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IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
CRIMINAL APPEAL 18/13
(Ind. 20/12)
C01001/2012

HER MAJESTY THE QUEEN

Respondent

- and

Leighton Griffin Rankine Jr

Appellant

Before:

The Hon John Martin QC, Justice of Appeal
The Hon Sir Richard Field, Justice of Appeal
The Hon Dennis Morrison, Justice of Appeal

Appearances: Appellant in person, Cheryll Richards QC Director and Candia James for the Crown

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JUDGMENT

Revised from transcript of oral judgment 7 March 2017 and Approved
Released 13 April 2017

MARTIN, J.A.:

1. On 11 June 2013 the applicant, Leighton Rankine, was convicted of two counts of wounding with intent, one count of possession of an unlicensed firearm, one count of unlawful use of a firearm and one count of assault. He was acquitted of two counts of attempted murder. On 23 August 2013 he was sentenced to terms of imprisonment of between 13 years and ten months, to run concurrently. He now applies for leave to appeal against his conviction.

2. The offences with which he was charged arose out of an incident in the early hours of the morning of 22 February 2012 outside Club 7 on West Bay Road. The Crown's case at trial was that in the parking lot outside the nightclub the applicant had an exchange of words with one of three complainants, Jordan McLean. Following this exchange he went to a parked motor vehicle from which he retrieved a .38 revolver which he pointed in the direction of Mr. McLean. The other two complainants, Jolyon Frederick and Mitchell Wright intervened in an effort to defuse the situation. As Mr. Wright approached where Mr. Frederick and

the applicant were standing facing each other, the applicant fired one shot from the revolver. The shot passed through the arm of Mr. Frederick and lodged in the arm of Mitchell Wright. Mr. Frederick left the scene immediately after the shot was fired. Mr. Wright held on to the applicant and wrestled with him. The sound of the shot was heard by two police officers who were on mobile duties in the immediate area. PC Derron Campbell and PC Jeremy Smith walked towards Mr. Wright and the applicant. As they approached, the applicant told Mr. Wright to let him go, the police are coming. Those officers saw the applicant with a firearm in his hand struggling with Mr. Wright. They saw him throw the firearm into nearby bushes. They separated the two men. The applicant received injuries to his eye as a result of being kicked in the head by Mr. Wright. Both men were taken from the scene to the hospital where they were admitted. Following the departure of the men, the officers retrieved a firearm from the bushes. It was subsequently examined by an expert witness, Allen Greenspan, and found to be a lethal-barrelled weapon within the meaning of the Firearms Law and to have been the weapon from which the bullet recovered from the arm of Mitchell Wright was fired.

3. The applicant's case was that he had been drinking earlier that night at the Buttonwood Club in George Town with two women. He told the police in interview, and gave evidence, that he had no recollection whatever of the incident and remembered only being in the Buttonwood Club earlier in the evening, his next memory being when he woke up in hospital.

4. The applicant was charged on an indictment containing seven counts which in summary were as follows:

   (a) counts of attempted murder of Mitchell Wright and Joylon Frederick (counts 1 and 3); .

   (b) counts of wounding Mitchell Wright and Jolyon Frederick with intent (counts 2 and 4);

   (c) possession of an unlicensed firearm (count 5):

   (d) unlawful use of a firearm (count 6); and

   (e) assault of Jordan McLean (count 7).

5. The applicant elected to be tried by judge alone. He was tried before Acting Justice McDonald-Bishop between 27 May and 4 June 2013. On 11 June 2013

the judge delivered a judgment running to 101 pages and 414 paragraphs. Her key findings were as follows:

(a) [paragraph 333];

"I am satisfied to the extent that I am sure on ample, clear and credible evidence that the defendant was present at Club 7 at the time a firearm was brought into play and utilised, even though he might have no knowledge or recollection of it".

(b) [paragraph 343];

"I am satisfied to the extent that I am sure that the defendant was the person who had the firearm prior to and at the time of the shooting and that he continued to retain his exclusive control over it until the police arrived on the scene. There was ample lighting and sufficient proximity between the main witnesses and him for him to have been correctly identified with that object in his hand".

(c) [paragraph 354];

"I am satisfied to the extent that I am sure that the defendant was armed with a .38 revolver exhibited in this case that he discharged in the Club 7 parking lot that morning.

(d) [paragraph 392];

"In all the circumstances I am not satisfied to the extent that I feel sure that the defendant had an intention to kill any of the complaints either directly or by way of transferred malice.

Accordingly, the prosecution failed to discharge the burden of proof to satisfy me to the requisite standard of the guilt of the defendant for attempted murder with which he is charged on counts 1 and 3."

6. On 30 August 2013 the applicant filed notice of application for leave to appeal against his conviction. The notice said that he felt he had had an unfair trial and would set out more grounds when he received transcripts. He has since made several applications to this Court for transcripts of evidence, the majority of which have been granted. On the last occasion when he was before this Court on 11 November 2016 it was made clear that no further adjournment of the appeal would be permitted.

7. The applicant has represented himself before us today. He had previously filed detailed grounds of appeal and he elaborated on some of them in his submissions to us. Those grounds of appeal make the following basic points:

(a) he was charged without written authorisation from the DPP;

(b) he was charged later than 72 hours after being arrested;

(c) conflicts in the evidence were inadequately dealt with by the judge;

(d) the applicant did not have proper or effective legal representation;

(e) the presence on the firearm of a fresh unidentified fingerprint was not taken into account by the judge;

(f) the conviction was unsafe and unsatisfactory.

We deal with these grounds in turn:

Lack of written authorisation.:

8. As the grounds of appeal themselves record, the charging officer - then DS Joseph Wright - said in his statement that he had received a ruling from the DPP recommending the charges. Proceedings were conducted by or on behalf of the DPP throughout, raising a strong inference that they had been authorised from the outset. There is no requirement to produce a written authorisation in the trial process, and there was no cross-examination on this point at trial. There is nothing in this point.

Charge after 72 hours.

9. The grounds of appeal assert that the applicant was arrested at the scene on 22 February 2012 and charged on 26 February 2012, more than 72 hours later. However, it is not the date of arrest that is relevant for these purposes. Section 65(15)(d) of the Police Law 2010, which was in force at the relevant time, provides that the period of detention is to be calculated from the time at which the person arrested arrives at the first police station to which he is taken after his arrest. Sections 65(3) and (4) provide that the arresting officer may in defined circumstances place the arrested person in custody for a period not exceeding 72 hours, and an officer with the rank of chief inspector or above may in defined circumstances extend that period by a further 24 hours. The evidence of the arresting officer at trial was that he could not remember whether the applicant had been taken after his release from hospital to the police station on the afternoon of 22 February 2012 or on 23 February 2012. The applicant told us that in fact he was taken to the police station in the evening of 23 February and charged at 7:10 p.m. on 26 February. It is likely that that was just within the 72 hour limit; but in any event detention without charge until 26 February 2012 would have been consistent with the provisions of sections 65(3) and (4). There was no investigation of this point by the defence at trial and, in the absence of

any material to the contrary, the detention must be taken as lawful. This point also fails.

Evidential conflicts.

10. The grounds of appeal identify questions about the type of firearm used in the incident and the absence of any fingerprint, DNA or gunshot residue evidence connecting the applicant to the firearm. So far as concerns the firearm, the applicant points out that the particulars of offence stated in the indictment, the police who attended the incident and the scene of crime investigator all referred to a .38 Smith and Wesson revolver; whereas Allen Greenspan, the firearms examiner called as an expert witness by the prosecution, identified the firearm as a .38 Rossi revolver (his identification of the firearm also being referred to by Angela Shaw, the prosecution's expert on gunshot residue). The judge's finding of fact was that the firearm was a Smith & Wesson revolver, and we are in no position ourselves to make a different finding. Even if the finding was wrong, however, it has in our judgment no impact on the convictions. The two police officers first at the scene gave evidence, which the judge accepted, that they saw the applicant with a gun in his hand, and that he threw the gun into nearby bushes. The process by which the same gun was recovered and examined by Mr. Greenspan was explained in detail and the taking, production and continuity of the exhibits was the subject of a formal admission at trial. The real question was whether the applicant had possession of an unlicensed .38 revolver, and it was clearly established that he had. The type of revolver was irrelevant. As to fingerprints, DNA and gunshot residue, the position is that no fingerprints whatever were found on the firearm or ammunition; the DNA swabs taken from the gun and the ammunition were all inconclusive in terms of including or excluding the applicant, except that the applicant could be excluded as a contributor to DNA taken from inside the bullet hole; and no gunshot residue was found on any of the applicants or the three complainants. The applicant contends that, contrary to the evidence of the eyewitnesses, the absence of any fingerprint, DNA or GSR link to him means that he could not have handled or fired the gun.

11. The judge was well aware of the possible implication of the absence of fingerprint, DNA and GSR evidence connecting the gun to the applicant. At paragraph 263 of her judgment she said that: "With respect to the absence of GSR or any sample concerning the defendant, [Angela Shaw] explained that one possibility, which I consider a rather important one to bear in mind, is that he did not fire a firearm". Between paragraphs 344 and 351 of the judgment she said this: "I've not ignored at all the evidence concerning the absence of GSR and the indeterminate DNA results as pointing to the possibility that the defendant might not have handled or fired a firearm. Mr. Greenspan and Miss Shaw have both

assisted me in my consideration of this aspect of the evidence, but their evidence has to be viewed against the backdrop of all the other evidence in the case, which I have done. Having looked at the science surrounding GSR and the nature of GSR itself, I accept that it would have been expected to be deposited on the hand of the defendant if he had fired that particular firearm. I accept also that it is not the deposit of GSR that is critical per se for the purposes of GSR analysis but rather whether it remained on the surface on which it was deposited long enough to be detected. I accept that there are a number of variables that could account for the removal of any trace of GSR on there by accounting for a negative finding upon examination as explained by the experts. Having listened to the evidence of Mr. Greenspan and Miss Shaw, I find that some pertinent variables pointed out by them as likely to affect GSR retention do exist in the circumstances of this case that could explain the absence of GSR on the defendant other than that he did not fire the firearm. Against the background of the expert evidence, I have seen that in this case on the evidence which is unchallenged, there was a struggle between the defendant and Mitchell Wright which resulted in some form of movement for a while and some degree of body-to-body contact. The defendant had fallen to the ground in the car park before he was moved by the police. He was lifted and put in a vehicle to go to the hospital. No one knows the condition of that vehicle and what happened while he was in the back as to his movements and activities or the conditions to which he was exposed during the journey. At the hospital he fell again. He was assisted by medical personnel and placed on a stretcher, which like falling to the ground, would involve some movements and some degree of friction between his body and the surface of the stretcher. He was subject to immediate medical attention and treatment by personnel which must have involved some handling of his person. His clothing was removed and placed on a table in the room all before any swabbing of his relevant body parts was done around two hours after the shooting. By the time his clothes were secured for testing, they were handled and removed by persons and placed on other surfaces. In sum, the defendant was not swabbed immediately upon the shooting occurring or within a reasonably short time thereafter. Passage of time, according to the experts, does affect the retention of GSR deposit. Apart from the lapse of time itself, there were between the shooting and the testing such activities involving him that could have had an adverse effect on the retention of GSR as explained by the expert witnesses. The absence of positive findings of GSR and DNA in all the circumstances proves unhelpful to the defence. I find that while it does give rise to the possibility that the defendant did not fire a firearm, I am convinced on the credible and non-mistaken eyewitness account presented by the prosecution that he was armed with a firearm in the parking lot and that he discharged it".

12. We find it impossible to fault the judge's handling of this issue. It must not be overlooked that there was no possibility of dispute that a gun had been fired in the course of the incident and two of the complainants had been wounded.

Whoever fired the gun left no fingerprints on it, and the absence of gunshot residue on any of the persons involved could not mean that the gun had not been fired at all. The DNA data was inconclusive: a mixture of DNA from at least four individuals, at least one of them male, was found on the gun handle and on the side of the gun, and a mixture of DNA from at least three individuals was found on the gun cylinder, trigger, trigger guard and hammer. The most significant piece of DNA evidence concerned the swab from inside the bullet hole, which indicated a mixture of at least two individuals contributing to a major female and minor DNA profile from which the applicant could be excluded. Much reliance was placed by the defence on this latter fact during the trial. Taken overall, however, the DNA evidence could not exclude the possibility that the applicant had handled the gun. The judge was accordingly entitled to take the view which she expressed as follows at paragraph 240 of the judgment:

> "The results do not point to any fact that could assist either the prosecution or the defence. There is nothing incriminatory or exculpatory found in relation to anyone".

In that paragraph, the judge used the expression "assist either the prosecution or the defence". The applicant appears to have interpreted this and other references in the judgment as meaning that the judge set out to assist the prosecution in establishing its case against the applicant. There is nothing whatever in that suggestion. The expression means no more than that the material provided no support for the case advanced by the prosecution or for the case advanced by the defence. In this respect, as in others, the judge's approach was notably balanced.

13 Before leaving the question of fingerprints, we should mention that in the grounds of appeal the applicant refers to the existence of a "fresh" fingerprint on the gun at the time of its examination by Mr. Greenspan, and suggests that this must be the fingerprint of the perpetrator of the crime. However, as the Crown pointed out in their response, the evidence of the scene of crime investigator who dusted the gun and ammunition for fingerprints on 23 February 2012 was that at that time there were no fingerprints on either.

Absence of effective legal representation.

14 This allegation appears to have been the reason for the applicant's repeated request of transcripts of the evidence. His contention appears to be that those transcripts will indicate that matters such as the absence of fingerprint, DNA, GSR and CCTV evidence were inadequately investigated at trial.

15 The applicant was represented at trial by Alistair Malcolm QC and Clyde Allen. Following a waiver of privilege by the applicant, Mr. Malcolm provided on 22

February 2017 a response to the allegations set out in the grounds of appeal. Between paragraphs 3 and 14 he said this:

> "It's important to remember from the outset that after Mr. Rankine was arrested and was still at the scene, he was attacked by the witness Mitchell Wright and kicked in the head. Following that assault, Mr. Rankine spent a significant length of time unconscious at hospital. Because of that assault, Mr. Rankine had no memory of the events that took place outside Club 7. It was not suggested in the course of the trial that his lack of memory was not genuine. Although he had no memory of the incident, Mr. Rankine could say that he had never been in possession of a handgun and he had not taken any handgun with him that night. To that end, despite what Mr. Rankine asserts, a great deal of the argument put before the Court went to the issue that there was no evidence to connect Mr. Rankine to the gun. In particular, there was no fingerprint to connect Mr. Rankine to the gun or the ammunition which was inside the gun. The same applied to the DNA. Although the DNA found on the outside of the gun could not exclude Mr. Rankine, as it had a male component, there was no evidence that it was his DNA. There was a far more significant piece of DNA evidence to which Mr. Rankine does not refer. That is the evidence that is contained in further admissions number ten which states:
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> 'The DNA profile obtained from the swab from inside the bullet hole in the cylinder of the gun indicated a mixture of at least two individuals contributing to a major female and minor DNA profile. Leighton Rankine could be excluded as a contributor to the mixed DNA profile'.

Although not referred to in the learned judge's judgment, it was relied upon in the defence submissions to show that there was no connection between Mr. Rankine and the gun.

16 The defence case that was run with the agreement of Mr. Rankine was that:

- The gun was brought to the scene by Wright or one of his companions.
- There must have been some form of struggle during which the gun was discharged.
- The single bullet caused both injuries.

17 If the officers were correct in saying that the gun was in Mr. Rankine's hand when they approached the struggle, it was because he managed to get control of the gun.

18 Mr. Rankine was seen before the trial in prison and neither then or in court did he disagree with the way his case was presented.

19 The evidence of the police officers who say they saw Mr. Rankine holding the gun when they arrived indicated that he was not acting aggressively with the gun. He was holding it pointing towards the ground and when instructed to put the gun down he threw it so that neither he nor Wright could get hold of it.

20 The defence had obtained a report from a firearm's expert dealing, inter aila, with GSR. That expert was present in Court and was available to give evidence. In the event Mr. Greenspan and Miss Shaw gave evidence in chief or cross-examination in accordance with the defence expert's opinion and it was not necessary to call him. Although in paragraphs 63 to 65 of the facts and arguments for appeal on sentence and conviction, Mr. Rankine refers only to fingerprints and DNA. I note he raises a question as to the identity of the firearm.

21 In the statements of Zoan Marin, who was the scene of crime investigator, and PC Kerr, it is referred to as a "black 38 revolver" or "black gun". It is correct that PC Campbell does refer to it as a "Smith & Wesson". There can, however, be no dispute that the gun which Mr. Greenspan examined was the gun that caused the injury, since the bullet which was recovered from the arm of Wright at George Town Hospital was found to have markings identical to that fired in the test by Mr. Greenspan".

22 In paragraph 283 of her judgment, the judge recorded the submissions made on behalf of the applicant as follows:

> "There is, as Mr. Malcolm QC has indicated, no independent evidence that is in support of the prosecution's case and that is to say no evidence of DNA or GSR findings implicating the defendant, no incriminating CCTV footage in the car park and no independent eyewitness account. It means the fortune(of the prosecution's case rests principally on the evidence of the three complainants".

23 In his submissions to us this morning, the applicant raised two specific matters of concern; the failure to instruct an expert to attempt to retrieve CCTV images and an absence of disclosure of his medical records.

24 As to the first of these, the position on the evidence is that the CCTV images are overwritten automatically after 72 hours and the police did not ask for the images until the 28th of February, having prioritised other matters. It is a matter of speculation whether anything could have been recovered once overwritten. But in any event, Mr. Allen told us that the question was never raised with his legal team by the applicant. It is unfortunate that there were no CCTV images but the defence did the best they could without them.

25 The second matter concerns the applicant's medical records. These are potentially relevant to the question of the applicant's ability to form an intent to harm, which is a necessary element of the wounding charges. We were told by the Director that a statement had been obtained by the Crown from the hospital and served on the defence team and, in any event, the judge carefully considered the question of intent and the applicant's ability to form it in the light of his mental state.

26 At paragraph 406 of her judgment she said this:

> "Having considered the case in its totality, I find that there is insufficient evidence before me from which I can conclude that the defendant's conduct was as a result of intoxication or drinking or due to any external cause for that matter. His conduct, as I have accepted it to be, showed that he was conscious enough to do the things he did and was deliberate in executing them. There is nothing on the evidence that he was affected in any way in his reasoning and intent. I find that he had the capacity to form the specific intent to do grievous bodily harm in the absence of evidence to the contrary".

27 There was ample material to justify this finding, all of which was considered and discussed by the judge. There is no substance in this point.

28 In our judgment, there is also no substance whatever in the suggestion that the applicant received inadequate representation at trial. His representation was handicapped by the fact that he could remember nothing of the incident. A case was nevertheless advanced that his possession of the firearm when the police arrived was attributable to the fact that he disarmed one of the complainants. Inconsistencies in the evidence of the eyewitnesses were extensively explored as the judgment demonstrates. The point about the absence of evidence linking the applicant to the gun or ammunition was clearly made and was demonstrably understood by the judge.

Unsafe and unsatisfactory.

29 In the end, the judge, after conducting what in our view was a comprehensive, fair and balanced assessment of all the evidence, both for and against the applicant, came to the conclusion that the applicant was the aggressor in the course of the incident. She made clear that she understood it was for the prosecution to prove its case and that she understood what standard of proof was required. On these matters, as on all others, she gave herself impeccable directions. We are quite unable to say that the conviction was in any sense unsafe or unsatisfactory.

30 For these reasons, we dismiss the application.