

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CRIMINAL APPEAL NO. 27/96

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.
THE HON. MR. JUSTICE WALKER, J.A. (Ag.)

REGINA vs. ROBERT WYNTER

Leonard S. Green for the appellant

Bryan Sykes and Miss Sharon George for the Crown

November 11 and 18, 1996

DOWNER, J.A.:

What was the circumstantial evidence which convinced Her Honour Miss Paulette Williams, the Resident Magistrate for Westmoreland, that the appellant Robert Wynter was guilty of illegal possession of a firearm and of ammunition contrary to section 20 of the Firearms Act?

Firstly, Detective Sergeant Clarke told the court that he visited the appellant Wynter at the Black River Hospital on 30th July, 1995, during the course of his investigation. On inspecting the appellant he questioned him as to what occurred on the previous Saturday night. The appellant reported that he was shot at Petersville.

In continuing his investigation, he went to Petersville and he recovered a burgundy-coloured tall pants taken from Wynter's home. He noted that the pants had a hole to the right foot. Further, he also received a fragment of a bullet from Detective Corporal Chambers. These were sent to the ballistics expert. When the appellant was questioned he said "Me no know what fe seh sah." The only challenge in cross-examination emerged thus:

"Suggt: He said to you `me nuh know
wha more fi seh sa cause it happen already.

Ans: Nothing like that."

So there was no challenge to the principal words used. The only difference was that additional words were suggested. The suggested words lacked sincerity for they did not emerge subsequently in the evidence-in-chief of the appellant when he went into the witness box. The careful Resident Magistrate could hardly have failed to note that lapse.

The medical contribution comes from Dr. Audley Hamilton, the Medical Officer of Black River Hospital. He told the court that the appellant was brought to the hospital by a party of about five. His examination of the appellant revealed one entry wound but no exit. The entry wound was on the outer aspect of the right leg and a mass was detected on the lower part of the right leg just behind the ankle joint. The mass was surgically removed and this turned out to be a bullet. This bullet was handed over to Corporal Chambers who was present during its removal.

The Resident Magistrate accepted the opinion of the doctor on the issue of whether the wound could have been self-inflicted and it is pertinent to record his answer as it was noted by the Resident Magistrate. Here it is:

"Ans: From my observation and examination taking into consideration the entry wound and where the bullet eventually ended up it is clear that the firearm was discharged from upper part of body. It is a possibility firearm could be discharged from his waist or pocket."

It is significant that Mr. Green, who cross-examined, did not challenge the doctor on this aspect of the evidence. He objected to the expertise of the doctor. The Resident Magistrate rightly over-ruled the objection and Mr. Green did not cross-examine the doctor on any aspect of the evidence. The other important opinion was obtained from the ballistics expert by way of his certificate. There was no request to call him for cross-examination, although there was an entitlement to do so pursuant to section 46A(4) of the Firearms Act.

On the certificate the exhibits were listed as follows:

"One sealed envelope marked 'A' containing: One .38 Calibre fired copper jacketed hollow-point firearm bullet, slight nose damaged, 5 lands and grooves, right twist, weight - 125 grains.

One sealed envelope marked 'B' containing: One red jeans pants, Tagged 'Jonathan Martin' 100% cotton/algodon, size 36."

So far as the examination of the bullet was concerned, here is his report:

"Examination of Exhibit 'A' revealed that it was a .38 calibre copper jacketed hollow-point firearm bullet of a type used in .38 Special+P firearm cartridge and that it was discharged from a firearm of the class of a .38 Special 'Smith and Wesson' revolver and that

"after it was discharged, it impact on a hard surface at close to right angle."

Then turning to his examination of the trousers, he found:

"Examination of Exhibit 'B' revealed three holes, entry, exit and entry, $3/4 \times 1/2$ inch diameter and $1 \times 1/2$ inch all in a line over $5 \ 3/4$ inch on the outer side of the right leg, commencing $18 \ 1/2$ inches down from the waist band and 2 inches to 1 inch forward of the side seam. There was evidence of gunpowder deposited on an area commencing approximately 12 inches down from the waist band suggesting that a Firearm was discharged along side the right side of Exhibit 'B' and within a 12 inches radius."

This is telling evidence in favour of the Crown. Since the firearm was fired within a 12 inches radius then that compelling evidence must have satisfied the Resident Magistrate that the wound was self-inflicted. Thus his further opinion is to be found under the heading "Remarks". The remarks on Exhibit A were as follows:

"Exhibit 'A' was a .38 calibre copper jacketed hollow-pointed firearm bullet that was discharged from a firearm believed to be a .38 Special 'Smith and Wesson' revolver, or another make revolver of similar class."

Then further those remarks on Exhibit B are powerful in favour of the Crown:

"The three holes found in the right leg of Exhibit 'B' were entry, exit and re-entry and could be made by Exhibit 'A', discharged from a .38 Special revolver downwards and perhaps, slightly backwards. The .38 Special revolver could have been fired by a person wearing Exhibit 'B' and standing erect.

A .38 Special 'Smith and Wesson' or similar revolver is a handgun with barrel length of 2-4 inches or slightly longer, with 5 or 6 shot capacity and is fired by single action (when the hammer is cocked) and/or Double Action (without cocking the hammer.) The fired

"cartridge cases is retained in the firearm until they are extracted manually."

This opinion, when read with that of Sergeant Clarke and the doctor, were sufficient to warrant calling on the appellant to answer the Crown's case.

The principal ground of appeal is as follows:

"A) That the Learned Trial Judge erred in that she failed to allow the Application made on behalf of the Defendant/appellant that the prosecution has failed to make out a prima facie case that the Defendant/Appellant was in legal (sic) possession of a firearm."

In view of the principal ground of appeal has failed and it now remains to determine if this evidence, when considered against the background of the defence, was of such cogency to justify the Resident Magistrate's findings of fact and her verdict of guilty.

The Defence

Robert Wynter, in his sworn evidence, told the court that he received a gunshot injury to his leg and he denied that he had possession of a firearm that night which could have caused his injury.

The cross-examination revealed that Wynter's defence was rightly rejected by the learned Resident Magistrate. He explained that when he heard the explosion he was talking to three ladies who were all around him and that the place was crowded.

This excuse prompts the question as to how he could have received the shot the way he recounted it in the light of the cogent evidence of the doctor

and the ballistics expert that he was shot within a radius of twelve inches and further that it was self inflicted.

The finding of fact and verdict

Contrary to Mr. Green's submission, the Resident Magistrate demonstrated by her findings of fact that she was aware of the quality of circumstantial evidence necessary to support the verdict of guilty. Further, those findings showed that she applied the classic authorities of *Teper v. The Queen* (1952) A.C. 480 from the Privy Council and *McGreevy v. The Queen* (1973) 1 W.L.R. 276 or (1973) 1 All E.R. 563 from the House of Lords which are binding on this court.

Here are her findings on circumstantial evidence:

"12. The opinion of the two independent experts established an array of circumstances which pointed to one conclusion that being that the accused man himself had in his possession a firearm which caused his own injury.

13. At the time of handling of the firearm the accused man did not possess a licence or other legal authority to be in possession of it." (Emphasis supplied)

Here are her findings on the medical evidence:

"2. The doctor who attended to him Doctor Audley Hamilton found the injury to be that of a gunshot wound - with an entry wound to the upper outer aspect of the right leg with no exit wound.

3. The examination revealed a mass on the lower aspect of the right leg behind the ankle joint and this mass turned out to be a bullet.

4. The wound and the finding of the bullet were conclusive proof that the accused had been shot by a firearm.

Having found that the accused man was suffering from a firearm injury the issue to be determined was how he came by that injury - in whose possession was the firearm at the time and was he legally in possession of it."

Then as regards her findings on the ballistics expert she found:

"7. There was evidence in the Certificate of the presence of gun powder deposit on the pants suggesting that a firearm was discharged alongside "the right side of the pants and within a twelve inches radius.

8. I accept the unchallenged opinion of the expert that the bullet was a .38 calibre copper jacketed hollow point firearm bullet that was discharged from a firearm believed to be a .38 Special Smith and Wesson revolver or another make revolver of similar class.

9. I accept the unchallenged opinion of the expert that the .38 Special revolver could have been fired by a person wearing the pants and standing erect.

10. I accept the unchallenged opinion of the Doctor that the firearm which caused the injury he saw on the accused was discharged from the upper part of the body and it is a possibility the firearm could have been discharged from his waist or pocket."

Further she considered the defence and in rejecting it found:

"11. I considered carefully the account of the accused man as how he came by his injury especially the unchallenged physical evidence."

In our opinion, the Resident Magistrate drew the right inferences from the facts as outlined in the unchallenged medical and ballistics evidence and these inferences were such that she rightly found the appellant guilty. Further, she set out her findings in a logical, convincing and admirable manner. Accordingly, therefore, we have no hesitation in affirming the conviction and sentence of nine (9) months imprisonment with hard labour. The sentence is to run from 1st October, 1996.