[2012] JMCA Crim 24

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 116 & 117/2007

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA

FREDERICK MINOTT
KIRK GARDENER v R

Leroy Equiano for the applicant Gardener

Mrs Diahann Gordon-Harrison for the Crown

8, 11 February 2010 and 15 June 2012

DUKHARAN JA

[1] The applicants were convicted in the High Court Division of the Gun Court in Kingston on 3 August 2007 for illegal possession of a firearm, wounding with intent and shooting with intent. They were each sentenced to six years, nine years and six years imprisonment respectively, with sentences to run concurrently.

[2] The applicant Gardener sought to adduce fresh evidence before this Court. This was contained in an affidavit of Earnest Morgan, who had been one of the identifying witnesses at the trial of the applicants. We ruled that the

evidence of the witness be taken. Having heard submissions of counsel, we were of the view that the evidence that he had given to this court was incapable of belief and accordingly was rejected. We also ruled that the application for leave to appeal be refused with sentences to commence from 3 November 2007. We promised to reduce our reasons to writing and we now fulfil that commitment.

[3] A brief outline of the evidence for the prosecution was that on 8 November 2006 in the parish of St. Andrew, the applicants were among a group of men armed with firearms. At about 1:15 pm they approached another group of men who were digging a pit on Whitehall Lane and opened fire at them with their firearms. As a result of the shooting Earnest Morgan and Jeffrey Ducasse were shot and injured. Both applicants were subsequently arrested and charged.

[4] At the trial Earnest Morgan identified both applicants as being two of the men who were firing guns. He knew the applicant Gardener for over eight years before the incident and knows him as 'Kirkie'. He also knew Minott whom he calls 'Fritz' for over three years. The witness Morgan was 15 years old at the time of the incident. The other eyewitness was Angella Rodney, the mother of Morgan, who also knew and identified the applicants as being among the group of armed men. The applicants were well known to the witnesses and this was never challenged at the trial, as the main issues were one of credibility and the correctness of the identification.

[5] The applicants defence was one of alibi, as both denied any involvement in the incident. Gardener gave sworn evidence and called two witnesses, while Minott gave an unsworn statement.

[6] Mr Equiano filed a revised ground of appeal which is as follows:

> "(a) The convictions of the Applicants are unsafe."

[7] Mr Equiano informed the court that it was brought to his attention that the witness, Earnest Morgan had gone to the Office of the Public Defender and had given a statement recanting the truthfulness of the evidence he had given at the trial. The statement dated 22 December 2008, stated that on the day of the incident, after he was shot and injured, he was instructed by a man called 'Spider' to give a statement implicating the applicant Gardener. He also said that he was instructed to call names.

[8] The affidavit of Mr Morgan is set out below:

> "I, ERNEST MORGAN, being duly sworn make oath and say as follows:
>
> 1. That I reside and have my true place of abode and postal address at Central Village in the parish of Saint Catherine and I am unemployed.
>
> 2. That on November 8, 2006 I was walking pass my gate of my then address at 8 Henley Road, Kingston 11 in the parish of Saint Andrew when several men with guns emerged from a nearby yard and started firing shots at some other guys who were sitting on the wall across the street. I was approximately 4 houses away from the incident, during which I got shot in my left foot.

3. That at the time of the shooting there was an ongoing gang war in the community between Masco and White Lane residents.

4. That after I was shot and was being helped into a car to be brought to the hospital, a man known to me as Spider, the leader of the White Lane gang came up to me and told me that it was Kirkie, Ottey, Fretz and Itchy Bell as being the men who I actually saw. However Itchy Bell was the only one that I actually saw. Spider further informed me that if I didn't do as he said I would be killed or I would have to leave the community. I therefore had a genuine fear for my life knowing spider's reputation.

5. As such in fear for my life when the Policemen came to the Hospital to take statements I gave a statement to the Police in which I included all the names that were given to me.

6. That Mr Kirkie and a gentleman known as "frets" were subsequently arrested and when the matter was put before the Home Circuit Court I pointed out Kirkie and Frets in Court as being among the men with guns.

7. Both men were subsequently found guilty of the offence and sentenced to time in prison.

8. That prior to the incident I had a confrontation with Kirkie, when he hit me. I did not see the men that morning but relied on what was told to me by Spider.

9. That after the trial ended I continued to feel more and more guilty and as such I decided to come forward and tell the truth and do the right thing.

10. My mother and I always talked about the incident and my mother said she was going to tell the truth and Spider threatened her that if she go and let go the men he would kill her.

11. After the trial my mother insisted that she would not continue doing dirty work for Spider.

12. On the 28th day of January 2008 my mother was shot and killed in the community. We all removed from the community immediately."

[9] Mr Equiano submitted that if the evidence sought to be adduced was before the learned trial judge, it was very likely that the applicants would not have been convicted. He further submitted that the effect would cast serious doubt on the credibility of the witnesses.

[10] Mrs Gordon-Harrison submitted that the main issue was whether the evidence sought to be adduced was capable of belief. She further submitted that the evidence at the trial was overwhelming with detail given by Mr Morgan, and that was to be contrasted with the new and uncertain position which this court was being asked to believe.

[11] The principles governing the admissibility of fresh evidence was laid down in ***R v Parks*** (1961) 46 Cr. App Rep 29 where Lord Parker said at page 32:

> "As the court understands it, the power under section 9 of the Criminal Appeal Act, 1907, is wide. It is left entirely to the discretion of the court, but the court in the course of years has decided the principles upon which it will act in the exercise of that discretion. Those principles can be summarized in this way: First, the evidence that it is sought to call must be evidence which was not available at the trial. Secondly, and this goes without saying, it must be evidence relevant to the issues. Thirdly, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this court to decide whether it is to be believed or not, but evidence which is

> capable of belief. Fourthly, the court will, after considering that evidence, go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with other evidence at the trial."

These principles were endorsed by this Court in ***Samuel Lindsay and Henry McKoy*** SCCA Nos 7 & 8/96 delivered on 18 December 1998 (unreported) as well as in ***R v Deon McTaggart*** SCCA No 57/95 delivered on 6 March 2000.

[12] Mr Morgan told this court that he knows both applicants and that he gave evidence against them at the trial. He said he was threatened by one 'Spider' that if he did not go to court and give evidence his mother would be killed. He said at the time of the shooting neither of the applicants was present. 'Spider' had told him to say that they were present and took part in the shooting. He said his mother, who gave evidence and was subsequently killed, had said "she a go leggo Kirk Gardener, because a innocent youth". He said he went to the Public Defender's Office and gave a statement. When asked why he did that, he said- "thru how mi deh home and mi conscience a ride mi, fi know say a innocent youth go down…" He said a Christian lady named Yvonne Rodney saw him and spoke to him about the applicant Gardener and said he "must mek him come a road cause him never deh deh". Mr Morgan maintained that he never saw the two applicants on the morning of the shooting.

[13] Mr Morgan was extensively cross-examined by Mrs Gordon-Harrison. He maintained that he was threatened to say that it was the applicants who had shot him.

[14] The credibility of the content of the affidavit and the demeamour of Mr Morgan in his *viva voce* evidence must be assessed on the background of the previous evidence given by him at the trial. An analysis of his evidence revealed several inconsistencies. He told this court that his interaction with Miss Yvonne Rodney about purging his conscience occurred in 2009, the statement that he gave at the Public Defender's Office was dated 22 December 2008.

[15] On the issues of threats, Mr Morgan told the court that 'Spider' was a dangerous man as a "him run de place, him will send the man and kill you if you don't do what he says". He said his mother also knew 'Spider' and she also gave evidence at the trial that it was the two applicants who had shot the witness. He said his mother had said publicly and in the presence of 'Spider' that she was going to "leggo the innocent youth dem". This seems a bit strange as knowing the reputation of 'Spider' she would in his presence speak about letting go the applicants. In his affidavit Mr Morgan indicated that 'Spider' told him that if he did not do as he said he would be killed. However, before this court he said the threat really was that his mother would be killed if he did not do 'Spider's' bidding. Another account given by Mr Morgan during cross-examination, was that when he was in a taxi going to the hospital 'Spider' came up to the car and

said: "just say that 'Kirkie' and 'Fritz' did deh deh". When asked by the court if that was all 'Spider' said to him, his answer was yes. It is quite clear from his answer that there was no threat but instructions from 'Spider' to say 'Kirkie' and 'Fritz' were there.

[16] Mr Morgan gave an incredible account of written instructions given to him by 'Spider' in respect of the evidence he was supposed to give at the trial. He said 'Spider' wrote down what he was to say on a paper which he studied. When asked by the court how many sheets were in this paper, he said he didn't know as it was in a book which had been lost. It is quite incredible that he gave detailed evidence as to distance and for how long he knew the applicants. Did 'Spider' give him all those details as to what to say?

[17] In view of the foregoing, we came to the conclusion that the evidence contained in the affidavit of Ernest Morgan, as well as, his *vive voce* evidence is incapable of belief and for that reason, as stated, refused the application to adduce fresh evidence.

[18] In reverting to the trial judge's summation, the critical issue in the case was that of visual identification, which in our view, was adequately addressed. The applicants were well known to the witnesses and the learned trial judge accepted them as credible witnesses. With respect to the identification of the applicant Gardener, the learned trial judge stated:

> "… Ernest Morgan testified that in the bright daylight of the incident nothing prevented him from seeing the faces of the men who were shooting. He saw Kirkies' [Gardener] face … for about two minutes … he knows Kirkie … for about eight years and would see him daily … and had in fact seen Kirkie ealier that week with a gun …"

The learned trial judge in our view had more than enough evidence to be satisfied of the correctness of the identification of the applicant.