23-04-07

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CRIMINAL APPEAL NO. 9/2005
(Indictment No. 9/05)

BETWEEN

JASON SMITH
ASFA WEBSTER

APPELLANTS

AND

REGINA

RESPONDENT

BEFORE: **THE HON. MR. JUSTICE ZACCA, P.**
THE HON. MR. JUSTICE TAYLOR, J.A.
THE HON. MR. JUSTICE FORTE, J.A.

Howard Hamilton, Q.C. Attorney at Law, instructed by Facey-Clarke & Associates, for the appellant Jason Smith.
Ben Tonner, Attorney at Law of Samson & McGrath, for the appellant Asfa Webster.
Tanya Lobban, Crown Counsel, for the Respondent.

Heard 11th & 12th April, 2007

Decided: April 23rd, 2007
Reasons released: 25th July, 2007

FORTE, J.A.

Reasons for Judgment

Both appellants were tried and convicted in the Grand Court on the 2nd day of August 2005 for the offences of attempted murder and illegal possession of a firearm. They were each sentenced to 18 years imprisonment on each count. However, the learned judge ordered that the sentences on count 2 should run concurrently with those on count 1.

Arguments were heard in the appeal on the 11th and 12th April 2001. On the 24th of April 2007 we gave our decision, dismissing the appeal and promised then to put our reasons in writing. We now keep that promise.

The victim of the attempted murder was Brian Parchment who was numbered among a group of men who appeared to have been friends with, or at least well known to, each other.

In proof of its' case, the prosecution relied upon the evidence of Alex Bennett. At one stage of the investigation, the police believed that he (Alex Bennett) was implicated in the commission of the offences. This issue will be addressed later.

A good point to begin a summary of the events, which led to the commission of these offences, is the earlier occurrences on the 22nd day of October 2004. At about 7:30 p.m. on that day Alex Bennett met up with the appellant Jason Smith in Kelly's bar. Smith invited Bennett to go to "Superman's" house to get some ganja. "Superman" was the name given to Kevin Ebanks- a witness who also testified at the trial. When they arrived at "Superman's home Bennett went into a room to get *"a draw of weed"*. On returning to the main room he saw Brian Parchment there with some other men. At the time, he saw the appellant, Jason Smith, pointing a gun at Parchment's face whilst at the same time saying *"you want a man put a hole in your face."* Parchment was seated. Smith was standing in front of him. Bennett testified that Parchment answered the appellant Smith, saying, *"You think I didn't hear you ask a man for a box of warhead to kill me?"* Parchment then left the house going in the direction of the

Police Station. According to Bennett, the appellant Smith then told some one else to see where Parchment (otherwise called Jahb) had gone. This person reported back later, that Parchment (Jahb) had gone to "Ann Chicken".

Bennett and the appellant Smith then returned to Kelly's bar, where Bennett asked the appellant Smith to show him the gun that he had pointed at Parchment. Raising his shirt and showing the gun to Bennett, Smith replied, *"It's not a real gun. It is a nail gun."*

Smith and Bennett left Kelly's bar after about a half-an-hour, intending to go home. Both were on Smith's bicycle, with Bennett sitting on the handlebar. Smith was unable to pedal the bicycle while holding the gun, so he asked Bennett to hold it for him. Bennett took the gun and put it in his lap. They decided to stop at "Johnny and Francis" yard where Parchment was passing time. As they arrived at the yard, Bennett fell off the bicycle's handlebar. As a result, the nail gun fell. He then picked it up and handed it to the appellant Smith.

Bennett testified that when they arrived at the yard, the appellant Asfa Webster and Parchment were present in the yard. There were other men there. He named "Royce", "Allenby" and someone called "Camillo". Shortly after they arrived, Bennett saw the appellants in conversation with each other. He could not hear what they were saying. Smith, however, started speaking loudly, saying *"My things keep going missing. I am going to turn this yard into a murder scene so nothing can't sell again in this yard."*

At that time, Parchment got up and *"went around behind a shed that was towards the back of the property."* Bennett testified that the appellant Webster

then went to a white Honda civic motorcar, which was parked in the yard and removed a school bag from the back seat of the car. He opened the school bag and removed two long pairs of gym socks. He gave one pair to the appellant Smith and put the other pair on his hands. These covered his "hands and arms" up to the elbows. The appellant Smith also put the socks on his hands in a similar manner.

According to Bennett, both men *"whispered together a little bit and then disappeared towards the shed."* After they "disappeared towards the shed" he heard *"two loud pops coming from the direction in which the two men had first headed."* Bennett then heard a voice, which he purported to identify as that of Asfa Webster, saying *"Finish him, finish him"* and then the *"sound of 'scrubling', as if someone was trying to run."* He started to walk towards the shed when he saw the appellant Webster come around the corner. He had no shirt on. He no longer had the socks on his arms and he was breathing hard. Bennett asked him for Smith but he did not answer. Feeling scared, Bennett headed for the front gate where he again saw the appellant Webster, who started running and then said *"Jason let's go."* However, before leaving, Bennett said that the appellant Webster said to him, *"If you talk I'll clip you wings. If you hold your mouth I'll make you fly."* Bennett interpreted those words as a threat. Bennett then left the yard and went to his mother's house, ate, had a shower and then went to his girlfriend's house.

Later, the appellant Smith came to Bennett's girlfriend's home and asked if his girlfriend was there. At that time, he (Smith) had on "different clothes".

Bennett later went to the house of Brian Borden. Two hours later, the appellant Webster came there. He grabbed Bennett by his shirt collar and said *"You'd better leave West Bay because I know if they catch you, you will talk. I like you. Don't wanna have to do nothing to you."* When Webster said that, he had a knife in his hand.

In the meantime Parchment was examined and treated by Dr. Kairsingh, a medical expert, who confirmed that when Parchment was brought to the hospital later that evening, he had bullet wounds in his neck and superficial bullet wounds on each of his legs. In fact, a .22 calibre bullet was extracted from Parchment's neck.

Bennett, after discussing the whole issue with his mother, "turned" himself in to the police. The police promptly placed him in a cell with the appellants Webster and Smith. While there, the appellant Webster threatened him for a third time.

When Bennett first attended at the police station, he was treated as a suspect. Under those circumstances, he gave a statement denying all knowledge of the events that took place. However, sometime later, the police told him that he had a choice to be either a crown witness or to join the others as co-accused. Bennett chose the former and thereafter gave a statement disclosing what he knew, and which was generally consistent with his evidence outlined above.

That evidence, if believed, would in our opinion, be sufficient to establish the case against both appellants. However, it had the qualification of being

evidence which came from a possible accomplice or at least a person who had an interest to serve. The learned judge was well aware of that and indeed treated the witness Bennett as an accomplice. This is what the learned judge said:

> "Before I approach the evidence of Brian Parchment I must give myself certain warnings.
> First of all, Mr. Bennett may have been an accomplice. He has a conviction for theft and, most significantly, he was subject to police pressure when they said to him that, if he would not be a Crown witness, he would end up as a defendant. These circumstances render it dangerous to convict on the uncorroborated evidence of Alex Bennett. I must now examine the evidence to see which parts of it confirm or fail to confirm his testimony."

Thereafter, the learned trial judge approached the evidence with specific care. Although in this jurisdiction it is no longer necessary to look for corroboration in the case of accomplice evidence, nevertheless, quite correctly, the learned judge sought supporting evidence for the credibility of Bennett, from the evidence of Parchment.

In the end, the learned judge came to the conclusion that Bennett was a witness of truth, on whose evidence he could rely. He made this finding in circumstances where the evidence of the virtual complainant, (who admittedly was under the influence of drugs at the time when he was shot), was held to be not sufficiently credible. The trial judge accepted only parts of the complainant's evidence and not all of it.

The following words from the judgment of the learned judge demonstrate his treatment of Parchment's evidence.

> "Dr. Marc Lockhart, an expert in psychiatry and behavioural medicine, testified that cocaine, depending on the concentration of the dosage, can have deleterious effects on your memory and perception.
>
> Taking that into account and bearing in mind the significant number of contradictions between the evidence and Parchment's statements, I consider him to be an unreliable witness on a number of points. I will say, from having observed his demeanour closely, that he appeared to be trying to tell the truth. I did not have the impression that he was shading his evidence, or deliberately trying to bring about a false conviction. His recollections however are in part unreliable."

The learned judge was entitled to treat that evidence in the way he did, as the law permits him, depending on the circumstances, to accept a part of the witness' testimony and reject a part. In keeping with this principle the learned judge later identified the parts of the evidence of Parchment, which he accepted as true as follows:

(1) Parchment's assertion that Smith did threaten to harm or kill him at Superman's house earlier.

(2) Parchment's evidence that Smith accused him of stealing cocaine.

(3) Parchment's evidence that something fell down Bennett's pant leg when Bennett arrived at the yard [i.e. the nail gun]

(4) Parchment's evidence that one of the appellants went and picked up a school bag from a car, although whereas the witness Bennett said it was Webster, Parchment said it was Smith.

(5) That he, Parchment saw Smith put the socks on his hands.

(6) Parchment's evidence that the appellant Smith fired the first shot.

(7) Parchment's evidence that someone yelled "finish him, finish him" although he did not accept "any assertion from Parchment that he was able to recognize the voice.

Having examined the above, as against the testimony of Bennett and finding that Bennett's evidence was corroborated in all these aspects, except as contained in paragraphs 4 and 6, the learned judge came to the following conclusion:

> "These findings corroborate the evidence of Alex Bennett to a substantial extent. Overall, I am satisfied that Bennett was a witness of truth."

As Bennett gave no evidence in relation to who shot first (paragraph 6) it is a necessary inference that the learned trial judge accepted Parchment's unsupported evidence as to Smith firing the first shot. This he was entitled to do.

In our view the learned judge entered into a detailed examination of the evidence, both of Parchment's and Bennett's. The issues of facts which arose

on the evidence were resolved. The learned judge dealt thoroughly with any apparent discrepancies and in the end convicted the appellants in circumstances, which in our view, cannot be said to be unsafe and unsatisfactory.

An appellate court will not interfere with a trial judge's findings of facts, where they are properly founded on the evidence presented in the course of a trial and in particular where those findings are made after properly resolving internal inconsistencies within the evidence of a single witness, or discrepancies between the evidence of two or more witnesses. *A fortiori,* an appellate court will have regard to the fact that in accepting or rejecting evidence of witnesses, a trial judge had the opportunity of hearing and seeing the witnesses and of assessing their demeanour as they testified. It will therefore not interfere with those findings, in a proper case, especially when the appellate court has not had the added benefit of assessing the demeanour of the witnesses to determine credibility.

As the gravamen of the appeals rested on the basis of discrepancies, we need only repeat that questions of facts are for the trial tribunal and that this court will not interfere unless it can be shown that (1) the learned judge did not deal with the discrepancies in coming to his conclusion, (2) that he did not make good use of the opportunity of seeing and hearing the witnesses, and (3) that his conclusion is unsafe and unsatisfactory.

None of those circumstances existed in this case. To the contrary, the learned judge demonstrated, by what he said, that he appreciated the issues of

fact that existed and that he made good use of the opportunity he had, of assessing the witnesses as they testified.

There are however, two other matters worthy of comment:

(1) **Application to adduce fresh evidence-**

Before hearing the appeals, we heard and refused an application to hear fresh evidence from the virtual complainant Mr. Parchment. That fresh evidence consisted of an additional statement of Mr. Parchment given after the convictions of the appellants. In this statement he alleges that at the time he was shot, he went after his attacker while his (the attacker's) back was turned to him and stabbed him in his left shoulder with a screwdriver, which he had taken from his (Parchment's) waist at the time he was shot. Subsequently, he discovered that another gentleman whom he named as Byron Ebanks had a scar to his left shoulder, on the spot where he had inflicted the injuries to his attacker. He challenged Ebanks about that, whereupon Ebanks, he alleges, confessed to having shot him, giving him details of the attack. No affidavit of Byron Ebanks was submitted or presented to the Court.

However, in response, the Crown filed an affidavit of Detective Sergeant Wayne Powell who attested that on the 3rd April 2007 he spoke to Mr. Ebanks at West Bay CID office. He informed him that he was making enquiries about an incident on the 22nd October 2004, in which Brian Parchment had been shot. Mr. Ebanks denied any knowledge of the incident. He cautioned Ebanks and questioned him further. During that process Ebanks explained that the scar he had was as a result of being shot on the night of the 2nd May 2005. He was

treated at hospital for the injury. Physician notes from the hospital were produced by the Crown in opposition to the application to adduce fresh evidence. The notes revealed that Byron Ebanks was treated on the 5th May 2005 for bullet injury. The diagnosis revealed, *"s/p gunshot wound abdomen, neck, left shoulder, right thumb, right arm. Right thigh, right back, left back."* In respect to the shoulder injury it is therein described as *"superficial thru and thru left shoulder."*

In addition to this evidence produced by the Crown, the original evidence, given by Mr. Parchment at the trial falls short of supporting this allegation. In his evidence, he had said that after he was shot, he pulled the screwdriver from his waist and ran toward his assailant. Then he said:

> *"I then tried to stab him inside his shoulder, but I was weak."*

This evidence shows that at the time of the trial he was not alleging that he had actually stabbed his assailant, which means that the assailant would not have had a scar caused by an injury he inflicted with the screwdriver.

It is a principle of law, so well settled that it needs no authority, that one of the criteria of admitting fresh evidence is that the evidence sought to be adduced must be credible. In our view, given the circumstances, the evidence sought to be adduced was not credible. Given Mr. Parchment's testimony at trial, the scar, which is on the left shoulder of Mr. Ebanks would have no relevance and consequently no effect on the conclusions reached at the trial.

The credible evidence of the physician, as to the cause in fact of the injury to Mr. Ebanks' left shoulder, does not assist the appellant Webster. The application to adduce the fresh evidence was therefore refused.

2 (a) **Visual Identification**

There was a complaint in relation to the identification aspect of the case, which in our view had no merit. The learned trial judge recognized that a cautious approach had to be taken in relation to the visual identification of the appellants. In so doing, he expressed his knowledge of the principles of law involved and warned himself of the dangers of acting on the unsupported evidence of visual identification. He examined the circumstances carefully, including the lighting, in respect of which he accepted as fact that a fire in the yard assisted in the opportunity to see the persons involved. The men were all known to each other. In fact, the witness Bennett had spent some hours, immediately preceding the commission of the offences, in the company of the appellant Smith, actually arriving at the premises with him. In our view, the evidence of visual identification was very strong and there was hardly very little room for a mistaken identification to have been made. In addition, in so far as the appellant Webster is concerned, the learned judge accepted the evidence of Bennett that he was threatened three times by Webster.

We agree with the learned judge that the evidence of visual identification of both appellants was sufficient for him to find that they were positively identified to the extent that he felt sure that they were the assailants.

(b) Voice identification

We agree with the submission of the appellants that the learned judge failed to warn himself as to the acceptance of unsupported voice identification and the necessary evidence to be advanced, e.g. knowledge of the voice and the circumstances of that knowledge. The learned judge failed to demonstrate that he was aware that the relevant principles, as set out in the case of ***Turnbull,*** are equally applicable to voice identification.

However, given the circumstances of this case, it would have made no difference to the learned judge's conclusion had he warned himself and as a result rejected the evidence that Webster said "Finish him finish him." The evidence of Bennett was strong circumstantial evidence that the appellant Webster participated in the commission of the offences. He went to the back of the premises with the appellant Smith, having spoken with Smith and having heard Smith make his comments about turning the yard into a murder yard. He had put on the socks on his hand just as Smith did. When he returned from the back, the shots having been fired, he told Smith "Let's go" and they both left. In addition, he threatened Bennett three times as to what may happen to him if he revealed what he had seen.

The words "Finish him finish him" therefore paled into insignificance, except as a part of the *res gestae* i.e. that one of Parchment's attackers did say

so. Who did mattered less, having regard to the visual identification, which was accepted by the learned judge after a careful analysis of the evidence.

This omission by the learned judge is by no means fatal to the convictions. In any event, were it necessary, we would be prepared to apply the proviso, as no miscarriage of justice occurred. In our opinion, the learned judge would have come to the same conclusion had he correctly directed himself on the issue of voice recognition.

For those reasons, we dismissed the appeal and affirmed the convictions and sentences.

E. Zacca, P.

M.R. Taylor, J.A.

I. Forte, J.A.