JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 202/2001

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE COOKE,J.A.(Ag.)

IAN McDONALD V. REGINA

Dr. Randolph Williams for the appellant

Mrs. Jeneice Nelson-Brown, Crown Counsel (Ag.), for the Crown

July 7, 11, and 31, 2003

PANTON, J.A.

1. A single judge of this Court refused an application for leave to appeal in this matter. The application was renewed before us on July 7, 2003, when we granted it and heard arguments in respect of the appeal.

2. The appellant was tried and convicted by Miss Justice Kay Beckford on September 11, 2001, of the offences of illegal possession of firearm (Count 1) and shooting with intent (Count 2). The trial took place in the High Court Division of the Gun Court sitting in Kingston. On September 13, 2001, the appellant was sentenced to ten years imprisonment on Count 1 and twelve years imprisonment on Count 2, with an order that the sentences run concurrently.

3. The factual situation which gave rise to the convictions may be stated as follows. At about 11 a.m. on November 3, 1998, the appellant was seen on Pottinger Avenue by police officers who were "on enquiry" in a jeep in the "Oakland Avenue area" of Saint Andrew. Pottinger Avenue leads directly on to Oakland Avenue. Two of the police officers, namely, Detective Inspector Donovan O'Connor and Constable Rohan Blackwood, gave evidence that the appellant fired shots from a revolver at them; they alighted, took cover, then chased the appellant who escaped into neighbouring premises. The officers returned to Hunt's Bay police station where they were based and made a report to Detective Sergeant Kermit Fairweather at about 1 p.m. on the same day. At the time of the incident, Detective Inspector O'Connor was a Detective Sergeant. The appellant was arrested at the Hunt's Bay lock-up on January 17, 1999.

4. The appellant gave evidence admitting that he was in the vicinity described by the police officers on the date in question. He also admitted running from the scene, but denied being in possession of a firearm, or firing same. He ran, he said, because he knew that he was "wanted on a case that (he) get sentence on".

5. The learned judge, in her summation, said:

> "So the only difference in the evidence of the prosecution and the defence is that the prosecution is saying there was a firearm while the defence is saying there was no firearm and no shooting at the police. The prosecution is saying there was a firearm and that the defendant fired shots at the police, the accused is saying I did not have a firearm and I did not shoot at the police. So it really boils down to a

question of who do I believe?" (page 66 of the record).

She went on to express her acceptance of the evidence of Constable Blackwood as to the events of that morning particularly as they concerned the firing of shots by the appellant, whereas she accepted the evidence of identification of the appellant as given by Inspector O'Connor who had known the appellant for three years.

6. In challenging the convictions, Dr. Randolph Williams, on behalf of the appellant, relied on two grounds -

(i) the learned trial judge misdirected herself on the ~~evidence; and~~

(ii) the defence of mistaken identity and alibi which arose in the evidence were not adequately considered by the learned trial judge.

Misdirection on the evidence

7. The appellant's reliance on this ground is based on the following statements by the judge:

(i) "The accused gave sworn evidence and he said that on that morning the 3rd of November as....the Crown alleges he was on Oakland Avenue". (page 62)

(ii) "The accused man put himself on the spot. He agrees with the police up to that point". (page 65)

(iii) The statement quoted earlier as coming from page 66 as to the difference between the prosecution and the defence.

7A. In determining whether there has been a misdirection on the facts, this Court is guided by the principle stated by Scarman, L.J. in **R. v. Wright** (1974) 58 Cr. App. R. 444 at 452:

> "At the end of the day, when the appellant's case is not that the judge erred in law but that the judge erred in his handling of the facts, the questions must be first of all, was there error, and secondly, if there was, was it significant error which might have misled the jury? If this Court has a lurking doubt it is its duty to quash the conviction as unsafe . . ."

8. In relation to the statement as to the location of the appellant , Dr. Williams pointed out that the Crown 's allegation was that the appellant was on Pottinger Avenue, not Oakland Avenue. ~~This he said was a~~ material factor. Mrs. Nelson-Brown agreed that the learned judge had erred in this regard but said that the error was not of any significance. In considering this matter, we note the close proximity of the two streets. During cross-examination (page 56), the appellant said that he knew Pottinger Avenue and Oakland Avenue, and that one would come off Oakland on to Pottinger. It was suggested to him that he was on Pottinger when the jeep came up, and he replied in the negative, adding that he was on Oakland.

9. It is interesting to note that although the appellant gave evidence, he was not led in examination-in-chief as to where he was when the incident occurred. Surely, if this was a matter of any importance in the context of the case, experienced junior counsel who conducted the defence would not have failed to have placed the necessary emphasis on it and to lead the appropriate evidence.

The sum total of the appellant's evidence was that he was coming from shop, saw a jeep coming up the road, and because he knew that he was wanted in relation to a case for which he had already been sentenced, he ran. He went to his aunt's house at 14 Oakland Drive, from which location twenty minutes later he heard gunshots being fired.

10. At the trial, as appears from the transcript, the immediate location of the appellant at the time of the incident was not a material factor. The critical factor was whether there was any truth to the allegation that he fired shots at the police officers. Given the nature of the evidence as to the proximity of Oakland Avenue to Pottinger Avenue, and the fact that the appellant placed himself in the vicinity, the error of the learned judge in this regard is of minimal importance. It does not in the slightest degree detract from the findings of fact made by her, and has no effect whatsoever on the validity of the convictions.

11. The second statement referred to above of which complaint is being made does not require any comment other than that the learned judge was not in error as the appellant did indeed place himself on the spot, that is, on the road on which the said police officers were in the jeep.

Identification

12. The appellant complained of misdirection by the judge when she said that the only difference between the prosecution and the defence was that the former was alleging that there had been a shooting whereas the latter was saying that there had been nothing of the sort. Dr. Williams categorized this as

an error considering that in his view identification was in issue. In this regard, he pointed to what he considered as important evidence in that the prosecution was saying that the incident had occurred at 11 a.m. whereas the appellant spoke of an incident at 1 p.m. That being so, according to Dr. Williams, the issues of mistaken identity and alibi were live for consideration. The learned judge did not consider these, he said, and so was in error. Therefore, the convictions ought to be quashed.

13. The context in which the time of 1 p.m. was introduced into evidence ought to be looked at as it will show that there was no reason for the learned judge to address her ~~mind~~ to the question of an ~~alibi~~. ~~The~~ appellant was not setting up an alibi. The entire defence at the trial was conducted on the basis of the incident having occurred in the morning at 11 a.m. Page 24 of the record of appeal shows the following questions and answers during the cross-examination of the witness, Detective Inspector O'Connor :

> "Q Well, I am going to put it straight to you that the accused was there that morning but he had no firearm.
>
> A. He wasn't there sir?
>
> Q. When you looked in his direction he ran immediately, he fired no shots at the police.
>
> A. He was there sir."

Then, further, the following suggestion was put to the witness:

> "Q. I am putting it to you that on the approach of the police vehicle that morning the accused did run, that he had no firearm."

To this, the Inspector answered:

> "On the approach of the vehicle the accused opened fire."

The following question and answer took place:

> "Q. There is no opening of fire or anything, all he did was ran and entered a premises and made good his escape, he had no guns, he did not fire at the police.
>
> A. On the approach of the vehicle the accused opened fire, ran and kept firing at us."

14. At page 41 of the record, the following suggestion was put on behalf of the appellant to Constable Blackwood:

> "I am suggesting to you that the accused man never had any gun, police chased him down and fired shots at him."

The learned judge intervened and inquired of the witness:

> "Did he have a gun that morning?"

The witness replied:

> "Yes, M'lady"

And then at page 43, the defence attorney suggested:

> "And yet he gained 25 yards away from you. I am suggesting this man had no firearm and fired no shots that morning".

15. The first mention of 1 p.m. came in the evidence of Sergeant Fairweather at page 46 where he stated that the police officers made the report to him at the Hunt's Bay Police Station at about 1 p.m. on the date of the incident. And then

during the evidence in chief of the appellant at page 52 his attorney introduced the time of 1 p.m. to him.

The attorney asked him:

"At about 1o'clock where were you on that date?"

His answer was to the effect that he was coming from shop with baby feed when he saw the jeep coming up the road and knowing that he was wanted because of the sentence he had received in another matter, he ran.

16. The sequence of events as shown here indicates that the case was conducted by both sides on the basis of an incident at 11 a.m. The appellant had one encounter with the police on the date in question. He is not disputing that. Indeed, he has clearly acknowledged it. The introduction of the time of 1 p.m. was done by the appellant's attorney without there being any basis for it, considering that he himself had not put that time to the witnesses for the Crown and had asked them questions which show that his instructions were in relation to an incident in the morning, not the afternoon.

17. The appellant has failed in respect of both grounds that have been argued. The facts were clear, and the learned trial judge addressed her mind properly to the issue which was really one of credibility. In the circumstances, the appeal was dismissed, the convictions and sentences affirmed and the sentences ordered to run from December 13, 2001.