The Court of Appeal for Bermuda

CRIMINAL APPEAL No 11 of 2015

Between:

JAVON WEEKS

Appellant

-v-

THE QUEEN

Respondent

Before: **Baker, President**
Bernard, JA
Kawaley, JA (Acting)

Appearances: Mr. Craig Attridge for the Appellant
Mr. Alan Richards, Department of Public Prosecutions, for the Respondent

Date of Hearing: **3 June 2016**

Date of Judgment: **17 June 2016**

JUDGMENT

Appeal against conviction- joint enterprise-assault occasioning grievous bodily harm –possession of bladed article- circumstantial evidence- sufficiency of evidence-fairness of summing up-application to admit fresh evidence-safeness of conviction

Kawaley, JA (Acting)

Introductory

1. "Blood is thicker than water" is the phrase which best reflects the underlying theme of the present appeal. The Appellant at trial (Greaves J, with a jury),

where he was jointly charged with his brother Derek, conducted his defence in a manner which supported rather than undermined his brother's defence, despite potentially significant differences in the cases against each of them. They were both convicted (by a majority of 9 to 3) on charges of wounding with intent to do grievous bodily harm contrary to section 305(a) of the Criminal Code (Count 1) and having a bladed or pointed object in a public place contrary to section 315C of the Criminal Code (Count 2), on July 1, 2015. On July 27, 2015, the Appellant filed a Notice of Appeal against conviction. Thereafter, the Appellant's brother decided to accept responsibility for these offences and to assist the Appellant in the prosecution of the present appeal.

2. The Appellant was sentenced to 4 years imprisonment concurrent on each count on October 20, 2015. Prior to the sentencing hearing at which the Appellant's brother and co-accused Derek was presumably also dealt with, Derek was interviewed in connection with his own sentencing for a Social Inquiry Report on August 24, 2015. The Social Inquiry Report was dated September 1, 2015 ("the SIR"). The Appellant's brother admitted the offences, described being given a lift in a jeep by a "brethren" to a spot near the scene of the crimes and said of the Appellant: "*My brother was not even there. He was at our house.*" The Appellant filed an application to adduce fresh evidence to like effect from his brother and former co-accused in support of the present appeal on May 11, 2016.

The Grounds of Appeal

3. In addition to seeking leave to adduce fresh evidence on appeal with a view to demonstrating that the conviction was unsafe, the Appellant advanced the following grounds of appeal:

    (1) The Learned Trial Judge erred in ruling that the Appellant had a case to answer;

(2) The conviction was unreasonable and unsupportable;

(3) The Learned Trial Judge erred by directing the jury that it was open to them to find that Appellant was the driver seen in the CCTV footage;

(4) The Learned Trial Judge conflated the evidence against the Appellant and his co-Defendant and failed to properly distinguish their respective defences.

4. Before considering the application for leave to adduce fresh evidence and these grounds of appeal, it is necessary to outline the evidence which the jury were invited to consider.

The Evidence

5. The Prosecution case was that JS, the victim, was a 15 year old schoolboy on the date of the offences, March 8, 2014. He left home with his friend KS and spotted a bike outside the Defendants' Border Hill residence at some point after 9pm. The boys decided to take the bike and wheeled it down Border Dell Road to an area known as the Jungle, behind a trailer, where they tried in vain to start it. The boys saw someone walking by whom they thought they knew and hailed. He approached them and had something in his hand. The man said: "*You, we'll teach you a lesson for messin' with our bike. Someone is goin' to die tonight*". The man produced a knife out of a scabbard and chased the two boys, one of whom (the victim) tripped and the other (KS) managed to escape. The victim was then attacked with the weapon, being struck in the side of the neck and then (as he raised his hands in self-defence and begged for mercy) struck in the hand, cutting his left ring finger off. He then heard a second voice, a deeper voice, telling the attacker to get into the car. JS did not describe the second man kicking him as he appeared from the CCTV footage to have done. He saw

his attacker walk towards a dark vehicle like a jeep which had driven down to the bottom of the hill, and he then ran away.

6. JS under cross-examination by Mr Attridge admitted that he had for the first time in Court described his attacker as saying "*we will teach you a lesson*" and agreed that the words he used in Court might not have been the precise words actually used by his assailant. The two witness statements were placed before us. The first was dated March 9, 2014, the day after the incident and omitted any mention of the removal of the bike. The second was dated March 21, 2014, and admitted the removal of the bike. In both statements JS described his assailant as asking "*where is my bike?*" It was common ground that although the bike was registered in their father's name it was regularly used by the Appellant's brother Derek.

7. The evidence of KS covered essentially the same ground as regards the taking of the bike, rolling it down the hill, and trying to start it before the man appeared. He recalled the man saying "*I'm going to chop you*" before he pulled out a sword, prompting the boys to run away. JS tripped and KS kept running up the hill, hearing JS' cries when he reached the top. He gave no evidence of seeing the second man or the van at all.

8. Police Officers attended the scene of the attack, found the cycle and identified the Defendants' father as its registered owner. Also found at the scene was a metal scabbard and a towel, both of which items had traces of the DNA of the Appellant's brother Derek on them. It was suggested on behalf of the Appellant's co-Defendant that the towel has been in the bike and that Derek's DNA had been transferred from the towel onto the scabbard. The Officers attended the family home outside of which a maroon Vitara Jeep was parked. This jeep, which was registered in the name of the Appellant, had traces of his brother and co-Defendant's DNA on the passenger seat. So there was strong circumstantial evidence suggesting that the Appellant's co-Defendant was the

victim's assailant who had been called by the 'second man' to leave the scene in the jeep-like vehicle.

9. The CCTV evidence supported a finding that the jeep in question was in fact the Appellant's vehicle. It did not directly identify either Defendant as being at the scene. The jury was reminded that the recording showed a jeep driving up and a figure who was probably KS running across the picture. According to another camera view, the second man ran over to the victim and apparently kicked him or kicked at him. The victim was already on the ground being attacked by the other man with an object. The second man returned to the driver's side of the vehicle before driving off. As the judge told the jury, the Prosecution was entitled to say that this constituted strong evidence that the second man was a "*knowing and intentional participant in the chopping joint exercise*".

10. Thus far, therefore, the only evidence linking the Appellant to the offences was the fact that he was the owner of the vehicle whose driver participated in the attack and the brother of the man who rode the stolen cycle, the removal of which by the victim prompted the attack. The Prosecution relied on the Appellant's Police interview as evidence of his guilt. He initially denied ever lending his car to anybody, then said he occasionally did and refused to answer questions about whether he had lent his car to anyone on the night of the offence. The Appellant also denied involvement in the attack, asserted he had a leg injury from a road accident and was incapable of doing what he was alleged to have done. He displayed minimal sympathy for the victim. The interview was both self-exculpatory and potentially incriminating. Meanwhile the Appellant's co-accused, against whom there was subsequently shown to be far more incriminating evidence, exercised his right of silence.

11. The Appellant's counsel extracted a concession from one of the arresting officers that he may have seen the Appellant with a cane. But the Appellant's own alibi witness merely stated that the Appellant only walked with a limp when his knee hurt and made no mention of him using a cane. The Appellant's alibi witness,

his friend Tariq Webb, did say he was unaware of the Appellant leaving his home that evening.

The Application for Fresh Evidence

Governing Legal Principles

12. This Court's jurisdiction to admit fresh evidence on appeal is the same as that of the Supreme Court. The Court of Appeal Act 1964 provides as follows:

> *"8.(1)Subject to this Act and any Rules, in the determination of appeals before it, the Court of Appeal shall have all the powers and duties conferred or imposed on the Supreme Court in the exercise of its original or appellate jurisdiction.*
>
> *(2) The powers of the Court of Appeal to admit additional evidence shall correspond to the power of the Supreme Court to admit fresh evidence in the exercise of its appellate jurisdiction in a civil or criminal cause, as the case may be."*

13. In *Barnett-v-R* [2015] Bda LR 103, Bernard JA (at paragraph 7) held that the principles governing the exercise of the discretion to admit fresh evidence were:

> *"...reflected in the case of* R v Parks[1] *(1961). These are (i) the evidence sought to be called must be evidence which was not available at the trial; (ii) the evidence must be relevant to the issues; (iii) it must be credible evidence, that is, evidence well capable of belief; (iv) if the evidence is admitted, the Court will, after considering it, go on to consider whether there might have been a reasonable doubt in the minds of the jury with regard to the guilt of the appellant if that evidence had been given together with the other evidence at the trial."*

[1] (1961) 46 Crim App R 29.

14. It was common ground in the present case that the Court of Appeal, in its discretion, could hear oral evidence from the proposed witness, *de bene esse*. The Court would then decide whether or not to admit the fresh evidence the Appellant sought to adduce. Both counsel referred to two English cases which they agreed reflected the principles governing adducing fresh evidence when a co-defendant confessed to the offence after the appellant was convicted. In brief, the main considerations are:

(a) whether the evidence is credible; and

(b) if it is credible, does it render the conviction unsafe.

15. In *R-v-Ditch* (1969) 53 Cr. App. R. 627, Mr Richards aptly relied upon the following observations by the English Court of Appeal (O'Connor J, at 633):

> *"...in the ordinary course of events this Court will be very careful before it will admit a confession of guilty by one of two people who have been convicted by a jury of a joint offence. It would be too easy for criminals to seek to share out responsibility so as to get one of them off."*

16. Mr Attridge argued the facts in *R-v-Horner* [2004] EWCA Crim 560 were similar to the present case. But Pitchers J also described the approach to fresh evidence from a co-defendant who was a friend or relative as follows:

> *"As a general proposition if a friend or relative comes forward after a trial and a conviction of the offence and claims to have committed the offence having allowed the trial to go ahead without imparting that information previously, the appellant in such case would have a very high hurdle to surmount in persuading the Court that the new witness is giving evidence that is credible."*

Merits of Application

14. Having heard the Appellant's co-Defendant, his brother Derek, give oral evidence, I am unable to conclude that his evidence is credible. Under cross-examination by Mr Richards, he admitted that at trial the effect of his defence was to mislead the trial Court. He testified that the Appellant was not the second man, but declined to say who the second man in fact was.

15. In reminding the jury of the evidence, the judge noted in passing the inconsistency between the Police evidence that another family member was on the premises when officers arrived at the family home and that family member's own witness statement to the effect that when he arrived home the Police were already there. It is tempting to speculate that the Appellant and his co-Defendant may have been concerned to conceal the identity of the true driver of the jeep because he was another family member. But courts do not decide cases on the basis of speculation. Their proper role is to shine a light on the truth, not to help to conceal it.

16. In each of the cases referred to in argument, the co-defendant admitted to being solely responsible for the crime in circumstances where it was open to the jury to find that one defendant was solely responsible for the crime. There was other credible evidence which supported the reliability of the co-defendant's confession. It easy to understand why the courts in those cases felt that the high threshold for adducing this type of evidence on appeal had been met. The present case was not only a joint enterprise case; the fresh evidence sought to be adduced did not even come from a person confessing to be the 'true' second man.

17. The Appellant's application to adduce fresh evidence is accordingly refused.

<u>Ground 1:</u> The Learned Trial Judge erred in ruling that the Appellant had a case to answer

18. There was clearly a case to answer, although the evidence was in my judgment stronger on Count 1 than it was on Count 2. It was open to the jury to conclude that the Appellant was the second man, based on a combination of the fact that his jeep was at the scene, he lived at the same property as his brother, the driver of the jeep was shown to have aided in the attack and his Police interview could be construed as including a withdrawn admission that he was the only person who drove his jeep. Although at trial the Appellant's defence did not involve distinguishing between Counts 1 and 2, to my mind the evidence on Count 2 was more tenuous. Count 1concerned the attack on the victim. Count 2 concerned having a bladed article in a public place. The Prosecution's case through each of the eyewitness' accounts, and supported potentially at least by the CCTV footage, was most plausibly as follows. The assailant, the co-accused, was on foot in the Jungle with the sword and launched the attack before the jeep driven by the Appellant arrived. How he assisted in the wounding (if he was the second man) was clear in light of the CCTV footage. How he assisted his brother in having the sword (if he was the second man) in a public place was, it appears from the Summing-Up, based on precisely the same facts.

<u>Ground 2:</u> The conviction was unreasonable and unsupportable

19. This was a hopeless ground of appeal. There was a case to answer. The Appellant elected not to give evidence. A friend gave 'alibi' evidence which did not completely exclude the possibility that the Appellant had spent a short time at the scene of the crime. Subject to any misdirection, it was open to the jury to enter verdicts of guilty.

<u>Ground 3:</u> The Learned Trial Judge erred by directing the jury that it was open to them to find that Appellant was the driver seen in the CCTV footage

20. The judge dealt with the CCTV evidence carefully and fairly and the jury actually saw the footage. He made it clear that, although it was not possible to identify the Appellant in the video images, they could infer that he was the driver based on the fact that it was his jeep and his brother's bike which had been stolen. This ground of appeal also fails.

<u>Ground 4:</u> The Learned Trial Judge conflated the evidence against the Appellant and his co-Defendant and failed to properly distinguish their respective defences

21. From the outset, this ground of appeal appeared to me to have the most substance to it. However, having heard full argument and carefully reviewed the record, it is clear that the Appellant and his co-Defendants essentially raised the same defence: 'we were not there'. Mr Attridge conceded that he did not distinguish between his client's case on Counts 1 and 2 at trial. Nor did he do so in the course of the appeal. The judge said when summarising the defences:

> *"The case for each of the Defendants. Remember, I've told you that each Defendant's case must be separately considered, but their arguments are so similar I will put them as I do now."*

22. In summarising the defences, the judge unsurprisingly reminded the jury of the actual defences which were positively advanced, in essence, insufficient proof that the Defendants were the two men involved in both offences, without adverting to the elements of the different offences. At the outset he properly directed the jury that they simply had to be sure that both men were involved, irrespective of who did what. As far as Count 1 is concerned, however, there was in light of the way the trial was conducted no room for doubt that the jury

understood the different roles each Defendant was alleged to have played and what evidence was relevant to which Defendant. The most damning evidence for the Appellant's co-Defendant was the fact that it was his bike which had been stolen and he attacked the victim with a sword-like weapon drawn from a scabbard which was left at the scene with his DNA on it. For the Appellant himself, the most damning evidence was that his jeep was apparently seen at the scene of the crime, the driver was shown on video footage to have participated in the attack before driving the main attacker away from the scene, and his co-Defendant's DNA was found on the passenger seat.

23. The position was little different as far as Count 2 was concerned. The judge explained (when discussing the elements of Count 2) that the Defendants were charged with being concerned together, and that:

> *"The prosecution is saying that this was an enterprise carried out jointly; that is, one attacker, one person carrying the sword to do the attack and on the other with the sword, the other person knowing that that is what he was doing and assisting him to do that, enabling him to do that, encouraging him by his conduct to do that."*

24. So there was no material distinction between the two charges and the defences of each Defendant. As the judge said after instructing the jury on the elements of each offence:

> *"So the issue in each case is who did it?... If you are satisfied so that you feel sure that the Defendant whose case you are considering did it, then it is open to you to convict. If you are not sure, then you must acquit."*

25. Mr Attridge made various minor complaints which need not be rehearsed here. Suffice it to say that it is not the function of a criminal appeal to reargue points which have clearly been placed before the jury for their consideration and which have been rejected by them. Far less is it possible to advance for the first

time on appeal an obvious defence which could have been advanced at trial but which was not. It seems quite obvious that the Appellant could have invited the jury to find that even if his co-Defendant was guilty he was innocent. Clearly he put brotherly love and family solidarity ahead of self-preservation. The defence he elected to advance was fairly put to the jury by the trial judge.

26. This ground of appeal also fails.

Conclusion

27. For the above reasons, I would dismiss the appeal.

Kawaley, JA

Baker, P

Bernard, JA