

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE DUNBAR-GREEN JA
THE HON MR JUSTICE BROWN JA**

SUPREME COURT CRIMINAL APPEAL NO 57/2014

KEMAR RICHARDS V R

Ms Karlene Afflick for the applicant

Miss Sophia Rowe and Kemar Seetal for the Crown

19 and 20 July 2023

ORAL JUDGMENT

MCDONALD-BISHOP JA

[1] The case brought by the prosecution against the applicant was that on 25 December 2011, in the morning, acting on information, a police party went to premises on Cordless Road, Spanish Town, in the parish of Saint Catherine. Two police officers, Inspector Jason Sinclair and Sergeant Albert Parks, entered the premises while other members of the police party took up strategic positions around and near the building. While on the premises, Inspector Sinclair and Sergeant Parks observed the applicant jumping from the upstairs of a multiple-story building to the stairway on the ground level. They did not know him before. The applicant had a gun in his hand. Upon reaching the ground level, he fired the gun in the direction of Inspector Sinclair and Sergeant Parks. Inspector Sinclair, who was at the front, returned fire in the applicant's direction. The applicant fell to the ground. He was later observed to be bleeding from his head and torso. The gun he had fell from his hand to the ground. Inspector Sinclair retrieved the gun and summoned other police personnel who took the applicant to the Spanish Town Hospital, where he was treated. The gun that fell from the applicant's hand was

discovered to be a black Smith and Wesson 9 mm pistol with six live rounds of ammunition. The serial number was erased. The prosecution also alleged that ammunition, handed over to the police by a nurse, was taken from the pocket of the pants the applicant was wearing at the time of the incident.

[2] The applicant was subsequently arrested and charged with the offences of illegal possession of firearm, illegal possession of ammunition (two counts), and shooting with intent. On 20 May 2014, he was brought before a judge sitting without a jury in the High Court Division of the Gun Court. Upon arraignment to a four-count indictment, he pleaded not guilty on all counts, and his trial ensued before the learned trial judge.

[3] At the trial, the applicant denied the charges levelled against him by the prosecution. His defence, presented in his unsworn statement from the dock, was that the police witnesses were lying. He testified that on the morning of the incident, he went to visit a female friend at the premises, where the police saw him. On his arrival there, he was ascending the staircase when he was accosted by two police officers who ordered him not to move. They were armed with guns. He raised his arms and began to descend the stairs. On reaching ground level, he saw a policeman come around a corner with a long gun. The policeman fired at him, and he fell. Several police officers entered the premises and encircled him. One of the police officers placed a gun in his right hand and used his (the police officer's) finger to squeeze the trigger. He saw two shots being fired from the gun, and then he lost consciousness. He later woke up in hospital. He did not have a gun or shoot at the police.

[4] The applicant was found guilty on counts one to three (illegal possession of firearm, illegal possession of ammunition and shooting with intent) but not guilty on count four (which was the charge for the ammunition that was allegedly taken from his pants pocket while he was at the hospital). He was sentenced to seven years' imprisonment at hard labour on count one, four years' imprisonment at hard labour on count two, and 15 years' imprisonment at hard labour on count three. He was discharged on count four. The sentences were ordered to run concurrently.

[5] Aggrieved by the outcome of the trial, the applicant filed his Criminal Form B1 in this court, seeking permission to appeal the convictions and sentences. The matter was considered by a single judge who refused the application for leave to appeal. The learned single judge ruled that the central issue in the case was credibility, which, in his opinion, was adequately dealt with by the learned trial judge, and the sentences imposed cannot be fairly said to be manifestly excessive.

[6] Dissatisfied with the ruling of the learned single judge, the applicant renewed his application for permission to appeal before the full court as he is entitled to do. He relied on four grounds of appeal as set out in the Criminal Form B1 in these terms:

“(1) **Misidentify by the Witness:** - That the prosecution witnesses wrongfully identified me as the person or among [sic] any persons who committed the alleged crime.

That I was shot by the police for no reason.

(2) **Unfair Trial:** - That the evidence and testimonies upon which the Learned Trial Judge relied on for the purpose to convict me lack facts and credibility thus rendering the verdict unsafe in the circumstances.

3. **Lack of Evidence:** - That the prosecution failed to present to the court any ‘concrete’ piece of evidential material, forensic or scientific evidence to link me to the alleged crime.

4. **Miscarriage of Justice:** - That the Learned Trial Judge failed to recognised [sic] the fact that the prosecution witness presented to the court contrary reports which mislead [sic] the court and result in my conviction and sentence.

(B) That the court wrongfully convicted him for a crime I knew nothing about, and could not have committed.”

[7] It is noted that although the application for permission to appeal relates to conviction and sentence, the applicant did not set out a ground of appeal regarding sentence. However, before us, Miss Afflick, counsel acting on his behalf, rightly conceded that she could not properly advance any argument regarding sentence because it cannot

fairly be said that the sentences imposed by the learned trial judge are manifestly excessive in all the circumstances.

[8] Counsel also conceded that she could not advance any argument on grounds one and two regarding misidentification and unfairness of the trial, respectively, because having considered the transcript, she saw nothing to impugn the proceedings on these grounds. She also indicated to the court that in relation to ground four, she could not reasonably say there was a miscarriage of justice.

[9] It is on ground three that Miss Afflick directed her focus and expended her energy in trying to convince the court that there was a lack of evidence supporting the conviction. Counsel highlighted inconsistencies and discrepancies in the evidence advanced by the prosecution witnesses. She argued that the inconsistencies and discrepancies have rendered questionable the credibility of the prosecution witnesses. She also highlighted, among other things, that Inspector Sinclair wrote his witness statement two months after the incident. Even more significantly, counsel directed the court's attention to the absence of gunshot residue on the applicant's hands as well as the lack of evidence that his fingerprints were extracted and found on the gun. She contended that the absence of scientific evidence meant there was nothing to support the prosecution's case, which was "based purely" on the evidence of the police witnesses.

[10] Counsel concluded that given the absence of scientific evidence connecting the applicant to the gun and the shooting, the delay in the preparation of the police witness statements, and the conflicting evidence of the prosecution witnesses, the evidence was not sufficient to convict the applicant. She maintained that all the matters she has highlighted for the court's consideration went to the credibility of the witnesses, and so the learned judge would have erred in finding them credible. Therefore, the applicant should have been acquitted.

[11] The court considered the written submissions of the Crown as they were found to be adequate to dispose of the solitary ground pursued by the applicant. In keeping with

the arguments of Miss Afflick and her concessions, counsel for the Crown submitted that there is no substance or merit in ground three and, indeed, in the application for permission to appeal. They maintained that the evidence of the prosecution witnesses “proved, without a doubt”, that the applicant had a gun and that he fired at the police. They submitted that the discrepancies or inconsistencies in the evidence of the witnesses were not material and did not go to the root of the prosecution's case. The learned trial judge, they submitted, accepted the account of Inspector Sinclair since he was the person walking at the front and the first officer to enter the premises. Therefore, the inconsistencies and discrepancies noted by counsel for the applicant were not fatal to the conviction.

[12] Counsel for the Crown sought to reinforce the learned trial judge's finding that the prosecution had been broadly consistent in its case, which led to the verdicts. They also noted that the applicant had mentioned in his unsworn statement that the police had put the gun in his hand and fired it. They pointed to the learned trial judge's consideration and rejection of that assertion. In the Crown's view, there was more than enough evidence before the court for any properly directed jury to safely convict the applicant. Therefore, the learned trial judge correctly concluded that the prosecution had discharged its duty to prove the case to the requisite standard.

[13] Having considered the transcript of the proceedings and the submissions of counsel for the applicant and the Crown, the court accepts the concession of counsel for the applicant on grounds one, two, and four, as rightly made, as those grounds are devoid of merit.

[14] Concerning ground three, we accept the Crown's submission that there is nothing in the circumstances in which the court could find that the learned judge erred, in law or fact, in coming to her verdicts. This was a case to be determined solely on findings of fact, as nothing turns on any question of law. Having been guided by the prescribed standard of review of findings of fact of a court at first instance, we see no basis on which we could conclude that the findings of fact of the learned trial judge, which led to the

guilty verdicts, are plainly wrong. We endorse the view of the learned single judge that the question of credibility, which was the main issue, was adequately dealt with by the learned trial judge. Therefore, we find no merit in ground three.

[15] In the circumstances, the court finds that the application for leave to appeal cannot succeed.

[16] Accordingly, the court orders as follows:

1. The application for leave to appeal is refused.
2. The sentences are to be reckoned as having commenced on 25 May 2014 and are to run concurrently as ordered by the learned trial judge.