The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 6 of 2015

Between:

WOLDA SALAMMA GARDNER

Appellant

-v-

THE QUEEN

Respondent

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

Appearances: Mr. Richard Horseman, Wakefield Quin Limited, for the Appellant
Ms. Cindy Clarke, Department of Public Prosecutions, for the Respondent

Date of Hearing: **15 November 2016**

Date of Judgment: **30 January 2017**

JUDGMENT

Murder – admissibility and relevance of expert evidence on gunshot residue- relevance of one and two component particles – fairness of trial and summing- up

Bernard, J.A.

Background

1. On 21st March, 2013 the Appellant was charged with premeditated murder in that on 25 December, 2012 he unlawfully killed Malcolm Augustus, and also with using a firearm to commit an indictable offence, namely murder.

2. After a trial in the Supreme Court which commenced on 30 March 2015 and concluded essentially uninterrupted until 24 April, 2015, the Appellant was convicted by a majority of 11 to 1 of premeditated murder and sentenced to life imprisonment, with a 20 years' tariff set before eligibility for parole. He was also convicted by the same majority for the firearms offence and sentenced to 20 years' imprisonment to run concurrently with the 20-year tariff set for the life sentence. The position relating to sentence was complicated by the fact that, as accepted by counsel for the Crown when the sentence was set, the Appellant was already serving a life sentence that he had been given in another earlier trial before Justice Greaves. Since Bermuda law does not provide for consecutive life sentences, the life sentence for this offence was expressed to be concurrent to the life sentence already being served. The tariff for the life sentence was then set at 20 years. As stated, the sentence for the firearms offence was then set to run concurrently with the 20 year tariff for the premeditated murder.

3. In June 2016 the Appellant was granted leave to appeal against conviction and sentence, but his appeal against sentence has been adjourned pending the outcome of the Crown's appeal to the Privy Council in the other case referred to above.

Introduction

4. The Crown's case was that against a background of a dispute about payment for drugs the Appellant was called upon to assist. He came armed with a gun, and Kent Greenidge brought in Caswell Robinson with his jeep to help flush out the victim from a stand of bamboo into which he had fled, with the aid of its headlights. The shooting followed an extended period of threats to the victim who had run into and remained hidden in the bamboo. Both Greenidge and Robinson saw the Appellant pull out a gun. After the shooting Robinson, Patrick Stamp and the Appellant departed in the jeep. Robinson was driving, the Appellant was in the front passenger seat, and Stamp was in the back. Greenidge departed on foot. Numerous one and two-component particles of gunshot residue in the front passenger area of the jeep connected the Appellant to the gun. The Appellant's case was that he was in the area by chance as he had called Stamp with regard to the delivery of a Christmas hamper. He never had the gun and was not the shooter. His case was that he had been on his phone when the shot went off, that he had "flinched" and at that point had dropped his phone. Without locating it, he had quickly left the bamboo and had got into the jeep.

Evidential History

5. Shanrico Ottley, a witness for the Crown, testified that on 24 December, 2012 at about 10 p.m. he and Malcolm Augustus were riding on a bicycle along Wellington Back Road, St. George's, when the bike ran out of gas. While looking at the bike, a man approached and swung a helmet at them. He and Augustus walked away from the bike towards the golf course, on their way to the home of Ottley's girlfriend. They saw two men on a bike riding towards them, and he and Augustus ran away into some nearby bamboo bush.

6. Greenidge testified that he was on his bike riding along Wellington Back Road at around the same time, when he came across his friend Patrick Stamp (who was also charged with the murder of Malcolm Augustus but was acquitted) standing next to a broken bike lying on the street, and with a piece of cable wire in his hand. Greenidge said that Stamp told him that he had been selling weed to two guys who instead of buying it tried to rob him. He and Stamp rode around looking for the two men until they reached the bamboo bush on the golf course. There he saw the Appellant, who told him that he had seen someone running into the bamboo bush. They all tried to flush the person in question out of the bush with a cricket bat and Stamp's cable wire.

7. After a while Greenidge saw lights at the top of the golf course. He and the Appellant went up to see where the light was coming from and met the witness Robinson, who was known to the Appellant, standing by a jeep, pumping a tyre. The Appellant asked Robinson to shine the headlights of his jeep into the bamboo, which Robinson did. The Appellant walked through the lights in front of the car and into the bamboo. When he did so he reached into his belt and pulled out a gun.

8. Upon seeing the Appellant pull out a gun, Greenidge said he "freaked out" and left the scene. He returned later to retrieve his helmet which he had left by the bamboo. He heard gunshots and ran away.

9. Robinson said that when he was sitting in his jeep shining the lights into the bamboo, he heard someone say "see him here" and then Stamp, the Appellant and another male in the bamboo started scuffling for a few seconds. He then saw Stamp push the other male off him and the Appellant shot the man. Robinson said he was shocked, and backed up

within the grass with his tyres spinning. When he reached the little road in the golf course, the Appellant was already on the road with a gun in his hand, and he flung Stamp into the passenger seat of the jeep and then got in himself.

10. The body of the deceased was later found by police officers about 10 feet into the bushes, with the Appellant's phone lying near to the body. A baseball cap was also nearby on which was found DNA of Stamp and the deceased. The phone was forensically examined.

Grounds of Appeal

11. The learned judge:

1.1 Erred in law when she permitted the GSR expert, Allison Murtha, to give evidence for the Prosecution on matters not contained in her original report, namely, that it was unlikely that the one and two-component particles reported came from other sources. The complaint was that the expert report was not transparent as it did not specifically say or set out the basis on which the prosecution expert could eliminate other sources of the particles, and it was an error in law to permit her to give this evidence when it was not previously disclosed in her report.

1.2 Erred in directing the jury on the GSR evidence and did not give a fair and balanced summing-up. She therefore failed to properly sum up Ms. Murtha's evidence, as at no time did she remind the jury that one or two–component particles could have come from sources other than the discharge of a firearm.

1.3 Erred in law by not directing the jury to treat the evidence of Ms. Murtha with caution, given that the method in which the GSR evidence was gathered and analysed was neither transparent, impartial nor fair.

1.4 Erred in law when she misdirected the jury on the law of pre-meditated murder.

1.5 Erred in law when she failed to give the appropriate direction that the prosecution witness Robinson may have had an interest to serve, and the jury should treat his evidence with caution.

1.6 Erred in law and made several prejudicial comments against the Appellant and the Appellant's counsel such that the overall cumulative effect was that the summation was not balanced and fair.

1.7 Erred in law by constantly intervening during the Appellant's counsel's questioning of witnesses, such that the Appellant did not receive a fair trial.

1.8 Failed to review the evidence of Loryn Bell, the telephone records expert, that was crucial to the Appellant's defence.

Ground 1.1

12. At the trial Ms. Murtha, an expert in gunshot shot residue, was called by the prosecution, and testified that between 2 and 5 January, 2013, she received fifteen gunshot residue stubs from the Police Service for examination. She tested the stubs for residue by placing them in a scanning electron microscope, and by manual analysis. The stubs which she tested were:

    (a) Passenger-side exterior door handle – PT/A
    (b) Inside door area passenger side – PT/C
    (c) Passenger side dashboard – PT/D
    (d) Seatbelt passenger side – PT/G
    (e) Passenger side head rest and seat – PT/H
    (f) Rear headrest and seat of driver side – PT/I
    (g) Steering wheel and controls (indicators and light levers) – PT/J
    (h) Handbrake and gear levers – PT/K
    (i) Passenger seat – PT/L
    (j) Rear seats – PT/M
    (k) Centre console, ash tray area in front of car – PT/O
    (l) Front seat base of car – PT/R

13. Ms. Murtha testified that on PT/C (the stub taken from the passenger side inside door area) she found twelve (12) two-component particles, eight (8) of which were lead/barium, four (4) of which were lead/antimony and forty-one (41) one- component particles, eighteen (18) of which were lead, twelve (12) were barium and eleven (11) antimony.

14. On PT/D (the stub from the passenger side dashboard), she found one (1) two-component particle which was lead/antimony, thirty (30) one-component particles, sixteen (16) were antimony and fourteen (14) lead.

15. On PT/H (passenger side head board and seat) she found one (1) two-component particle which was lead/antimony. PT/R (front passenger seat base) had one (1) two-component particle which was lead/antimony, twenty (20) one-component particles, six (6) antimony, one (1) barium, thirteen (13) lead. No three-component particles were found.

16. Ms. Murtha stated that the one and two-component particles reported were consistent with gunshot residue but could also have come from other sources. She used a process called "manual analysis" to ensure that the one and two-component particles could in fact have come from gunshot residue. Such analysis looks at shape, elemental composition and extra elements to eliminate the possibility that the residue came from other sources. She further informed the Court that every particle mentioned in her report had the right shape chemistry and did not contain other elements that might indicate that the particles came from another source. This did not mean that they did not come from another source, but that she had done everything she could to ensure that the particles reported did not.

17. Ms. Murtha offered two reasons for the absence of three-component particles; either the particles were not gunshot residue, or there had been particulate loss from movement, washing or weather or time passed had occurred between discharge and collection.

18. The defence also called an expert on gunshot residue – Dr. Robert Scott White – who reviewed Ms. Murtha's report, and in his report he stated that an analysis would include looking for elements which comprise gunshot residue. He listed other possible sources of antimony, such as wheel

weights, battery terminals and fishing sinkers. He reported that certain types of employment, such as cement workers or masons, involve the handling of elements like antimony and lead. He, however, was unable to say what other components were necessary to indicate whether the source was cement or flame retardant. In his testimony he said that if someone shot a revolver and then touched something, he would expect to see other particles transferred, not only the three -component particles.

19. He agreed with Ms. Murtha that wind, running or touching your waistband would all be factors affecting the number of gunshot residue particles recovered. He also agreed that there was nothing in the morphology of the particles that Ms. Murtha analysed in coming to her conclusions to suggest that it did not come from gunshot residue.

20. Ms. Murtha's evidence apart from her report was a result of cross-examination, and there was no objection by counsel for the Appellant that she was not an expert on gunshot residue, or objection to the form of her report. Her qualifications were not challenged at any time, and neither was the transparency of her report; further, the defence's expert himself stated that he had reviewed Ms. Murtha's notes.

21. The Appellant's counsel, Mr. Horseman, made reference to the case of *R v T* (2010) EWCA, 2439, which involved consideration of the transparency of a report of footprints from a pair of shoes based on statistical data. The Court made it clear that reports should disclose any opinion in which the expert proposes to express a more evaluative opinion, and it is wrong in principle for an expert to fail to set out the way in which he has reached his conclusion in a report. Mr. Horseman claimed that Ms. Murtha's report failed to set out any basis upon which she could express a more

evaluative opinion, and despite objection the trial judge allowed her to testify outside the bounds of her report.

22. However, counsel for the Crown, Ms. Clarke, drew a distinction between *R v T* and the case at bar in that in *R v T* the Court concluded that there was no sufficiently reliable basis for an expert to be able to express an opinion based on the use of a mathematical formula, whereas in the present case the data that Ms. Murtha relied on was disclosed in her notes, and her testimony was not called into question; in fact the Appellant's expert agreed with some of Ms. Murtha's conclusions. This is also unlike the case of *R v Puaca* (2005) EWCA, Criminal 3001, cited by the Appellant, and which similarly involved the reliability of the evidence of one pathologist against others with regard to the cause of death. The pathological evidence was the main issue in that appeal, and the Court found that the conclusions of the expert could not be safely relied upon. The situation in that case differs from the one at bar. In the circumstances this ground cannot be relied upon and the learned trial judge did not err in law in admitting the evidence of the GSR expert.

Ground 1.2

23. The Appellant complains that at no time did the learned trial judge expressly tell the jury that one and two-component particles could come from other sources, and made reference to page 156 of the summing-up.

24. In deciding this ground of appeal one has to analyse the summing-up of the trial judge in relation to the evidence of Ms. Murtha on gunshot residue. The following is an excerpt of the summing-up from p.155, line 20:

"She [Ms. Murtha] told us that the firing of a gun can also produce a two-component particle. Such a particle would be made up of two of the three elements. For example, lead and antimony, or lead and barium, or barium and antimony.

She told us that one- component particles such as just lead, or just antimony, or just barium, are also produced. She refers to the fused, single, three-component particle as "GSR". In other words, when carrying out tests in her lab on, for example, a GSR stub, if she locates a single three-component particle that has the right chemistry and has the right morphology, she will determine that it is GSR.

Now, she told us that she cannot be so certain with one and two-component particles.

She told us, however, that with her methodology, using the SEM microscope and her physical re-checking of the results from the microscope she looks for any other element that may be present with a two or one-component particle. If she finds an extra element, whether it is gold, silver or anything else, other than lead, antimony or barium, she does not include that result in her work.

She told us that all she can say about a two-component particle, or a one-component particle is that it could come from the discharge of a firearm.

She told us that she found one two-component particle on the headrest of the passenger side of the car, 12 two-component particles on the passenger inside door area.

> She told us that she found one two-component particle on the baseball cap.
>
> ….Now, Ms. Murtha made some qualifications. She said that lead, antimony and barium can come from fireworks, but in such a case…. and I am just giving an example here…. and in such a case she expects to find a high amount of magnesium. In such a case she would exclude that from her report."

25. The learned trial judge in her summing-up also discussed the evidence of Mr. White, the GSR expert called by the Appellant (see p. 159, line 3). She told the jury that Mr. White's evidence indicated that he had no criticism whatsoever of Ms. Murtha's working papers or working methods. The trial judge indicated that the nub of his evidence was that flame-retardant fabric can contain antimony, and he was of the opinion that flame retardant fabric is typically found in vehicles. He expressed the opinion that testing should have been carried out in all areas of the car, as it might have been helpful.

26. The learned trial judge cannot be faulted as she dealt with all aspects of Ms. Murtha's evidence on the components of GSR found on the samples which she examined. In addition, at p.160 of the summing-up she discussed the evidence of Mr. White, the Appellant's GSR expert, in relation to antimony, a component of GSR, and which can be found in other metals. Finally, in the passage cited above, the learned judge made specific reference to the fact that Ms. Murtha had said only that one or two-component particles *could* come from the discharge of a firearm.

Ground 1.3

27. This ground alleges that the learned trial judge erred in law and should have directed the jury to treat the evidence of Ms. Murtha with caution, given that the method in which the GSR evidence was gathered and analysed was neither transparent, impartial nor fair.

28. The Appellant contends that Ms. Murtha was specifically requested by the Police not to test certain samples for GSR that could have supported the defence case, and Ms. Murtha's report failed to set out the limitations of failing to test other areas of the vehicle from which samples were taken and/or take control of samples from the vehicle in order to ensure that particles were not present in other areas of the car.

29. It is the case that although GSR stubs were taken from all over the car, the only ones sent to Ms. Murtha for testing were largely from the front passenger area. However, it is also the case that the defence never asked for other stubs to be tested, and only belatedly made inquiries about the car after it had been returned to the owner and was no longer in the custody of the Police. But it is also to be noted that the Appellant's GSR expert accepted that it was common police practice to take samples which were most important to their case.

30. The learned trial judge advised the jury on how they should treat expert evidence, and had this to say at p. 21, line 21 of the summing-up:

> "Expert evidence is permitted in a criminal trial to provide you with scientific or technical information and opinion which is within the witness's expertise but which is likely to be outside your experience and knowledge. It is by

no means unusual for evidence of this nature to be called and it is important that you see it in its proper perspective which is that it is before you as a part of the evidence as a whole, to assist you with regard to one particular aspect of the evidence. With regard to this particular aspect of the evidence you are not experts and it would be quite wrong for you, as jurors, to attempt to come to any conclusions on the basis of your own observation of, for instance, any exhibits.

A witness called as an expert is entitled to express an opinion in respect of matters which are put to him and you are entitled and would no doubt wish to have regard to this evidence and to the opinion expressed by the experts when coming to your own conclusion about the particular aspect of the evidence. You should bear in mind that, having given the matter careful consideration, if you do not accept the evidence of the experts, you do not have to act upon it. Indeed, you do not have to act upon even the unchallenged evidence of an expert. It is for you to decide whose evidence and whose opinions you accept, if any."

31. The trial judge at p.159, line 14, referred to the evidence of the Appellant's expert, Mr. White, who she said expressed the view that in his opinion testing of the flame-retardant fabric in the vehicle should have been carried out in all areas of the car as this would have been helpful to the jury; further, the dirty state of the car and the tools and the fact that people were in and out of the car could have contaminated it.

32. The trial judge at p.161, line 18, informed the jury that Mr. Horseman, counsel for the Appellant, had suggested to Detective Inspector Greenidge that his client had been targeted, and the Inspector expressed the view that the evidence strongly pointed to Mr. Gardner. I agree with the

submission of Ms. Clarke that Mr. Horseman would have been within the rules of evidence to ask DI Greenidge about the possibility of a closed-minded investigation. However, the information which he sought to obtain from DI Greenidge did not accord with the rules of evidence and was properly disallowed by the trial judge. And in my view there was nothing improper in the manner in which the GSR stubs were sent for analysis.

33. **Ground 1.4** was not pursued.

Ground 1.5

34. The claim is that the trial judge failed to give the appropriate direction that the witness Robinson may have had an interest to serve, and the jury should treat his evidence with caution.

35. The trial judge dealt with Robinson's evidence from p.75 to p.78 of the summation. At p.79 Robinson said that he did not tell the Police what he had told the Court because he was scared. He explained that he knew that he was not involved in anything and eventually told the truth. The learned judge's comments were made in this way:

> "I think he meant that he knew….I think he meant that he knew he had nothing to do with the search for Augustus or the man in the bush and Augustus's eventual murder, so he decided to give the Police a witness statement.
>
> Now, under cross-examination he admitted that he was in custody for four to five days.
>
> Robinson admitted that he was not initial – that he did not initially tell the truth to the police.

> He admitted that he had told the Police in an earlier interview that he had not heard a gun-shot, and in court, once he was referred to his statement, he admitted that that was a lie.
>
> He admitted that he had met with lawyers in preparation for this trial and had reviewed his documents, but he said that he reviewed the documents by himself.
>
> He denied, however, that he had spoken with the Police. Let me say this: it would be unusual for a person to have their interview statement or record to review before trial.…
>
> Now, he remembered, after being referred to his statement, that the police told him that it was not likely that he would be charged.
>
> Now, let me say that that was a Police decision, and that officer said in his evidence to you that he had not been told that Robinson wouldn't be charged, by anyone in charge; he was expressing his own view.
>
> In any event, I don't think that there is any suggestion that Mr. Robinson was in the bush, or even got out of the car."

36. As Ms. Clarke for the Crown pointed out, there was no request by the defence for a direction of the nature outlined in this ground of appeal, and, in any event, Robinson's position was different from that of Greenidge, in respect of whom such a direction was given. Furthermore, there was no suggestion by the defence that the judge's summary of Robinson's evidence was inadequate. In my judgment, the judge's handling of Robinson's evidence was appropriate for the purposes of this case.

Grounds 1.6 & 1.7

37. These grounds taken together involve complaints of wrongful intervention by the learned trial judge during the trial and prejudicial comments made against the Appellant and his counsel during the summation.

38. Ground 1.6 alleges that the trial judge made several prejudicial comments against the Appellant, and ground 1.7 alleges constant intervention during defence counsel's questioning of witnesses such that the Appellant did not receive a fair trial. Particular reference was made to the cross-examination of DI Greenidge by Mr. Horseman from page 806-824 of Volume 3 of the Record. A perusal of the pages indicates that the trial judge intervened thirty (30) times, the first being on page 811, six pages after the cross-examination had begun, and which went this way:

> "Question: Okay. I mean, believing what a suspect says, you're aware that Kent Greenidge said that he was nowhere near the scene while this was all going on; correct?—
>
> Ms. Clarke: Outside.
>
> The Court: That's far too broad.
>
> Mr. Horseman: Sorry, sorry, no, no, Sorry, my Lady"

39. The next intervention is on p.812 in answer to this question:

> Mr. Horseman: So he was – I mean….And, I mean, did you believe that aspect of his story?

The Court: His belief is not relevant.

Mr. Horseman: Okay."

40. The third intervention of note on pages 812 & 813 was this:

Mr. Horseman: Going back to Mr. Robinson, so you accepted Mr. Robinson's witness statement and said, No need – no need to – no need to test Mr. Robinson for gunshot residue; is that the nature of ---

The Court: He already answered that question.

Mr. Horseman: Yeah, but I am trying to –

The Court: He already answered the question (p.813)

41. Other interventions were of two or three words. The next of some significance was this in answer to Mr. Horseman's questioning of Mr. Greenidge at p.814:

Mr. Horseman: "Well, you----wouldn't you agree it would have been more fair to my client ---

The Court: Uh-uh, that sounds like you're calling for an opinion, and this witness cannot state an opinion. And fairness to your client is a matter in the Jury's hands or my hands, in assessing the evidence or the law."

This was one of the Court's longest interventions.

42. Another was to this effect: (p.815)

> "If you've asked and the witness has answered, there's no need to do a wrap-up because that will be done at the appropriate point in this trial."

43. At p.822 in commenting on Mr. Horseman's repetition of questions, the learned judge made this inquiry:

> "Are you asking him if the total of the evidence they received and decisions made from the evidence was based on what their two witnesses are saying; is that what you're asking, or are you asking him about a particular part of the investigation?"

44. The strongest exchange between the Court and defence counsel was at page 823 when the Court asked whether something was wrong with his ears to which he replied in the affirmative that "they're big, but they're hard of hearing". Counsel later apologised.

45. The Court displayed firmness when counsel at page 823 sought to pose a theory to the witness, and the Court insisted that the question put must have a foundation in the facts, which she insisted it did not.

46. Overall, the interventions by the trial judge were not inappropriate or prejudicial and reflected the judge's ruling on questions which she thought were repetitive or irrelevant, and which was within her judicial authority. Indeed many of the interventions were necessary to prevent improper questions being put to or answered by witnesses.

Ground 1.8

47. The final ground of appeal concerns the evidence of Loryn Bell, the telephone records expert. This was described as "crucial" to the Appellant's defence because his defence was that he was on the telephone at the time of the shooting and was not the shooter. Bell's evidence was that Gardner was on his telephone at 03.49 a.m for 11 seconds, and at 05.05 a.m for 53 seconds. His case was that he had his phone in his hand at the time of the shooting and lost his phone when the shot went off. It was common ground that the phone was left at the scene, and that he, Stamp and Robinson had taken off immediately after the shot was fired. Greenidge, who according to Gardner had gone ahead of him, and was to be presumed to be the person who fired the shot, had taken off on foot. The evidence of both Greenidge and Robinson was that it was Gardner who had pulled out a gun and fired the shot.

48. The problem from the Appellant's perspective is that the evidence as to the timing of the firing of the shot is not conclusive. The witness who called the police, Arthur Cordeiro, in fact made three calls, the final one being immediately after he had heard the shot. He did not place a time on that call, and in her summation the judge simply said "we know that midnight or around that time was when Mr. Cordeiro called the police to report the gunshot". I have not been able to find any evidence given by the dispatcher who received the 911 call from Mr. Cordeiro, and neither counsel referred to evidence from this person in their submissions, but there is a record of the 911 log in the record which shows the operator at 2.40 referring to a call from someone who had heard a gunshot just before the police arrived at the scene. The police officer who located the deceased said that he was dispatched at around 11.55 p.m. In short, the Appellant's case on this point is dependent on an acceptance of his version of events (namely that

he had been on his phone when the gun had been fired, and had dropped it upon hearing the shot). It is clear that the jury did not accept the Appellant's version of events.

Summary

49. In all of the circumstances, I am of the view that the trial was fair and not prejudicial to the Appellant.

50. For all of the foregoing reasons I would dismiss the appeal.

Signed

_____

Bernard, JA

Signed

_____

I agree Baker, P

Signed

_____

I agree Bell, JA