

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 59/2012

**BEFORE: THE HON MRS JUSTICE McDONALD-BISHOP JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MR JUSTICE FRASER JA (AG)**

CRAIG MITCHELL v R

Kemar Robinson holding for Peter Champagnie for the appellant

Miss Cheryl-Lee Bolton for the Crown

8 February 2019

F WILLIAMS JA

Background

[1] By this appeal, the appellant seeks to set aside his convictions and sentences for the offences of: (i) illegal possession of firearm; and (ii) wounding with intent. He stood his trial for these offences in the High Court Division of the Gun Court, Kingston, on 24 April 2012 before a judge of the Supreme Court. On 18 May 2012, he was sentenced to seven years' imprisonment at hard labour for illegal possession of firearm; and 15 years' imprisonment at hard labour for the offence of wounding with intent. The sentences were ordered to run concurrently.

[2] On 27 February 2018, he was granted leave to appeal by a single judge of this court. That leave was granted to afford the appellant, if he so desired, the opportunity of arguing and for the court to address and advise on the answers to the following questions: (i) whether the question of good character can only be raised by way of a defendant giving sworn testimony; and (ii) if the learned trial judge erred in failing to give a good-character direction, whether, having regard to the strength or otherwise of the evidence in this case, and the fact that during sentencing it was revealed that the appellant, in fact, had convictions for possession of a chillum pipe and smoking ganja in 2008, any miscarriage of justice occurred.

Summary of the Crown's case

[3] The virtual complainant gave evidence of having been shot by the appellant and another man on 3 May 2011 in Waterford, in the parish of Saint Catherine. He testified that he had known the appellant for some four or five years before the shooting. The incident occurred about 5:20 pm and the shooting took place at close range. The virtual complainant later pointed the appellant out at a video identification parade.

Summary of the defence

[4] The appellant made an unsworn statement from the dock. His defence was to the effect that there was an argument between himself and the virtual complainant. The virtual complainant pulled a firearm and a struggle ensued between them, during which the firearm went off.

The appeal

Summary of submissions

[5] Before us, Mr Robinson indicated that, he and Mr Champagne having perused the transcript, neither of them could find any arguments to advance on the appellant's behalf. He also confirmed that he had so informed the appellant and had obtained the appellant's agreement and written instructions not to pursue the appeal. He cited the case of **Horace Kirby v R** [2012] JMCA Crim 10 (which cites **Michael Reid v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 113/2007, judgment delivered 3 April 2009) in support of the position at which he had arrived.

[6] On behalf of the Crown, Miss Bolton submitted, in summary, that, even if the good character direction had been given in this case, it would not have made a difference having regard to the strength of the Crown's case.

Discussion

[7] The main issues raised in the court below were identification and credibility and, in our view, the learned trial judge dealt adequately with these. However, in the course of his unsworn statement, the appellant stated that he had never been convicted before and that he was innocent. The learned trial judge in his summation did not give himself a good-character warning on either the propensity or credibility limb. In the sentencing process, at page 74 of the transcript, the learned trial judge stated in essence that, in order for the question of good character to arise, there has to be "evidence" of good character; and since the appellant did not give sworn testimony but rather an unsworn statement, which was rejected, the question of his good character did not arise. In this

respect, the learned trial judge fell into error, as there are several authorities coming from this court that require the giving of a good character direction in regard to propensity where the issue of good character is raised by way of an unsworn statement.

[8] For example, in the case of **Leslie Moodie v R** [2015] JMCA Crim 16, Morrison JA (as he then was) made the following observation at paragraph [127] of the judgment:

“[127] The foundation of the modern law of good character directions is commonly acknowledged to be the decision of the Court of Appeal of England and Wales in **R v Vye, R v Wise, R v Stephenson** [1993] 3 All ER 241. That case established definitively that, while the propensity direction should generally always be given if the defendant is of good character, where such a defendant ‘does not give evidence and has given no pre-trial answers or statements, no issue as to his credibility arises and a [credibility] direction is not required’ (per Lord Taylor CJ, at page 245).”

[9] To similar effect is the dictum of Brooks JA in the later case of **Tino Jackson v R** [2016] JMCA Crim 13. At paragraph [24] of that judgment, it was stated that:

“...It is correct to say that there are two possible limbs to a good character direction. The first is the propensity limb and the second is the credibility limb. The propensity limb speaks to the likelihood, or more accurately, unlikelihood, of the person accused having committed such an offence. The credibility limb speaks to the likelihood of his being truthful in his assertions of innocence to the court. If an accused raises the issue of his good character in an unsworn statement only, the cases suggest that whereas he is entitled to a good character direction on the propensity limb, a direction on the credibility limb may be of limited effect.”

[10] Even before these cases, however, and before the appellant was tried, was the case of **Michael Reid v R** in which Morrison JA (as he then was), setting out general principles relating to good character, gave the following guidance at paragraph 44 of the judgment:

“(iii) Although the value of the credibility limb of the standard good character direction may be qualified by the fact that the defendant opted to make an unsworn statement from the dock rather than to give sworn evidence, such a defendant who is of good character is nevertheless fully entitled to the benefit of the standard direction as to the relevance of his good character to his propensity to commit the offence with which he is charged...”

[11] It was these considerations, supported by the authorities, that led us to concur with the single judge’s general view of the matter, reflected in the written ruling dated 27 February 2018.

[12] Having ourselves perused the transcript and reviewed the matter in its entirety, however, we find ourselves to be in agreement with counsel for the appellant’s assessment of the case. It seems to us that, whilst it might, in other circumstances, be of interest to explore the question of whether a defendant’s good character should only be capable of being raised by way of sworn testimony, this would not be the case to do so. This is so as the eventual revelation of the appellant’s previous convictions (although for unrelated offences) and the cogency of the Crown’s case have come together to make any such discussion in the particular facts and circumstances of this case merely academic and, at the end of the day, doomed to failure. So that, although we think that the learned trial judge ought properly to have given a good character

warning in respect of propensity, the later revelation of the appellant's convictions had the eventual effect of showing that the omission to give such a warning was negated by the fact that the appellant was not in fact someone of good character.

Sentences

[13] We have also given careful consideration to the sentences in this matter. Having done so, we find that they are not outside the normal range of sentences imposed for these offences. In fact, the sentence of 15 years that was imposed for the offence of wounding with intent is the statutory mandatory minimum sentence for that offence. In relation to the sentence of seven years' imprisonment for illegal possession of firearm, although at the time of sentencing the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts (introduced in January 2018) would not then have been in force, those guidelines show a usual starting point of 10 years' imprisonment and a normal range of seven to 15 years' imprisonment for that offence. The applicant, therefore, in all fairness, ought not to complain about the sentences imposed.

[14] In the result, the appeal is dismissed; and the convictions and sentences are affirmed. The sentences are to be reckoned as having commenced on 18 May 2012.