

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 86/2014

**BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA**

DURAN TYRELL v R

Mrs Caroline Hay QC for the appellant

Mrs Andrea Martin Swaby and Rosheide Spence for the Crown

14 February and 15 March 2019

FOSTER-PUSEY JA

[1] On 17 July 2014, the appellant, Mr Duran Tyrell, was convicted in the High Court Division of the Gun Court holden at Port Antonio in the parish of Portland before Straw J for the offences of illegal possession of firearm and two counts of assault at common law. On 24 July 2014, he was sentenced to nine years' imprisonment at hard labour for the illegal possession of firearm and two years' imprisonment at hard labour for each count of assault. It was ordered that the sentences should run concurrently.

[2] His application for leave to appeal against his convictions and sentences was reviewed by a single judge of this court on 20 April 2018. The application for leave to

appeal against his convictions was refused. However, leave to appeal was granted in respect of the sentences imposed on all three counts.

[3] In so far as the sentences of two years' imprisonment for each count of assault were concerned, the learned single judge of appeal expressed the view that the sentences were improper in law and therefore manifestly excessive. The learned single judge of appeal so found in light of section 43 of the Offences Against the Person Act, which provides for the imposition of "a term not exceeding one year" for that offence.

[4] On 14 February 2019, the appeal against sentences and the renewal of the application for leave to appeal against convictions came before us for hearing.

[5] At the conclusion of the hearing this court made the following orders:

- i. The application for leave to appeal against the conviction is refused. The conviction is affirmed.
- ii. The appeal against sentence in respect of count one relating to the offence of illegal possession of firearm is dismissed. The sentence of nine years' imprisonment at hard labour is affirmed.
- iii. The appeal against sentence in relation to the offence of assault at common law in respect of counts two and three is allowed. The sentences are set aside and substituted therefor is a sentence of one year's imprisonment at hard labour on each count.
- iv. All three sentences are to run concurrently.
- v. Sentences are to be reckoned as having commenced on 24 July 2014."

These are our promised brief reasons for the making of those orders.

The grounds of appeal

[6] The original grounds of appeal filed against the convictions and sentences were stated as follows:

- “(1) **Misidentity by Witness**: That the prosecution witness wrongfully identify me as the person or among any person who committed the alleged crime.
- (2) **Lack of Evidence**: That the prosecution failed to put forward any piece of evidence (material, scientific, ballistic) to link me to the crime.
- (3) **Conflicting Testimonies**: That the prosecution witness presented to the court conflicting testimonies thus rendering the verdict unsafe in the circumstance.
- (4) **Unfair Trial**: That the prosecution failed to recognize that I could not have committed the alleged crime as I was nowhere near where the crime was committed.
- (5) **Miscarriage of Justice**: That I was wrongfully convicted of a crime I did not commit and could not have committed.
 - (b) [sic] That I was convicted of a crime I knew nothing about.”

[7] By notice of application filed on 6 February 2019, the appellant sought leave to argue the following supplementary grounds of appeal:

- “1. The sentence of nine (9) years on Count 1 is manifestly excessive in all the circumstances of the case and ought to be set aside. This Honourable Court ought to substitute the sentence as it deems just.
2. The sentences of two (2) years on Counts 2 and 3 are without jurisdiction and manifestly excessive in all the circumstances of the case and ought to be set aside. This Honourable Court ought to substitute sentences as it deems just.”

[8] Permission was granted to the appellant to argue these supplemental grounds of appeal.

The case for the prosecution

[9] A short statement of the facts is useful in the circumstances. Miss Jennifer Cameron testified that at about 7:30 pm on 11 October 2012, she was inside the shop, which she operates as a restaurant. A man later identified as the appellant came in and bent down at the counter. Miss Cameron stated that she enquired as to what the appellant wanted. He stood up and pointed a gun at her, ordering her to go to the bathroom. She thereafter heard a tussle and saw her son on the ground with the appellant pointing the gun at him. Shortly after, she saw the appellant run out the door with her son chasing after him.

[10] Miss Cameron, attended an identification parade, however she did not identify the appellant. At the trial, she testified that while she had recognized the appellant at the identification parade, she did not point him out because she was afraid.

[11] Mr Adrian Goburn, Miss Cameron's son, also gave evidence. He testified that he was at the shop operated by his mother when he went outside to make a telephone call. He stated that he saw a man (whom he later identified as the appellant) with a knapsack in his hand at the steps beside the shop. Mr Goburn testified that he looked at the man while he, Mr Goburn, was walking along a lane that is adjacent to the shop. On his return to the shop, he saw the appellant holding a gun to his mother's side. He further deponed that he grabbed a cricket bat, hit the appellant in his upper body and that the appellant

bounced against a refrigerator in the shop. Mr Goburn testified that he then lost his balance and fell to the ground. While on the ground he was able to get a good look at the appellant's face. When the appellant pointed the gun at him he threw himself to the left. The appellant then ran out of the building. Mr Goburn further gave evidence that he began to chase after the appellant but that at one stage the appellant turned and began to chase him. He stated that the appellant then escaped.

[12] Mr Goburn testified that he later identified the appellant at a video identification parade.

[13] The Crown called two other witnesses – Detective Corporal Tarren Edwards, the investigating officer, and Detective Sergeant Errol Gould, who was attached to the Visual Identification Unit of the Jamaica Constabulary Force Operations Branch.

[14] At the end of the Crown's case defence counsel made a no case submission, however, the court ruled that there was a case to answer.

The defence

[15] The appellant made an unsworn statement from the dock, in which he stated that on 11 October 2012, he went to his aunt's house in Buff Bay, Portland. He stated that he left his aunt's house at 5:00 pm to return to his home which was located in Enfield, Saint Mary. He arrived at Enfield at around 6:30 pm and went directly home, joining his aunt and her children. He further stated that, having arrived at home, he went on the computer and did not leave home for the rest of the evening.

The summing up

[16] The learned trial judge identified the major issue in the case as that of identification. The learned trial judge also indicated, among other things, that the appellant had established an alibi as his defence.

[17] In the course of her summing up, the learned judge carefully analyzed the evidence given by Mr Goburn, having indicated that she would not rely on the testimony of Miss Cameron for the purposes of identification, as her identification of the appellant in the course of the proceedings amounted to a dock identification. The learned trial judge identified four to five occasions in the course of which Mr Goburn testified that he had an opportunity to see the appellant. Thereafter, the learned trial judge stated that on one of these occasions Mr Goburn clearly had sufficient time to see the attacker properly and that those circumstances could “by no stretch of the imagination” be seen as amounting to a fleeting glance. The learned judge also stated that on the occasions which followed when Mr Goburn saw the attacker, these would have added to the time span when Mr Goburn had had a good opportunity to view the attacker.

Renewed application for leave to appeal against convictions

[18] At the start of the hearing of the appeal, Mrs Hay QC indicated that she had carefully reviewed the transcript so as to determine whether there was any basis on which a challenge could be made to the convictions of Mr Tyrell. Queen’s Counsel told the court that she explained to Mr Tyrell that she could find no ground on which she could successfully challenge the convictions. In Queen’s Counsel’s view, the learned trial judge made it clear that she would not rely on the identification evidence of Miss Cameron who

failed to point out the accused at the identification parade. In so far as the second witness, Mr Goburn was concerned, the learned trial judge carefully dissected and analyzed the various opportunities which Mr Goburn had to see the attacker and identified the opportunities in the course of which Mr Goburn would have been able to see the attacker.

[19] Queen's Counsel also stated that while at the trial a challenge was made by defence counsel to the circumstances leading up to the video identification parade at which Mr Goburn had identified the appellant, the learned trial judge carefully considered the points made and found that there was no prompting of Mr Goburn and there was no opportunity for the appellant to have been seen by Mr Goburn before the holding of the identification parade.

[20] Queen's Counsel, therefore, advanced no arguments with respect to the grounds of appeal against convictions.

[21] We also examined the transcript and agreed that there was no basis on which the directions in law and the findings of fact made by the learned trial judge could be impeached. In addition, we found that the verdicts were reasonable having regard to the evidence.

Appeal against sentences

[22] Leave was granted to the appellant to appeal against the sentences imposed in respect of the convictions for illegal possession of firearm (count one) and common assault (counts two and three) as previously mentioned at paragraph [2] herein.

[23] Mrs Hay informed the court that she had received instructions in writing from the appellant to no longer pursue the challenge in respect of the nine year sentence imposed for illegal possession of firearm. In our view this was an appropriate position to take as the nine year sentence was in keeping with the usual range of sentences imposed for such an offence. In fact, according to the Sentencing Guidelines For Use By Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017, the normal range for sentences for illegal possession of firearm is seven-15 years' imprisonment with a usual starting point of 10 years. In the circumstances, the remaining issue concerned the sentences imposed for each count of common assault.

[24] Queen's Counsel submitted that in light of the fact that the appellant was charged with and tried for common assault, the maximum sentence of imprisonment for that offence is one year. She, therefore, submitted that the learned trial judge had no jurisdiction to impose a sentence of two years on each count of common assault. She asked that the sentence be substituted as the court deems just.

[25] The Crown conceded that the sentences of two years on each count of assault exceeded the maximum sentence prescribed by law.

Discussion

[26] Section 43 of the Offences Against the Person Act provides that:

“Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable to be imprisoned for a term not exceeding three years, with or without hard labour; and whosoever shall be convicted upon an indictment for a common assault shall be liable, to be

imprisoned for a term not exceeding one year, with or without hard labour.”

[27] Counts two and three of the indictment outlined the following charges:

“Assault

Durrant Tyrell on the 11th day of October 2012 in the parish of Portland assaulted Jennifer Cameron

...

Assault

Durrant Tyrell on the 11th day of October 2012 in the parish of Portland assaulted Adrian Gubern.”

[28] We agree with the submissions of counsel. It is clear that in light of the provisions of section 43 of the Offences Against the Person Act, the sentences were erroneous and were manifestly excessive in the circumstances. This issue has been considered by this court in a number of cases including **Leon Barrett v R** [2015] JMCA Crim 29. In that case the applicant was found guilty of assault and other offences. Importantly, for the purposes of this analysis, he was sentenced to two years’ imprisonment for the offence of assault. At paragraphs [63] and [64] of the judgment (per F Williams JA), reference having been made to section 43 of the Offences Against the Person Act, the court stated:

“[63] This court, giving effect to that provision, has already indicated that the maximum sentence of this offence is one year’s imprisonment (see for example, **Denmark Clarke v R** SCCA No 153/2006, judgment delivered 9 July 2009). That ruling has received reaffirmation recently as this year in this court’s decision in the case of **Cornel Grizzle v R** [2015] JMCA Crim 15 (per Panton P).

[64] This sentence will, therefore, have to be set aside; and a sentence of one year’s imprisonment substituted therefor.”

[29] It therefore, remained for us to consider an appropriate sentence for each count of common assault. We examined the circumstances of the assault and bore in mind the fact that on the evidence the appellant held the gun in the side of Miss Cameron, pointed the gun at Mr Goburn and "pulled something on the gun as if he was fixing it". Furthermore, during the chase on the lane the appellant made a "healthy pull" on the gun while chasing Mr Goburn. In those circumstances, we felt that the maximum sentence of one year for each count of assault is appropriate.

[30] For these reasons, we made the orders as outlined above in paragraph [5].