



The Court of Appeal for Bermuda

CRIMINAL APPEAL No 6 of 2012

Between:

DEREK ROY SPALDING

Appellant

-v-

THE QUEEN

Respondent

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

Appearances: Mr. Marc Daniels, for the Appellant
Mr. Rory Field, Mr. Carrington Mahoney, and Ms. Maria Sofianos
for the Respondent

Date of Hearing: **24 & 25 June 2013**

Date of Reasons: **18 November 2013**

REASONS FOR DECISION

PRESIDENT

1. The appellant was convicted by a Jury on February 10, 2012 of one count of premeditated murder and a second count of using a firearm to commit an indictable offence. On the premeditated murder charge he was sentenced to life imprisonment, with the minimum time to be served before eligibility for consideration of parole being thirty eight years. On the second count he was sentenced to 10 years imprisonment to run concurrent with the life sentence. Time in custody to be taken into account.
2. The case for the prosecution mainly rested on the evidence of Mr. Randolph Lightbourne and the appellant's father, Mr. Carlton Spalding, both these

witnesses alleged that the appellant confessed to them that he had killed the deceased Shaki Crockwell. There was also evidence of “song lyrics” found in the appellant’s apartment.

3. Mr. Lightbourne, the appellant and the deceased had at one time been inmates at the Westgate Correctional Facility. The deceased was paroled in 2005, and the appellant in 2006, was placed in what was known as the Transitional Centre from which he could leave the prison daily on work release, returning in the evening and spending weekends with family and friends.
4. Mr. Lightbourne, though, still in prison had a cell phone as did the appellant. They kept in touch by their cell phones.
5. In early 2006 the appellant told Mr. Lightbourne that he had given drugs to the deceased to sell for him. The deceased had told the appellant that he had lost the drugs. The appellant did not believe the deceased and asked Mr. Lightbourne to call Shaki to feel him out to see if he was speaking the truth. The deceased confessed to Mr. Lightbourne that he had lost the drugs.
6. Sometime after the appellant again telephoned Mr. Lightbourne complaining that Shaki was yet to provide restitution for the loss and that he believed that Shaki was playing him. Mr. Lightbourne continued to mediate between the appellant and the deceased. Subsequently the appellant told Mr. Lightbourne that he had given Shaki a pound of weed to sell and that the deceased was yet to make a payment.
7. In a telephone conversation with Mr. Lightbourne, the appellant told him that he was convinced that he was being played and ripped off by the deceased, and if he didn’t pay him, he was going to take Shaki out.
8. The appellant was released on parole in March 2007 and Mr. Lightbourne was transferred to the Prison Farm. They continued to communicate by cell phone.
9. On May 26, 2007 the appellant and Mr. Lightbourne met at Heritage House where a wedding reception was being held. The appellant is alleged to have shown Mr. Lightbourne about ten pounds of marijuana and a number of guns and in reference to Shaki said “If this boy thinks he is going to keep playing me...”

10. They next met in June 2007 on the ferry where the appellant was working. The appellant told Mr. Lightbourne that he had not heard from Shaki and he was convinced that Shaki was playing him for a joke and if he did not come up with something he was going to kill him and make a lesson of him.
11. A week before Shaki was killed the appellant is alleged to have told Mr. Lightbourne "You think I am joking, you will see".
12. Yannique Minors testified that she was the live in girlfriend of Shaki and she was aware that he was selling drugs for someone who had recently come out of prison. On the night of Friday August 24, 2007 Shaki got dressed and he put on a bullet proof vest and told her he had to pick up a package with "Kinte" at Loyal Hill. He left on his bike at about 9.00 p.m. and told her to call him at 10.00 p.m. She called him at about 9.45 p.m. but he did not answer.
13. Teanne Trott testified that she was the mother of Shaki's young son. She knew that Shaki sold drugs for the appellant whom she had met on three occasions and seen him hand packages to Shaki. She noted that he began wearing a bullet proof vest.
14. On August 24, 2007 at about 9. 30 p.m. Mr. Dean DeSilva was in the vicinity of Loyal Hill railway trail. He noticed bright lights flooding the trees and loud reggae music coming from the direction of the railway trail. He then heard a gunshot coming from the same area. Minutes later the lights and music ceased.
15. That same night Mr. Albert Harvey was walking along the railway trail in Loyal Hill. He came upon the body of the deceased. He called 911.
16. Police Constable Mark Lewis arrived on the scene. He saw the body of the deceased in the road of the railway trail. His pants was unzipped and his penis out. The body had on a bullet proof vest and Shaki's bike was parked nearby.
17. On Saturday August 25, 2007, in the morning, Mr. Lightbourne caught the ferry from Dockyard. The appellant who was working on the ferry asked him if he really wanted to hear what happened. Mr. Lightbourne replied "yes".
18. The appellant said to Mr. Lightbourne "that he called Shaki, told him that he had another pound of weed for him and gave him the time and meeting place by the Loyal Hill tracks. The appellant said that he was waiting there and flagged down Shaki when he rode in. Shaki got off the bike and came towards him. He told

Shaki to hold off a second because he thought a lady was in a car parked in the car park. The appellant said that Shaki said “okay cool”, turned and said he wanted to drop a piss. The appellant said that he went up behind Shaki when he was urinating, called him a bitch and shot him in the back of his head and Shaki dropped on the ground and started bleeding out over time, after which he wrapped the gun up and rode off.

19. Mr. Carlton Spalding testified that on Saturday, August 25, 2007, the appellant, his son, came to his shop in St. David’s and asked him to be his alibi. He told his father that he killed a man and if the police asked him where he (the appellant) was the father was to tell them that the appellant was there with him all day and left about 9.30 to 10.00 p.m.
20. Mr. Spalding said he asked his son why he had killed the man and the appellant replied that the man had a secret for him about a prior murder, he gave the man drugs to sell for him, the man kept keeping his money and laughing in his face, so he had to take him out.
21. On Thursday September 6, 2007 the appellant was arrested and interviewed on September 7, 2007 the appellant was present when a search warrant was executed at his then residence at Middle Terrace. The police found a computer bag on the floor of his bedroom. The contents of the computer bag include what appeared to be typed versions of original reggae songs. The words of the songs were “Brand new glock”. The songs were tendered in evidence. It was the suggestion of the Crown that that song captured the circumstances of the murder of Shaki. On September 9, 2007 the appellant was released due to insufficient evidence at that time.
22. A post mortem examination was conducted on the body of the deceased by Dr. Polloman and it was his opinion that the deceased had died from a gunshot wound through the neck.

The Defence:

23. The appellant gave sworn evidence at his trial. He denied killing Shaki Crockwell. He pointed to the fact that there was no DNA or fingerprint evidence connecting him to Crockwell’s death.

24. He never confessed to Mr. Lightbourne or to his father Mr. Spalding that he had killed Shaki Crockwell. These two witnesses for the Crown were dishonest and both had an interest to serve.
25. Mr. Lightbourne was motivated because of a reward which was offered and which he hoped to receive. He was a person with convictions and should not be trusted. He was not a credible witness.
26. His father Mr. Spalding did not have a good relationship with him. He accused the appellant of being a homosexual and ordered him to take his belongings and leave. His father also slapped him in his back with a machete, chased him and cut his bike.
27. The appellant denied having any dealings with Shaki Crockwell. He did not give him any drugs to sell for him. Teanne Trott was mistaken about the identity of the appellant.
28. The appellant also denied that he was the author of the songs which were found in his possession. These were all written by Kirk Mundy, a witness called by the Defence, who stated that he was the author of the songs.

Issues raised by Counsel for the appellant.

- i. The Judge's conduct of the case was unbalanced, unfair and biased.
 - ii. Improper directions on circumstantial evidence.
 - iii. The learned trial judge erred in law in failing to warn the jury of the need for special caution in considering the evidence of Mr. Lightbourne and Mr. Spalding as a result of their alleged improper motives.
 - iv. The learned trial judge erred in admitting the evidence of the song lyrics.
29. In relation to the judge's conduct of the case, Mr. Daniels referred the Court to a number of passages where he alleged the judge appeared to be furious with defence counsel and made it almost impossible for the defence to put its case.
 30. We have examined these passages and came to the conclusion that whilst the learned trial judge was somewhat robust and somewhat impatient, it cannot be said that this prevented the defence from putting forward its case. His conduct

did not in any way prejudice the case as put forward by the defence. The case for the defence was fully investigated by defence counsel in cross examination of the witnesses. The appellant gave sworn evidence and called several witnesses. The case for the defence was clearly and accurately placed before the jury in the summation of the learned trial judge.

31. Mr. Daniels appears to have been suggesting that the Crown rested its case mainly on circumstantial evidence. The Crown's case relied mainly on the evidence of the confessions to Mr. Lightbourne and Mr. Spalding. The evidence of the song lyrics would be regarded as circumstantial evidence. In the circumstances of this case we are satisfied that the direction on circumstantial evidence was sufficient to meet the case as put forward by the Crown and the Defence.
32. In his directions to the jury, in relation to the evidence of the song lyrics, the learned trial judge at p. 1969 stated:

“Further, that this is merely one fibre in its rope. Not entirely important. Therefore even if you reject this piece of evidence there were still many other strings in the rope, like, Mr. Lightbourne and Mr. Spalding's ... when added together make a strong and binding rope in all the circumstances binding the defendant to a verdict of guilty”.

33. Mr. Daniels submitted that if the jury had rejected the evidence of Mr. Lightbourne and Mr. Spalding the jury may have convicted the appellant on the evidence of the song lyrics. We see this as an unlikely event as no reasonable jury could have come to such a conclusion.

It was a matter for the jury to say what weight, if any, they would put on this evidence.

34. The learned trial judge at p. 1963 also stated:

“In the end the Crown put its case to him based on the version testified by Mr. Rudolph Lightbourne and Carlton Spalding”.

35. We are of the view that the learned trial judge did not err in admitting the evidence of the song lyrics.
36. Mr. Daniels laid much emphasis in his submissions to the effect that the trial judge failed to warn the jury of the need for special caution to be exercised in considering the evidence of Mr. Lightbourne and Mr. Spalding in regard to their alleged improper motives.
37. It is necessary to examine the directions of the judge as to how he approached this particular issue. Firstly, the learned trial judge at p 1742-1743 stated:

“You have heard in this case that these are witnesses with special interest.

Your have heard, for example, from the defence, that Mr. Lightbourne is a witness with special interest. That he is only doing what he is doing in coming and giving evidence and so on because of the reward he is receiving from the Crown; that is protection and support, wherever else he may be for him and perhaps his family. So he is a witness with special interests. Their contention is that he is afraid he might lose it.

They say that Mr. Spalding is also – Mr. Spalding snr. is also a witness with special interest, because on one hand you heard that, when he was under cross-examination, that the reason why he is saying what he is saying about his son, the defendant, is because he had some immigration issues and he might be fearful that his son might mess that up for him and therefore he is trying to get out of the way”.

38. Again at page 1744 the learned trial judge said:

“So when these allegations are made about witnesses with an interest to protect, I have to give you a caution.

I must warn you that you should examine their evidence with particular care, because that witness is saying what he said against the defendant, or for the defendant, may have been only interested in serving his own interests and may have been only interested in protecting himself rather than being concerned about telling the truth.

Bear that in mind, whether you can believe what a particular witness has told you or not”.

39. The learned trial judge again in his directions to the jury at page 1876-1877 said:

“I gave you an important direction about witnesses with special interest, or where it is alleged that witnesses have special interest. Remember, I told you, you have to be cautious about that, and you determine whether that person is in fact giving evidence because they have some special interest, like a reward or because they’re trying to – in the case of the prosecution witnesses, Mr. Spalding snr. and Mr. Lightbourne, for example, whether you are giving the evidence because of some reward, in the case of Mr. Lightbourne, or in the case of Mr. Spalding, because of some threat about his immigration status or anything like that”.

40. Again at p. 1950:

“So there he is showing you the motive again for Lightbourne, the interest that Lightbourne is serving. The reason why you shouldn’t believe Mr. Lightbourne a spiteful fella who despised the defendant”.

“He has seen how Lightbourne set people up at Westgate. He must be jealous of me not coming on board with his program when he got out of jail. He was in the street life, I wasn’t. As for his father, he thought he truly believes I am a batty boy and wanted nothing to do with me, so would do anything to get me out of his space. He believes I am homosexual and he is very upset that I turned out to be homosexual, in his mind”.

So there you see the express motives or interest to serve on the part of these two witnesses as – Mr. Lightbourne and Mr. Spalding snr., as put forward by the defendant himself.

I have directed you about the approach to such allegations, and I again remind you of those directions. You should apply them”.

41. It is incorrect to say that the learned trial judge failed to direct the jury as to the approach to be adopted in considering evidence which it is alleged shows improper motives and or interest to serve. We are satisfied that the directions given by the trial judge were fair and sufficient in the circumstances.

42. Counsel concedes that “a no case submission” was not made at the trial. We have found no merit in the grounds of appeal argued. There was an abundance of evidence on which the jury properly directed could find the appellant guilty of the charges.

We are in no doubt that the jury must have accepted the evidence of Mr. Lightbourne and Mr. Spalding snr.

43. For the above reasons the appeal against convictions were dismissed and the convictions affirmed.

Signed

Zacca, P

Signed

Ward, JA

Signed

Auld, JA