The Court of Appeal for Bermuda

CRIMINAL APPEAL NO 4 of 2012

Between:

NOET BARNETT

Appellant

-v-

THE QUEEN

Respondent

Before: **Baker, P.**
Bell, J.A.
Bernard, J.A.

Appearances: Ms. Elizabeth Christopher, Christopher's, for the Appellant
Mr. Rory Field, Mr. Carrington Mahoney, Ms. Larissa Burgess, Department of Public Prosecutions, for the Respondent

Date of Hearing: **9 November 2015**

Date of Decision: **20 November 2015**

Date of Reasons: **30 November 2015**

REASONS

PRESIDENT

1. I agree with the reasons of Bernard JA and add a few words of my own as the subject of special measures and the appointment of an intermediary does not appear to have arisen in Bermuda before. In every case where the

defendant is a child or has comprehension issues the court must be astute to the possible need for special measures to ensure he is able to understand and participate in the trial process.

2. In the present case Ms. Christopher sought to call fresh evidence from Dr. Brownell with a view to showing that the necessary steps had not been taken at the trial. We agreed to hear his evidence *de bene esse*, and indeed he gave oral evidence and was cross-examined. Like my Lady I am satisfied that his evidence added nothing of significance to that which was already available at the trial. Accordingly we declined to admit it.

3. The only issue with regard to the appellant's shortcomings was his ability to follow the proceedings. The judge was well placed to form a view on this in the light of the evidence he heard; he also had transcripts of the appellant's lengthy interviews by the police. There were regular breaks in the trial for communication and Dr. Fowle said the appellant had an attention span of up to two hours.

4. True it is that there was no mention at the trial of the possibility of appointing an intermediary. In my judgment one was not necessary. If there is a need for an intermediary this is an issue that is best addressed well before the start of the trial as there are likely to be difficulties of finding a suitable person, funding and so forth. Furthermore, it is important for the intermediary to build up a relationship with the defendant and this may take time. As is apparent from the case of *Cox*, there may be other ways of ensuring a fair trial.

5. There was a very strong case against the appellant. Ms. Bascome recognised him as the shooter. She knew him from school days so this was a recognition case rather than an identification case. Some weeks later, near his residence, a bag was found containing a firearm and other items. The

appellant's DNA was, on the trigger, trigger guard and the firearm grip as well as on other items. A phone seized by the police contained a video recording showing the appellant and others handling a gun and making negative comments about the Parkside gang. When interviewed, he purported to set up an alibi that at the time of the shooting he was at the Southampton Princess Hotel applying for a job, but this was destroyed by evidence from the hotel.

6. The appellant exercised his right not to give evidence. He was of course entitled to do so, but this left unchallenged the various strands of evidence against him. I have no doubt that this was a safe conviction.

7. On sentence the one point upon which Greaves, J fell into error was in the application of Section 70P. This was an entirely appropriate case in which to impose an order under Section 70P which provides that the court can order a defendant to serve one half of the sentence or 10 years, whichever is the less, before consideration for parole. The judge initially said the appellant should serve half of 25 years. When the restriction was pointed out to him he said he should serve half of the 15 year sentence on count 1 and half of the consecutive sentences of 10 years on the other counts i.e. still 12 ½ years. In my judgment Section 70P applies to the total sentence imposed, a point that was conceded by the Crown. Accordingly the appellant must serve at least 10 years before consideration for parole and we allowed his sentence appeal to that extent. It does not of course follow that the appellant will in fact be released at that point.

Signed

Baker, P.