JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 99 OF 2007

BEFORE: THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MR.JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A. (Ag.)

LEONARD STODDART
V
REGINA

Jack Hines for the Applicant.

Miss Kathy Pyke on fiat for the Crown.

May 21 and October 24, 2008

HARRISON, J.A.:

Introduction

1. The applicant was tried and convicted in the Regional Gun Court before Marsh, J. on July 17, 2007 on an indictment containing two counts. Count 1 charged him with the offence of illegal possession of a firearm and on this count he was sentenced to seven (7) years imprisonment at hard labour. Count 2 charged him with wounding with intent and he was sentenced to a term of 12 years imprisonment at hard labour. The sentences were ordered to run concurrently.

2. On April 2, 2008 a single judge refused his application for leave to appeal. He said that the issues in the case related to identification and credibility and that the learned judge had carefully analyzed the evidence and demonstrated in his summing up that he was mindful of the principles enunciated in **Turnbull**. The applicant has now renewed his application to the Court.

The Prosecution's Case

3. O'Neil Bernard, a taxi driver, testified that at approximately 2:00 pm on March 25, 2007 he was at the home of his girlfriend Tasha–Gaye who lives at Cousins Cove, Hanover. The yard in which she lives has two houses. They were standing on the verandah of one of the houses when an argument developed between them. She went to her room and shortly thereafter, a car drove up and stopped on the right hand side of the roadway. The applicant and another man, who Bernard did not know before, alighted from the motorcar. He had known the applicant for about three years before March 25. He would see him approximately three times per week and had last seen him at a football match, about two months before March 25. He also knew that Tasha and the applicant had an intimate relationship between them before he met her.

4. Both men entered the premises and walked towards the verandah where Bernard was standing. Bernard left the verandah and went around to Tasha's room. He tried to open the door but did not succeed. He called out to her but she did not answer. He then turned around and saw the two men standing behind him. They were about 8ft. away from him.

5. The man whom he did not know had a gun in his right hand. The applicant then used some expletives and said to Bernard: "Wey you a rough up the people them gal pickney fah". Bernard responded: "rough up who?" "Is who you"? The applicant told the other man to give him the gun which was handed to him. Bernard said he jumped off the verandah and immediately he heard a loud explosion. He continued running until he reached Tasha's "aunty" house. When he lifted his shirt, he realized that he was bleeding in the region of his abdomen. He telephoned a policeman whom he knew and within 15 minutes the officer came to the house. He was taken to Lucea hospital and was transferred later to Cornwall Regional Hospital.

6. Bernard attended an identification parade on April 15, and pointed out the accused from a line of nine men. He identified him to the police as the person who had fired at him and shot him.

7. Bernard disagreed with the suggestion made by Counsel for the Applicant, that he did not like the applicant because he believed that he was still having a relationship with Tasha. It was also suggested to the witness that he did not have a good opportunity to identify the person who he said shot him but he disagreed with the suggestion. He said: "...I see the man very, very, clear." He was asked by the learned judge which man he was referring to, and he said "Leonard and the man I don't know."

8. Det. Sgt. Orrett Coburn was the investigating officer and he said that when he told the applicant he had information that he went to a yard at Cousins Cove and shot

Bernard, he said: "A di same thing mi hear over mi phone". On the very day of the incident, Det. Sgt. Coburn requested personnel from the Scenes of Crime to have the hands of the accused swabbed. Coburn said under cross-examination that the request was made because he wanted to see if any gun powder residue was present on his hands. He had considered the presence or absence of gunpowder residue important to his investigations.

9. Cons. Lorie who was attached to the Crimes of Scene Unit was the officer who did the swabbing of the hands of the applicant. Lewis said he made efforts to find out what Cons. Lorie had done with the swabs but was unsuccessful. He tried to obtain a written statement from Lorie but was also unsuccessful. He was unable to obtain an analyst report. Cons. Lorie was on vacation leave at the time of trial and had not resumed duties up to the end of the trial. Sgt. Lewis was unable to say whether he was still a member of the Jamaica Constabulary Force.

The Defence

10. The applicant, a taxi operator gave evidence at the trial. He said he was not at the scene of the shooting and that he did not fire any shot at the complainant. He said that he was approached by police officers on the 25th March 2007 about 4:00 pm and was asked about the shooting of someone at Cousins Cove, Hanover. He was searched by the police and was told that they were searching him for an illegal firearm. After the search was done, he was taken to the police station in Lucea where his hands were swabbed. He said that the police took him to his house the following morning where it

was searched but no firearm was found. He denied that he went to Bernard's house along with another man and that this man had a gun. He also denied that he was carrying feelings for the complainant and that he had shot at the complainant.

11. Det. Sgt. Lewis was called as a witness on behalf of the applicant. He was the sub-officer in charge of the Crimes of Scene section at Freeport Police Station, Montego Bay. He said that he was trained in the taking of swabs and was issued a certificate after he completed his training.

12. Sgt. Lewis said he had instructed Cons. Lorie to take swabs of the applicant's hands but he was not able to say whether the swabs were handed over to the Analyst.

The Letter from the Forensic Laboratory

13. Counsel for the prosecution advised the Court that she had discovered that the swab tests were not sent to the Forensic laboratory. Counsel was advised by letter from Miss Marcia Dunbar, Deputy Director of the Forensic Science Laboratory, as follows:

> "A search of records at the Chemistry Department of the Forensic Science Laboratory was made to determine if swabs allegedly taken from Leonard Stoddard was received. This search has revealed that none was received by the department."

The Grounds of Appeal

14. The original grounds of appeal were abandoned and Mr. Hines, Counsel on behalf of the applicant, was granted leave to argue the following supplemental grounds:

"1. (a) The learned Judge erred in accepting the evidence of Sgt Senneth Lewis as the opinion evidence of an expert which evidence was inadmissible in that he was not an expert and only qualified and gazetted to give evidence of the taking of a swab: not evidence of pertaining to the desirable time in which to test the swab see- pages 108 and 138 -139 and 141 of the transcript and **R v Michael Causwell** 26 J L R (1989) and page 520-521 (b). Further it is the duty of the learned judge at all times to determine who is an expert (see page 138).

2. The learned judge compounded the error by refusing to consider adequately or at all the substantial miscarriage to the applicant's case by determining that because it is desirable to take a swab for elevated levels of gunpowder residue within three hours of the firing a report of the finding of the forensic laboratory would be unhelpful to the court. Indeed , because it is desirable (if it is) can never mean and does not mean that elevated levels, intermediate on trace levels cannot be found beyond that period.

3. The learned judge erred in that he failed to appreciate or treat with the essence and totality of the defence to the (see page 78 of the transcript read). The defence is one of expected vindication i.e. that the result will show or indeed support the fact that he never fired a shot. By not producing the result (which is the duty of the agent of the Crown), the Crown has hindered obstructed and aborted his defence and reduced considerably his chance of acquittal.

4. The learned trial judge erred in failing to consider the submission in the address of the applicant's counsel; which is that there being no report, the Prosecution has not satisfied him beyond a reasonable doubt of the guilt of the accused.

5. The learned trial judge erred in that he failed to recognised (sic) that the Crown through its agents has a duty to present the result of the swabbing and had failed to do so and in so doing denied the Applicant his full Defence and more significantly a fair trial as guaranteed under section 20(1) of the Jamaica Constitution".

Grounds 1 and 2

15. We are of the view that grounds 1 and 2 can be considered together. Mr. Hines submitted that Sgt. Senneth Lewis' evidence regarding the desirability of conducting a test for elevated levels of gunpowder residue within three hours of firing a firearm, had led the learned judge to wrongly presume and to say that the absence of the result in relation to the swabbing would be unhelpful in his decision. Mr. Hines argued that Sgt. Lewis was not an expert so his evidence on this aspect of the case ought not to have been accepted by the trial judge. He further submitted that the decision of the judge to accept his evidence was flawed and had amounted to a miscarriage of justice. In the circumstances, he submitted that the appellant's conviction ought to be quashed.

16. The learned trial judge in our view was not in error when he treated Sgt. Lewis as an expert in the swabbing of hands. Sgt. Lewis was called on behalf of the applicant and it was Counsel for the accused man who had informed the judge that he was called in order for him to "establish his expertise" in relation to hand swabbing. The witness was therefore called as an expert. It is a little ironical that the 'expert evidence' called on behalf of the applicant should now be subjected to this type of criticism. The judge had warned himself that he was not obliged to accept his evidence and that it could be treated like any other evidence in the case. The record further reveals that at the time of trial, Sgt. Lewis was a police officer with fourteen (14) years service, nine of which

he served as a Detective. He had received training in the swabbing of hands at the Criminal Investigation Branch headquarters and for this he was issued a certificate.

17. The evidence further reveals that the swabbing of the applicant's hands was done some six (6) hours after the shooting had taken place. Sgt. Lewis had said that it was desirable that testing for elevated levels of gunpowder residue on the hands should take place within three hours of firing a firearm. It is well known among forensic experts that the quality of swabbing can be compromised by a number of factors such as extreme sweating and the washing of hands. These factors could possibly have had a negative effect on the test for gunpowder residue on the hands. The learned judge was minded of the time factor and said inter alia at page 148:

> "...even on the case of the defence the swabs were taken sometime after 8:00 o'clock. The alleged incident took place a little after 2:00, and consequently it would not have been evidence to assist this Court one way or another".

Regrettably, we cannot agree with the submissions made by Mr. Hinds. Grounds 1 and 2 therefore fail.

Grounds 3, 4 and 5

18. In our view, grounds 3, 4 and 5 can be conveniently dealt with together. Mr. Hines contended in relation to these grounds that the learned judge failed to understand the significance of the applicant's consent to the taking of swabs. He argued that the applicant had said from the very outset that he did not fire a gun. Mr. Hines submitted that the Crown having failed to produce the result of the swabbing,

had failed to properly discharge their duty. This he said, had resulted in a reduction of the applicant's chances of an acquittal.

19. Mr. Hines also submitted that the applicant's constitutional rights were breached due to the fact that his defence was not fully placed before the learned trial judge for consideration. He submitted that it is well established in law that the Defence must be presented however weak and referred to the cases of **R v Teddy Wiggan** 9 JLR page 492 and **R v Tillman** 1962 Criminal Law Review.

20. Cooke J. A. posed the following question to Mr. Hines:

> "What is the significance of the absence at trial of any results of the swabbing and in particular any prejudicial consequence to the applicant within the totality of the circumstances of the case?"

21. Mr. Hines responded and said that there was no challenge where identification is concerned but the Crown had a duty to see that the rights of an accused are protected. He argued that the swabbing of the hands was an essential part of the applicant's defence and submitted that the Crown had deprived the applicant of the chance of proving that the test was negative.

22. The Court was informed by Miss Pyke that the swabs were not submitted for analysis, so Cooke J.A. posed the following question to her:

> "By not submitting the swabs to the laboratory was the applicant denied the opportunity of establishing his innocence?"

23. Miss Pyke, responded and said that the submissions made by Mr. Hines on this issue were without merit since they were predicated on an assumption that the test would be negative and that a negative result would lead to an acquittal.

24. It was contended that the failure to present the result of the swabbing had caused the applicant to be deprived of a fair trial under section 20(1) of the Constitution of Jamaica. We are of the view however, that the non-submission of the swabs to the Analyst with the result that no test was forthcoming from that officer, could not have had a prejudicial effect on the outcome of the trial. The disposition of this appeal does not, in our view, depend upon this proposition. We nevertheless strongly deprecate the conduct on the part of Constable Lorie who had failed to take the swabs to the Analyst for analysis. This said, however, we have not been persuaded by the submissions of Mr. Hines that the absence of a report from the Analyst would have advanced the applicant's case. At best, it is really a matter of speculation that a report might possibly have contained a negative result.

25. It is our view that the issues in this case turned essentially on the credibility and reliability of O'neil Bernard's evidence. Learned Counsel, quite properly conceded that he was not challenging the issue of identification. In our view, the learned judge had demonstrated that he was mindful of the principles enunciated in **Turnbul**l. His directions on identification cannot be faulted.

26. The transcript has revealed that the judge had properly considered the evidence of both Bernard and Applicant. He said he had observed how the complainant answered

questions both in examination-in-chief and under cross-examination. He found as a fact that the applicant was known to the witness. He accepted the evidence of Bernard when he said that the applicant had asked the other man for the gun and had used it thereafter to shoot at and injure the complainant. He also found that there were discrepancies in the evidence of Bernard but he nevertheless found him to be a credible witness in respect of his evidence of identification of the applicant.

27. The learned judge rejected the evidence of the applicant and said that even though he did not accept his evidence he would be required to go back to the evidence of the prosecution and that he would have to be satisfied beyond a reasonable doubt that the Crown had proved its case. In the end, he accepted Bernard as a witness of truth.

28. At this level, we are definitely handicapped in forming a view on the facts since the learned judge had the benefit of seeing the witnesses and assessing the demeanour of both Bernard and the applicant. He had carefully analysed the evidence and arrived at a decision of guilt. We see no reason therefore to differ from him. Grounds 3, 4 and 5 also fail.

Conclusion

29. We have treated the application for leave to appeal against conviction and sentences as the hearing of the appeal. The appeal is dismissed and the sentences are to commence as of the 17th of October 2007.