[2015] JMCA Crim 6

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 3/2009

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA

KEMAR SHARMA v R

Ms Jacqueline Cummings for the applicant

Mrs Paula Rosanne Archer-Hall for the Crown

3 and 6 March 2015

BROOKS JA

[1] On 4 December 2008 Mr Kemar Sharma was convicted in the High Court Division of the Gun Court on charges of illegal possession of a firearm, robbery with aggravation and wounding with intent. He was sentenced by the learned trial judge, Daye J, to sentences of 10, 14 and 16 years imprisonment on the respective charges. Mr Sharma is dissatisfied with the convictions and sentences and seeks leave to appeal against them. His initial application was considered by a single judge of this court but was refused. He has renewed his application before us.

[2] The evidence that the learned trial judge accepted in finding Mr Sharma guilty of the offences concerned an incident which occurred on 29 January 2008. The only witness as to the shooting was the victim thereof, Mr Leroy Playdle. He testified that sometime in the evening of that day he was at his home in Old Harbour in the parish of Saint Catherine. While there, he received a telephone call from someone whom he knew before as "Baby Two". As a result of the call he expected a visit from Baby Two or someone associated with him.

[3] At about 8:00 pm that evening there was a call at his gate and he went to the gate to see a motor vehicle with three men, including Baby Two, aboard. He spoke to Baby Two, whom he identified to be Mr Sharma. Mr Playdle testified that he gave Mr Sharma $1,000.00, but Mr Sharma voiced dissatisfaction with that amount. One of the other men, armed with a gun, came out of the car and ordered Mr Playdle into the vehicle. He complied and when he had got into the car Mr Sharma told Mr Playdle that he was going to kill him. The men took him to another location. During the drive Mr Playdle remonstrated with Mr Sharma, offering to give him $50,000.00, which was at his home, in lieu of his life, but Mr Sharma was undeterred by their discussion.

[4] At their destination, Mr Playdle testified, Mr Sharma brandished a gun, ordered him out of the car and marched him to a nearby track. While on the track, Mr Sharma kicked Mr Playdle's feet from under him and he fell face down. While he lay on the ground, Mr Sharma ordered his cronies to search Mr Playdle's pockets. The men took $83,000.00 from his pockets.

[5] Mr Sharma then shot him in the hand. He got up, pushed Mr Sharma and ran for his life. He was however shot again while he ran. He hid in bushes and the next morning called for help. The police came to his rescue. One of the officers, Constable David Bernard, testifed that he saw Mr Playdle in bushes lying on his back, "with what appeared to be gunshot wounds over his body" (page 88 of the transcript). The officers took Mr Playdle to hospital where he was admitted and treated for his injuries.

[6] On 21 June 2008, he pointed out Mr Sharma on an identification parade as being one of his assailants. He said that he knew Mr Sharma for about five to six months before the day of the shooting. He knew Mr Sharma's father and brother. He said that Mr Sharma was always calling him on his telephone, begging for money.

[7] At the trial, Mr Sharma, in an unsworn statement, denied being involved in Mr Playdle's misfortune. He said that he was at his home on the night of the incident. He said that some time before that day, Mr Playdle had asked him to kill a man named Joe, but he declined saying that he would have nothing to do with such matters. He, however, agreed to introduce Mr Playdle to two men who could assist Mr Playdle with that nefarious task. He said that on the evening in question, Mr Playdle had telephoned him saying that he was in the company of the men and they were on their way to Joe's place. Mr Sharma called a witness who supported his alibi.

[8] The main issues with which the learned trial judge had to wrestle were those of credibility, identification and alibi. He found that Mr Playdle was an honest witness. He found that there was no mistake in the identification and he rejected Mr Sharma's alibi.

[9] Ms Cummings, on behalf of Mr Sharma, argued that "the discrepancies and inconsistencies in the prosecution [sic] case were so numerous and [so] serious in nature that the Learned Trial Judge ought not to have convicted [Mr Sharma] for these offences". She submitted that the learned trial judge was also in error in his reliance on voice identification in accepting the prosecution's case. Learned counsel also argued that the sentences were "harsh and excessive having regard to all the circumstances of the case". These complaints will be considered in turn.

The discrepancies and inconsistencies

[10] Ms Cummings pointed out a number of discrepancies and inconsistencies in the prosecution's case. These, she said, were as follows:

> "(a) The lack of medical evidence and the difference between what the complainant said was [sic] his injuries and what the police described as his injuries.
>
> (b) The fact that the complainant said he did not see the gun all that good but he knew it was a gun.
>
> (c) The issue on [sic] when the complainant said he knew or first met the Appellant.
>
> (d) The lack of lighting on the scene and not seeing the face of his assailants in the circumstance would have made identification of anyone difficult

(e) When the complainant gave his statement to the police and if he read it or was it read over to him and when it was dated.

(f) Whether the complainant had 3,4 or 5 assailants on the date in question.

(g) The sequence of event [sic] how the complainant met the Appellant.

(h) How many times the complainant was shot or a gun was fired.

(i) The omissions of evidence of general importance by the complainant from the police statements and whether they were recent concoctions."

[11] Learned counsel acknowledged that the learned trial judge did assess the various discrepancies and inconsistencies and had resolved them in favour of the prosecution. The learned trial judge had also identified and assessed omissions from Mr Sharma's statement to the police that defence counsel had highlighted during the trial. Ms Cummings submitted, however, that these discrepancies, inconsistencies and omissions were so numerous and serious that the learned trial judge should have found that there was no case for Mr Sharma to answer. She argued that the learned trial judge erred when he found that these flaws in the prosecution's case were not serious enough to affect the credibility of its main witness. She relied on **R v Galbraith** [1981] 1 WLR 1039 in support of these submissions.

[12] In answer to these submissions, Mrs Archer-Hall submitted that the prosecution's case was such that it could not be said that no jury properly directed could not convict Mr Sharma. Learned counsel argued that the decision at first instance depended on the

view of the tribunal of fact of Mr Playdle's credibility. She submitted that the decided cases have firmly established the principle that an appellate court will not disturb the findings of the tribunal of fact unless it is obviously and palpably wrong.

[13] Mrs Archer-Hall further submitted that where there is a complaint about a conviction based on findings of fact, it is not sufficient to say that it was against the weight of the evidence. Learned counsel submitted that the authorities required that the appellant must show that the verdict is so against the weight of the evidence that it is unreasonable and unsupportable. She relied on the cases of **Charles Salesman v R** [2010] JMCA Crim 31 and **R v Joseph Lao** (1973) 12 JLR 1238, among others, in support of these submissions.

[14] Of the inconsistencies pointed out by Ms Cummings, only two may be considered as being serious. These are (c) and (g) identified above. The others are really not material. The questions of differences in injuries and the description of the weapons used cannot undermine the strong evidence that Mr Playdle was shot and his injuries were plain to see by the police officer who saw him in the bushes the morning after the shooting. The lack of lighting at the scene of the shooting cannot be viewed in isolation. The interaction between Mr Playdle and his assailants commenced with a telephone call, continued with a discussion at Mr Playdle's gate and a further discussion as they drove along to the spot where they disembarked. There was ample evidence of the opportunity for identification of someone who was known before to Mr Playdle; a previous knowledge that Mr Sharma acknowledges. It is true that there was no

evidence of lighting or the time for which Mr Playdle saw Mr Sharma's face but based on their previous knowledge of each other and the length and quality of their interaction on the evening in question it would be pedantic to say that the requirements of a reliable identification were not specified in the evidence.

[15] The difference in the number of men is also not significant. Mr Playdle in his statement to the police said that Mr Sharma came to his house with three other men. In his testimony he said it was two other men and that they picked up another man along the way after they had taken Mr Playdle from his home. The learned trial judge found that the statement had been given while Mr Playdle was in distressed circumstances at the hospital and this could have accounted for the discrepancies.

[16] The more serious discrepancies ((c) and (g)) arose from the circumstances of the first meeting between Mr Sharma and Mr Playdle. Mr Playdle testified that his first interaction with Mr Sharma was when he received a telephone call from Mr Sharma, whom he did not know before. He said that he asked Mr Sharma how he had got his number. In his statement to the police, however, he said that he first met Mr Sharma in a meat shop and a few days later Mr Sharma telephoned him. It was then that he asked Mr Sharma how did he come by his telephone number. It cannot be said, however, bearing in mind the fact that Mr Sharma acknowledged that they had had previous interaction, that a discrepancy as to how they met would be material in undermining Mr Playdle's credibility.

[17] Ms Cummings was undaunted by observations that these were not significant discrepancies. Learned counsel submitted that the cumulative effect of these flaws in the prosecution's case resulted in the case being unreliable and that the learned trial judge ought not to have convicted on that evidence.

[18] The learned trial judge not only gave himself careful correct warnings in respect of inconsistencies, discrepancies and omissions, but was clinical in his analysis of the evidence. He carefully identified and asssessed each of these flaws in the prosecution's case. In respect of the omissions from Mr Playdle's statement to the police the learned trial judge found that because the statement was taken while Mr Playdle was in hospital and close to the time of the injury, "that is a factor which accounted for the difference between the time when he said that he knew the accused and he last saw the accused" (page 133 of the transcript). The signing of the statement was also affected by Mr Playdle's injury. Constable Bernard testified that Mr Playdle did not sign the statement on the same day that he gave it because bandages and an introvenous drip in his hand at the time prevented that exercise.

[19] Among the omissions that Ms Cummings identified was that Mr Playdle's statement to the police did not include the allegation that Mr Sharma had said that he was going to kill Mr Playdle. The learned trial judge identified four omissions. He directed himself that omissions could lead to discrepancies and to a finding that the witness is not truthful. Nonetheless, he found that the omissions from Mr Playdle's

statement did not damage his credibility. He found Mr Playdle to be a truthful reliable witness. He said at page 144 of the trancript:

> "…These [omissions] are details which were not in his statement but I find that as a fact, the event he testified about did occur. I find him a truthful witness, an honest witness. I do not find that he was mistaken at all as to the accused who he said that he knew, that he saw him that night and he was with him in the car that the accused was, from his home in Marley Acres to Church Pen and that he had several conversations in the car with the accused between those points and that the accused led him up a tract [sic], shot him, stepped in his back, tried to hold him, shot him and he had to run away from the accused."

[20] This court will not disturb findings of fact by the tribunal of fact unless they are shown to be "obviously and palpably wrong" (see **R v William March and others** SCCA 87, 155, 156 and 157/1976 (delivered 13 May 1997) at page 5). There is no finding in the present case that fits that description. Indeed, the following quote from paragraph [32] of the judgment of Mangatal JA (Ag) (as she then was), in **Dwight Kirkaldy v R** [2014] JMCA Crim 13 very aptly applies to the summation given by Daye J and the circumstances of the present case:

> "In our view, the learned trial judge adeqately demonstrated an understanding and application of the relevant principles involved in assessing the credibility of the witness. Whilst there were a number of inconsistencies in the evidence of the complainant, we agree with the learned trial judge and [counsel for the Crown] that the nature and level of the inconsistencies when taken together, were not of such a material nature or of such severity as to render the evidence of the complainant manifestly unreliable or the conviction unsafe. The learned trial judge dealt with all of the salient issues and resolved the areas of inconsistency and discrepancy in a wholly permissible manner. It is fair to say that the question of exactly how many men were shooting at

> the complainant, (whether he was alone, or whether he was in the company of other men who were also shooting), and the inconsistencies in the evidence as to the sequence of events, did have some effect on the credibility of the complainant. However, at the end of the day, as the learned trial judge found, the essential question was whether she was satisfied so that she felt sure that on the day in question the applicant was armed with a firearm and shot at the complainant. [The learned judge] was quite justified in finding that such inconsistencies and discrepancies as existed did not erode the complainant's credibility in any major way and did not go to the root of the Crown's case."

Identification

[21] On the issue of identification, Ms Cummings submitted that the learned trial judge erred when he relied on Mr Playdle's purported recognition of Mr Sharma's voice during the incident. She argued that no "evidence was led as to how many times or how often they spoke for him to be able to recognize [Mr Sharma's] voice".

[22] Learned counsel stated that the prosecution's evidence in respect of the assailant's voice fell short of the standard set in **Rohan Taylor and Others v R** SCCA Nos 50-53/1991 (delivered 1 March 1993) in which Gordon JA, who delivered the judgment of the court, said:

> "In order for the evidence of a witness that he recognized an accused person by his voice to be accepted as cogent, there must, we think, be evidence of the degree of familiarity the witness has had with the accused and his voice and including the prior opportunities the witness may have had to hear the voice of the accused. The occasion when recognition of the voice occurs, must be such that there were sufficient words used so as to make recognition of that voice safe on which to act…"

(Extracted from paragraph [17] of **Ronique Raymond v R** [2012] JMCA Crim 6.)

[23] Mrs Archer-Hall conceded that the prosecution had led no "formal evidence of voice identification". She submitted, however, that the evidence of prior conversations between Mr Playdle and Mr Sharma was "sufficiently available, and cogent enough for the learned trial judge to place reliance on it".

[24] The learned judge did rely on voice identification. He did so after carefully reviewing the previous association of the two men and a detailed analysis of their interaction on the evening of the incident, starting with Mr Sharma's telephone call to Mr Playdle. After sifting through the evidence concerning the opportunities for visual identification, the learned trial judge referred to Mr Playdle's "further opportunity, though in a limited sense" (page 127-128 of the transcript) to identify Mr Sharma.

[25] It was then that the learned trial judge conducted a careful review of the "talking between the accused and the complainant" (page 128 of the transcript). During that review he made two distinct findings in relation to identification by voice. Firstly, he said at page 127:

> "Now, the talking does not really mean that [Mr Playdle] saw [Mr Sharma] at the time of the talking because [Mr Playdle] would have been in the back seat of the car at the time of that talking. That is the complainant, but **I find based upon the knowledge of the complainant that he knew who he was talking to, and who was doing the talking**, the person he saw, Baby Two, although he did not say that he saw his face while he was in the car...but the circumstances was [sic] that he knew who he was talking to." (Emphasis supplied)

[26] The second finding is recorded at page 129 of the transcript. It speaks to the occurences at the location of the shooting. The learned judge said:

> "So, there was further talking and **I find that the further talking was with the person who he know** [sic]. He did not see his face because he was kicked down and he fell face down, but it was somebody he knew by voice because prior to the incident he said that he had spoken to him several times on the telephone and he met him after and that he was not mistaken with the voice that he heard from the time he went out to the gate, and from the gate to Marley Acres, to Church Pen, to this track." (Emphasis supplied)

[27] Although there was no deliberate adducing of the evidence of familiarity with the voice of the assailant along the lines summarised by Gordon JA in **Rohan Taylor and Others v R**, the evidence did exist and the learned trial judge very carefully and sensibly analysed and made use of that evidence. In the circumstances, no complaint may properly be made of his findings in respect of the identification by voice.

Alibi

[28] Ms Cummings did not make any specific complaint about the learned trial judge's treatment of the alibi raised by Mr Sharma. Learned counsel contrasted the flaws in the prosecution's case against Mr Sharma's denial of being involved in that incident and the evidence adduced from Mr Randy Messiah (McTitus) who testified that Mr Sharma was at home on the night of 29 January 2008. Mr Messiah said that he was also there at the time as that is where he works and sleeps during the week. He and Mr Sharma sleep in the same area. He testified that Mr Sharma fell asleep before him that night.

[29] The learned trial judge, in his careful summation, gave himself the requisite directions on the treatment of the alibi raised (see page 107 of the transcript). He analysed Mr Messiah's evidence and found that, although he had "just over reached himself giving evidence beyond what he actually knows about" (page 146 of the transcript), he did give evidence of what usually occurred. The learned judge did not believe, however, that Mr Sharma was sleeping at the house on the night in question. He found that Mr Messiah's evidence did not assist Mr Sharma. He rejected the alibi. The learned trial judge's approach and finding in this regard cannot be faulted.

Sentence

[30] On the issue of sentence, Ms Cummings submitted that the learned trial judge did not reflect in his sentence the matters in favour of Mr Sharma and did not consider all the elements that should be considered in sentencing. She also submitted that, having regard to the uncertainty of Mr Playdle's injuries (no medical evidence having been tendered), the sentence of 16 years was manifestly excessive.

[31] Ms Cummings is not on good ground in respect of these submissions. The evidence is that Mr Playdle was shot in the hand and in his torso. One of the police officers who rescued him, Constable David Bernard, saw the injuries to the hand and the body. He also saw Mr Playdle while he was a patient in the hospital and noticed that he had dressings on his hand his side and his chest. It is true that there was no medical evidence but Mr Playdle testified that he was, at the time of the trial, still

feeling the effects of the injuries. Undoubtedly these were serious injuries. They were inflicted with the intent to do serious harm.

[32] A comparison with other cases involving injuries inflicted with firearms reveals the unusual case of **Kevin McKenzie v R** [2011] JMCA Crim 38 where a sentence of seven years was imposed. The sentences in the majority of the cases range, however, from 12 to 15 years including **Oneil Higgins v R** [2010] JMCA Crim 13 (12 years), **Christopher McKenzie v R** [2010] JMCA Crim 45 (15 years), **Dwight Kirkaldy v R** (12 years), **Kirk Mitchell v R** [2011] JMCA Crim 1 (15 years) and **Bryan Williams v R** [2012] JMCA Crim 34 (15 years). There were at least three cases with sentences above 16 years, including **Brian Shaw v R** [2010] JMCA Crim 34 (18 years).

[33] From the manner in which these offences were carried out, including taking Mr Playdle from the safety of his home, it cannot be said that a sentence of 16 years was manifestly excessive in the circumstances of this case. There is no basis on which to disturb the sentences imposed.

Conclusion

[34] Ms Cummings and Mrs Archer-Hall each conducted a thorough analysis of the various issues raised on this application in advancing their respective views of the prosecution's case against Mr Sharma. We are grateful to counsel for their industry.

[35] Having carefully considered the transcript and the respective submissions of learned counsel, we are, however, convinced that the learned trial judge conducted a

commendably careful analysis of the evidence that was presented to him. He made it clear that he came to his findings of fact on that evidence and on the demeanor of the witnesses who testified at the trial. His findings of fact and the conviction that resulted therefrom, cannot be faulted.

[36] We are also of the view that the sentences that he imposed are in line with previously decided cases and cannot be said to be manifestly excessive.

[37] For these reasons we find that the application should be refused and that the sentences should be reckoned as having commenced on 4 December 2008. It is so ordered.