[2022] JMCA CRIM 46

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MR JUSTICE FRASER JA
THE HON MR JUSTICE LAING JA (AG)

PARISH COURT CRIMINAL APPEAL NO COA2021PCCR00023

SHAQUILLE ASHLEY v R

John Clarke for the appellant

Ms Natalie Malcolm and Mrs Kimberly Guy Reid for the Crown

21, 22 and 23 September 2022

LAING JA (AG)

Background

[1] On 19 October 2019 Shaquille Ashley ('the appellant') was a member of a group of men on a walkway in Gore Tuca, Portmore, in the parish of St. Catherine. Constable Michael Manning and Corporal Dennis Plummer approached the men and proceeded to search them. The appellant was searched by Constable Manning and a ratchet knife was taken from his pocket. Constable Manning arrested him for being in possession of an offensive weapon. There was an altercation between Constable Manning and the appellant, which escalated to a vigorous struggle, following which, Constable Manning restrained the appellant with handcuffs and took him to the Portmore Police Station where he was charged for the following offences:

a) Being armed with an offensive weapon in a public place contrary to section 3(2) of the Offensive Weapons (Prohibition) Act ("the Offensive Weapons Act");

b) Resisting arrest contrary to section 30 of the Constabulary Force Act; and

c) Disorderly conduct, contrary to section 11 of the Towns and Communities Act.

[2] At the trial of the appellant before the Judge of the Parish Court ("the parish judge"), an order for indictment was obtained and he was tried on an indictment containing three counts in respect of these offences. He was found guilty on all three counts and sentenced as follows:

> Count 1– Being armed with an offensive weapon in a public place: fined $4000.00 or 30 days' imprisonment;
>
> Count 2 – Resisting arrest: fined $2000.00 or 30 days' imprisonment; and
>
> Count 3-Disorderly conduct – fined $2,000.00 or 30 days' imprisonment.

The sentences were ordered to run concurrently.

[3] The appellant has appealed against his conviction pursuant to section 293 of the Judicature (Parish Courts) Act on the following grounds:

> "(i) The learned judge of the parish court erred in law.
>
> (ii) The learned judge of the Parish Court misdirected
>
> herself by ignoring fundamental facts and principles of law
>
> hence arriving at a flawed decision.
>
> (iii) Insufficiency of facts found to support the judgment."

The submissions on behalf of the appellant

Mr. Clarke, appearing for the appellant, submitted that these three grounds could be consolidated into a single ground representing a challenge to the correctness of the conviction, which is, that the conviction is unsafe in respect of all three offences. Accordingly, counsel made his submissions in keeping with this formulation and did not structure his arguments strictly in keeping with the grounds as filed and we have adopted a similar approach in our analysis of the appeal.

[4] In respect of the offence of being in possession of the offensive weapon, Mr Clarke did not pursue with any vigour, his argument that the appellant was not knowingly in possession of the ratchet knife. However, he complained that the particulars of the offence as stated in the indictment, did not accurately reflect the section of the statute under which the appellant was charged, namely section 3(2) but was more consistent with section 3 (1). For that reason, he argued that the particulars of the offence as stated in the indictment was prejudicial to the appellant in that he was not prepared to meet those particulars.

[5] Counsel submitted that the two predicate offences of being armed with an offensive weapon contrary to section 3(2) of the Offensive Weapons Act and disorderly conduct, contrary to section 11 of the Towns and Communities Act, made express provisions for how an arrest can be made. The relevant provision in the Offensive Weapons Act is section 5 (2) (c) and in the Towns and Communities Act, it is section 23. He argued that Constable Manning did not satisfy the procedures laid down in these two acts in that he did not first seek to ascertain the name and residence of the appellant prior to arresting him. Accordingly, section 30 of the Constabulary Force Act was not breached because the Crown did not establish that Constable Manning was acting in the lawful execution of his duty, and hence he was as a consequence effecting an unlawful arrest at the time when the appellant is alleged to have resisted.

[6] In respect of the charge of disorderly conduct, Mr. Clarke submitted that the parish judge had a duty to disclose the basis on which he came to the conclusion that the appellant was guilty of this offence. He argued that this was particularly so in circumstances in which the appellant was complaining of an unconstitutional search of his person.

The submissions on behalf of the Crown

[7] The Crown submitted that pursuant to the Criminal Justice (Administration) (Amendment) Act of 2018 it was permissible for the learned parish judge to have tried all three offences together although the offence of being armed with an offensive weapon in a public place was under the summary jurisdiction of the court and the other two offences under the Petty Sessions jurisdiction.

[8] In respect of the charge relating to the offensive weapon, the position advanced was that section 5 of the Offensive Weapons Act cannot be read in isolation especially since it states that the constable "may" arrest the person. Reference was made to section 15 of the Constabulary Force Act which provides that a constable can arrest without warrant or apprehend any person once that person is found committing an offence that is punishable by way of indictment or summary conviction. In this case, it was highlighted that the offence of possession of an offensive weapon in public, is one which is punishable by summary conviction and as such the Crown submitted the arrest was lawful. The argument posited by the Crown was that the Constabulary Force Act is the primary act and that the Offensive Weapons Act is subsidiary to it. The result of this is that Constable Manning was well within his right and carrying out his lawful duty when he arrested the appellant after he found the ratchet knife. For this reason, it was argued that the offences of resisting arrest and disorderly conduct that followed thereafter were properly found to have been committed.

[9] The Crown made reference to section 291 of the Judicature (Parish Courts) Act and the observations of F Williams JA in the case of **Dwain Brown v R** [2021] JMCA

Crim 33 as to the requirement of a judge of the Parish Court to set out a summary of his or her findings of fact which need not be in the nature of a treatise or dissertation. It was argued that the learned parish judge did provide a summary, which although concise, was sufficient for the appellant to discern her reasons for finding him guilty.

[10] It was conceded by the Crown that section 11 of the Towns and Communities Act indicates that the prescribed fine is one not exceeding $1000.00 or 30 days' imprisonment. The learned parish judge accordingly erred in imposing the fine of $2000 that she imposed in respect of the offence of disorderly conduct and the court was respectfully asked to re-sentence the appellant.

Analysis

Being armed with an offensive weapon in a public place

[11] The appellant admitted in his evidence that Constable Manning took his utility knife from his right front pocket. He admitted that his utility knife is the same knife called a ratchet knife that was exhibited in evidence. Section 2(1) provides that:

> " 'offensive weapon' means –
>
> (a) …
>
> (c) any swordstick, ballistic knife, butterfly knife, flick knife, knuckleduster, knuckle knife or any knife which is commonly known as a switchblade, ratchet knife or rambo knife, or such other knife as the Minister may prescribe by order subject to affirmative resolution; …"

It is clear on the evidence that the appellant was knowingly in possession of a ratchet knife and was accordingly in possession of an offensive weapon.

[12] It is helpful in examining the conviction in respect of the three offences to reproduce section 3 of the Offensive Weapons Act in its entirety as follows:

> "3.-(1) A person shall not, without lawful authority or reasonable excuse, knowingly have with him in any public place any offensive weapon falling within paragraph (a) or (b) of the definition of 'offensive weapon'.
>
> (2) A person shall not knowingly have in his possession in any public place, any offensive weapon falling within paragraph (c) of the definition of 'offensive weapon'
>
> (3) A person who contravenes subsection (1) or (2) commits an offence and is liable on summary conviction before a [Judge of the Parish Court] to a fine not exceeding four thousand dollars and in default of payment to imprisonment for a term not exceeding four months.
>
> (4) It shall be a defence for a person charged with an offence under subsection (1) to prove that he had the article with him for the purposes of any lawful sport or the person's lawful trade, business or occupation."

[13] The particulars of the offence of being armed with an offensive weapon in a public place, contrary to section 3 (2) of the Offensive Weapons Act for which the appellant was charged reads as follows:

> "... on the 19th day of October 2020 in the parish of St. Catherine without legal authority or reasonable excuse in a public place to wit walkway Gore Tuka Portmore St. Catherine did have in his possession a ratchet knife."

[14] The assertion by Mr Clarke that the particulars of the offence were more consistent with the offence prohibited by section 3 (1) has some merit to the extent that the concept of "without legal authority or reasonable excuse" is introduced whereas this is absent from section 3(2). It is however noteworthy that section 3(1) relates only to offensive weapons falling within paragraph (a) or (b) of the definition in section 2 (1). Section 3(2) under which the appellant was charged relates to paragraph (c) of the definition which includes a ratchet knife the subject of the charge against the appellant.

[15] In these circumstances, the possession by the appellant of the ratchet knife even if it were for the purposes of the appellant's lawful trade, business or occupation would

not have amounted to a defence since section 3(2) under which he was charged, simply requires the appellant to have knowingly been in possession of it in a public place in order to infringe that section. The purpose of the possession is for all intents and purposes, immaterial.

[16] The evidence of the appellant's supporting witness, that firefighters are allowed to carry knives to perform their duties and that the ratchet knife is safer, was not relevant to the determination of the appellant's guilt or innocence, and the learned parish judge was quite correct in her conclusion that this was not a defence that could avail the appellant in the circumstances of this case.

[17] Although the particulars of the offence had the words "without legal authority or reasonable excuse", these words were mere surplusage. Their inclusion was unfortunate, but the appellant was not prejudiced. The learned parish judge was entitled to find, as she did on the evidence, that the appellant was knowingly in possession of an offensive weapon in a public place, and that this was sufficient to satisfy the requirements of subsection 3 (2), under which the appellant was tried on the indictment. Accordingly, the complaint in respect of the conviction of the appellant in respect of this charge has no merit. We have therefore reached the conclusion that the appellant was properly convicted of this offence.

Resisting arrest

[18] Section 5 (2) of the Offensive Weapons Act provides that if in the course of any search carried out pursuant to subsection (1) an offence under section 3 appears to have been committed-

> "(a) the constable shall seize any offensive weapon found in the course of such search;
>
> (b) the person shall give his true name and address to the constable when requested to do so,

> (c) if the person fails to give his name and address the constable may, without a warrant, arrest that person."

It is common ground that Constable Manning did not request that the appellant give his true name and address to him, before Constable Manning arrested him. The evidence of Constable Manning was that when he took the knife from the appellant's pocket, he informed him of the offence of being armed with an offensive weapon, he also cautioned and arrested him and began to escort him to the police vehicle. Constable Manning did not in his evidence suggest that there was any basis for arresting the appellant for disorderly conduct at this point. The evidence of the sequence of events suggests that the alleged resisting arrest occurred after this point.

[19] There is no evidence of the appellant resisting arrest on a charge of disorderly conduct. In any event, there was no evidence by Constable Manning that he sought to ascertain the name and residence of the appellant and accordingly there is no necessity to consider the effect of section 23 of the Towns and Communities Act to which Mr Clarke referred. This section is in the following terms:

> "It shall be lawful for any constable, and for all persons whom he shall call to his assistance, to take into custody without a warrant any person who, within view of any such constable, shall offend in any manner against this Act, and whose name and residence shall be unknown to such constable, and cannot by enquiry be ascertained by such constable, but not otherwise, except as to the offences mentioned in section 3."

[20] There is accordingly merit in the submissions of Mr. Clarke that Constable Manning was not in the lawful execution of his duty at the point at which the appellant resisted what was an unlawful arrest, and that section 30 of the Constabulary Force Act requires the resisting of the arrest to be of a constable in the lawful execution of his duty for the offence to be proved. Section 30 is in the following terms:

> "If any person shall assault, obstruct, hinder or resist, or use any threatening or abusive and calumnious language or aid or incite any other person to assault, obstruct, hinder, or resist any Constable in

> the execution of his duty, every such offender shall be liable to a fine not exceeding two thousand dollars."

[21] We do not accept the submissions of the Crown in respect of an overarching right conferred on Constable Manning by virtue of section 15 of the Constabulary Force Act that overrides the specific provision of section 5(2) of the Offensive Weapons Act. The Offensive Weapons Act was passed to address a specific mischief and has provided its own operating framework for the arrest of persons found with offending items. Accordingly, there is no difficulty created by what may be viewed as a tension between the two referenced provisions. The Court is required to give effect to the specific procedural requirements contained in the Offensive Weapons Act. However, to the extent that it is argued that there is a conflict between both statutes, the Constabulary Force Act predates the Offensive Weapons Act by many years and the general rule of statutory interpretation is that where there is a conflict between two statutory provisions, in respect of a specific issue, then the legislation that most recently took effect, prevails.

[22] We are also not convinced by the submission of the Crown that the fact that subsection 5 (2) (a) of the Offensive Weapons Act states that the constable "may" without a warrant arrest that person, is material. The use of the word "may" merely provides for the availability of an arrest as an option if the person does not give his true name and address to the constable after being required to do so. The fact that the offence of being in possession of a prohibited weapon in a public place is a summary offence, does not in and of itself confer a right on a constable who has detected such an offence to effect an arrest, without more. It should also be noted that an unlawful arrest does not vitiate the subsequent criminal proceedings but merely gives a right to a civil claim for damages. There is therefore nothing illogical about the precondition of ascertaining an accused person's name and address.

[23] It is not in dispute that a person has an unqualified right at common law to resist an unlawful arrest (see **Christie v Leachinsky** [1947] AC 573). Where a person uses excessive force to resist an unlawful arrest, this may amount to an offence, but that offence would not be assaulting a constable in the execution of his duty (see **Kenlin v**

Gardiner [1967] 2 QB 510). We have concluded that the learned parish judge erred in failing to give due consideration to the effect of the fact that Constable Manning did not seek to ascertain the name and address of the appellant before arresting him. As a consequence, the conviction of the appellant for the offence of resisting arrest cannot stand.

Disorderly conduct

[24] In respect of the offence of disorderly conduct, Mr Clarke submitted that the conduct of the appellant in all the circumstances would not be sufficiently egregious to make him guilty of the offence. We note, that there is ample evidence from Constable Manning as to the boisterous behaviour of the appellant, which, if accepted by the learned parish judge could be sufficient to satisfy the offence.

[25] Unfortunately, whereas the learned parish judge indicated that she found Constable Manning to be a credible witness, she did not go further to indicate what specific portions of his evidence she accepted in order to arrive at her conclusion that the appellant was guilty of the offence of disorderly conduct. She made the following findings:

> "… Further on his [sic] evidence he said many things that night, whether loudly or not his conduct that night on his own evidence invited the crowd's shouting. The whole scene was such as to disrupt the peace and accordingly the court finds beyond reasonable doubt that the prosecution has succeeded in proving the accused guilty on all counts on the indictment."

[26] Section 291 of the Judicature (Parish Courts) Act which references all proceedings in the Parish Court by way of indictment and all summary proceedings before Courts of Petty Session provides as follows:

> "… Where any person charged before a Court with any offence specified by the Minister, by order, to be an offence to which this paragraph shall apply, is found guilty of such an offence, the Judge of the Parish Court shall record or cause to be recorded in the notes of evidence, a statement in summary form of his findings of fact on which the verdict of guilty is founded."

In the case of **Dwain Brown** (supra) which was commended to us by the Crown, Frank Williams JA provides an apposite reminder of this requirement.

[27] In the circumstances of the case which was before the parish judge, where there was a divergence in the evidence of the appellant and Constable Manning as to the appellant's conduct, it was particularly necessary for the learned parish judge to have specifically indicated the critical elements of the appellant's conduct, which in her view amounted to the offence of disorderly conduct.

[28] Furthermore, as a consequence of having erroneously concluded that the arrest was lawful, the learned parish judge fell further into error by not considering whether the force used by the appellant in resisting what was an unlawful arrest was reasonable, nor did she consider whether the fact that the appellant was resisting an unlawful arrest may have influenced her assessment of whether the appellant's reaction could have nevertheless amounted to disorderly conduct. No findings of fact were made in respect of this issue.

[29] In light of these deficiencies, the conviction for the offence of disorderly conduct is not sustainable.

<u>The joinder of the offences</u>

[30] It was noted by the parish judge in the notes of evidence that the Crown elected for the offences to be tried together on indictment pursuant to the Criminal Justice (Administration) (Amendment) Act, 2018. Section 22 of the Criminal Justice (Administration) Act as amended by the section 2 of the Criminal Justice (Administration) (Amendment) Act, 2018 is in the following terms:

> "2**.** Section 22 of the principal Act is amended by deleting subsection
>
> (2) and inserting next after subsection (1) the following subsections—

"(2) Where, in relation to offences triable before a Parish Court (whether summarily, on indictment, at Petty Sessions, or by virtue of any criminal jurisdiction conferred by statute)—

(a) a person is charged with two or more offences which—

(i) are founded on the same facts;

(ii) arise out of a single act or series of acts;

(iii) form part of a series of offences of the same or similar character; or

(iv) are so connected as to form part of the same transaction; or

(b) a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, and a person is charged with each or any of such offences,

the charges may be tried at the same time, on indictment, unless the Court is of the opinion that there is a substantial risk of injustice if the offences are tried together, or that the administration of justice would be better served if the offences are tried separately.

(3) Where offences are tried together pursuant to subsection (2), any appeal which may lie from the decision of the Parish Court shall be heard by the Court of Appeal."

[31] We agree with the submissions of the Crown that the course pursued was permissible. The intention of the amendment appears to have been geared at removing offences from their respective statutory silos where they were being tried together, with the indictment being the common vehicle for trial of the otherwise disparate offences. The words of the legislation are clear and there is no indication that there is a need for one of the offences being tried to be an indictable offence before this course can be adopted.

Disposition

[32] For the reasons contained herein we make the following orders:

1. The appeal is allowed in part.

2. The appeal against conviction and sentence on count 1 of the indictment for the offence of being armed with an offensive weapon in public is dismissed. The conviction and sentence are affirmed.

3. The appeal against the conviction and sentence on count 2 of the indictment for the offence of Resisting arrest is allowed and the conviction is quashed, the sentence is set aside, and a judgment and verdict of acquittal are substituted therefor.

4. The appeal against the conviction and sentence on count 3 of the indictment for the offence of disorderly conduct is allowed and the conviction is quashed, the sentence is set aside, and a judgment and verdict of acquittal are substituted therefor.

5. The appellant is to be forthwith refunded the fines paid in respect of counts 2 and 3.