IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CRIMINAL APPEAL No. 28 OF 2014
IND 15/11
C#048442/10

Between :

RAZIEL OMAR JEFFERS **Appellant**

- and –

REGINA **Respondent**

Before :

The Rt Hon Sir John Goldring, President
The Hon Sir George Newman, Justice of Appeal
The Hon Dennis Morrison, Justice of Appeal

Tom Price QC instructed by Amelia Fosuhene of Brady Law appeared for the Appellant and Andrew Radcliffe QC instructed by Ms Cheryll Richards DPP and Candia James appeared for the Respondent.

Hearing: 29 August, 2017
Judgment delivered: 14 September 2017

JUDGMENT

The Rt Hon Sir John Goldring, President

The conviction

1. On 14th August, following a trial on an indictment alleging murder, the applicant was convicted of manslaughter. The Chief Justice, who had been the trial judge, sentenced him to 20 years' imprisonment concurrently with other sentences he was serving, namely, two sentences of life imprisonment for two offences of murder. The applicant's appeals against conviction for those murders have previously been dismissed by this court. Although in his grounds of appeal the applicant sought to re-open those unsuccessful appeals, Mr Price QC on

his behalf rightly accepted that this court had no jurisdiction to reconsider them and abandoned those applications. We therefore only need consider the applicant's appeal against conviction for manslaughter.

The prosecution's case

2. The deceased was a 'numbers man' called Marcus Duran. In the early evening of 11th March 2010 he was collecting money from a woman called Rita Martinez at 28, Maliwinas Way in the West Bay area of Grand Cayman. Put shortly, the prosecution case was that the applicant planned and organised that Mr Duran should be robbed. Firearms would be used to frighten him into handing over the money he had collected. The applicant recruited Jordan Manderson, Austin Jackson, Joshua Ebanks and Craig Johnson (as the getaway driver). The applicant provided at least one of the firearms. The applicant was not to be present at the robbery. He was to alert the robbers when Mr Duran was about to leave Rita Martinez's apartment so they could rob him. He did so. The robbery went wrong. Mr Duran was shot twice in the head. One shot shattered his skull. Another shot penetrated the orbit of his left eye. A third shot injured the back of this right finger. One of the robbers, Jordan Manderson, himself sustained a gunshot injury to his left leg. Craig Johnson drove Manderson (among others) from the scene. Manderson's blood was in Johnson's car. The next day, as part of an attempt to hide what had happened, the applicant and Johnson cleaned the car of blood.

The evidence

3. The crucial evidence implicating the applicant came from his former partner, Meagan Martinez. Although there was said to be other evidence supporting what she said, his conviction depended upon her. As the learned Chief Justice put it:

> "…the prosecution's case greatly depends [on]…what you make of Meagan Martinez's evidence that the defendant admitted his involvement to her. It is suggested to you on the defendant's behalf that…[she] has fabricated her evidence of the defendant's admission for some reason known only to her; perhaps because she

and her child are obtaining financial benefit from the state in the witness protection programme or because she feels spurned by the defendant who has married her cousin instead of her…You will consider…[her] evidence with great care. If you are sure that the defendant made the admissions to her, then [they]…represent important evidence in support of the prosecution's case. If you are not sure, then her evidence as to the admissions can be of no assistance to the prosecution, and you must ignore them. Indeed, there will then be no basis for convicting the defendant."

4. The applicant alleges in his first ground of appeal that the prosecution's disclosure of material regarding Ms Martinez was inadequate. That had the applicant's then counsel, Mr O'Neill QC, had all the material he should have had, his attack on Ms Martinez's character would have been more effective. It is therefore necessary to refer to Ms Martinez's hotly disputed evidence in some detail.

5. Mr Price has taken us through much of she said both in chief and in cross-examination. The extent and tenor of the defence approach to her evidence is well illustrated by the following observation during the course of the learned Chief Justice's summing-up, when quoting Mr O'Neill's speech to the jury (at *31/14*):

> "The words honest, truthful, reliable were never designed to fit [Ms Martinez]. She is, we submit, the complete antithesis, opposite of these principles and accordingly we you should not believe her accounts of what she says she was told that happened…that night…
>
> Mr O'Neill also went on to identify what he described as 20 or 28 points of unreliability…"

6. Ms Martinez said she and the applicant parted at about 6.30PM on the evening of 11 March 2010. She said the applicant told her he was going into West Bay "to make money." She said at first, she did not know how. She then said she understood he was to rob the numbers man

who went to Rita Martinez's house. (Rita Martinez was her aunt). The learned Chief Justice quoted verbatim from the transcript of her evidence:

> "[the applicant] has spoken to me about it before on previous occasions…Before the actual incident…He planned to get some money by robbing the number's man…He said he would get some soldiers, some guys from the street and they would trail him while he did his rounds and then stick him up and take money from him…Frighten him with the gun…He would talk about it on and off…"

7. Ms Martinez spoke of events on the night of the killing. She said the applicant called her to come and collect him from the area behind Rita Martinez's house. He was "very panicked." She could hear sirens in the background. She was driven by a friend to pick him up. The applicant continually called the friend's phone to see where they were. They located the applicant who was "just stepping out of the foliage of the trees." The applicant said he did not know what was happening. He said all he knew was that the numbers man was dead. Miss Martinez said that when she saw the applicant later that night he seemed very agitated. He made a lot of calls. She said he told her he was trying to call "the guys that were involved in the mission earlier that night." He wanted to find out "how everything got so messed up with plan…He said that when he came out of [Rita Martinez's] house he had seen the numbers man slumped over her front door. He had blood on the back of his shirt and forehead like he had been shot there." Ms Martinez said the applicant told her what had happened when he was inside Rita Martinez's apartment. "…[H]e was sitting watching TV and that when the numbers man arrived he went in the back of her bedroom and called the guys and said they were downstairs under the staircase…He called them when the numbers man arrived and…again when he was leaving…To let them know he would be coming out the door." Ms Martinez said the applicant gave her the names of the others involved. She said too that the applicant threatened her by saying he "owned" her because she was an accessory, having come to pick her up. She said she assured him she would not tell anyone.

8. Ms Martinez gave evidence about events the next day, Friday 12th March 2010. She said that the applicant told her he had got into contact with those he had been trying to reach the night before. He now understood had happened. He described events as he had been told them. He said that "the boys ran up the stairs to confront the numbers man, the numbers man got frightened…because apparently they were wearing masks…[the numbers man] turned and ran back to [Rita Martinez's] door [on]…which he proceeded to pound…She didn't let him in and he turned to confront his attackers and must have wrestled with [Manderson]…for the [.44] gun. When they were wrestling the gun went off and hit…[Manderson] in the leg and when that happened Joshua [Ebanks] had a separate gun, a .22, and he shot the numbers man. He didn't say where…and then they helped [Manderson]…get downstairs…and they got him in the car because [Johnson]…was parked in the parking lot." She said the applicant told her they called an ambulance and gave a cover story to the effect that someone called Andy Barnes had shot Manderson. The applicant also said he spent the whole day at Johnson's apartment. They were cleaning the blood from Manderson's bleeding leg from inside Johnson's car.

9. Ms Martinez said the applicant had provided the guns. She said she had seen him the .44 gun previously and gave some details.

10. In cross-examination, she agreed that on her account the plan was to frighten the numbers man, not to hurt him.

11. Mr O'Neill asked her about events on 12th March. She said that Johnson was the only man connected with the events whom the applicant met. She agreed with the suggestion that the account given to the applicant of what had happened came from Johnson. She agreed that as Johnson was not present at the scene of the shooting (waiting as he was in the car), it must have been an account given to him by those who were. In other words, an account which in legal terms was on its face second-hand hearsay. We shall approach this appeal on the basis

that Johnson's account was the sole source of the applicant's understanding of the events. That, as we understand it, was the approach below, although we do observe that it would not have been necessary for the applicant to meet one of those involved to be given an account. Ground 2 of the Grounds of Appeal submits that the learned Chief Justice's direction in respect of this evidence was wrong.

12. Much of Mr O'Neill's cross-examination of Ms Martinez consisted of an attack on her character. He suggested she was wholly unreliable and was lying. Ms Martinez did not disagree with most of the suggestions Mr O'Neill made to her. She accepted she was expelled from school. She sometimes ran away from the children's home where she was living. She was involved in guns and gangs from the age of thirteen. She smoked a lot of cannabis. She had been involved with someone from an opposing gang. She knew of that gang's dealing in drugs. She had been incarcerated for breaching referral orders made by the juvenile court. Mr O'Neill put to her Social Services records in which she was described as 'deviant and uncontrollable.' She did not accept she was deviant. She accepted she frequently misled social workers. She had "anger issues." She had stabbed the applicant once in the knee with a pen when she lost her temper and threatened to kill him. She had lied in a witness statement.

13. An important part of Mr O'Neill's attack was the suggestion Ms Martinez was lying to gain the financial assistance provided to her as part of the witness protection programme. Again, she did not demur from much of what was put to her. It was agreed (in Admission 38) that from 2010 until the date of trial she had been provided with accommodation and living expenses amounting to CI$99,708.90. She was provided with, among other things, rent-free accommodation, living expenses, school fees for her son, medical and travel expenses. The detail was put to her. She agreed her police handlers on occasion accused her of dishonesty. She asked for more money. She wanted a bigger house and a car. She threatened to leave the programme if she did not get what she wanted. She said she had ask for those things. She spoke of her "degraded" mental state. At the end of her cross-examination, she said that "[the

applicant] never expected for me to fight back…What he expected was that I would be afraid. He would tell me these things were going to happen and then I'd see them happening…for a long time…I was very afraid. I thought he was the most powerful force to be reckoned with but I've learned different…"

14. It is not necessary to set out in detail the other evidence said to lend support to what Ms Martinez said. In short, Manderson's blood was at the scene of the incident and in Johnson's car, there was independent evidence placing the applicant immediately behind Maliwinas Way shortly after the incident and telephone and cell site evidence was consistent with Ms Martinez's account.

15. The applicant did not give evidence.

Other prosecutions

16. Manderson was separately prosecuted for murder by Justice Quin sitting alone. He was acquitted. As we understand it, none of the others allegedly involved has been prosecuted.

The relevant legal directions

Manslaughter

17. As the learned Chief Justice told the jury, the Crown's case in respect of the allegation of murder relied upon sections 18 and 19 of the Penal Code. As he told the jury (at *6/24*), by section 18:

> "…when an offence is committed not only the person or persons who actually do the acts that constitute the offence is guilty of the offence, but also every person who does any act for the purpose of enabling or aiding those other persons to commit the offence or actually aids and abets those persons in carrying out the offence or counsels or procures them to commit the offence."

18. By section 19:

> "When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such a purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such a purpose, each of them is deemed to have committed the offence."

19. The common intention alleged was an armed robbery. The Crown alleged that Mr Duran was plainly murdered, that that murder was the probable consequence of the armed robbery. Given the applicant's acquittal of murder, it is not necessary in the present case to consider the possible impact of the recent Supreme Court decision of *Jogee* [2016] 2 WLR 681) upon section 19.

20. Having directed the jury on the murder allegation, the learned Chief Justice directed them in respect of unlawful act manslaughter (sometimes described as constructive manslaughter) in the following terms (at *11/13-13/2*):

> "…if…you are sure that the defendant was involved in the planning of the robbery, including the use of the firearm or firearms, but you are not satisfied about the offence of murder as against the defendant because you are in doubt whether the murder…was a probable consequence of the carrying out of the firearm robbery then you may go on to consider whether…manslaughter was committed. In this sense, manslaughter is committed where an unlawful act results in the death of a person and the unlawful act was such as all sober and reasonable people would recognise must subject the person to at least the risk of some harm…albeit not necessarily serious harm. You therefore…consider…whether the defendant was party to an unlawful act where the offence of firearm robbery which in fact resulted in the death of the deceased and it would be relevant for these purposes…whether or not the defendant should have foreseen that the death of the deceased was a probable consequence of

the robbery. It would suffice…if a reasonable person would have recognised the act of robbing the deceased with a firearm was in and of itself an unlawful and dangerous act and so giving rise to a risk of some harm, even if not serious…"

21. The learned Chief Justice repeated this direction in response to a question from the jury (at *201/7*). He added:

> "…if you are sure that the defendant was party to an unlawful…and inherently dangerous act of robbery, it would be open to you to convict of manslaughter."

22. As the Director of Public Prosecutions accepted before us, section 19 of the Penal Code was irrelevant to unlawful act manslaughter. The manslaughter direction was a free standing one founded on non-statutory principles. As was said in *Jogee* (supra):

> "[96] If a person is party to a violent attack on another, without an intent to assist in causing of death or really serious harm, but the violence escalates and results in death, he will not be guilty of murder but guilty of manslaughter. So also if he participates by encouragement or assistance in any other unlawful act which all sober and reasonable people would realise carried the risk of some harm (not necessarily serious) to another, and death in fact results…[that too will be manslaughter]."

23. Unsurprisingly, there is no ground of appeal in respect of the manslaughter direction.

The hearsay issue

24. In summarising the prosecution case on murder, the learned Chief Justice referred to the applicant's account deriving from Johnson of what had happened. He said (at *10/19-11/2*):

> "If you accept the evidence of Meagan Martinez as to what was related to her by the defendant, then you will be able to conclude that Marcus Duran was shot when his assailants met with resistance and the gun went off, injuring Jordan Manderson in the

leg and Marcus Duran was shot in retaliation by another of the accomplices [Ebanks] in order to ensure their escape."

25. We shall return to this when considering Ground 2 of the Grounds of Appeal.

Manderson's acquittal

26. In ground 4 of the Grounds of Appeal, it is said the learned Chief Justice erred in the direction he gave regarding Manderson's acquittal. He said (at *15/25*):

> "…you have heard evidence to the effect that…Manderson was tried separately for the murder…and acquitted by Justice Quin. You may therefore be wondering what to make of the evidence in this case of the alleged involvement of…Manderson in the robbery leading to the murder (*sic*) of Marcus Duran, and indeed the evidence [derived from Johnson] that [Manderson] had been wielding a firearm provided by the defendant and sustained a gunshot injury to his leg during the incident. The direction I must give you is that the fact of…Manderson's acquittal does not preclude the prosecution from relying upon the evidence which has been adduced at this trial and which, if you accept it, could implicate…Manderson in the robbery and murder of Marcus Duran. The same holds true for the evidence that implicates others who have been named, in particular…Johnson…The fact of the acquittal of…Manderson and…none prosecution of…Johnson do not prevent the Crown from prosecuting this indictment against this defendant based on the evidence which is available to the prosecution in relation to this indictment. It is for this reason that I must also direct you that the acquittal of…Manderson in a different trial is irrelevant to your consideration of the evidence you find implicates him in this trial. We do not know what evidence was or was not presented before Justice Quin. Justice Quin did not try this case.
>
> In this case you are responsible as the judges of the facts to decide what to make of the evidence that is before you in this trial."

Ground 1 of the Grounds of Appeal: the witness protection logs and the Bermuda Report

The witness protection logs

27. Although in the Grounds of Appeal there is complaint about the adequacy of the witness protection logs now shown to have been compiled in respect of Ms Martinez, Mr Price's complaint revolved around two aspects. First, what was a heavily redacted version of the logs was only disclosed to Mr O'Neill during the course of his cross-examination of Ms Martinez. Second, what was disclosed now turns out to have been substantially inadequate.

The background

28. After the trial, Ms Martinez alleged, among other things, that her witness support handlers provided her with illicit drugs. There was an investigation into her allegation by some Bermudan officers. They produced a report (the Bermudan Report) which dismissed Ms Martinez's allegations. She withdrew them. She confirmed however the truth of the evidence she had given by saying that "I am now believing that I did the wrong thing in seeing that justice was done, based on the treatment meted out to me." The full logs were disclosed in the light of the allegations Ms Martinez was making.

29. We have read the full logs with care. Mr Price has drawn our attention to parts. In reading the entries we have asked ourselves whether, had Mr O'Neill had all the information they contain, he might, as Mr Price submits, more effectively have cross-examined Ms Martinez. We are in no doubt it would not have made any difference. Further references to her demands for money (for example CI$100 for clothing, something Mr Price draws to our attention) does not significantly add weight to the attack Mr O'Neill mounted. Nor do references to Ms Martinez's medical or psychiatric condition; or the references to her shortness of temper. In our judgment the Respondent is correct in submitting that Ms Martinez's character was laid bare in the course of the trial, as our extracts from her evidence make plain. Indeed,

overwhelmingly, Ms Martinez accepted her many deficiencies. We cannot see that adding further detail would have had any effect on the jury's assessment of her.

30. The fact that what was disclosed was disclosed late, is unfortunate. However, it did not prevent Mr O'Neill from mounting the attack we have described.

31. Finally, we cannot accept Mr Price's submission that what was revealed by the Bermuda Report, renders the applicant's conviction unsafe. These were entirely separate matters. The fact she sometimes lied was plain to the jury. She accepted lying in respect of these allegations. She maintained the truth of her evidence.

32. It is not necessary in the circumstances to consider whether the full logs were disclosable in accordance with the principles in *Keane* [1994] 99 Cr App R 1.

33. That disposes of the first ground of appeal.

Ground 2 of the Grounds of Appeal: the hearsay point

34. In Ground 2 the applicant submits the learned Chief Justice wrongly permitted Johnson's secondhand hearsay account given to the applicant as evidence of how Mr Duran came to be shot. The learned Chief Justice, it is submitted, was wrong to regard that account as an exception to the rule against hearsay.

35. We have set out the relevant evidence and the learned Chief Justice's direction in paragraphs 8, 11, 23 and 25 above. It is necessary to add some more background.

36. In broad terms, Mr O'Neill objected to the admission of the Johnson account as allegedly recounted by the applicant to Ms Martinez. He submitted it was second hearsay not capable of amounting to evidence of what happened during the robbery and greatly prejudicial to the

applicant. The Director of Public Prosecutions submitted Ms Martinez's evidence was relevant to the applicant's state of knowledge when continuing to participate in the offence by cleaning the blood from Johnson's car. He knew what had happened and yet continued to participate. In answer to a question from the learned Chief Justice, the Director agreed that it was the fact of the account, not its truth which formed the basis of her submission. It was evidence of the applicant's state of mind when he continued to assist. In his ruling, the learned Chief Justice went further than the Director urged him to. He said (at *12.2* of the transcript of 7th August 2014) that:

> "…because [the account came]…from someone allegedly in a common enterprise with the defendant, it is admissible as an exception to the hearsay rule."

37. Having previously indicated that fuller reasons would follow, the learned Chief Justice gave those reasons on 12th September 2014 (*volume 1/27*).

38. At paragraph 4, the learned Chief Justice said that:

> "The jury would be entitled to consider whether the report was given by…Johnson because they were accomplices to the joint enterprise and in furtherance of the joint enterprise; for instance, whether the report helped inform the defendant of the reason why it was important to rid the getaway car of any possible trace of incriminatory evidence…the rule permits the actions and declarations of one party to a joint enterprise…to be used as evidence against the other…and is thus an exception to the general rule that [the other] is not to be prejudiced by the acts or statements of the another, and an exception to the hearsay rule…Here the rule is a fortiori applicable because the declarations of…Johnson are adopted and reported by the defendant himself in his admissions to Meagan Martinez of his own involvement in the joint enterprise and the truth of what actually happened during the course of the joint enterprise."

39. The learned Chief Justice went on to say that:

> "…Johnson's account to [the defendant]…was for the purpose of securing the successful completion of the common purpose by cleaning the vehicle to avoid arrest and prosecution for their involvement in it. It was not hearsay, but an account given by the defendant which he implicitly accepted, as to the truth of what transpired during the attempted robbery and murder of Marcus Duran. In this sense it is to be regarded as evidence of the truth of its contents…The fact that the statement was first made by…Johnson to the defendant and recounted by him to Meagan Martinez did not change the nature of the statement."

40. At paragraph 7 of his ruling he summarised the position in the following way:

> "I am satisfied that the narrative of the account related by Meagan Martinez as reported to her by the defendant, is admissible as evidence of what he was told by an accomplice in furtherance of the joint enterprise and is evidence of what his state of mind must have been when he made the alleged admission to Meagan Martinez and when he had earlier acted to assist in the cleaning of the car."

41. As the Director submitted to us, there is no doubt that:

> "Even an act done after the principal object of the conspiracy has been accomplished may be in furtherance of it e.g. those done to avoid detection or conviction." (see *Cross and Tapper on Evidence (12th Edition at page 583)*)

42. There is no doubt too, as the learned Chief Justice said, that if what is said by one accomplice to another in furtherance of the joint enterprise, or, as he also put it, for the purpose of securing its successful completion, then that evidence may be admitted as to its truth. It seems to us the difficulty is that on proper analysis the account of Johnson (itself secondhand hearsay) was not given with the object of securing the successful completion of a joint enterprise, but was merely an account to the organiser of a joint enterprise which had gone

wrong about what had happened. It was an account which, according to Ms Martinez, the applicant had been anxiously but unsuccessfully seeking the evening before. Of course, that account formed the basis of the applicant's understanding of what had happened and the context in which the events of 12th March took place. As such it was plainly admissible, for the reasons the Director had originally urged upon the learned Chief Justice. But it seems to us, with great respect to the learned Chief Justice, to go too far to say it was something said in furtherance of the joint enterprise. We cannot accept therefore that the account was other than hearsay.

43. Moreover, it does seem to us that assuming it was not hearsay for the reasons given by the learned Chief Justice, something should have been said about the source of the account and the jury warned that before they could rely on it, they needed to be sure it was true.

44. That having been said, it is in our view inconceivable that what the learned Chief Justice said on this topic could affect the safety of the conviction for manslaughter. Mr Duran was plainly killed by an unlawful act during an armed robbery in respect of which there was ample evidence of the applicant's involvement. Irrespective of the precise mechanism by which Mr Duran suffered harm, the jury must have been sure that all sober and reasonable people would have realised that participation in an armed robbery carried the risk of some (albeit not necessarily serious) harm to another. That was a sufficient and safe basis to found the conviction for manslaughter.

45. Ground 2 of the grounds of appeal fails.

Ground 3 of the Grounds of Appeal: a direction regarding Meagan Martinez

46. In Ground 3 the applicant is critical of an observation of the learned Chief Justice concerning some evidence of Rita Martinez to the effect the applicant had not been at her apartment on the evening of 11th March. The learned Chief Justice said (at *27/17*):

> "You…have to consider what other evidence [apart from Meagan Martinez] there is of [the defendant's] presence…[at Rita Martinez's apartment] on the evening of 11th March and it will then be open to you to find whether Meagan Martinez's evidence of the defendant's admission to her that he had gone to the apartment on the night of 11th March is to be preferred to Rita Martinez evidence to the effect he had not gone there."

47. It is submitted in the grounds of appeal that the jury should have been directed first that they had to be sure of Meagan Martinez's evidence of the applicant's presence at the apartment before they could reject evidence from Rita Martinez that he was not.

48. This was not a ground referred to by Mr Price in his submissions. That may not have been surprising. The learned Chief Justice made it plain to the jury they could only convict if they were sure of the truthfulness and reliability of Meagan Martinez's evidence (see paragraph 3 above). A further direction was not required. There is nothing in Ground 3.

Ground 4 of the Grounds of Appeal: the Manderson direction

49. Although Ground 4 of the grounds of appeal is critical of the direction given by learned Chief Justice in the summing-up regarding Manderson's previous acquittal (see paragraph 25 above), this again was not something pressed upon us by Mr Price. Again, that may not be surprising, as what the learned Chief Justice said was plainly correct. There is nothing in this Ground.

Other general criticisms in the Grounds of Appeal

50. There are other general criticisms in the grounds of appeal. Mr Price did not refer to them. We need not go into detail. We have considered them. In our judgment, there is nothing in any of them.

Conclusion

51. While we are prepared to grant the applicant leave to appeal, for the reasons we have given we dismiss his appeal.

Goldring P

Newman JA

Morrison JA