JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 62/90

BEFORE: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (Ag.)

REGINA vs. ALPHANSO ROBINSON

Dr. Randolph Williams for the applicant

Miss Carol Malcolm for the Crown

May 20 and June 4, 1991

MORGAN, J.A.:

The applicant was convicted for the offences of illegal possession of firearm (Count I) and of ammunition (Count II) on the 23rd April, 1990, by Wolfe, J. in the High Court Division of the Gun Court in the parish of Kingston and sentenced to five years hard labour on count I and six months hard labour on count II. On the 20th May, 1991, we heard an application for leave to appeal against conviction and sentence.

The facts of this case are these: On 22nd April, 1988, about 12:15 p.m., Detective Inspector Cole and Assistant Superintendent Garnett Daley were travelling in an unmarked car on the road toward Dumbeholden in St. Catherine, when they saw a Lada motor car with four male occupants drive out into the road from a by-road ahead of them.

They drove alongside this car and ordered the driver to stop. When abreast Superintendent Daley saw the accused, who was sitting on the left rear passenger seat, move his hand

as if he was dropping something on the floor. The Lada stopped, Superintendent Daley alighted, ordered the occupants to come out, opened the left rear door and saw on the floor at the left rear of the car where the accused had been sitting, a .38 calibre Smith and Wesson revolver. He picked it up and in it were five live revolver cartridges. He showed it to the occupants and told them what he saw the accused do. None of them made any statement.

Inspector Cole, who was present, proceeded to search the car and found a small plastic bag wrapped in newspaper on the floor of the car. In it were five live .38 cartridges. When shown to them none made any statement but when questioned later they all said they knew nothing about them. The firearm and ammunition were subsequently examined by the Government Ballistic expert, who confirmed that the revolver was in perfect working order and capable of discharging deadly missile through its barrel and that all the ammunition were in his opinion live.

The applicant denied possession or knowledge of the firearm and ammunition. His account was that he worked as a mason on a compound where a worker had been shot in his foot. He had secured this car from another friend to take the injured man to the hospital and on his way to fetch him he was apprehended. He said he was seated on the right side and denied that he was seated to the left rear of the car as a spare tyre was being carried on that area of the car seat, and that he and the other occupant alighted from the car on the right side. It is significant that the cross-examination of the police, centered on a spare tyre being on the floor, and not the seat of the car, and that this hindered anyone from sitting on that side.

Dr. Williams argued before us four grounds of appeal. Ground 1 was that at the end of the Crown's case there was

insufficient evidence to find possession in the defendant and the learned trial judge should have upheld the no-case submission.

One is in possession in law of whatever to one's own knowledge is physically in one's custody or under one's physical control - **D.P.P. vs. Brooks** (1974) 2 W.L.R. 879.

It is not always possible to get direct evidence to prove possession, and because of this, it is sometimes found from inferences drawn from facts which have been proved.

In **R. v. Cavendish** (1961) 2 All E.R. 856, where the appellant was charged with receiving stolen goods, and he denied knowledge of the receipt of the goods which were received in his absence by his servant, Lord Parker, C.J., in his judgment at page 858, said:

> "Certain propositions are quite clear without referring to authority that for a man to be found to have possession actual or constructive of goods, something more must be proved than that the goods have been found on his premises."

This principle of "something more" has been applied in this Court (see R. vs. Monica Williams (1970) 16 W.I.R. 74).

Dr. Williams submitted that that "something more" was missing in this case; that the movement of the hand was equivocal; that there was no evidence to infer that he was aware of the presence of the firearm and at the end of the Crown's case, the evidence amounted to no higher than a suspicion.

We do not agree as it is quite clear that "something more" was present in the evidence here apart from the applicant's occupation of the space where the firearm was found. There was the hand movement of the applicant, which was consistent with dropping something; the fact that the firearm was resting on the floor at that space; it was unconcealed,

not hidden under the seat; it was not wrapped, it was openly visible; it was seen immediately on his alighting from the car. All this evidence could contribute to a finding that he knew the firearm was there; that he was in control of it and was in possession. The submission of no-case, therefore, had been properly rejected.

The second and third grounds were that the learned trial judge, in his summing-up, misdirected himself in that he took a view of the case which was unsupported by the evidence, a view which led to a finding that the applicant was guilty of the offences. Counsel further submitted that the mere use of the word "satisfied" in his summation without the words "that he is sure" taken together with his comment, left the view that he had not applied the proper standard of proof.

The base for this ground arose in this manner. The summing-up ended with a finding by the learned trial judge of possession of the gun and ammunition and a finding of guilt on both counts of the indictment. Immediately after that Wolfe, J. said:

> "I don't make it a finding of fact but it is clear on the evidence that what happened; a man on the work site got shot and all these men were doing, they were going to get the man who did the shooting, but it is not a finding, just a comment at the end of the case. A man on the work site got shot and the men in the car went in search of the man and the police caught them while they were searching for this other man."

We take the view that this comment means exactly what it says, that is, it is a comment and is to be regarded as mere surplusage. Having found as a fact that the applicant was in possession of the gun, the judge offered an opinion as to the reason why the gun was there. Implicit in the comment is the fact that he had already considered all the evidence

and had come to a finding on that evidence and his expressions of a theory with respect to the reason for the possession of the firearm had no influence on his finding and the comment coming where it did after a verdict of guilty could not have coloured his finding nor influenced him to determine his verdict. This ground also fails.

The standard of proof required in a criminal case indeed is that the prosecution must satisfy the tribunal by the evidence to the extent that he feels sure of the guilt of the accused, and in a trial by jury he so directs the jury. Sitting alone a judge is mindful of the standard of proof required and though it is desireable that he enunciate it, if, as in this case, a shortened form is used it clearly indicates that he remains mindful of the standard of proof and the omission to recite it all, does not indicate that it has not been applied or that he has used a lower standard of proof and such use is not, in our view, fatal to the case. This ground also fails.

There was ample evidence for the learned trial judge to arrive at the conclusions to which he came and for these reasons the application for leave to appeal is refused, and we order that the sentence commence on the 23rd July, 1990.