IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL 003 of 2020
IND#0058/2015
SC#0830/2015

BETWEEN:

ROBERT AARON CRAWFORD

Appellant

- and -

HIS MAJESTY THE KING

Respondent

Before:	**The Rt Hon Sir John Goldring, President** **The Rt Hon Sir Alan Moses, Justice of Appeal** **The Rt Hon Sir Jack Beatson, Justice of Appeal**
Appearances:	**Ms. Amelia Fosuhene of Brady Law for the Appellant** **Mr. Scott Wainwright of Office of the DPP for the Respondent**
Date of Hearing:	**Monday, 11th September 2023**
Judgment Delivered:	**Friday, 20th October 2023**

JUDGMENT

MOSES JA:

1. On 14 November 2019 the appellant was convicted on two counts of attempted murder and one count of possessing an unlicensed firearm. The conviction followed a trial before The Hon Mrs Justice Carter (Acting), sitting alone. The total sentence, against which the appellant does not appeal, was one of 24 years imprisonment.

2. This is an application for leave to appeal, although we have heard full argument. The appellant advances two grounds of appeal through his counsel Miss Fosuhene, who did not appear at the trial. The first is that he never elected trial by judge alone and, accordingly the trial is a nullity. By the second ground he contends that the evidence of a key witness, one of the alleged victims, Daric

Ebanks, was read without affording any opportunity to the defence to challenge that evidence by way of cross-examination.

3. The case concerned an alleged attack at 5 am 4th July 2015 on Daric Ebanks and his girlfriend, Errolyn Thompson as they lay in bed at a house in West Bay, where Daric lived with his father Donovan Ebanks.

4. In her verdict judgment dated 4 November 2019 the judge found that the appellant entered the house looking for Daric Ebanks and Errolyn Thompson, whom he knew was there. The appellant broke through the kitchen door. He went straight to the bedroom door, held his hands straight out and started to shoot the gun through the door into Daric's bedroom.

5. The judge found that the appellant had the gun, a 338 caliber revolver when he entered. He was wearing a hood as a mask.

6. Daric's father, Donovan Ebanks, escaped through a window and dialled 911; the transcript of the call formed part of the independent evidence of what happened and the identity of the assailant. He then armed himself with a machete and saw his son and the appellant struggling for possession of the gun. Donovan struck and injured the appellant with the machete. Daric hid the firearm in a box in the house from which it was recovered by the police.

7. The appellant when interviewed by the police admitted he had gone to the house but said it was merely to show his former girlfriend, Errolyn, that he knew she was there. He said that Daric had produced the gun. He did not give evidence on oath to support this account, which the judge rejected.

Election of Trial by Judge Alone

8. The appellant has contended ever since he drafted his own grounds of appeal, that he never elected trial by judge alone. This ground necessitated that he waive privilege, with the consequence that we have seen statements from leading counsel Mr Timothy Burke KC and his junior Mr Laurence Aiolfi. Both of them assert that the appellant elected trial by judge alone, of his own free will and after advice.

9. The power to elect trial by jury is contained in section 129 of the Criminal Procedure Code (2017 Revision). This provides:

> "129. (1) If an accused person is of the opinion that, due to the nature of the case or of the surrounding circumstances, a fair trial with a jury may not be possible, he may, at least twenty-one days before the date of the trial or the date of arraignment, whichever is earlier, elect to be tried by a Judge alone; and such election shall be made by notice in writing addressed to the Clerk.
> (2) Notwithstanding subsection (1), a judge may permit an accused person to make an oral or written election at any time before a jury is empanelled where such accused person has proven that, because of exigent circumstances, it was not possible for him to make an election within the time limit specified in subsection."

10. The procedure laid down by this section was not followed. There is no record of a notice in writing to the Clerk. Nor is there any evidence of any explanation being given as to why that was not done, when the judge was informed orally on 19 March 2019, in circumstances we shall describe below, that there was to be a trial by judge alone. Much of the difficulty in piecing together the events relevant to this issue might have been avoided if the Code had been properly followed.

11. It is inevitable that counsel when being asked, over two years later in November 2021, to recollect a trial, which finally took place in September 2019, should have limited memory of pre-trial discussions with their client. All the more difficult when their statements were made in March 2023. Mr Aiolfi was instructed throughout and is certain that the appellant elected trial by judge alone with the benefit of Mr Burke KC's advice. He produces what notes he can find, since he has changed law firms. We shall refer to those notes later.

12. Mr Burke KC speaks of his settled practice: his statement sets out what he would have done; he says he always advises waiting, before making an election, until a jury panel list is available and shows the client that list. He distinctly recalls that that happened in the appellant's case. He sets out, to the best of his recollection, the reasons why he would have advised his client to elect a trial by judge alone: sympathy for the witness Daric who had suffered catastrophic injuries as a child and his clients' previous serious criminal record, which attracted widespread local publicity. Mr Burke had previously represented this client in a murder case in which the appellant was acquitted. Mr Burke describes several conferences with the client and has 'no doubt' that the mode of trial was discussed. He is confident that following his advice, he would have asked Mr Aiolfi to endorse his brief as to the appellant's decision and would have asked the appellant to sign it.

13. No such endorsement has ever been found. The only endorsement which has been found is the signature of the appellant under a note that he wishes trial by jury.

14. This court has been driven to examine in detail a somewhat confused sequence of events from undated notes, copied but without the benefit of originals, court records produced late in the day, some transcripts and a by no means full chronology. We should emphasise that all available records of dates and times of hearings should have been produced earlier, we should have had the benefit of originals of notes to assist as to chronology and an agreed full chronology should have been prepared.

15. The trial was due to start on 5th August 2015, at which time the appellant was represented by Mr Jeremy QC. Prosecution witnesses failed to appear and the trial was adjourned. There is a note dated 11/3/2019 (sic) endorsed by the appellant, in anticipation of a trial on 18 March 2019 in which he says he wants to press on without waiting to see whether he can have legal aid to instruct leading counsel. At the end of the note he says "I also confirm that I will proceed with jury trial", and he has signed that confirmation. It is of significance that the appellant says in his grounds of appeal that the only endorsement he ever signed was to agree to trial by jury. He must have written that before he ever knew there would be a note to confirm his story.

16. However, on 19 March 2019, there was a discussion in open court about refixing the date for trial due to the late submission of expert evidence. Mr Burke by that time was instructed and appeared. He says "it will be a judge-alone trial". The appellant was present and there is no record of him intervening or of him protesting at what, according to him, was a decision of counsel without his agreement. The only light that may be shed on this change of decision is an undated note, part of a two page note in which, after some discussion about evidence it is recorded that the appellant "elects judge alone" but it is noted that he does not want Quinn J who was the judge in a previous judge- alone trial in which he was convicted, although the conviction was apparently quashed.

17. That note must have been created at a time when it was not known who the trial judge was to be, but without the original which might have helped, it is not possible to know whether it predates the note of 11th March 2019.

18. There is a further undated note written on the front page of the Crown's Special Measures application. The application has no date. The note records a new date for the trial on 17 July 2019 and that it is to be a judge only trial.

19. Mr Aiolfi also produces what he calls a trial notebook by which we assume him to mean the notes at the trial which started on 13 September, 2019. The second page of that note is a note of evidence which confirms what Mr Aiolfi says about the date of this note. The note starts: "confirms judge alone" Later it records a time 2.40 pm and reads:

> "Client raises issue of reading in +whether to have judge alone.
> Client says will not be involved.
> Revisit issue of judge alone/jury trial in the morning".

20. There is no note of what happened the following morning.

21. The appellant says he wanted a jury trial, never agreed to a judge alone trial and was overborne by his counsel.

22. There is no credible reason as to why his wishes should have been ignored. There is no credible reason why counsel, who noted at one stage his wish for a jury trial and obtained his signature to that effect, should subsequently have falsely noted and announced his election for trial by judge alone and should have sought to underline that election by referring to a previous trial before Quinn J. We recall that this appellant is no stranger to the courts. He has experienced trial by judge alone and can have been in no doubt as to his right to trial by jury.

23. We have recognised an evidential point in his favour, namely that he did at one stage endorse his confirmation that he "will proceed" to a jury trial and no endorsement to the contrary has been found. But his account is not capable of belief. Counsel would have had no reason to override his wishes or create a false note of what he said. We reject this ground of appeal.

24. This issue should not arise again. We should draw attention to the need to sign the form specified (Form 3) in the Criminal Procedure Rules 2019, which did not come into force until 1st November 2019 (see Rule 9).

Reliance on the Evidence of Daric Ebanks

25. The judge, after hearing full argument from counsel, admitted the evidence of Daric Ebanks, in the form of two statements he had made to the police. An audio and video recorded statement of 4 July 2014 and a written statement of 9 July 2015 pursuant to section 33(1)(b) and (3) (b) of the Evidence Act (2019 Revision). Section 33 (1) provides that a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence would be admissible if, amongst

other circumstances, the person who made it "does not give oral evidence through fear" S.33(3)(b). There is no need to set out other requirements which are not relevant to this appeal.

26. The Crown relied on a number of serious, violent attacks on and threats to Daric Ebanks. On 5 May 2016, he was stabbed ten times in the chest outside Bananas Bar in Georgetown, the assailant was subsequently convicted of wounding with intent. In September 2016, while on remand in HMP Northwood he received threats to kill should he give evidence. On 26 November 2016 he was shot in the chest at Super C's restaurant by unknown assailants, who have never been identified. On 2nd May 2018 he was attacked and beaten with a log, sticks and rocks on his face and arm West Bay public beach. His arm was broken and he required surgery. On the morning of a date scheduled for trial, 26 November 2018 he was shot through the arm into his stomach. He suffered life threatening injuries.

27. The Crown had sought, by applications which were undated, Special Measures pursuant to section 41(B)(1) and (D) by which the evidence would be recorded, though giving the defence the opportunity to cross -examine. But, in a statement dated 18 February 2019, Daric Ebanks described how he had been threatened three weeks after he left hospital following the shooting in November 2018. He was suffering from panic attacks, in fear for his life should he give any evidence at all.

28. The grounds for that fear were obvious and neither the defence at the hearing of the Crown's application nor at the hearing of the appeal could dispute that fear.

29. The defence relied on two bases for excluding the evidence of Daric Ebanks. First, that his medical condition was such that he lacked the capacity to give evidence capable of belief. Although the court was not shown the three statements on which the defence relied at the hearing of this appeal, they have now emerged and we have read them, as the judge read them. They were referred to in Mr Burke KC's written and oral submissions.

30. The first ground relied on Daric Ebanks's mental state and capacity. He had suffered a serious traumatic brain injury at 12. A report from Dr Neita in October 2016 had found that Daric Ebanks was not fit to plead. In a report dated 14 July 2017, Professor Myers assessed that he was suffering from mild neurocognitive symptoms, but he was fit to plead.

31. The defence placed the greatest reliance on a report from Dr Brow dated 15 August 2018. This is a lengthy report giving extracts from previous reports. It records that Daric Ebanks had no recollection of the events of July 2015, was suffering from PDST and was not fit to give evidence, though he might be in the future.

32. The second basis for excluding the evidence was that so central a witness was Daric Ebanks, that it was unfair to allow his evidence to be read and admitted when the defence had no opportunity to test his evidence by cross-examination.

33. The judge's ruling allowing the Crown's application was short:

> "The Crown has made an application pursuant to section 33(1) and (3) of the Evidence Law for the video recorded interview and further statement of the complainant, Derek Ebanks, to be admitted into evidence.
>
> The Crown's application is based upon the incident surrounding the complainant where the complainant was the subject of physical attacks and threats and statements of the complainant to the effect that he does not want to appear in court because he is in fear. I have considered the Crown's application and the many matters highlighted during Mrs Oko's oral application this morning before me, highlighting the various aspects in the Crown's bundle, I have also considered counsel for the defence's arguments relating to the likely effect of the court's determination of this application in favour of the Crown. I am mindful as well of the provisions of section 33(f) of the Evidence Law, would seek to balance any prejudice that might result from the court adopting the course sought by the Crown.
>
> I have also considered counsel for the defence's further submission that the court may wish to consider whether it should allow this evidence to be admitted under section 33 (2) and not section 33(3), ----section 33(2) relating to the unfitness of the complainant because of his mental condition. As well as counsel invited the court to consider any inherent unfairness that will result from this course.
>
> I have balanced these against the obvious fear of the witness, shown in the statements, and as well the mischief that section 33 (3) was aimed at, that is not to prevent the admissibility of a witness's evidence where that witness may genuinely be in fear of giving oral evidence in criminal proceedings.
>
> It appears to this court that the Crown has satisfied the requirements of the section. The complainant's statements, and as well the other accounts of physical attacks and threats make me certain that he does not wish to give oral evidence through fear and I will, therefore, accede to the Crown's application.
>
> For the avoidance of doubt, I do not consider that any of the accounts of the complainant being subjected to physical attacks, or threats have been at the behest of or have any connection with the defendant in this case."

34. At the forefront of the court's consideration of the judge's decision must be the gravity and significance of the exercise of the power, conferred by section 33(1), to admit the evidence of a witness to be read without cross-examination. It should go without saying that it is a power that should only be exercised after the most careful scrutiny of the grounds relied upon and the countervailing reasons for refusing such an application. To grant such an application should never be routine and should never occur without recognition that to do so is contrary to the essence of a fair adversarial criminal trial, where the fact-finder, judge alone or jury, should have the opportunity to see and hear a witness, giving evidence openly and thus, subject, quite apart from cross-examination, to the pressure that such a circumstance imposes.

35. It is only necessary to recall the history of challenges to the introduction of legislation which permits a prosecution to derogate from the essential features of a fair trial to appreciate how important those features are and how careful a court must be to examine any departure from them. In *Al-Khawaja v United Kingdom* 92012) 54 E.H.R.R, the Chamber had ruled that the reading of evidence was contrary to the guarantees of a fair trial provided by Article 6(1) of the European Convention on Human Rights. The Court overruled that decision but only in circumstances where there were sufficient procedural safeguards to enable a fair trial to take place, even though the rights of the defendant were restricted. Such restriction should be a measure of last resort [125]. The Court stressed that, where a conviction is based solely or decisively on a witness's evidence, the proceedings must be subjected to "the most searching scrutiny" [147]. This is no less the case even where it may be said that the conviction is not decisively or solely based on the absent witness.

36. We stress these well- established considerations because, though there was full argument before the judge, her ruling did not fully grapple with the issues she was bound to consider.

37. She made only a passing reference to the defence arguments as to capacity. Her brief reference to section 33F (which allows evidence to be given of credibility where a witness's evidence is read) was not an answer to the defence submissions.

38. More fundamentally, she failed to give any reasons as to why the requirements of fairness could be satisfied in the instant case. It was not enough to conclude that the witness was in fear and that that was the reason that he would not give any evidence. Having found those facts, which could hardly be disputed, she was bound then to go on to consider whether fairness could be achieved, even though the witness had not been tested in cross-examination. If she concluded that the trial could be fair, then she was bound to say why she had reached that conclusion. She made no reference at all to that second, essential issue.

39. We accept that during a trial a judge might well not want to hold up proceedings while she prepares and delivers a reasoned judgment. She might well wish to give a ruling and proceed so as to avoid delaying witnesses or a jury. But she should then hand down a reasoned decision later. In this case, the question was dealt with in a preliminary hearing. The decision need not be lengthy but it should deal with any meritorious points raised by the defence, and give reasons why they are being rejected or accepted.

40. Our criticism of the Ruling is by no means determinative of this appeal. Although we have referred to the absence of adequate reasons, our jurisdiction is concerned with the safety of the conviction, whether there was a wrong decision on a question of law or a material irregularity. Even if we so found, we have the power to dismiss the appeal, under the proviso, should we conclude no material irregularity has taken place (s.9 and the Proviso) Court of Appeal Act (2011 Revision).

41. It is therefore essential that we consider whether, despite the fact that Daric Ebanks could not himself be challenged, his evidence could be supported or challenged.

42. There was ample evidence, which did not depend on the direct evidence of persons involved, to support his evidence. There was evidence of the damage to the kitchen door, of the direction of travel of the bullets which showed that the revolver had been fired from outside the bedroom and into it, where four bullets were found. A "black hoodie" was recovered which showed that whoever had worn it had been trying to hide his identity. That can only have been the appellant. There was the evidence of the content of the 911 call made while the struggle between the appellant and Daric for the possession of the gun was continuing.

43. All of this evidence supported the account given by Daric and his father Darren Ebanks. Errolyn Thompson's evidence could not be relied upon; she was treated as a hostile witness.

44. It is also important to recall that there was no evidence whatever to contradict the account given by the two Ebanks. The appellant could have given evidence to support his version to the police, that it was Daric and not he who had the gun and was the aggressor. He chose not to do so.

45. As to capacity, the medical evidence on which the defence relied did not go to the witness's mental condition when he was speaking to the police or when he made his statement in 2015. That he was later either fit or unfit to plead or was not in a fit state to give oral evidence in 2019 was not to the point.

46. We are left in no doubt that the Judge was right to allow the evidence of Daric Ebanks to be admitted, that there was ample evidence to support his account that the appellant was the aggressor and had fired the gun with the intention of killing both Daric Ebanks and Errolyn Thompson. There was an opportunity to challenge that evidence by calling the appellant.

47. For those reasons we are satisfied that the verdicts were safe. We shall grant leave on the basis of the criticisms we have made of the Ruling but for the reasons we have given we dismiss this appeal.