**[2020] JMCA Crim 54**

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NO 73/2014**

**BEFORE: THE HON MR JUSTICE BROOKS JA**
**THE HON MISS JUSTICE STRAW JA**
**THE HON MRS JUSTICE FOSTER-PUSEY JA**

**MIKAL TOMLINSON v R**

**Mr Kemar Robinson instructed by Peter Champagnie QC for appellant**

**Miss Donnett Henriques and Ms Debra Bryan for the Crown**

**23 November 2020**

**BROOKS JA**

[1] This is an application by Mr Mikal Tomlinson for leave to appeal against his conviction in the Western Regional Gun Court, held in Montego Bay on 10 April 2014. Mr Tomlinson was convicted for the offences of illegal possession of firearm and wounding with intent. The learned trial judge, on 30 June 2014, sentenced him to 10 years' imprisonment for the offence of illegal possession of firearm and to the mandatory minimum sentence of 15 years' imprisonment for the offence of wounding with intent. Mr Tomlinson's application for leave to appeal was initially refused by a

single judge of this court. Despite that refusal, he has pursued the application, as he is entitled to do, and has renewed it before this court.

[2] The circumstances which led to him being charged are, briefly, that on 2 March 2012, Mr Richard Townsend was walking home with a friend in Niagra District, in the parish of Saint James, at about 8:30 pm, when he heard explosions like gunshots. Shortly thereafter, Mr Townsend heard another explosion and felt his right foot give way under him. He fell, and there was also another shot which hit him in his left foot. He dragged himself out of the road to the back of a nearby house. A man ran past him there. When Mr Townsend got to an area at the back of the house, where there was a light, and what he has described as a "drainage system" or alternatively, a gutter. He went into the gutter and from there, he saw Mr Tomlinson, whom he knew before for several years, come and stand, with a gun in hand, above him. He said Mr Tomlinson pointed the gun at him and accused him and others of taking him, Mr Tomlinson, for a fool. Mr Tomlinson then grabbed Mr Townsend by the hair (he had long dreadlocks at the time), pulled him up, pointed the firearm at Mr Townsend, and squeezed the trigger twice. Fortunately, the firearm did not discharge and Mr Townsend only heard a click. Mr Townsend escaped, went inside the house and closed the door.

[3] After a while, someone came and rescued Mr Townsend and put him in a car. He was taken to the Cornwall Regional Hospital where he was treated. He later reported the matter to the police.

[4] Sometime afterward, Mr Tomlinson was taken into custody, and when confronted with the allegations, he is said to have said words to the effect that there was a misunderstanding between them. Those words will be important for the analysis that follows, but he further said he did not have a gun or shoot anyone.

[5] At the trial, Mr Tomlinson gave sworn testimony and he said that he was knocked unconscious at about 7:35 that evening, and it was at about 8:30 to 8:45 pm that he recovered consciousness. He was then, he said, in a motor vehicle on his way to the hospital. He said he told the driver of the vehicle not to go to the hospital but, instead, to take him to his father's house, which instruction was followed. He insisted that he had nothing to do with the shooting.

[6] The learned trial judge accepted Mr Townsend as a witness of truth, and on that basis, found Mr Tomlinson guilty and sentenced him, as has already been mentioned.

[7] Counsel on behalf of Mr Tomlinson, Mr Robinson, has, with the leave of this court, filed and argued three amended grounds of appeal. They, briefly, are:

1. that the learned trial misdirected himself in respect of the principles of identification evidence.
2. that the learned trial judge failed to properly assess the alibi evidence and state why he rejected it.
3. that the learned trial judge misquoted the evidence.

[8] While we have heard arguments from both counsel in respect of all three grounds of appeal, we are satisfied that ground 3 must succeed. That position has

essentially been conceded by the counsel for the Crown, Miss Henriques. The misquoting of the evidence came about as a result of what was earlier foreshadowed.

[9] The investigating officer testified that when he cautioned Mr Tomlinson, and questioned him, Mr Tomlinson's response was "Officer, is a little misunderstanding happen between them". The officer also said, at page 81 of the transcript:

> "...I further enquired of him the firearm that was used by him. I enquire[d] of the whereabouts of the firearm.... [u]se[d] in commission of the crime and he replied, 'officer, mi nuh know nothing bout nuh gun. Mi nuh shoot nobody'...."

[10] Unfortunately, the officer was not asked any question, by either Crown Counsel or defence counsel, to clarify those statements, and so it is not known whether that use of the word 'them' was a mangling of reported speech. It is apparent, however, the learned trial judge had a different understanding of the evidence. He quoted the officer twice in the course of his summation. His quote was "Officer is a little misunderstanding between **us**" (emphasis supplied). The learned trial judge said that at pages 151 and 161 of the transcript. He relied heavily on the quote, at pages 162 and 163, in finding that Mr Tomlinson had essentially admitted to being involved in an altercation with Mr Townsend. As a result, and largely on that basis, he convicted Mr Tomlinson, having rejected his alibi, and accepted Mr Townsend as a witness of truth.

[11] The misquoting of the evidence, therefore, is a material aspect of the case, and therefore is fatal to the conviction. In light of that, we asked both counsel for Mr Tomlinson and for the Crown whether there ought to be a retrial in the circumstances,

and they helpfully pointed to the decision of **Vince Edwards v R** [2017] JMCA Crim 24. That case extrapolated the principles from the Privy Council's decision in **Dennis Reid v R** (1978) 16 JLR 246, and set out a number of points, at paragraph [141], which the court is to consider when deciding whether to order a retrial, namely:

> "a. the strength of the prosecution's case;
>
> b. the seriousness or otherwise of the offence;
>
> c. the time and expense that a new trial would demand;
>
> d. the effect of a new trial on the accused;
>
> e. the length of time that would have elapsed between the event leading to the charges, and the new trial;
>
> f. the evidence that would be available at the new trial;
>
> g. the public impact that the case could have."

[12] We have considered the various principles and defence counsel's concern about the availability of his witnesses for retrial. We are convinced that although it is not an overriding factor, the time which Mr Tomlinson had already spent in custody is a significant aspect of this case. He has spent six years and seven months in custody since he was convicted, and when we consider:

a. the uncertainty of the time for a retrial to be held;
b. the fact that, in the event that he is convicted following the retrial, even if he gets a certificate from the judge upon sentencing, there would be a mandatory minimum

sentence of 15 years which, that judge would be obliged to impose; and

c. if there is an appeal, there would be some time before the transcript is prepared and sent to this court.

This would result in Mr Tomlinson having to spend a significant amount of years in custody. In the circumstances, we are of the view that it would be oppressive to order a retrial.

[13] As a result, we order as follows:

1. The application for leave to appeal is granted.

2. The hearing of the application is treated as the hearing of the appeal.

3. The appeal is allowed.

4. The convictions are quashed and the sentences are set aside.

5. A judgment and verdict of acquittal is substituted.