JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 102/07

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MRS. JUSTICE HARRIS, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.

KEVIN CLARKE v R

Leroy Equiano for the applicant

Jeremy Taylor, Deputy Director of Public Prosecutions (Ag.) & Mr. Adley Duncan, Assistant Crown Counsel (Ag.) for the Crown

16th November 2009

ORAL JUDGMENT

PANTON, P.

1. This is an application for leave to appeal by Mr. Kevin Clarke who was convicted of the offences of illegal possession of firearm and shooting with intent before Mr. Justice Marsh sitting in the Western Regional Gun Court in Montego Bay. The trial took place on July 16 and 17, 2007. He was sentenced for illegal possession of firearm to seven (7) years imprisonment and for shooting with intent to fifteen (15) years imprisonment with sentences to run concurrently.

2. A single judge of this court considered the application and refused leave to appeal. In so doing, the single judge said, "the issues in this case were the correctness of the identification of the applicant and the credibility of the witnesses. The learned trial judge in my view dealt adequately with the issues."

3. Before us the application has been renewed, with Mr. Equiano appearing for the applicant. He has placed before us for consideration, three (3) grounds of appeal which he has described as revised grounds of appeal. The three grounds read as follows:

> "(a) The identification evidence insufficient as it was not supported by any other evidence.
>
> (b) The learned trial judge failed to demonstrate in summation an appreciation of the weaknesses in the identification evidence.
>
> (c) The learned trial judge erred in law by allowing the prosecution to lead evidence on an issue for which the applicant was not being tried and that was prejudicial to the application and of no probative value to the case."

4. The circumstances giving rise to these convictions are that on the 8th April 2007, the applicant was seen at night, seated on a bench along with two other men in front of a shop, under a light, on the Spicy Hill Main Road, in the parish of Trelawny.

5. Cons. Omar Hutchinson was the main witness at the trial. His evidence was to the effect that he was in a police vehicle with Cons. Ricardo Foster when he saw these men. The applicant was well-known to him prior to the date of the

incident. He had known the applicant for over a year and would see him regularly, at least once a month during the space of time that he knew him. According to the constable, there was some shuffling by these men when they were first seen on this bench and he put on what he described as "take down lights" which are on the police vehicle. The lights, he said, are situated on the top of the motor vehicle, one pointing to the left, one pointing to the right and one straight ahead, and in putting on these lights, he had a better view of these men. The men ran and in the process of running, the applicant discharged a firearm at the constables. The applicant also had a black plastic bag in his left hand which fell during the running. As it turned out, that black plastic bag contained a brown paper bag with five (5) 12 gauge cartridges and also three (3) transparent plastic bags with flour, sugar and cornmeal. Incidentally, the shop before which they were sitting was described by the witness Hutchinson as a cookshop. The men escaped. Subsequently, that evening, Cons. Hutchinson made a report of what had transpired to Det. Cpl. Reynolds. He handed over the bag to Cpl. Reynolds and he, based on the information given to him by Cons. Hutchinson that night, prepared warrants for the arrest of the applicant.

6. Subsequently, the applicant was apprehended at a wedding apparently before he had had time to participate in the wedding feast. The applicant did not give evidence. In the usual manner in this country, he chose the comfort of an unsworn statement, in which he simply said that he did not know what the policeman was talking about. He said that he was at the wedding with his

friends and the police officer came, held him and took him to the station. He does not know the reason why they should have done that. That was his case.

7. The learned trial judge, in what we regard as a very careful summation, examined the circumstances of the identification and indeed, he divided into three the opportunity that Cons. Hutchinson would have had to make a proper identification. Firstly, when the vehicle approached. Secondly, after the "take down lights" had been turned on and thirdly, after the firing had begun. The learned judge concluded that Cons. Hutchinson had at least seventy-five seconds in all that period of time to make the identification that he did – that in his judgment the identification was correct and that he took into consideration the fact that the applicant was known to Cons. Hutchinson prior to the incident.

8. In cross examination there was some suggestion of malice but there was nothing to indicate what was the nature of this malice between the constable and the applicant.

9. Mr. Equiano, in his usual persuasive style, has sought to put blemishes on the proceedings that have resulted in the conviction of the applicant. He said, in arguing grounds (a) and (b) together, that the applicant was robbed of the opportunity of having the identification evidence of Cons. Hutchinson tested. He submitted that the holding of an identification parade, for the purpose of having Cons. Foster as a witness on that parade, was vital. Although Mr. Equiano did not embrace the words being put in his mouth by the court, he seemed to have

been saying that the conviction was hopelessly flawed by virtue of the fact that no identification parade was held for Cons. Foster to attempt to point out the applicant, notwithstanding that the learned trial judge found that Cons. Hutchinson knew the applicant well.

10. Mr. Taylor for the prosecution in his response on that point submitted that to hold an identification parade in the circumstances of this case would have been farcical and meaningless, and that no useful purpose would have been served. However, he did concede, in response to the court that perhaps, Cons. Foster could have been asked to go on a parade to see if he could make the identification. However, it was his submission that in any event the case depended on whether the learned trial judge found that the credibility of Cons. Hutchinson was not shaken and whether the court was of the view that there was no mistake so far as Cons. Hutchinson's identification of the applicant was concerned.

11. We are of the view that there should be no speculation as to what might have occurred had Cons. Foster been asked to attend an identification parade. We are of the view that the learned trial judge was correct in focusing on the evidence of Cons. Hutchinson, he being the only witness to have purported to have identified the applicant and having so focused on Cons. Hutchinson's evidence we are of the view that there was ample reason for the learned trial

judge to have concluded that Cons. Hutchinson was not merely credible but not mistaken.

12. The other ground argued by Mr. Equiano was that there should not have been any evidence led against the applicant in respect of the ammunition that was found, seeing that he had not been charged with that offence. Mr. Equiano, with tongue in cheek, submitted that the learned trial judge may well have been influenced by that evidence in arriving at the verdict. We are satisfied that the learned trial judge was aware that the applicant was not being tried for illegal possession of ammunition and that his duty was to focus on the two counts with which the applicant had been charged. We note, that there was evidence that the applicant had indeed been charged with the offence of illegal possession of ammunition but it was not pursued. In any event, given the whole circumstances of the case, we fail to see how it can be successfully argued that the evidence of the dropping of the ammunition could be prejudicial to the outcome of the case, given the nature of the charges.

13. In the circumstances as we see them, the applicant was properly convicted and sentenced. The application for leave to appeal is refused. The sentences are to run from the 17 October 2007.