BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 1 of 2012

BETWEEN:

JOHN ANDRE MEDFORD **Appellant**

AND

THE QUEEN **Respondent**

Before: The Hon. Sir Marston C.D Gibson, KA, Chief Justice, The Hon. Andrew D. Burgess and The Hon. Kaye C. Goodridge, Justices of Appeal.

2015: October 7
December 16

Mr. Marlon M. Gordon and Ms. Safiya A. Moore for the Appellant.
Mr. Elwood Watts for the Respondent.

DECISION

GOODRIDGE JA

Introduction

[1] The appellant has appealed his conviction and sentence. On 18 January 2012, the appellant appeared before the court charged with

three offences: (1) aggravated burglary; (2) unlawful possession of a firearm and (3) unlawful possession of five rounds of ammunition. He pleaded not guilty to all charges. At the end of the trial the jury found him not guilty of aggravated burglary, but guilty of the other charges. On 10 July 2013 **Cornelius J** sentenced him to 15 years imprisonment for each offence.

The Case for the Prosecution

[2] On 26 March 2008, the appellant and another man, Anderson Pilgrim, (Pilgrim) agreed to rob Choices Minimart situated at the corner of Gunsite Road and Brittons Hill Main Road in the parish of St. Michael. The appellant drove Pilgrim to the area and lent him a gun. Pilgrim entered the minimart, pointed the gun at the proprietor and demanded money. Pilgrim discharged the firearm. The proprietor handed over a sum of money. Pilgrim then fled the scene.

[3] The proprietor was able to observe the vehicle in which Pilgrim made good his escape. He called the police and made a report and also provided the registration number of the vehicle.

[4] That information was given to police officers on patrol who saw the appellant's vehicle in a line of traffic travelling in the direction of BET and the Life of Barbados Roundabout. The officers ordered the

appellant to stop. Instead the appellant jumped out of the vehicle and ran in the direction of the Shell Gas Station. He was pursued by the officers, and as he pulled something from his waist the officers discharged their firearms. The appellant received two gunshot wounds. A firearm was retrieved from the scene. The appellant was taken to the Queen Elizabeth Hospital where he was detained for nine days. He was subsequently charged with the offences.

The Case for the Defence

[5] At the trial the appellant gave an unsworn statement and called four witnesses. According to the appellant, he was driving his motor car and was smoking a joint when he realised that a police vehicle was next to him. He became nervous. Suddenly he heard a door open and a voice said "Don't get out". The appellant jumped out of his vehicle, leaving it in motion and ran in the direction of the Shell Gas Station. As he ran through the station, he heard an explosion, then another and he fell to the ground.

[6] The appellant denied that he had a firearm or ammunition on his person and maintained that the officers planted these items on him to justify shooting him. He stated that he did not make any oral

statements nor did he sign the written statement which was produced in evidence.

Grounds of Appeal

[7] The appellant has filed four grounds of appeal against his conviction and sentence. We set out the grounds and discuss them below.

Ground 1

[8] On this ground it is alleged that "the verdict of the jury is contradictory and inconsistent thereby rendering it unsafe and unsatisfactory having regard to the evidence".

[9] Mr. Gordon, counsel for the appellant, contended that the conviction of the appellant for possession of a firearm and ammunition was inconsistent with his acquittal on the charge of aggravated burglary, for no reasonable jury which had applied their minds to the facts in the case could have arrived at the conclusion which they did.

[10] Counsel submitted that there was an evidential link between the alleged aggravated burglary and the firearm. Thus the verdict could not be supported because if the appellant was found with the firearm and it was established that the firearm was used, "then it more than likely suggests that he was part of an enterprise, even if you can't put him as the trigger man".

[11] In response, Mr. Watts, counsel for the respondent, submitted that there were two sets of circumstances before the jury. It was clear that the jury viewed the case as two separate incidents and accepted the evidence of the police officers as it related to the firearm and ammunition, but rejected the evidence as it related to the aggravated burglary. They found no nexus between the appellant and the aggravated burglary and on that basis found the appellant not guilty.

[12] The principles to be applied by the Court when considering whether a verdict should be set aside on the basis that it is contradictory or inconsistent were discussed in **Rennis Johnson v R, Criminal Appeal No. 17 of 2007**. There **Mason JA** stated at **paras [102]** to **[104]**:

> "[102] The legal authorities indicate that the fact that verdicts are shown to be inconsistent will not lead to the verdicts of guilty being set aside as being unsafe unless the only explanation for the inconsistency must or might be that the jury was confused or adopted the wrong approach. Thus, there are instances when, notwithstanding the inconsistency, the conviction or convictions will stand. It all depends on the facts of the case.
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> [103] In **R v Durante [1972] 56 Cr. App. R 708** Edmund Davies LJ cited with approval the oft quoted test formulated by Devlin J in the unreported case of **Stone (13 December 1954)**:

> "When an appellant seeks to persuade this court as his ground of appeal that the jury has returned a repugnant or inconsistent verdict, the burden is plainly upon him. He must satisfy the court that the two verdicts cannot stand together, meaning thereby that no reasonable jury who had applied their mind properly to the facts in the case could have arrived at the conclusion and once one assumes that they are an unreasonable jury or they could not have reasonably come to the conclusion, then the conviction cannot stand. But the burden is upon the defence to establish that."
>
> [104] However, as previously determined by the case of **R v Hunt [1986] 2 QB 433**, if the verdicts reflect a view of the facts and evidence which the jury could reasonably have taken, the appeal will be dismissed even if the majority of juries faced with the same evidence might have been expected to acquit, or as the cases might be, convict on each count rather than return a split verdict."

[13] In this case the prosecution alleged that the appellant was part of a joint enterprise. The evidence adduced by the prosecution disclosed that Pilgrim entered the minimart, discharged a firearm and received money from the proprietor. There was no evidence that the appellant entered the minimart or discharged a firearm. On that evidence, it was open to the jury to find, and they found, no nexus between the appellant and the aggravated burglary. Consequently they returned a verdict of not guilty of that offence. Accordingly we hold that the verdicts are not inconsistent or contradictory. This ground cannot be sustained.

Ground 2

[14] Here it is alleged that the trial judge failed to properly analyse and evaluate the evidence for the benefit of the jury.

[15] Mr. Gordon submitted that the appellant was entitled to have his case fairly presented by the trial judge. He contended that the judge's summation was just a reading over without any effort being made to properly put it in context and setting the foundation for the jury to deliberate properly. Counsel relied on **R v Amado-Taylor [2000] 2 Cr. App. R 189**; **Fuller v The State (1995) 52 WIR 424** and **Dwight Ovid Alleyne v R, Criminal Appeal No. 17 of 2003**.

[16] In his response, Mr. Watts submitted that this ground was without merit. He contended that on a careful reading of the summation, it is evident that the judge identified the issues and analysed the facts and the law for the benefit of the jury. Counsel submitted further that Mr. Gordon did not identify "a single instance of deficit or deficiency" on the part of the judge, yet Mr. Gordon complained that the summation lacked analysis and evaluation.

[17] In her summing up, the judge after giving the jury the standard directions, reviewed the evidence of the prosecution witnesses. During this process the judge identified the inconsistencies and

discrepancies which arose on the evidence. The judge analysed the allegation of ill treatment made by the appellant.

[18] The judge then reminded the jury in detail of the appellant's unsworn statement and identified the salient aspects. She next recounted the evidence of the defence witnesses. From page 615 to page 619 of the record the judge dealt exclusively with the case for the defence and stressed that the defence of alibi arose on the first count and that the appellant had denied possession of any firearm or ammunition.

[19] We have concluded, on a careful reading of the summation, that the judge adequately identified and analysed the evidence and the cases for the prosecution and the defence. Consequently we are unable to agree with counsel's characterisation of the summation. We find no merit in this ground.

Ground 3

[20] On this ground Mr. Gordon contended that the trial judge's "numerous interventions during the appellant's cross-examination of prosecution witnesses effectively denied the appellant the opportunity of properly putting his defence before the jury".

[21] Counsel submitted that as the appellant was unrepresented and not skilled in the art of criminal advocacy, the judge was required to give

appropriate assistance to the appellant during the trial without compromising the judicial function. He submitted that the assistance provided was not of the required standard and the appellant was deflected from pursuing lines of questioning which went to the heart of the defence case. He relied on **Wooding v R Criminal Appeal No. 9 of 2002 (Wooding**).

[22] Mr. Gordon also submitted that the impression on the face of the record seemed to suggest that the judge was impatient and condescending.

[23] In response, Mr. Watts countered that the Court must examine the interruptions which are the subject of complaint in the light of the principles expounded in **Wooding**.

[24] In seeking to determine whether the complaint was justified, we have had regard to **paras [11]** and **[13]** in **Wooding** where **Simmons CJ** said:

> "[11] The question in any case where it is alleged that a trial judge improperly intervened in the trial must be answered both from the standpoint of the defendant (subjectively) and from the standpoint of a reasonable person who might have observed the trial (objectively). Thus, the trial must have been fair in the eyes of the defendant and seen to have been so by an objective by-stander. Convictions will be quashed where judicial interventions have made it impossible for defence counsel properly to present the defence or have deflected

> counsel during the cross-examination from his strategy and considered line of questioning.
>
> [13] In determining whether judicial interventions may amount to material irregularities adversely affecting the fairness of a trial, it is important to analyse not only the quantity of interventions but the quality of those interventions. A large number of interruptions may, at first, put the court on notice that there may be a denial of justice, but the large number is not, per se, decisive - see Purchas LJ in Matthews v Matthews (supra) at p.32, "The critical aspect of the investigation is the quality of the interventions as they relate to the attitude of the judge..." Essentially the investigation is whether it might reasonably appear that the appellant did not have a fair trial and, in particular, whether excessive judicial intervention may have created a real danger that the trial was unfair. The number of interruptions or questions are, by themselves, insufficient to give rise to unfairness. It is the quality of the interruptions that counts."

[25] As counsel has correctly noted, the appellant was unrepresented and the judge was under a duty to assist him. We have examined the excerpts of the record identified by counsel. In our view the interventions can be characterised as follows: (i) assisting the appellant in formulating his questions; (ii) controlling the admissibility of evidence, including preventing the introduction of prejudicial evidence; (iii) disallowing improperly put questions; and (iv) seeking clarification. They cannot be described as excessive, nor do they amount to material irregularities.

[26] Further, we have seen nothing in the record which supports the contention that the judge was impatient or condescending towards the appellant. This ground also fails.

Conclusion on Conviction

[27] Having regard to all we have said in relation to the above grounds, we hold that the verdict was safe. The appeal against conviction is therefore dismissed.

Ground 4

[28] It is contended in this ground that the sentence is excessive in that the trial judge "failed to properly (i) apply her discretion in the sentencing process; and (ii) assess the aggravating factors in relation to the offence and attributed a more aggravating form of conduct to the appellant than the evidence outlined".

[29] Ms. Moore, counsel for the appellant, submitted that at the time the sentence was imposed, the judge considered herself bound by the provisions of **section 30** of the **Firearms Act, Cap. 179** (**Cap. 179)** which prescribed a minimum mandatory sentence for the offences of unlawful possession of firearms or ammunition. Therefore the judge could not truly exercise her discretion as she ought to have done under the **Penal System Reform Act, Cap. 139**.

[30] Counsel next turned to the decision of this Court in **Elvis Alexander v R**, **Criminal Appeal No. 14 of 2007**. She submitted that the sentence imposed was higher than necessary, and that the Court could remit the matter to the trial judge for sentencing or to determine what is the appropriate sentence to be imposed on the appellant. Ms. Moore invited the Court to adopt the latter course.

[31] As for the second limb of her argument, Ms. Moore contended that the judge misapprehended the facts when she stated that the appellant "discharged the firearm at two police officers in a gas station with people and vehicles and all the attendant dangers" as there was no evidence that the appellant ever discharged the firearm.

[32] In response, Mr. Watts conceded that there was merit in Ms. Moore's submissions. He agreed that the judge had represented in error that the appellant had discharged the firearm and there was no indication as to what extent this factor, by itself, contributed to the sentence of 15 years.

[33] We agree with the submissions of counsel. As to the appropriate sentence, we have reviewed the facts and have taken the aggravating and mitigating factors into account. This was a contested matter. The appellant was found guilty of unlawful possession of a .357 Magnum

revolver and five rounds of ammunition. He pulled the firearm from his pocket while being pursued by police officers. The record reveals that the appellant has a previous conviction for unlawful possession of a firearm and ammunition for which he received a sentence of 6 years in 2001.

[34] In **Bovell v R, Criminal Appeal No. 23 of 2000**, this Court issued guidelines in respect of offences committed contrary to **sections 3, 19, 20** and **21** of **Cap. 179.** The range of sentence for offences involving possession should be between 8 and 10 years. We consider that a sentence of 10 years imprisonment for each offence would meet the requirements of justice in this case.

Disposal

[35] The appeal against conviction is dismissed. The appeal against sentence is allowed. The sentence of 15 years is set aside and a sentence of 10 years substituted for unlawful possession of a firearm and unlawful possession of ammunition, the sentences to run concurrently.

[36] Prison records show that the appellant spent 1,921 days on remand. He will therefore serve a sentence of 10 years minus 1,921 days.

Chief Justice

Justice of Appeal

Justice of Appeal