JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 17/05

BEFORE: THE HON. MR. JUSTICE HARRISON, P.
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A. (Ag.)

DAIN FINDLATER
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Ms. Velma Hylton Q.C. for the applicant
Mrs. S. Jackson- Haisley, Assistant Director of Public Prosecutions (Ag) and
Ms. Natalie Brooks, Assistant Crown Counsel for the Crown

6 and 8 February, 2006

ORAL JUDGMENT

SMITH, J.A.:

On the 14thJanuary 2005, the applicant was convicted of the offences of illegal possession of firearm and wounding with intent in the High Court Division of the Gun Court held in the parish of St. Elizabeth. He was sentenced to 6 and 8 years respectively. His application for leave to appeal was refused by the single judge. He has now renewed his application before this court. Before us, learned Queen's Counsel, Miss Velma Hylton argued the two original grounds which were set out in the Criminal Form B1page 2. These are:

(1) that the learned trial judge misdirected, himself in relation to the doctor's evidence; and

(2) that the defence was not adequately considered by the learned trial judge.

So then, identification was not in issue. The main issue was credibility and how the learned judge approached that issue.

At page 140 of the transcript the learned trial judge summarized the evidence of the virtual complainant and the statement of the applicant. I will now refer to that. The prosecution's case was that the accused armed himself with a firearm, approached the complainant, and fired a shot at him which caught him in his right upper arm. There was a struggle and during this struggle, the complainant received other injuries. The defence was that complainant who in fact attacked the applicant with a firearm, fired a shot at him and during the struggle "the gun jus go off." According to the applicant that is how the complainant got his injuries. Those are the two divergent versions.

Now when one looks at the two cases, the real issue is who was the aggressor, who was acting offensively and who was acting defensively. The complainant gave evidence on his own behalf; no other witness as to fact was called on behalf of the complainant. The applicant made an unsworn statement and he called two witnesses, one Wosley Findlater and the other Laurington Williams. I must refer to the judge's summing up

which again concisely sets out the evidence of these two witnesses. At page 146 the judge said:

> "The defence called two witnesses Mr. Wosley Findlater and Mr. Laurington Williams. Neither of these two gentlemen were witnesses to this incident. The witness Wolsey Findlater says that he went to the work site and there was one Laurington Williams and he said the complainant came along discussed work and there was some problem about the work.
>
> He said the complainant starts (sic) get ignorant and he said he took up his bicycle and rode up the road about ten, twelve chains away and then heard explosions, about five explosions from where he was."

The other witness' evidence which was summarised by the learned judge at page 147 as follows:

> "...the complainant came there, started to curse bad words... He packed up his tools and went away. He said he saw the complainant. He said he was sitting on the verandah when he saw the complainant with something in his hand as he jumped over the gully...
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> He said he heard three explosions, about two minutes later he heard two more coming from over the gully. He went across the road, looked in the gully, saw both accused and complainant. Then he saw them shuffling, to use his words."

Now, the learned judge at the end of his summary of the evidence said that these two witnesses did not see how the men were injured.

> "They can't say how these men...got their injuries. So therefore it is left for the court to

> determine now, whether or not he believes Mr. Rulen Smith. So even if I have some doubt about Mr. Findlater's statement, even if I have some doubt about what he said, I have to give him the benefit of the doubt."

But I must say I reject his statement at page 148. I must confess I am not too sure what the learned judge was saying because if he had doubts as to what the applicant said as to how it happened, he should have resolved that doubt in favour of the applicant and the applicant should have been acquitted. However, the judge went on to say he rejected the defence. Learned Queen's Counsel did not complain about this aspect of the judge's summation. She did not desire to embark on such a course. The complaint was that the judge failed to adequately consider the evidence of the defence.

Now it would seem to us that when one carefully analyses the two stories which I have described, the critical issue is really who fired the first shot. The applicant is saying the complainant fired the first shot, then there was a struggle, and then other injures were sustained. The complainant swore that it was the applicant who first fired shots then the struggle and the injuries. So both complainant and applicant are at one that there was a struggle and during this struggle the complainant got the four injuries, but as to who fired the first one that is where the issue is. It would seem to us that the judge was really dismissive of the two witnesses called by the applicant in that the judge came to the conclusion that

since they did not see how the incident started their evidence could not assist him. He decided to go with the complainant's evidence alone.

We are of the view that the judge erred in that the evidence of these two witnesses might have assisted the judge in determining the critical factor as to who was the aggressor. One of the witnesses said the complainant was "ignorant" and he had to leave. The other said the complainant was "cursing" and he rode off too.

It would seem to us that the learned judge did not adequately consider the evidence of these two witnesses. As learned Crown Counsel ably argued, when one looks at the complainant's evidence, he was cursing and he was angry, but there are critical differences between that statement and the evidence of the applicant's witnesses in that, although the complainant admitted having the hammer in his hand at one stage, he did not say that he jumped over the gully and went towards the applicant. The evidence is that the applicant went over the gully; the evidence of Williams is that the complainant had something in his hand (he could not say what it was) and he (Williams) saw him jump over the gully. It would seem to me that this is something in respect of which the learned judge should make a finding of fact. The witnesses' evidence would have to be carefully analysed along with the evidence of the complainant, in the context of the burden and standard of proof. This was not done. Although this Court is reluctant to interfere with the judge's

findings of fact, if however, the judge omits to take into consideration relevant facts, this Court will no doubt interfere. Where the necessary factual findings have not been made below and such findings depend on the credibility of the witness, an Appellate Court ought not, itself to embark on a fact finding exercise. It should remit the case for re-hearing below if the interests of justice so require.

The **locus classicus** on the re-hearing or re-trial issue is ***Reid v The Queen*** 27 WIR 254 and this is a Privy Council decision. I will give one or two aspects dealing with the interests of justice as stated by Lord Diplock at page 257 of the judgment:

> "This interest of justice that is served by the power to order a new trial is the interest of the public that those persons who are guilty of serious crimes should be brought to justice and should not escape it merely because of some technical blunder by the judge in the conduct of the trial or his summing up to the jury ."

After elaborating on the interests of justice Lord Diplock went on to say at page 258:

> "It is not in the interests of justice,...that the prosecution should be given another chance to cure any evidential deficiencies."

This case is clearly not such a case where a retrial would allow the Crown to cure any evidential deficiencies. Among the factors to be considered in determining whether or not to order a new trial are:

(1) the seriousness and prevalence of the offence;

(2) the extent and length of time involved in a fresh hearing;

(3) the ordeal suffered by an accused person on trial ; and

(4) the length of time that will have elapsed between the offence and the new trial.

We have carefully considered the circumstances of this particular case and we have concluded that it is in the interests of justice that a new trial be ordered.

We treat the hearing of the application for leave as the hearing of the appeal. The appeal is allowed and the conviction quashed. The sentence is set aside and a new trial is ordered to take place as soon as possible.