The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 10 of 2016

B E T W E E N:

ESTON JOELL

Appellant

-v-

THE QUEEN

Respondent

Before: **Baker, President**
Kay, JA
Bernard, JA

Appearances: Susan Mulligan, Christopher's, for the Appellant
Cindy Clarke and Takiyah Burgess-Simpson, Office of the Director for Public Prosecutions, for the Respondent

Date of Judgment: **6 November 2017**

REASONS

Non-disclosure of appellant's previous conviction – circumstances relating to prosecution's duty of disclosure

BERNARD JA
INTRODUCTION

1. On 13th June, 2016 the Appellant was convicted of the offence of Possession of a Prohibited Weapon, contrary to section 2(1)(a)(iv) of the Firearms Act 1973 ("the 1973 Act"), and of Possession of Ammunition without a Licence, contrary to section 3(1)(a) of the 1973 Act. He was sentenced to 12 years imprisonment on

count 1 (being in possession of the firearm), 12 years on count 2 (being in possession of the ammunition), and 12 years for possession of ammunition found in his house, all to run concurrently. The Appellant's conviction stemmed from possession of a firearm that was found in a bag which was in the possession of Lekan Scott, who was charged as a co-defendant. These are our reasons for dismissing his appeal against conviction.

BACKGROUND

2. On 1st September, 2015, Lekan Scott visited the home of the Appellant riding a motorcycle, registration number BO722, and left 12 minutes later. Police officers who had him under surveillance followed him along Middle Road in Paget, where he collided with another motorcycle. He escaped from the scene leaving the motorcycle and the property which he had in his possession. This included a brown bag in which the police discovered another grey bag, a bag of charcoal and a receipt. The grey bag contained an army colt 45 firearm with five rounds of .45 calibre ammunition which the police took into their possession.

3. On the next day, 2nd September, 2015, the Appellant's home was searched and a number of items were seized from a room. These included a black wooden box containing one .38 calibre SPL CNC spent casing, and fourteen rounds of F hollow point small calibre ammunition, a yellow OHMS envelope containing 38 RP 223 REM rifle rounds, and a push video 8 channel H 264 DVR CCTV recorder.

4. On Monday, 14th September, 2015, Lekan Scott was arrested for possession of a firearm. On Tuesday, 15th September, 2015 during further interviews with the police, Scott admitted that on 1st September, 2015 he was at the residence of the Appellant who asked him to carry an item to the Botanical Gardens where it would be collected by someone.

5. A forensic examination of the seized firearm revealed the Appellant's DNA on parts of it.

GROUNDS OF APPEAL

6. The grounds advanced by Ms. Mulligan were:

i) The Appellant's 25-year-old prior conviction for making a false statement to the police under the Motor Car Act 1951;

ii) The fact that the Crown and police had attended the Appellant's home and made certain observations and conducted certain experiments;

iii) By allowing the Crown to split its case and surprise the Appellant during cross-examination with evidence about bolts on a door and an experiment regarding whether one could hear a door knock from the downstairs portion of the Appellant's house;

iv) By not excluding the evidence of the Appellant's 25-year-old conviction for making a false statement to the police as being more prejudicial than probative;

v) By failing to give the jury an appropriate and adequate direction regarding the Appellant's good character;

vi) By first commenting on his own observations and or interpretation of what was transpiring on CCTV footage around the time when the defendants were allegedly engaged in exchanging a firearm and then refusing to permit Counsel for the Appellant to play the entire CCTV footage to the Appellant;

vii) By permitting the co-defendant's Counsel to suggest that the Appellant was a drug dealer without any foundation.

7. The issues at the heart of this appeal concern the non-disclosure of a previous conviction of the Appellant and the non-disclosure of a photograph as well as an experiment carried out at his house during the course of the trial. These gave rise to a number of complaints by the Appellant articulated as separate grounds of appeal, but all emanating from the same source.

8. It is not the prosecution's practice in Bermuda to disclose traffic convictions in routine disclosure in criminal cases. Accordingly the prosecution did not, in the course of pre-trial disclosure, disclose that the Appellant had a conviction in 1991 under the Motor Car Act 1951 for making a false statement to the police. The Co-defendant asked for a more detailed check on the Appellant's record and the prosecution supplied it to him but did not tell the Appellant.

9. During the evidence of D.S. Kenton Trott, the officer in the case, Ms. Mulligan asked him if the Appellant had no criminal record and Trott replied that to the best of his knowledge that was correct. On the other hand, he said the Co-defendant did have convictions. At this point Counsel for the Co-defendant showed Ms. Mulligan a print-out of the Appellant's conviction. Following further enquiries D.S. Trott said that the print-out had been certified as a true copy of a computer record, but that the original record had been destroyed. The Appellant's position was that he had no recollection of the conviction and that it had not been strictly proved, although it is difficult to see how the details on the record could have referred to anyone else. The trial judge had to balance the interests of the two defendants as the Appellant was attacking his Co-defendant's character. He was right to admit the evidence.

10. Whilst there is no evidence of bad faith on the part of the prosecution, they should have disclosed the 1991 traffic conviction to the Appellant at the same time that they disclosed it to the Co-defendant, and thus been even-handed between the two defendants. It is difficult, however, to see that the Appellant suffered any significant prejudice from the prosecutor's failure. Had his 1991 conviction been disclosed to the Appellant at the same time as it was disclosed to the Co-defendant, the element of surprise would have been avoided, but the Co-defendant would still have been permitted to introduce it. No details were available of the conviction and the Appellant was otherwise a person of previous good character.

11. At the summing-up the trial judge was again faced with the problem of being fair to each defendant in his character directions. His summation was appropriate to the circumstances of the case. He referred to the subject twice – first at page 18, line 25:

> "*You have heard it is the Crown's position that Mr. Joell has a previous conviction for giving the Police a false statement. Mr. Joell had not admitted that. He has said it was so long ago he can't even remember it. All right? So you may take and attach such weight as appropriate according to the direction that I have given you.*
>
> *You've heard - - I think you have the exhibit, it has on a name which matches his; it has on a date of birth which matches his; and it has on an address at a place which he, I think, admitted he previously lived.*
>
> *You must be careful when it comes to the issue of previous conviction, not to jump to any automatic conclusions that because the Defendant was convicted, or may have been convicted previously for offences, that he also, therefore, committed the offence, or offences, with which he is now charged.*
>
> *The only reason you have heard, or reasons you have heard about those convictions is because of this: Each Defendant attacked the character of the other - - that's one reason - - and therefore it is only proper that you should hear his character as well. That's one.*
>
> *But the purpose of the evidence is this: Only to be considered by you when it comes to the issue of considering his credibility. Not his guilt, but his credibility; that is, whether you believe him or disbelieve him on a particular piece of evidence. All right? That's what it goes to, nothing more, nothing less. All right? Otherwise it does not otherwise assist you to determine his guilt. Right? Good."*

The trial judge repeated this direction in like manner at page 34, line 11:

> *"Now let me revisit this good character, bad character issue. I have already given you a direction where I was dealing with the sympathy and - - sympathetic and prejudicial evidence about how you should approach the issue of the Defendant's alleged convictions. Right?... I think I do not need to repeat in any detail the bad character direction. I told you the only reason why you've heard it. I have told you why - - how to apply it."*

12. Now to the other issues which have arisen. When the police searched the Appellant's house on 2nd September they found the ammunition in a hidden room accessed from his bedroom. His case was that he had no knowledge of the items found there; the Co-defendant and others had access to this "secret room". He said he was not aware of the compartment in the wall where the ammunition was found. The Co-defendant's case was that on1st September he had gone to the Appellant's house to discuss employment. The Appellant had entered the secret room and returned with a plastic bag which he handed to him and asked him to take it to the Botanical Gardens, but never told him what was in the bag. The Appellant, on the other hand, said he had given nothing to the Co-defendant.

13. Whether the room in the Appellant's house was secret was an issue from the start of the trial. When D.C. Palmer gave evidence he was asked if there was any lock to the concealed room and he replied that he did not notice one. When D.C. Saints was cross-examined on behalf of the Co-defendant he was shown a photo and his attention drawn to what appeared to be bolt holes. He was asked if he had seen any bolts and replied that he didn't recall seeing any bolts, but it was possible. When the Appellant gave evidence he repeatedly said there were no locks on the doors to the room and maintained that position when cross-examined on behalf of the Co-defendant. When he was cross-examined by the Prosecution four days later Ms. Burgess showed him photographs that had been taken the previous day and plainly showed two locks, one on the top and one on the bottom of the inside of the door. The Appellant's response was that he had never noticed them. Ms. Christopher, who then represented the Appellant,

objected vigorously to the production of the photograph of which she had received no prior disclosure, but it was too late because the evidence was already before the jury before she was aware that it was a new photograph. The following day Miguel Pereira gave evidence of the taking of the photograph and the fact that there had been no changes to the property.

14. Two points arise. First, whether the photo should have been sprung on the Appellant's Counsel without prior notice while he was being cross-examined, and second, whether the evidence should have been admitted at all. As Toulson LJ said in *R v Grocott* [2011] EWCA Crim 1962 at para.14:

> "*The fundamental principles are that a defendant ought not to be ambushed and the prosecution should, as a matter of general principle present its entire case in one piece from the outset".*

15. As to the first point, Ms. Christopher should have been given prior notice by the Prosecution and been shown the photograph. This would have enabled her to make a more timely and considered objection, but it would have availed her little because the objection would not have succeeded and she would not have been able to show the photograph to the Appellant because he was already in the witness box in the course of his evidence. The second point is whether the photograph fell within the exception to the general principle and could be introduced as rebutting evidence under the *ex improviso* rule: see *R v Frost (1839)* 9 C&P, 129. As Watkins LJ said in *R v Hutchinson* (1985) 82 Cr. App R, 51 at p.59:

> *"The ex improviso principle has to be applied by the court with a recognition that the prosecution are expected to react reasonably to what may be suggested as pre-trial warnings of evidence likely to be given which calls for denial before-hand, and for that matter to suggestions put in cross-examination of their witnesses. They are not*

expected to take notice of fanciful and unreal statements no matter from what source they emanate."

16. The evidence of the photograph was properly admitted because of the Appellant's unforeseen assertions that there were no locks on the room.

17. The issue about the experiment arose because the Appellant gave evidence that when the Co-defendant had knocked on the door he was at the lower level, heard it and came up. The Co-defendant disputed this. On the same occasion that the photograph was taken of the locks on the door of the secret room, a police officer conducted an, admittedly not very scientific, experiment knocking on the front door while Mr. Pereira was at the lower level of the house. Mr. Pereira could not hear the knocking until the officer banged very hard. The experiment appears to have been carried out at the instigation of the Co-defendant. It had no direct relevance to the Prosecution's case. Its relevance was to test the credibility of the two defendants. The first that Ms. Christopher learned of it was during the cross-examination of Mr. Pereira by Counsel for the Co-defendant to which she objected, but which the trial judge rightly allowed no doubt balancing the competing interests of the two defendants. There is no doubt that Ms. Christopher's complaint was justifiable as the Prosecution did not disclose the details of the experiment to the Appellant. The fact that the Prosecution was not seeking to rely on the experiment did not absolve them from disclosing it to the Appellant.

18. Ms. Clarke has asked the Court for guidance should circumstances similar to the traffic conviction, the locks on the door and the experiment arise in future. It is advisable that where the Crown is prosecuting more than one defendant for the same or similar offences there is a duty to be even-handed, and ordinarily the same disclosure should be made to all defendants.

19. In the case of *R v Brown [1997] UKHL 33*, Lord Hope of Craighead in his judgment expressed the view that the rules of disclosure which have been developed by the common law owe their origin to the elementary right of every defendant to a fair trial; if a defendant is to have a fair trial he must have adequate notice of the case which is to be made against him. He concluded that if fairness demands disclosure, then a way of ensuring that disclosure must be found.

20. Several cases were cited in Lord Hope's judgment, but all referred to evidence which formed part of the prosecution's case but could be favourable to the defence. Reference was made to the case of *R v Keane[1994] 1 WLR, 746* where questions arose on how to determine whether and to what extent the material in the possession of the prosecution could be of assistance to the defendant. In determining this, one of the questions suggested by Jowitt, J in *R v Melvin* (unreported) 20 December, 1993, was whether it was relevant or possibly relevant to an issue in the case.

21. The same principle is applicable to the present case even though the new evidence came from a co-defendant but was known to the prosecution.

22. Ground 5 arises out of the judge's intervention when the Appellant was giving his evidence in chief. He questioned why it was necessary for the jury to see again the whole of a video tape that they had already seen during the prosecution's case that the firearm came into the Co-defendant's possession inside the house. Whilst a judge must allow a defendant giving his evidence in chief to give his account unhindered by unnecessary interruptions he has also an obligation to keep the trial moving and free from avoidable delay. The Appellant was able to tell the jury that what was to be seen on the video was a discussion with the Co-defendant and referred to by the judge in his summation. The judge's intervention caused no injustice to the Appellant.

23. The suggestion that the Appellant was a drug dealer came from the Co-defendant. This raised an issue that is typical in cases where there is a cut-

throat defence between two defendants. The judge dealt with it appropriately, first directing the jury as to the caution in weighing evidence by one defendant implicating the other and then reminding the jury that the Co-defendant had called no evidence to support his assertion that the Appellant was a drug dealer. Ms. Mulligan in her submissions accepted that this was not her strongest point. In reality there is nothing in it.

24. With regard to the trial judge commenting on the CCTV footage, he was free to do so, and used his discretion in relation to granting permission to have it played for the Appellant.

25. Having considered and reviewed the evidence and directions of the trial judge to the jury, and having analysed the issues which arose in the case, we dismissed the appeal.

D. P. Bernard

Bernard JA

Scott Baker

Baker P

Maurice Kay

Kay JA