

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 201/03

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

CONROY CORNWALL v R

Keith Bishop for the Applicant.
Miss Winsome Pennicooke for the Crown

June 4 & 5, 2007

ORAL JUDGMENT

DUKHARAN, J.A. (Ag):

The applicant Conroy Cornwall was convicted on the 7th of November, 2003 in the High Court Division of the Gun Court on an indictment which charged him with the offences of illegal possession of a firearm and shooting with intent. He was sentenced to ten (10) years imprisonment at hard labour and twelve (12) years imprisonment at hard labour respectively with the sentences to run concurrently. The application for leave to appeal was refused by a single judge but has been renewed before us.

The facts which resulted in the conviction of the applicant are that on the 2nd of December 2002, the applicant and another man went to a work site at Hartlands, Spanish Town, St. Catherine. There were other

men present at the work site. At about 10:30 a.m. Constable Gary Newman, Corporal Lorenza Benjamin and another officer were on motor cycle patrol in the Spanish Town area when they received a report. As a result, they proceeded to the work site. On arrival, the applicant and another man were seen together near tractors and other equipment. There were workmen on the tractors working. On seeing the police, both men walked away. On seeing this, Constable Newman called out to them and the men started running away from them. They were chased by Constable Newman and the other officers. During the chase, a firearm fell from the applicant who retrieved it and fired at Constable Newman. The fire was returned. The other man also fired at them while running. The applicant and the other man made good their escape in a nearby cane field. A search was made but the men were not found. A black leather belt was found with what appeared to be blood stains on it. A report was made to the Spanish Town Police Station by Constable Newman.

Later the same day, the applicant turned up at the Spanish Town hospital with gunshot wounds. While at hospital he was identified by Constable Newman as one of the men who had earlier engaged them in a shoot-out at Hartlands. The applicant was arrested and charged with illegal possession of firearm and shooting with intent.

The applicant made an unsworn statement and denied the charges made against him. His defence was one of alibi. He said that on the 2nd of December 2002, he went to look for his girlfriend in the Lakes Pen area of St. Catherine and while walking in a lane he was approached by two (2) men who accused him of being a "labourite". They produced firearms and he heard explosions. He then observed blood coming from his chest. He was shot. He was subsequently taken to the Spanish Town Hospital where he was hospitalized. He said the police came there along with Constable Newman. His hands were swabbed. The applicant called (2) two witnesses to give evidence on his behalf, Mrs. Marcia Dunbar, a Forensic Analyst and Constable Douglas Maynard who swabbed his hands.

Mr. Bishop for the applicant was granted leave to argue supplemental grounds of appeal which are as follows:

- (a) That the learned trial judge failed to adequately discuss the strengths and weaknesses of the evidence as to identification.
- (b) That the evidence as to identification was not of the requisite standard to cause a conviction and
- (c) That the sentence imposed by the learned judge with respect to both counts was unreasonable in all the

circumstances having regard to the charges and antecedents of the matter.

Mr. Bishop argued Grounds (a) & (b) together. The main thrust of his submissions was that the learned trial judge did not give a proper analytical review of the evidence, but gave a repetition of the evidence of the Crown witnesses. He was critical of the learned trial judge's failure to analyse or discuss the strengths and weaknesses of the evidence of identification, notwithstanding the warning given by the learned trial judge as required by the **Turnbull** directions. Mr. Bishop relied on **Regina v Whyllie** Vol. 15 J.L.R 163 in which Rowe J.A. said at page 166: (F)

“...from these cases we extract the principle that a summing up which does not deal specifically, having regard to the facts of the particular case, with all matters relating to the strength and weaknesses of the identification evidence is unlikely to be fair and adequate.”

Mr. Bishop highlighted the areas that in his view were not properly analysed or discussed by the learned trial judge as it related to the identification of the applicant. He submitted that in reviewing the evidence of Constable Newman, the learned trial judge merely summarised his evidence without examining the strength or weaknesses of the identification. Constable Newman told the court that on seeing the two (2) men, he noticed that they started to run in the opposite direction. He gave chase and an object fell from the applicant. The applicant turned around to pick it up. The applicant fired in his direction and

continued running. He saw the applicant's face for two (2) seconds when he picked up the object. During the exchange of gunshots he saw the side of the applicant's face for one (1) second. He had said earlier in his evidence that he had seen the applicant's face for about two (2) to three (3) minutes before they started "drifting away".

In relation to the evidence of Corporal Lorenza Benjamin, Mr. Bishop highlighted the fact that he was able to see the applicant's face for the better part of ten (10) seconds as he was running away and that he saw the side of the applicant's face for a second or two. At best, this was a fleeting glance of the applicant. This, he said, called for careful analysis which the learned trial judge failed to do. Mr. Bishop also highlighted the fact that the absence of gunpowder residue on the hands of the applicant called for analysis.

Miss Pennicooke for the Crown was unable to challenge the submissions made by Mr. Bishop and did not convince this Court that there was a proper summation as it related to identification evidence, and the absence of gunpowder residue on the hands of the applicant.

We are of the view that the learned trial judge gave the proper directions in law as it related to identification, but she failed to demonstrate a proper analysis of the weaknesses that existed. For example, in respect of the two (2) to three (3) minutes mentioned in

evidence by Constable Newman, she concluded at page 61 of the summation:

"When he saw the accused about a half-a-chain away he was able to see his face. Nothing was blocking his view. He saw his face for about two to three minutes. And then the men started to drift away."

The evidence of Constable Newman, does not accord with the finding of the learned trial judge.

The finding that Corporal Lorenza Benjamin's evidence bolstered that of Constable Newman as it related to the identification of the applicant is not supported by the evidence. Neither of these witnesses knew the applicant before. Corporal Benjamin's identification of the applicant was by way of dock identification. The learned trial judge erred in this regard when she failed to mention the danger of this type of identification. In our view, Corporal Benjamin's evidence at best only supported the events that took place that day.

The issue of identification also comes into focus in light of the fact that there was no trace of gun shot residue on the hands of the applicant. This certainly was of some significance. In our view the absence of gun shot residue on the hands of the applicant was a probative factor in respect of the assessment of the quality of the identification evidence tendered by the prosecution. The summing up of the learned trial judge

does not indicate that she addressed her mind to this aspect of the evidence.

We are of the view that the convictions cannot stand. The application for leave to appeal is granted. The hearing of the application is treated as the hearing of the appeal which is allowed. The convictions are quashed and the sentences set aside. Verdicts of acquittal are entered.