JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 88/2010

BEFORE: **THE HON MR JUSTICE MORRISON JA**
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA

ANDREW SHAW v R

Delano Harrison QC, for the applicant

Miss Sanchia Burrell and Miss Melony Dornville for the Crown

2 December 2013

ORAL JUDGMENT

MORRISON JA

[1] On 29 July 2010, the applicant was tried on an indictment before Marsh J in the Western Regional Gun Court held at Montego Bay, for the offences of illegal possession of firearm and illegal possession of ammunition. The particulars of the offence were that, on 10 March 2010, he unlawfully had in his possession a firearm not under/and in accordance with the terms and conditions of a Firearm User's Licence and that he also unlawfully had in his possession ammunition, again not under/and in accordance with the terms and conditions of a Firearms User's Licence.

[2] The applicant pleaded not guilty on both counts and his trial therefore proceeded before Marsh J. The case for the Crown was that, on 10 March 2010 Sergeant Orett Cockbourne and Constable Omar Grant were on mobile patrol in the Sandy Bay area in the parish of Hanover. On reaching a section of the Recovery main road, they came upon a white Toyota Corolla motor car parked in the road, apparently in some distress. There were four men around the car and they were waving their arms as if to stop the oncoming vehicle for assistance. Sergeant Cockbourne stopped the vehicle some 6 yards or so from the parked vehicle and shone the spotlight and headlight of the police vehicle on that vehicle. The men were requested to come forward to be searched one at a time. This was done because Sergeant Cockbourne was suspicious of the possibility that they might have a firearm.

[3] When the first man was searched, nothing was found on him and he was told to stand beside the service vehicle. The second man to be searched was the applicant; he was wearing a big dark coloured jacket, and Sergeant Cockbourne's evidence was that as soon as he started to search this man, he found and recovered a pistol from the right side of the waist of his pants. Immediately after this happened, the man whom he had first searched, jumped into a gully and the other two men ran off away from the Corolla motor car. He then heard explosions coming from the direction in which the men ran. Sergeant Cockbourne held on to the applicant and placed him at the side of the police vehicle. When he removed the pistol from the applicant's waist, he asked him where he got the pistol from, and he got no answer.

[4] Some three days later, while Sergeant Cockbourne was present at the Hanover Police Headquarters in Lucea, the applicant and his attorney-at-law were present at a question and answer session with the police. The applicant was charged afterwards with illegal possession of firearm and illegal possession of ammunition. The firearm and the ammunition along with the appropriate ballistics certificate were in fact produced in court and identified by Sergeant Cockbourne.

[5] The applicant's defence was given by way of a brief unsworn statement, in which he denied that the police had found any gun in his waist band. In relation to how the police came by the gun, he said, "They picked it up right in the bush corner, where the man saw me."

[6] On this evidence, the learned trial judge found that the sergeant of police was a credible witness, and accepted his account of the events of the night in question. He therefore found the applicant guilty on both counts of the indictment and he sentenced him on count one, for illegal possession of firearm, to 10 years' imprisonment and on count two, for illegal possession of ammunition, to four years' imprisonment. The sentences were ordered to run concurrently.

[7] On 13 August 2012, the applicant's application for leave to appeal was considered and refused by a single judge of this court and, as is his right, the applicant has now renewed the application before the court. When the matter came on for hearing today, no supplemental grounds of appeal having been filed on behalf of the applicant, Mr Harrison, QC for the applicant advised the court that, as regards

conviction, he had formed the view that the evidence against the applicant was compelling and that, in relation to the sentence of 10 years' imprisonment on count one and four years' imprisonment on count two, to run concurrently, they could not be said to be harsh and excessive, especially given the applicant's circumstances. The circumstances referred to by Queen's Counsel are that on 2 October 2006 this applicant had been convicted of illegal possession of firearm and ammunition and sentenced at that time to five years and one year of imprisonment to run concurrently, so that the offences committed in the instant case on 10 March 2010 were committed some three years and five months after the earlier offences were committed. Mr Harrison submitted that it is plain from this that the earlier, lesser, sentences had not sufficed to teach the applicant any lesson. With this, we entirely agree.

[8] It is clear that the evidence against the applicant was, as Queen's Counsel has described it, compelling or, as the single judge had observed when refusing leave to appeal, plainly irresistible. The only issue for determination by the trial judge was one of credibility, which is to say, to weigh the police officer's testimony that the gun had been found in the applicant's waistband against the applicant's assertion in his statement, that no such thing had happened. The trial judge, as he was fully entitled to do, preferred the version proffered by the Crown and we see no basis at all to disturb his conclusion, either as to conviction or the sentence.

[9] In the circumstances, the application for leave to appeal is refused and the court orders that the sentences against the applicant are to be reckoned from 29 July 2010.