



The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 1 of 2011

Between:

QUINCY BRANGMAN

Appellant

-v-

THE QUEEN

Respondent

Before: Zacca, President
Ward, J.A.
Baker, J.A.

Appearances: Frank Phipps, Q.C. and Mr Charles Richardson for the Appellant
Mr. Rory Field, Ms Kirsty-Ann Kiellor and Ms Auralee Cassidy for the Respondent

Judgment

Date of Hearing:

1 November 2011

Date of Judgment:

17 November 2011

ZACCA, P.

1. The appellant was convicted by a jury for the offences of attempted murder and using a firearm during the commission of an indictable offence. He was sentenced to fifteen years imprisonment for the offence of attempted murder and a consecutive sentence of ten years imprisonment for the firearms offence. Pursuant to section 70 of the Criminal Code he was ordered to serve one half of his total sentence, twelve and a half years, before he could be eligible for parole.
2. On Friday, 12 February 2010, Nathan Darrell along with Leslie Trew and Tyeo Simons had been out together. During the course of the day, Darrell had been smoking cannabis and had also had three beers.
3. About 1:00 a.m. on Saturday, 13th February 2010 Darrell borrowed Leslie Trew's car. He drove to Woody's Bar in Somerset but on seeing certain people there he turned around and drove to his home at 8 Kitchener Close, Boaz Island in Sandys. He parked his car and he noticed a person come up to the car and looked in through the windshield. The person was riding a bike and wearing a full-face visor. Darrell moved his vehicle and parked on a grass verge between two buildings, one being his apartment. He described the motorcycle as a Yamaha Sniper with a clutch gearbox, which he had seen on previous occasions.
4. He noticed someone approaching his vehicle on the driver's side and come up to the window. The person raised his visor and looked at Darrell. It seemed as if the person wanted Darrell to see him. He was shot three times and the shots shattered the glass. He exited the vehicle and ran. He looked back and saw his assailant looking around the ground before he got back on his bike and rode away. He knew the bike and had seen the appellant with it many times. The incident happened at about 2:15 a.m.
5. Darrell was able to identify the person who shot him. He said the person was the appellant. He had known of him for seven years. The appellant was called "Jim" and "Jimbo". He first saw the appellant three years before and would subsequently see him at least twice a week in different locations. He last saw him on the Sunday before the shooting.

6. Darrell stated that he had a clear view of the appellant and that there were a number of lights in the vicinity of his vehicle. After exiting the vehicle he ran to his house. He met there Tyeo Simons at the door, who by then had heard the explosions and had come out of the house. Darrell said to him “Jim shot me. Take me to the hospital. Don’t let me die.” They got into the car, drove to Leslie Trew’s house and woke him and Trew took control of the car and drove them to the fire brigade station. From there Darrell was taken by ambulance to the King Edward Memorial Hospital. Trew stated that he saw Darrell holding his neck and chest saying “Come on Bill, I have been shot”. Trew asked him “Who shot you?” Darrell said, “Jimbo shot me.” On the way to the fire station, Darrell was saying “Tell my mama and my son I love them. I am slipping away, I am slipping away.”

7. The medical evidence disclosed that Darrell had three bullet wounds; one to the chest, one to the neck and one to the buttocks.

8. Three spent cartridges were recovered at the scene, one inside the vehicle and two on the grassy area where Darrell had parked the car. It was the evidence that for the casing to have been expelled from the firearm so as to drop inside the vehicle, the shooter must have reached inside the car before firing. There was evidence that at the time of the shooting, it was raining and that the window at the driver’s side was rolled up.

9. The case for the prosecution also relied on the following circumstantial evidence.

(a) On the afternoon of 13th February 2010 police officers were looking for the appellant. He was seen by PS Senior and PC Daniels in Somerset at about 2:40 p.m. When they attempted to approach the appellant, he ran away. Later, however, the appellant surrendered to the police. He was asked whether he was still in a relationship with Nakisha Robinson to which he replied, “No, that’s been over,” and that it had been “a time back” since he had last seen her.

(b) The lie told by the appellant as to his relationship with Nakisha Robinson, his girlfriend. The prosecution led evidence that the appellant’s girlfriend, Nakisha Robinson, had checked into the Cambridge Beaches Hotel on 12th February 2010. That hotel was only 3-5 minutes drive from Kitchener Close. The police searched the hotel room on the evening of 13th

February 2010 at about 7:02 p.m. Nakisha Robinson and two other young ladies were in the room. A pair of gloves and a bag of men's clothing containing a facemask were recovered. Robinson's camera and phone was also seized. An examination of the camera revealed several photographs taken in the same hotel room, which was occupied by Robinson. The appellant could be seen to be in the room at various times thus putting him in close proximity to the scene. The photographs also revealed his absence from the room during the course of the evening. The prosecution case was that this provided a window of opportunity to commit the offences.

c) The inside of the left glove recovered from Robinson's hotel room was examined and found to have only one DNA profile which matched that of the appellant.

d) Gunshot residue particles were found on the mask and on the outside of the left glove.

10. The statements made by Darrell as to who shot him was tendered in evidence as part of the *res gestae*. Leslie Trew gave evidence and the statement of Tyeo Simons was read into evidence.

11. There was some suggestion by the Defence that Darrell had shot through the house of Ashley Wellman and that it may be that someone else other than the appellant was responsible for the shooting.

12. Evidence was led by the prosecution that the appellant was a member of the M.O.B. gang and that Ashley Wellman was also a high-ranking member of the M.O.B. gang. The letters M.O.B. could be seen on the arm of the appellant in one of the photographs. Sgt. Alexander Rollins described how the gang operates and that the gang was known to be involved in criminal activity, including violence with weapons like bladed instruments and firearms.

13. The appellant did not testify at his trial but called one witness, Dominic Miller a gunshot residue expert. The case for the defence was one of mistaken identification. It was suggested that Darrell only had a fleeting glance under difficult circumstances and was therefore

mistaken, confused or dishonest. It followed therefore that nothing he said to Simons and Trew could be relied upon.

14. The appellant has appealed against his convictions. In doing so his counsel Mr. Frank Phipps QC argued four grounds of appeal.

Ground 1: Inadmissible evidence

The following inadmissible evidence was allowed at the trial relating to

- (a) The appellant's membership of the Criminal M.O.B. gang.
- (b) The statement of Tyeo Simons and the testimony of Leslie Trew as *res gestae* evidence.

Ground 2: Misdirection on Law

The learned judge misdirected the jury on the law relating to *res gestae* evidence.

Ground 3: Unreasonable verdict

The verdicts cannot be supported by the evidence.

Ground 4: Irregular Judgment

The appellant was ordered to be punished twice for the same act.

15. **Ground 1 (a)**

Mr. Phipps submitted that the evidence of the appellant's membership of the M.O.B. gang and its operations was an attempt to prove that he was a person of bad character. It was highly prejudicial.

16. To understand the relevance of this evidence it is necessary to look at the summation of the trial judge at page 191:

“The prosecution is relying on that to show the close association of the defendant to this group M.O.B. of which both he and Wellman are members; and to illustrate why the defendant had a motive to carry out the shooting of the complainant in support of Wellman, as the defence, in cross examination, had raised, and had reason to shoot or have the complainant shot. The defence is suggesting it was not that they raised a reason or motive why the defendant would have shot at the virtual complainant, but it is that they were demonstrating that someone else perhaps are more likely, Wellman included, may have shot at the complainant, and also a reason why the virtual complainant might have wrongly or mistakenly blamed the defendant for the shooting.

Again I say it is entirely up to you to attach such weight as you deem fit to these matters. The M.O.B. tattooed evidence is not led for you to automatically conclude that just because the defendant is a member of M.O.B. or may be a member of M.O.B. he is the shooter. As I said, it is merely to establish the close relationship he has with Wellman which may have motivated him to shoot the complainant.”

at page 195:

“Again I must remind you, you must not jump to any automatic conclusion that because the defendant may be a member of a gang, and in particular the M.O.B. gang, that he shot Darrell. The evidence is only for your consideration because it was the defendant who raised the issue that it might have been Wellman who shot at Darrell and not him. The evidence is admitted to show the close relationship between the defendant and Wellman and to show a motive why the defendant had an interest to shoot Darrell.”

17. The Director of Public Prosecutions submitted that the evidence with respect to the gang was admissible because it was the defendant who in cross examination relied on the relationship between Wellman and the defendant and to suggest that it may have been Wellman who shot Darrell. Wellman was also a member of the M.O.B. gang and it was rumoured that Darrell had shot up the house of Wellman. The evidence of the M.O.B. gang related to the historical background prior to the shooting.

We are satisfied that the evidence relating to the M.O.B. gang was admissible in order to explain the relationship between the defendant and Wellman.

18. **Ground 1 (b)**

Mr. Phipps submitted that the evidence of Tyeo Simons and Leslie Trew was wrongly admitted as evidence of *res gestae*. He argued that the circumstances of the identification of the appellant were such that the jury could not rely on the creditability of Darrell, that it was the appellant who shot him. This would render the admissibility of the statements unreliable and should not be admitted. Mr. Phipps also stated that the words which Simons said he heard Darrell say to Trew were somewhat different from the words Trew ascribed to Darrell.

19. In *R v Andrews* [1987] 1 ALL ER 513, the facts of that case were not dissimilar to the facts of the case before the court. The victim was found several minutes later after he was severely wounded by two men. The police were called and they arrived soon after. The victim told the police that he had been attacked by two men, and gave the name of the appellant and the name of the other man.

20. On appeal to the House of Lords it was held:

“Hearsay evidence of a statement made to a witness by the victim of an attack describing how he had received his injuries was admissible in evidence, as part of the res gestae, at the trial of the attacker if the statement was made in conditions which were sufficiently spontaneous and sufficiently contemporaneous with the event to preclude the possibility of concoction and distortion. In order for the victim’s statement to be sufficiently spontaneous to be admissible it had to be so closely associated with the event which excited the statement that the victim’s mind was still dominated by the event. If there was a special feature e.g. malice, giving rise to the possibility of concoction or distortion the trial judge had to be satisfied that the circumstances were such that there was no possibility of concoction or distortion. However, the possibility of error in the facts narrated by the victim went to the weight to be attached to the statement by the jury and not to admissibility.”

21. We are satisfied that the statement made by Darrell, who was seriously injured, was made in circumstances which were spontaneous and contemporaneous with the attack. There was ample evidence of the close and intimate connection between the statement ascribed to Darrell and the shooting which occurred shortly before the statement was made. We hold that the statement had been rightly admitted in evidence as part of the *res gestae*. The House of Lords applied the case of *R v Ratten* [1972] 56 CR APP. R18.

22. **Ground 2**

Mr. Phipps was unable to direct the Court to any misdirection on the part of the judge as to the proper application of the law as to *res gestae*. We have examined the directions given by the trial judge and are unable to say that the trial judge misdirected the jury as to the law relating to *res gestae*.

23. **Ground 3**

Mr. Phipps submitted that if the statements made to Simons and Trew are inadmissible, the evidence of Darrell and the circumstances in which he is alleged to have identified the appellant as the shooter was such that it could not be relied on by the jury. *R v Turnbull* 63 CR APP. R 132.

24. It was for the jury to consider the totality of the prosecution's evidence and to say whether they were satisfied that Darrell was able to and did identify the shooter as the appellant. The evidence led by the prosecution was sufficient for the case to be left with the jury for their consideration. It cannot be said that the verdict of the jury was not supported by the admissible evidence.

25. **Ground 4**

Mr. Phipps submitted that the two counts were mutually inclusive and it was wrong to have a verdict returned on Count 2, the jury having convicted the appellant on Count 1. He argued that as a result of that the appellant was punished twice for one offence. The Director of Public Prosecution referred the Court to s 30 of the Firearms Act 1973, which creates the

offence charged in Count 2. In particular the Court was referred to s 30 (1) (A) of the Act which provides:

30(1)(a) *“a sentence of imprisonment imposed on a person convicted of an offence under sub section (1) shall be served consecutively to any other punishment imposed on him for an offence arising out of the same event or series of events and to any other sentence to which he is subject at the time the sentence is imposed on him for an offence under sub section (1).*

It is therefore proper for the verdicts on both counts to be returned and for the appellant to be sentenced on both counts.

26. For the above reasons, the appeal is dismissed. The convictions and sentences on both counts are affirmed.

Signed

Zacca, P

Signed

Ward, JA

Signed

Baker, JA