The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 6 of 2017

B E T W E E N:

SHANTOINE PRINSTON BURROWS

Appellant

v

THE QUEEN

Respondent

Before: **Baker, President**
Bell, JA
Clarke, JA

Appearances: Craig Attridge, C. Craig Attridge Barrister & Attorney, for the Appellant
Carrington Mahoney and Nicole Smith, Office of the Director for Public Prosecutions for the Respondent

Date of Judgment: **22 March 2018**

EX TEMPORE JUDGMENT

Approach to juror by relative of Defendant – effect of juror having a conviction – section 538 of the Criminal Code 1907 – alleged incompetence of trial counsel – failure to follow instructions

BAKER, P

1. On 4 October 2016, Shantoine Prinston Burrows ("the Appellant") was convicted of the murder of Rickai Swan and wounding with intent in respect of Dimicko

Gibbons, and two offences of using a firearm to commit an indictable offence. He was later sentenced to life imprisonment and to serve 25 years before being eligible for parole.

Facts

2. The facts of the case as alleged by the Crown were in summary as follows. On Friday, 23 October 2015, from about 8:30pm, patrons were gathering and socialising at the Southampton Rangers Sports Club. At about 10:30pm while Rickai Swan, Demiko Gibbons and others were socialising on the front porch of the sports club, a gunman crept up on them and proceeded to fire shots at the group; everyone scattered. Rickai Swan unsuccessfully tried to elude the gunman who chased and shot him several times before he collapsed at the entrance of the sports club on South Shore Road. The gunman returned via the direction from which he had come, strolled through nearby premises located to the rear of the sports club, 49 Horseshoe Road, and started a bike which he rode in an easterly direction toward Camp Hill.

3. The shooting was captured on CCTV located in the vicinity. The gunman was dressed in a black helmet, black jacket, black gloves, dark coloured pants and sneakers. About 11:30pm that same evening, a white Sports City Aprilla motorbike with registration plate "CA094" was found abandoned in the driveway of 59 Spice Hill Road, Warwick, which was a little over a mile to the east of the sports club. The motorbike had no keys but had two wires protruding from the front housing. It had been stolen from its owner earlier that day or on the previous day. The front grips were found to contain gunshot residue particles as well as two and one component particles. The Appellant's DNA was the major contributor to the DNA mixture found on the left grip.

4. Earlier on the same day at about 3:30pm, CCTV footage showed the motorbike in the White Hill area of Middle Road with two males travelling on the motorbike. A witness, Joel Smith, identified the passenger as "Jachael" and the rider as the

Appellant who was dressed in a black jacket, black helmet and black gloves as the motorbike was driven onto Woodlawn Road. Joel Smith knew the Appellant for some seven or eight years from the White Hill neighbourhood.

5. Joel Smith's evidence was that on the evening of Friday, 23 October 2015, he, the Appellant and four other friends were at "Anthony's house" on Woodlawn Road "chilling". Smith and two of his friends decided to go into town. Smith tried to get a lift with the Appellant, but the Appellant told Smith that he did not want to take him because if the police came, he, the Appellant, would shoot at them and he did not want Smith to get in the way. The Appellant gave Smith a ride on the white Sports City Aprilla motorbike that he was riding to the nearby home of another friend, Azah, who had agreed to take Smith into town. They arrived at the house just before 9:30pm and left for town via Middle Road shortly thereafter.

6. The Appellant travelled alone on the white Sports City Aprilla motorbike while Smith and his other three friends travelled on two other bikes. The Appellant was wearing dark coloured clothes, namely a black helmet, black gloves, black jacket and dark pants. In the vicinity of Port Royal Post Office and the Port Royal Primary School, the Appellant told Smith and the others that he was going to go handle his business. He then turned the motorbike he was riding and went up the hill – that is St Ann's Road – to go to South Shore Road and meanwhile Smith and his other friends proceeded on their bikes to town, namely Roberts Avenue.

7. While at Roberts Avenue, Smith and his friends were made aware of a shooting at Rangers Sports Club. A few minutes later Jachael, one of Smith's friends, got two WhatsApp voice note messages from Jachael's young brother, who lived near the Orange Laundromat on Ord Road at the time. The Appellant's voice was heard when the voice notes were played requesting someone to come and pick him up.

8. On 18 November 2015, Smith was at his home in Spring Benny along with the Appellant and four other friends when the Appellant started to tell them what happened on the night the Appellant shot Rickai Swan, also known as "Black". Smith said that the Appellant told them that he did not have his visor all the way down, and that Dillas smacked the gun away from his chest and he, the Appellant, shot Swan. Smith then went outside at that point followed by the Appellant and the other persons present.

9. On the day of the killing, the police wanted to speak to the Appellant in relation to an unrelated matter. The Appellant phoned Detective Sergeant Trott at 7:10pm and indicated he wanted to turn himself in to the police, however he needed to speak to his lawyer first. The Appellant called Detective Sergeant Trott again at 7:44pm that same night, and indicated that he had tried to speak to his lawyer, but that his lawyer was unavailable that evening. So the Appellant said that he would turn himself in to the police the following morning, which would have been Saturday 24 October 2015 at 9am, but he failed to turn himself in as he had promised and was never seen or heard of by the police until Monday, 26 October 2015 when he did turn himself in at Hamilton Police Station in relation to the other unrelated matter.

Ground 1: The Issue of the Juror

10. Mr Attridge has taken two points on this appeal. The first is the issue whether a juror to (hereinafter referred to as "Juror Number 7") should have served on the jury at all. The issue arose as follows. Shortly before the close of the Crown's case, the Appellant's mother spoke to Mr Daniels, the Appellant's counsel, in the parking area. She said that her husband, Mr Wilson, had spoken to one of the jurors and Mrs Wilson recognised the name of the juror. It was said that Mr Wilson asked the juror how the trial was going, to which he received the response: "it doesn't look good".

11. Mr Daniels told the Appellant and discussed the situation with him. They decided that no action needed to be taken. Mrs Wilson was warned that speaking to jurors was inappropriate and to tell her husband so. An affidavit was produced from Mr Wilson. The material part reads as follows:

> *"Whilst I was grocery shopping, I passed [Juror Number 7] in the aisle, and a lapse of judgment came over me, I knew I had seen her sitting on the jury in Prinston's trial so I asked her "How's it looking for my boy?" She shook her head and replied "It's not looking good". She also said how she was aware that this was not my son's first case like this so why should they the jury believe him now. She also added something about, "the victim's poor family."*

He went on a little later:

> *"…I felt comfortable speaking to [Juror Number 7] because I have known her since primary school days."*

12. There was also provided an affidavit from Mrs Wilson. The material part of which reads:

> *"In or around October 2016, a few days before the end of my son's trial, my husband, Kwesi Wilson, came home one evening and informed me of a conversation he had had with a woman familiar to me named, [Juror Number 7] who was a member of the jury at my son's trial.*
>
> *My husband told me that he had seen [Juror Number 7] and asked her how was the trial looking for my son.*
>
> *I knew he should not have spoken to her as she was on the jury.*
>
> *My husband informed me that [Juror Number 7] replied "it was not looking good". She also brought up to my husband, how was the jury supposed to consider the*

> *family of the victim, and a previous Supreme Court trial in which my son was also a defendant.*
>
> *I believe that [Juror Number 7] was not honest in her decision of accepting the duty of jury member in my son's case and should not have continued as she must have been aware of my son's family ties and her own sons ties to Joel Smith and Taj Brown."*

13. On the basis of that information we directed the Registrar to interview Juror Number 7. We have a transcript of that interview. She was asked if she knew Mr Wilson to which she said "yes from years ago." Asked whether she had contact with him when she was a juror she replied as follows:

> *"Yes. I remember the last week of the trial. I do remember him approaching me and saying to me that that was his son, and I was like "what you mean that's your son" and I said "look I can't talk to you."*

14. The following relevant answers were given in response to questions by the Registrar:

> *"**THE COURT:** Okay one moment. Where was this conversation?*
>
> ***JUROR NUMBER 7:*** *Maxi Mart.*
>
> ***THE COURT:*** *Continue.*
>
> ***JUROR NUMBER 7:*** *And I said "I cannot talk to you I will not talk to you" and I walked off.*
>
> ***THE COURT:*** *"I cannot talk to you and I will not talk to you and I walked off"?*
>
> ***THE COURT:*** *I want to catch everything you say, so you have to speak at a certain pace. So you said that this was at Maxi Mart and he approached you?*
>
> ***JUROR NUMBER 7:*** *Yes*

THE COURT: *Did he say anything to you in approaching you?*

JUROR NUMBER 7: *Yes he said "you know that's my son?".*

THE COURT: *Anything else?*

JUROR NUMBER 7: *And I just looked at him said what I said "I am not going to talk to you I will not talk to you" and I walked off.*

THE COURT: *Prior to the trial, did you know Shantoine Prinston Burrows?*

JUROR NUMBER 7: *Well, see - -*

THE COURT: *You've nodded your head can you please just give me a word for the audio recording - -*

JUROR NUMBER 7: *Well I'm trying to explain it to you. I did not know that was Kimberley's son - -*

THE COURT: *"I did not know that that was Kimberley's son." Who's Kimberley?*

JUROR NUMBER 7: *That's his mother.*

THE COURT: *Okay, but my question is, did you know Shantoine Prinston Burrows prior to the trial?*

JUROR NUMBER 7: *At that time when I first got picked, and they had asked me did I have any issues, I said I didn't have any issues because I didn't know him.*

THE COURT: *Apart from what you said during the trial - - I'll just put the question to you one more time. Did you know Shantoine Prinston Burrows before this trial, did you know who he was?*

JUROR NUMBER 7: *Oh before the trial, no I didn't - - no.*

THE COURT: *And you referred to his mother, Kimberley. Did you know Kimberley prior to the trial?*

> ***JUROR NUMBER 7:*** *I - - I knew Kimberley yes, but like I said, I didn't know that was her son.*
>
> ***THE COURT:*** *Did you know her - - did you have any sort of relationship with Kimberley?*
>
> ***JUROR NUMBER 7:*** *Umm - - I wouldn't call it a relationship. I would just say that when we was teenagers, we used to see each other out. But I wouldn't call it a relationship.*
>
> ***THE COURT:*** *Did you - - bring to the attention of the trial judge or a jury officer - - the fact that Kwesi Wilson approached you during the trial?*
>
> ***JUROR NUMBER 7:*** *No I didn't because I - - I had people on my job as well asking me questions, so I just thought it was - - you know - - normal to ask a question or say something to me where I knew I had to have my defence up and be like "I can't talk to you I will not talk to you."*
>
> ***THE COURT:*** *And when is it that it came to your attention that Shantoine Burrows was Kimberley's son?*
>
> ***JUROR NUMBER 7:*** *When we were - - was one day we were in court and somebody pointed out - - one of the juror's said "oh that's his mother right there" I said "where to" and then she pointed at Kimberley and I was - -That's when I realise I said "oh my god I didn't know." I didn't say anything to anybody because I didn't know who to talk to. I didn't know what to do. So I just didn't say anything."*

That was the interview with the juror.

15. In our judgment on the face of it, Juror Number 7 behaved entirely appropriately. In a small community like Bermuda, there are bound to be connections from time to time between jurors and witnesses, defendants or their families. Depending on the closeness of the connection, it may be appropriate for an individual to serve or not to serve in a particular trial. The question will be whether any connection is likely to be perceived as affecting the fairness of the

trial in the eyes of a reasonable bystander. The connection in this case was, in our judgment, remote. Nothing was said by Juror Number 7 on her account of the meeting that was inappropriate, in circumstances, when she should not have been approached by Mr Wilson at all.

16. Accordingly, there is nothing in this ground of appeal, save for one matter was raised at a late stage, as far as the Court is concerned, although Mr Attridge contends that it was a point that was flagged up through his client's affidavit, and that the documents were ventilated in Court on a previous occasion. Be that as it may, the point made is that Juror Number 7 was disqualified by reason of her having a previous conviction for stealing three cans of drink from a shop in respect of which she was given a conditional discharge. As far as this Court can see, although the sentence was a conditional discharge, the matter was recorded as a conviction. However, that is of no consequence in the light of section 538 of the Criminal Code 1907, which provides:

> *"Notwithstanding anything in the foregoing provisions of this Part, where a person—*
>
> *(a) being a person not qualified to serve as a juror, is drawn or selected as a juror, and is not challenged in pursuance of section 519; or*
> *(b) who, although qualified to serve as a juror, was not duly returned to serve as a juror under any provision of law for the time being having effect with respect to the selection and service of jurors at that particular trial,*
>
> *then in any such case, if after being sworn he subsequently serves as a juror, such service shall not invalidate or affect any verdict found by the jury, and all proceedings of the jury shall be as valid and effectual as if he had been duly qualified to serve as a juror."*

So, in the light of s. 538, there is nothing in the point.

Ground 2: Alleged Incompetence of Trial Counsel

17. The second point and in reality the main point run by Mr Attridge, who has appeared on this appeal for the Appellant, is that the Appellant says in summary, that he met Mr Caines, Mr Daniels' assistant, on three occasions. He was presented with a printed document containing proposed cross examination, and he gave Mr Caines a sheet of paper with his handwritten additions and corrections etc, and at the core of this was his contention that Joel Smith had confessed to him that he was the shooter, and he was riding the white Sport City Aprilla motorbike on the night of the murder.

18. He says in his affidavit that on the Thursday before the trial, they met again and Mr Caines told him that he had passed the information to Mr Daniels. The Appellant gave evidence to us and the thrust of his evidence was again that he made it clear to Mr Daniels that it was his case that Joel Smith had confessed to him that he was the shooter, and that he was riding the Aprilla bike on the night in question.

19. It was not entirely clear during the course of the Appellant's cross examination at what point that case was made out and told to his lawyer Mr Daniels, but he appeared, according to Mr Attridge, to fix on a meeting when the defence was first discussed in detail on or about the 3 August 2016. It is helpful to look first at the Appellant's affidavit to see how he put his case on this point on. The relevant passage reads as follows:

> *"…On the first day of trial I had the opportunity to finally speak to Mr. Daniels again and asked if he had received the information and my instructions from Mr. Caines. He replied that he had, and then said something along the lines of, "We'll get to that after jury selection. I'm still digesting the information".*
>
> *Having already received what Mr. Daniels called the "Template" of his intended cross-examination of Joel Smith, I expressed my lack of confidence in Mr. Daniels'*

theory that being "less complicated is better" – or words to that effect. Mr. Daniels expressed the view that the fight in which Joel Smith's jaw was broken gave him sufficient reasons for wanting to get back at me by lying, and that the jury would be swayed by that into believing that Joel had made up the story implicating me in revenge for my breaking his jaw.

That I made it clear to Mr. Daniels that I did not have the same belief in his theory and that I did not want to make that route because: firstly, it was not the truth; and, secondly, it was not, in any event, sufficiently strong enough in my view, and I wanted him to follow my instructions, that Joel rode the white Aprilia SportCity on the night in question and that he was the one who confessed to me that he had committed the offences with which I was charged.

As the trial progressed I was even more convinced that he should follow my instructions rather than his watered-down version and as the time grew closer for Joel Smith to give his testimony Mr. Daniels and I had more discussions about how Joel Smith's evidence was to be attacked on the stand. On the day that Joel Smith took the stand Mr. Daniels came back to me in the cells and asked me if I was ready, and I asked him the same question, and told him that I was sure that we should stick to my approach. He again expressed his opinion that we should follow a more simplistic approach, and he asked me if I was sure, and I told him I was.

Mr. Daniels then proceeded to cross-examine Joel Smith, and whilst he laid much of the foundation work and even went so far as to suggest to Joel that ridden the white Aprilia SportCity on the night in question

When asked by the Judge whether that was our case Mr. Daniels told Justice Simmons that that was not our case, when in fact that absolutely was my case.

At the next adjournment following the cross-examination of Joel by Mr. Daniels I addressed Mr. Daniels regarding

> *his failure to follow my instructions, and asked him to explain why he chose not to. He replied that he, "did not think it would have gone over well with the jury", or words to that effect, and that he, "didn't want Joel Smith continually saying no to all his suggestions".*
>
> *The fact that this suggestion was not put to Joel Smith also affected my decision as to whether or not to give evidence in my own defence, because on the one hand I wanted to go up there and tell the jury what Joel Smith had told me about him committing these offences, and the fact that he was the one riding the white Aprilia SportsCity that night, but at the same time I did not know how that would look to the jury."*

20. So it is abundantly clear from that affidavit that there was a very sharp conflict between his account and the account of Mr Daniels who says that no such instructions were ever given.

21. We heard the Appellant's cross-examination and it seems to us that the following points are relevant. He had retained Mr Daniels before. He was no stranger to the criminal justice system, and giving instructions to his lawyer. It was clear that he was romantically involved with Ms Swan, a judicial trainee or assistant who was involved with this case to the extent that she attended with Mr Caines, Mr Daniels' assistant, when Mr Caines went to visit the Appellant in custody on a number of occasions. It was also clear that there was a previous case which the Appellant was a defendant, where again, there was a prosecution witness where the circumstances were not dissimilar to the circumstances in the present case to the extent that the prosecution witness implicated the Appellant, and the Appellant did decide to make his case that the prosecution witness was in fact the person who was guilty of the offence rather than the Appellant.

22. We formed the impression that the Appellant was a client who liked to liaise closely with his lawyer and be closely involved in how his case should be

conducted. The critical question in our judgment is whether the Appellant ever told Mr Daniels or his assistant, Mr Caines, that Smith was the shooter and had confessed that fact to him. The Appellant said that he did although he has given us conflicting evidence about the occasion upon which this message was passed over. Mr Daniels and Mr Caines say that he did not. The Court has to resolve an issue of credibility. We heard evidence not only from Mr Daniels but also from Mr Caines. Paragraph 13, 14 and 15 of Mr Caines' affidavit are in our judgment very relevant in this regard. He said:

> *"I had a conversation with Mr. Burrows in a subsequent meeting which was not attended by Ms. Swan. In that meeting I unambiguously and purposefully asked Mr. Burrows if he knew who committed this murder as I did not believe that he was the person responsible.*
>
> *Mr. Burrows never orally answered my question instead he coyly smiled and explained that he lived his life by his personal code his personal belief and was not based on some blind loyalty or code of the street. I accepted his answer and then continued to converse about the case in general as well as take his instructions.*
>
> *To remove all doubt, I can categorically state that Mr. Burrows has never told to me that Joel Smith confessed to him, where this took place and under whatever circumstances this alleged confession took place."*

Mr Caines said that he passed everything over to his principal, Mr Daniels, on Mr Daniels' return from abroad.

23. The Appellant was in our judgment unconvincing and his evidence does not match the reality of what happened. The incompetence of counsel was not in his original grounds of appeal. A confession by Smith to the Appellant is something that competent counsel would certainly not have overlooked. If true, it is likely that the Appellant would have told Mr Daniels at the start, particularly in the light of the other case. Mr Caines was in our judgment honest and very

keen at the same time not to damage the prospects of the Appellant's appeal, and we think that his evidence is important in establishing the truth of what happened.

24. Mr Daniels did his best to give this Court an accurate account of what happened, although understandably his memory was at times hazy. He said that his instructions changed from time to time, and it was plain to us that he was running the case on the basis that the Appellant was not the shooter, albeit implying that the Appellant could have been the shooter without specifically alleging this. Had he had instructions from the Appellant that Smith had confessed to him, he would have had to put that in cross-examination to Smith. Instead, his case was that Smith was untruthful and had wrongly implicated his client. It is common ground that at one point the learned trial judge intervened and asked if it was the Appellant's case that Smith was the shooter, although no one has been able to find the specific point in the transcript. Mr Daniels responded appropriately and said that it was not, because that was the status of his instructions.

25. We are satisfied the Appellant would have taken this point up with Mr Daniels immediately after the judge's request to know what his case was had his instructions been ignored. We accept Mr Daniels was a truthful witness doing his best to assist the Court. Mr Caines also being a truthful witness, it follows we are unable to accept the evidence of the Appellant. If the Appellant's evidence was true, it could have been corroborated by Ms Swan, the legal trainee or pupil, who followed the case. We have not, however, heard from her.

26. In one respect, we should say that Mr Daniels' conduct fell short of what is to be expected of counsel in these circumstances. A signed statement should have been obtained from the Appellant with regard to his decision; that he had been advised of his opportunity to give evidence; that it was his own decision not to; and that he decided not to give evidence. Mr Daniels was unable to produce any

such signed statement, and indeed Mr Daniels was unable to produce the Appellant's signed proof of evidence, which for inexplicable reasons, has gone missing from the place where it should have been in his office. We have however seen an unsigned proof of evidence and are satisfied on the balance of probability it would have been at some point in the Appellant's possession. That unsigned proof of evidence makes no mention of the defence as it now is.

27. Mr Attridge takes a subsidiary point, saying that on any showing, even if specific instructions were never given about the confession to the shooting, it should still have been put to Mr Smith that he was the shooter. We cannot accept that. Mr Daniels makes the point that it would have been inappropriate, and not only inappropriate but a breach of professional conduct to put that to the witness if it was not his expressed instructions. Furthermore, Mr Daniels made the point that he was dealing with a situation that was ever shifting before the jury, and there were complications with regard to the co-defendant and what the co-defendant's evidence might be, and he had given a clear indication to Mr Daniels that he wished to give evidence in the event that his submission of no case to answer was rejected.

Conclusion

28. At the end of the day, the ultimate question is whether this conviction is safe. We have heard nothing to indicate that the conviction is not safe. Indeed, even had Mr Daniels put to Joel Smith that he was the shooter, we think it is unlikely in the extreme that that would have caused the verdict of the jury to have been any different. There was, as Mr Mahoney pointed out, clear separate evidence against the Appellant in the form of his DNA and gunshot residue on the bike, and the fact that the Appellant's clothing and black gloves matched the clothing and black gloves of the shooter that was seen on CCTV. In these circumstances, despite the valiant efforts of Mr Attridge, this appeal must be dismissed.

BELL, JA

29. I agree.

CLARKE, JA

30. I agree.

Baker P

Bell JA

Clarke JA