IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL 8/2017
CRIMINAL APPEAL 9/2017
IND.0042/2015
SC#0917/2015

BETWEEN:

WALTER JORDAN MCLAUGLIN

KEITH MONTIQUE

Appellants

- and –

Her Majesty the Queen

Respondent

BEFORE: **The Rt. Hon Sir John Goldring, President**
The Hon. John Martin, Justice of Appeal
The Rt. Hon Sir Alan Moses, Justice of Appeal

Date of Hearing: Monday 5th November 2018

Appearances: Mr. Oliver Grimwood of Richard Barton Attorney-at-Law for Walter McLaughlin
Mr. Keith Montique in person
Ms. Candia James of DPP for the Respondent

JUDGMENT

Transcript of oral judgment dated 5th November 2018
Approved and Released 13th December 2018

GOLDRING, President

The convictions

1. On 31 March 2017 the applicants were convicted after a trial in the Grand Court before Justice Worsley and a jury as follows: On count 1 both were convicted of possessing a loaded unlicensed firearm, namely, a .38 revolver.

2. On count 2 the applicant, Keith Montique, was convicted of possessing another loaded unlicensed firearm, namely, a .9 millimetre pistol. The applicant Walter Jordan McLaughlin was acquitted of that offence.

3. Both applicants were acquitted of possessing eight rounds of .38 ammunition found elsewhere in the premises.

4. Keith Montique was sentenced to 15 years' imprisonment concurrent on each count: Walter McLaughlin to 12 years' imprisonment to run consecutively to a sentence for an offence of robbery which he was then serving. The time served in custody for these offences was ordered to be set off against those sentences.

5. Each now seeks leave to appeal against conviction and sentence.

The background

6. This was a retrial. At the first trial the applicants had successfully submitted to Justice Panton that there was no case to answer. This Court overturned that decision and ordered a retrial.

The facts

7. At five o'clock in the morning of 8 February 2017, the police went to 35 Rossini Street in Grand Cayman with a search warrant. Bill McLaughlin, the applicant Walter McLaughlin's father, lived there. Both applicants were there at the time. The loaded

revolver, count 1, and the loaded pistol, count 2, were together under the bed of the middle bedroom. They were hidden unwrapped in an area beneath the mattress.

8. Keith Montique, later told the police he had twice used the middle bedroom during a four-day stay at the house. There was evidence, and ultimately an admission, that Walter McLaughlin, used a third bedroom. His driving licence was found in that bedroom.

9. The ammunition in respect of which they were acquitted was found at the top of a china cabinet in the living room.

The DNA evidence

10. Miss Tanzillo-Swarts was the DNA expert. She took two swabs of DNA from each of the weapons. One swab was from the trigger, one from the grip. She had DNA from both the applicants. As she explained to the jury, she calculated, taking into account the genetic makeup of the population of the Cayman Islands, the likelihood of a constituent of the swab in question containing DNA from the applicant in question, as opposed to DNA from anyone else. In other words, she sought, as she put it, to answer in terms of likelihood the question whether the DNA sample truly contained the applicant's DNA or the DNA of an unknown, unrelated person. She expressed numerically the likelihood of a swab containing the applicant's DNA as opposed to anyone else's. The more likely it was that the applicant contributed to the DNA in the swab in question, the higher or greater the number.

The revolver

11. Swab 1 was from the trigger. Miss Tanzillo-Swarts said it originated from at least two people. She could not reliably separate the components into major or minor traces. Keith Montique could not be excluded as one of those who contributed to swab 1. Assuming two contributors to the swab, and based upon the population of the Cayman Islands, she estimated it was 210 billion times more likely to observe such a profile if the applicant, Walter McLaughlin, and others contributed, as opposed to two unknown and unrelated people.

12. She made a second calculation in respect of swab 1, factoring in the possibly that it had been contributed to by two unknown and unrelated people and a parent or child of one of them. She said it was 940,000 times more likely to observe such a sample if Walter McLaughlin, had been a contributor. Mr. Grimwood, on behalf of Walter McLaughlin emphasised that lower figure.

13. The evidence was that it was 1,700 times more likely to find such a profile if Keith Montique and an unknown, unrelated person had contributed to it, as opposed to two unrelated individuals.

14. In respect of the second swab, namely from the grip of the revolver, Miss Tanzillo-Swarts said it contained mixed DNA from at least three people. She could not reliably separate the components into major and minor traces. Assuming three contributors, and based on the population of the Cayman Islands, Miss Tanzillo-Swarts estimated that it was 68 million times more likely that one would observe this DNA profile if Walter McLaughlin and two unrelated individuals were contributors as opposed to three unknown, unrelated individuals. She also made a second calculation with a lower figure.

15. As to Keith Montique and the grip of the revolver, the evidence was that it was 66 million times more likely that such a sample would be found if he and two unknown, unrelated people had contributed to the sample.

The pistol

16. The grip of the pistol had on it DNA from at least three people. The estimate was that the DNA on it was 110,000 times more likely to have come from Keith Montique, and two other people, than from three unknown people. Walter McLaughlin, and his father were both excluded as possible contributors.

17. As to the trigger of the pistol, the DNA originated from at least two people. Assuming two contributors, the estimate was that it was 120 million times more likely that such a profile would be observed if the applicant, Keith Montique, was a contributor as opposed to two unknown, unrelated people. Again, Walter McLaughlin and his father were excluded as possible contributors.

The defence case at trial

18. Neither applicant gave evidence. The defence argument was that the Crown could not show when or how the DNA came to be on the weapons. It could have come, was the suggestion, by secondary transfer. The absence of fingerprints on the weapons suggested they were not handled. It was not enough, it was submitted, that they happened to be found in the house where the applicants were staying or, in the case of Keith Montique, under the bed where he was sleeping. There was no direct evidence that they had touched the weapons or were aware they were in the house, let alone that either of them had a weapon in his possession.

19. This was a very short trial. Much of the evidence was dealt with by way of admissions. The evidence was heard and summed up in less than a day.

The appeal against conviction

20. We take each of the applicants' appeals against conviction in turn.

21. Mr. Montique is representing himself. He filed lengthy documents in support of his proposed appeal. We have sought diligently to read them. We have also read his most recent response to the respondent's skeleton argument. The first and main ground is that the Court of Appeal was wrong to allow the prosecution's appeal. Mr. Montique has now accepted that it is not for this Court to revisit the decision of the Court of Appeal in that regard. If he wishes to appeal that decision, he must take the case to the Privy Council. He, therefore, has not pursued that aspect of his appeal.

22. He also raised other grounds upon which he made no oral submissions to us. He was critical of the prosecution's failure to call witnesses whom they had called in the first trial. In fact, their evidence was dealt with by way of admissions in the second trial. He was critical of the changed basis of calculating the analysis of DNA from the time that the Court of Appeal considered the case to the time of this trial. This simply reflected a change of practice in the reporting of DNA evidence. It did not reflect any change of substance. There is nothing in this point. He was critical of the direction that the judge gave in respect of the DNA. It seems to us that the directions he gave were perfectly adequate in the circumstances.

23. In the circumstances, there was nothing in any of the grounds originally raised by Keith Montique which would form any sort of basis for an appeal against conviction.

24. So far as the applicant, Walter McLaughlin, is concerned, there is first of all criticism of the following comment by the judge (page 10/11 of the summing up):

> "*Secondly, say the prosecution, this was Mr. McLaughlin's house shared with his father and he, Walter Jordan McLaughlin, lived there. So the things in his house you may assume are there with his knowledge and under his control*".

25. Mr. Grimwood makes the point that the jury may have thought this was some sort of direction to them to assume that what was found was there with Mr McLaughlin's knowledge and under his control. We cannot agree. The judge there was merely repeating the prosecution's case, something he was perfectly entitled to do.

26. Secondly, Mr. Grimwood is critical of the fact that Miss Tanzillo-Swarts gave evidence of the likelihood of the father, Bill McLaughlin's, DNA having contributed to the swabs from the trigger and grip of the revolver. The submission is that this was inadmissible evidence. It was prejudicial to his client. It might have been thought by the jury in some way to implicate his client. We cannot agree.

27. First, it was appropriate for the witness fully to explain her findings regarding the DNA.

28. Secondly, findings in respect of Bill McLaughlin were relevant. He was living in the house at the time.

29. Third, there is a suggestion that this evidence went in with the consent of the defence.

30. Fourth, it was, in any event, incumbent on the Crown to explain, that although father and son share some DNA, Miss Tanzillo-Swarts could distinguish between the two. Moreover, it seems to us somewhat far-fetched to say that the evidence would in some way be held against the son.

31. The final submission made by Mr. Grimwood is that the judge failed adequately to direct the jury in respect of the DNA evidence. He submits that there is, as a result, a lurking doubt about the safety of the conviction. He has set out in paragraph 39 of his skeleton argument the reasons he advances for that submission. We obviously have read that paragraph and shall only refer to one or two points it makes.

32. There were no fingerprints suggesting the weapon was handled. There was little DNA, as far as his client was concerned. He is critical of the length of the summing up and what the judge said to the jury.

33. As it seems to us, Mr. Grimwood is in part seeking to re-argue the facts of the case which were a matter, of course, entirely for the jury. As to the length and its detail of the summing up, they were perfectly adequate in the circumstances of this short, straightforward trial.

34. In our judgment, there was cogent evidence, uncontradicted by any defence case, that these applicants had in their possession, in Mr. Montique's case both of these weapons, in

Mr. McLaughlin's, the revolver. In the circumstances there is no basis to grant leave to appeal against conviction.

The appeals against sentence

35. By section 15(5) of the Firearm's Law, the maximum sentence for possessing a firearm is 20 years. By section 39 of that law, it is said:

> "*The Grand Court before which the individual is convicted shall ... impose a sentence of imprisonment for at least ten years, unless the court is of the opinion that there are exceptional circumstances relating to the offence or offender which justify its not doing so and such exceptional circumstances should be stated by the Court".*

36. No such exceptional circumstances are advanced by either applicant. In his sentencing remarks, the judge said:

> "*I bear in mind that these guns were not out in public, they were not being used to threaten anyone at the time they were recovered. They were not used in the course of crime, but they were there ready for use. Both guns were recovered under the mattress in the bedroom of the house where you were both living at the time. They were loaded. They were ready to be used. The evidence of the firearms officer was that the cartridges were live, that each gun was successfully fired by the firearms officer in determining whether in fact they were capable of firing*". [paragraphs 8 and 9.]

37. Mr Montique, submits that the sentences were excessive. There was a great deal of uncertainty as to his relationship with the firearms in question. He has the right to liberty. He has the right to life.

38. Mr. Montique was sentenced for the possession not of one, but of two firearms in a case in which there was not the mitigation of a plea of guilty. The judge in our view was entitled to pass the sentences he did.

39. Mr Grimwood on behalf of Mr McLaughlin, makes a number of points, while accepting that at the time Mr McLaughlin committed the present offence, he was on bail in respect of offences of robbery and assault committed, as Mr Grimwood put it, in a domestic context. He was sentenced to two and-a-half years imprisonment in respect of those offences.

40. The submission is that there was no history of using or possessing firearms to commit offences. The judge should not have increased from ten to 12 years the sentence. There should be significant aggravating features to justify such an increase. Although the revolver was loaded, there was no evidence of its possible use. In all the circumstances, ten years was adequate.

41. It is also submitted that the total sentence was excessive, bearing in mind he was serving the two and-a-half years in respect of the robbery. We do not agree. He was being sentenced in respect of an offence committed on bail. We see nothing in the point as to totality.

42. It seems to us that the judge was amply justified in imposing the sentence he did.

43. In the circumstances, we refuse leave to appeal against these sentences.