BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 11 of 2004

BETWEEN:

DWAYNE O'BRIAN HERBERT APPELLANT

AND

THE QUEEN RESPONDENT

BEFORE: The Honourable Justice Frederick L. A. Waterman, The Honourable Justice Peter D.H. Williams, The Honourable Justice Sherman R. Moore, Justices of Appeal

2006: September22

2007: March30

Mrs. Angella A. Mitchell-Gittens forthe Appellant.

Mr. Eli Edwards for the Respondent.

JUDGMENT

INTRODUCTION:

WATERMAN, JA: On 29 January 2004, the appellant(Herbert) was arraigned on an indictment containing four offences, namely, (i)conduct endangering life and safety, contrary to section 19 of the Offences Against the Person Act, Cap. 141(the Act); (ii) having possession of a firearm, contrary to section3(1)(b)(A) of the Firearms Act, Cap. 179;(iii) inflicting serious bodily harm, contrary to section 17 of the Act and (iv) assault occasioningactual bodily harm, contrary to section 26 of the Act. He was convicted on4 February 2004and on 26 February, he was sentenced by Kentish J. on the charge of, (i)endangering life, to 18 years; (ii) unlawful possession of a firearm, to 12years; (iii) inflicting serious bodily harm, to 8 years; and (iv) assaultoccasioning actual bodily harm, to 8 years. The sentences were to run concurrently.

Summary of Prosecution's Evidence

[2] Thecase for the prosecution was that on 23 January 2002 at about 11.30 in themorning the complainant Pedro Caddle went to Ward A of the Queen Elizabeth Hospital for medicalattention. He left the ward, and was walkingalong the corridor when he saw a man with a hat on his forehead walking fastcoming towards him. As the man gotcloser to him he recognised the man as the appellant Herbert. When the appellant got 3 feet away from him hetook a gun from his pocket and shot Caddle in his chest. Caddle testified that he saw the appellantstill pointing the gun at him whereupon he ran for his life. When the appellant realised that the gun wasnot working he ran upstairs and he, Caddle, ran downstairs. Caddle gave evidence that he was able toidentify the appellant because he knew his face and he had known him for about12 years. He said that he recalled thatthe appellant was wearing dark clothes. His entire face was not covered so that he was able to see his eyes andhis mouth. Under cross-examination bythe appellant, Caddle insisted that he did see the appellant at the hospital onthe day in question and that he was certain that it was the appellant who shothim.

[3] VickieMondore, a nurse at the Queen Elizabeth Hospital, testified that on the day inquestion as she was leaving Ward A3, she spoke with a man who had knocked onthe door of the ward and that this man was taller than she was; and that whatshe remembered most about the man was that he had a bandage on his hand. She then left him at the door and walked overto the Ward A1 and then to the elevator. As she was waiting for the elevator, she heard what sounded like aballoon bursting. She was startled bythe noise. She then she saw thegentleman to whom she was talking at the door run around the corner. He grabbed her and then she saw another manrun around the same corner with a gun in one hand, holding the gun down as heran. She also testified that it was whenshe saw the man running with the gun, that she realised why the other man hadgrabbed her. She later learnt that thename of the man who had grabbed her was Pedro Caddle, the complainant.

[4] VelmaHolder, a nurse at the Queen Elizabeth Hospital,gave evidence that on the 23 January 2002 she and another nurse, Keren Beckles,were on the third floor of the hospital. They left the back room and went across the corridor in the direction ofWard A3 where she saw a male person who was tall, slim and dark standing by thedoor of Ward A3 and she spoke with this male person whom she later learnt to bethe complainant Pedro Caddle. She also sawnurse Vickie Mondore as she came through the door of Ward A3, and Mondore spoketo that male person. Mondore left thecomplainant at the door of Ward A3 and got into the lift. Another person whom Holder said she did notknow ran towards the lift and as nurse Beckles and herself walked down thestairs she heard a loud noise as though a balloon had burst. The noise sounded as if it came from behindher and when she looked back she saw someone who appeared to be a male runningtowards the lift and that person appeared to be the complainant PedroCaddle. She testified that she sawanother male person who also looked as if he was going towards the lift

in thatarea and she saw what appeared to be a gun in that person's hand.

[5] NursePamela Smith gave evidence that she was at work on 23 January at Ward A3 towhich she was attached. She answered aknock on the door, spoke to the complainant and closed the door. About a couple of seconds after, she heardexplosions, about two, which sounded like gunshots. She opened the door and saw Pedro Caddle onthe corridor and she noticed another male person moving backwards from theelevator. She heard Pedro Caddle say ina high agitated tone of voice, "Look wuh you gone and do to me." But she did not know to whom he wasreferring.

[6] Dr.David Byer, a registered medical practitioner, testified that on 23 January 2002 he examined Pedro Caddle who hada gunshot wound to his central to lower chest. His vitals were stable at that point and he was resuscitated inaccordance with the accident and emergency protocol. X-rays were done which positively revealed abullet in his abdominal cavity. Hereferred Pedro Caddle to general surgery for admission and possible surgery. Dr. Byer said he would classify the gunshotinjury to Caddle as a serious injury.

[7] Furtherevidence implicating the appellant came from police officers, Sgt. VernonFarrell, Sgt. Peter Dawson and Police Constable Junior Boyce. Sgt. Farrell and Police Constable Boycetestified concerning oral statements given by the appellant which were admittedin evidence.

[8] Accordingto Sgt. Farrell when cautioned on 24 November, 2002 and questioned about a firearm, theappellant said: "A .32 spin barrel that did nickel wid a board handle." And later, when told in the presence of Boycethat he had a right to consult with an attorney-at-law of his choice theappellant said: "I all right I ain't need no lawyer." And yet later, when told by Sgt. Farrell thathe had reason to suspect that he was the person who pointed the gun and assaultedVickie Mondore and asked what he could say about the matter, the appellantreplied: "I walked to the elevator and point the gun at Pedro, but she did infront he and she like she get frighten, but it ain't she I did want."

[9] Sgt.Peter Dawson testified of going on duty to the Queen Elizabeth Hospital on 23January, 2002 and of having a telephone conversation with Caddle and later goingto the residence of Vickie Mondore on 25 January, 2002 and that Mondore made astatement to him as a result of which he conducted investigations and on 1November, 2002 he went to Chalky Mount, St. Andrew where he arrestedthe appellant.

The Defence Case

[10] At the trial, the appellant made an unsworn statement, at pages134 – 135 of the record, as follows:

"Your Ladyship, members of the Jury, Iam not going to try to persuade you of my innocence, the prosecution hasalready done that. All I am going to dois to state the facts. They are, thatPedro Caddle, a person who by his own admission is constantly in trouble andalways being shot, went to the Queen Elizabeth Hospital on that day in questionfor dressing for one of his numerous gunshot wounds, and was shot again by anunknown assailant, but events that ensued are that he accosted Miss Mondore inan attempt to get away from the gunman.

Miss Mondore, by her own statement,has said that no one else touched her or said anything to her. After this, itgets complicated because Pedro is saying that he ran down the stairs and leftthe hospital and came back afterwards. Miss Mondore is saying that he pulled her into the elevator and that theelevator took them down to another level.

The other nurses who gave testimonysaid that they took the stairs and none of them remember seeing anyone running downthe stairs.

I say this is complicated becausesomebody is lying and if a person can tell one lie, then all of their testimonyshould be a whole lie and should be completely discarded.

The police came, shot me monthsafterwards after the alleged incident. Iwas in the hospital for a while. They thentook me out of the hospital and literally terrorised me and so to make me signto statements which I did not give them. I was in so much pain they had to take me back to the hospital the sameday I was discharged.

We are all sensible people. Would anyone in their right mind sign theirname to something that would put them in trouble? You, the members of the jury, unless you werein so much pain you would do anything to stop it.

I don't know why he is doingthis. My brother whom he said he had analtercation with was at the hospital on that same date Pedro was shot. Questionable, isn't it?

My Ladyship, members of the jury, I aminnocent. The favour is in your hand."

[11] The appellant denied making oral statementsto the police. His defence was one ofalibi. He said that he was not at the Queen Elizabeth Hospital on the day ofthe incident and in fact, at about the time of the incident he was still in hisbed either on the East Coast or at Chalky Mount, St. Andrew. The appellant called five witnesses tosupport his alibi, including his step-mother, Sylvia Knight.

Grounds of Appeal

[12] Mrs. Angella Mitchell-Gittens on behalf ofthe appellant filed seven grounds of appeal. It is necessary for us to consider only two issues arising out of thegrounds in order to dispose of the appeal:

(1) Fair Hearing: the trial judge erred in lawby commencing the trial on 26 January, 2004 anddenying the appellant's request for an adjournment as he was unprepared fortrial, the matter having been previously set down for hearing on 18 February, 2004.

(2) Alibi: the trial judge's directions on alibiwere inadequate.

Fair Hearing

[13] The first ground of appeal alleged that thejudge erred in law when she proceeded with the trial on 29 January 2004 although the date fortrial had been set for 18 February, 2004 and the appellant had requested an adjournment toallow him adequate time to prepare his defence.

[14] Mrs. Mitchell-Gittens for the appellantsubmitted that the fundamental right of the appellant to be given adequate timefor the preparation of his defence as enshrined in section 18(2)(c) of TheConstitution was breached because the appellant had a legitimateexpectation that he would have had until the 18 February to prepare hisdefence.

[15] Section18 of The Constitution, contained in Chapter III, as far as relevantto this appeal, provides:

"18.(1) If any person is charged with a criminal offence, then, unless the chargeis withdrawn, the case shall be affordeda fair hearing within a reasonable time by an independent and impartial courtestablished by law.

(2)Every person who is charged with a criminal offence –

(a)…

(b)…

(c)shall be given adequate time and facilities for the preparation of his defence;

(d)…

(e)…

(f)…"

[16] Whether or not the appellant's right to be given adequate time toprepare his

defencewas infringed requires an analysis of the facts.

[17] The appellant first appeared in court on the 5 January 2004, when theProsecutor requested that the matter be set for trial on the 26 January, whichwas done. The court then inquiredwhether or not the appellant had his depositions. Upon his response in the negative, theProsecutor told the court that he would endeavour to have the depositions sentto the appellant that same day.

[18] On 26 January 2004, when the appellant next appeared in court, the Prosecutoradvised the court that the matter could not be reached that day and requestedan adjournment to 18 February. Theappellant was then asked whether or not he had his depositions, to which he respondedin the affirmative. On 26 January, noinquiry was made as to when the appellant received the depositions.

[19] Three days later on 29 January, the appellant is brought back tocourt and told that his trial would commence. When he objects on the ground that he only received the depositions on26 January, he is told that three days should have been sufficient time inwhich to prepare himself.

[20] Counsel for the appellant submitted to the Court that "it cannotbe reasonable to call him 3 days later, at a moment's notice and to say to him,"we are starting your trial today", when he had a legitimate expectation thathe would have had at least until 18 February to prepare his case."

[21] She further submitted that the appellant at the time was anunrepresented person, charged with four serious offences, facing thepossibility of life imprisonment, and that these were not simple matters, aswas suggested by the court. In addition,there was the evidence of at least twelve witnesses in the depositions whichthe appellant would have had to read and inwardly digest. Having said to the judge that he was notprepared, and in light of the fact that he was given the expectation that histrial would commence on 18February, inquiry should have been made as to the possibility of a shortadjournment in order to assist the appellant. Finally, Counsel contended, the appellant was at no point told that thecourt could call him down at any time to start his trial, so that he couldprepare himself accordingly.

[21] Counsel for the Crown submitted that it was in the discretion ofthe judge whether or not three days was sufficient time to prepare. Further, once he had his depositions, threedays was more than adequate time within which to prepare himself and thereforethe question of a legitimate expectation did not arise. Counsel further suggested that as theappellant was on remand at Glendairy, he had nothing to do all day andtherefore should have been prepared to proceed at any time.

[22] Counsel for the appellant cited Cumberbatch (Glyne) v. R., (2004)67 WIR 48 in support of her contention that the fairness of theappellant's hearing had been compromised by the court proceeding to commencethe trial without affording the appellant sufficient time to prepare hisdefence. In that case, Cumberbatch wascharged with serious indecency committed with a girl under 16 years ofage. On nine occasions between July 2000and July 2002 his case was traversed, until finally on 8 October 2002 the Judge sought tocommence the trial. The accused statedthat his lawyer was not present and was on her way. Counsel for the Prosecution stated that hislawyer had indicated that she was not representing him. In the circumstances, and in light of thehistory of the matter, the court ordered that the matter should proceed. A brief recess was granted so that the depositionscould be copied for the accused.

[23] In that case, the Court of Appeal held that the appellant's rightto a fair trial had been breached because he had not been given adequate time toprepare his defence. In this case theappellant appeared at the January Assizes 2004 for the first time, and wasgiven an early trial date,

despite not having received his depositions. On his second appearance in court, he wasgiven a new trial date of 18 February 2004. The appellantwould have had a reasonable expectation that he would have three weeks withinwhich to prepare for his trial.

[24] Given this combination of factors, notably that (a) the appellantwas given a fixed date for trial, (b) he was not warned that his trial couldcommence at a moment's notice, and (c) he had received his depositions a merethree days earlier, significant prejudice would have been occasioned to the appellant. He was charged with four seriousoffences, the penalty for one of which is life imprisonment.

[25] The court has an obligation, especially with respect to an unrepresentedappellant, to act with fairness and to give him ample opportunity, inaccordance with The Constitution, to prepare for trial.

[26] It is on this basis that the Court finds that there is merit inthis issue. The possibility of prejudiceto the appellant, in all the circumstances, should have been the paramountconcern of the court, such that an adjournment should have been granted toafford the appellant adequate time for preparation of his case. We are of the view that the appellant's rightto a fair trial was infringed.

Issue 2

Alibi

[27] In the second ground of appeal the appellant contends that thejudge did not properly and adequately direct the jury on the defence ofalibi. At the hearing of the appeal, theCrown conceded that the judge did not properly and adequately direct the juryon alibi. He did state, however, thatthis blemish was not fatal.

[28] The appellant called four witnesses in support of his defence ofalibi. His defence was that he was athome during the morning hours when Caddle is alleged to have been shot and thathe could not have been at the Hospital around 11:30 a.m. on that day.

[29] The judge directed the jury at pages 183 and 196 of the record asfollows:

"Theaccused also gave an unsworn statement from the dock. Although the accused in that statement saidnothing about his whereabouts on that day, he called witnesses to testify abouthis whereabouts. And so Madam Foremanand your members, the accused has invoked the alibi defence. He is saying he was somewhere else and byimplication he is saying that the virtual complainant is mistaken inidentifying him. I will give youdirection on alibi later in my summation…"

…Analibi defence is really a special plea of not guilty, where it is said by theaccused that at the time when the offence is alleged to have been committed theaccused was somewhere else, and therefore, could not have committed theoffence. So that is the basis of thedefence. I must tell you that it is notfor the accused to establish that he was somewhere else. He is not here to prove anything to you. The burden is on the prosecution to provethat the accused committed the offences with which he is charged.

So,if you believe the alibi put forward by the accused through his witnesses thathe was somewhere else, well then, your verdict will be a verdict of notguilty. If you are left in doubt as towhether he was somewhere else or not, your verdict will likewise be a verdictof not guilty. You can only convict theaccused of the offences charged if you completely reject the defence of alibiwhich has been put forward by the accused and you are convinced and feel sureof the guilt of the accused on the evidence led by the prosecution."

[30] The judge later reviewed the cross-examination of Caddle in whichthe appellant suggested to Caddle that it was not he who was seen at thehospital and that it was not he who had shot Caddle, to which Caddle respondedthat it was the appellant. The appellantnext suggested to Caddle that he was elsewhere on that day and the court intervenedstating that it was an improper question as Caddle would have to be omnipresentto know the answer to that question.

[31] The judge continued:

"MadamForeman and members of the jury, you will recall that the accused gave anunsworn statement from the dock, but in that statement, Madam Foreman and yourmembers, the accused himself said nothing at all about his whereabouts on theday of the incident and I will remind you of that statement."

[32] The court then proceeded to read the unsworn statement made by theappellant to the jury. The judge thenreviewed the evidence given by the defence witnesses.

[33] The judge continued:

"…Now,Madam Foreman and your members, as I said, that is the evidence in support ofthe defence of the alibi put forward by the accused not by himself but throughhis witnesses. He is saying that he wasnot at the Queen Elizabeth Hospital. He is innocent and you must return a verdictof not guilty. That is the case for theaccused."

[34] Counsel for the appellant in her submissions relied on the case ofAllanWoodall v. R. (Criminal Appeal No. 7 of 2002, unreported decision of 29 November 2005),at para. [15] which reads as follows:

"In addition tothe general direction on the burden of proof, the judge should have directedthe jury specifically on the burdenof proof in relation to alibi; that the appellant did not have to prove that hewas elsewhere at the time of the commission of the alleged offence and on thecontrary, that the prosecution had to disprove the alibi. It is also desirable for the judge to remindthe jury that an alibi is sometimes invented to bolster a genuine defence."

[35] And it is further stated at para. [17]:

“It is important to appreciate that it ispossible for an accused to give a false alibi and yet not be the perpetrator ofthe offence charged. Although thejudge did tell the jury that the prosecution would have to establish its caseto the standard required by law, it was important, where the appellant gave sworn testimony in support of hisalibi, for the judge to warn the jury that if they disbelieved the alibi, theirdisbelief did not necessarily confirm the disputed identification.” (Emphasisadded)

[36] This Court in Woodall referred to R. v.Pemberton (1994) 99 Cr. App. R. 228, in which the English Court ofAppeal gave guidance as to the correct approach in an identification case, ifthe jury rejected the purported alibi. In that case, it was held that an express warning to the jury of theconsequences of a discredited alibi was necessary. In Pemberton at page 233 the judgmentstates:

“Thejury was faced with a defendant who had elected not to give evidence but who hadcalled affirmative evidence to support an alibi, which may very well, in theirjudgment, have been valueless. In ourjudgment this will have made a significant impact on the jury, who thereaftermay have approached the case on the basis, understandably but wrongly, that thecollapse of the alibi evidence, not supported by the defendant’s own evidence,somehow suggested that it would be right to conclude that the defendant musthave been correctly identified by the cab driver.

Inour judgement, given that situation and remembering also that in the course ofthe summing up the judge… had said nothing expressly about the burden of proofin relation to the alibi question, we have been left with the firm impressionthat this was a case in which in all the circumstances the jury should havebeen given proper directions as to their approach if they rejected the alibievidence; in other words, in this particular case a Turnbull direction was required.”

[37] In our view, the judge should have given the jury an expresswarning that an alibi is sometimes invented to bolster a genuine defence. Therefore the rejected alibi direction oughtto have been given, namely, that where the jury disbelieves the alibipresented, they must still find that the eye-witness evidence as toidentification is truthful before they can convict. If they disbelieve the alibi evidence and yethave a doubt as to whether the appellant was present at the hospital, theyshould acquit the appellant.

[38] The failure of the judge to give the jury such a direction in thiscase was a serious omission. There is thereforemerit in this ground of appeal.

[39] We should point out that the decisions in the two cases on whichwe have relied to dispose of this appeal had not been heard by this Court whenthe judge tried the appellant’s case in February 2004. The appeal in Glyne Cumberbatch washeard in March 2004 and Allan Woodall in November 2004.

Disposal

[40] We find merit in the two issues discussed for the reasonsexpressed above. Taking the trialprocess as a whole, and in the circumstances of the case, we are not satisfiedthat the appellant’s trial was fair. Inaddition, the failure of the judge to give the appropriate direction in thesummation with respect to rejected alibi is a fatal omission in the light of noindependent evidence implicating the appellant. We conclude that the cumulative effect of the matters raised in theappeal rendered the conviction unsafe. Wetherefore do not consider that this is a fit case for the proviso to beapplied. The appeal is therefore allowedand accordingly, the conviction and sentence are quashed. In our view, the interests of justice requirethat we order a re-trial. The appellant is toremain in custody pending his re-trial,which should take

placeas soon as practicable and preferably at the next sitting of the High Court forthe trial of criminal cases.

Justice ofAppeal

Justiceof Appeal Justice of Appeal