The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 13 of 2018

B E T W E E N:

JEREMIAH DILL

Appellant

- v -

THE QUEEN

Respondent

Before: **Clarke, P**
Kay, JA
Bell, JA

Appearances: Mark Pettingill and Victoria Greening, Chancery Legal Ltd., for the Appellant;
Carrington Mahoney and Nicole Smith, Office of the Director for Public Prosecutions, for the Respondent

Date of Hearing: **11 March 2020**
Date of Judgment: **9 June 2020**

JUDGMENT

Admissibility of GSR evidence where less than three-component particles – Identification – reliability of evidence in light of medical condition – admissibility of hearsay evidence

KAY JA:

Introduction

1. On 23 October 2018, Jeremiah Dill ("the Appellant") was convicted of two offences, namely, Premeditated Murder contrary to section 286A(1)(pre-amendment) of the Criminal Code Act 1907, and Using a Firearm Whilst

Committing an Indictable Offence contrary to section 26A of the Firearms Act 1973. He now appeals against his conviction.

The Evidence

2. At around 9:00pm on 3 January 2010, Perry Puckerin ("the Deceased") was leaving the Hamilton Workman's Club, otherwise known as the Crawl Club. He was shot dead by an incoming male. It was a gang related murder. The Deceased was a member or supporter of the 42 Street Gang. The case for the Crown was that the murderer was the Appellant, a member or supporter of the Parkside Gang. The evidence upon which the Crown relied fell mainly into the following categories.

3. First, Paco Fubler, who had been a friend of the Appellant since childhood, said that at around midday on the day of the murder, he had visited the Appellant at his home at Seagull Lane, Spanish Point. Also present was Prince Edness, a Parkside ringleader. Fubler testified that he heard Edness say that they were going to go to the Crawl Club, a known 42 meeting place, and shoot the first 42 man they encountered. The shooter would than escape out of the back of the club and hide in the shed at Tamasgen Furbert's house. Tamasgen is the Appellant's cousin. At the time of this conversation it was suggested that another man, Tashon (aka "Blood"), would be the shooter. The men dispersed, and a few days later, following the murder, Fubler again went to Seagull Lane, where he found the Appellant in a very excited and celebratory state about the murder. The Appellant simulated a "bang, bang" motion and was laughing and joking. He also expressed concern about the police going to Tamasgen's house. Not long afterwards, Fubler, when he himself was in custody in relation to a minor and unrelated matter, gave a statement to the police but declined to sign it. He said he wanted to leave Bermuda and start a new life, away from gangs and drugs. In 2011 he moved to England, where he remained until he returned to Bermuda to give evidence at the Appellant's trial in November 2018. At some point the Appellant also moved to England where, in 2017, he contacted Fubler and

endeavoured to persuade him to retract the statement he had given to the police following their recent tracing of him in London. Notwithstanding the Appellant's persistence, Fubler did not retract the statement which later provided the basis for his evidence at trial.

4. Secondly, the Crown relied on the evidence of Yasmin Cann, who had been working behind the bar at the Crawl Club on the night of the murder. The Deceased had come to the Club to pick her up. They were leaving the club, she just ahead of him, when the shooter came in and shot the Deceased. She had known the Appellant since childhood. They used to play together, visit each others' homes, attend church and swim together. They had then gone their different ways as adults but would still speak when they met by chance in the street. Her evidence was that she recognised the Appellant as the shooter. Although the rest of his face was covered, she recognised his "sleepy eyes" and his voice when he said, "don't move". This evidence lies at the heart of the Appellant's appeal.

5. Thirdly, the Crown relied on forensic evidence. Part of it related to a camouflage tee shirt removed by the police from the garage at the Appellant's house in Seagull Lane. More related to items of gunshot residue ("GSR") and one or two component particles found on certain exhibits said to belong to the Appellant (including the tee shirt) and on the Appellant's hand.

6. The Appellant declined to answer questions when interviewed by the police following his extradition from the United Kingdom and he neither gave nor called evidence at his trial.

The Grounds of Appeal

The Evidence of Yasmin Cann

7. The centrepiece of this appeal is a three-pronged attack on the evidence of Yasmin Cann. It is said that (1) the Judge ought to have excluded it; (2) the trial

was unfair because of inadequate disclosure in relation to Ms Cann's medical and psychological condition; and (3) defence counsel ought to have sought further disclosure and/or have endeavoured to obtain expert evidence on the question of whether Ms Cann's medical and psychological conditions might have affected the reliability of her evidence.

8. Ms Cann made three witness statements relevant to these issues (a fourth was not concerned with the incident). The first two in time were made on 5 and 7 January 2010, shortly after the shooting. In neither did she refer to the Appellant. She described the shooter and his clothing but did not say that she recognised him. Her third statement was made on 4 July 2011, some 18 months later. This time she said that she recognised the Appellant as the shooter. She based her recognition on his eyes, which came to be referred to as "sleepy eyes", and his voice, when he had told her not to move.

Failure to Exclude the Evidence

9. It is not suggested that the Judge ought to have excluded the evidence before it was given. No such application had been made at trial and I cannot see any basis upon which one might have been made.

10. At the conclusion of the case for the Crown, counsel then representing the Appellant made a laconic submission that, upon application of the principles set forth in the well-known case of *Turnbull v R* [1977] Q.B. 224, there was no case to answer. The evidence of recognition was "poor and unsupported" and that the Judge should withdraw the case from the jury. The Judge's ruling was in these terms:

> *"I find that there is a case to answer in this case. My reasons are not exhaustive but I think there is credible evidence from the -- Ms. Yasmin Cann, from Mr. Paco Fubler, supported by documentation in respect of Mr. Fubler.*

> *There are other exhibits, including the GSR evidence which is deposited on material objects and places at the time, and there is a sufficiency of evidence of motive established, all of which tends to identify the Defendant as the assailant in this case. I find, therefore, that there is evidence to put the Defendant to answer a case."*

11. Mr Pettingill now submits to this Court that the Judge ought to have acceded to the submission of no case to answer or, at the very least, he should have directed the jury to ignore the evidence of Ms Cann.

12. The main features of Ms Cann's evidence to which Mr Pettingill refers in support of this submission are the following. First, she had a close relationship to the Deceased and other members of the 42 gang, so "may have had an interest to serve". Secondly, her psychological and medical condition rendered her testimony unreliable. Thirdly, the opportunity to recognise the shooter was very limited; his face was covered apart from his eyes; he spoke only a few words and, in her first statement, she had described his voice as "muffled". Fourthly, she did not name the Appellant until her third statement, which was made some 18 months after the previous two.

13. Needless to say, Ms Cann was asked about all these matters. In essence, she said that she had initially omitted to name the Appellant out of fear of the consequences, being that the murder was gang related. She eventually changed her mind because she "realised enough is enough and that I had to say what I know because he [the Deceased] has children and a Mama". Her psychological and medical issues (and I shall have to return to them) affected her ability to express herself but not her memory. Although she had had only a brief and imperfect opportunity to recognise the Appellant, she was not mistaken: "I know who it was".

14. I accept that the circumstances in which Ms Cann observed the shooter were not ideal. If her evidence had stood alone, it is possible that the Judge would have

had to withdraw the case from the jury. However, it did not stand alone. The man said by Ms Cann to have been the shooter is the same man referred to by Paco Fubler as having been present at the meeting with Prince Edness earlier on the day of the murder and as having excitedly celebrated the murder two days later. It was also open to the jury to find support for Ms Cann's evidence in the GSR evidence, to which I shall return. For these reasons, I consider that the Judge was right to reject the submission of no case to answer and to leave Ms Cann's evidence to be assessed by the jury.

Ms Cann's psychological and medical condition

15. This issue requires consideration for two purposes. It is one of the matters relied upon by Mr Pettingill as demonstrating the weakness of the recognition evidence. It also gives rise to a separate ground of appeal to the effect that the Appellant at trial was wrongly denied a proper opportunity to explore further the adverse effect which all this may have had on the reliability of Ms Cann's evidence.

16. Not surprisingly, Ms Cann was traumatised by what she saw and experienced on the night of the murder. Two reports were served on the defence. They disclosed ongoing post-traumatic stress disorder and, much later, long after she had made her third witness statement, she suffered a brain aneurysm. Dr Chiappa, a consultant neurologist, saw her on 15 May 2018 in relation to the aneurysm. He said:

> *"…she is fully capable of answering yes/no questions regarding prior events, including identification of objects and people.*

17. Dr Rosorea, a clinical psychologist, had seen her some years ago in relation to the PTSD but he no longer had records following a fire. He saw her again on 21 May 2018. Letters from both clinicians were read to the jury by agreement. Essentially, they showed that, as a result of the recent aneurysm, Ms Cann has

difficulty in expressing herself, but her memory is not affected. Dr Chiappa explained that "the memory structures in her brain are not in the region of the subarachnoid haemorrhage".

18. As the material before the jury, including the evidence of Ms Cann, did not suggest that her psychological or medical conditions affected her memory or her capacity for truthfulness, they did not support the attack on the evidence or the submission of no case to answer.

19. Mr Pettingill's other point is that the reports ought to have led the Crown to obtain and disclose further expert evidence in relation to Ms Cann's reliability or should have triggered a search by the defence for such expert evidence. I do not consider that the Crown were under any obligation to do more than they did. As regards the submission that the omission of the Appellant's trial attorneys to seek further expert evidence resulted in the Appellant not having a fair trial, I regard that to be an unsustainable proposition. Whilst it is true that expert evidence to prove the unreliability of a witness is, in principle, admissible (*Toohey v Metropolitan Police Commissioner* [1965] A.C. 595), there was nothing to suggest that defence counsel at trial ought not to have taken the evidence of Dr Chiappa and Dr Rosorea at face value. Nor is there any new material which has been placed before us in support of this ground of appeal. There is an affidavit by trial counsel which is persuasive, and Mr Pettingill rightly declined the opportunity to cross-examine him. In my judgment this ground of appeal cannot succeed.

Hearsay Evidence

20. When police officers executed a search warrant at the Seagull Lane property three days after the murder, the Appellant was not present, but his brother was. Evidence about the search was given by DC Swaby. Among the items seized were a camouflage tee-shirt and two pairs of blue jeans, all found in a trash bin in the garage. They feature in the GSR evidence to which I shall return. In answer to

Mr Mahoney, DC Swaby testified that Jamar Dill said that the tee-shirt was his and the other items in the bin belonged to him and the Appellant. By this ground of appeal, Mr Pettengill submits that what Jamar told the officers was hearsay and ought not to have been admitted.

21. The evidence was undoubtedly hearsay, but it is relevant to understand how it came to be admitted. Having adduced the uncontroversial evidence about the finding of the items of clothing, Mr Mahoney said:

> *"Unless there is any objection, I'm going to ask you, was anything said when you found any of these items?"*

22. There was no objection, so the officer proceeded to recount what Jamar had said, all of which was known to defence counsel because it had been recorded in the search notes written by another officer.

23. It is obvious that counsel then representing the Appellant was content for the evidence to be given. I infer that there were two reasons for this. The evidence suggested that the tee-shirt was not the Appellant's and he was no more than a co-owner of the jeans. Also, defence counsel was intending himself to adduce further hearsay evidence from the officer in cross examination. Also present at the time of the search was the appellant's grandmother and she had signed the search notes as a correct record. In cross examination, the officer was able to confirm that Tamasgen Furbert was the subject of the search (as he had already stated in chief), that Tamasgen had been staying in the house for the previous two days and that she and Jamar were the only persons currently residing in the property. These latter two statements were just as much hearsay as was Jamar's account of the ownership of the clothes.

24. It is by no means uncommon for defence counsel to be allowed some latitude when cross examining police officers in this way. Objection can be taken but

often it is not. It is obvious why Mr Attridge, trial counsel, was anxious that the jury should hear this evidence. It tended to distance the Appellant from Seagull Lane and the clothing and cast suspicion on Tamasgen. If he had objected to Mr Mahony's venture into hearsay, it was foreseeable that he would not have been the beneficiary of similar latitude.

25. This is all part of the dynamics of a criminal trial. It seems to me that, once it had become apparent that both counsel wanted to approach the matter in this way, it was permissible for the Judge to let matters take their course. In these circumstances, technically inadmissible hearsay cannot now form the basis of a ground of appeal. Counsel had taken an informed and rational decision that, on balance, this approach was beneficial to his client.

The GSR Evidence

26. As in many cases involving the discharge of a firearm, evidence was admitted to prove, or support, the allegation that the Appellant had been the shooter. The science has been explained in several previous cases, perhaps most clearly by Clarke P in *Jahmico Trott v The Queen* [2019] CA (Bda) 2 Crim, 15 March 2019. He said this at paragraphs 82 and 85:

> *"[82] Gunshot residue is composed of three components: lead, barium and antimony. Particles may, also, be found which consist of only one component (lead or barium or antimony); or two of the three components, fused together; or all three components fused together.*
>
> *…*
>
> *[85] The judge gave a careful and detailed direction to the jury in respect of the evidence of Farah Helsel, a GSR expert. As she explained, GSR generally refers to all the particles (in the three categories) which are expelled from a discharged firearm. One-component particles are commonly referred to as "commonly associated with GSR". But they can be found in several other sources. She did not bother with those. Two-component particles*

> *are known as "Consistent with GSR". These may be found in other sources, which she identified, but in fewer sources than one-component particles are found in. These she reports, after considering their morphology and their chemistry, which may indicate that they are derived from some source other than GSR e.g. fireworks. Three-component particles are known as "characteristic GSR" because they are highly specific to the discharge of a firearm. There are very few other sources from which they can be found."*

27. The findings in the present case included the following:

(1) On the Appellant's hands (samples taken nine days after the shooting), numerous one component particles, either lead or antimony.

(2) On the motorcycle said by the Crown to have been the Appellant's (and of which there was evidence sufficient for the jury so to find), there were two component particles, including both lead and antimony and lead and barium.

(3) On the camouflage tee-shirt recovered from the trash bin in the garage at Seagull Lane, a three-component particle and several two and one component particles.

(4) On a pair of jeans recovered from the same trash bin, a three-component particle.

(5) On a pair of camouflage pants recovered from Tamasgen Furbert's house, a three-component particle and numerous one and two component particles.

Consideration has been given to the value of this sort of evidence, both in this Court and elsewhere in recent years. No one disputes the probative value of three

component particles which are accurately referred to as GSR. The controversy was related to two and one component particles, which should not attract the label GSR and are more accurately described as, respectively, "consistent with GSR" and "commonly associated with GSR". Because of the probative ambivalence, it has been suggested that evidence of them ought not to be admitted. However, that suggestion has not found favour.

28. In *George* [2014] EWCA Crim 2507, Sir Brian Leveson P said:

> *"[46] In our judgment, there is no basis for challenging the decision of the trial judge to admit the evidence of gunshot residue and neither does the new evidence provided by Ms Shaw justify such a view. The fact that scientists have adopted a cautious approach to reporting low levels of residue (i.e. 1-3 particles) such that for that residue, on its own, no evidential significance can be attached to it does not mean that the evidence is necessarily inadmissible or irrelevant. Still less is that the case when (as here) there were in fact a total of four recovered particles, albeit that two are characteristic of gunshot residue and two indicative only (to say nothing of the additional particle found by Ms Shaw). The jury are more than able to assimilate evidence as to potential significance or lack of significance of recovered evidence, provided that there is an appropriate explanation of that potential significance, for example, by reference to what might occur in the environment or might otherwise be the consequence of entirely innocent contamination."*

29. This rather reflects the approach that had already been taken in this Court in *Blakeney and Grant*, where Baker JA concluded (paragraph 30) that it was a matter of weight rather than admissibility. He revisited the subject as Baker P in *Hewey and Dill* [2016] Bda LR 55:

> *"[36] In our judgment the judge was correct to admit the evidence because it had to be considered in the context of the other evidence in the case, not least the evidence that both appellants were together that night, that both bikes had particles on them and that Dill's jacket and*

> *jeans had three, two and one component particles on them. The presence of three component particles was of particular significance in view of scientific evidence that they had come from the discharge of a firearm. Such evidence, in the absence of any evidence from Hewey, could assist the jury in weighing the significance of the one and two component particles found on Hewey's clothing. Further, the two and one component particles comprised between them the three elements necessary to constitute GSR namely lead, barium and antimony."*

30. Finally, in *Trott*, Clarke P said:

> *"[88] In our view the judge was not in error in allowing the Crown to adduce evidence of what was on the appellant's palms, and his summing up was appropriate and fair. We do not accept that because a possible explanation for the particles on the appellant's palms was that the two-component particles came from the arresting officer the jury should have been denied the evidence of what was found on those palms. That evidence was part of the whole picture and it was for them to determine what significance, if any, they attached to it. As this court said in Deven Hewey and another v R [2016] CA Bda Crim at [35] this type of evidence has to be considered in the context of the other evidence in the case.*

31. Turning to the present case, it is certainly not one in which it can be said that the evidence against the Appellant rested wholly or mainly on GSR evidence. The evidence of Paco Fubler and Yasmin Cann would, without more, have been sufficient for the case to be left to the jury. It seems to me that the GSR (again in the broad sense of three, two and one particle findings) evidence was properly a matter for consideration by the jury. The defence had points to make about it - for example, the one component particles of lead and antimony on the Appellant's hands were not recovered until nine days after the murder; there is no evidence that the shooter was wearing a camouflage tee shirt; the Appellant through his attorney disputed that the motorcycle was his; and Tamasgen Furbert had, on the basis of hearsay evidence, been at the house on Seagull Lane

and particles, in the broader and narrower senses, had been found on clothing in his house. In my judgment, the jury would have been able to come to a view about the weight, if any, to be accorded to all this evidence. In their task, they would have been greatly assisted by the testimony of Alison Laneve, the gunshot expert, who gave very clear evidence about the strengths and limitations of her findings.

32. Once it is established (and in my view it is) that the evidence was properly admitted, the next question is whether the Judge gave the jury an adequate summary of it and appropriate directions on how to approach it. The passage in which he summarised the evidence of Alison Laneve covers 16 pages of the transcript. I detect no error in his recounting of her evidence. The passage includes references to some of the points made by counsel on both sides about the evidence. It seems to me that no substantial objection can be made to its content or terms. It concludes with this:

> *"You may think the Defence are entitled to rely on this evidence to suggest that this GSR-like evidence does not provide a satisfying string in any rope to bind the Defendant to the crime. It leaves some reasonable doubt for the reasons advanced. There is particle evidence connected to Tamasgen as much as there is to the Defendant. This Tamasgen particles evidence should leave you in reasonable doubt about who shot Mr. Perry and in particular whether it was the Defendant.*
>
> *You may think the Defence are entitled to say, This evidence does not assist or remove reasonable doubt that the Defendant was the shooter in this case, it merely reports some particles which do not surely connect him to the crimes charged."*

33. In the concluding passages of his summation the Judge encapsulated the cases for the Crown and for the defence. Of the Crown's case, he said:

> *"It is the case for the Prosecution there is no reasonable explanation for the particles on that clothing, him and his motorcycle, other than that they must have come from that shooting that night.*
>
> *You have not heard any evidence that he was involved in any other sources that might have transferred or caused to be transferred particles in the numbers and variety of these particles, which the Prosecution is entitled to say was part, or likely part in the drawing inference of the same population."*
>
> *It is the case for the Prosecution as I understand it that particles by themselves may mean nothing, but when interpreted, having regard to all the circumstances of a case, of this case, they come to mean a lot, as they did in this case, says the prosecution.*
>
> *The case for the Prosecution is that this Defendant has been proved guilty by all these strings of evidence against him, inclusive of the Yasmin recognition evidence, the Paco Fubler overhearing evidence, and the later excited evidence given to him by the Defendant, and that his evidence is supported by the telephone evidence and the WhatsApp documents evidence, inclusive of the copy of the statement sent to him by the Defendant, who wanted him to withdraw his truthful statement.*
>
> *It includes the forensic evidence, the GSR, inclusive of the several different particles in all the varieties to be found, in true GSR, and the several places to which they were attached, including places and things accessible to the Defendant, home, in Seagull, at Furbert's place, in Midland, and on him."*

34. Mr. Pettingill takes particular exception to that final sentence. He suggests that it conveyed the impression that "true GSR" was found on the Appellant himself, presumably on his hands. I do not believe that the Appellant was unfairly prejudiced by this passage. It is not pellucid, but it forms part of the Judge's summary of the Crown's case, not of the evidence, and it has to be read along with the earlier passages to which I have referred.

35. Notwithstanding the force of Mr Pettingill's critique, I have come to the clear conclusion that, read as a whole, as it must be, the summation did not unfairly imperil the Appellant in its treatment of this evidence. It had its strengths and weaknesses and they were all put before the jury for their careful consideration. It would have been open to them to attach significance, if they thought fit, to the fact that, in relation to the particulates on the Appellant's clothes found at Seagull Lane and on the motorcycle, there was little or no explanation as to the alternative sources. On careful analysis, I do not find this ground of appeal to be sustainable.

Conclusion

36. It follows from what I have said that I would dismiss this appeal against conviction.

BELL JA:

37. I agree and would also dismiss the appeal.

CLARKE P:

38. I have had the benefit of reading My Lord's judgment in draft, and I agree. I too would dismiss the appeal.

COURT OF APPEAL FOR BERMUDA

KAY JA

CLARKE P

BELL JA