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**

REASONS

Bernard, J.A.

Background

1. On 4th October, 2010 just before 9 a.m., Charmelle Bascome, saw the Appellant who was well known to her from school days sitting on a stationary white Sym motor-cycle at the junction of Roberts Avenue and Friswell's Hill. There was a person from the 42nd gang sitting behind him on the motorbike. Around 10 a.m., later that morning Ms. Bascome while

on Parsons Road saw Jeremiah Dill, the Complainant, riding a yellow bike. He stopped to speak with her and another friend. While doing so the Appellant, clothed as he was when she saw him earlier, rode up on the same white Sym motorbike pulled out a gun and shot Dill in his leg. Both of them were wheel to wheel on their motor bikes. Dill dropped his bike, picked up his helmet and threw it at the shooter who shot him in the other leg.

2. Ms Bascome claimed that she knew that it was the Appellant as he was wearing the same clothes which she had seen him in earlier that morning, was riding the same bike with the same helmet, and she recognized his lips as he was so close to her that she could touch him.

3. Ms Dill, on the other hand, stated that he did not see the face of the shooter, although he knew the Appellant. A forensic support officer took photographs at the scene, and recovered two shell casings and other exhibits. On 22nd December, 2010 a search was conducted at the Appellant's home, and outside of the residence a bag with a firearm, a piece of red cloth and two gloves was discovered by the Police. The Appellant was later arrested and charged with the offences of attempted murder, using a firearm to commit an indictable offence, and handling a firearm.

4. On 14th December 2011 the Appellant was convicted of one count of each of the aforementioned offences, and on the 15th February 2012 he was sentenced to 15 years imprisonment for the attempted murder, 10 years for using a firearm which is to run consecutive to the first count for attempted murder, and 10 years for handling a firearm which is to run concurrent with the count for using a firearm, for a total term of imprisonment of 25 years.

5. On 28th February 2012 the Appellant filed an appeal against the conviction and sentence which is now being heard before this Court.

6. Apart from the appeal against the conviction and sentence the Appellant is seeking leave to be heard on an application to lead additional evidence from Ms. Victoria Pearman, former attorney for the Appellant pertaining to the conduct of the trial which led to his conviction as well as additional evidence from Dr. Philip Brownell, clinical psychologist, based on the Appellant's capability to participate in his defence. An assessment of the Appellant indicated that he has a learning disability and an IQ of 63 which is the lowest 1 percentile of the population (mildly retarded range). The application for leave to lead additional evidence from Ms Pearman was not pursued.

7. In the submissions of Counsel for the Appellant, reference was made to Section 8(2) of the Court of Appeal Act 1964 read in conjunction with Section 16(2) of the Criminal Appeal Act 1952 which is equivalent to Section 9 of the U.K. Criminal Appeal Act, 1907; also to the principles on which the Court will exercise its discretion to allow further evidence to be led reflected in the case of *R v Parks*[1] (1961). These are (i) the evidence sought to be called must be evidence which was not available at the trial; (ii) the evidence must be relevant to the issues; (iii) it must be credible evidence, that is, evidence well capable of belief; (iv) if the evidence is admitted, the Court will, after considering it, go on to consider whether there might have been a reasonable doubt in the minds of the jury with regard to the guilt of the appellant if that evidence had been given together with the other evidence at the trial.

8. The first question to be asked is whether the evidence which is now sought to be led was not available at the time of the trial. Records indicate that

[1] [1961] 46 Crim App. R, 29

similar evidence was led at the trial by Dr. Fowle, a psychologist and Dr. Farqhuar, the Prison's psychiatrist, concerning the Appellant's mental capacity to understand the legal proceedings. A perusal of Dr. Brownell's opinion indicates that he relied on and agreed with the findings of Dr. Fowle and Dr. Farqhuar in his report to present Counsel for the Appellant who had retained him. This Court, however, decided to receive his testimony before granting leave to admit additional evidence. A review of his testimony indicates that there was no significant difference between his evidence and the opinions of Drs. Fowle and Farqhuar. In the circumstances there was nothing new to add to the evidence already led at the trial, and which could have been available from Dr. Brownell, if needed at that time. The application for leave to lead additional evidence was therefore denied.

Substantive Grounds of Appeal

9. An assessment of the main grounds of appeal indicate:

(1) The vulnerability of the Appellant.

(2) The trial judge's failure to give adequate Turnbull directions on identification.

(3) The trial judge's failure to direct the jury on the expert evidence for the Appellant compared with the expert evidence for the Respondent in relation to the DNA evidence.

(4) The trial judge's failure to instruct the jury on taking special care in dealing with the statement of the Appellant instead of inviting the jury to treat his intellectual challenges with scepticism.

Vulnerability of the Appellant

10. Counsel's submissions on this ground are based on the fact that the trial judge failed to take special measures to assist the Appellant as a vulnerable defendant having been made aware of his deficiencies from the

psychological reports given at the trial. Present Counsel advanced the argument that the Appellant ought to have had a properly-trained intermediary, separate and apart from his lawyer to assist him in following the proceedings, the ultimate objective being to ensure a fair trial. There is no evidence, however, that any application had been made to the Court by his former Counsel for him to be treated as a vulnerable person.

11. Many cases were cited by Counsel mainly on the vulnerability of children with mental issues, but which are equally applicable to adults who may be assessed as being vulnerable. Code D of the Police and Criminal Evidence Act 2006 which is applicable to Bermuda indicates that being "mentally vulnerable" applies to any detainee, who, because of his mental state or capacity may not understand the significance of what is said.

12. The concept of providing an intermediary may be new to this jurisdiction, and reference to cases relevant to the issue are informative. In *C v Sevenoaks Youth Court*[2] *Openshaw, J* sitting in the Queen's Bench Divisional Court made reference to *R v H*[3] where the Court of Appeal Criminal Division recognised that "the courts have an inherent right, indeed a duty, to appoint an intermediary to help a defendant follow the proceedings and to give evidence, if without such assistance he would not be able to have a fair trial."

13. *Openshaw, J* in continued reference to *Sevenoaks* remarked that although at the time the judgment was being considered in 2009 there was no statutory power permitting the appointment of an intermediary for a defendant, there may have been some procedural power in the Criminal Procedure Rules. He went on to say that in his judgment, when trying a young child, particularly one with learning and behavioural difficulties,

[2] [2009] EWCA, 3088 (Admin)
[3] [2003] EWCA, Crim 1209

notwithstanding the absence of any express statutory power, the Youth Court had a duty under its inherent powers and under the Criminal Procedure Rules to take such steps as were necessary to ensure that he had a fair trial. The Court concluded that in the circumstances of that case an intermediary should have been appointed to help the 17 year old defendant prepare for the trial in advance of the hearing and during the trial so that he could have effectively participated in the trial process.

14. Later in 2012 in the Criminal Division of the Court of Appeal in *R v Anthony Russell Cox,*[4] the Lord Chief Justice (*Lord Judge*) made reference to *Sevenoaks* and the trial judge's conclusion that he was possessed of a common law power to give a direction which would enable the Appellant, aged 26 years, to be provided with an intermediary, and accordingly he directed that one should be made available to assist. Unfortunately the direction was ineffective as no intermediary could have been identified for whom funding was available.

15. On the issue of provision and use of intermediaries in appropriate cases the following opinion of the Lord Chief Justice is instructive:

> ".....We recognise that there are occasions when the use of an intermediary would improve the trial process. That, however, is far from saying that whenever the process would be improved by the availability of an intermediary, it is mandatory for an intermediary to be made available. It can, after all, sometimes be overlooked that as part of their general responsibilities judges are expected to deal with specific communication problems faced by any defendant or any individual witness ....as part and parcel of their ordinary control of the judicial process.... In short, the overall

[4] [2012]EWCA Crim, 549

> responsibility of the trial judge for the fairness of the trial has not been altered because of the increased availability of intermediaries….
>
> In the context of a defendant with communication problems, when every sensible step taken to identify an available intermediary has been unsuccessful, the next stage….. [is] for the judge to make an informed assessment of whether the absence of an intermediary would make the proposed trial an unfair trial."

16. The above quoted comments are not to be regarded as a finding or criticism of the learned trial judge's failure to act in the interests of justice in the case before this Court. As stated by Counsel for the Respondent in his oral submissions, the presence of an intermediary at trials is not institutionalised in the justice system of Bermuda, and no requests were made to him to have an intermediary appointed. What must be taken into account with regard to the Appellant is the fact that the trial was not his first appearance in a court of law, having been charged before with a criminal offence. The trial process was not new to him.

17. It is, however, recommended that in appropriate circumstances, the appointment of an intermediary ought to be considered provided suitable funding can be obtained.

Turnbull Directions (Identification)

18. It was contended that even though the trial judge instructed the jury correctly on the *Turnbull Directions*, he went on to water them down. This Court cannot agree. The trial judge dealt with these directions extensively throughout the summation from pages 30 to 49, and again from pages 286 – 300 when the jury sought further directions.

19. The sole identification of the Appellant by Charmelle Bascome was of someone she knew from school days, and one who oft times slept at her home. Of greater significance is the fact that she testified that she had seen him earlier on the morning of the incident when she was taking her child to school. She said that she had passed close to him on the road, so close that she could have touched him. This is clearly a case of identification by recognition. The only problem concerned the position of the helmet he was wearing and whether it obscured her view of the whole of his face. Nothing had obscured her view of his clothing or the bike he was riding.

20. All of this was brought to the attention of the jury by the trial judge. Reference was made by Counsel, however, to Ms. Bascome's evidence about the Appellant having what she described as smoker's lips. There was some difficulty in analysing what was meant by this. It may have been a description peculiarly understood by her. Overall it does not affect her identification by recognition of someone known to her for several years, whether she saw him on Friswell's Hill or later at Parsons Road wearing the same clothing and riding the same bike.

Trial Judge's Failure to direct adequately on Appellant's Expert Evidence on DNA

21. The submission of Counsel is that the trial judge dealt unfairly with a major plank of evidence which was the possibility that the Appellant's DNA came to be on the gun allegedly used in the incident by virtue of transfer as opposed to him handling the gun. Reference was made to the evidence of Ms. Zulegar, an expert called by the Respondent, and who opined that DNA can be transferred from one item to another, but could not say how the DNA came to be on the items.

22. On the other hand, Mr. Appleby, the expert called by the Appellant, indicated that the recovery of the firearm and other items from an "extremely well-used bag provided a route via which transfer of DNA between all of the items could be expected." Counsel submitted that the trial judge should have made it clear that the issue of transfer is separate from that of mixed profiles, and as such they should sever their consideration of each issue.

23. The scientific knowledge on transferability of DNA is technical, and depends on the possibilities in the particular circumstances as was stated in the case of *R v Reed*[5]. Ultimately it is for the jury to decide which expert opinion they accept having regard to the circumstances surrounding the DNA. The trial judge made reference to the evidence of both experts at great length, and indicated to the jury that it was for them to decide whose evidence they preferred.

Trial Judge's Failure to Instruct the Jury with Regard to the Appellant's Statements

24. The contention is that the trial judge ought to have excluded the Appellant's interview with the police as being unreliable, and ought to have instructed the jury to take special care in dealing with the statements instead of inviting the jury to treat his intellectual challenges with scepticism; at a minimum he ought to have directed the jury to take the Appellant's vulnerabilities into account.

25. One important flaw in Counsel's argument is that an attorney was present throughout when the Appellant was being interviewed by DCs Edwards and Henry, on 14 January 2011 and Mr. Farge, his attorney, confirmed his presence and advised his client on answers whenever necessary during both sessions of the interview on that date. The interviews continued on

[5] [2009] EWCA Crim 2698

15th January 2011, again with Counsel, Mr. Farge, present. At all of the interviews the Appellant was asked to confirm that his Counsel was present, and he did so, naming Mr. Farge. Mr. Farge himself confirmed that he was representing the Appellant at all of the interviews.

26. The issue of the Appellant's vulnerability or mental incapacity was never raised during the interviews, and was not a live issue at any time while the interviews were being conducted. A perusal of the record of the interviews indicates that the Appellant seemed to understand and gave direct replies to the question asked in a sensible manner.

Sentence

27. With regard to the sentence imposed it is argued that the trial judge should have taken into account the fact that the Appellant was mentally challenged. The transcript indicates that the trial judge found no merit in this, and told the jury that it was an argument that had been thoroughly put before them and rightly rejected. (p. 369 of the transcript on Sentencing). In this regard counsel also made mention of Section 70P of the Criminal Code Act, 1907 pertaining to eligibility for parole, and which the trial judge disregarded or paid insufficient regard to the limitation upon applications under the said Section 70P.

28. Under Section 70P (3), a court may order that the portion of the sentence that must be served before the offender may be released is one-half of the sentence or 10 years, whichever is less. Both Counsel for the Appellant and for the Respondent agree that the trial judge had some difficulty in determining the length of the sentence after applying Section 70P (3) and decided that the Appellant must spend at least one-half of his total sentence before any consideration is given for parole.

29. The total sentence imposed by the trial judge was 25 years, that is, 15 years for Count 1, 10 years for Count 2 to run consecutively with Count 1, and 10 years for Count 3 to run concurrently with Count 2. By the trial judge's order the Appellant will have to serve 12½ years before any consideration can be given for parole. Under Section 70P (3) the Appellant having been sentenced to a total of 25 years, he could be eligible for parole after serving one half of his sentence or 10 years whichever is less. This means that he would serve 10 years, being less than 12½ years, in accordance with Section 70P (3).

30. In the circumstances the order of the trial judge concerning the Appellant's eligibility for parole will be varied to 10 years with time in custody being counted as part of the sentence.

31. For all of the aforementioned reasons the appeal was dismissed, and the sentence varied as indicated.

Bernard, JA

I Agree

Baker, P

I Agree

Bell, JA