[2013] JMCA Crim 13

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 18/2010

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MRS JUSTICE McINTOSH JA
THE HON MR JUSTICE BROOKS JA

ALRICK WILLIAMS v R

Leon Palmer for the applicant

Miss Paula Llewellyn QC, Director of Public Prosecutions and Mrs Tracy-Ann Robinson for the Crown

4, 5, 8 and 15 March 2013

BROOKS JA

[1] After hearing counsel in respect of this application we took time for deliberation and on 8 March 2013, ordered that the application was refused and that the sentences reckoned as having commenced on 8 April 2010. At the time of delivering the decision, we promised to put our reasons therefor, in writing. We now fulfil that promise.

Introduction

[2] On 3 May 2009, at about 12:10 pm, a police party, led by Detective Inspector Paul Thomas, and acting on information, went to a road construction site at Faith's Pen

in the parish of Saint Ann. There they saw the applicant Mr Alrick Williams driving a piece of heavy-duty construction equipment, called a front-end loader. The applicant and another man were aboard the vehicle.

[3] The applicant stopped the vehicle and the police boarded it. On the evidence of the police, Detective Inspector Thomas saw the applicant with a black bag on his shoulder. According to Inspector Thomas, he took the bag from the applicant and searched it. In it, he found a Mach 11 sub-machine gun which was loaded with 24 rounds of ammunition in its magazine. Also in the bag, the inspector testified, was a bank card-holder case containing the applicant's driver's licence, a photograph of himself and some business cards with his name thereon.

[4] On the applicant's testimony, the bag was behind his seat in the vehicle. He asserted that he did not put the bag there, he did not know what were its contents and had nothing to do with it. He maintained that it was not on his shoulder and his driver's licence, photograph and business cards were not in the bag, but were in his wallet in his trousers' pocket.

[5] The applicant said that he had been employed at the construction site as an operator of the front-end loader. Both he and his witness testified that the front-end loader was used by different operators according to a shift system and was never locked. They gave evidence that at nights, security guards for the work site sometimes slept in the vehicle and that the guards, as well as other workers, would sometimes

leave items of clothing as well as other items in it. On his account, the bag could have been left behind the seat by any one of a number of persons.

[6] These contending versions were placed before Sykes J at a trial in the High Court Division of the Gun Court. The learned trial judge, after hearing both sides and weighing the evidence, accepted that of the prosecution's witnesses and rejected that of the applicant and his witness. He found the applicant guilty of the offences of illegal possession of a firearm and illegal possession of ammunition. He sentenced him to nine years imprisonment at hard labour on the firearm count and one year in respect of the ammunition. The sentences were ordered to run concurrently.

The application

[7] Mr Williams has applied for permission to appeal against his conviction and sentence. A single judge of this court refused his application and Mr Palmer has renewed it before us, on his behalf.

[8] In advancing the application, Mr Palmer argued, as his main ground, that the learned trial judge wrongly downplayed the serious discrepancies between the two witnesses for the prosecution. Learned counsel submitted that, because of the issue on which the witnesses disagreed, those discrepancies made the conviction unsafe.

[9] In addition to that issue, Mr Palmer argued that certain questions asked by the learned trial judge called into question the safety of the conviction. It should, therefore, he submitted, be quashed and a verdict of acquittal substituted therefor.

The analysis

[10] In respect of the first issue, the learned trial judge did identify certain omissions and discrepancies in the evidence of the two prosecution witnesses, Detective Inspector Thomas and Detective Corporal Jeffery Brooks. They were:

a. Inspector Thomas testified that he searched the front-end loader. He, however, "did not put that detail in [his police] statement.

b. Inspector Thomas testified that he did not recall calling out to the applicant when he first saw him on the vehicle. His statement indicated that he did call to him.

c. Despite Inspector Thomas' testimony that he assisted in searching the vehicle, Detective Corporal Brooks testified that he searched the vehicle and no one assisted him.

d. Inspector Thomas testified that he jumped on the vehicle from the right side but found that he could not reach to the applicant from that side as there was neither door nor open window on that side, but only glass. He said that he had to cross over, on the front of the vehicle, from the right to the left side. It was when he got to the left side that he took the bag from the applicant. Corporal Brooks, however, testified

> that Inspector Thomas reached in through an open window on the right side of the vehicle and took the bag from the applicant. It was after taking the bag that he then crossed over the vehicle to the left side and assisted Corporal Brooks.

[11] Despite these omissions and discrepancies, the learned trial judge found that there was a "fair amount of consistency" between the testimonies of the prosecution's witnesses. He summarised Detective Corporal Brooks' testimony thus:

> "The evidence was substantially the same [as that of Inspector Thomas] in that the policeman is saying the vehicle is coming, he went on the left, Mr. Brooks [sic] was on the right and after the vehicle stopped, the two policemen now were on the left. He said it is a large yellow front-end loader with the cabin made of glass. The left side of the cabin there is an opening like a doorway. He saw the accused man in the driver's seat placing the bag on the floor and he identifies the man in the dock as the man he saw in the vehicle lowering this bag to the floor. He said it is a black string bag. He saw Mr. Thomas on the other side of the vehicle stretching his hand through the window area taking the bag from the accused. Mr. Thomas took the bag and came around to where he was, that is on the left side of the tractor…" (Pages 130-131)

[12] In addressing the inconsistencies, the learned trial judge preferred the testimony of Inspector Thomas as being "more accurate". He said, at page 140 of the transcript:

> "So what do I make of all of that [difference in testimony about the window]? Looking at both police officers and the way in which they gave their evidence, Mr Thomas appears to be more accurate of the things in regard to what took place with the accused and his movements on the vehicle in

> regard to this bag. This is confirmed to some extent by the accused man, when he found in his possession [sic] at the window and the window was closed. Which means that Mr. Brooks is not accurate when he says that Mr. Thomas gained access to the bag on the right because if Mr. Thomas jumped up on the right and he gained access that way, then he could not have gained access to the bag in the way described by Mr. Brooks….So I am satisfied that I feel sure that it was Detective Inspector Paul Thomas who took this bag."

[13] Mr Palmer submitted that to refer to Mr Thomas as being "more accurate" in such a crucial area of the evidence was to miss the significance of Detective Corporal Brooks' testimony as a "clear averment of the facts and not a mere inaccuracy". The "almost indefensible" nature of the case, Mr Palmer argued, did not allow for any inconsistencies. Learned counsel submitted that the authorities supported the stance of quashing the conviction if there is a doubt about the saftey of the conviction. He relied on the cases of **R v Cooper** [1969] 1 All ER 32; (1968) 53 Cr App R 82, **R v Pattinson** (1973) 58 Cr App Rep 417 and **Mohinder Singh v R** SCCA No 164/2006 (delivered 30 June 2008) in support of his submissions.

[14] In **R v Cooper**, the Court of Appeal of England stated the test for an appellate court when considering the safety of a conviction. The headnote of the case accurately states the finding of the court. It states, in part:

> "...the Court of Appeal must in the end ask itself a subjective question, viz., whether it is content to let the conviction stand or whether there is a lurking doubt in the court's mind which makes it wonder whether an injustice has been done: it is a reaction which may not be based strictly on the evidence as such, but can be produced by the general feel of the case as the court experiences it."

[15] In **R v Pattinson**, the English Court of Appeal cited the decision in **R v Cooper** with approval. Both cases turned on the credibility of a report of conversations held some time after the offences were committed. Lawton J, who delivered the judgment of the court in **R v Pattinson** said at page 426:

> "This Court is gravely concerned about the state of evidence in this case. It has to make a subjective judgment, as was pointed out in the case of Cooper...The problem for us on this evidence is this: have we got a lurking doubt about this case? I say on behalf of the Court that we have. We do not like this kind of evidence. It follows that the conviction of Pattinson must be quashed."

[16] Mr Palmer's submissions do not take into account that the issues joined before the learned trial judge were clear issues of fact, turning on the credibility of the witnesses. The issue was not in respect of post-offence conversations, but concerned events at the scene of the alleged offence. This court has made it clear that it will not overturn the findings of a tribunal of fact unless those findings are so against the weight of the evidence as to be "obviously and palpably wrong". The decision in **R v Joseph Lao** (1973) 12 JLR 1238 requires a more objective and definitive test than that propounded in **R v Cooper**, and, as mentioned before. **R v Lao** has been relied upon by this court for many years. The relevant portion of that judgment is accurately set out in the headnote:

> "Where an appellant complains that the verdict of the jury convicting him of the offence charged is against the weight of the evidence it is not sufficient for him to establish that if the evidence for the proscecution and the defence, or the matters which tell for and against him are carefully and minutely examined and set out one against the other, it may be said that there is some balance in his favour. **He must**

> **show that the verdict is so against the evidence as to be unreasonable and insupportable**." (Emphasis supplied)

[17] The court in **R v Lao** also cited with approval, at page 1241 of the report, an excerpt from Archbold, Criminal Pleading, Evidence and Practice in which the learned editors opined:

> "The court will set aside a verdict on [the ground that the verdict is unreasonable and cannot be supported by the evidence], where a question of fact alone is involved, only where the verdict was obviously and palpably wrong."

[18] In **R v William March and others** SCCA No 87/1976 (delivered 13 May 1977), this court cited **R v Lao** with approval. Zacca JA (as he then was) applied the principle stated in **R v Lao**. He said, at page 5 of the judgment:

> "Admittedly there were contradictions and inconsistencies in the evidence of [the prosecution's sole eye-witness] but this Court will only interfere with the verdict of the jury, where questions of facts are involved, if the verdict is shown to be obviously and palpably wrong."

[19] In the case of **Mohinder Singh v R**, this court overturned a conviction because the two witnesses for the prosecution gave conflicting testimony of a critical aspect of the case. Mr Singh had been charged for illegal possession of a firearm and shooting with intent. One witness said that he saw something in Mr Singh's hand, "but he was not sure what it was". Mr Singh was, however, in the company of another man who fired at the witnesses. The other witness testified that Mr Singh not only had a gun but that both he and another man fired. This court ruled that the learned judge in that case did not resolve the matter of whether Mr Singh had a gun or not or whether he

fired or not. It was in those circumstances that it ruled that the learned judge had erred and, on that basis, it quashed the conviction. That decision was in accordance with the test set out in **R v Lao**, in that the court found that the learned trial judge had erred in a specific way.

[20] It cannot be said that in the instant case, the learned trial judge did not grapple with the discrepancy. Not only did he do so but he revealed his thought process in making a clear decision in that regard. As the learned Director of Public Prosecutions, Miss Llewellyn, pointed out, the learned trial judge, in so doing, acted in accordance with the admonition by Carey JA in **R v Lloyd Chuck** RMCA No 23/1991 (delivered 31 July 1991). The learned judge of appeal, at page 19 of the judgment, set out, in part, the duties of a judicial officer, who is acting as the tribunal of fact:

> "Where there is conflicting evidence between Crown witnesses, [the judicial officer] should state whose evidence he accepts and whose he rejects. In that cae, it is expected that some reason or explanation for the choice, will be shortly stated. If a conclusion is derived from inferences, then the primary facts from which the inference or inferences are drawn should be stated...."

[21] The learned trial judge in the instant case, saw and heard the witnesses and was able to observe their demeanour. He constituted the tribunal of fact. As long as the evidence was credible and was believed, it provided strong incriminating evidence against the applicant, sufficient to establish the offence, for which he was charged. The learned trial judge was entitled, as he did, to accept the testimony of Detective Inspector Thomas in preference to that of Detective Corporal Brooks on the issue in

disharmony between them. We do not find that the discrepancy rendered the evidence unreliable.

[22] Mr Palmer, for his next ground, pointed to the fact that the learned trial judge asked the applicant a number of questions about the position of his arms while he was driving the vehicle. This, apparently, was in response to the testimony of the applicant that it would have been inconvenient and uncomfortable for him to have had the bag on his shoulder while driving the vehicle. He said that he had to use one hand to hold the steering and the other hand to operate the levers. Mr Palmer submitted that by asking the applicant those questions, the learned trial judge revealed that he had doubts as to whether the bag was over the appellant's shoulder.

[23] We cannot agree with Mr Palmer in respect of this submission. The learned trial judge was clearly attempting to clarify, in his own mind, whether there was any merit to the applicant's testimony about the improbability of having the bag on his shoulder. Having made those enquiries, the learned trial judge, in his summation, addressed the demonstration that the applicant had given in response to the learned trial judge's questions. The learned trial judge said, at page 141 of the transcript:

> "So what it is saying is that his hands are down in an operating position, there is no inconvenience or discomfort there. His hands were actually half-extended towards the steering wheel and also to the levers. This seems to me that there is no impossibility about the bag being over his shoulder in the way described by Mr. Thomas. So I do not accept the accused man's proposition that he could not have had the bag over his shoulder and operate the lever when the tractor was approaching the police."

[24] We also do not agree with Mr Palmer that the learned trial judge's questioning of the applicant demonstrated a bias against him. The questions were in the nature of enquiry in an effort to understand the applicant's testimony.

Sentence

[25] Finally, Mr Palmer submitted that the sentence of nine years imprisonment for the illegal possession of the firearm was excessive. Again, we disagree with learned counsel. The type of weapon, a sub-machine gun equipped with a magazine capable of accommodating 24 rounds of ammunition, is in a different class from a revolver or a pistol. It is far more effective a weapon. It had greater fire-power and was capable of greater loss of life. It, no doubt, was manufactured, purchased and sought after for that very reason. The sentence cannot be said to be manifestly excessive.

Conclusion

[26] It is for those reasons that we made the orders set out at paragraph [1] above.