IN THE COURT OF APPEAL OF BELIZE A.D., 2023

CRIMINAL APPEAL NO.10 OF 2018

ANDREW WILLOUGHBY **APPELLANT**

AND

THE KING **RESPONDENT**

BEFORE

The Hon Madam Justice Hafiz-Bertram	-	President
The Hon Madam Justice Woodstock-Riley	-	Justice of Appeal
The Hon Madam Justice Minott-Phillips	-	Justice of Appeal

Mr. Leeroy Banner for the appellant.
Mrs. Cheryl-Lynn Vidal SC, Director of Public Prosecutions for the respondent.

Date of hearing: 24 October 2022
Date of Promulgation: 17 April 2023

REASONS FOR JUDGMENT

WOODSTOCK-RILEY, JA

[1] On the hearing of this Appeal the Appeal was dismissed and indication given that the reasons would be given in writing. We do so now.

INTRODUCTION

[2] The Appellant was convicted of the murder of Daniel Matura Jr. which occurred on the 21st day of May 2012. On the 13th day of March 2019, he was sentenced to life in prison, with the possibility of parole in twenty-five years.

BACKGROUND

[3] The case for the Respondent was that on the 21st day of May 2012, the Appellant, while armed with a firearm, fired around eight shots towards Brandon Taylor and Roy Felix. That the Appellant missed his intended targets; however, two of the shots that were fired caught Daniel Matura Jr in his chest and hand, resulting in his death.

[4] The trial was conducted by the Judge without a jury. The Appellant gave a caution statement to the police which placed the Appellant on the scene and admitting to being the shooter. The prosecution called fifteen witnesses and the accused gave an unsworn statement from the dock.

The Trial Judgement[1]

[5] The Trial Judge found the first two elements of the offence charged, that Daniel Matura was dead, and that he died as a result of harm, were made out and were not contentious. With regard to the identification of the Appellant as the person who caused the deadly harm the Trial Judge found this evidence emanated from the testimony of Gregory Ferguson and the circumstantial evidence of Eric Reid and Sherla Cocom. That all three of those witnesses were truthful and were consistent on the salient points with respect to identification as well as their account of the details of the shooting incident.

[6] Further, that the harm the Appellant inflicted was unlawful and that it was intentionally or negligently caused without justification. The justification put forward by the accused was that of

[1] Para 59-61 of Judgment, page 790 of ROA)

self defence, which the Trial Judge held based on the evidence before the court was not substantiated and failed.

[7] The Trial Judge also found that at the time the Appellant inflicted the unlawful harm upon Daniel Matura, his specific intent was to cause death to Brandon Taylor. This intent could be inferred from the fact that Andrew Willoughby fired eight shots at Brandon Taylor. That the reasonable inference when you fire that many shots at a person is that the intent is to cause death and the principle of "transferred malice" as an element of the crime could be relied on.

[8] The Appellant was found guilty of the murder of Daniel David Matura Jr.

[9] Grounds of Appeal

The grounds of appeal which the Appellant filed were,

(1) the learned trial judge erred in law by admitting into evidence the caution statement that was given by the appellant without first ascertaining whether the conditions set out in section 90 of the Evidence Act were met;

(2) the learned trial judge allowed the respondent's application under section 123 of the Indictable Procedure Act without considering the prejudicial impact it would have had on the appellant;

(3) the learned trial judge erred in law as she failed to warn herself as to how she should treat with Sgt Jose Zetina's unsworn and untested statement;

(4) the learned trial judge did not sufficiently address her mind to the weaknesses in the identification evidence and erred when she held that each witness saw the shooter for a minimum of two minutes and

(5) the learned judge erred in finding that the appellant had the specific intention to kill Brandon Taylor and Roy Felix when he fired those six to seven shots towards them.

GROUND 1

The learned trial judge erred in law by admitting into evidence the caution statement that was given by the Applicant without first ascertaining whether the conditions set out in section 90 (2) of the Evidence Act, Chapter 95 of the Substantive Laws of Belize, R. E. 2000 were met.

[10] The Appellant had given a caution statement to the police which placed him at the scene and he admitted being the shooter. On the issue of admission, Counsel for the Appellant before us at the hearing of the Appeal conceded that the statement *'was not admitted at that stage*' and with regard to the Trial Judge's statements on the caution statement that *'it was not a ruling per se but it also shows her ladyship's mind was already made up before hearing from the recorder of the statement and before hearing from the accused himself*'.

[11] Counsel was referring to remarks made by the Trial Judge during the discussion on the caution statement. He points out in his submissions that the trial judge noted that the Crown had '*put on enough witnesses and put enough questions to the witnesses that they brought to, in my mind, prove affirmatively what they were saying'*. Counsel also cited part of a testy exchange '*the crown already put on their witnesses. He put the questions that you are challenging so they have affirmatively made their case. You don't get to determine which witnesses the Prosecution is going to use to make their case. Now if you have witnesses that you want to defeat the prosecution's case, the obligation is, you can't just sit back and say, well the prosecution have to do this and have to do that. They have met their burden'*. Counsel for the Respondent in response submissions asserts the remarks reflect the Trial Judge was stating that the Crown met its evidential burden and was not saying she had admitted the statement.

[12 The way in which it is stated by the Trial Judge and the point of time during the trial that it was stated would have raised some concern which no doubt founded this ground of appeal. However, as Counsel conceded at the hearing, the caution statement was not admitted 'at that stage' and the defence subsequently had the opportunity to challenge the admissibility of the

statement and as the trial judge put it 'doggedly' cross examine on the allegation that the accused was beaten to give the statement.

[13] Counsel for the Respondent also points out that both parties had the opportunity to address the court on the issue and that Counsel for the Appellant had addressed the judge, at length, on admissibility of the statement, concluding,

> "*My Lady, the law is saying that you should not…Your Ladyship should not assume that nothing untoward happened and for those reasons, My Lady, we submit with respect that the burden was not satisfied. The Crown did not prove affirmatively in accordance to section 90(2) of the Evidence Act, My Lady (sic).*"

[14] Section 90 of the Evidence Act provides:

> *"(1) An admission at any time by a person charged with the commission of any crime or offence which states, or suggests that inference, that he committed the crime or offence may be admitted in evidence against him as to the facts stated or suggested, if such admission was freely and voluntarily made.*
>
> *(2) Before such admission is received in evidence that prosecution must prove affirmatively to the satisfaction of the judge that it was not induced by any promise of favour or advantage or by use of fear, threat or pressure by or on behalf of a person in authority."*

[15] In her judgement, the learned trial judge refers to considering whether the requirements of Section 90 of the Evidence Act had been met by the prosecution, and reviewed all the relevant evidence in making her determination [2],

> *"[34] Having heard the testimony of all the officers as well as Justice of the Peace involved regarding all the circumstances surrounding the taking of the caution*

[2] Page 779 of the Record

statement from the accused on the 21st of May 2012 I am of the view that the Crown affirmatively discharged its duty pursuant to section 90 of the Evidence Act mentioned above to the extent that I am satisfied it was not induced by any promise of favour or advantage or by use of fear, threat or pressure by or on behalf of any person in authority.

…

[36] Both witnesses Mr. Modesto Madrid, and Sgt. Carmelito Cawich were cross examined on the issues of the voluntariness of the statement, as well as the quality of the caution that was administered.

[37] In all the circumstances, I find that the caution administered by Sargeant Carmelito Cawich to the accused contained sufficient information to convey to him that there was no requirement for him to say anything but, if he did so, it will be written down and may be given in evidence. I am also satisfied that the accused was informed of his right to an attorney and to have a family member present.

[16] The Trial Judge saw and heard the witnesses and cross examination, her decision was ultimately made after the evidence was received. She had the foundation on which to make such a determination and we saw no basis to interfere with the finding of the Trial Judge on the admissibility of the statement.

GROUNDS 2 and 3

The Learned Trial Judge allowed the Respondent's application under section 123 of the Indictable Procedure Act without considering the prejudicial impact it would have on the Applicant.

The Learned Trial Judge erred in law as she failed to warn herself as to how she should treat with Sgt. Jose Zetina's unsworn and untested statement.

[17] The Crown made an application for the statement of Sgt. Zetina to be read into evidence, pursuant to section 123 of the Indictable Procedure Act. The Crown's application was made under the ground that the witness is deceased. Pursuant to Section 123 of the Indictable Procedure Act, the statement of a deceased witness can be admitted into evidence; however, the Court must first be satisfied that the Accused would not be materially prejudiced by the admission of that statement.

[18] The Appellant submitted that the learned trial judge did not address her mind as to whether the admission of the statement would have been prejudicial to the Appellant. That the Appellant was prejudiced by the statement being admitted as he was deprived of being able to cross-examine and put his allegations of inducement, assault and the circumstances that led to him giving the caution statement. Further, that the Statement was admitted as of right, and without any consideration of the prejudicial impact it would have on the Appellant. That the Trial Judge merely acted as a 'rubber stamp' in granting the Crown's application to tender Sgt. Zetina's statement once the Crown proved that he was deceased.

[19] The Transcripts indicate that the Appellant was able to put forward his account that Sgt. Zetina was part of a group of officers who assaulted him and induced him to give a statement. The Trial Judge noted he was able to question the two other officers, Grinage and Dawson, whom he said were along with Sgt. Zetina, with a view towards confirming his allegation. The Trial Judge noted he did not allude to anything done by Sgt. Zetina in the absence of these two officers. In the circumstances it was reasonable to conclude that the mere fact that he was unable to cross-examine Sgt. Zetina did not materially prejudice him and render the statement inadmissible.

[20] The Appellant asserts having admitted the unsworn statement into evidence, the learned Trial Judge did not address her mind as to what weight she should give the statement. She simply "*accepted the evidence of Zetina's statement*". As noted, the evidence of the other two officers allegedly involved was given and of particular significance was that the statement of the Appellant was not the primary or sole evidence in the case that led to the conviction. The extent to which a Trial Judge has to 'warn' herself and detail the considerations in coming to a decision is addressed in greater detail in response to Ground 4. Suffice to say nothing on the record shows a failure to make the relevant considerations.

GROUND 4

The Learned Trial Judge did not sufficiently address her mind to the weakness in the identification evidence and erred when she held that each witness saw the shooter for a minimum of two (2) minutes.

[21] The Appellant submitted that there were weaknesses in the identification evidence against the Appellant, and those weaknesses were not adequately addressed by the learned trial judge. Referring to the distance the witnesses were, the angle of their observations, the time they would have to observe and 'inconsistencies' in what was testified to in court against their witness statements.

[22] The Appellant further submitted that the trial judge should have analyzed the identification evidence in greater detail and highlighted the weakness in the evidence. It has been established that a judge sitting without a jury need not detail every factor considered when coming to a decision. As cited by the Respondent, in ***Dioncicio Salazar v The Queen***[3], a decision of the Caribbean Court of Justice, His Honour Wit JCCJ, delivering the reasons for the decision, said this at paragraph 29,

> *"[29] Equally, a judge sitting alone and without a jury is under no duty to 'instruct', 'direct' or 'remind' him or herself concerning every legal principle or the handling of evidence. This is in fact language that belongs to a jury trial (with lay jurors) and not to a bench trial before a professional judge where the procedural dynamics are quite different (although certainly not similar to those of an inquisitorial or continental bench trial). As long as it is clear that in such a trial the essential issues of the case have been correctly addressed in a guilty verdict, leaving no room for serious doubts to emerge, the judgment will stand."*

[23] The Learned Trial Judge did analyse and clearly set out in her judgment the evidence and the basis upon which she accepted the evidence of the prosecution and ultimately found the

[3] [2019] CCJ. 15 (AJ)

Appellant guilty. The judge in the course of her judgement discussed the visit to the *locus quo*, the lighting, the distance, the duration, the alibi. Ultimately noting:

> *"[60] It is my view that all three of these witnesses were truthful and were consistent on the salient points with respect to the identification as well as their account of the details of the shooting incident."*

[24] A review of the evidence indicates that all three witnesses knew the accused for a considerable period of time, over six years, prior to the incident and saw him frequently, for one witness, daily. The Trial Judge relates that her visit to the *locus quo* was revealing in terms of the very small area in which the incident occurred and also noted evidence that it was a fairly clear day. The evidence also supported the length of time the shooter could have been observed, that he was standing outside, went inside a premises, came back outside, the shooting occurred, went back inside, walked down the road. As the Trial Judge noted it was a continuous event. There was certainly sufficient evidence on which the Trial Judge could base her decision.

GROUND 5

The Learned Trial Judge erred in finding that the Applicant had the specific intention to kill Brandon Taylor and Roy Felix when he fired those six (6) to seven (7) shots towards them.

[25] The Appellant submitted that there was no evidence that at the time when the Appellant fired those six to seven shots that he had the intention to kill Brandon Taylor and Roy Felix. That it was unclear how far away he was or what part of their bodies he aimed his gun.

[26] The Trial Judge noted '*the reasonable inference when you fire that many shots at a person is that the intent is to cause death*'. The Appellant submits that the fact that a shooter fired eight shots towards Brandon Taylor does not automatically mean his intention was to kill him and cited in support ***Dean Hyde v R Criminal Appeal No. 18 of 2007***. As Counsel for the Respondent points out that case is distinguishable where the accused fired a single shot.

[27] We have to agree with the Respondent that in the circumstances of this case, where multiple shots were fired by the Appellant with a handgun, while, according to the witness, Ferguson, he was "*chasing"* the targets[4], that this was a bold and remarkable argument. That it cannot be argued that the circumstances did not point conclusively to an intention to kill.

Conclusion

[28] There was an abundance of evidence that provided a basis for the Trial Judge's conclusions and the Appellant had not demonstrated, on any of the grounds advanced, that there was a miscarriage of justice. In the circumstances, for the reasons given, the Appeal was dismissed and the conviction affirmed.

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HAFIZ-BERTRAM, P

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WOODSTOCK-RILEY, J.A.

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MINOTT-PHILLIPS, J.A.

[4] Page 56 line 21 of the Record