The Court of Appeal for Bermuda

CRIMINAL APPEAL No 5 of 2012

Between:

ANWAR MUHAMMAD

Appellant

-v-

THE QUEEN

Respondent

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

Appearances: Ms. Shade Subair for the Appellant
Mr. Carrington Mahoney and Ms. Nicole Smith for the Respondent

Date of Hearing: **11 March 2014**

Date of Reasons: **24 March 2014**

JUDGMENT

Evans, JA

1. On 18 January 2012 the Appellant, Anwar Muhammad, was convicted of the offences of attempted murder and unlawful use of a firearm, after trial before the Hon Justice Carlisle Greaves and a jury. The verdict was unanimous.

2. The two charges arose out of a single incident. On the afternoon of Monday 23 August 2010, the victim of the shooting, Shantoine Princeton (or Prinston) Burrows ("the Complainant") was sitting on his stationary motor cycle beside the road at Woodlawn, White Hill, in the Middle Road junction area, whilst he was texting on his cell phone. Two men rode slowly past on a motorcycle. He noticed

that they looked at him, but he paid no particular attention. Then they turned their motorcycle, mounted the sidewalk and headed towards him. This alarmed him, and he tried to ride off but could not start his motorcycle engine. So he ran away pushing his motorcycle towards the Middle Road, but as he did so he heard two or three shots and realised that he had been shot in his leg. He dropped his bike and fled towards the Woodland Road. When the motorcycle caught up with him, he grabbed the pillion passenger, who was the shooter, dragged him off the bike and struggled with him. The rider shouted "Let`s go". The passenger freed himself and ran towards the bike, and they made off. Both the rider and the passenger wore helmets and visors, and the Complainant was unable to recognise or identify either of them.

3. There were eight eye-witnesses whose evidence supported this account. Some of whom said that the pillion passenger/shooter was wearing a white T-shirt, also described as a sleeveless vest. When one witness arrived on the scene, he saw a bike and a helmet on the road and a young man limping and stumbling who asked to be taken to a hospital, but he could not do this and he took him to the Maxi-mart store nearby. The Complainant realised that his middle finger had been shattered by a shot, and an ambulance was called. He was hospitalised in Bermuda, and overseas, for about two weeks.

4. The incident took place at about 3:15 – 3:30 pm. A police officer later recovered at the scene a left-foot black Adidas sneaker, size 11, at about 5:25 pm.

5. Meanwhile, police officers in a mobile patrol car went to an area described as a compound at the Southampton Industrial Park Road where they found three items of clothing: a white sleeveless shirt, a black shirt and a right-foot black Adidas sneaker, size 11. All three were blood-stained. That was at about 4:30 pm.

6. The sneakers and items of clothing were examined by a DNA expert. She gave evidence that there were bloodstains on both the right-foot and the left-foot sneakers, which she found in both cases matched blood samples obtained from

the Complainant. She also said that DNA testing identified the Appellant as a wearer of both sneakers. With regard to the two items of clothing recovered from the compound, she said that DNA testing of the white sleeveless tank top and the black shirt showed both the Complainant and the Defendant as donors, and that the bloodstains on both garments matched blood samples taken from the Complainant. (The expert evidence is not disputed, and for that reason it has been summarised in general terms.)

7. The Appellant was arrested and charged with the offences, but not until 7 April 2011, more than seven months later, and he was interviewed on the following day. A Blackberry cell phone in his possession was found to contain a number of photographs and what came to be called an "audio recording" which was transcribed and introduced in evidence.

8. The Defendant worked as an hairdresser, apparently for his own account with premises in Somerset. He said that on the day in question he visited his dentist, Dr. Lorna Hall, who practises at the Brangman Building on Reid Street in Hamilton. She confirmed in evidence that she saw him at an 11:40 am appointment which lasted about half an hour. He said that he returned to work by 2 pm and that he then had various customers, including one whose hair-do he photographed; the photograph was taken at 4:22 pm.

9. The Appellant said in his police interview that he had never owned black Adidas sneakers, but in his evidence at the trial he accepted that the ones that were found could be an old pair of his. He also accepted that the items of clothing found at the compound were his, and that he had worn them on the day in question. But he said that he was caught out in light rain when returning from his visit to the dentist, and because his clothes apart from his underpants were wet, he hung them out to dry at the compound so that the lady he called 'his boy`s Momma`, or 'Moma', who lived there or nearby, could wash and dry them. He said that he changed into other clothes before returning to his place of work.

10. The Prosecution said that the reason why he changed his clothes as he described was because they were blood-stained as the result of his struggle with the Complainant, and that if the clothes were damp it was through perspiration, not rain. He offered no other explanation of why his clothes were stained with the Complainant`s blood. He said that some other person must have taken and worn the clothes and carried out the attack on the Complainant, then returned them to the compound. So far as timing was concerned, the Prosecution asserted that the Appellant had time to change his clothes at the compound and return to work by 4:22 pm when the photograph was taken.

11. The Defendant`s father gave evidence that the compound was an area where he lived in a RV during the winter months, though he was not there at the time. He said that the area was used as a dump. There was a container on the site in which he stored his family`s household items, and the Defendant said that some of his belongings were stored in it. The Defendant said in his police interview that the compound "is where all them boys sit to and all that".

Gang evidence

12. In addition to the straightforward factual evidence referred to above, the Prosecution relied upon what was described compendiously as "gang evidence", or "gang expert opinion evidence", which the Appellant contends was wrongly admitted at the trial and which forms the principal subject matter of this appeal. The evidence was given mostly by Police Sgt. Rollin, who in this case as in several others was introduced as a "gang expert" witness and was permitted to give "opinion evidence" on that topic. There is no transcript of the Judge`s Ruling, but he said in his Summation that Sgt. Rollin "has been accepted as an expert in these Courts in this field and he was so declared in this case".

13. The admissibility of Sgt. Rollin`s evidence and his status as an `expert` witness have been considered by this Court in a number of judgments, the first of which, *Quincy Brangman v. The Queen* [2011] CA (Bda) 15 Crim (November 2011) pre-dated the trial in the present case, and the evidence was held admissible. The

judgments of the Court in *Myers v. The Queen* [2012] Bda LR 74 and *Cox v. The Queen* [2012] Bda LR 72, where his evidence was held admissible (by a majority), came later, on 22 November 2012.

14. Sgt. Rollin's evidence in the present case was summarised by the Judge as follows. He was supervisor of the gang targeting unit in the Bermuda Police and had spent many years in "street matters". He had built up expertise in "gang activity, membership etc." in Bermuda, had witnessed the development of gangs in Bermuda and had received training locally and overseas. He said that in Bermuda different gangs had different territories, and that gang members would not be found entering the territory of their rivals except with criminal intent. A gang known by its initials "MOB" had its territory from Somerset small bridge to Dockyard – the western end of the Island. MOB was an ally of the 42nd gang and a rival of the White Hill crew, "also known as Killer Hill". He described the crew as "a loose group of young men and girls who operate around the White Hill field, Woodlawn Road area" and who were known for their antisocial behaviour.

15. He gave this evidence about how gangs operate –

> "Now, disrespect of any gang member by a rival gang members or any other persons to any varying degree is a disrespect to all its gang members and entitles any member to retaliate against any disrespect of [sic]. Members do not need permission to retaliate. They may do so spontaneously and in accordance with what level of arms they may possess at the time".

This evidence was not challenged in cross-examination, during which he agreed "that for many years many of these groups, now called gangs, existed, some by other names, ... some have evolved into criminal activity as demonstrated since the drive-by shooting started from about 2007", and that "not every Somerset boy is a gangster".

16. Sgt. Rollin said that he did not know the Defendant (Appellant) personally, but that "his research confirms that he is a member of MOB". He referred to photographs down-loaded from the cell phone taken from the Appellant at the

time of his arrest, which showed him in a group with known members of the MOB gang, making signs for the camera which Sgt. Rollin interpreted as identifying himself with the gang; and to a photograph taken at the police station after his arrest showing a MOB tattoo on his right hand; and to an audio recording taken from the camera in which a number of voices, including the Appellant`s, were heard discussing the use of guns and possible shooting incidents. Sgt. Rollin also said that the Appellant`s barbers shop was "a hangout for the MOB Gang". The Appellant denied that he was a member of the gang at the time when the Complainant was shot, though he accepted that he had been some years previously, in 2008, and he said that the audio recording was made on his birthday, 3 April 2011, only a week or so before his arrest and some eight months after the shooting.

17. With regard to the Complainant, Sgt. Rollin said that he did not know him personally, but that "from his research in the Police data, [the Appellant] appears to have grown up in the central town areas, Parkside, Middletown territory. In more recent times he seems to be associated with the White Hill area and people from that crew".

The Judge said that the Complainant "may have been perceived by [the Appellant] to be a member or associate of the two rival groups", meaning the White Hill crew and their associates, the Parkside gang, who were rivals of MOB and the 42nd gang.

18. The Complainant said that he didn`t know why anyone wanted to shoot him, and he denied knowing or recognising whom the men were on the bike. He then said in cross-examination, as summarised by the Judge –

> "He said he was brought up in White Hill, but moved to town. That he knew the Parkside guys and that he went to school with many of them. Asked if he is friendly with them, he repeated he went to school with them. He denied having lots of enemies",

and the Judge commented "so you may or may not think that he was or was not forthright about that issue, that is the Parkside Association issue, because of the way he answered the question. He never said Yes or No, he just kept saying "I went to school with them"". Also in cross-examination, the Complainant said "he was fearful at the time when he saw the bike ride towards him, given the gun violence that was going on at the time, given the Town and Country rivalries and given he was from Town, but he knew all [everyone] in White Hill".

19. With regard to gang evidence, therefore, the general evidence of gang behaviour given by Sgt. Rollin was not challenged in cross-examination, but there were substantial issues as to whether the Defendant was a member of the MOB gang at the relevant time, in August 2011, and whether the Complainant was a member of the White Hill crew, or any other gang, at any time. Sgt. Rollin's evidence that they were members was, he said, based on his "researches" and therefore potentially was open to objection as hearsay evidence, as well as being, arguably, 'opinion' evidence: see the majority judgments in *Cox* and *Myers* (references above). Miss Subair, for the Appellant, submits that Sgt. Rollin's 'gang evidence' should not have been admitted at all. Objection was also taken to the admission in evidence of the audio recording found on the Appellant`s cell phone at the time of his arrest (paragraph 16 above).

The Appellant`s brother

20. Before considering this submission, we should refer to a specific issue that was raised by the defence in this case. In his police interview, when asked about his clothes that he left at the compound, the Appellant said "Like I told you, they could of used them or anything like. I wish I could find out right now, you know?". Then the police officer asked him "Someone would have used your clothes?" and he answered "Yeah, could have." In his evidence at the trial, he said that "it must have been his brother Rashid who took them ..... and participated in the shooting". That suggestion had to be withdrawn when he agreed that Rashid was in police custody on the day in question: "he agreed that it could not

have been Rashid who did the shooting". His defence was that the clothes were taken "by someone who did the shooting".

21. Sgt. Rollin's evidence included that "his research did reveal an incident at Albuoy`s Point around 2008 involving the two Muhammad brothers, Rashid and Anwar, in which Rashid was stabbed and their report to the Police blamed Parkside". Rashid had already been named in the cross-examination of the Complainant by counsel for the Appellant. The Complainant said that he did know the Defendant`s brother Rashid Mohammad and that he had been a fellow inmate with him at the Co-Ed facility for young offenders, but he denied a suggestion that he had ever attacked Rashid at the facility or had any beef with him. That cross-examination appears to have been laying the ground for the Appellant`s later assertion that it must have been Rashid who took the clothes and was responsible for the shooting, and in his evidence in chief he said that Rashid "looks like him and sometimes is mistaken as his twin". He said that Rashid "gets into trouble with the police", leading up to his suggestion that it must have been Rashid who took his clothes and carried out the shooting. His defence was that Rashid, rather than he, had a motive for shooting the Complainant, whether the suggested incident at the Co-Ed Facility or the incident at Albuoy`s Point which they had reported to the police. Inevitably, evidence about these matters overlapped what was said about gang rivalries and the extent to which both the Complainant and the Defendant were involved in them, as shown by the Complainant`s evidence in cross-examination, quoted above.

22. Defence counsel, therefore, raised these matters when cross-examining the Complainant, before Sgt. Rollin gave evidence and, so far as we are aware, before the Judge ruled on the admissibility of gang evidence. But counsel may have assumed that the Judge would admit the evidence, as he had done in a number previous cases.

Conclusions

23. I shall consider first whether Sgt. Rollin's gang evidence was properly admitted in this case, apart from specific issues relating to Rashid or "someone else" who, the Appellant said, took his clothes and committed the offence.

24. I would hold, as in *Cox* and *Myers*, that when there was other evidence to identify the Appellant as the shooter, the evidence was potentially relevant to the issue whether or not he had a motive or reason for committing the offence, and was admissible on that ground. If he had a motive, the case against him was stronger; if that was not proved, it was correspondingly weaker. I would not hold that it was admissible simply because it provided 'background' to the offence.

25. But evidence of gang hostility and of gang culture only becomes relevant when there is evidence that both the Complainant and the Defendant were members of opposing gangs at the time of the offence. There was some evidence of this in the present case, but it was hotly disputed by them both. Those became sub-issues which came to dominate the trial, and in such circumstances it is clear, in my judgment, that in this case the prejudicial effect of the general gang evidence outweighed its probative value as to the motive of the individual defendant whose involvement was proved by other direct or circumstantial evidence. Without regard to the special factors introduced by the Appellant`s defence, I would hold that the evidence was improperly admitted in the present case.

26. Secondly, however, it is also necessary to consider the effect of those special factors in the present case. The Appellant raised issues concerning his brother`s relationship with the Complainant, and suggested reasons why either his brother or "someone" who frequented the compound area might have taken his clothes and committed the offence, which almost certainly would have raised issues about gang membership and gang affairs. This could have meant that some or all of the 'gang evidence' evidence, even if generally excluded, became relevant and admissible, for that reason. . The weight of any objection to the evidence being admitted as part of the prosecution case would have depended on the extent to

which the nature of the of the defence was disclosed at that stage, and on whether defence counsel was seeking to rely on it e.g. as regards the likelihood of an unidentified gang member having attacked the Complainant. I consider it likely that if the question of admissibility had been fully argued, some of the evidence would properly have been admitted, but only to a clearly defined and limited extent.

27. I would hold, therefore, that Sgt. Rollin's and other 'gang evidence' was improperly admitted in this case, in whole or in part, and I would decide that issue in favour of the Appellant. However, it is also necessary to consider the effect of the proviso to section 21(1) of the Court of Appeal Act, 1964, which reads-

> "...Provided that the court may –
> (a).....dismiss the appeal if they consider that no substantial miscarriage of justice has actually resulted...".

28. In my judgment, this appeal undoubtedly is one where the proviso should be applied. Without regard to the evidence of Sgt. Rollin and other gang evidence, the case against the Appellant was overwhelming. One of a pair of sneakers that he had worn and that he admitted was his was found at the scene, The matching sneaker also with his DNA was found with other clothing that he wore on the afternoon in question, all stained with the Complainant`s blood. The Appellant`s explanation that someone else must have taken the clothing and sneakers, worn them whilst carrying out the attack and then returned them to where the Appellant left them, was unbelievable. There was no evidence to support his alibi that he had already returned to work when the shooting occurred. No jury properly directed could have failed to convict.

29. Nor do I consider that Sgt. Rollin`s evidence, and the gang evidence generally, weakened the force of the evidence referred to above, or that the Defendant was prejudiced by its admission in this case. To some extent at least, it was relied on as part of the defence case.

30. I would dismiss the appeal against conviction.

Sentence

31. The Judge passed sentence as follows –

> Count 1 (Attempted murder) – 15 years` imprisonment;
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> Count 2 (Using firearm etc.) – 10 years` imprisonment, Consecutive to Count 1.
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> Total imprisonment 25 years, and not to be eligible for consideration of release on licence until he has served one-half (twelve and a half years) of the sentence (Section 70P of the Criminal Code).

32. The appeal against sentence was based on two grounds –

> (1) the minimum period of 12 ½ years imprisonment before eligibility for parole was wrong in principle; and
>
> (2) the total sentence of 25 years` imprisonment was disproportionate and manifestly excessive.

33. With regard to Ground (1), section 70P of the Criminal Code provides –

> **"Eligibility for parole generally**
> (1).....a person must serve at least one-third of his term.....
> (3) Notwithstanding subsection (1), where a person receives a sentence of imprisonment for two years or more on conviction on indictment, the court may....order that the portion of the sentence that must be served before the offender may be released on licence is one-half of the sentence or 10 years, whichever is the less".

34. Miss Subair submitted for the Appellant that the Judge overlooked the final words "whichever is the less" and that 10 years was the maximum period that he was entitled to order under section 70P(3). Mr. Mahoney, for the Prosecution, accepted that this was correct.

35. Ground 2 was not pursued before us.

36. I would allow the appeal against sentence, therefore, to the extent that the period of 12 ½ years before eligibility for parole should be set aside, and a period of 10 years substituted for it.

Evans, JA

I agree

Zacca, P

I agree

Baker, JA