

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 80/2009

**BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA**

IAN WRIGHT V R

Michael Lorne for the applicant

Miss Paula Llewellyn QC, Director of Public Prosecutions and Miss Cadeen Barnett for the Crown

21 and 25 February 2011

DUKHARAN JA

[1] The applicant was convicted and sentenced on 11 June 2009 in the High Court Division of the Gun Court for the offences of illegal possession of firearm and illegal possession of ammunition. He was sentenced to twelve years and three years imprisonment respectively with sentences to run concurrently.

[2] The applicant was refused leave to appeal by a single judge of this court. This is a renewal of that application.

The Prosecution's Case

[3] The case presented by the prosecution was that on 25 December 2008 at about 11:30 am Sergeant Rupert Simmonds was at the intersection of Mark Lane and Laws Street in downtown Kingston. He was dressed in plain clothes. He observed the applicant whom he had been seeing in that general area for over one year. The applicant parked his bicycle at the above intersection by a grocery shop. Sergeant Simmonds stated that he observed a bulge on the right side of the applicant's waist. His suspicion was aroused and he discreetly followed the applicant toward Church Street while trying to seek assistance from Police Control at 119. He momentarily lost sight of the applicant but again saw him shortly afterwards in the Pearnel Charles Arcade. He said he went outside the arcade where he saw a colleague, Detective Corporal Lloyd Reid, and told him of his observation. Soon after, the applicant was seen walking towards his parked bicycle and was apprehended by Sergeant Simmonds. Corporal Reid held the applicant and Sergeant Simmonds carried out a search on him and a firearm with ammunition was taken from his right trouser's foot below his knee. When asked about it, the applicant said, "Officer is a man violate the thing and mi haffi come tek dah one yah from him". The applicant was subsequently arrested and charged for illegal possession of firearm and illegal possession of ammunition. The firearm and the ammunition were labeled and sealed in the presence of the applicant and taken to the forensic laboratory for examination which revealed a lethal barrel weapon capable of discharging deadly missiles as well as live ammunition.

[4] In cross examination Sergeant Simmonds said that the applicant was trying to escape and there was a struggle which resulted in a wound over the left eye of the applicant. One round was also discharged from the firearm of Sergeant Simmonds.

[5] Detective Corporal Reid gave supporting evidence to Sergeant Simmonds' account and said that he saw when an object resembling a firearm was removed from the trousers foot of the applicant. He repeated what Sergeant Simmonds said when the applicant said, "Officer is a man violatate and mi come tek it from him". Corporal Reid said that he observed that the object taken from the applicant was a 9mm pistol with a magazine containing seven 9mm rounds. In cross examination, it was admitted by Corporal Reid that there was a struggle with the applicant in a bid to escape and that he, the applicant, got an injury over his left eye.

The Defence Case

[6] The applicant gave sworn evidence and denied that any firearm was taken from him. He said that on 25 December 2008 at about 11:30 am he parked his bicycle at the intersection of Laws Street and Mark Lane in downtown Kingston and walked along Church Street to where his family sells sneakers. On his return to his parked bicycle and as he started pushing it, he heard someone shouting out, "Oi sah don't move". He looked over his shoulder and saw someone pointing a gun at him and was told to put his hands in the air. Having recognized that it was the police, he enquired what was the problem. He said another officer came and he was searched twice. He said he heard when one of the officers said "See a gun yah". The applicant enquired as to

what gun he was talking about when he was hit in his face and told to shut up. He was draped and he heard when a shot was fired. He said he was taken in a police jeep to the Central Police Station. He denied that any firearm was taken from him and that he had told the officer that "is a man violate the thing" and he had to take the gun from him.

Grounds of Appeal

[7] Mr Lorne, for the applicant, sought and was granted leave to argue supplemental grounds. They are as follows:

- "1. The learned trial judge did not analyse and consider the inconsistencies of the prosecution's case and consequently in a case where credibility was the main issue did not give the defence the full weight it deserved.
2. A sentence of 12 years was manifestly excessive in all the circumstances."

[8] Mr Lorne submitted in ground one that the learned trial judge treated the defence with little regard, in that no apparent serious consideration was given to two aspects of the evidence that were not explained adequately by the witnesses for the prosecution. His complaint related to two aspects of the summation of the learned trial judge in dealing with the evidence, which are as follows:

- (i) "Yes, the accused man received an injury over his left eye, he said the three of them struggled." and

- (ii) "He said he didn't fire it but it went off although he said both Corporal Reid and himself were armed."

It was further submitted that in the absence of a proper explanation from the prosecution, the applicant's explanation on these aspects of the evidence was much more credible. The learned trial judge, he argued, ought to have given more credence to the credibility of the applicant's explanation as to how the firearm was found.

[9] Miss Llewellyn QC, in response, submitted that the real issue in this case was one of credibility. The discharging of one round and the struggle could not have impacted on the credibility of the prosecution's witnesses in respect of the main charge of illegal possession of firearm.

[10] It is quite clear in this case that the main issue to be determined was one of credibility, as the learned trial judge stated at page 66 of her summation:

"This is a case in which it is really a question of credibility. I believe the witnesses for the prosecution. I have seen them, I have listened to them and I believe them. I do not believe the accused. I believe that this accused man was seen by Sergeant Simmonds, that he trailed him, that he waited for him to come back for this bicycle and that he found the firearm in his trousers pocket as he said. I accept him as a witness of truth. I accept both Corporal Reid and Sergeant Simmonds as witnesses of truth ..."

It can be seen from the above passage that the learned trial judge, after a careful analysis of the evidence, assessed the demeanour and credibility of the witnesses. She accepted the witnesses for the prosecution as truthful and rejected the evidence of the

applicant. Her findings were findings of fact based on the evidence. It is not a function of this court to disturb the findings of fact of a trial judge unless such findings are so unreasonable that no tribunal could have come to such a conclusion.

[11] The struggle that ensued after the firearm was recovered and the injury to the eye of the applicant is, in our view, peripheral to the main issue. On that issue the learned trial judge said at page 60 of the summation:

“... the accused man received an injury over his left eye, he said the three of them struggled. He, Sergeant Simmonds, Corporal Reid and the accused, the three of them struggled together because the accused man was trying to get away. When he was cross examined he said yes, his firearm went off, one shot. He said he didn't fire it but it went off ...”

The main focus of the learned trial judge was whether or not the applicant was in possession of the firearm, which she so found. The fact that the applicant received an injury at the time and that a shot was discharged from the policeman's firearm would not affect the question as to whether the applicant was illegally in possession of the firearm. We are of the view that there is no merit in this ground.

[12] It was submitted by Mr Lorne that a sentence of twelve years imprisonment on count one was manifestly excessive in all the circumstances, bearing in mind that the firearm was not used in the commission of an offence. We agree that twelve years imprisonment for possession simpliciter is manifestly excessive. We are cognizant of the range which is between seven to ten years for similar offences when illegal firearms have been used to commit offences. We are of the view that a sentence of ten years

would be appropriate in the circumstances of this case where the applicant was found with a loaded firearm in a crowded area.

[13] Based on the foregoing, the application for leave to appeal conviction is refused. Application for leave to appeal sentence on count one is granted. The sentence of twelve years imprisonment is set aside and a sentence of ten years is substituted therefor, to run concurrent to sentence on count two. The sentences are to commence from 11 September 2009.