COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCrApp. No. 195 of 2018

B E T W E E N

EMMANUEL ROLLE

Appellant

AND

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

BEFORE: **The Honourable Madam Justice Crane-Scott, JA**
The Honourable Mr. Justice Jones, JA
The Honourable Mr. Justice Evans, JA

APPEARANCES: **Mr. James Thompson, Counsel for the Appellant**
Ms. Stephanie Pintard, Counsel for the Respondent

DATES: **12 November 2019; 4 February 2020; 25 February 2020; 19 May 2020; 6 July 2020; 7 September 2020; 10 February 2021**

****

Criminal Appeal - Appeal against conviction - Appeal against sentence – Manslaughter – Attempted Murder – Dock Identification – Non-direction – Sentence Unduly harsh and severe - Proviso

On 24 January 2015, a gunman opened fire inside the G Spot Bar and Lounge, located on Faith Avenue North. Mr. Angelo Dorsett, Mr. Tameko Coleby and Mr. Victron Burrows all were shot. Mr. Dorsett died sometime after as a result of his injury. The appellant was arrested and charged with murder and the attempted murder of Mr. Coleby and Mr. Burrows. During the trial the appellant was identified whilst in the dock by a prosecution's witness. He was convicted of manslaughter and two counts of attempted murder. He has appealed his conviction and sentence on the grounds inter alia that **"the learned Judge erred in fact and law when she permitted the Respondent's witness, … to make a Dock Identification and failed in her summing up to warn the Jury about the undesirability of the Dock Identification of the Intended Appellant by this witness, thus, leading to a miscarriage of justice"** and also **that "the sentences imposed…. were unduly severe."**

Held: appeal dismissed, conviction and sentence is affirmed.

The trial judge was not necessarily in error in allowing the dock identification in the absence of an identification parade. However, the trial judge having admitted the dock identification should have warned the jury during the summing up, of the risk to the appellant connected with that type of identification. Furthermore, the trial judge ought to have pointed out to the jury the advantages associated with placing the appellant on an identification parade compared to a dock identification. The failure of the trial judge to give the required warnings amounted to a non-direction.

Stafford (Giselle) and Carter (Dave) v The State (1998) 53 WIR 417 applied
Donaldson Hall v Regina SCCrApp. & CAIS No. 165 of 2015 considered
Neymour v Attorney General (2010) SCCrApp. No.172 of 2010 considered
Williams (Noel) v The Queen [1997] 1 WLR. 548 applied
Maxo Tido v The Queen [2011] UKPC 16 applied
Fazal Mohammed v The State (1990) 37 WIR 438 considered

J U D G M E N T

Judgment delivered by the Honourable Mr. Justice Roy Jones JA:

Introduction

1. At a trial in the Supreme Court before Bethell, J. and a jury on 12 July 2017, the intended appellant was acquitted of murder and, in the alternative, found guilty of manslaughter and two (2) counts of attempted murder. He was sentenced to thirty (30) years' imprisonment on the charge of manslaughter and twenty (20) years imprisonment on each count of attempted murder. Having regard to time on remand the sentences were reduced to twenty-seven (27) years for the offence of manslaughter and seventeen (17) years for each count of attempted murder.

2. On 24 September 2018, the intended appellant filed a "Notice of Appeal" and on 26 May 2020, an amended Notice of Appeal and an Extension of Time application in support of his appeal. At the hearing before us counsel for the intended respondent withdrew their objection to the delay in filing the Notice of Appeal. We accordingly treat the hearing of this application for leave as the hearing of the substantive appeal.

3. The appellant has appealed against conviction and sentence. Four issues are raised on this appeal: (1) whether the conviction is unsafe and unsatisfactory where inadmissible prejudicial evidence was given (2) whether there was a failure to direct the jury on the lack of specific intent required for murder (3) whether the judge failed to direct the jury on the appellant's defence (4) whether the sentence was unduly harsh and severe.

The Case for the Prosecution

4. The prosecution's case is that on 24 January 2015, sometime after 11 pm, a fight ensued at the G Spot Bar and Lounge, located on Faith Avenue North. Following the altercation, the appellant, armed with a firearm, re-entered the establishment and opened fire inside the club. As a result, the deceased received a gunshot wound and succumbed to his injury. Furthermore, Tameko Coleby and Victron Burros also received gunshot injuries.

The Case for the Appellant

5. The appellant pleaded not guilty. At the trial the appellant did not give evidence, but he called his niece, Robin Ashley Taylor, as a defence witness. She said that she did not see the shooting inside the G Spot Nightclub since she had already gone outside the establishment and did not witness the shooting inside the same. But she did say that the appellant walked out the nightclub and left with her in her car.

The Appellant's Grounds of Appeal

6. The grounds of appeal filed were as follows:

> **"(1) That the Learned judge erred in fact in law when she allowed into evidence the hearsay statement of the investigating officer, Detective Inspector Randolph Deleveaux, who stated that, based on the evidence compiled, it could only be the Intended Appellant, thus, leading into a miscarriage of justice.**
>
> **(2) That the learned Judge erred in fact and law when she allowed into evidence the hearsay statements of the investigating officer, Detective Inspector Randolph Deleveaux, relative to the surveillance footage recorded at the G Spot Night Club, owned by Dexter Kerr, where he identifies the Intended Appellant, thus, leading to a miscarriage of justice.**
>
> **(3) That the learned Judge erred in fact and law when she permitted the Respondent's witness, Dexter Kerr, to make a Dock Identification and failed in her summing up to warn the Jury about the undesirability of the Dock Identification of the Intended Appellant by this witness, thus, leading to a miscarriage of justice.**
>
> **(4) That the learned Judge erred in fact and law when she failed to direct and inform the Jury in her summing up that the**

Respondent led no evidence to prove that the Identification Parade involving the Intended Appellant was fair and objective and, therefore, such evidence is unreliable.

(5) That the sentences imposed in (sic) the Intended Appellant were unduly severe."

Hearsay Evidence - Grounds One and Two

7. Under these two grounds the appellant complains that the judge below allowed inadmissible hearsay evidence from Detective Inspector Randolph Deleveaux to be given to the jury. In the first ground the appellant complains that Deleveaux, although not an eyewitness to the shooting inside the G Spot Nightclub was allowed say that the evidence compiled led to the appellant. The following exchange is taken from the transcript at page 824:13-27

"Q. Inspector Deleveaux, you mentioned several names in relation to this matter. Can you say why nobody else was charged in reference to this matter?

A. Well, all the information --

Q. In reference to the murder and attempted murder.

A. All the information that we compiled, all the evidence I compiled pointed to Emmanuel Rolle. We put that information and we sent that to the Attorney General's Office --

MR. CASH: My Lady, this is something for the jury.

THE COURT: Why weren't other persons Charged?

THE WITNESS: There is no evidence to suggest other persons to be charged"

8. Counsel for the appellant submitted that the evidence by Inspector Deleveaux was highly prejudicial and inadmissible hearsay as he was not an eyewitness to the shooting. Furthermore, it led to the conviction of the appellant. Counsel for the appellant relied on the case of **Fazal Mohammed v The State** (1990) 37 WIR 438 at page 438 which said that where inadmissible evidence was submitted on behalf of the prosecution, the correct approach is for the tribunal to ask itself, whether if the jury had not heard the inadmissible evidence, the only reasonable and proper verdict they could have returned is guilty.

9. In the second ground, the appellant complains that the trial judge was wrong to refer the jury in her summing up to Deleveaux's evidence showing the appellant surveillance footage from the G Spot Night Club as he was not an eyewitness to the shooting and it was hearsay and inadmissible (see transcript page 1016:3-12):

"Here now -- that is when you recall from the video you see Officer Deleveaux showing him on his phone what appears to be some sort of footage and he says.

"Here now I show to you a footage from that night in the club with you walking in the club with a gun in your hand.

"What do you have to say to that?

"Yes, sir.

"Where did you get the gun from?

"Did not wish to answer."

10. Transcript, page 802:20-32

"MR. CASH: This is Exhibit 6, my Lady.

THE COURT: Exhibit 6 played once more. Which one of the spots would you like to see?

MR. CASH: I would show him first number 6 to see if that assist him.

THE COURT: Exhibit 6 spot 6?

MR. CASH: Yes, spot 6.

(Tape played)

THE COURT: This is inside the club.

THE WITNESS: That's him right there (indicating).

THE COURT: That's him?

THE WITNESS: Yes."

11. Counsel for the appellant argues that the evidence from the surveillance footage should only have come from Dexter Kerr or any other eyewitness to the shooting. Furthermore, the trial judge should have warned the jury that Deleveaux's evidence about the appellant was prejudicial and inadmissible hearsay evidence. During the trial the following exchange took place regarding the identification of the appellant by Detective Inspector Randolph Deleveaux. Trial transcript pages 802:21-803:26:

"THE COURT: Exhibit 6 played once more. Which one of the spots would you like to see?

MR. CASH: I would show him first number 6 to see if that assist him.

THE COURT: Exhibit 6 spot 6?

MR. CASH: Yes, spot 6.

(Tape played)

THE COURT: This is inside the club.

THE WITNESS: That's him right there (indicating).

THE COURT: That's him?

THE WITNESS: Yes.

THE COURT: Can you play it from the beginning?

Spot 6 played.

THE WITNESS: That's him right there.

THE COURT: Just tell me. There is two men.

THE WITNESS: The first man that went out with the cigarette or cigar or whatever that is in his mouth.

THE COURT: That's him there?

THE WITNESS: That's him right there.

THE COURT: He's got something in his mouth.

THE WITNESS: Yes.

THE COURT: And he is sauntering to the door?

THE WITNESS: Yes. And then shortly thereafter Emmanuel Rolle will walk -- that's Emmanuel Rolle right there walk out behind him. That's after he already smashed the glass. Emmanuel Rolle already smashed the glass.

THE COURT: Witness points out the person he charged with possession of a firearm with intent to endanger life –

When you later caught up with him you said.

THE WITNESS: Yes, ma'am.

THE COURT: Some months later as Lashawn Bowe, the gentleman walking out with something in his mouth ahead of who he identifies as Emmanuel Rolle, the defendant in this matter."

12. When pressed by us as to his definition of hearsay, counsel for the appellant took the view that it is a statement by a third party who was not present when the statement was made. We do not agree that he gave a complete answer. We rely on the oft quoted passage from

the learned authors of **Phipson on Evidence, 14th ed., 1990, para. 21-02** which defined hearsay as:

> **"Former statements of any person, whether or ·not he is a witness in the proceedings, may not be given in evidence if the purpose is to tender them as evidence of the truth of the matters asserted in them. The rule at common law applies strictly to all classes of proceedings, and there is no special dispensation for the defendant in a criminal case".**

13. In addition, the learned authors of **Archbold 2005** gives the following definition of hearsay at paragraph 11-9:

> **"Evidence of a statement made to a witness ... may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made": Subramaniam v. Public Prosecutor[1956] 1 W.L.R. 956 at 969, PC; and Ratten v. R. Where, for example, the purpose is to tender the statement as evidence of the hearer's state of mind (see Subramaniam, ante), then it may be admissible as original evidence, i.e. the statement will be in issue or relevant for a reason quite independent of whether any assertions contained in the statement are true or false."**

14. However, in all the instances referred to us by counsel for the appellant, Detective Inspector Deleveaux made relevant factual statements as to his belief. Furthermore, there was no reliance by the respondent on any of the statements for the purpose of establishing the truth of what was said. The jury had the evidence before them and from the verdict were satisfied beyond reasonable doubt that the appellant committed the offences for which he was charged. There is no merit on either of these two grounds.

Dock Identification - Ground Three

15. On this ground, counsel for the appellant contended that the trial judge erred in allowing Dexter Kerr to identify the appellant for the first time from the dock on five occasions in the course of the trial. The following passage is taken from **Phipson on Evidence 19th Ed.** at para 15-14 where the learned authors speak to the usefulness of dock identification:

> **"For a witness to identify the accused as the person seen on a previous occasion as he or she stands in the dock is unsatisfactory, because the setting is highly suggestive, and the process involves no test of the witness's ability to distinguish between the accused and other people of similar appearance.**

Despite this, in summary proceedings it may sometimes be necessary to allow such identifications. In trials on indictment, however, this manner of identification is regarded as highly unsatisfactory, more so where a witness who failed to pick out the accused at an identification parade is then invited to make a dock identification. There is, however, no absolute rule that dock identifications are impermissible, nor that they are permissible in "only the most exceptional circumstances". When deciding whether to exclude evidence of a dock identification because of a failure to conduct a more reliable, formal, identification procedure it will be important for a trial judge to consider the extent to which the accused may have been disadvantaged by the failure and the reasons why a more reliable procedure was not used. Where a dock identification is permitted then the trial judge ought to give a direction on the weaknesses of the procedure, unless he or she considers that this would draw undue attention to what has occurred. The direction should specifically address the reasons why dock identifications are unsatisfactory, and a Turnbull direction as to the general risks associated with identification evidence will not be treated as a sufficient substitute."

16. Additionally, the learned authors of **Archbold 2005** have this to say on dock identifications at paragraph 14:42:

> **"…Although a trial judge retains a discretion to permit a dock identification, it is submitted that in practice the exercise of such discretion should not even be considered unless:**
>
> > **(a) a defendant has refused to comply with a formal request to attend an identification parade, and**
> >
> > **(b) none of the other identification procedures has been carried out as a result of the defendant's default"**

17. Counsel for the appellant gave the following instances in the trial transcript to illustrate the complaint under this ground of appeal. Trial transcript at page 663:5-13:

> **"Q. Who was getting beat up, a guy in a red shirt or guy in a green shirt?**
>
> **A. Manny was getting beat up.**
>
> **Q. No, you don't know nobody named Manny. Who was getting beat up the guy in a red shirt or --**
>
> **A. This same gentleman right here."**

18. Trial transcript, page 664:16-21:

> **"THE COURT: But he has also indicated that the person he saw getting beat up in the green shirt is the man in the box.**
>
> **THE WITNESS: I was there.**
>
> **THE COURT: Who he later found out to be Manny."**

19. Trial transcript, page 665:21-24:

> **"BY MR. CASH:**
>
> **Q. You signed to it.**
>
> **A. Me and him was there, the guy right there. Just how we here now we were there that night."**

20. Trial transcript, page 666:25-30:

> **"Q. And based on your -- what you gave to the police, you would have correlated this person as Manny as being the person in the red shirt.**
>
> **A. When I was there the person who I does call Manny is this guy right here, who in the box. That's who I called Manny, him right here."**

21. Trial transcript, page 667:16-20:

> **"A. Manny had on -- this gentleman right here had on a lime green shirt with a Jordan symbol. He had the gun in his hands. He had the gun and shoot the gun. He friends was also there. Whatever else happened was with his friends."**

22. However, the trial judge was not necessarily in error in allowing the dock identification in the absence of an identification parade. In **Maxo Tido v The Queen** [2011] UKPC 16 paragraph 17 the Privy Council had this to say:

> **"17. Dock identifications are not, of themselves automatically, inadmissible. In Aurelio Pop v The Queen [2003] UKPC 40 the Board that, even in the absence of a prior identification parade, a dock identification was admissible evidence, although, when admitted, it gave rise to significant requirements as to the directions that should be given to the jury to deal with the possible frailties of such evidence — see paras 9 et seq. In particular, the Board considered in that case that the failure to adhere to what was the normal practice in Belize of holding an identification parade should have led the judge to warn the jury**

of the dangers of identification without a parade. Delivering the advice of the Board, Lord Rodger of Earlsferry said at para 9:

> **'[The judge] should have gone on to warn the jury of the dangers of identification without a parade and should have explained to them the potential advantage of an inconclusive parade to a defendant such as the appellant. For these reasons, he should have explained, this kind of evidence was undesirable in principle and the jury would require to approach it with great care: R v Graham [1994] Crim LR 212 and Williams (Noel) v The Queen [1997] 1 WLR 548.'"**

23. On the issue of the directions by the trial judge, the respondent contends that no specific directions by the trial judge on dock identification were necessary. They argue that it was sufficient for the trial judge to direct the jury to consider the credibility of the witnesses. The direction given to the jury by the trial judge appears in the trial transcript, at page 994:13-16:

> **"In relation to Manny under cross-examination he said he pointed out who Manny was from the dock. He indicated he had never attended an identification parade, but he pointed him out. He said he didn't know his name was Manny until the rest of the people who were around was saying 'boy that's Manny.'"**

24. However, the trial judge having admitted the dock identification should have warned the jury during the summing up of the risk to the appellant connected with that type of identification. Furthermore, the trial judge ought to have pointed out to the jury the advantages associated with placing the appellant on an identification parade compared to a dock identification. This is how the trial judge dealt with the weaknesses in the dock identification at trial transcript page 970:4-13:

> **"Now, another specific weakness I must point out to you is the ability of the witness Dexter Kerr to pick out the person he saw that night was not tested by him in an identification parade as it was done with witness Alpha and witness Rigby. He claims that he did tell the police he can pick him out, but he was not given that opportunity or he did not attend an identification parade. You heard his evidence. He made identification from the dock. 'That is the defendant in the dock that I saw come into the club with a gun."**

25. In **Williams (Noel) v The Queen** [1997] 1 WLR. 548 at pages 554-55 the Privy Council took the view that although the dock identification of the appellant in that case was improper, the judge dealt with the matter correctly in his summing up. The following passage is taken from the judgment:

> **"…The witness volunteered his identification of the defendant in answer to two questions, one from prosecuting counsel and the other from the trial judge, neither of which had invited him to identify. Once that evidence was out, it was before the jury. What remained was for the trial judge to deal with the matter in an appropriate manner in his summing up. In their Lordships' opinion he said all that he could reasonably have been expected to do in the circumstances. He made it plain that this kind of evidence was undesirable, and that the normal and proper practice was to hold an identification parade. In the case of this witness there was no reason to think that that would not have been practicable and, as the trial judge pointed out, there was an absence of any explanation in the evidence as to why that had not been done. In the light of these observations the jury could have been in no doubt about the great care with which they were required to approach this evidence."**

26. The failure of the trial judge to give the required warnings amounted to a non-direction with the result that the appellant succeeds on this ground.

Identification Parade - Ground Four

27. Under this heading, the appellant contends that the trial judge erred when she failed to direct the jury on the absence of any evidence proving that the identification parade of the appellant was fair and objective. This, however, is not an accurate statement as the trial judge directed the jury on the necessity for fairness in the conduct of the parade in the following passages. First on page 983:29-32:

> **"And there were two witnesses for the Crown; witness Alpha who attended an identification parade on the 27th of January and Officer Rigby who attended an identification parade the following day."**

28. Then at page 984:1-13:

> **"An identification parade you have to be satisfied that every precaution was taken to exclude any unfairness of the risk knowing beforehand the identity of the person suspected. Now, I do know it is the defence's case as put to witness Rigby that he was told who to pick and told what to write and as I directed you earlier on unsubstantiated allegations. But you still, Members of the Jury, have to find whether the identification parades were conducted fairly. Based on the evidence led, and in particular as I go through it, the evidence of Officer Michael Johnson. And you also have to make sure that the witness's ability to recognize the accused was fairly and adequately tested."**

29. The second complaint of counsel for the appellant is that the direction of the trial judge was deficient as it gave no description of the participants in the parade involving the appellant. There was no need for this in the summing up as the description was given in evidence by Michael Johnson at page 424:8-10:

> **"He was then escorted onto the parade, which was made up of eight other individuals, all of the same age and characteristics as Mr. Rolle."**

30. There is no merit in this ground.

Sentence Unduly Harsh - Ground Five

31. In the final ground counsel for the appellant contends that the sentences imposed on the appellant were unduly severe. The appellant was sentenced to thirty (30) years for manslaughter, reduced to 27 years for his prior remand of three years. For his conviction for two counts of attempted murder, he was sentenced to twenty (20) years, reduced to 17 years for his prior remand. During the sentencing hearing it was disclosed that the appellant had antecedents and in interviews showed no remorse.

32. Counsel for the appellant contends that the sentence of twenty-seven (27) years imposed on the appellant should be reduced to twenty (20) years taking into consideration the period of incarceration since the date of conviction. The appellant relied on the case of **Neymour v Attorney General** (2010) SCCrApp. No.172 of 2010 in support of his contention. In that case, the appellant was not provoked but was convicted of the offense of manslaughter. The court said at paragraph 2:

> **"2. On 4 November 2012 the appellant was convicted of manslaughter by virtue of provocation after a trial before Snr. Justice Jon Isaacs sitting with a jury. On the 12 November he was sentenced to a term of five years imprisonment. Against his conviction he has appealed. The Attorney General pursuant to the provisions of section 12(3) of the Court of Appeal Act Chapter 52 has appealed the leniency of the sentence."**

33. The court in **Neymour** took the view at paragraph 44 that:

> **"44. …we vary the sentence of 5 years and impose a sentence of 20 years. The sentence will begin from the date of conviction."**

34. This Court has a discretion whether to interfere with the sentence imposed by the trial judge. However, prior to doing so we must be satisfied that the sentence is unduly harsh or excessive. In this case, it cannot be said that the sentence given by the trial judge in the court below was unduly severe with the result that this ground fails.

Application of the Proviso

35. Having regard to our conclusion on ground four in this appeal, it is necessary to consider the application of the proviso. Counsel for the respondent asks that we apply the proviso to ground 4 given the cogency of the evidence of the other witnesses at the trial. They relied on the case of **Donaldson Hall v Regina** SCCrApp. & CAIS No. 165 of 2015.

36. Section 13 of the Court of Appeal Act provides that:

> **"13. (1) After the coming into operation of this section, the court on any such appeal against conviction shall allow the appeal if the court thinks that the verdict should be set aside on the grounds that —**
>
> > **(a) under all the circumstances of the case it is unsafe or unsatisfactory;**
> >
> > **(b) it is unreasonable or cannot be supported having regard to the evidence;**
> >
> > **(c) there was a wrong decision or misdirection on any question of law or fact;**
> >
> > **(d) in the course of the trial, there was a material illegality or irregularity substantially affecting the merits of the case; or**
> >
> > **(e) the appellant did not receive a fair trial,**
>
> **and in any other case shall dismiss the appeal:**
>
> **Provided that the court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if the court considers that no miscarriage of justice has actually occurred."**

37. In **Stafford (Giselle) and Carter (Dave) v The State** (1998) 53 WIR 417 the court set out the test in the application of the proviso:

> **"The test which must be applied to the application of the proviso is whether, if the jury had been properly directed, they would inevitably have come to the same conclusion upon a review of all the evidence: see *Woolmington v. Director of Public Prosecutions* [1935] AC 462, per Lord Sankey L.C. at p. 482. In *Stirland v. Director of Public Prosecutions* [1944] A.C. 315 at p. 321 Lord Simon said that the provision assumed "a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict". As he explained later on the same page, where the verdict is criticised**

> **on the ground that the jury were permitted to consider inadmissible evidence, the question is whether no reasonable jury, after a proper summing up, could have failed to convict the appellant on the rest of the evidence to which no objection could be taken on the ground of its inadmissibility. Where the verdict is criticised on the ground of a misdirection such as that in the present case, and no question has been raised about the admission of inadmissible evidence, the application of the proviso will depend upon an examination of the whole of the facts which were before the jury in the evidence."**

38. Having regard to the nature of the evidence in this case, we take the view that a reasonable jury would have returned the same verdict if the trial judge gave the required directions to the jury on dock identification. In our view, this error did not diminish the strength of the identification evidence from the witnesses in this case. The evidence against the appellant was admissible and overwhelming and we take the view that this is a proper case for the application of the proviso to s.13(1) of the Court of Appeal Act. Accordingly, we dismiss the appellant's appeal, and affirm the conviction and sentence in the court below

The Honourable Mr. Justice Jones, JA

The Honourable Madam Justice Crane-Scott, JA

The Honourable Mr. Justice Evans, JA