IN THE COURT OF APPEAL

TURKS AND CAICOS ISLANDS

Appeal No. CR-AP 2/21

From CR 64/19

BETWEEN:

LARENZO RIGBY

Appellant

-and-

REGINA

Respondent

BEFORE:

The Hon. Mr. Justice C. Dennis Morrison P

The Hon. Mr. Justice Stanley John JA

The Hon. Mr. Justice Humphrey Stollmeyer JA

APPEARANCES:

Ms. Sheena Mair for the Appellant

Ms. Nayasha Hatmin for the Respondent

Date Heard: **31st January, 2022**

Date Delivered: **29th March, 2022**

JUDGMENT

John, JA

[1] This is an appeal against conviction**.** On 11th June 2021, after a trial lasting eighteen (18) days before Tanya Lobban Jackson J and a jury, the appellant was convicted of the offences

of keeping firearm and keeping ammunition contrary to section 3 (1) of the Firearms Ordinance Chapter 18.09 of the laws of the Turks and Caicos Islands.

[2] On Monday 31st January 2022, following submissions from counsel for the appellant and counsel for the Crown we dismissed the appeal. We indicated then that we would give written reasons at a later date. This we now do.

[3] The Prosecution case was that on 18th October 2019, police officers were on their way to execute a warrant in Five Cays at a motel known as Sally-Ann Motel in Providenciales. There were three police vehicles in the party. DC Jevon Hall was sitting in the passenger seat of one of the vehicles. On arrival at the location he got out of the vehicle and stood at a particular position.

[4] While he was in his position, he saw a black object being thrown from the direction of an open window at the back of the building. He saw where the object fell, and he observed the appellant coming out of the apartment from where the object came. DC Hall spoke to the appellant and asked him what it was he threw outside. DC Hall went to the area where the black object fell and upon searching the area he found a small silver and black firearm.

[5] DC Hall brought the appellant to the area and showed him the firearm in the bush. The appellant responded "I don't know anything about that". Other officers saw a person later identified as 'GG' standing on the balcony of the apartment. The appellant together with GG was taken into custody.

[6] Sometime later DC Carl Wynter, a scenes of crime officer, was summoned to a scene at the John Morley apartment located at School Hill Road in the Five Cays district. He processed the scene and took photographs. He also took swabs from a silver and black Taurus millennium pistol which was pointed out to him. Additionally, he took swabs from parts of the pistol. DC Wynter testified that in accordance with universal guidelines, he wore two (2) pairs of gloves. The first pair of gloves he described as base gloves and another glove was placed over it. Each item he handled, he wore a clean glove over the

base glove. He labeled, packaged, and sealed each separately and placed them in a gun evidence box in the presence of the accused and other officers. The items were later handed over to the exhibit keeper for safe custody.

The items were marked as follows:

- CW1A- handle of pistol
- CW1B- slide of pistol
- CW1C- trigger and trigger guard
- CW1D- magazine
- CW1E- 9mm cartridges

[7] Swabs were taken both from the accused and GG and they were labelled as follows:

- AA1 for GG
- AA2 for the accused

[8] Ms. Tarah Neiroda, a DNA analyst attached to the DNA Labs International, was cross examined by Ms. Mair. She said in answer to Ms. Mair that she reviewed the case submission form which was received from the Turks and Caicos Islands Police Force. She received exhibits labelled CW1A CW1B, CW1C, CW1D, CW1E, AA1, and AA2, all to be examined for touch DNA. She subsequently submitted a report which showed that the DNA on all items retrieved from the firearm matched the DNA buccal swabs from AA2.

The 'No Case Submission'

[9] At the close of the case for the prosecution, counsel for the appellant made a submission of 'no case to answer'. Counsel submitted that there was insufficient evidence to establish that the DNA swabs were not compromised, that is to say, contaminated or otherwise tampered with. The evidence she submitted showed a lapse in the chain of custody. Counsel further submitted that DC Carl Wynter was not deemed an expert witness by the court. In

support of her submission, counsel referred the Court to the case of **Damian Hodge v The Queen**[1].

[10] The trial judge overruled the submission and called upon the accused who elected to remain silent. He called one witness on his behalf, Ms. Kelsey Neary, who appeared by video link. At the time she was employed at the Broward County Sheriff's Office and she is a criminalist, that is to say a forensic scientist in the field of DNA Analysis who was deemed an expert by the court.

The Appeal

[11] On 13th July 2021, the appellant filed an appeal against his conviction relying on the following grounds:

(1) The court erred in repelling the 'no case submission' made by the defence.

(2) The court erred by failing to properly address a part of the defence case to the jury.

(3) The court failed to properly direct the jury on the law as it relates to the offences charged.

Submissions

[12] Ms. Mair reiterated her submission made before the trial judge that the court fell into error in not upholding the 'no case submission'. Counsel submitted that there was no chain of custody as opposed to break in the chain of custody. She placed reliance on the cases of **Damian Hodge v The Queen** (*supra*) and the Irish cases of **Whelan v The DPP**[2] (Unreported, ex tempore, High Court, O'Neill J, 2nd February, 2009) and **DPP v Corbally**[3].

[13] The first ground of appeal centered on the chain of evidence concerning the items retrieved by DC Carl Wynter and later examined by Tarah Nieroda, the DNA analyst at the Universal Laboratory. Counsel for the appellant submitted that DC Wynter was not deemed an expert.

[1] 2010 HCRAP 2009/001
[2] Para 15. DPP v Corbally [2021] IECA 87
[3] [2021] IECA 87 (unapproved)

However, Ms. Hatmin refuted that submission when she said that DC Wynter was not called to give an opinion on any aspect of his evidence. Accordingly, she said there was no need for him to be deemed an expert.

[14] We were satisfied that there was no requirement for him to be an expert in the instant case as he was not giving evidence of any opinion as is required of an expert. He was an experienced scenes of crime officer and his function was to process the scene. In so doing he took photographs, retrieved the firearm, labelled and secured separately all parts in keeping with universal guidelines. He said that each item that he touched, a new glove was placed over the base glove. It follows therefore that at all material times DC Wynter was double gloved.

[15] Additionally, each item was labelled, sealed and placed in a brown bag. The items were subsequently handed over to the exhibit keeper. Three months later they were sent via DHL Worldwide expressed to Universal Labs for analysis. The evidence of Ms. Neiroda was quite clear, she received items with labels which corresponded to those given by D.C Wynter.

[16] The law in this area is fairly well settled. In **Damian Hodge v The Queen** (*supra*) a decision of the Eastern Caribbean Supreme Court from the Territory of the Virgin Islands, Baptiste JA stated in paragraph 12:

> "The underlying purpose of testimony relating to the chain of custody is to prove that the evidence which is sought to be tendered has not been altered, compromised, contaminated, substituted or otherwise tampered with, thus ensuring its integrity from collection to its production in court. The law tries to ensure the integrity of the evidence by requiring proof of the chain of custody by the party seeking to adduce the evidence. Proof of continuity is not a legal requirement and gaps in continuity are not fatal to the Crown's case unless they raise a reasonable doubt about the exhibit's integrity. There is no specific requirement, neither is it necessary, that every person who may have had possession during the chain of

transfer be called to give evidence of the handling of the sample while it was in their possession. It is a question of fact for the jury whether or not there is reason to doubt the accuracy of DNA results because of the possibility that security or continuity of samples was not maintained. See *R v Stafford* at paragraph 116, where the case of *R v Butler* is cited for that proposition." (emphasis mine)

[17] Counsel also referred to the case of **DPP v Corbally**[4]. In that case, the chain of evidence regarding the DNA sample taken from the accused was in issue. "The Chain of Custody" included evidence from the officer who took the swab on a specific date. There was evidence that it was transported to the Forensic Services Laboratory nine days later. Evidence was received from the person who collected the sample and the doctor who analyzed it. In dismissing the appeal, the court referred to the Irish case of **The People (DPP) v Hawkins**[5] where the court of Criminal Appeal considered the issue of maintaining the chain of evidence and said it was not necessary to call every person who handled or had custody of the evidence.

[18] We were satisfied that the procedure followed in the instant case concerning the chain of custody was in accord with the principle enunciated in **Hodge v The Queen**, and the trial judge could not be faulted for repelling the submission of no case to answer. Accordingly, that ground of appeal failed.

[19] Grounds 2 and 3 were dealt with together for convenience. Counsel complained about the judge's failure to properly address parts of the defence case to the jury and also her failure to properly direct the jury on the law as it relates to the offences charged. Ms. Mair in support of her submissions on the second ground directed the court to the summation on day eighteen. There, the trial judge read the charges and referred to **section 3 (1) of the Firearms Ordinance**. Her Ladyship explained to the jury that the prosecution had to satisfy them firstly, that the defendant kept the firearm and ammunition and secondly, that he had knowledge and control over the firearm. That in our view was sufficient.

[4] [2021] IECA 87 (unapproved)
[5] [2014] IECCA 36

[20] As to the latter ground, while the trial judge did not explain what was meant by "keeping" and what was meant by "knowledge and control", we were satisfied that the jurors would appreciate and understand the meaning of those ordinary words.

[21] In refuting the submissions of Ms. Mair, Ms Hatmin relied on her written submissions. However, she submitted that there was sufficient evidence to establish a chain of custody for the items retrieved by D.C. Wynter. Counsel, in support of her submission, relied on the case of Hodge v The Queen (supra).

[22] Referencing grounds 2 and 3, Ms. Hatmin referred to a passage in the case of **George Henry v The State**[6] a decision of the Court of Appeal of Trinidad and Tobago where Bernard CJ in addressing a complaint that the judge failed to adequately address the accused unsworn statement from the dock said at page 326:

> "**A summing up is neither a musical or orchestral performance; nor is it a prayer or homily. It does not require as a condition precedent to his jurisprudential viability or acceptability a resort to any specific formula or set of words, or for that matter any particular incantation or legalistic tabula. A summing up must be looked at in the light of particular facts and circumstances against the background of the duty of prosecution to establish guilt beyond a reasonable doubt. Juries (if we may be presumptuous to say so) modern day juries are not to be credited with lack of understanding of and/ or ability to grapple with issues without a legalistic commentary by the trial judge".**

[23] She also referred to the earlier case of **Mc Greevy v DPP**[7] where Lord Morris of Borth-y-gest said at page 507:

> **"The particular form and style of a summing-up, provided it contains what must be on any view be certain essential elements, must depend not only on**

[6] [1986] 40 WIR
[7] [1973] 1 ALL ER 503

the particular features of a particular case but also on the view formed by a judge as to form and style that will be fair and reasonable and helpful. The solemn function of those concerned in a criminal trial is to clear the innocent and to convict the guilty. It is, however, not for the judge but for the jury to decide what evidence is to be accepted and what conclusion should be drawn from it. It is not to be assumed that members of the jury abandon their reasoning powers and, having decided that they accept as true some particular piece of evidence will not proceed further to consider whether the effect of that piece of the evidence is to point to guilt or is neutral or is to point to innocence. Nor is it to be assumed that in that process of weighing up great many separate pieces of evidence they will forget the fundamental direction, if carefully given to them, they must not convict unless they are satisfied that guilt has been proved and has been proved beyond all reasonable doubt."

[24] Complaints are generally made that the trial judge failed to address or that he failed to direct the jury on the law. It must be borne in mind that the jurors have sat through the trial and have heard all the evidence. In the instant case, while we felt that the trial judge could have given a more robust direction to the jury, we were nevertheless of the opinion that the summation in its entirety did not occasion any prejudice to the accused. Accordingly, those two grounds of appeal failed.

[25] For all the above reasons we dismissed the appeal and confirmed the order of conviction.

/s/ Stanley John, JA

I agree.

/s/ C. Dennis Morrison, P

I also agree.

/s/ Humphrey Stollmeyer, JA