

IN THE COURT OF APPEAL OF BELIZE AD 2015

CRIMINAL APPEAL NO 19 OF 2013

MARVIN CRUZ REYES

Appellant

v

THE QUEEN

Respondent

BEFORE

The Hon Mr Justice Sir Manuel Sosa

President

The Hon Mr Justice Samuel Awich

Justice of Appeal

The Hon Mr Justice Murrio Ducille

Justice of Appeal

B Neal for the appellant.

L Willis, Senior Crown Counsel, and L Banner, Crown Counsel, for the respondent.

18 June 2015 and 18 March 2016.

DUCILLE JA

[1] Between the 6th and 11th of November, 2013 before Gonzalez J sitting with a Jury, the Appellant was convicted on an indictment for one count of attempted murder. He was sentenced to a term of imprisonment for 15 years. We heard his appeal against conviction and sentence on 18th June, 2015.

[2] The brief facts are that on the 26th of August, 2007, Kareem Wright was on his way home accompanied by two female friends namely Rashawn Garbutt and one Stephanie after leaving a night club named "Club Next."

[3] They were walking and at Ebony and Sarstoon Streets, Kareem Wright saw the Appellant in the company of some other men standing on Sarstoon Street.

[4] The Appellant requested to speak to Kareem and was about three to four feet away with his right hand pushed in the area of the front of his pants. Kareem attempted to go to the Appellant but was pulled back by Rashawn who said that she would call the police. The Appellant pulled out a gun from his pants waist and fired a shot in the air. Rashawn and Stephanie ran in one direction and Kareem ran in opposite direction.

[5] Kareem heard two more shots and then he heard Rashawn screamed. He turned back to see what was happening when he saw the Appellant walking towards him. The Appellant fired a shot which caught him on the right side of his neck and as a result he fell on the ground.

[6] The Appellant filed ten grounds of appeal, withdrew ground three and the court invited the Respondent to make submissions with respect to the remaining grounds except for grounds four and six.

[7] The first ground argued by Mr. Neal for the Appellant was that the Learned Trial Judge erred in failing to direct the Jury to disregard the prejudicial statement of the witness Rashawn Garbutt that "by answering this question my life is at risk."

It is to be noted that this was a spontaneous utterance by the witness which was immediately addressed by the Learned Trial Judge. Further in his summing up in reference to the same point he reminded the Jury that the witness said she did not see the Appellant shoot Kareem because she had reached home. This could only have been beneficial to the Appellant rather to his detriment. In the circumstances this ground fails.

[8] Learned Counsel for the Appellant raised ground two that the Learned Trial Judge erred by soliciting improper responses from the prosecution's main witness Rashawn Garbutt during the course of the trial which amounted to a material irregularity. Counsel for the Appellant indicated that this complaint arose from the following passages of the trial

THE COURT: Ask her to read that again because I -

THE PROSECUTION: Your Honour, that's the section that I showed the Marshall, My Lord.

THE COURT: Did you read that portion from "our way home" right up to Kareem run up Sarstoon Street? Did you read all that area, that portion from the statement just now?

THE WITNESS: Yes.

Q: Did you say on that part that you see the accused fired a shot in the air?

A: We the walk and --

Q: Did you see him fire a shot in the air?

THE COURT: I think if you push, you see you have not declared her hostile yet. So the question has to be favour this way, "can you say whether or not that you saw the accused fire a shot in the air"? "Can you say whether or not"

Q: Can you tell us whether or not you saw the accused fire a shot in the air on that morning?

A: No cause my back turned.

Q: And can you tell us whether or not you saw the accused while running fired two more shots in your direction?

A: I can't say. I heard the shots because I nuh the look back.

THE PROSECUTION: My Lord, at this time the Crown -

THE COURT: You didn't see him fire the other two shots because what?

THE WITNESS: Because I the walk. I nuh see who fired the two shots because I the walk. I nuh the look back fi see anybody.

THE COURT: Okay. So you were walking and he was behind you?

THE WITNESS: Well three ah we mi gwen.

THE COURT: Was he behind you? Yes or no?

THE WITNESS: We leave him behind.

THE COURT: And when you heard the shot he was still behind you but you were not looking backwards?

THE WITNESS: No.

THE COURT: Yes

THE PROSECUTION: My Lord, the Crown makes an application that the witness be treated as a hostile witness.

THE COURT: We declare the witness hostile for this portion of the evidence.

THE PROSECUTION: Guided, My Lord.

THE COURT: Yes, okay.

Q: Witness, in your statement you gave the police, didn't you tell the police that you saw Marvin came down the fence and it was then that he pulled out a hand gun and fired a shot in the air?

A: Read it over please?

Q: That it was then that he pulled out a handgun and fired a shot in the air.

THE COURT: Did she admit that this is her statement?

THE PROSECUTION: Yes, My Lord, she admitted earlier.

THE COURT: And she said that's her signature?

THE PROSECUTION: No, My Lord, My Lord, may the witness be shown the statement?

THE COURT: Just show her the statement.

THE PROSECUTION: Do you see a signature to the bottom of the paper?

THE COURT: Is that the statement

THE WITNESS: Yes.

THE COURT: You see the signature to the back of it?

THE WITNESS: Yes

THE COURT: Can you say when you gave that to the police? The indication is that you gave it to the police on the 26th of August, 2007, is that so? Is that the statement that you gave to the police on the 26th of August, 2007 around 2:15 in the morning?

THE WITNESS: Yes.

THE COURT: Okay, go ahead now.

THE PROSECUTION: Guided, My Lord. And in that statement you gave the police on August 26th, 2007 you mention that you saw when the accused came down of the fence and started to walk behind us saying to Kareem to pull up, however we did not stop, and this is the important part, and it was then that he pulled out a hand gun and fired a shot in the air. Did you say that to the police? A simple yes or no would do. Do you recall saying that to the police? Very well, you also mention to the police --

THE COURT: What did she say?

THE PROSECUTION: She didn't answer, My Lord.

THE COURT: She didn't answer? She has to answer. You have to answer whether or not you told it to the police. He is quoting from the statement you told the police so you have to say whether you told that to the police or whether you didn't tell that to the police. Yes so what's your answer?

THE WITNESS: Yes.

THE COURT: Yes.

THE PROSECUTION: You also told the police that "me" referring to yourself ran into Courtenay Crescent while Kareem ran up Sarstoon Street? Yes?

THE WITNESS: Uh-huh.

THE PROSECUTION: You also inform the police that "while we were running he (the accused) fired two more shots."

THE COURT: Mr. Banner you told me that you want the accused to refresh her memory up to line twenty in the application the treat her as hostile. I asked you if you wanted her to be treated as a hostile witness from "on our way home" right up to Sarstoon Street. You said yes.

THE PROSECUTION: That's line twenty, My Lord.

THE COURT: You can't go outside that. Okay but I stop at Sarstoon Street and you said yes. Okay since you say 20, I'll allow you to ask that one more question.

Q: Did you tell the police that while you were running he (the accused) fired two more shots?

A: I said yes already.

Q: You said yes? Thank you.

THE PROSECUTION: You Honour, I have no further questions.

THE COURT: Any questions to ask the witness, Reyes?

THE ACCUSED: (Inaudible)

THE COURT: What's that? Talk aloud man. I can't hear you. We don't have speakers in here, you see. It's a public hearing. Talk loud you know like when you talk on the street. "Buay weh that?" Talk like that man. Go through.

CROSS-EXAMINATION OF RASHAWN GARBUTT BY MARVIN CRUZ REYES (THE ACCUSED)

Q. THE ACCUSED: RaShawn, did you see me haul out any gun from my side, point it in the air and fired any shots?

THE COURT: You understood the question?

THE WITNESS: Yes.

THE COURT: Well answer the question. What's your answer? Did you see the accused pull the gun and fire it in the air and then fire shots afterwards? Did you see that? Yes or no? Remember you are here to tell the truth, sworn to tell the truth and nothing but the truth so help me God. Did you or did you not see the accused fire one shot in the air while you were running and then you hear two more shots fired? The answer could only be yes or no. I will not wait the whole afternoon for you to answer. You don't answer the question when I tell you to answer it, I will tell you thank you for contempt of court and send you to prison overnight and bring you back tomorrow, see if then you will remember. Once I tell you answer and you refuse to answer, you are in contempt of court disobeying a court order. I will send you to Hattieville, okay, so go ahead.

THE WITNESS: I mean by answering this question my life is at risk.

THE COURT: That is not my concern whether your life is at risk. My concern is for you to tell the truth. You are a witness for something that happened and now you are to say whether or not you saw the person fire the three shots.

THE WITNESS: All right, yes.

THE COURT: I am going to write "I did not want to answer because my life was at risk." Okay, any other question?

Q: You see me shot Kareem?

A: I nuh see you shot Kareem because I mi done reach home. I can't say I see you shot Kareem because I me done reach home.

THE COURT: The fact, Reyes, the witness had said that she was told by someone that Kareem got shot. So she never said she saw you shot Kareem. What she had said was that she saw you shooting in the air. While she was walking, you were behind her and then she heard two more shots. So she didn't see you shot Kareem. Any other questions?

THE ACCUSED: No other questions, Your Honour.

THE COURT: Any re examination?

THE PROSECUTION: No, My Lord.

THE COURT: Okay, now let me ask you witness, there seem to be two positions here, two contradictory positions, two of them cannot be true. First you said you said you could not have seen the accused shoot in the air. You could not have seen him shoot two times because you were walking towards your home and he was coming behind you and you were not looking backwards. You remember you say that? But to the police you said and in quote in details "In this scene the accused shoot in the air and shoot two times." Which one of two versions is the truth? Two of them can't be the truth. Which one is the truth?

THE WITNESS: Shoot one in ah the air and two behind.

THE COURT: What's that?

THE WITNESS: Shoot one in ah the air and two behind.

THE COURT: Those are true? But if you were walking going towards your home and he was walking behind, how you could see him fire the shots? Your back is towards him. Can you see behind you?

THE WITNESS: No.

THE COURT: So how you know it was him who fired the shots?

THE WITNESS: He dah the only one left behind me.

THE COURT: Okay, I am asking these questions because the accused is unrepresented so I have to start to give some assistance to him to ensure that there is fair play and justice in this case. How you know he was the only one behind you? You were not looking behind you.

THE WITNESS: Because he was the only one I was paying attention to.

THE COURT: He is behind you. You say you were not looking behind you. You saw him coming behind you. Do you know whether or not somebody else had joined him? You know if somebody else had come out and fired another shot?

THE WITNESS: No.

THE COURT: So how you know? Why are you then saying it was he because he was behind you? You understand? If you can't answer the question, don't answer it okay. Can you answer that question?

THE WITNESS: No.

THE COURT: Okay, now I think the Jury wants to ask you a question. When you first saw Kareem, no not Kareem, Marvin Reyes sitting on a fence, can you say whether or not you saw him taking out anything from his pants waist?

THE WITNESS: A gun.

THE COURT: What?

THE WITNESS: A gun.

THE COURT: A gun. At what point did you see him do that? When did you see him do that?

THE WITNESS: When we the walk off.

[9] In a Jury trial, any question of law that arises should be considered in the absence of the Jury as questions of law are for the Judge as opposed to facts which are to be considered by the Jury.

[10] From the passage referred to by Counsel for the Appellant, it is unclear as to whether there was an application made for the witness to be treated as a hostile witness. It seems to us that the questions which were put to her as a means of contradicting her amounted to the prosecution cross-examining its own witness. This ought not to have been permitted by the Learned Trial Judge. Considering the nature of the evidence given by ROSHAWN GARBUTT it could only have benefitted the Appellant and in that regard we see no merit in this ground.

[11] Ground three was withdrawn by the Appellant.

[12] In relation to ground four the appellant complained that the Learned Trial Judge erred in directing the Jury that "And if somebody shot you to the side of the neck more to the front, the suggestion is that that person must have been frontwards to you, not behind you. The implication of that is that Kareem Wright must have seen his assailant or you may find he may have seen his assailant."

The Learned Trial Judge is entitled to express his views on the facts. The Jury is the trier of the facts and was at liberty to reject whatever views that the Judge may have expressed. We find no merit in this ground which therefore fails.

[13] In Ground 5 Counsel for the Appellant argued that the Learned Trial Judge erred in quoting to the Jury portions of the witness Rashawn Garbutt's statement to the police even though it was not adduced in evidence in the trial, thereby leading to a miscarriage of justice.

[14] It is unfortunate that the Learned Trial Judge read from the statement to the Jury. However, the substance of what was read was before the Jury.

[15] It cannot be said that the Learned Trial Judge in his direction to the Jury displayed any unfairness to the Appellant in that regard. He emphasized the gist of the cross-examination of the appellant when he said:

"Now in cross-examination by the accused she said, "I did see the person fire three shots." "I did see the person fire three shots." Remember the

whole time she is saying she did not see and indeed, members of the Jury, if you follow the evidence, she could not have seen because the person was coming behind her. You can't see what's behind you unless you turn back, you look back. But she said she no turn back. She didn't look back. So how could she see him? But when she was cross-examined by the accused she said, "I did see the person fire three shots. I didn't want to answer in court because my life is at risk." Then to another question by the accused she said, "I did not see you shot Kareem because I had reached home. "And of course the evidence bears out that she didn't see when Kareem was shot."

We see no merit in this ground.

[16] Ground 6 is that the Learned Trial Judge erred when he failed to advise the Appellant of the importance of obtaining legal representation for his trial and failed to adjourn the trial to enable representation to be obtained.

[17] It cannot be overlooked that the particulars of the charge concerned the 26th day of August, 2007 and the trial commenced on the 6th day of November, 2013. By a simple calculation this was in excess of five years. From the time of his arrest, the Appellant would have become acquainted with his right to have counsel of his choice. It is shocking that a ground of this nature would now be advanced by counsel for the Appellant. We see no merit in this ground given these circumstances.

[18] The Appellant in ground seven complained that the learned Trial Judge by saying "I will not insist that you say anything but I need to advise you that it may work to your disadvantage if you don't say anything. You still don't want to say anything?"

[19] The import of that ground is that the Learned Trial Judge failed to offer proper assistance to the Appellant during his trial as he was unrepresented and he failed to provide sufficient explanations and information as to the appellant's rights as there is a duty on the Learned Trial Judge to advise and assist an unrepresented accused.

[20] The Court of Appeal in Botswana in the case of *Nieklas Willem v The State* No. CLCLB-092-2009 addressed the duty of Judicial Officers to advise unrepresented accused persons of their procedural rights.

[21] In the instant case it can be said that the Learned Trial Judge was overly generous in his assistance to the Appellant. For those reasons, this ground fails.

[22] Ground eight concerned the Learned Trial Judge making an error in not excusing the Jury to determine whether the witness Rashawn Garbutt ought to have been treated as a hostile witness.

[23] Counsel for the prosecution did in fact make an application to the Judge for the witness to be treated as being hostile in the absence of the Jury. At that stage it was the Learned Trial Judge's view that there was no need for that as the prosecutor was not getting the answers required as he was not asking the proper questions.

[24] From the evidence led by the prosecution it was apparent that the witness may have been an inconsistent witness but not necessarily hostile. Consequently, the Learned Trial Judge did not have an issue of law to be resolved which necessitated the Jury to be absent. As he quite rightly observed it was straight forward. For those reasons this ground fails.

[25] For Ground nine the Appellant's contention was that the Learned Trial Judge erred in allowing the Prosecution to treat the witness Rashawn Garbutt as hostile and to allow cross-examination of her on her police statement. The observation is that the substance of what transpired before the Learned Trial Judge was nothing more than the witness being inconsistent in her testimony. In the circumstances this ground also fails.

[26] The tenth ground is that the Learned Trial Judge erred when he allowed the witness Rashawn Garbutt to refresh her memory from her notes since she had not alleged that her recollection of any fact in respect of which she was required to testify was imperfect.

[27] It must be noted that a witness testifying in court is not a memory test. It is quite permissible that the witness could be shown her witness statement once it had been made sufficiently contemporaneously with the events it recounted. The document was only used to refresh the witness' recollection and was not admitted as evidence of the facts. This ground also fails.

[28] For the above reasons the appeal is dismissed. The conviction and sentence are affirmed.

SIR MANUEL SOSA

AWICH JA

DUCILLE JA