[2022] JMCA Crim 49

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MISS JUSTICE SIMMONS JA

PARISH COURT CRIMINAL APPEAL NO COA2021PCCR00010

LAURIE FERRON v R

Keith Bishop and Andrew Graham instructed by Bishop and Partners for the appellant

Ms Judi-Ann Edwards for the Crown

3 November 2021 and 7 October 2022

SIMMONS JA

[1] On 4 September 2020, Mr Laurie Ferron ('the appellant'), was tried and convicted for the offence of negligent loss of firearm pursuant to section 41A of the Firearms Act in the Parish Court for the parish of Saint James before Her Honour Miss Austin ('the learned judge'). He was sentenced to a fine of $80,000.00 or three months' imprisonment in default of payment.

[2] The appellant aggrieved by the outcome of this decision filed a notice of appeal in the Parish Court dated 14 September 2020. The grounds of appeal were set out as follows:

> "1. That the learned Parish Court Judge erred in law in failing to accede to the appellant's submission of no case to answer;
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> 2. The learned Parish Court Judge erred in law in convicting the appellant notwithstanding the fact that the appellant has taken all reasonably foreseeable steps to forestall the possibility of his firearm being stolen;

3. The learned Judge erred in law in imposing a sentence of $80,000.00 or three months' imprisonment, which is excessive and/or unreasonable."

[3] On 3 November 2021, when the appeal was heard, ground three was abandoned by the appellant. On that date the court made the following orders:

"1. The appeal against conviction and sentence is dismissed.

2. Conviction and sentence is affirmed."

[4] On that date, we promised to provide our reasons in writing. This judgment is a fulfilment of that promise. The delay is sincerely regretted, and the court apologises for it.

Background

[5] It was the prosecution's case that on 26 January 2017, at about 7:20 pm the appellant, who was a registered firearm holder, went to the supermarket at the Blue Diamond Shopping Centre in Montego Bay, in the parish of Saint James ('the shopping centre'). He left his licensed firearm in a knapsack that he placed on the floor behind the driver's seat in his motor vehicle. The appellant then locked the motor vehicle which was parked about 30 feet from the entrance of the supermarket. At the time, there was one security guard in the car park. Upon returning to the motor vehicle, the appellant observed that the glass of the right rear window was broken and the knapsack and its contents were missing. He subsequently reported his firearm stolen at the Coral Gardens Police Station and was later charged with the offence which was the subject of this appeal.

[6] The prosecution relied on the evidence of four witnesses: (i) Constable Shantel Watson- the officer to whom the theft was reported by the appellant; (ii) Deon Scarlett, the security guard who was on duty at the shopping centre; (iii) Chevanese Burke, Regional Manager of the Firearm Licensing Authority, whose statement was tendered into evidence and (iv) Constable Ryan Harrison, the investigating officer who interviewed the appellant at the police station.

The evidence

Constable Watson

[7] The officer stated that on the night in question the appellant made a report to her that his vehicle had been broken into and certain items, including his licensed firearm stolen. She recounted that he told her that he had business meetings earlier that day and based on his attire, had placed his firearm in his black knapsack which he took with him to those meetings. Later that day, he went to a supermarket and left the bag with other items therein in his motor vehicle. Upon his return to his vehicle about 10 minutes later, he realized that it had been broken into and the bag with the items removed.

[8] In cross examination, she could not recall whether the appellant had told her that the area where he parked his motor vehicle was brightly lit. Her evidence was that he had said something about the lighting. She confirmed that the appellant had told her that he had seen a security guard close to where he parked, that he had parked about 30 feet from the entrance of the supermarket and had locked the vehicle by electronic means and physically checked the doors.

[9] In re-examination, she said that the appellant told her that he saw a security guard when he entered the car park and that when he returned to his car, he saw someone who identified himself as a security guard.

Mr Scarlett

[10] It was Mr Scarlett's evidence that whilst he was patrolling the car park of the shopping centre, he heard a banging sound like glass being broken. He went in the direction of the sound and observed a gentleman coming from between two cars. He observed that the glass of one of the cars had been broken.

[11] He stated that the car park was accessible to persons shopping at the plaza and that "[t]hings always do happen there so [he] always make sure that whenever [he was] working there [he paid] attention". He also stated that criminals would target the car park every three to four months. In respect of the lighting, his evidence was that the lights in

the car park were not working properly and were situated "way up on the cantilever on the building". The lights were about the distance of two lengths of the courtroom from where the appellant had parked. He further explained that there was a big street light a little distance from the car park. He indicated that the tint on the appellant's vehicle was dark.

[12] He stated further, that the area where the appellant had parked his motor vehicle was not bright enough for him to observe anything properly even though he was about two chains from the motor vehicle when the incident occurred. On that night, there were many vehicles in the car park and many persons were shopping and going to and from the car park to the supermarket. The witness stated that the appellant's motor vehicle was parked at a distance less than two lengths of the courtroom away from the supermarket.

Ms Burke

[13] The statement of this witness was admitted in evidence pursuant to sections 31A and 31C of the Evidence Act. Ms Burke who was the regional manager of the Firearm Licensing Authority, indicated that the appellant was a licensed firearm holder at the time of its loss.

Constable Harrison

[14] Constable Harrison who was the investigating officer, stated that due to the length of time that had elapsed between the incident and the report he did not attend at the scene. His explanation was that the scene could have been tainted as a result of vehicular and pedestrian traffic. He did, however, indicate that the car park based on his experience, was a very busy area that was traversed by many shoppers and vehicles.

[15] At the conclusion of the Crown's case, a no case submission was made on the basis that the appellant's actions did not meet the threshold to establish criminal negligence. It was submitted by counsel for the appellant, that the security arrangements at the car park, the location where the vehicle was parked, the lighting, the presence of security

personnel and the security features of the motor vehicle made it reasonable for the appellant to have left his firearm in the motor vehicle.

[16] The prosecution on the other hand, submitted that the appellant as a licensed firearm holder had a duty to keep it safe. He had failed to do so, as based on his report to the police, he left the firearm in a bag on the floor behind the driver's seat. The car park, it was submitted, was poorly lit and not well guarded.

[17] The court ruled that the appellant had a case to answer.

The defence

[18] The appellant gave sworn evidence. It was his defence that he took sufficient steps to ensure the safekeeping of his firearm. He stated that his motor vehicle was parked in close proximity to the entrance of the supermarket. The vehicle was "heavily tinted" and had "reasonable" security features which were stated to be "the locking mechanism which it comes with". The windows which were tinted were closed. Before going into the supermarket, he checked twice to ensure that the doors were locked and that the windows were up.

[19] He could view the cashiers from where his motor vehicle was positioned. On the night in question, it was his opinion that the car park was reasonably lit with lights from the building and from the front of the supermarket. Further, he observed security personnel stationed close to where he had parked and that the car park was not crowded. All these circumstances led him to conclude that the premises were safe for him to leave his knapsack which contained his firearm, magazine, Samsung tablet, architectural seal, cash and documents "tucked in below the driver's seat to the back".

[20] The appellant was in the supermarket for about seven minutes. Upon his return, he noticed that the right rear window of his motor vehicle was smashed and there was glass on the back seat. He noted that the knapsack was missing. A security guard for the premises informed him that he had seen someone break the glass. The appellant subsequently made a report at the Coral Gardens Police Station.

[21] In cross examination, the appellant could not say whether the window that was broken was the one closest to where he had placed the knapsack. He also stated that the knapsack was not something of value and disagreed that it would be if something was inside. The appellant stated that his motor vehicle was equipped with an alarm system which was engaged on the night of the incident. When asked why this was now being mentioned, he said, "I cannot answer that. I do not know". He indicated that having seen his statement he was maintaining that he had placed the knapsack under the driver's seat. He, however, agreed that he had told Constable Watson that he put the knapsack on the floor behind the driver's seat.

[22] In re-examination, the appellant stated that "locking mechanism" was the same as the alarm system that he had referred to in cross-examination.

Reasons for judgment

[23] The learned judge stated that in order for the prosecution to succeed in its case, it needed to prove that: (a) the appellant was a licenced firearm holder or a person who was lawfully in possession of a firearm and (b) the loss of firearm was through negligence. The negligence which it needed to prove was "negligence simpliciter as opposed to wilful negligence and the test is one of reasonableness". The learned judge explained that the appellant was required to "exercise such care, skill and foresight as a reasonable man in his situation would exercise and that is an objective test". Reference was made to **Merrick Miller v R** [2013] JMCA Crim 5 ('**Merrick Miller**'), in which the court stated that a licensed firearm holder must ensure that the firearm is at all times in a secure place if not on his person.

[24] The learned judge indicated that the issue for determination was whether the appellant was negligent in the loss of his firearm. The resolution of that issue was dependent on the credibility of the witnesses and the court had to consider whether the appellant's motor vehicle was a secure place to keep the firearm.

[25] The learned judge found that no reasonable explanation was given as to why the appellant did not keep the firearm on his person. She found that the appellant was not a witness of truth as there was recent fabrication, in respect of his evidence that the motor vehicle was equipped with an alarm system. However not much weight was placed on this aspect of the evidence as she expressed the view that that was "not how his motor vehicle was breached".

[26] The learned judge rejected the appellant's evidence that the knapsack had been placed under the seat. She concluded that based on the evidence, the knapsack was placed on the floor at the back of the seat instead of tucked under the seat as asserted by the appellant. The learned judge accepted Mr Scarlett as a witness of truth and accepted his evidence, based on which, she made the following findings:

> "O The lighting was inadequate as the area was poorly lit. O The [appellant] parked his Honda Fit motor car in a poorly lit area.
>
> O The light was on the cantilever.
>
> O The security post was a distance from the parking area.
>
> O The security guard was not in a position to properly see the area where the motor vehicle was parked because of the distance and poor lighting.
>
> O The plaza was busy with people and the car park had several motor vehicles."

[27] Based on the above, the learned judge concluded that the appellant "failed to exercise such care, skill and foresight as a reasonable man in [that] situation", with the result that the prosecution had proved that the firearm was lost as a result of his negligence.

Appellant's submissions

[28] Mr Bishop submitted that the grounds of appeal raise the following issues for this court's determination:

> "a. Whether or not the learned parish court Judge erred in law in not acceding to the appellant's submissions of no case to answer;
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> b. Whether or not the Parish Court Judge erred in law in convicting the appellant notwithstanding the fact that the appellant has taken all reasonably foreseeable steps the [sic] possibility of his firearm being stolen;
>
> c. Whether not the findings of the learned [judge] and[sic] are not supported by the facts, as presented in court at trial."

[29] Issue (a) relates to ground one of the grounds of appeal and issues (b) and (c) relate to ground two.

Ground 1 - The learned Parish Court Judge erred in law in failing to accede to the appellant's submissions of no case to answer

Appellant's submissions

[30] Counsel submitted that the prosecution's evidence was tenuous and that taken at its highest, was such that a jury properly directed could not convict on it. Reference was made to **Regina v Galbraith** [1981] 1 WLR 1039 ('**Galbraith**'), in support of that submission. It was submitted that the prosecution's evidence was insufficient to prove criminal negligence the test being "whether [the appellant] did all that a reasonable man would do to forestall this possibility".

[31] The appellant's conduct was said to be in stark comparison to that of the appellant in **Merrick Miller**, as the appellant in the instant case, took deliberate steps to secure the motor vehicle. Further, that the learned judge failed to consider the security arrangements of the car park which would have comforted the mind of the appellant in leaving his firearm in his motor vehicle. This included: the presence of security guards,

lighting in the car park, security cameras, the presence of other vehicles and the absence of any concerning individuals lurking in the car park, tinted windows, locked motor vehicle, proximity to the entrance of the supermarket and the appellant was only away from his motor vehicle for about 10 minutes. Reference was made to **Cheddi Creighton v R** [2014] JMCA Crim 54 ('**Cheddi Creighton**'), in which this court found that the trial judge erred in focussing solely on the absence of a safe and by not taking into account the entire circumstances.

[32] Alternatively, it was submitted that even if all the elements of negligence had been proved, the learned judge still had to consider whether the evidence presented by the prosecution was such, that a jury could properly convict on it. It was submitted that the evidence of the prosecution's witness was at best tenuous and unhelpful because:

i. Constable Watson supported the proposition that the appellant took all reasonable steps to secure the firearm. The appellant told the constable that he saw someone looking like a security guard for the premises. This evidence was not contradicted.

ii. Constable Harrison was unhelpful as apart from receiving the statement from Constable Watson and speaking with the appellant not much more was done. That witness did not visit the locus to examine the lighting, where the appellant had parked or to interview other individuals who may have been present at the time of the incident.

iii. Chevanese Burke's evidence was limited to confirming that the accused was permitted to carry a firearm.

iv. Deon Scarlett corroborated much of the evidence which the appellant recounted to Constable Watson. He noted that the appellant's motor vehicle had a dark tint, the vehicle was parked in close proximity to the entrance of the supermarket and lighting was present.

[33] In all the circumstances, it was submitted that the appellant's conduct was not indicative of negligence. There was no evidence of blatant omission or reckless behaviour on the part of the appellant.

Respondent's submissions

[34] Counsel for the respondent, Miss Jodi-Ann Edwards submitted that there was sufficient evidence before the learned judge to find that there was a prima facie case against the appellant and to reject the submission of no case to answer. She stated that in order for the submission to succeed, the evidence must be so weak that the accused ought not to be called upon to answer. Reference was made to **Galbraith**, which sets out the approach to be adopted by the court when considering such a submission.

[35] It was submitted that the issue before the learned judge was a question of fact. The prosecution's case therefore fell under limb 2 (b) of **Galbraith** which states that where the strength or weakness of the evidence is dependent on an assessment of a witness' reliability or matters which would be in the province of the jury, which could result in the accused being found guilty, the matter should be tried by the jury. As such, the ruling of the court that the decisions in **Merrick Miller** and **Cheddi Creighton** could be distinguished from the appellant's case on the basis that his situation turned on the assessment of security features of the car, lighting conditions, the presence and proximity of the security guards, the location of the motor vehicle in relation to the entrance to the supermarket and other factors, was correct.

Analysis

[36] Where a submission of no case to answer is made to a judge sitting alone who, is therefore, the arbiter of both the law and facts, the test as outlined by Lord Lane CJ, in **Galbraith** at page 1042, should be applied. Lord Lane CJ stated thus:

> "How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could

> not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred.
>
> There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

[37] The prescribed approach does not permit the trial judge to rush to judgment where the prosecution's case is alleged to be weak based on the credibility of its witnesses. In **Sadiki Heslop v R** [2021] JMCA Crim 48 at paras. [46] and [47], P Williams JA stated thus:

> "[46] ...Therefore, absent situations where there is no evidence to prove an essential element or elements of the offence charged, a submission of no case to answer should only be upheld, if a reasonable jury properly directed, or in a judge alone trial, a reasonable judge applying the appropriate legal principles, could not form a view of the evidence on which a conviction could properly be returned.
>
> [47] .... **Ellis (Taibo) v The Queen** is authority for the proposition that on a submission of no case to answer, the criterion to be applied by the trial judge is whether there is material on which a jury (in this case it would be the LTJ herself), could, without irrationality, be satisfied of guilt; if there is, the trial judge is required to allow the trial to proceed. That statement of principle is important; especially considering that the Board of the Judicial Committee of the Privy Council described the evidence against the appellant in that matter as 'thin, and perhaps very thin' and the prosecution's case as 'not only weak but confusing, and confusing in a way which tended to obscure its weakness'."

[38] In this matter, there was no dispute that the appellant was a licensed firearm holder. The issue of whether he was negligent when he left it in his car was one of fact and was dependent on the learned judge's assessment of the evidence. This was a matter for her jury mind. Mr Scarlett gave evidence that he heard "a banging like glass mash" and that when he went to investigate, he saw a gentleman come from between two cars. He stated that the area in which the appellant had parked his motor vehicle was "not bright enough" in that it was "[n]ot clear enough for [him] to observe properly". In addition, he stated that "things always do happen there..." and the car park was targeted every three to four months. The witness also stated that he was one of the two guards working that night and that it is an area accessible to persons going to the plaza. He was not discredited. The learned judge, in our view, had sufficient evidence to establish a prima facie case of negligence. The reliability of that evidence was a matter for her jury mind. The learned judge, was therefore, correct when she ruled that the appellant had a case to answer.

[39] There was no merit in this ground of appeal.

Ground two - The learned Parish Court Judge erred in law in convicting the appellant notwithstanding the fact that the appellant has taken all reasonably foreseeable steps to forestall the possibility of his firearm being stolen

Appellant's submissions

[40] Mr Bishop submitted that this ground of appeal raised two issues. Firstly, whether or not the learned judge erred in law in convicting the appellant, notwithstanding the fact that the appellant had taken all reasonable steps to forestall the possibility of his firearm being stolen. Secondly, whether or not the findings of the learned judge are supported by the facts presented at the trial.

[41] Counsel submitted that the learned judge in her determination of the matter conflated the issues of whether the appellant was negligent in the loss of the firearm and whether the motor vehicle was parked in a secure place in the circumstances. The learned judge he said, in her consideration of the issue of negligence, ought not to have focused

on whether the motor vehicle was in a secure place in the circumstances. It was submitted that these are two separate issues. Reference was made to **Yandell Campbell & Francis Thomas v R**, (unreported), Court of Appeal, Jamaica, Resident Magistrates Criminal Appeal No 24/2005, judgment delivered 20 December 2007, ('**Yandell Campbell**'), in which the court stated that the presumption of negligence was rebutted by the circumstances surrounding the escape of the prisoners.

[42] The ultimate focus on whether the firearm ought to have been left in the motor vehicle, he said, clouded the mind of the learned judge from looking at all the circumstances to determine whether the appellant was negligent. Counsel submitted that the same erroneous approach was adopted in **Cheddi Creighton**, in which the court at first instance focussed on the absence of a firearm safe at the premises to establish negligence. Mr Bishop argued that even if the motor vehicle was not secure, that was not sufficient to establish that the appellant was negligent. He submitted that the approach taken by the court in **Yandell Campbell** was correct. In that case, Smith JA in addressing the offence of negligently permitting the escape of a prisoner stated at page 22, that "...negligence is a fluid principle which has to be applied to the most diverse conditions".

[43] Mr Bishop submitted that there was sufficient evidence to satisfy the learned judge that the appellant took reasonable steps to prevent his firearm from being stolen. These were itemized as follows:

i. The appellant had visited the shopping centre on many previous occasions;

ii. The motor vehicle had reasonable security features being that it was equipped with a locking system and was heavily tinted;

iii. The car park was reasonably lit with lights from the building and lights from other vehicles in the car park;

iv. The motor vehicle was parked about 60 feet from the entrance of the supermarket and the appellant could see the cashiers from where he parked;

v. He observed security personnel close to where he parked;

vi. He checked twice to ensure that the car doors were locked before he proceeded to enter the supermarket;

vii. He had been a firearm holder for four years prior to the incident;

viii. The knapsack with the firearm was tucked in below the driver's seat to the back; and

ix. He only spent about seven minutes inside the supermarket;

[44] It was further submitted, that the learned judge erred in finding that the appellant's evidence that the motor vehicle was equipped with an alarm system which was engaged at the relevant time was a recent fabrication. Counsel did, however, acknowledge that it was open to her to make that finding. The learned judge should have considered the fact that the appellant did not delay in reporting the loss of his firearm and gave a statement to the police. He highlighted that the police did not investigate the matter as was done in **Cheddi Creighton**. Counsel submitted further, that the short time that the appellant spent in the supermarket was critical to the determination of the issue of negligence.

[45] Counsel submitted that the learned judge focused on whether the firearm should have been left in the motor vehicle rather than the test of negligence which required a comprehensive review of all things done by the appellant as well as what he was thinking.

[46] It was submitted further, that the following findings of fact made by the learned judge were not supported by the evidence:

a. The lighting was inadequate as the area was poorly lit;

b. The light was on the cantilever; and

c. The accused failed to exercise such care, skill and foresight as a reasonable man in this situation.

[47] Where the lighting is concerned, counsel submitted that the learned judge ignored her own finding that the shopping centre was busy with people and the car park had several motor vehicles and that their headlamps would have provided additional lighting. It was also submitted that the learned judge failed to consider that there was a "big light" that was not far away. He stated that based on the facts there was sufficient lighting. It was argued, that had the learned judge considered all the evidence pertaining to the light sources she may have arrived at a different conclusion.

[48] In addressing the definition of criminal negligence, counsel stated that the following definition was applicable: "Everyone is criminally negligent who in doing anything, or in omitting to do anything that is his duty to do, shows wanton or reckless regard for the lives or safety of other person". Counsel also referred to the following definition of negligence:

> "A person is negligent if he fails to comply with the standards of the reasonable man. Negligence is the omission to do something, which a reasonable man, guided upon those considerations which ordinarily regulate human affairs, would do, or doing something which a prudent and reasonable man would not do. It is acceptable that the test for breach of duty is objective in the sense that the individual character and mental and physical feature of the particular defendant are usually irrelevant".

[49] Reference was also made to Charlesworth & Percy on Negligence, 7th ed page 9 and **Riddell v Reid** [1943] AC 1 at 31.

[50] It was accepted that a licensed firearm holder has a duty to keep his firearm in a safe place and that duty carries heavy responsibilities (see **Merrick Miller**). Counsel submitted that notwithstanding the fact that the *actus reus* in this matter was proved, the *mens rea* was absent. The prosecution, he said, was required to prove that there was a failure on the part of the appellant to foresee the avoidable danger. That burden was not discharged by the prosecution. He made the point that in **Yandell Campbell**, the presumption was rebutted by evidence of poor lighting, shortage of staff and the fact that

there was one key that opened all cells. Reliance was also placed on **Roy Dillion v The Queen** Privy Council Appeal No.19 of 1981, delivered 25 January 1982. Counsel stated that the learned judge failed to consider the security arrangements at the car park, the fact that the motor vehicle was parked close to the entrance of the supermarket, the presence of security guards, the dark tint on the windows of the motor vehicle and the fact that it was securely locked.

Respondent's submissions

[51] Miss Edwards submitted that the learned judge gave herself full and accurate directions. She submitted further, that it was an issue of fact whether a reasonable man would have left his firearm in his motor vehicle in a busy public place and in the circumstances of this case. The test is an objective one. Negligence simpliciter was sufficient and there was no need to prove wilful negligence. Reference was made to the decision of the Court of Appeal of Trinidad and Tobago in **Hayden Toney v PC Joseph Corraspe** MAG APP No.68 of 2008 ('**Toney v Corraspe**'), in support of that submission. Counsel also relied on the definition of negligence as stated in Archbold: Criminal Pleading, Evidence and Practice, 2013. A licensed firearm holder, it was submitted, has a heavy responsibility and must ensure that his weapon is in a secure place, if not on his person (see **Merrick Miller** at para. [18]).

[52] Counsel submitted that **Yandell Campbell** could be distinguished as the offence of negligently permitting the escape of a prisoner was different from the negligent loss of a firearm. It was also submitted that the length of time that the firearm was left in the vehicle was irrelevant as the fact that its loss occurred within a relatively short period of time points to the risk of leaving it in the motor vehicle (see **Toney v Corraspe** at para 49). Counsel argued that although it was not stated by the learned judge, the realities of the situation would inform the circumstances surrounding the loss of the firearm. The factors that she considered were stated in her reasons and went beyond the issue of whether the motor vehicle was a safe place to leave the firearm. The circumstances in **Cheddi Creighton** could be distinguished from those in the instant case and **Merrick**

Miller, as the firearm in the former case was left at home that was secured and not in a public place.

[53] It was submitted that the learned judge applied the objective test and assessed the circumstances under which the appellant left the firearm in the motor vehicle. Having done so, she was correct in finding that the motor vehicle was not a secure place to store his firearm, for the following reasons:

i. The motor vehicle did not have an engaged alarm system;

ii. The knapsack with the firearm was placed on the floor behind the driver's seat;

iii. Poor lighting;

iv. The security post was some distance from the parking area;

v. The security guard could not properly see the area where the motor vehicle was parked;

vi. The shopping centre was busy and there were several motor vehicles in the car park; and

vii. The accused failed to exercise reasonable care in the circumstances.

[54] It was submitted that the test was one of reasonableness. The learned judge's approach was correct as she considered the entire circumstances instead of focusing on the steps taken by the appellant and what was in his mind at the time when he left the firearm in the motor vehicle. The latter approach would have been contrary to the objective test. A reasonable man aware of the Jamaican realities, especially in Montego Bay, would not have considered it safe to leave his firearm in his motor vehicle for any amount of time. These are circumstances attractive to thieves and curious individuals.

Appellant's response

[55] Mr Bishop submitted that **Toney v Corraspe** could be distinguished as the wording of the Trinidad and Tobago legislation was different and not specific to negligence on the part of the firearm holder. The length of time that the firearm was left in the vehicle was also much longer than in the instant case. He also argued that the presence of the security guard was important and ought to have been considered by the learned judge.

Analysis

[56] The ingredients of the offence of negligent loss of a firearm are set out in section 41A of the Firearms Act, which states:

> "41A. Any person who, being the holder of any licence, certificate or permit in respect of a firearm or being lawfully in possession of a firearm by virtue of subsection (2) of section 20, loses such firearm through negligence on his part shall be guilty of an offence and on summary conviction thereof before a Resident Magistrate, shall be liable to a fine not exceeding one hundred thousand dollars or to imprisonment with or without hard labour for a term not exceeding twelve months."

[57] In order to establish liability for this offence, it must be proved that: (i) the appellant was in lawful possession of a firearm and (ii) he lost the firearm through negligence. In this matter, there is no dispute that the appellant was a licensed firearm holder and that the firearm had been lawfully in his possession.

[58] In order to determine whether the firearm was lost as a result of the appellant's negligence, an objective test is to be applied. It is one of reasonableness. Negligence has been understood to be "the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do" (see **Blyth v The Company of Proprietors of the Birmingham Waterworks** (1856) 11 Exch 781 at page 784). Further, the degree of negligence required to be proved, is

negligence simpliciter (see **Toney v Corraspe**).

[59] The owner of a firearm undoubtedly has a serious responsibility to ensure the safekeeping of his firearm. The scope of that responsibility was explained by this court in **Merrick Miller**. In that case, Panton P stated at para. [18]:

> "[18] The right granted to the appellant to hold a firearm user's licence is one that carries with it heavy responsibilities. **The holder of such a licence must ensure at all times that the firearm is in a secure place, if not on his person. A firearm ought not to be left in a manner that will attract thieves and murderers, or even merely curious persons**. When the holder of a firearm user's licence is going to engage in the activity of picking plums, or anything else that does not allow for the firearm to be under his personal watch, it should be in a secure place where neither evil nor idle hands will have access to it." (emphasis supplied)

[60] In **Merrick Miller**, the appellant had been convicted for the offence of losing a firearm through negligence. The circumstances surrounding the loss were that the appellant, who was with his daughter, stopped by the side of the road, which was in the public thoroughfare, to pick plums. He left his firearm in a pouch in his motor vehicle and placed the pouch on the floor. He was uncertain as to whether he had secured his motor vehicle. Upon his journey home he realized that the pouch and the contents were missing. The learned judge, as recounted by the appellate court at para. [5], found that the appellant "failed to exercise such care skill and foresight as a reasonable man in his situation would exercise and that it is an objective test". She also found that a reasonable man would foresee that failure to safely secure his firearm would lead to its loss. The appellate court found that when a firearm is not on the person of the holder, the holder of the firearm must store it in a secure place where "neither evil nor idle hands will have access to it" (see para. [18]). The appellant was found to have been negligent in his conduct as he had not done so.

[61] In **Cheddi Creighton**, it was pointed out that the entire circumstances need to be considered. In that case, the appellant was convicted and sentenced for loss of a

firearm through negligence. The appellant, on the day in question, left his firearm in a laptop bag in his apartment. The apartment was located in a gated community which was secured by a wall and a code was needed to enter the property. There was also a pedestrian gate beside the main entrance. There was a guard house on the premises, however the security guard was only on duty at night. There was no safe in the apartment for the storage of the firearm. In its assessment of whether the learned magistrate erred in law by predicating his finding of guilt on the absence of a safe, the court at para. [16] stated:

> "[16] It is quite obvious that the learned Resident Magistrate gave attention only to the fact that the firearm had not been left in a safe. **In so doing, he gave no thought to the security arrangements at the premises which ought to have guided his consideration of whether there was negligence on the part of the appellant**." (emphasis supplied)

[62] The court distinguished the case of **Merrick Miller** which it found to be unhelpful. Panton P stated at para. [18]:

> "[18] ...The circumstances in Miller were very different from those in the instant case. **In Miller, the appellant had left his car unsecured with his firearm therein, in the vicinity of a playfield with many persons around, and had gone off to pick plums. That may be likened to an opportunity to treat. In the instant case, the appellant left his firearm in his house, a place described by Sir Edward Coke as a man's castle**. Indeed, the instant apartment even seems to have been fortified like a castle. **'The breach of the fortification was clearly not due to any negligence on the part of the appellant**. There is, in addition, no evidence of anyone else occupying the apartment with him, who could have interfered with the weapon." (Emphasis supplied)

The appeal against conviction was allowed.

[63] In **Toney and Corraspe**, the appellant was charged and convicted for negligent loss of a firearm under a provision similar to that of our section 41A. On the day in question, the appellant left his pistol and ammunition, together with $6,000.00 and some documents in a pouch under the front seat of his motor vehicle that was parked a few yards away from his office. He returned about four hours later, opened the vehicle with the alarm control and drove away. After driving for about 300 yards, he checked the pouch and discovered that the firearm was missing.

[64] The circumstances surrounding the storage of the firearm were as follows:

i. the car was fitted with an alarm and automatic locking system;

ii. the appellant heard the car lock when he walked away;

iii. the appellant's office was located in a private driveway;

iv. the compound was enclosed by a concrete fence;

v. there was a guard booth and the guard would normally open and close the gate. There was however no evidence that a guard was present when the firearm would have been stolen;

vi. the appellant's office was on the first floor of the building;

vii. the vehicle was parked about three feet from the entrance of the office;

viii. the appellant was at his office from 2:30 pm to 6:30 pm;

ix. the vehicle was just beneath his office window and he could see the top of the vehicle and the entire left side of the vehicle if he looked outside; and

x. the appellant never had any issue with theft at his office.

[65] On appeal, the court noted that the magistrate had not set out the factors which she considered in arriving at her decision. As such, it conducted its own review of the evidence. At para. [48] Bereaux JA, who delivered the judgment of the court, stated:

> "...we can find no fault with the decision of the magistrate for the following reasons (some of which she did herself consider).
>
> (a) While it is correct that the appellant's office is located in a private driveway, there were other residents living on the compound with access to it. Moreover, there was no evidence that a guard was actually on duty during the incident. We find the lack of such evidence critical to the issue since the presence of a guard would not only have been a deterrent to potential intruders but would also have added to the comfort level of the appellant. A fortiori the absence of a guard should have put the appellant on notice to be more vigilant with the pistol and ammunition.
>
> (b) A locked vehicle which is fitted with an alarm is no great obstacle or deterrent to those wishing to enter the vehicle unlawfully. That too was a consideration for the appellant.
>
> (c) The appellant did not have a sight of the entire vehicle while in his office. When he did look out the window he could see only the top and side of the vehicle.
>
> (d) The appellant conceded that when he left the items under the front seat he was well aware of the conditions of the licence and knew what he was doing.
>
> (e) The marked increase in recent times in the theft of guns from persons authorised to own and carry them requires that such licenced firearm holders be vigilant in their care and control of those firearms and that they be held accountable for lapses in that standard of care."

[66] Bereaux JA, further stated at paras. [49] and [50]:

> "[49] ...We cannot ignore what have become the realities of life in our country, particularly in Port of Spain. Motor vehicles are never places in which to leave valuable items, far more

so, a dangerous weapon...

> [50] The law recognises varying degrees of negligence...in this case, given that it is a summary offence and the penalty moderate, **all that is required is proof of negligence simpliciter, akin to that of careless driving as opposed to wilful negligence. The test is still one of reasonableness. Given the realities of life in Port of Spain, we do not believe that a reasonable man, knowing those realities, would have left his firearm in his vehicle in the circumstances which existed in this case**." (Emphasis supplied)

[67] The court found that the magistrate was correct to have convicted the appellant and there was ample evidence on which she could have done so.

[68] Mr Bishop has sought to distinguish **Toney and Corraspe** from the instant case. Section 28(1A) of the Firearms Act of Trinidad and Tobago states:

> "1A) The holder of a licence, certificate or permit in respect of any firearm or ammunition and any other person lawfully in possession of any firearm or ammunition by virtue of section 7(2) who loses such firearm or ammunition through negligence on his part commits an offence and is liable, on summary conviction, to a fine of five thousand dollars."

This section is essentially the same as the Jamaican Act and as such, we are of the view that the reasoning of the court of appeal in **Toney and Corraspe**, is quite persuasive.

[69] A firearm holder in keeping with his duty must secure his firearm in a safe place. The learned judge was therefore, correct when she posed the question, "...was [the appellant's] motor car a secure place in the circumstances?".

[70] In dealing with this issue, the question to be asked is whether a reasonable man apprised of all the circumstances would have left his firearm in the vehicle? This was the position adopted by the court in **Merrick Miller**, **Cheddi Creighton** and **Toney and**

Corraspe. We disagree with the appellant's submission that the question should have been limited to whether the appellant believed that he was taking reasonable steps to secure his firearm. That would be a subjective test and contrary to the authorities which have all indicated that the determination of the issue of negligence should be based on an objective assessment of the evidence.

[71] The learned judge in the instant case made the following findings of fact:

i. The appellant is a licensed firearm holder;

ii. The motor vehicle did not have an engaged alarm system; and

iii. The appellant placed the knapsack which contained the firearm behind the driver's seat on the floor.

She accepted Mr Scarlett as a witness of truth and found that:

i. The light was on the cantilever;

ii. The lighting was inadequate as the area was poorly lit;

iii. The security post was at a distance from the area;

iv. The guard was not in a position to properly see the area where the motor vehicle was parked; and

v. The plaza was busy with people and many cars were parked in the car park.

[72] She noted that the appellant took the firearm with him to his meeting but not inside of the supermarket and had provided no reason for not having done so.

[73] The learned judge rejected the evidence of the appellant that he had placed the knapsack under the driver's seat. She also found that he had adjusted his time in the supermarket from 10 minutes to seven minutes. That adjustment, she stated was of no assistance because " all it shows is that it did not take long for the car to be broken into and the firearm stolen".

[74] She then proceeded to consider whether the evidence presented by the prosecution was sufficient to make her feel sure that the appellant was guilty of the offence charged. Having reviewed the circumstances, the learned judge found that the appellant had "...failed to exercise such care, skill and foresight as a reasonable man in this situation".

[75] The findings of the learned judge were based on her assessment of the credibility of the witnesses and the evidence as a whole. The role of this court when reviewing the decision of a trial judge based on his findings of fact is well settled. In **R v Crawford** [2015] UKPC 44, the principle was stated in the following terms:

> "*THE ROLE OF AN APPEAL COURT*
>
> [9] There has been no dispute before the Board as to the proper role of an appellate court when reviewing a decision of a trial judge which amounts to a finding of primary fact based upon his assessment of the credibility and reliability of witnesses whom he has seen and heard. It is well established that an appellate court should recognise the very real disadvantage under which it necessarily operates when considering such a finding only on paper. There are many statements of this principle. It is enough to set out the formulation of it by Lord Sumner in ***The Hontestroom*** [1927] AC 37 at 47-48:
>
> > 'What then is the real effect on the hearing in a Court of Appeal of the fact that the trial judge saw and heard the witnesses? I think it has been somewhat lost sight of. Of course, there is jurisdiction to retry the case on the shorthand note, including in such retrial the appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of statute. ... It is not, however, a mere matter of discretion to remember and take account of this fact; it is a matter of justice and of judicial obligation. None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the

> responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be let alone. In ***The Julia*** (1860) 14 Moo PC 210, 235 Lord Kingsdown says: 'They, who require this Board, under such circumstances to reverse a decision of the court below upon a point of this description undertake a task of great and almost insuperable difficulty. ... We must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong.'

This passage has often been approved at the highest level since; see for example Lord Wright in ***Powell v Streatham Manor Nursing Home*** [1935] AC 243, 265 and Lord Edmund-Davies in ***Whitehouse v Jordan*** [1981] 1 WLR 246, 257. In ***Benmax v Austin Motor Co Ltd*** [1955] AC 370 at 375 Lord Reid added the following:

> '... it is only in rare cases that an appeal court could be satisfied that the trial judge has reached a wrong decision about the credibility of a witness. But the advantage of seeing and hearing a witness goes beyond that: the trial judge may be led to a conclusion about the reliability of a witness's memory or his powers of observation by material not available to an appeal court. Evidence may read well in print but may be rightly discounted by the trial judge or, on the other hand, he may rightly attach importance to evidence which reads badly in print. Of course, the weight of the other evidence may be such as to show that the judge must have formed a wrong impression, but an appeal court is and should be slow to reverse any finding which appears to be based on any such considerations.'

The advantage enjoyed by the trial judge applies equally to those comparatively rare criminal cases tried by judge alone,

> with, of course, appropriate consideration being given to the different standard of proof."

[76] In this matter, the evidence pertaining to the lighting in the car park and its general conditions was given by a security guard, Mr Scarlett. He spoke to the location of the lights on the cantilever and stated that they were not working properly. He also stated that they did not provide sufficient illumination for him to observe the area clearly.

[77] Apart from Mr Scarlett and the appellant, there was no other witness who spoke to the lighting in the car park. The learned judge had the discretion to accept or reject the evidence given by the witnesses. She rejected the appellant's evidence and accepted that given on behalf of the prosecution. She found that the lighting was poor. Her findings were supported by the evidence.

[78] The learned judge also found that the appellant left his firearm in the knapsack on the floor behind the driver's seat (as stated by the appellant in his statement to the police) and not under the seat as stated in evidence. This was in a busy car park that was accessible to anyone. The location of the vehicle in an area that could be seen from the supermarket did not in our view, assist in those circumstances, as there was no evidence that anyone was watching the vehicle from inside the supermarket or the extent of the visibility of the area from inside the supermarket. Whilst there were security guards in the car park, Mr Scarlett stated that the lighting in the area where the appellant's motor vehicle was parked was "not clear enough for [him] to see". He also gave evidence that he pays attention when on duty at that time of the day as the car park is targeted every three to four months. That evidence was not challenged.

[79] The circumstances in the instant case were clearly distinguishable from those in **Cheddi Creighton**. In that case, the firearm was inside a bag which was stored in the appellant's home that was secured. The court in that case distinguished the circumstances from those in **Merrick Miller**, where the appellant's vehicle was left unsecured in the vicinity of a playing field with many persons around. At para. [18] Panton P stated that the "appellant left his firearm in his house, a place described by Sir Edward Coke as a

man's castle" and commented further, that the appellant's apartment was "fortified like a castle".

[80] The failure of the learned judge to mention that security guards were present at the location did not impugn her decision, as the totality of the evidence was sufficient to support her decision. The actions of the appellant were, as stated in **Cheddi Creighton** at para. [18], "...an opportunity to treat".

[81] The circumstances in the instant case were in our view, similar to those in **Tony and Corraspe**. We found that there was sufficient evidence for the learned judge to have concluded in the circumstances, that it was not reasonable for the appellant to have left his firearm in his motor vehicle especially given the prevalence of crime in Jamaica, including motor vehicle break-ins. There was, therefore, no basis on which to interfere with her decision. In the circumstances, this ground also failed.

Conclusion

[82] It for the reasons stated above that the court made the orders set out in para. [3] above.