[2021] JMCA Crim 24

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE BROWN JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 97/2014

APPLICATION NO COA2021APP00112

SHELDON MOSCOLL v R

Linton Gordon and Obika Gordon for the applicant

Mrs Tracy-Ann Robinson and Miss Vanessa Campbell for the Crown

28 and 30 June 2021

MCDONALD-BISHOP JA

[1] This is an application brought by Mr Sheldon Moscoll ('the applicant') seeking leave to appeal his conviction and sentence, following a trial in the High Court Division of the Gun Court, held at King Street in the parish of Kingston, between 26 May and 29 July 2014.

[2] The applicant was tried before George J ('the trial judge') on an indictment containing two counts. The first count charged him with the offence of illegal possession of firearm, contrary to section 20(1)(b) of the Firearms Act, and the second, with wounding with intent, contrary to section 20 of the Offences Against the Persons Act.

[3] The prosecution's case was that on 25 April 2013, at approximately 2:00 am, Mr Timmey Brown, the complainant, was at home asleep with his girlfriend when he was

awoken by the sounds of dogs barking in the yard. The complainant got up and looked through the window where he saw a man "peeping" around a corner. The man walked towards the complainant's house with a gun in his hand. The complainant immediately recognised the man to be the applicant whom he had known for one year and with whom he would "hang out", go parties, "sit down and reason", and "cook food and eat".

[4] The applicant entered the verandah of the complainant's house and began kicking the front door while the complainant, on the inside, braced the door. There was a second person with the applicant on the verandah. The complainant, however, did not identify this person but said he knew that another person was present as the glass windows on both sides of the door were being broken at the same time.

[5] When the glass windows started breaking, the complainant told his girlfriend to go under the bed. Shots were then fired into the house, and the complainant moved from behind the door and joined his girlfriend under the bed. While under the bed, the complainant saw that a bottle with fire was thrown into his house, and the curtains and his bed were burning. The complainant and his girlfriend received gunshot injuries, with the complainant receiving seven gunshot wounds.

[6] The complainant subsequently pointed out the applicant on a video identification parade, and the police later charged him.

[7] The applicant gave an unsworn statement from the dock, comprising two sentences, in which he denied being present at the complainant's house and ever attacking the complainant.

[8] The trial judge, in her summation, correctly identified that there were two issues in the case; in her words: "[t]here is that of identification…which is the main issue, and there is that of credibility" (see page 213, lines 19 to 23 of transcript).

[9] The applicant was found guilty on both counts. On 7 November 2014, he was sentenced to 10 years' imprisonment at hard labour for the offence of illegal possession of firearm and 20 years' imprisonment at hard labour for the offence of wounding with intent. The sentences were ordered to run concurrently.

[10] Dissatisfied with the outcome of the trial, the applicant filed an application in this court for leave to appeal his conviction and sentence. A single judge of the court considered the application and refused leave to appeal. As a result, the applicant has renewed his application before the court, as is his right to do.

[11] The applicant, through his counsel, Mr Linton Gordon, sought and obtained leave to abandon his original grounds of appeal contained in the B1 form and to argue five supplementary grounds of appeal ('the grounds of appeal'). These five grounds of appeal, which were, in effect, framed as submissions, may be encapsulated in three main but interrelated issues that arose for this court's determination. Those issues are:

(1) whether the trial judge failed to properly apply the law in assessing the complainant's evidence of his purported identification of the applicant (grounds 1, 2 and 3);

(2) whether the trial judge failed to properly treat with contradictions in the evidence of the complainant that affected his credibility (ground 4); and

(3) whether the trial judge erred in finding the applicant guilty in light of errors, contradictions and omissions in the complainant's evidence regarding the identification of the applicant (ground 5).

Issue 1: Whether the trial judge failed to properly apply the law in assessing the complainant's evidence regarding the identification of the applicant (grounds 1, 2 and 3)

[12] The applicant's complaint in ground 1 is that the trial judge wrongly equated the truthfulness of the complainant with the credibility of identification and in so doing

"failed to properly analyse and assess the possibility that a credible witness in terms of one being honest and truthful can also be mistaken in his identification". Mr Gordon, in his submissions on behalf of the applicant, acknowledged that the trial judge had warned herself of the possibility that an honest and truthful witness can also be mistaken in his identification. However, he argued that all the contradictions which arose in the complainant's evidence were explained by the trial judge on the premise that the complainant was an honest and truthful witness and that at no time did she advise herself that an honest witness could be "mistaken, lying and/or embellishing his evidence".

[13] It is our view that the trial judge's approach was in keeping with the guidance given in **R v Turnbull and Others** [1976] 3 All ER 549 ('the Turnbull Guidelines'). In this regard, she demonstrably warned herself of the possibility that an honest and credible witness can also be mistaken in his identification. At page 215, lines 4 to 17 of the transcript, she stated:

> "I must therefore warn myself of the special need for caution before convicting on the reliance of the correctness of the identification of Mr. Brown. The reason for that is that it is quite possible for an honest witness to make a mistake, a mistaken identification, and for an honest witness to be a convincing one. It is also possible, in a case of recognition where persons are known to each other before, to also make a mistake. I have to acknowledge that there have been instances of miscarriage of justice based upon mistaken identification made by honest witnesses even in recognition cases."

[14] The trial judge also reminded herself that the complainant's evidence was uncorroborated and that it required careful scrutiny, particularly in relation to identification (see page 208, lines 17 to 20 of the transcript).

[15] Having warned herself of the need for caution in treating with the uncorroborated evidence of the complainant, she embarked on a thorough examination of the circumstances surrounding the purported identification of the applicant. Ms

Vanessa Campbell, on behalf of the Crown, helpfully directed the court's attention to various aspects of the trial judge's summation where she outlined and applied the relevant considerations regarding the assessment of visual identification, in keeping with the Turnbull Guidelines. The trial judge considered, particularly, the opportunities that the complainant had to see the applicant and the conditions in which he was able to view the applicant. She identified, at least, four such opportunities and found that the complainant saw the applicant for a cumulative period of approximately 11 to 12 seconds, in circumstances where the lighting shone brightly not far from the applicant. In addition, she noted that the applicant came within two and a half feet of the complainant in clear lighting and that the complainant was familiar with him. After assessing the evidence that went to the issue of visual identification, the trial judge concluded that "this is good quality identification, particularly in the context of recognition" (see page 244, lines 1 to 15 of the transcript).

[16] At the end of her evaluation of all the evidence, the trial judge had this to say at page 246, lines 6 to 21 of the transcript:

> "In assessing the identification defence, I find without a doubt, that the complainant was not mistaken when he said it was the accused man, Sheldon Moscoll. I take into account that the identity upon which I have to consider, I found the complainant to be a [sic] honest witness and I have carefully regarded the evidence, again coming to the conclusion that his identification was correct. I have considered the circumstances of the identification carefully and I am left with no doubt that it was the accused man, Sheldon Moscoll, who, along with another, smashed the windows of the complainant, fired shots in his room and set his room alight on the morning of the 25th of April, 2013."

[17] The trial judge concluded that the applicant was correctly identified as the perpetrator after a painstaking assessment of the complainant's evidence, including the conflicts and omissions in his evidence, and having regard to his demeanour and level of intelligence. Her path of reasoning demonstrated, beyond question, that she was cognizant that a credible witness, in terms of one being honest and truthful, can also be

mistaken in his identification. The task she undertook in closely examining the complainant's evidence regarding the purported identification of the applicant was evidently borne out of her expressed awareness that an honest and truthful witness can be mistaken. For that reason, she declared at the end of her analysis that the complainant was not mistaken when he said the applicant was the perpetrator.

[18] The court finds that the applicant's complaint in ground 1 is unfounded.

[19] The applicant contends in ground 2 that, in analysing the evidence of the complainant that he was able to see the applicant on the verandah but only saw the shadow of the other person, the trial judge guided herself by a theory and an explanation as to the reason the complainant could not see the other person, which is not founded in any evidence adduced before the court. In advancing this ground, Mr Gordon argued that, in making the inference that she did as to the reason the complainant could not see the other person with the applicant, the trial judge was adding to the evidence. According to counsel, there was no factual basis from which she could have drawn that inference.

[20] The "theory" to which Mr Gordon refers emanated from this portion of the trial judge's summation, where she stated at page 220, lines 9 to 25 of the transcript:

> "However, on careful analysis of the evidence and taking into account what it is that he said earlier that he was looking through the window, and he gave a demonstration of the door being in the middle, the window to the left of the door, a window to the right of the door. He demonstrated how he was bracing the door, he showed how he was bracing the door and he had turned on his side, his side against the door pressing against the door. He showed how he was turned to the right window. And in those circumstances the inference, in my view, is that he was not able to see the person on the other side, because of how he was positioned at the door. Because the left window would have been to his back, to the other side."

[21] Ms Campbell, in her response on behalf of the Crown, submitted that the complainant gave an explanation and demonstrated his positioning at the time he was bracing the door. This explanation, Crown Counsel argued, was considered by the trial judge, having seen the witness' demonstration in the witness box. Having seen and heard him, the trial judge was then able to assess his evidence, and it was open to her to draw such inference from it that was reasonable. Ms Campbell relied on the well-known authority of **Watt (Or Thomas) v Thomas** [1947] 1 All ER 582 to argue that the applicant had not raised any issue of the trial judge misdirecting herself. Therefore, the findings of fact by the trial judge should not be disturbed by the court as the advantage enjoyed by her, by reason of having seen and heard the complainant, was sufficient to explain or justify her findings.

[22] There is no question that the trial judge was entitled to draw reasonable and inescapable inferences from facts she accepted as true and proved. She had seen and heard the witness – an advantage not enjoyed by this court – and was entitled to make proper use of that opportunity. It means then that once the inference was supportable on proved facts and the judge was not plainly wrong in drawing the inference, this court should defer to the trial judge's finding as the drawing of an inference is tantamount to a finding of fact.

[23] We find that it cannot be fairly said that the inference drawn by the trial judge as to how the complainant knew that a second person was on the verandah was not grounded in any evidence adduced before her. The evidence of the complainant's position behind the door and looking at the right window was a proper basis from which it could be inferred that he could not see anyone at the left window. This was a reasonable and inescapable inference that could be drawn.

[24] In any event, the issues raised in this ground of appeal relates to the identification of the second person who was said to have been on the verandah. This did not materially affect the evidence concerning the identification of the applicant, whom the complainant said he had clearly seen and recognised. The inference drawn

by the trial judge regarding the viewing of the person in the company of the applicant was not critical to the issue that the learned judge had to resolve, which was the correctness of the visual identification of the applicant. There is, therefore, nothing in the trial judge's reasoning regarding the inference she drew, that could affect the safety of the conviction.

[25] The court also finds no merit in this ground of appeal.

[26] In relation to ground 3, the applicant contends that the trial judge, in her summation, referred to someone sitting on the verandah, when there was no evidence given of anyone sitting on the verandah, and that "this interpretation by the trial judge, went to rehabilitate and diminish the serious conflict and contradiction arising in the complainant's evidence". In support of this ground, Mr Gordon submitted that the trial judge ought to have thoroughly and objectively analysed the evidence to determine whether the complainant, who she found to be a credible and truthful witness, had made an error which is sufficiently fundamental as to "resolve the matter in a verdict of not guilty".

[27] Ms Campbell conceded that the trial judge made an error when she referred, in her summation, to someone sitting on the verandah as this was not consistent with the evidence of the complainant. Ms Campbell, however, submitted that this error was not fatal to the applicant's conviction. We accept Ms Campbell's submission in this regard.

[28] It is our view that though the trial judge erroneously referred to someone sitting on the verandah, there is no indication that this had any bearing on her finding of guilt. What she was examining, at the time she made the error, was the apparent inconsistency between, on the one hand, the complainant's statement to the police that he noticed the applicant using the gun to beckon to someone and that he saw someone coming from behind the applicant, and, on the other hand, the complainant's oral evidence that he had not seen the other person coming, he had just seen the applicant beckoning for the other person to come (see page 223, lines 13 to 24 of the transcript).

The trial judge thoroughly examined this inconsistency and accepted the explanation given by the complainant. She then concluded at page 227, lines 3 to 11 of the transcript:

> "In any event, as it relates to the inconsistency between the statement and his evidence that he saw someone coming behind the assailant, it is his evidence that the assailant, after beckoning to someone behind him, continued walking forward to the verandah. So it does not affect the amount of time or the number of seconds that he would have seen the assailant for."

[29] We, therefore, do not agree that the error by the trial judge in her summation, when she referred to someone sitting on the verandah, went to rehabilitate and diminish any serious conflict and contradiction arising in the complainant's evidence, as contended by Mr Gordon. We also do not accept that the inconsistency regarding whether the complainant had seen the second person coming from behind the applicant was sufficiently fundamental to resolve the matter in a verdict of not guilty, also as contended by Mr Gordon. The trial judge thoroughly analysed the evidence and found that, in any event, the inconsistency did not affect the issue of identification of the applicant, which was the crucial issue in the case. We cannot fault her for arriving at this conclusion.

[30] We, therefore, find that ground 3 lacks merit.

Issue 2: whether the trial judge failed to properly treat with contradictions in the evidence of the complainant that affected his credibility (ground 4);

[31] in arguing ground 4, Mr Gordon contended that the trial judge failed to give proper weight to the conflict in the complainant's evidence. Counsel referred to an aspect of the complainant's statement to the police where he claimed the applicant used to sleep in a room next to his room and then admitted in cross-examination that the statement was incorrect. The correct version, he testified, was that the applicant was sleeping at premises on Clifton Road. Mr Gordon submitted that the complainant's evidence was clearly an untruth and should not have been brushed aside as "an

innocent error". He argued that the trial judge failed to assess whether the complainant lied.

[32] In response to this contention, Ms Campbell maintained that the complainant remained consistent in his evidence that the applicant would sleep in the room next door, despite this not being included in his statement to the police. Ms Campbell further submitted that, in any event, this omission in the statement to the police and the contradiction between what he told the police about the applicant sleeping at Clifton Road and his evidence in court did not go to the root of the Crown's case so as to affect the conviction.

[33] Regrettably, we cannot accept the contention of Mr Gordon that the trial judge "brushed aside" this aspect of the complainant's evidence. We accept that there was an omission in the complainant's statement to the police, which, like an inconsistency, would have affected his credibility. The omission was, however, addressed by the trial judge in her summation (see page 230, line 23 to page 232, line 10). She concluded that although the omission and apparent inconsistency that arose from the police statement and the evidence in court were not reconciled by the Crown, she did not find it fatal to the complainant's identification evidence. She opined (page 244, line 20 to page 245, line 4 of the transcript):

> "Despite the omission and some inconsistency between the complainant's evidence and police evidence and his evidence, I accept him on the whole as a witness of truth. I also accept the explanation given by the complainant for the omission and apparent inconsistency and take into account his level of intelligence, comprehension and expression, as well as, his explanation that the police statement was taken a day after the incident."

[34] It is, therefore, clear that the trial judge did not "brush aside" the inconsistency or omission as "an innocent error". Instead, she considered it as a matter going to the credibility of the complainant and found that he was not lying and that it was not fatal

to his identification evidence of the applicant. We find no fault with the trial judge's treatment of this issue.

[35] Accordingly, we find that ground 4 has no prospect of success.

Issue 3: Whether the trial judge erred in finding the applicant guilty in light of the inconsistencies contained in the complainant's evidence (ground 5)

[36] The all-encompassing contention of the applicant in ground 5 is that the identification evidence was "replete with errors, conflicts, and contradictions sufficient for the trial judge to have in her jury mind a reasonable doubt as to the reliability of the identification and to return a verdict of not guilty". He further maintained that the trial judge would have concluded that the applicant was not guilty had the inconsistencies been properly assessed.

[37] Ms Campbell, in response to this ground, submitted that whilst every case has inconsistencies and discrepancies, this court has accepted in **Steven Grant v R** [2010] JMCA Crim 77, that:

> "No duty is imposed upon a trial judge to direct a jury to discard the evidence of a witness containing inconsistencies or discrepancies. The aim of proving that a witness has made a contradictory statement is to nullify his evidence before the jury and it is for them to decide whether the witness has been discredited."

[38] In an endorsement of Ms Campbell's submissions, we accept that the trial judge, being the arbiter of the facts, was not duty bound to discard the complainant's evidence simply because it contained errors, discrepancies, or inconsistencies. It was for her to say whether she accepted the witness as a witness of truth, in the light of those contradictions (and despite them), having made an assessment as to their materiality to the issue she had to decide and having regard to any explanation given for them. The trial judge demonstrably approached the evidence with the dictates of the law in mind as it relates to the treatment of matters that weighed on the credibility and reliability of

the witness. She correctly identified the omissions and contradictions, weighed them appropriately by reference to the central issues of identification and credibility that she had to decide, and declared what she found to be the degree of importance of those matters. She expressly determined which aspects of the complainant's evidence she would accept and that which she would reject. That assessment of the complainant's reliability and credibility was well within her purview as the tribunal of fact, and she carried out her task commendably.

[39] In the end, whether the witness was speaking the truth and was not mistaken was a finding of fact, having regard to the requirement of the need for caution in approaching the evidence of identification. There is nowhere in the trial judge's summation where it could reasonably be said that she was not faithful to the dictates of the law in assessing the complainant's evidence and arriving at her findings of fact, which formed the basis of the applicant's conviction. We would only be justified in disturbing her findings if we found that she failed to properly analyse the entirety of the evidence and was plainly wrong.

[40] In the oft-cited speech of Lord Thankerton in **Watt v Thomas** at page 587, it is stated:

> "I. Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.
>
> II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
>
> III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen

> and heard the witnesses, and the matter will then become at large for the appellate court."

[41] In **Beacon Insurance Co Ltd v Maharaj Bookstore Ltd** [2014] UKPC 21, Lord Hodge, in delivering the judgment of the Board, endorsed the speech of Lord Thankerton in **Watt v Thomas** and noted that:

> "[12]...It has often been said that **the appeal court must be satisfied that the judge at first instance had gone' plainly wrong'**...This phase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts…Rather **it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole**., That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. **The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions**. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence…" (Emphasis added)

[42] Upon an examination of the entirety of the evidence and the trial judge's reasoning, we do not find that that there was a mistake in her evaluation of the evidence that is sufficiently material to undermine her conclusions. Nor do we find that she misdirected herself in law, misinterpreted the facts or draw inferences that were insupportable on the evidence. Accordingly, there is no basis in fact or law on which it could reasonably be said that she was plainly wrong in concluding that the applicant was guilty. On the contrary, her finding of guilt is sufficiently grounded in the evidence.

[43] We, therefore, find no merit to this ground of appeal.

Conclusion

[44] Nothing in the evidence or the trial judge's directions is sufficiently material to vitiate the conviction. The trial judge accurately and adequately dealt with all critical issues that needed to be resolved on the case within the ambit of the applicable law. In all the circumstances, therefore, the court concludes that there was no error in her treatment of the case. Her application of the law to the facts was impeccable.

[45] We conclude that the verdict was reasonable and the conviction safe. Accordingly, leave to appeal conviction is refused.

Leave to appeal sentence

[46] The court notes that though the application was for leave to appeal conviction and sentence, no grounds were filed or arguments advanced with regard to sentencing. We raise this because there was no express withdrawal or abandonment of the application regarding sentence. However, this was, probably, a matter of discernment as to the likelihood of success because the application for leave to appeal sentence suffers the same fate as the application for leave to appeal conviction. It has no real prospect of succeeding.

[47] It is appreciated that the sentencing of the applicant was done before the guidance provided by **Meisha Clement v R** [2016] JMCA Crim 26, and the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines'), regarding the approach to be taken in relation to sentencing. Consideration of both is, nonetheless, useful in helping to determine whether the court could justifiably interfere with the sentences imposed by the trial judge.

[48] Regarding the offence of illegal possession of firearm, the statutory maximum sentence that could have been imposed is life imprisonment. However, a review of the established principles, taking into account the Sentencing Guidelines, shows that the normal range of sentence for this offence is seven – 15 years with a usual starting point

of 10 years. As it relates to the offence of wounding with intent, this attracts a maximum sentence of life imprisonment and a statutory minimum term of 15 years' imprisonment, with the normal range being 15 – 20 years.

[49] The trial judge appropriately considered the relevant matters, including the aims of sentencing, a starting point, the aggravating and mitigating factors and the time the applicant spent in pre-trial custody. On our evaluation of the sentences within the framework of the applicable principles of law, we conclude that the trial judge made no error in principle that could be taken to be so fundamental as to undermine the reasonableness of the sentences she imposed. The sentences are well within the range of sentences for offences of this nature, which involved a home invasion in the dead of night. If anything, the sentence for illegal possession of firearm is, generously, at the lowest end of the range.

[50] We, therefore, find that there would have been no basis on which it could have successfully been argued on appeal that the sentences of 10 years' imprisonment for the offence of illegal possession of firearm, and 20 years' imprisonment for the offence of wounding with intent, are manifestly excessive.

[51] Consequently, for completeness and to dispose of the application for leave to appeal in its entirety, we declare that leave to appeal sentence is also refused.

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

1. Leave to appeal conviction and sentence is refused.

2. The sentences are to be reckoned as having commenced on 7 November 2014 and are to run concurrently, as ordered by the trial judge.