Status: Positive or Neutral Judicial Treatment

Regina v Michael Mitchell

No: 2009/2411/B3

Court of Appeal Criminal Division

15 March 2010

[2010] EWCA Crim 783

2010 WL 1368828

Before: Lord Justice Moses Mrs Justice Rafferty DBE Mr Justice Maddison

Monday, 15 March 2010

Representation

Mr O Pownall QC and Miss A Bailey appeared on behalf of the Appellant.
Mr M Gadsden and Miss S Halkerston appeared on behalf of the Crown.

Judgment

Lord Justice Moses:

1 This appellant was convicted of attempting to shoot a police officer under a count alleging attempted murder for which he was sentenced to 25 years' imprisonment, a sentence that will shortly become the subject of argument if this appeal is dismissed. He was also convicted of possessing a controlled drug of class A and another drug of class C and having an article with a blade or point. Together with the attempted murder, since it was a shooting, he was convicted of possessing a firearm with ammunition with intention to endanger life. The conviction followed a trial at Inner London Crown Court culminating on 24th March 2009.

2 The two main grounds of appeal concern, firstly, the admission of bad character evidence adduced on behalf of a co-defendant charged jointly with him of possession of the firearm with intent to endanger life and in relation to the judge's intervention at the close of the Crown's cross-examination in which it is said that he unfairly intervened so as to create the impression on the jury that he disbelieved what the appellant was saying. There are other grounds on which application for leave to appeal is sought.

3 The facts demonstrate the strength of the case against this appellant. He was stopped with his co-accused, Mah-Wing, in the morning of 15th August 2008 in a motorcar. The car in which he was a passenger sped off and was caught in a cul-de-sac after a short pursuit. The appellant ran from the car pursued by police officers at the head of whom was an officer PC Callow. There were other officers including a PC Knight-Little.

4 As the appellant escaped, PC Callow said that he shouted, “Stop police” and when five

metres away he saw the appellant reach into his waistband and produce something in his left hand which he came to appreciate was a firearm. Raising it to shoulder height, the officer said the appellant pointed it directly at him and he heard a loud bang and saw a plume of smoke. Checking that he was not hit, the officer bravely continued the pursuit, followed by others. He was the only police officer to see the appellant, as he said, use that gun. The other officers followed and eventually found the appellant underneath a van from which he was pulled. The appellant was to say he was then effectively beaten up and kicked.

5 There was another witness who gave evidence under a pseudonym, but it is plain from that witness's description, not only of what happened but of the appellant, that his eye-witness evidence was wholly faulty. The evidence thus depended on the undoubted fact that the gun had discharged.

6 Mr Pownall QC for the appellant, who appeared for him at trial, points out that there was a significant discrepancy between the evidence of the alleged victim, PC Callow, and one of his colleagues, PC Knight-Little, as to the location of the firing. That was of importance since it was the location that provided the basis of the explanation the appellant proffered as to why the gun had discharged. PC Knight-Little said it happened as the appellant was being pursued and shortly after he had jumped down from a wall, a distance of some three feet. Whereas PC Callow said that it had happened some considerable and appreciable distance away from there.

7 The essential issue for the jury was whether the appellant may have been right when he said that the explanation for the gun firing was that as he jumped down a wall, the distance as we have said of some three feet, the gun which had been in his waistband and which he had taken out, accidentally discharged, certainly not as the result of any deliberate action by him and certainly without him aiming it at the police officer.

8 The appellant's explanation for having his gun was that he had been joined by his co-defendant Mah-Wing and when he got into Mah-Wing's Ford Focus that morning he had noticed the gun and had taken it because he had previously lost family members to gun crime and was concerned for Mah-Wing who was his young cousin. He did not know if it was real, whether it was loaded or whether it was cocked. When the police arrived he and Mah-Wing were arguing. Mah-Wing told him to run and in shock and in panic he had run off and, with the gun in his left hand, had fallen over the drop in the ground which he described. He gave evidence in accordance with that explanation which was consistent with what he had said earlier in interview.

9 Mah-Wing also gave evidence in which he said that he was not responsible for the gun and blamed the defendant for it. Thus, as we have said, the issue on the attempted murder depended upon the accuracy of the police evidence and the credibility of the explanation the appellant gave. There was a significant difficulty for the appellant. That consisted in the evidence of a ballistics expert, a Miss Ritchie, who described the handgun as a "modified Brocock", modified so as to enable it to fire live bullets. When she got the gun it was loaded with five unfired cartridges and she sought to examine whether it was capable of accidental discharge.

10 The evidence she gave was accurately described in the summing-up of her evidence by the judge. She described two methods of cocking the gun. First, by pulling the

trigger a certain way and then firing it which required pressure of 14.7 pounds, or manually cocking the hammer and then pulling the trigger which would require significantly less pressure but nevertheless noticeable pressure of 6.3 pounds. She tried in a number of ways trying to make the gun go off accidentally, hitting it with a mallet, trying a throw away motion (as she put it) with the hammer lowered or with it cocked. On none of her attempts to re-create an accidental discharge was she successful.

11 Thus, as we see it, the appellant faced a formidable case. Nevertheless, we wish to emphasize that serious though the evidence was against him, it merely serves to emphasize the importance of the rules pursuant to which bad character evidence may be admitted and the propriety or otherwise of a judge appearing to assist the prosecution in demonstrating the falsity of a defendant's account.

12 The first ground, which was a ground on which permission was given, related to an application made by the appellant's co-accused to adduce evidence in relation to an incident in prison which had occurred whilst the appellant was in custody on 15th January 2009. His co-accused had obtained a draft of a report of an offence in which it was alleged the appellant had plastic knives in his pocket when he was stopped by a prison officer and had sought to give an explanation for his possession saying that he had possession of the knives because he was going to hand them over.

13 The co-accused Mah-Wing's counsel sought permission to adduce evidence of that incident on the basis that when caught with a knife the appellant had advanced an explanation which, so the co-accused said, was false but bore a striking similarity to the explanation this appellant had advanced to the jury for his possession of the gun, namely that he had picked up the gun in order to avoid his young cousin getting into trouble.

14 The application was made pursuant to section 101(1)(e) of the Criminal Justice Act 2003 , namely that that evidence, which was evidence of the defendant's bad character, had substantial probative value in relation to an important matter in issue between the defendant and a co-defendant. There was no dispute but that it was an important matter: who was responsible for the gun which formed the subject matter of count 3 in respect of which both defendants were charged? The judge was required pursuant to section 109(1) of the 2003 Act to assume, in considering the relevance or probative value of the evidence, that the evidence was true, subject to his reaching a conclusion that no court or jury could reasonably find that evidence to be true — see section 109(2) .

15 Mr Pownall correctly points out that the similarity of the explanations was only of probative value, let alone substantial probative value, if the explanation that the defendant offered for his possession of the knife was untrue. If that were not so then the similarity between the two explanations was of no probative value since, for all the jury would know, the explanation for possession of the knife was wholly innocent.

16 The judge giving his ruling relied upon the fact that the coincidence of the explanations was unlikely. But, says Mr Pownall, unless the appellant's explanation was untrue, although the judge was required to assume it was true, then the evidence had no probative force.

17 In our judgment it does not follow that the judge was wrong to apply section 109(1) in the way that he did. It is necessary to analyse what is meant in Part 2 Chapter 1 of the 2003 Act by bad character. Bad character is defined as evidence or disposition towards "misconduct" on the part of a defendant other than evidence to do with the alleged facts of the offence. Section 101(1) refers to evidence of a defendant's bad character and section 101(1)(e) refers to "it", namely bad character that is misconduct on the part of the appellant as defined in section 98 . The reference in section 109(1) to an assumption that "it" is true, is a reference back to bad character as defined by section 98(1) .

18 There were two elements therefore to what is identified as the evidence of misconduct in relation to the Brixton incident. Firstly, that the appellant gave an explanation which in its similarity to the explanation for possession of the gun was an unlikely coincidence. The second factual proposition that was advanced was that the explanation was false. It should not be overlooked that those were two factual propositions, both of which, taken together, amounted to evidence of misconduct within section 98 . Were they not to be taken together they would not be evidence of misconduct at all. Thus, by virtue of section 109(1) the judge was required to assume that the explanation that the defendant gave was false, as well as the fact that he had given that explanation. Once he assumed both those facts they amounted to evidence of misconduct within the meaning of section 98(1) and were plainly of substantial probative value. The error, in our view, in the submission advanced by Mr Pownall, is to overlook the fact that there was a second factual proposition, namely that the explanation was false and that the judge was required to assume the falsity of that explanation. In those circumstances, we reject the first ground of appeal.

19 The second ground of appeal, however, is in our judgment more serious because it demonstrates how important it is for a judge to remain vigilant that the rules in relation to adducing evidence of bad character are complied with. As we have made clear, counsel for the co-accused sought to adduce this evidence before the judge, as it happens successfully, on the basis of the unlikelihood of the explanation the appellant was giving to have been true given that it was the same explanation given when he was caught on two quite distinct occasions with a dangerous implement. However, having obtained permission for that evidence to be adduced, the cross-examination in our judgment developed in a wholly impermissible way. Counsel for the co-accused started to ask him about the facts of his possession of the knife, clearly with the intention of painting a picture of a propensity of this defendant to carry dangerous weapons and by that means exculpate himself from responsibility for possession of the gun. Counsel put to him that he had been in possession of two plastic knives that he had stuck together and then sandpapered very carefully to make into a weapon. He then, in a clumsy way, sought to suggest that he had been watched by his client making those two knives into a dangerous weapon. No application had been made to adduce that evidence on that basis. Indeed no application could have been made because, as it emerged later, when Mr Pownall cross-examined Mah-Wing, Mah-Wing had never told his counsel about it until later. But the cross-examination was allowed to develop, late as it was, without any application and far too late for counsel to intervene. Prosecuting counsel had not even seen the raw material that formed the basis of that cross-examination, nor does it appear had the judge. It was difficult for counsel of

enormous and respected experience to intervene lest it look as though he was trying to protect his own client. The judge did not do so no doubt because neither prosecuting counsel nor defence counsel had done so. But as we seek to emphasize, it is important that a judge remains vigilant to protect a defendant in cross-examination particularly when there is a cut-throat defence and particularly when the allegation, namely attempted murder by shooting of a police officer, creates so fraught an atmosphere in court. That cross-examination was beyond the scope and purpose of the judge's ruling.

20 There is now ample authority to establish the importance of paragraph 35, rule 8 of the Criminal Procedure Rules — see Musone [2007] 2 Cr.App.R 379 , *Jarvis [2008] EWCA Crim. 488* , and *Ramirez [2009] EWCA Crim. 1721* . The evidence of the possession of the knife was such that we very much doubt whether, had the application been made at the right time, the judge would ever have allowed it to have been adduced, bearing in mind the dissimilarity between the circumstances of possession of the knife and possession of the gun. Certainly, it was most unlikely he would ever find it to be of substantial probative value. In those circumstances we think there is merit in the ground advanced in relation to allowing that cross-examination to go ahead.

21 The next ground relates to the conduct of the judge at the close of the evidence of the appellant. Re-examination had been completed, and Mr Pownall, no doubt thinking there might be one or two matters of clarification had, as a matter of mere forensic courtesy before sending his client back to the dock, asked whether the judge had any questions. Unfortunately the invitation was only too readily accepted and the judge asked a number of questions before the short adjournment. He indicated that he had more after that short adjournment. Indeed he had and for a space of about 10 minutes or so (it is not possible to be accurate) proceeded to cross-examine the defendant about why he had run away and about his possession of the gun and about how he deployed that gun.

22 Some of the questions, it is true, were fairly innocuous and nothing is said about the tone of those questions to aggravate the accusation that the judge descended into the arena and gave the impression to the jury that he did not believe the account that had been given. We need identify only one short passage as an example of a number of questions the judge asked which make good that allegation against him:

> “Q. So that is why you were running, to get away from the police?
>
> A. Yes, your Honour.
>
> Q. But Mr Mitchell, how is this for a proposition, that if someone is seeking lawfully to dispose of a weapon—
>
> A. Yes, your Honour.
>
> Q. — is not the best way to hand it to the police?”

At the end of that period of questioning the judge obviously realised that he may have gone too far and said that he hoped he was not cross-examining. Mr Pownall, with customary courtesy, did not make the allegation at the time. Indeed it was too late for him to do so, although he did venture to say, “Well, you were hardly leading through

his evidence but I have no objection."

23 Again counsel is not to be blamed for not intervening at that period. For all the jury knew it was commonplace for a judge to have a second go at a defendant after senior and competent prosecuting counsel had spent some time cross-examining him. An intervention may have only given the impression that he was seeking unfairly to protect his client. That merely demonstrates the danger of the course which the judge adopted. We take the view that the length of the cross-examination was unnecessary and by asking so many questions the judge did run the risk of giving the impression to the jury that he was not accepting what the defendant said.

24 Time and again this court has had occasion to comment that it is quite unnecessary for a judge to have another go at a defendant after he has been cross-examined by the prosecution. Indeed, it is no part of his function to cross-examine a defendant at all, lest he runs the risk of demonstrating his own approach to the evidence that the defendant had given. So often these occasions arise when there is a strong case against the defendant and a judge proves unable to resist the temptation to descend into the arena. But those cases are those where it is quite unnecessary and unfair for a judge to do so. This is by no means one of the worst cases, but we have to say that the judge did go too far.

25 The other two grounds of appeal are ones in which permission has not been given and we can deal with shortly. The co-accused had at one stage been accused of making his story up as he went along. Unwisely his counsel then sought to adduce evidence of his pre-interview instructions as being evidence of a previous consistent statement pursuant to section 114 and 120 of the 2003 Act in response to the accusation the prosecution made. This was highly unwise since the instructions were to a very large extent wholly at odds with the oral evidence that the co-accused Mah-Wing had given. It is unnecessary to identify all the respects in which the evidence was inconsistent, but it was certainly inconsistent as to the way the appellant and this co-accused had met on that morning and in other significant respects. The inconsistency can have served only to help the prosecution and, we venture to suggest, the co-accused, this appellant. In those circumstances we do not think there is anything in the assertion by way of application to appeal that the judge was wrong to allow this statement to be adduced.

26 The other ground relates to the way the judge dealt with the allegation made by this appellant that he had been kicked and beaten up by the police when they came upon him and dragged him out from underneath the van. The judge in summing-up correctly told the jury that that aspect of the case was a matter for them to consider and, as he put it, "may bear upon the weight you feel it right to give to the evidence of various of the police officers". We pause to wonder whether that really was a clear enough direction to the jury that that issue did go to the credibility particularly of PC Callow whose description of what the appellant did was so important. We also query whether the judge did to an extent undermine the ground upon which the appellant relied when he put that allegation of being beaten up in this way: "If you consider the police behaved with more force and enthusiasm than they should have done it is something for you to bear in mind." But reading the summing-up as a whole, we do not think that affords any separate ground of appeal.

27 We are thus faced with two bases of appeal that we think are made out. First, as to

the development of the cross-examination to suggest propensity, and secondly, as to the interventions of the judge. But we have to pause at this point. Our jurisdiction is limited to considering whether the verdicts of the jury were safe. As we said at the outset, in our judgment this was an overwhelming case. There was no realistic or rationale explanation for the discharge of the gun. That, coupled with the description given by PC Callow of how the appellant aimed that gun, does in our view demonstrate that in the context of that evidence the bases of appeal that have been made out do not render the verdict unsafe and in those circumstances the appeal against conviction is dismissed.

(There followed an application for leave to appeal against sentence)

28 LORD JUSTICE MOSES: This is an application for permission to appeal against sentence which, as we have said, was 25 years' imprisonment. The basis of the application is twofold. First, it is said that this is an unusual case in that effectively, apart from some minor offences in Jamaica, this was a man of 32, with no previous convictions and the last person one would have thought would get involved in a crime of this gravity, of whom, very unusually in a helpful pre-sentence report, the probation officer had said that he was not a significant risk to members of the public. In other words, accepting that the offence was serious he was not a significant risk of committing a further specified offence, he had no previous history of violence, no relevant criminal convictions and that the explanation for the offence was, as appears obvious from the background, impulsivity and lack of forethought.

29 The second basis is that although there was no definitive guideline to guide the judge at the time, within three months one was produced in relation to attempted murder which showed either that this was a Level 3, where the range is between six to 14 years with aggravating circumstances (namely that the victim was a police officer and that a loaded pistol was used) or that it was Level 1 where the range is between 12 and 20 years where there is little or no psychological harm.

30 Mr Pownall accepts that there were serious aggravating features, namely that the victim was a police officer and therefore vulnerable, and that a loaded gun was used. But not, he submits, so as to take this offence into one where 25 years was appropriate. He points out the effect of comparison that is necessary with the provisions of section 244 of the Criminal Justice Act 2003 and draws attention to the decision of the Court of Appeal in relation to a notional determinate term in *Ford [2006] 1 Cr.App.R (S) 36* .

31 At first blush there is some merit in these arguments, particularly having regard to the appellant's background. But in our judgment the judge was fully entitled to pass the sentence he did of 25 years for two reasons. First, the possession of which this appellant was convicted in count 3. He had chosen to go out in the middle of the day in possession of a dangerous weapon loaded with ammunition. Not only had he chosen to go out in possession of that weapon, but when stopped by the police had made the decision not only to run away carrying that gun but, so it should be remembered from the evidence, cocked the gun and deliberately fired it at a distance of some five metres or so away from the pursuing police officer. Nowadays it requires no emphasis from this court as to the gravity of not only carrying loaded pistols but firing them. If one adds to that the deliberate decision to attempt to kill the pursuing police officer, there

can in our judgment be no basis for contending that the sentence is manifestly excessive. In those circumstances the application is refused.