The Court of Appeal for Bermuda

CRIMINAL APPEALS No 14 of 2011 & 3 of 2012

Between:

MARICO COLIN DEREK BASSETT

Appellant

-v-

THE QUEEN

Respondent

Before: **Zacca, President**
Ward, JA
Baker, JA

Appearances: Mr. Saul Froomkin, QC for the Appellant
Ms Susan Mulligan for the Respondent

Date of Hearing: **20 March 2013**

Date of Reasons: **27 June 2013**

REASONS FOR DECISION

PRESIDENT

1. On a first trial on an indictment charging the appellant with attempted murder, using a firearm during the commission of an Indictable Offence, and unlawful possession of ammunition, the Jury convicted the appellant for the offence of unlawful possession of ammunition. The Jury failed to reach a verdict on the other two charges and the appellant was retried on those charges.

2. The appellants' second trial on charges of attempted murder and using a firearm during the commission of an Indictable offence commenced on October 18, 2012 and ended with guilty verdicts on both counts.

3. The Chief Justice imposed a sentence of 15 years for attempted murder, 10 years consecutive for using a firearm during the commission of an indictable offence. He also imposed a concurrent sentence of 12 years for the unlawful possession of ammunition. An Order pursuant to Section 70P (3) of the Civil Code was made requiring that the appellant serve half of his sentence before being eligible for parole.

4. The appellant filed two notices of appeal, firstly against the possession of the ammunition and secondly against the other two charges.

5. The appeals were heard on March 20, 2013 and were dismissed by this court. In respect of the sentence on the ammunition charge, the court varied the period to which the appellant was eligible for parole to one of 10 years. It was agreed by the prosecution that that was the proper Order pursuant to Section 70P (3) of the Code.

6. The prosecution's case was that the victim, Randolph Lightbourne, was shot whilst he was in the parking lot of the Charing Cross Pub in Somerset Village. At least twelve shots were fired and seven of these hit the victim.

7. It was the prosecution's case that it was the appellant who fired the shots. Mr. Lightbourne testified that he had known the appellant for three years prior to July 23, 2011, the day he was shot. The appellant was a friend of the victim's son and had been a frequent visitor to Lightbourne's home.

8. The appellant rode up on his motor cycle within 8 – 10 feet of Lightbourne, who had seen the appellant riding a motor cycle on many occasions and testified that the appellant had a unique way of sitting on his motor cycle.

9. Mr. Lightbourne further testified that not only did he recognize the appellant based on the way he was riding the bike, but also he was able to see the shape of the appellant's face, his nose, his mouth and the way he holds his mouth.

10. Mr. Lightbourne also testified that the appellant was wearing a helmet with the visor on and that the visor was tinted. However, it was only a half visor that covered the appellant's face down to his nose.

11. Whilst the shooting was in progress he had dropped to the ground and after the shooting stopped he was looking up into the appellant's face and could see his whole face at that time.

12. Evidence was also led that the appellant had tattoos spelling out his name across the corner of his left hand, RICO and Mr. Lightbourne testified that he saw those distinctive tattoos that day.

13. A CCTV footage showed the assailant with a gun in his left hand. Mr. Lightbourne testified that the appellant had the gun in his left hand. The police officer who processed the appellant upon his arrest testified that the appellant told him that he was left handed.

14. Mr. Lightbourne testified that he was blind in his left eye but he was able to see properly out of his right eye. He was licensed to drive a car and a motor cycle. A statement from an Ophthalmologist, Dr. Teye Botchway, was admitted into evidence wherein Mr. Lightbourne's sight in his right eye was described as 20/20 or perfect vision.

15. Mr. Lightbourne whilst not a member of a gang, explained the history of gangs in Bermuda. He was friendly with members of the rival gangs. He had a nephew, Roger Lightbourne who was a fairly high ranking member in the Parkside gang and friends who were members of the MOB gang.

16. About two weeks prior to Mr. Lightbourne being shot, his cousin Jachai Morris, a member of the Ord Road Crew, was shot. He was concerned about him and met up with him along with his nephew, Roger Lightbourne Jr. and Janicko Trott, both of whom were Parkside gang members.

17. One week later Mr. Lightbourne was approached by the leader of the MOB gang, a Mr. Kenneth Bulford on the patio of the Charing Cross Pub, who expressed his concern as to why Mr. Lightbourne was meeting with Lightbourne Jr., Trott and Morris.

18. On July 23, 2011, Mr. Lightbourne went to the Charing Cross Pub, a well-known MOB hang out. He had hoped to meet Mr. Jermane Butterfield about some truck business. Mr. Lightbourne had called Mr. Butterfield to arrange a meeting and left him a message that he had arrived at the pub but Mr. Butterfield never showed up. Mr. Butterfield is an associate of the MOB gang who hang out with Mr. Bulford.

19. A CCTV footage showed some fifteen to twenty members of the MOB gang arriving at the pub. They remained to witness the shooting and fled the scene immediately

afterwards. Mr. Kenneth Bulford was one of the men present. Whilst he was in the bar Mr. Lightbourne approached him intending to discuss with him the World Cup football. However Mr. Bulford ignored him and walked away.

20. Mr. Lightbourne testified that the appellant was a member of the MOB gang. He had several discussions with the appellant about his involvement with the MOB gang and counselled him about staying away from the gang.

21. Sgt. Alexander Rollin testified as a gang expert and corroborated Mr. Lightbourne's evidence that the appellant was a member of the MOB gang.

22. Spent cartridge casings were collected from the scene of the shooting. Mr. McGuire examined the casings and was able to match them with spent casings in other gang related shooting including murders.

23. Mr. McGuire also testified that two live rounds of ammunition found in a closet in the appellant's girlfriend home on July 27, 2010 were of the same make, type and calibre as some of those fired at and into Mr. Lightbourne.

24. Lakeisha Wolfe, the appellant's girlfriend at the time of the shooting, testified that her apartment was very near to the scene of the shooting and in fact overlooked the car park where the shooting occurred. She was seeing the appellant at that time but was overseas when the shooting occurred. The only person, other than possibly the landlord, with a key to her apartment was the appellant. There were no signs that anyone had broken into her apartment whilst she was away. She did not leave any ammunition or cocaine in her home before she left. She was surprised to hear that these items were found by the police side by side and under some clothing on a shelf in her bedroom closet.

25. There was evidence that cocaine wrapped in plastic were found right next to the bullets in the closet. They were extremely close to each other.

26. Candy Zuleger testified that samples were taken from the plastic wrappings in which the cocaine was found and the appellant's DNA was found on the plastic wrapping.

27. The CCTV footage showed that the bike used by the person who attempted to murder Mr. Lightbourne, was most unusual. It was described as an Aprilia Sportcity bike. These bikes are uncommon in Bermuda and only five were registered with the TCD.

28. It was not challenged by the defence at trial that the bike used in the shooting was unregistered and belonged to one Everett Wellman the uncle of Ashley Wellman, who is one of the leaders of the MOB gang.

29. Items of clothing taken from the appellant were tested by Mr. Somyle an expert, for gunshot residue. He testified that gunshot residue particles were in fact located on the inside waistband of the jeans, the back side of the jeans and the front exterior of the jeans.

30. The appellant did not give evidence at his trial nor did he call any witnesses. The case for the defence was advanced through cross examination and submissions by his counsel. It was argued that Mr. Lightbourne's identification is inherently unreliable and made under difficult circumstances and was no more than a fleeting glance. The gang evidence is unreliable and someone else may have had access to the apartment where the bullets were found. In effect the defence is denying that the appellant was the person who shot Mr. Lightbourne.

31. Mr. Saul Froomkin Q.C. appeared at the hearing of the appeal on behalf of the appellant. He was not counsel at the trial.

32. The following grounds of appeal were filed by the appellant:

    (i) That the learned Chief Justice erred in law in admitting evidence relating to #2 Huntley Lane, Sandy's Bermuda.

    (ii) That the learned Chief Justice erred in holding that police sergeant Alexander Kenneth Rollin qualified as an expert and permitting him to give opinion evidence.

    (iii) That the learned Chief Justice erred in law in admitting the evidence of the said Sergeant Rollin as it related to "gangs" and "gang activity" and gang affiliation.

    (iv) That the learned Chief Justice erred in law admitting the evidence of Randy Lightbourne as it related to "gangs", "gang activity" and "gang affiliation".

    (v) That the learned Chief Justice erred in law in rejecting the appellant's "no case submission".

33. At the hearing of the appeal Mr. Saul Froomkin Q.C. on behalf of the appellant abandoned grounds 2 and 5. No submissions were advanced on these grounds.

34. With respect to ground 1, Mr. Froomkin submitted that the learned trial Judge in directing the jury with respect to the plastic bag with the bullets, confused "control" with "possession". He submitted that the trial Judge failed to tell the jury that in order to be in possession of something, the crown must prove, beyond a reasonable doubt, that one knows they possess it and they intend to exercise control over it.

35. In his directions to the jury the trial Judge stated:

> "So if, on the evidence you are satisfied that those were his, he put them up there, they belong to him. Right? He had them under his control. Remember he still had the key for the apartment and everything. Miss Wolfe was overseas and so on. So the prosecution is saying, who else control would they be under."
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> "Possession means to have control."

36. Mr. Froomkin also submitted that of the two plastic bags, one with cocaine and the other with the bullets, whilst the plastic bag with the cocaine had the appellant's DNA on it, the appellant's DNA was not found on the plastic bags with the bullets.

37. Miss Wolfe stated in her evidence that she had a relationship with the appellant and that before going overseas she handed the keys to her apartment to the appellant. She also stated that when she left the apartment, neither the plastic bag with the cocaine, nor the plastic bag with the bullets were in her apartment. At trial the defence did not suggest that the bullets belonged to Miss Wolfe or that she placed them there.

38. The prosecution led evidence that bullets found in the apartment were similar to bullets discharged at the shooting.

39. It was open to the jury to find that the two bullets found in the apartment were placed there by the appellant and that he was in possession of the bullets. The trial Judge was not in error in admitting the evidence.

40. Whilst there was no specific ground of appeal on the issue of identification Mr. Froomkin submitted that the identification by Mr. Lightbourne of the appellant as the assailant was unreliable. He pointed to the following factors in support of his submission:

    (i) Mr. Lightbourne is totally blind in one eye;
    (ii) The situation was fast moving and traumatic for Mr. Lightbourne;
    (iii) The episode lasted about 15 seconds;
    (iv) The longest period during which Mr. Lightbourne could observe his assailant was about 8 seconds;
    (v) During the actual shooting, Lightbourne was trying to shield himself with his legs and he had his head under or behind his bike for protection;
    (vi) The shooter was wearing a helmet with a tinted visor;
    (vii) Lightbourne could not see through the tinted visor.

41. No challenge was made to the judge's direction on the issue of identification. The "no case submission" ground was abandoned by Mr. Froomkin. The issue of identification was left to the jury for their consideration. Mr. Lightbourne in his evidence told the jury how he came to identify the appellant as the shooter. It was therefore open to the jury to consider the evidence of identification and for them to come to their conclusions in the matter.

42. With respect to grounds 3 and 4, Mr. Froomkin submitted that the "gang evidence" given by Sgt. Rollin and Mr. Lightbourne was more prejudicial than prohibitive and ought not to have been admitted in evidence by the Judge.

43. Ms. Susan Mulligan for the Crown submitted that the evidence of gang membership and motive were both relevant and necessary as part of the whole picture and the jury was entitled to consider the evidence in arriving at its verdict.

44. Mr. Froomkin did not challenge the accuracy of the facts as set out in the prosecution's written submission.

45. Mr. Lightbourne had a criminal past. He explained the history of gangs as he had experienced it. About two weeks prior to the shooting, Mr. Lightbourne's cousin Jachai Morris, a member of the Ord Road Crew, was shot. He was concerned about his cousin, and met up with him along with his nephew, Roger Lightbourne Jr. and

Jamiko Trott, both of whom were Parkside gang members. One week later he found out that he had been seen by someone connected to the MOB gang when the leader of the MOB gang, Kenneth Bulford approached him on the patio at the Charing Cross Pub and expressed concerns about why he was meeting with Lightbourne, Trott and Morris. The evidence of Sgt. Rollins did not take the evidence any further.

46. On July 23, 2011 Mr. Lightbourne went to the Charing Cross Pub in Somerset which was known as a hangout for members of the MOB gang. He was hoping to meet Jermaine Butterfield who Mr. Lightbourne regarded as an associate of the MOB. He wished to discuss with him some trucking business. He called Mr. Butterfield and left a message indicating that he had arrived at the bar but Mr. Butterfield never turned up.

47. Activity within and outside the bar was captured on CCTV It disclosed that there were a few members of the MOB gang present but about 15 to 20 MOB members can be seen arriving over the next thirty minutes. Kenneth Bulford can be seen to being one of those present. They were all present during the shooting but fled immediately afterwards.

48. It was the prosecution's case that the members of the MOB gang knew that Mr. Lightbourne would be at the pub and that the shooter was a member of the gang. He was shot because he was previously seen with members of the Parkside gang.

49. Mr. Lightbourne was well acquainted with the appellant who was a friend of his son. He knew him to be a member of the MOB gang and on occasions had discussions with him about his membership in the gang. He had tried to dissuade him from associating with the gang.

50. In considering the admissibility of gang evidence, this Court in ***David Cox v the Queen*** CR. App 15/15A 2011 stated:

> "Without the evidence, the jury would not know of any reason or possible reasons why the defendant should shoot the deceased with intent to kill or seriously injure him, something that was relevant to their decision whether or not the defendant was the person who shot him, as the prosecution alleged. We should emphasize that evidence of motive, is by its nature, secondary to other

> evidence which suggests that the defendant committed the offence with which he was charged. Evidence of motive, on its own, could never identify the defendant as the person who carried out the shooting, but when he is identified by other evidence it was clearly relevant to the Jury's decision whether he, as an individual was guilty of the offence."

51. In the case before us there was evidence of Mr. Lightbourne identifying the appellant as the person who shot at him. He also knew the appellant to be a member of the MOB gang. There was also the evidence of the two bullets, the DNA and the gunshot residue for the Jury to consider as to whether the appellant was the shooter. There was also the evidence of the images of the shooter in the CCTV coverage.

52. The prosecution submitted that the gang evidence was not admitted in evidence to identify the shooter but indicated a motive for the shooting of Mr. Lightbourne.

53. Mr. Froomkin whilst stating that he relied on dissenting Judgment in ***Cox v the Queen*** CR. App 15/15A 2011 and ***Myers v the Queen*** CR App 17/2011, submitted that the facts now before the court were clearly distinguishable.

54. The Jury was directed that evidence that the appellant was a member of the MOB gang, was not evidence that the appellant was the shooter. We are satisfied that having regard to all the circumstances of the case, the trial Judge was not in error in exercising his discretion to admit the evidence.

Sentence

55. Mr. Froomkin submitted that the totality of the sentence was disproportionate and manifestly excessive. The appellant was sentenced to a term of imprisonment of 15 years for the attempted murder, the minimum mandatory sentence of 10 years for using the firearm in the commission of an Indictable offence and the minimum mandatory sentence of 12 years for unlawful possession of ammunition. The 10 years sentence was ordered to be consecutive to the 15 years sentence and the 12 year sentence to be concurrent. The total sentence to be served was 25 years.

56. The Court can take Judicial Notice to the effect that gun violence including shootings and murders have been escalating at an alarming rate in Bermuda. Gang violence where there is retaliation by gang members have also escalated to intolerable levels.

The trial Judge was well aware of this situation and made reference to it in his sentencing remarks.

57. The sentences imposed are not outside the range of sentences which are required for these types of offences. Each case will of course depend on the facts of the particular case.

58. The Chief Justice pursuant to Section 70 P (3) of the Criminal Code ordered that the appellant should serve half of the 25 years before being eligible for parole.

59. Section 70P of the Criminal Code provides as follows:

> 70P(i) "Subject to section 70N, where no minimum period of imprisonment is provided before a person can apply for his release on license, a person must serve at least one-third of the term of imprisonment before any application for his release on license may be entertained or granted by the Parole Board in the absence of an order made under subsection (3).
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> 70P(iii) "Notwithstanding subsection (1), where an offender receives a sentence of imprisonment for two years or more on conviction on indictment, the Court may if satisfied having regard to –
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> (a) The circumstances of the commission of the offence; and
>
> (b) The character and circumstances of the offender,
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> that the expression of society's denunciation of the offence or the objective of specific or general deterrence so requires, order that the portion of sentence that must be served before the offender may be released on licence is one-half of the sentence or 10 years whichever is less."

60. The Crown concedes that pursuant to the provisions of Section 70P (3) of the Criminal Code, the trial Judge should have ordered that the period to be served before parole can be considered should be one of 10 years. The Court made an order, varying the 12 ½ years to one of 10 years.

61. There is therefore the possibility the appellant will only serve 10 years before being paroled.

62. The Court is satisfied having regard to all the circumstances of the cases that the total sentence of 25 years is not manifestly excessive and the sentences were affirmed.

63. For the above reasons the appeal against convictions was dismissed and the convictions affirmed.

Signed
Zacca, P

Signed
Ward, JA

Signed
Baker, JA