JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 55/06

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MISS JUSTICE SMITH, J.A. (AG.)

NKOMO CLARKE V REGINA

Delano Harrison, Q.C., for the appellant

Donald Bryan, Deputy Director of Public Prosecutions and Miss Melissa Simms, Crown Counsel (Ag.) for the Crown

26th November & 20th December 2007

PANTON, P.

1. We heard arguments in this matter on November 26, 2007, after which we postponed our judgment until today. The appellant was granted leave to appeal against the decision of Pusey, J., who had convicted him on March 30, 2006, of the offences of illegal possession of firearm and shooting with intent. The sentences imposed were eight and ten years imprisonment respectively.

2. The case for the prosecution was that the appellant and the complainant knew each other quite well having attended the same high school at the same time. At about 6:30 p.m. on November 8, 2005, the complainant visited the appellant's residence where he spoke to a cousin

of the appellant. On his way home the complainant said he saw the appellant walking behind him. The distance between them at that point was estimated at thirty-five feet, and identification was made as a result of lights from the eave of a shop and a house, as well as by the fact that the appellant was in the same clothes he had been seen in earlier in the day. The complainant hid behind a stack of building blocks about six feet high. He then saw the appellant remove a firearm from his waistband, pointed it in the direction of the complainant and an explosion was heard. The complainant threw two blocks at the appellant, and ran.

3. The appellant made the customary unsworn statement in which he said that he was on the road coming from a shop and saw the complainant and his (appellant's) uncle talking. The complainant left the scene. Thereafter, while he was standing on the said road with a lady named Rose, he heard an explosion. Rose ran but he remained. They were both standing under the light. The appellant said that the complainant returned to the spot and said that the appellant had shot at him.

4. Leave was granted for the appellant to argue the following grounds of appeal, as summarised:

> (i) That the learned trial judge glossed over material discrepancies in the complainant's evidence so as to make it plain that he failed to

> apply the appropriate burden and standard of proof in arriving at the verdict of guilty;
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> (ii) That the learned trial judge erred in that he failed to identify the appellant's defence of alibi;
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> (iii) In the face of the grave weaknesses in the Crown's case, the learned trial judge ought to have raised the issue of whether a prima facie case had been made out; and
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> (iv) That the verdict is unreasonable or cannot be supported having regard to the evidence.

5. Mr. Delano Harrison, Q.C., submitted that the learned trial judge did not deal with the discrepancies that arose as a result of cross-examination of the complainant. He stressed that the judge had said that the complainant's "sequence in relation to exactly where he was and where the light was had some difficulty", yet no attempt was made to resolve the difficulty. The quality of the light and the position of the complainant were critical matters for the determination of whether the identification was correct. In this regard, it has to be noted that the learned judge went on to say this:

> "I have said and I would say that some of the difficulty was caused by the fact that Mr. Cameron was not originally asked to put things in sequential ways. In other words, where did that happen? In relation to that, there was in fact as I would say an indication that the narrative in terms of where things were there was some questions in relation to that". (p. 66 lines 8-19 of the record)

Miss Simms, for the Crown, submitted that the judge had indeed resolved the difficulties by saying the following:

> "I will also indicate that in relation to the issues of credibility, I have, you know, been mindful of the fact of the discrepancies of Mr. Cameron's evidence". (p. 68 lines 18-22)

6. With the greatest respect, this is no answer to the problem. There is nothing on the record to indicate that the uneasiness that the judge had found himself experiencing as he reviewed the evidence was solved by those words. Merely saying that the matter is one of credibility is insufficient. There has to be a demonstration of why notwithstanding the difficulties in the evidence, it is in order to rely on Mr. Cameron's general position that it was the appellant who fired at him. He has not shown how he has resolved the issues that he raised earlier in respect of the light and the position of Mr. Cameron while making the observation of the appellant. The situation is further complicated by the fact that the learned judge did not address his mind to the fact that the appellant was really saying he was elsewhere.

7. In the circumstances, grounds 1, 2 and 4 ought to be sustained. The appeal is allowed, the convictions are quashed and the sentences set aside. The application of the principles set out in ***R. v. Reid*** forbids a retrial. Hence a verdict and judgment of acquittal is hereby entered.