The Court of Appeal for Bermuda

CRIMINAL APPEAL No 7 of 2015

Between:

STACEY ROBINSON

Appellant

-v-

THE QUEEN

Respondent

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

Appearances: Ms. Elizabeth Christopher, Christopher's, for the Appellant
Ms. Nicole Smith, Department of Public Prosecutions, for the Respondent

Date of Hearing & Decision: **19 November 2015**

Date of Judgment: **19 November 2015**

EX TEMPORE JUDGMENT

PRESIDENT

1. On the 13th of May of this year Stacey Robinson was convicted by a majority of 9 to 3 of wounding with intent to cause grievous bodily harm contrary to section 305A of the Criminal Code ("the Code") and by the same majority of using a firearm to commit that offence contrary section 26A of the Firearms Act 1973. He appeals against conviction.

2. There were originally three other defendants who are not involved in this appeal. Shannon Dill pleaded guilty to the same two offences. Shelton Baker was acquitted of those two offences and Roshuntae Davis was acquitted of being an accessory after the fact by assisting the defendant Dill after he had committed the offence. Dill, Baker and the Appellant Robinson were originally charged with attempted murder and using a firearm to commit that offence but the Learned Judge stopped the case in respect of those charges. Apparently the prosecution had some gunshot residue evidence that related to Dill and Baker but not to the Appellant. Because of difficulties caused by late service, the judge decided that it was not appropriate to allow that evidence to be adduced, but that is of no direct relevance to the current appeal.

3. The facts of the case can be relatively shortly stated: -

The victim Lionel Thomas Junior lives at 7 Cove Valley Lane, St. David's with his parents. On Tuesday 29th April 2014, he was out during the day, but was dropped off by someone else at his house at about 2:00 in the early hours of the following morning. He went into his house and had arranged for his girlfriend to join him there. She arrived about a quarter of an hour later at roughly 2:15 a.m. When she arrived he went out and directed her to the parking area at the top of Smith Hill because there was no available parking any closer. There he noticed a black Volkswagen which was parked without any number plates either front or rear. It had not been there when he arrived home. He helped his girlfriend to park, got out of her vehicle and then noticed three or so figures going in the direction of his door. He took off his chains and gave them to his girlfriend and then went to investigate. The next thing that happened was he saw a silhouette of three persons in his neighbour's yard moving in the direction of the Volkswagen that he'd earlier noticed. He asked, perhaps foolishly in the light of events that occurred

subsequently, if they were trying to rob him. The response was two or three gunshots from which he sustained two leg wounds. He was subsequently taken to hospital. His girlfriend heard arguing followed by one shot and then two more shots. She saw at least three people, one of whom was a girl. She noticed the Volkswagen which the three or more people were close to but they left it behind. Neither the victim nor his girlfriend was able to identify any of the shooter or his associates. The victim knew of no reason why the Appellant or any of the former defendants, or indeed anyone, should want to shoot him.

4. The Crown's case as described in the Summing Up was based on joint enterprise. There were, said the Crown, three of them - Baker, Robinson and Dill, one of whom was armed and all three knew that that one was armed. They knew and understood that the gun would be used to shoot a person, if necessary. The three of them together had earlier removed the number plates on the Volkswagen in order that it could not easily be identified. They knew and approved that the gun could be used to shoot someone with intent to cause grievous bodily harm.

5. The section of the Code relied upon was section 27 and the judge directed the jury at page 70. He said this:

> "Now the prosecution's case in respect of the defendant Mr. Robinson and Mr. Baker is based on section 27 of our Criminal Code which deals with parties to an offence. Let me tell you what that section says. That section says when an offence is committed each of the following persons is deemed to have taken part in committing the offence and to be guilty of it and may be charged with actually committing it (a) every person who actually does the act or makes the omission which constitutes the offence. In this case that is the person

> that actually did the shooting or the person who actually used the firearm to do the shooting (b) every person who does any act or makes any omission for the purpose of enabling or aiding another person to commit the offence (c) every person who aides another person in committing the offence."

6. Now the Crown's case was based entirely on inference from circumstantial evidence and included in that are events that occurred after the shooting. Later in his summing up, the judge said this at page 161:-

> "Well nobody knows what is the reason they shot the man and nobody has to prove that. The question is did they shoot the man or not? Did they participate in shooting the man or not? That is the question in relation to Mr. Baker and Mr. Robinson."

And it seems to us that there is a serious hurdle that the Crown has to surmount to establish participation in the actual offence with which the Appellant is charged namely shooting with intent to cause really serious injury. There was no evidence of any clarity to indicate for what purpose the shooting took place. Was it that they took out the gun in order to fortify their position in the course of a burglary or robbery? Or were they targeting for some unknown reason the Appellant in order to shoot him?

7. Turning then to the events that occurred after the shooting. At 2:52 a.m. there was a WhatsApp message from the Appellant's phone to Roshuntae Davis requesting that she come to St. David's and bring a helmet. The Crown relied on that evidence as something that occurred pretty soon after the shooting had taken place, the shooting having occurred somewhere in the region of 2:20 – 2:30 although there's no real clarity about that, and say here is evidence that suggests that the Appellant was

at just after 10 minutes to 3:00 somewhere in St. David's in the region of where the shooting had taken place Ms. Christopher, who has appeared before us for the Appellant and who also appeared in the Court below, says that this evidence should not be taken at face value in the way that the Crown suggests. The evidence which is in the form of text messages is to be found at page 51 of the record and what happened was that at 2:52:26 there was a message from the Appellant's phone to "Davis: come St. David's now." "Reply: Why? And then the caller says: "Just do it bring a helmet." And then the recipient responds: "Where is Shannon?" Justice Bell points out that on page 51, the order of the calls is not correct in particular 2:54:11 obviously precedes 2:54:41 and that means that there is less clarity about this discussion than might previously have been thought.

8. Now the Appellant's response to this is that it wasn't him making the call, that Dill came to his house and made those calls because he hadn't the relevant facilities at the time on his own phone as it was out of battery or something of the kind.

9. It's unnecessary to dwell a great length on this point save to say that the Learned Judge when he came to sum up, didn't remind the jury of Appellant's case on this point. This, Ms Christopher argues, is a small further point in her client's favour.

10. However, the critical point with regard to this appeal comes at 3:00 a.m. when Dill awoke Myeisha Waldron at 10 Luke's Lane St. David's and the following conversation took place as described by the judge in his summation:

> "Now on that 30th April 2014 she was asleep about 3:00 a.m. when Shannon Dill awoke her to borrow her bike. Now let

> me slow down here a little bit because this is significant particularly when you compare it with the evidence given by Mr. Stacey Robinson. See how the two work together or collide or whatever. Now, she said on the 30th April 2014 she was asleep about 3:00 a.m. when Shannon Dill awoke her to borrow her bike alleging Stacey Robinson was in trouble. So you might think if that is so, Stacey could not be home according to what she was thinking. You might think that that conflicts with what Mr. Robinson said about the reasons the bike was given."

11. Now there is a fundamental problem in our judgment about this passage because what Dill said to Ms. Waldron was hearsay and not admissible as to its truth. It is true that there was no objection raised by the defence when this evidence was adduced. Ms. Christopher has told us that Ms. Waldron was a difficult witness and there were other problems with her evidence and it slipped in. Nevertheless, it seems to us that the evidence was on its face potentially very damning. The common law rule is clearly stated in *Phipson* on Evidence 16th edition para. 28-01:-

> "It's a fundamental common law rule that a statement made outside the courtroom, regardless of its relevance, cannot be adduced in evidence for a hearsay purpose."

This common law rule can be traced right back to as early as *Wright v Doe* (1838) E.R. 488 and has continued, see for example *Teper v The Queen* [1952] A.C. 480 and *Blastland* [1986] A.C.41 and finally *Myers* [1997] UKHL 36 and it has remained as far as Bermuda is concerned until the present day untouched by any statutory provision.

12. Ms. Christopher says that this case is really on all fours with *Teper* and she draws attention to page 486 at which the Court said: -

> "The rule against the admission of hearsay evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost" and at 488 at the bottom "before assessing the prejudice caused by the wrongful admission of the hearsay evidence, and deciding whether it affected the substantial justice of the trial, the nature and effect of the other evidence must be looked at. One important observation falls to be made at the outset. There was no other evidence of identification that was of any value, and the effect of this on the jury's mind would not improbably be to throw into relief the hearsay evidence and to give it prominence."

13. The particular evidence that was complained about in *Teper* related to someone whose statement was heard by a policeman saying "your place burning and you going away from the fire." In our judgment there is some force in Ms. Christopher's argument about the similarity between *Teper* and the present case. Before leaving the authorities, Ms. Christopher also drew our attention to *Blastland* at page 11 where it was said "it is, of course, elementary that statements made to a witness by a third party are not excluded by the hearsay rule when they're put in evidence solely to prove the state of mind either of the maker of the statement or the person to whom it was made. What a person said or heard said may well be the best and most direct evidence of that person's state of mind. This principle can only apply, however, when the state of mind evidenced by the statement is either itself directly an issue at the

trial or of direct and immediate relevance to an issue which arises at the trial."

14. Ms. Smith, who has argued this case most forcibly for the Crown, submits that the evidence was admissible to show the state of mind of Ms. Waldron. We have real doubts about that, but even if she is right in our judgment the prejudicial effect of the evidence far outweighed any probative value and accordingly the judge should have made it clear to the jury that this was not evidence against the Appellant. It seems to us clear that the present case does not fall within any of the exceptions to the rule against hearsay. The reason for the rule is clear, the maker of the statement cannot, because he hasn't given evidence, be tested as to the veracity of the statement. That is of particular relevance in the present case because the jury knew that Dill had pleaded guilty to the very same offence with which the Appellant was charged. Furthermore, he said nothing about his involvement in the shooting to Ms Waldron. He may very well have had an interest in implicating the appellant by saying that he was in trouble. He had reason to protect his own skin and the evidence could not be tested. The statement on its face was damning, the jury would no doubt be asking themselves the question why is the Appellant in trouble and for what? The matter could have been dealt with had it been fully appreciated at the time by Ms. Waldron answering the question "as a result of what Dill said to you, did you lend him your bike?" But that wasn't the way in which the matter was approached.

15. Turning then to how the Learned Judge dealt with this in his Summation, I've read already the passage at 114. We move on then to page 158 beginning at the bottom of 157 , this is at the point the judge was dealing with the Appellant's defence and he said: -

> "What did she say was said to her about the borrowing of the bike and the reason given by her as to why she left home and responded. Now you have to take into account that when the conversation, nobody said that when the conversation between her and Shannon was taking place that Mr. Robinson was present and heard so that's a matter that you will have to take into account."

Now what the judge didn't at that point say was that the evidence wasn't admissible against Mr. Robinson as to the truth of what was being recited. The judge was putting it to the jury on the basis that as Mr. Robinson wasn't present the jury would have to balance it up and decide what weight to give to it. Then we move to 174 at which point the jury has gone out of court and Ms. Christopher makes the point that evidence goes in for a limited purpose, namely to show the state of mind of the recipient and explain why she did, what she did. Ms. Christopher accepts that she made a concession that she didn't need to make but in the event we don't think that that's either here or there. Then the jury returned and the judge gave them this further direction at 175:-

> "In relation to the piece of evidence from Myeisha Waldron when she said Shannon Dill came to her and woke her up and told her that he wanted to borrow the bike because Stacey was in trouble, remember I told you that you had to take into account that there's no evidence that Stacey was present and heard that conversation right? In fact his evidence is that he sent Stacey to her, he sent Shannon to her, so the conversation there that Ms. Waldron speaks about would be hearsay evidence in relation to Mr. Robinson alright? The usefulness of that evidence is to the state of mind of Ms. Waldron. It explains why she said she left home to go and look for Stacey."

> The jury again withdrew and Ms. Christopher pursued this with the judge as of course was appropriate for her to do saying at 177 "you didn't specifically state that in so far as the court indicated that saying Stacey was in trouble that it was evidence against him is incorrect because it's not admissible. The high watermark of what the court said was that it was hearsay evidence against Mr. Robinson. The court did not say or correct for the purpose of a lay jury that Ms. Waldron hearing from Shannon that Stacey was in trouble was not evidence of the truth of that." Despite Ms. Christopher's efforts to persist the judge brought the issue to a close saying "Ms. Christopher I've had enough of that."

So the position is that in our judgment there was misdirection by the judge as to how the jury should handle this piece of evidence that should in reality not have been admitted at all.

16. In our judgment one then has to turn to the remainder of the evidence to try and assess the effect that misdirection may have had on the jury. In our judgment the case against the Appellant on joint enterprise was extremely thin putting it at its highest and perhaps only got past the half time stage in the light of the WhatsApp messages at exhibit 51 of the court record.

17. In these circumstances we have come to the conclusion that Stacey Robinson's conviction for these two offences cannot be regarded as safe and therefore the appeal should be allowed and the conviction set aside.

Signed

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Baker, P