The Court of Appeal for Bermuda

CRIMINAL APPEAL No 18 of 2013

Between:

THE QUEEN

Appellant

-v-

JAHKEIL SAMUELS

RONNIKO BURCHALL

JAMIN SALTUS

ALEX VANDERPOOL

Respondents

Before: **Baker, President**
Kay, JA
Bell, JA

Appearances: Mr. Garrett Byrne and Ms. Larissa Burgess, Department of Public Prosecutions, for the Appellant
Mr. Craig Attridge, for the 2nd Respondent
Ms. Elizabeth Christopher, Christopher's, for the 3rd Respondent

Date of Hearing: **2 March 2015**

Date of Decision: **20 March 2015**

Date of Reasons: **31 March 2015**

REASONS

PRESIDENT

1. This appeal by the prosecution raises two points; (1) whether the judge was correct to rule that there was no case to answer on counts of attempted murder and conspiracy to commit murder and (2) whether the Court of Appeal has jurisdiction to hear an appeal under section 17(2) of the Criminal Appeal Act 1964.

Background

2. The four respondents appeared before Hellman J and a jury on an indictment containing four counts. Count one charged Samuels, Saltus and Burchall with the attempted murder of Aaron Moniz. Count two charged the same three respondents with conspiracy to murder a person unknown. Count three charged them with using a firearm whilst committing an indictable offence and count four charged Vanderpool alone with handling a firearm without lawful authority. On 18 June 2013 Hellman J ruled that there was no case to answer on Counts one and three. On 20 June 2013 he directed that the indictment be amended to include additional counts, 1A charging Samuels, Saltus, and Burchall with attempting to discharge a loaded firearm at Aaron Moniz and 2A the same three with conspiracy to shoot at a person unknown with intent to cause grievous bodily harm. On 4 July 2013 the jury acquitted all the respondents on the remaining counts namely 1A, 2A, 3 and 4.
3. The prosecution appealed not only against the judge's direction to the jury to return not guilty verdicts on counts one and two but also on a number of other grounds, seeking the directed verdicts to be set aside and a new trial on the original indictment, and in the alternative setting aside the verdicts on the amended indictment and a new trial on that indictment.
4. On the morning of the hearing of the appeal, Mr. Byrne on behalf of the appellant, made it clear that he was no longer seeking a retrial of any of the respondents. The outcome of the appeal was therefore academic. He nevertheless urged the court to hear the appeal because, he submitted, the decision of

Hellman J was wrong in law and, if it stood, was likely to be used as a precedent in other cases. Albeit with some reluctance, the Court agreed to hear the appeal.

The Facts

5. The victim, Aaron Moniz, attended a party at premises at Mission Lane, North Shore arriving around 10:30 pm on 28 February 2012. At about 1:00 am the following morning he walked a short distance from the house to some trees to urinate. He looked up and saw a man wearing a mask whereupon he ran and jumped over a wall. He said "I heard a shot before I jumped the wall, a shot coming from behind. I kept running". He then realized he had been shot in the buttocks and noticed he was bleeding. He felt pain in his lower back before he jumped over the wall and added that he heard four shots before he jumped over the wall. Moniz did not identify his attacker. The defence was essentially alibi and incorrect identification by a witness, Morgan. The undisputed evidence of Jahki Burgess was that when inside the house he heard two shots. Leaving the house he came face to face with a gunman. The gunman used his right hand and pointed the gun at him. He ran through the parking area. A ballistics expert confirmed that three of the four cartridge cases that were recovered from the scene were fired from the gun that the police recovered as a result of information supplied by Morgan. The bullet recovered from Moniz was also fired from this gun which was in good working order. Morgan's evidence of identification was that on the evening of 28 February 2012 he was sitting on some steps in Rambling Lane when he overheard Samuels, Burchall and Saltus discussing going to a party in North Shore to shoot somebody. Vanderpool then arrived and handed a gun to Samuels who told Burchall and Saltus to carry out the shooting. Samuels, Burchall and Saltus then left on motorcycles. On the following morning, 29 February 2012, Morgan saw Samuels and Burchall again at the same place. He heard Burchall tell Samuels that: "they went to shoot the guy, but the guy ran so they shot another guy."

The No Case Ruling

6. The judge in making his ruling on the no case submission began by saying that it remained to consider Mr. Attridge's elegant submission that no reasonable jury properly directing itself could be satisfied that the prosecution had proved *the mens rea* for either the conspiracy to commit murder or the attempted murder. He said that he took into account that the conversations overheard by Morgan both referred to shooting rather than killing. Further, Mr. Moniz's injury in the buttocks was unpleasant but not life threatening and there was no evidence that the gunman aimed the gun at his head or upper body. There was no evidence as to the direction of any of the shots other than the one that hit him. He added that the prosecution argued that four shots implied deliberation as did the fact he was wearing a mask but the direction of the three shots was speculation because none hit him and the only bullet recovered was the one that hit Mr. Moniz. Mr. Burgess saw the gunman, or another gunman, point a gun at him but did not say at which part of his body.
7. Hellman J then stated his conclusion in the following terms:

> "In all the circumstances, I am satisfied that no reasonable jury properly directing itself could be sure that the Defendants conspired to commit murder or attempted to murder Mr. Moniz."

He added:

> "The jury could not properly exclude the possibility that in the case of both offences the intention was to cause grievous bodily harm with what the Australian authorities describe as reckless indifference as to whether or not that resulted in death."

8. This was a case in which the Crown relied on inferences to prove the murderous intent required for each of the offences conspiracy to murder and attempted murder. Mr. Byrne complains that the judge should have asked whether the inferences sought to be drawn by the Crown were supportable on the evidence; it was not for the judge to usurp the jury's function by drawing his own inferences. The evidence in this case was open to more than one interpretation and it was for

the jury to consider what inferences to draw in the light of the whole of the evidence.

9. In *DPP v Varlack* [2008] UKPC 56, Lord Carswell, giving the judgment of the Judicial Committee, said at para 21 citing Lord Lane CJ in *R v Galbraith* [1981] 1 WLR 1039, 1042 that the basic rule on deciding on a submission of no case at the end of the evidence adduced by the prosecution was that the judge should not withdraw the case if a reasonable jury properly directed could on that evidence find the charge in question proved beyond reasonable doubt. He went on to point out that the underlying principle that the assessment of the strength of the evidence should be left to the jury rather than undertaken by the judge was equally applicable in cases concerned with the drawing of inferences. He cited King CJ in the Supreme Court of South Australia in *Questions of Law Reserved on Acquittal (No. 2 of 1993)* 61 SASR 1, 5 as an accurate statement of the law:

> "If the case depends upon circumstantial evidence, and that evidence, if accepted, is *capable* of producing in a reasonable mind a conclusion of guilt beyond reasonable doubt and thus is *capable* of causing a reasonable mind to exclude any competing hypotheses as unreasonable, there is a case to answer. There is no case to answer only if the evidence is not capable of supporting a conviction."

10. He then referred to a similar statement by Moses LJ in *R v Jabber* [2006] EWCA Crim 2694 at para 21:

> "The correct approach is to ask whether a reasonable jury, properly directed, would be entitled to draw an adverse inference. To draw an adverse inference from a combination of factual circumstances necessarily does involve the rejection of all realistic possibilities consistent with innocence. But that is not the same as saying that anyone considering those circumstances would be bound to reach the same conclusion. That is not an appropriate test for a judge to apply on the submission of no case. The correct test is the conventional test of what a reasonable jury would be entitled to conclude."

11. In concluding that the Court of Appeal was in error, Lord Carswell said:

> "When one applies this principle, it follows that the fact that another view, consistent with innocence, could possibly be held does not mean that the case should be withdrawn from the jury."

12. In the recent case of *R v Darnley* [2012] EWCA Crim 1148 Elias LJ noted at para 21:

> "…we think that the focus should be on the traditional question, namely whether there was evidence on which a jury, properly directed, could infer guilt. It is an easier test, not least because it focuses on what a reasonable jury could do rather than what it could not do. Reasonable juries may differ because the assessment of the facts is not simply a logical exercise and different views may reasonably be taken about the weight to be given to potentially relevant evidence. The judge must be alive to that when considering a half-time application."

13. In our judgment the judge fell into error in the following respects. He drew inferences against the prosecution's case from the following:

- the fact that Mr. Moniz was hit in the buttock and the injury was not life threatening.
- the fact that none of the other shots hit him.
- that the direction of the other shots was speculation.
- that Mr. Burgess did not say at which part of his body the gun was pointed.
- that the conversation overheard on 28–29 February referred to shooting rather than killing.

He did not consider what inferences might be drawn in favour of the prosecution case, for example, that the reference to shooting could involve lethal intent, that there were four shots and that what part of the victim's body a bullet struck was not necessarily determinative of the shooter's intent. In short, he did not look at the whole evidence and consider what inferences a reasonable jury could draw; he simply alighted on inferences that the jury might draw consistent with a lack of murderous intent. This in our judgment was not his function but that of the jury.

14. In our judgment the judge should have left both counts one and two to the jury.

The Jurisdiction Point

15. Section 17(2) of the Court of Appeal 1964 provides:

> "Where –
>
> (a) an accused person tried on indictment is discharged or acquitted or is convicted of an offence other than the one with which he was charged; or
>
> (b) an accused person tried before a court of summary jurisdiction is acquitted and an appeal to the Supreme Court by the informant has not been allowed; or
>
> (c) an accused person whose appeal to the Supreme Court against conviction by a court of summary jurisdiction has been allowed,
>
> The Director of Public Prosecutions or the informant, as the case may be, may appeal to the Court of Appeal against the judgment of the Supreme Court on any ground of appeal which involves a question of law alone."

16. The point in issue is whether the decision of the judge that there was no case to answer on counts one and two is a question of law alone. Section 17(2) is concerned with appeals by the prosecutor whereas section 17(1) is concerned with appeals by a defendant and permits, with the leave of the Court of Appeal or the certificate of the Supreme Court, an appeal on any ground which involves a question of fact alone or a question of mixed law and fact or on any ground which appears to the court to be a sufficient ground of appeal.
17. The Court of Appeal is a creature of statue and unless the judge's decision raises a question of law alone this court had no jurisdiction to hear this appeal.
18. The leading authority is *Smith v The Queen (Bermuda)* [2000] UKPC 6. The same issue arose in that case: whether within the meaning of section 17(2) there was a ground of appeal which involved a question of law alone. The judge held that there was no case to answer, surprisingly (per Lord Steyn at para 7) because the circumstantial evidence was inconclusive to connect the defendant with the commission of the crime. The judge concluded:

> "I rule that the quality of the evidence is poor and the inferences which the prosecution are asking this Court to draw from the circumstantial evidence are inferences which in my view no reasonable jury could properly draw."

The judge said he applied the rule in limb one of the well-known case of *Galbraith* [1981] 1 WLR 1039, 1042 B-E and on the judge's direction the jury returned a verdict of not guilty.

19. In light of the provision in section 17(1)(b) providing for an appeal by an accused Lord Steyn concluded at para 16 that " 'a question of law alone' in section 17(2) excludes questions of fact and questions of mixed law and fact". Counsel argued for extreme positions. Counsel for the appellant submitted that any submission that there was no case to answer failed to satisfy the statutory requirement, whilst counsel for the Crown argued that every no case submission involved issues of fact and degree and could not ever involve "a question of law alone". The Privy Council did not, however, accept either submission in its entirety. Lord Steyn said at para 21:

> "It is of supreme importance to approach the problem correctly. In law when somebody asks whether some issue involves a point of law, the response must always be: in what precise context and for what precise purpose? The question whether there is evidence to support a finding is often treated as involving a point of law for the purpose of statutory rights of appeal from tribunals. It has been said that in this context the courts 'ought… to guard against any artificial narrowing of the right of appeal on a point of law, which is clearly intended to be a wide and beneficial remedy': see *Wade and Forsyth, Administration Law,* 7th ed. 1994 at 951, and generally at 945 – 953. It is also accepted practice in criminal courts to describe any ruling by a judge on a no case submission, or indeed any other ruling by a judge on a no case submission, or indeed any other ruling by the judge, as one on a question of law. *Salmond on Jurisprudence*, 12th ed., 1966, at 68 explained in regard to a no case submission:-
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> > '…it is the duty of the judge to decide whether there is any sufficient evidence to justify a verdict for the plaintiff; and if he decides that there is not, the case is withdrawn from the jury altogether; yet this is mere matter of fact, undetermined by any authoritative rule of law.

> By an illogical though convenient usage of speech, any question which is thus within the province of the judge instead of the jury is called a question of law, even though it may be in the proper sense a pure question of fact. It is called a question of law because it is committed to and answered by the authority which normally answers questions of law only.'"

20. Their Lordships accepted that in context that was a convenient and appropriate use of language but section 17(2) uses the words "a question of law *alone*". Further, as Lord Steyn observed, the provision of section 21(1) of the Act is relevant. This spells out the powers of the Court of Appeal to allow an appeal by a convicted person. Those include setting aside the jury's verdict on the ground that it cannot be supported according to the evidence or on a ground of a wrong decision on any question of law. This suggests the legislature did not regard a point in the former category as a question of law alone. So, Lord Steyn concluded, section 17(2) permits an appeal on a pure question of law only.
21. Lord Steyn went on to make the important point that it was relevant to consider the spectrum of cases that might arise on a retrial, in particular allowing a prosecutor bent on presenting a better case to secure a conviction to appeal under section 17(2) to achieve that. He said it was a settled principle of English law that an acquittal recorded by a court of competent jurisdiction although erroneous in point of fact, cannot generally be questioned before any other court.
22. Having explained why the operative words of section 17(2) covered only a pure question of law Lord Steyn described cases that fell on each side of the line. A ruling on a no case submission that there was no evidence of *mens rea* in a case where the offence was a statutory one requiring *mens rea*; the prosecution could dispute the legal question under section 17(2). On the other hand most no case submissions would simply involve an assessment of the strength of the evidence by the prosecutor. A certain amount of weighing of evidence is unavoidable at this stage because the trial judge has to form a view whether the evidence could potentially produce conviction beyond reasonable doubt. It was clear, he said, that the judge accepted an argument that the circumstantial evidence was an insufficient basis for the jury to convict the defendant. It was a decision arrived at

on matters of fact and degree namely the inferences which could be drawn from the evidence before the jury.

23. The prosecution's grounds of appeal in the present case are in the following terms:

> "(1) That the judge erred in law when he directed the jury to return verdicts not guilty in relation to counts one and two in the original indictment.
>
> (2) That the judge erred when he found, as a matter of law, that unless there was evidence that the firearm was specifically aimed at a vital organ of the victim at time when it was discharged, there could not be sufficient evidence of intent in order to leave the charge of attempted murder with the jury."

24. The judge's ruling was in the terms we have earlier described and focused on his opening words accepting defence counsel's submission that the prosecutor had not proved the necessary *mens rea* to establish either conspiracy to murder or attempted murder. Examination of the judge's reasoning in support of his ruling shows that he examined the evidence before the jury and the inferences, or some of them that could be drawn from the evidence as to the respondent's state of mind.

25. Mr. Byrne for the Director of Public Prosecutions argued that the judge failed to apply the correct test and that he failed to weigh the evidence with regard to intent. Nowhere does he recite the correct test which is set out in *R v Galibrath* [1981] 1 WLR 1039 where Lord Lane C.J. said:

> "(a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.
>
> (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there *is* evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

Later authorities, as we have mentioned earlier in these reasons, have given further assistance with regard to the drawing of inferences from circumstantial evidence.

26. Mr. Byrne argued that there was a distinction between a judge applying the wrong test which he submitted is, a question of law alone and applying the right test but incorrectly which is a mixed question of law and fact. We can see some attraction in this distinction but it will often be difficult to categorise a case as one or the other. A judge may preface his ruling with words such as "applying the well-known test in Galbraith" and then conduct an examination of the evidence leaving it unclear whether he did in fact take the prosecution evidence at its highest. There are indications in the present case that the judge did not apply the correct test at least as regards handling inferences from circumstantial evidence But whether he did or whether he applied the correct test wrongly it is clear that he embarked on an examination of the evidence and this court has had to review his analysis of the evidence and the inferences that might be drawn. This is a case which involved what Lord Steyn described as "weighing of the evidence" to form a view whether the evidence could potentially produce conviction beyond reasonable doubt. Once one is into that territory we cannot see that an appeal is on a point of law alone. Accordingly the criterion laid down by the draughtsman of section 17(2) is not met and the court has no jurisdiction to hear this appeal.

27. We should however add this as a postscript. In the event that we had jurisdiction the Director of Public Prosecutions was initially seeking a retrial but abandoned this claim along with the other grounds of appeal at the commencement of the hearing. Section 23(2)(b) of the Court of Appeal Act 1964 sets out the court's powers on allowing an appeal under section 17(2). It provides that the in an appropriate case and if the interests of justice so require it may set aside the acquittal and remit the case to the Supreme Court to be re-tried, or make such other order as it may consider just. The Director was right to abandon his claim to a retrial. It is very difficult to envisage how this court could have remitted this case for any retrial on counts 1 and 2 as any retrial would necessarily have

involved a jury reconsidering evidence that another jury had apparently rejected on counts 1A and 3A of the amended indictment.

Signed

Baker, P

Signed

Kay, JA

Signed

Bell, JA