JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 50 OF 2007

BEFORE: THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A. (Ag.)

REGINA
V
O'BRIAN MUIR

Mrs. Jacqueline Samuels-Brown and Miss Tameka Jordan for the Appellant

Mr. Jeremy Taylor and Miss Annette Austin for the Crown

March 10, 11 & May 2, 2008

HARRISON, J.A:

1. The appellant was convicted on March 20, 2007 in the Regional Gun Court before Sykes, J of the offences of illegal possession of firearm and wounding with intent and was sentenced to 5 years and 7 years imprisonment respectively, at hard labour. On December 10, 2007 a single judge of this Court granted him leave to appeal against these convictions on the basis that the appellant's right to further cross-examine the witness Kimar Nembhard had been duly restricted. The questions for determination now in this appeal are: (i) whether

the appellant's convictions are unlawful and/or unfair having regard to the failure of the appellant to further cross-examine the complainant on material issues and; (ii) whether this had resulted in a miscarriage of justice.

2. Learned Counsel, Mrs. Samuels-Brown, formulated and argued eight grounds of appeal. Having regard to the decision which we have arrived at, we do not find it necessary to refer to all the grounds of appeal or to any detail in relation to the facts of the case. We propose therefore to deal with grounds 2-5 which read as follows:

> "1. . . .
>
> 2. The appellant was deprived of his right at law to timely disclosure of material in the possession of the prosecution, to wit, the statement of Kenneth Oates who was called as a witness for and on behalf of the prosecution. As a consequence of the foregoing the appellant was not able to exercise his rights of cross-examination and the learned trial judge erred in convicting the appellant of the offences charged.
>
> 3. The appellant was deprived of his legal right to cross-examine a witness for the Crown in that the said witness did not return to court for further cross-examination on material issues; after the evidence of another prosecution witness made those issues material, whereupon the appellant's conviction is unlawful and/or unfair.

> Alternatively:
> 4. The appellant was deprived of his entitlement at law to timely disclosure of a statement of the main witness for the prosecution; as a consequence of which the appellant was unable to fully exercise his right of cross-examination. In the premises the appellant has been deprived of a verdict in his favour and his conviction is unlawful and/or unfair.
>
> 5. The learned trial judge erred in accepting and/or relying on the evidence of a witness for the prosecution the appellant not having been afforded his lawful right to cross-examine that witness. As a consequence the appellant has been unlawfully deprived of a verdict in favour and his conviction is unlawful and/or unfair and/or his chances of acquittal were imperilled."

3. The case for the Crown rested mainly on three witnesses. The complainant Kimar Nembhard was examined in chief and he testified that during the night of October 28, 2006 he went to a night club at Sandy Bay, Hanover, along with his wife and others. He was wearing a pair of shorts and had a camcorder in the left pocket of his shorts. They spent about four and one-half hours at the club. His wife and friends came out of the club ahead of him. He did not see them initially so he went to where the car in which they had traveled was parked. He saw Ingrid Clarke and she was engaged in an argument with the driver of a motor car. He went to the parked car and asked the driver what was the problem. The driver retaliated by telling him to move from his car. Nembhard then asked Clarke for his wife and

she pointed in the direction of an almond tree. He was about to turn when he heard three gunshot explosions. The driver in the car then sped off and headed in the direction of Lucea. He realized that he was shot in the region of his back and he was taken to Cornwall Regional Hospital where he was treated for a gunshot injury. Nembhard was unable to identify the person with whom he had the verbal confrontation.

4. The cross-examination of Nembhard was extremely brief. Mr. Sinclair, counsel for the accused man, asked him two questions. The questions are set out below with the following answers:

> "Q. The camcorder you said you had in your pocket, what was the – give us an idea of this camcorder?
>
> A. It was about four inches or so, (indicating). Three, four inches.
>
> Q. And what colour was it?
>
> A. The colour, it was like black and grey."

5. The learned judge then asked the witness three other questions and thereafter, Counsel took his seat. Ingrid Clarke and Detective Constable Campbell who were potential witnesses for the Crown were called but they were not present to testify. What transpired thereafter is of interest. At pages 44 and 45 of the transcript the following dialogue occurs between the learned trial judge and Crown Counsel:

> "HIS LORDSHIP: How do you all propose to establish the necessary connection to assuming ...
>
> MR. SMITH M'Lord, the firearm that was in question, it is my understanding this was a licensed firearm. Certain spent shells were recovered from the scene M'Lord."

6. The trial was adjourned and on resumption a further dialogue took place between Crown Counsel, the Defence Counsel and the learned Trial Judge. It is recorded at pages 50-51 as follows:

> "MR. SMITH: M'Lord, with your leave, a notice to adduce in relation to one Special Sergeant Kenneth Oates. The same has been served on my learned friend. With your leave, the Crown will now seek to call Special Kenneth Oates.
>
> MR. SINCLAIR: If it pleases you M'Lord. As my friend has indicated, I was served only this morning with the statement and having regard to what is contained within that statement, and also another statement, although my friend has not made mention of it, Inspector Desmond Campbell ...
>
> HIS LORDSHIP: Having regard to what is in the statement what?
>
> MR. SINCLAIR: As well as another statement that I have also received this morning, there are some questions that I am going to have to put to the complainant and in the circumstances I am requesting that his presence be made available.
>
> HIS LORDSHIP: Okay. Have arrangements to have the complainant back and we will take it from there. Yes Mr. Smith."

7. Special Sgt. Kenneth Oates was called and he gave evidence on behalf of the Crown. He testified of having arrived on the scene on the night in question and that three spent shells were handed over to him by a third party. He had handed over these spent shells to the investigating officer.

8. Detective Constable Campbell was also called by the prosecution. Various exhibits were admitted into evidence through him. They were: The three spent shells, the firearm of the accused man, and a ballistic certificate. Counsel for the accused man applied to the Court for a statement which was given by the accused shortly after arrest to be admitted into evidence. This was admitted through Constable Campbell.

9. Counsel for the accused man sought permission of the trial judge for the witness Nembhard to be recalled for further cross-examination. The learned judge instructed the prosecutor that the witness should be brought back to court in order to be further cross-examined. The witness was found and he promised to attend but failed to do so. The prosecution therefore closed their case.

10. The accused man gave sworn evidence. He raised the issue of self defence which was rejected by the learned trial judge. He was thereafter found guilty as charged and sentenced accordingly.

11. Mrs. Samuels-Brown filed skeleton arguments and argued several grounds but as we have said before, we will only consider those arguments in support of grounds 2, 3, 4 and 5.

12. We will deal first with grounds 2 and 4. Mrs. Samuels-Brown contends that the main issue in this appeal is the failure to make disclosure in a timely manner. While we agree with counsel that there are times when failure to disclose can result in "irreversible prejudice" we find that there is merit in the submissions of Mr. Taylor, Crown Counsel, when he submitted that the trial in the instant matter was conducted fairly and the ability of the appellant to conduct his defence to the charges brought against him had not been compromised, nor was he prejudiced because of the late service of statements by the Crown. He argued that defence counsel was able to pursue an effective cross-examination of Special Sgt. Kenneth Oates and was able to challenge the consistency of Oates' evidence.

13. We are also in agreement with Mr. Taylor when he submitted that the cases relied on by Counsel in respect of non-disclosure are clearly distinguishable from the facts in the instant matter. Those cases discuss the effect of non-disclosure upon the defendant's ability to adequately present his case at trial. The issue for consideration

now is really not one of non-disclosure, but one that relates to the lateness of disclosure.

14. We therefore find no merit in grounds 2 and 4, and they fail.

Grounds 3 and 5

15. These two grounds can also be conveniently dealt with together. They have really given us some anxious moments however. Mrs. Samuels-Brown submits as follows in her skeleton arguments:

> "27. It is trite law that where the defence's constitutional and legal right to cross-examine has been unduly restricted this is a proper ground for quashing the conviction. It is submitted that it matters not whether the restriction is due to direct intervention by the judge or arises out of the manner in which the prosecution executes its obligations to the Defence, and in the interest of justice, whether before or during trial.
>
> 28. Where the right to cross-examine relates to:
>
> (a) the main witness;
>
> (b) a material issue or material issues;
>
> (c) there is no prosecution evidence from a source independent of that witness as to how the event, the subject matter of the charge unfolded;
>
> (d) the defence put forward by the accused contradicts that witness' account.
>
> Then the likelihood of a successful appeal in this ground is virtually guaranteed.

> 29. In the premises it is respectfully submitted that the learned trial judge ought not to have allowed the case to continue without the witness Kimar Nembhard being subjected to further cross-examination; and/or alternatively the learned trial judge ought to have dismissed the case without calling upon the accused to answer; and/or alternatively the learned trial judge ought not as a matter of law to have placed reliance on the evidence of Kimar Nembhard relative to how the shooting took place."

16. Counsel referred to and relied on the case of ***Alan Lawless and Andrew Bashford*** (1994) 98 Cr. App. R 342. This was a case where co-accused D, who suffered from heart disease had previously pleaded guilty to three counts in the indictment and was called as a witness for the Crown. At the end of this evidence–in-chief, he suffered a heart attack and was unable to give further evidence or be cross-examined. The appellants applied to have the jury discharged because of the prejudice to their case in leaving D's evidence untested and un-challenged by cross-examination. The judge refused the application on the ground that the co-accused's evidence related only to a limited, albeit important, part of the case and he could give appropriate directions on the quality of his evidence. The judge had also directed the jury on how they should view D's evidence. The appellants were convicted and they appealed their conviction. It was held inter alia, on appeal, that (1) the judge had been entitled to refuse to exclude D's evidence; (2) the decision whether to call D as a witness was

essentially one for the prosecution and the judge's decision not to intervene was not itself unfair to the appellants.

17. Mrs. Samuels-Brown suggested that we pay particular attention to the dicta of Watkins L. J where he said at page 353:

> "The second difficulty in the judge's direction was his instruction to the jury to assume that cross-examination would have "weakened or destroyed" Davison's evidence. How were the jury to choose between those two possibilities? Faced with that direction, their only proper course would have been to assume that it would have been destroyed. That being so, **the judge should have directed the jury to ignore his evidence altogether**. In our view, that would have been the nearest he could have got by of direction to overcoming the substantial prejudice to the appellants resulting from the untested evidence of Davison". (her emphasis)

18. Mr. Taylor on the other hand, submitted that it was not inevitable that if Kimar Nembhard had been recalled for further cross-examination that the accused man would have been acquitted. He also submitted that there was no guarantee that under further cross-examination Kimar Nembhard would have admitted that he was armed with a gun or that he would be able to identify the appellant on the scene.

19. In our view, the learned judge was in error in continuing the trial without the witness Nembhard being present for further cross-

examination. There is no doubt that the appellant would have been prejudiced since his counsel was unable to put forward his case through the recall and cross-examination of the witness in order to test his credibility and to have the learned trial judge assess his reaction to particular questions.

Disposal of the Appeal

20. Mrs. Samuels-Brown sought to have the convictions quashed and sentences set aside and for an outright acquittal to be entered. The Court invited her to address it on the possibility of a re-trial and she submitted as follows:

> "It would be unfair to give the prosecution a second bite at the cherry since Nembhard had absented himself from the trial so he could not be further cross-examined. Where the Crown's case rests on the credibility of a particular witness who by his own deliberate act has prevented his credibility to be tested, a re-trial would not be proper in the interests of justice."

21. The power to order a new trial is conferred upon this Court by s. 14 (2) of the Judicature (Appellant Jurisdiction) Act 1962, which is in the following terms –

> "(2) Subject to the provisions of this Act the Court shall, if they allow an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial at such time and place as the Court may think fit."

22. ***Reid v R*** (1978) 27 WIR 254 has enunciated the principles regarding the ordering of a new trial and they are well-known. In that case Lord Diplock stated inter alia at page 255:

> "Although the verb used is mandatory: 'the Court shall..., if the interests of justice so require, order a new trial', and consideration of what the interests of justice require in a particular case may call for a balancing of a whole variety of factors, some of which will weigh in favour of a new trial and some against, and not all of which are necessarily confined to the interests of the individual accused and the prosecution in the particular case. The weight to be given to these various factors may differ from case to case and depends very much on local conditions in Jamaica with which the Court of Appeal is much more familiar than their Lordships and is better qualified to assess".

23. We are satisfied on an application of the principles laid down in ***Reid*** (supra) that the offences in respect of which the appellant was tried are not only serious but are quite prevalent in this country. The issues in the case are not complex and the case for the prosecution is prima facie a strong one. We are also of the view that no questions could arise with respect to the Crown seeking to cure evidential deficiencies on a re-trial. It is further our view, therefore, that there can be no prejudice to the applicant since a re-trial can only be in the interests of justice.

Conclusion

24. In the circumstances, the appeal is allowed, the convictions are quashed and the sentences set aside. In the interests of justice, a new trial is ordered to take place as soon as possible in the Regional Gun Court.