviso ought and should be applied as the evidence led by the prosecution was overwhelming.

[15] It seems clear that in the absence of a propensity direction this court is guided by section 14 (1) of the Judicature (Appellate Jurisdiction) Act which provides:

> "… the Court may, notwithstanding that they are of the opinion that the point raised in the appeal might be decided in favour of the Appellant, dismiss the appeal if they consider that no substantial miscarriage of justice actually occurred."

In **Reid v R** (1978) 27 WIR 254, the Privy Council held inter alia where the evidence against the accused is so strong, that any reasonable jury, properly directed, would have convicted the accused, prima facie the more appropriate course is to apply the proviso and dismiss the appeal.

[16] In **Albert Edward Haddy v R** [1994] Criminal Appeal Report 182, the court held that:

> "A substantial miscarriage of justice within the meaning of the proviso occurs where by reason of a mistake, omission or irregularity during the trial the applicant has lost a chance of acquittal which was fairly open to him. It is not necessary that they should be satisfied that no jury properly directed could have acquitted the appellant, they may apply it if they are satisfied that, on the whole of the facts and with a correct direction, the only reasonable and proper verdict would have been one of not guilty."

In the instant case, the applicant Mendez is saying he has no previous convictions recorded against him. This however does not mean he inevitably is a person of good character. The evidence led by the prosecution was quite strong. The applicant was well known by the witness. The incident occurred in broad daylight and the view of the applicant by the witness was unobstructed. The proviso should be applied. This ground therefore fails.

Ground two

> **The applicant did not receive a fair trial as evidence favourable to him was not adduced/incorrectly adduced at trial**

[17] This ground was not really pursued by Mr Hines. In any event no evidence favourable to the applicant was adduced. This was just a bald assertion and this ground has no basis and is without merit.

Ground three

The learned judge erred when she told the jury that:

> **(1) Although there is no burden or duty on the accused person to say anything to you to try and prove their innocence, they may attempt to do so, and they may attempt to do so and succeed then you must find them not guilty. If their attempt has left you in a state of doubt you must find them not guilty.**
>
> **(2) I think there [sic] three pieces of police statement and the reason why they do that is to attack or weaken the credibility of Dino Shand in your eyes. That is what he is attempting to do.**

[18] Mr Hines submitted on this ground that the learned trial judge erred in her summation to the jury when she repeatedly used the words 'attempt' three times. He argued that this was also compounded by the learned judge's directions to the jury that the reason why defence counsel asked that certain portions of the prosecution's witness statement given to the police be admitted as exhibits, was to attack or weaken the credibility of the prosecution witness and again using the word attempting. Counsel further submitted that given the various background of the jurors comprising the jury, the words "attempt", "attempting" could connote to the jury an impression of disapproval of the evidence by the learned trial judge. Such a pejorative impression by the learned judge in her summing up could prevent the applicant from having a fair trial. Counsel cited **R v Earl Johnson (**1993) 30 JLR 143.

[19] The passage that counsel complains of in the learned trial judge's summation is at page 299 of the transcript. Line 7-13 reads thus:

> "Although there is no burden or duty on the accused person to say anything to you to try and prove their innocence, they may attempt to do so, and they may attempt to do so and succeed then you must find them not guilty. If their attempt has left you in a state of doubt you must find them not guilty."

The learned trial judge, in my view, clearly highlighted to the jury that it was the prosecution who had the burden of proving the applicant's guilt. At page 295 of the transcript from lines 4-13, this is what the learned trial judge said:

> "Now, in all criminal trials in this jurisdiction the prosecution bears the burden of proving the defendant's guilt. And that burden never shifts throughout the trial. The prosecution has brought the two accused persons here and it is the prosecution who must prove to you that the defendants are guilty of the charge. … That is their right in law."

Also at page 296, lines 1-13 of the transcript, the learned trial judge said:

> "If they fail, either of them fail in their attempts to convince you, that does not mean that you can convict them or either of them for that reason alone. You still have to consider all the evidence including what they said and go back to the prosecution's case and examine it. … it is only when you are so satisfied to the extent that you are sure that you can properly say that they are guilty of the charge."

[20] It can clearly be seen from the above passages that the learned trial judge demonstrated in her summation as to where the burden of proof lies. Hence, she clearly emphasised at various times throughout her summation the presumption of innocence and the burden of proof. The learned trial judge also gave careful directions

on discrepancies and inconsistencies in several areas of her summation. The overall effect of the summation when assessed as a whole was fair to the applicants. In **William Francis v R** [2010] JMCA Crim 39, McIntosh JA (Ag) (as she then was) said:

> "… the judge's summation ought not to be fragmented but must be looked at as a whole in order to fully appreciate how he dealt with the issues. Although he did not employ any formula or use any particular words to demonstrate how he treated with the discrepancies, inconsistencies and omissions identified in the evidence of the prosecution's main witness, it is clear from his review of the evidence, that he did assess them."

This ground, in our view, is clearly without merit.

Sentence

[21] It was the submission of Mr Hines that a period of 40 years imprisonment before the applicant is eligible for parole is manifestly excessive in all the circumstances. Counsel submitted that in applying the principal objects of sentencing, the legislation and common law, the sentence should be substantially reduced.

[22] In sentencing the applicants, this is what the learned judge said:

> "I do not have much to say to either of you, because I have to consider what it is that one says to two young men who acted so coldly and callously, taking the life of another young man, because in taking that life both of you have thrown away your own lives, or at least the greater and more productive years of your lives, or at least the greater and more productive years of your lives. The circumstances of the killing was such that even though there were several persons present, the way in which it was done seem to have been in such a manner as to have driven fear into the hearts of all those who were looking on, because this thing was done in the daylight hours, in full view of onlookers."

[23] The above comments by the learned judge are factual rather than emotional comments. We entirely agree with those comments. This was no ordinary murder. The applicants fired at least 12 shots which entered the deceased's body. There are no mitigating and redeeming factors here. This was a most vicious, cold and cruel act by the applicants, done in broad daylight in the presence of onlookers. In this country life is cheap and when persons who commit these vicious murders are caught and convicted, they can expect to get long sentences before being eligible for parole. This is one such case. We are of the view that the sentence imposed by the learned trial judge ought not to be reduced.

Tio Bamberry

[24] Dr Williams for the applicant Bamberry, abandoned the original grounds, sought and was granted leave to file supplementary and further supplementary grounds which are as follows:

> "1. The learned trial judge failed to exercise her discretion in allowing dock identification of the applicant as one of the gunmen, or in the alternative failed to consider material relevant to the exercise of her discretion.
>
> 2. The directions of the learned trial judge to the jury on dock identification were inadequate.
>
> 3. The applicant was denied a chance of acquittal by the failure of defence counsel to put his good character in issue and to advise about giving sworn testimony.
>
> 4. The sentence is manifestly excessive.

5. The learned trial judge misdirected the jury on the evidential value of exculpatory statements in an interview of the applicant by the police put in evidence by the prosecution."

[25] Dr Williams argued grounds one and two together for convenience. He submitted in his oral and written submissions that the identification of the applicant (Bamberry) in court for the first time more than two years after the incident imperiled the fairness of the trial. He argued that the learned judge failed to exercise her discretion in permitting the witness to point out the applicant in court, when no reason was given for not holding an identification parade. Dr Williams was fortified in his argument when he cited in support, the case of **Goldson and McGlashan v R** (2000) 56 WIR 444 where Lord Hoffmann at page 448 said:

> "There is no dispute that if an identifying witness has not made a previous identification of the accused, a dock identification is unsatisfactory and ought not to be allowed. Unless the witness had provided the police with a complete identification by name or description, so as to enable the police to take the accused into custody, the previous identification should take the form of an identification parade."

Counsel further submitted that the witness in the instant case testified that he knew the applicant by the aliases "Pops" or "Popsie". The witness said he would see the applicant on McKinley Crescent or on Wint Road but he had never had a conversation with him because they were of different age group. There was no evidence he argued, of any interaction between the applicant and the witness which would enable one to conclude that the applicant was well known to the witness. Counsel concluded that no

reason was given for not holding an identification parade and that dock identification of the applicant was admitted in evidence as a matter of course. In the circumstances there was a failure to exercise the discretion. Counsel cited the cases of **Leslie Pipersburgh and Patrick Robateau v R** [2008] WKPC 11 **Maxo**, **Tido v R** [2011] UKPC 16, **Aurelio Pop v R** [2003] UKPC 40.

[26] Dr Williams submitted that the directions on dock identification by the learned trial judge to the jury were of a very general and abstract level with little or no connection with the circumstances of the case. He further submitted that the directions failed to bring out that the applicant was challenging the claim that the witness knew him well. The jury was not told, he argued, that the failure to hold an identification parade denied the applicant the opportunity to show that the witness did not know him well. He submitted that although the learned trial judge told the jury that dock identification was undesirable, frowned upon and not encouraged, she failed to point out the inherent danger of the procedure.

[27] In response, Miss Jackson for the Crown, submitted that the learned trial judge correctly allowed the dock identification of the applicant and that the directions given were sufficient. It was further submitted that the case clearly depended on the credibility and reliability of the witness. The witness knew and recognized the applicant, hence holding an identification parade would have served no useful purpose.

Analysis

[28] In **Goldson and McGlashan v R** the court took the view that an identification parade ought to be held where it would serve a useful purpose. In her summation, the learned trial judge gave careful directions to the jury that dock identification is generally adjudged to be undesirable and is not encouraged, especially where the person being identified was not known to the witness before. At page 331 of the transcript the learned trial judge said:

> "While identification parade … may have been a better course to take to test the reliability of the witness' claim that he knew the accused and could identify him. And that the accused, Tio Bamberry otherwise called Popsy did not benefit from the identification parade and if he had one, it might have been potential advantage to him if it had been held and Dino could not point him out and you're entitled to take that into account and appreciate the dock identification with care. … in the circumstances where the witness knew the accused where he lived and family members … where the accused is not denying that the witness knows him, you may find that the damage is reduced and that there would have been no potential advantage in having [an] identification parade and the only factor for you in your deliberation is the witness' credibility when he says that he knew the accused and was able to identify him …."

What can be gleaned from the above passage is that the learned trial judge was telling the jury that if the appellant was well known to the witness before pointing him out for the first time in court, it was a question of credibility in their deliberations. This was a clear case of recognition by the witness. He knew the applicant Bamberry from McKinley Crescent. He knew his mother as Shirley, his sister, his father as 'Candy Man' as well as his fiancé. The witness said he knew him all his life because they lived in the

same community. He would see him twice weekly. At the time of the incident he said nothing obstructed his view of the face of the applicant. He saw his face for one minute. This was in broad daylight and he last saw him on Wint Road with the other applicant two days before the incident.

[29] In **Stewart v R** [2011] UKPC 11, the identifying witness claimed to have known the appellant and his family for a long time. Although the defence challenged the witness' evidence on this, the Board held that there was no real challenge to her, in fact, knowing the appellant and his family in the way she described and being in a position to describe the appellants on the day of the killing. As Lord Brown who delivered the judgment of the Board said:

> "It is the Board's clear view that this cannot properly be regarded as a dock identification case at all. As already indicated, Mr Minnott knew not only the appellant but also his mother and his brother as well and it can hardly be thought that she was mistaken in her recognition of all three of them as having been present on the day in question."

[30] It is our view that failure to hold an identification parade was not a serious miscarriage of justice. There was no real challenge to the fact that the witness knew the applicant and his family and he was seen shortly after at the scene. I am of the view, that the learned trial judge adequately directed the jury on dock identification. She carefully explained to the jury the danger of dock identification by telling them to review it with care. I see no merit in these two grounds.

Ground three

The applicant was denied a chance of acquittal by the failure of the defence counsel to put his good character in issue and to advise about giving sworn testimony

[31] Dr Williams submitted that the applicant was denied a chance of acquittal by the failure of his counsel to put his good character in issue and to advise about giving sworn testimony. In his affidavit, he swore that he had no previous convictions and had never before been arrested. He said he was asked by the defence counsel at trial about any convictions and he replied that he had none. He said he only found out when he went to prison that it was important to give sworn testimony. Counsel further submitted that by not putting his good character in issue, he was denied both limbs of a good character direction and this could have made a difference to the outcome.

[32] Miss Jackson for the Crown submitted that there was no duty on the learned trial judge to give a good character direction when the issue of good character of an accused was never raised during the course of the trial (see **Thompson v R** [1998] AC 811). The applicant Bamberry did not adduce any evidence of his good character during the course of the trial. Consequently, such an omission cannot be the fault of the learned trial judge but by counsel. Counsel further submitted that having regard to the strength of the recognition evidence by the witness of the applicants, a jury having been exposed to the facts in the case would not have arrived at a different verdict had a full character direction been given to the applicants.

Analysis

[33] It is clear that once an accused raises his good character at his trial, a trial judge will be under a duty to give the jury a direction as to the relevance of his good character, both in terms of his credibility and his propensity (see **R v Vye** [1993] 1 WLR 471). In the instant case, the applicant failed to adduce any evidence of good character during the course of the trial. Experienced counsel appearing for the applicant at trial stated in his affidavit that after discussion with the applicant he took the decision to make an unsworn statement from the dock. That from his recollection, he was aware that the applicant had no previous conviction but it was never discussed by them that he should have stated this in his statement from the dock.

[34] Once the issue is raised at the appellate stage, the court must consider what is the likely impact of the omission on the outcome of the trial. In **Barrow v The State** [1998] AC 846; it was stated that:

> "Notwithstanding the importance of good character evidence, it does not necessarily follow that a failure to lead such evidence or even the omission by the trial judge to direct the jury on the issue in his summation when the issue is raised will result in the conviction being set aside…
>
> "[Although counsel was at fault], it does not necessarily follow *ipso facto* that there is a miscarriage of justice. Each case must depend on the particular circumstances. The question at the end of the day is whether the jury would necessarily have reached the same verdict if they had a full direction as to the appellant's good character."

In the absence of a good character direction, there has been no miscarriage of justice in the instant case. There is no doubt that the evidence against the applicant was quite strong. This was a clear case of recognition, details of which have already been highlighted and bears no repetition. Morrison JA stated the following principle in a judgment of this court **Michael Reid v R** SCCA 113/2007 delivered 3 April 2009 at paragraph 44 (v) as adduced from authorities referred to in that case::

> "The omission, whether through counsel's failure or that of the trial judge, of a good character direction in a case which the defendant was entitled to one, will not automatically result in an appeal being allowed. The focus by this court in every case must be on the impact which the errors of counsel and/or the judge have had on the trial and verdict. Regard must be had to the issues and the other evidence in the case and the test ultimately must always be whether the jury, properly directed, would inevitably without doubt have convicted (Whilby v R, per Cooke JA (Ag) at page 12, Jagdeo Singh v The State (2005) 68 WIR 424, per Lord Bingham of pages 435-436)."

It is to be noted that it was at the sentencing stage that the fact that the applicant had no previous conviction came to light. As was said in **Muirhead v R** [2008] UKPC 40 at paragraph 35, it was noted:

> "One must nevertheless look at the trial as a whole and the evidence against the appellant to see what difference the giving of a direction could have made to the verdict."

Based on the foregoing, it is clear that this ground must fail.

Ground five

> **The learned trial judge misdirected the jury on the evidential value of exculpatory statements in an interview of the applicant by the police put in evidence by the prosecution.**

[35] Dr Williams submitted on this ground that the learned trial judge in directing the jury that the answers given by the applicant to questions asked by the police did not amount to evidence of the facts stated by him. The directions were unbalanced, too complex and unfair. Although directed, the answers were not evidence of the facts stated. He further submitted that the jury was told that they could draw an inference adverse to the applicant from them and they could measure what he said in the answers against what he said in his statement from the dock, and drew whatever conclusion they made of it.

[36] The short answer to this ground is that the editing of the questions and answers was raised during the trial. Counsel for the applicant noted that the document was of a self serving nature. The applicant, in his unsworn statement, basically said the same thing in the questions and answers. The learned trial judge had carefully directed the jury on the questions and answers of the applicant and was more than adequate in the circumstances. At page 365-366 of the transcript, the learned trial judge stated:

> … " Mr Bamberry tells you … he was in the area watching some boys playing football and he heard gunshots on Wint Road … [his] defence is a complete denial … so that is his defence [sic] Not me; wasn't there. I had nothing to do with it."

The jury had the opportunity to observe the witnesses and the benefit of the trial judge's direction on inconsistencies and discrepancies and how to deal with them. We see no merit in this ground.

[37] On sentence, Dr Williams submitted that the sentence was manifestly harsh and excessive. However, see paragraphs 22 and 23 which apply to both applicants.

[38] It is for the foregoing reasons that we made the order in paragraph [2].