JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 72/2002

BEFORE: THE HON. MR. JUSTICE PANTON, J. A.
THE HON. MR. JUSTICE SMITH, J. A.
THE HON. MR. JUSTICE MARSH , J. A.(Ag.)

OMAR BOLTON V R

**Delano Harrison, Q.C.** for the Applicant

**Mrs. Stephanie Jackson-Haisley** for the Crown

5th, 9th, June and 28th July, 2006

SMITH, JA:

The applicant Omar Bolton was indicted in the High Court Division of the Gun Court for the offences of illegal possession of firearm (count 1) and wounding with intent (count 2).

The trial began on the 23rd July, 2001 before Donald McIntosh J, and ended on the 27th March, 2002 after some twelve (12) days of hearing. The applicant was found guilty on both counts and sentenced to 15 and 30 years imprisonment respectively.

His application for leave to appeal was refused by a single judge on the 8th November, 2005. He has now renewed the application before this Court.

**The Prosecution's Case**

The evidence of Andrew Creary is to the effect that on the 8th day of February, 2000 at about 8:30 p.m. he was at home at premises on Paradise Street in the parish of Kingston. He was in the yard washing dishes when the applicant entered the premises through the gate. There was a bright light in the yard. The applicant approached him. He had known the applicant for about 20 years and had seen him earlier that day "at the corner" where he worked. When the applicant was about 15 feet away, Mr. Creary enquired, " Omar what you doing in my yard me and you not any friend? " The applicant responded by pulling a firearm from his waist band, pointing it at Mr. Creary and firing several shots. Mr. Creary was injured, and he fell to the ground. The applicant stood over him, pointing the gun at his head. "Lord have mercy he is going to kill me now, " Mr. Creary prayed. He heard a clicking sound, but, apparently, the trigger had stuck. The applicant ran through the gate and disappeared. Mr. Creary was taken to the hospital. Whilst at the hospital he gave a written statement to the police.

Mr. Creary gave clear evidence as to the circumstances in which the identification by him of the applicant was made. It is not necessary to repeat these since no complaint is made in this regard.

**The Defence**

The applicant gave evidence on oath. His alibi defence was supported by three witnesses. His first witness Mr. Aston Brown testified that it was he who had taken the complainant to the hospital in an ambulance. He said that on the way, the complainant when asked whether it was Omar who had shot him replied that it was not Omar, it was " some man from a van". The second defence witness Mr. Anthony Shaw, a Justice of the Peace, testified that at the time when shots were being fired "from the direction of Paradise Street" he saw the applicant among a group of men at the corner of Fishers Road and Rae Street. The effect of the evidence of the third witness Mr. Dwight Brown was to support the evidence of his father Mr. Aston Brown that the complainant on the way to the hospital said it was not the applicant who shot him.

**Grounds of Appeal**

Mr. Delano Harrison, Q.C. sought and obtained leave to argue the following supplementary grounds of appeal. The original grounds 1 and 2 were abandoned. The original ground 3 is listed hereunder as ground 2:

"1. That by virtue of the learned trial judge's conduct, during the currency of the trial, in relation to the Applicant's witnesses

and his counsel, the Applicant was effectively denied the substance of a fair trial.

**Particulars**

(a) The learned judge questioned defence witnesses improperly extensively; he sharply interrupted attempts to answer some of his questions, thus precluding defence witnesses answering them in their own way; he generally questioned defence witnesses in a manner amounting to close cross-examination and to such a descent into the arena as to give the plain impression of him acting as advocate for the prosecution.

(b) Exchanges between the learned trial judge and Applicant's Counsel disclosed such thinly veiled ***animus,*** on the part of the learned trial judge respecting Counsel, as could only have belittled his Counsel in the eyes of the Applicant and, in the result, also have suggested to the Applicant that his chance, ultimately, of receiving a fair trial had dissipated .

2. The sentence imposed is manifestly excessive."

**Ground 1**

Mr. Harrison Q.C complained that after Mr. Aston Brown was cross-examined by counsel for the prosecution and re-examined by defence counsel, the learned trial judge proceeded to question the witness with considerable verve. He stated that the judge asked some 92 questions plainly targeting the witness' credibility. These questions, he contended, were not calculated to clarify the witness' evidence. Rather, he said, they were calculated to imply that the witness had come to give evidence deliberately intending to mislead the Court. Counsel for the

applicant underscored the following excerpt from the record. (The witness was being questioned by the learned judge).

"**Q.** How come you come here?

**A.** I don't understand, please sir.

**Q.** How is that you are here in this matter when you don't know any of the parties involved in this matter?

**A.** Well, I was called because of the persons who took the man that got shot, and my son told me that Mr. Witter...

**Q.** Your son told you that they want you to give evidence?

**A.** Not really, not really sir, he said Mr. Witter...

**Q.** Your son...

**Mr. Witter:** My Lord, I didn't interrupt my Lord's questions but I ask my Lord to give the witness a chance to finish answering the questions.

**Q.** Your son was present with you on that night?

**A.** Yes, sir.

**Q.** He went to the hospital with [you]?

**A.** No, sir.

**Q.** He was playing poker box?

**A.** No, he was on the road somewhere, sir."

It is Mr. Harrison's contention that the question "How is that you are here in this matter ..." was not a fair question.

As regards the witness Anthony Shaw, Mr. Harrison, Q.C complained that the witness' cross-examination by prosecuting counsel was

interrupted by "the badgering of learned trial judge, plainly calculated to fluster the witness." He further complained that the witness was questioned by the learned judge such questioning "occupying 13 pages of the record which read like carefully prepared cross-examination as to the material geography, the object of which was plainly to discredit witness Shaw's evidence of such knowledge of the area..."

As regards the witness Dwight Brown, counsel for the applicant complained that the interventions of the learned trial judge unnerved the witness. Another complaint is that the trial judge asked the witness some 125 questions the tenor of which was, he said, unequivocally cross-examination. Indicative of this, he said, is the fact that the witness' answers to some of the questions would be met with "you sure?" In an attempt to hammer home the point, counsel referred to the following:

**"His Lordship:** Mr. Brown, you know if your father knows your baby mother?

**The Witness:** Yes Sir.

**His Lordship:** You sure?

**The Witness:** Yes.

**His Lordship;** You know if he knows if she is related to Omar?

**The Witness:** Yes.

**His Lordship:** He knows that?

**The Witness:** Yes.

**His Lordship:** You sure?

**The Witness:** Yes.

**His Lordship:** How you know that he knows?

**The Witness:** Because him came down to the yard.

**His Lordship:** Make sure. You know that or you know that by some other means?

**The Witness:** She told him."

In light of the foregoing counsel for the appellant submitted that the appellant was effectively denied the substance of a fair trial. He relied on ***Jones v National Coal Board*** [1957] 2 All ER 155; ***Perks*** [1973] Crim L.R. 388; ***Belnavis***, SCCA No 107 of 2003 delivered May 25, 2005 and ***Randall*** [2002] 1WLR 2239.

Mrs. Haisley for the Crown submitted that the conduct of the trial judge did not militate against the applicant receiving a fair trial. She submitted that it must be borne in mind that the trial judge in the instant case was sitting without a jury and so the principles guiding his conduct are different from those relevant to a case where there was a jury adjudicating on the facts. There is a duty, she claimed, on a trial judge sitting without a jury to attempt to ascertain where the truth lies. It is her contention that the questioning of the defence witnesses was simply to garner the truth.

She submitted that there is no basis for the submission of learned Queen's counsel for the applicant that the trial judge questioned the

defence witnesses "improperly extensively." While conceding that the questioning was extensive, Counsel for the Crown pointed out that on all occasions the extensive questioning of the witnesses by the learned trial judge took place after the re-examination of the witnesses.

Therefore, she argued, the contention of learned Queen's counsel on behalf of the applicant that the development of the applicant's case was deflected from its true course is without foundation. Counsel for the Crown relied on ***R v Davis*** SCCA 178/87 delivered on 22nd July, 1988; ***R v Baker et al*** [1972] 12 JLR 902 at p. 909H; 2001 Archbold para. 7-81; ***R v Donald Matthews et al*** [1984] 78 Cr. App. R. 23.

We think that the correct principle of law as regards the conduct of a trial judge is stated at para. 7-81 of the 2001 Edition of Archbold. It is this:

> "Interventions by the judge during a trial will lead to the quashing of a conviction:
>
> (a) when they have invited the jury to disbelieve the evidence for the defence in such strong terms that the mischief cannot be cured by the common formula in the summing-up that the facts are for the jury, and that they may disregard anything said on the facts by the judge with which they do not agree;
>
> (b) when they have made it impossible for defending counsel to do his duty;
>
> ( c) when they have effectively prevented the defendant or a witness for the defence from telling his story in his own way: ***R v Hulusi and Purvis*** 58 Cr. App. 378, C.A; see also ***R v. Frixou*** [1998] Crim. L.R. 352, C.A; and ***R v Roncoli*** [1998] Crim. L.R. 884, C.A."

Since no jury was involved, (a) above is not applicable. As regards (b), we have carefully examined the interventions by the learned trial judge and entirely agree with counsel for the Crown that they did not make it impossible for defence counsel to do his duty.

Learned Queen's counsel in seeking to impeach the conduct the learned judge cited the following passage in ***Jones v National Coal Board*** (supra) at 159F:

> "And it is for the advocate to state his case as fairly and strongly as he can, without undue interruption, lest the sequence of his argument be lost... The judge's part in all of this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of the advocate; and the change does not become him well."

However, as Crown Counsel pointed out, before making the above statement, Denning, L.J. was careful to observe that "a judge is not a mere umpire to answer the question "How's that?" His object above all is to find out the truth, and to do justice according to law..."

We agree with Crown counsel that it cannot be said with any justification, and there is no such complaint, that counsel for the defence was not able to properly put his case. It is convenient at this point to mention some of the other authorities to which we were referred.

In ***R.v. Matthews et al***, it was said that the general comments, repeated above, of Denning LJ in ***Jones v National Coal Board,*** which was a civil action were equally applicable to a criminal trial. After examining the authorities, the English Court of Appeal per Purchas L.J. said:

> "To summarize these authorities the following propositions appear to emerge:
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> (1) Whilst a large number of interruptions must put this court on notice of the possibility of a denial of justice, mere statistics are not of themselves decisive;
>
> (2) The critical aspect of the investigation is the quality of the interventions as they relate to the attitude of the judge as might be observed by the jury and the effect the interventions have either upon the orderly, proper and lucid deployment of the case for defendant by his advocate or upon the efficacy of the attack to be made on the defendant's behalf upon vital prosecution witnesses by cross-examination administered by his advocate on his behalf;
>
> (3) In analyzing the overall effect of the interventions, quantity and quality cannot be considered in isolation, but will react the one upon the other;..."

In ***Christopher Belnavis v R*** (supra) Panton JA said :

> "It is obvious that the judge asked many questions. That by itself is not an indication of bias, and does not necessarily detract from a fair trial. There are so many factors that have to be taken into consideration, for example, the importance of the content of the question in context of the case. There are questions that are necessary for clarification of what a witness is saying, in order that the judge may get a proper appreciation of the case that is being put forward. Having said that, although a judge is not expected to remain mute throughout a trial, he should be careful to ask only necessary questions, and not give the impression that he has descended into the arena."

In ***R. v Perks*** (supra) the trial judge asked ***Perks*** some 147 questions during examination-in-chief. It was held on appeal that "the matter should not be decided simply by reference to the number of questions: there might be cases where it was legitimate for the judge to ask many questions, though they would be rare. What mattered was the quality of the interruptions."

The authorities to which we have referred and others indicate that the fact that a trial judge asked many questions does not by itself detract from a fair trial. What is critical is the quality of the interventions. We have examined the questions put to the defence witness Aston Brown. It is fair to say that they were not hostile. As we have already said, these questions were asked after counsel for the defence had re-examined the witness and thus the judge's intervention did not obstruct

counsel in the performance of his duty. It seems to us that most of the questions did no more than explore aspects of the evidence upon which counsel had already embarked, but which the learned judge felt had not been sufficiently canvassed.

As regards the questioning of Dwight Brown the interventions of the trial judge were mainly to ascertain whether or not his evidence tallied with that of his father who was called to bolster the defence of incorrect identification. The judge's intervention was not hostile and also came after the witness was re-examined by defence counsel. In our view these questions were in the main, aimed at ascertaining the truth.

As regards the witness Anthony Shaw, the trial judge's questions were for the most part, clearly intended to provide fuller information on the geography of the area and the witness' knowledge of the area. The judge's interventions cannot in our view be described as biased or hostile. The extensive questioning of the witness occurred after the re-examination by defence counsel. Here too it is fair to say that these were aimed at unearthing the truth. Despite the many questions put to the witnesses of the defence we are unable to say that the applicant was on that account denied the substance of a fair trial.

**Particulars (b)**

Learned Queen's counsel submitted on behalf of the applicant, that the manner of the trial judge's conduct towards defence counsel

plainly indicated hostility to the defence and might, as well, have so belittled his counsel in the eyes of the applicant as to imbue him with the notion that he stood no chance of a fair trial.

The basis for this complaint is as follows: During the examination-in-chief of the witness, Aston Brown by defence counsel the learned judge directed the witness not to answer a certain question on the ground that it would breach the hearsay rule. Counsel for the defence asked that the witness be permitted to withdraw so that he could address the court. The trial judge refused the request. The following dialogue ensued:

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|---|---|
| **"His Lordship:** | Your problem is that you intend to run the Court. All right? |
| **Mr. Witter:** | I intend to do no such thing. I don't know, your Lordship is... |
| **His Lordship:** | I have no problem with that. |
| **Mr. Witter:** | I must have. |
| **His Lordship:** | Because of your conduct. |
| **Mr. Witter:** | M'Lord, frankly, I resent that allegation. |
| **His Lordship:** | Why you stretching out this thing like that, why can't we get to the point?" |

At this point Mr. Witter renewed his request for the witness' withdrawal. Again the learned judge refused and repeated that Mr. Witter was seeking to elicit hearsay evidence. Mr. Witter did not agree.

| | |
|---|---|
| **" His Lordship:** | Mr. Witter stop shouting at me. I can shout too, it doesn't help anybody. |

**Mr. Witter:** With respect...

**His Lordship:** You certainly are not able to speak louder than I can .

**Mr. Witter:** I am speaking no louder than your Lordship.

**His Lordship:** That is what I am telling you, you can't.

**Mr. Witter:** Nor do I believe I ever have, not in these proceedings nor at anytime at all.

**His Lordship:** You are shouting at me for no reason at all and it will not serve your purpose, I will not be bullied by you.

**Mr. Witter:** M' Lord I resent the implication of that.

**His Lordship:** You can resent it as much as you want, that is exactly what you are trying

**Mr. Witter:** How could I bully your Lordship?

**His Lordship:** That is what I am saying you can't do, so stop it.

**Mr. Witter:** With respect, that is an unjust accusation.

**His Lordship:** As to why don't you stop the nonsense?

**Mr. Witter:** I wish to explain to your Lordship...

**His Lordship:** I do not want to hear you on the point of eliciting hearsay evidence. All right. Good?

**Mr. Witter:** Your Lordship?

**His Lordship:** I have ruled.

**Mr. Witter:** Can I address the Court at all? Can I say anything?

**His Lordship:** But you are addressing the Court and saying...

**Mr. Witter:** Every time I open my mouth your Lordship cuts me off, I can't get a word in edgewise.

**His Lordship:** And I said before I am not going to be bullied by you.

**Mr. Witter:** M'Lord I am not seeking...

**His Lordship:** Please move on

**Mr. Witter:** I wish to address the Court, if I may?

**His Lordship:** Will you please move on.

**Mr. Witter:** Your Lordship does not wish me to address you?

I cannot address you, is that what your Lordship says?

**His Lordship:** I am saying that you need to move on.

**Mr. Witter:** And I desire to address your Lordship.

**His Lordship:** And I am saying that as far as eliciting hearsay evidence is concerned, I do not want to hear you, I do not intend to hear you."

After a few more exchanges Mr. Witter finally moved on.

We note that the dialogue to which we have just referred occupied about six pages of the transcript of the record. It involved one point – the judge's refusal to receive in evidence, Mr. Witter's out- of-court statement to the witness.

We have examined the dialogue between the trial judge and counsel. We are of the view that the judge was correct in preventing counsel from pursuing the question put to the witness. But even if the judge was wrong, it is the duty of counsel to accept the ruling and move on. He may, if necessary, challenge the ruling of the judge on appeal. We do not share the view of learned Queen's counsel that the learned judge was plainly hostile to defence counsel and that the conduct of the judge would have the effect of belittling counsel in the eyes of the applicant.

In any event, we agree with counsel for the Crown that this is not a ground for setting aside the judgment of the trial judge. In ***Ptonopoulos*** [1968] Crim. L.R. 52 it was held that the Court of Appeal will not interfere merely on the ground that the judge has been guilty of discourtesy to counsel. The Court will only interfere if the conduct of the judge "positively and actively obstructs counsel in the doing of his work." - ***Hicock*** [1969] 1All E.R. 47 (see commentary on ***R v Perks*** (supra)).

In ***R v Baker et al*** 12 JLR 902 at 909H this Court said:

> "Acts of discourtesy to counsel, however, are not a ground on which the verdict of a jury can be set aside unless they were so many and so contemptuous and disparaging of counsel as was likely to prejudice the case for the defence in the eyes of the jury."

The authorities seem to indicate that when interventions are made in trials which involve a jury, the judge must exercise greater caution than when he sits alone.

In sum we agree with the submissions of Mrs. Haisley that although the trial judge played an active part in the trial, he conducted himself within the limits of propriety and did not in any way exceed the legitimate boundaries which have been set for judges in the trial of criminal cases - ***R v Carl Davis*** (supra).

Accordingly, this ground fails on both limbs.

**Ground 2 sentence**

The complaint is that the sentences were manifestly excessive. The circumstances of the offences are that Mr. Creary was at home washing dishes. The applicant was an intruder. Mr. Creary was shot several times by the appellant in a coup de main. When he was on the ground wounded, the applicant attempted to deliver the coup de grace. Mr. Creary prayed, he heard a clicking sound apparently the trigger had stuck. The applicant retreated. The manifest intention was to kill.

We think that in the circumstances it cannot be said that sentences of 15 to 30 years imprisonment were manifestly excessive. Persons who behave as the applicant did must expect long terms of imprisonment as the society has to be protected from them.

The application for leave to appeal against convictions and sentences is refused. The sentences are to commence as of the 27th June, 2002.