NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No: 85 OF 1999

BEFORE: **THE HON MR JUSTICE FORTE, P.**
THE HON MR JUSTICE HARRISON, J.A.
THE HON MR JUSTICE SMITH, J.A.

BETWEEN: **ERROL HARDY** **PLAINTIFF/APPELLANT**

AND **THE ATTORNEY GENERAL FOR JAMAICA** **DEFENDANT/RESPONDENT**

Mr Rudolph Smellie for the appellant instructed by Daly Thwaites & Co.

Mr Curtis Cochrane for respondent instructed by the Director of State Proceedings

November 27, 28, 2002 and December 20, 2004

FORTE, P

Having read in draft the judgment of Harrison, J.A., I entirely agree and there is nothing I could usefully add.

SMITH, J.A.:

I agree.

HARRISON, J.:

This is an appeal from the judgment of Hibbert, J. delivered on June 18, 1999, in which he gave judgment for the respondent in an action by the appellant for assault.

The appellant's evidence before the learned trial judge was that on June 28 1990, at about 11:00 to 11:30 p.m. he was standing with his brother and a friend at his gate along Oakland Road in the parish of St Andrew. The appellant was reading by means of the street light. A voice said "light, light". He looked up and saw a light about ten chains away and resumed his reading. He again looked and saw a jeep stop beside him. He did not then see his brother and friend. Voices inside the jeep said "Don't move". The front door was opened and someone pointed a long gun at him. A policeman called "Bobby" or "Speckle Face" later identified by the appellant as District Constable Selford Williams, who was seated in the back of the jeep pointed a gun through the window at the appellant who turned away. Two shots were fired. The appellant was shot in the abdomen and back. He was taken to the hospital where he was admitted and treated for one month and a further two weeks.

In the hospital, the appellant said District Constable Williams asked him who shot him but he did not answer. He thereafter went to the Hunts Bay Police Station and made a report.

In cross-examination, the appellant denied that he gave a statement to the police at the hospital. He also denied that he told District Constable Williams that some boys shot him and that he did not know who they were.

The appellant was then shown a statement, exhibit 2, on which he identified his signature. However, he said:

> "... I signed a blank sheet of paper at the station. I signed first then gave my report and police wrote on some sheets of paper. Did not read what was written on paper. No one read it to me."

The appellant further denied telling the police what was contained in the said statement, exhibit 2. He said, at page 16 of the record:

> "Did not tell police one of men pulled gun from his waist and I spin around to run. Did not tell police I heard an explosion and felt pain and numbness to back. Did not tell police I glanced around and saw men running up lane. Did not tell police I made an alarm". (Emphasis added)

On behalf of the respondent, in contrast, Detective Corporal Alvan Fearon said that he was at the Hunts Bay Police Station at about 11: 00 p.m. when he got a report and went to the Kingston Public Hospital. There in the Casualty Department he saw the appellant lying on a bed with "gunshot wounds to his back" and asked him his name and what happened. The appellant told him that his name was Errol Hardy and that he was standing at 49 Oakland Road when he saw a group of men approach him. One of them asked him who he was and where he was from. He then heard explosions and ran off and felt pain and numbness to his back. This witness said that the appellant then dictated a statement to him which he recorded in the appellant's "own words". He read the statement to the appellant who said it was "O.K." The appellant signed his

name and dated it and he the witness certified it, signed his name and dated it. In cross-examination the witness denied that the statement was a concoction, denied that he got the appellant to sign a blank sheet of paper and said that the appellant did not tell him that "Bobby Williams" shot him. Detective Fearon went to Oakland Road and conducted further enquiries.

Detective Sergeant Leslie Ashman said, in evidence, that on September 26, 1990 at about 11:45 p.m. he was the driver of a land rover marked "Police" on mobile patrol along Oakland Road. In the vehicle were Detective Corporal Gunter, Constables Robinson and Reid and District Constables Brown and Williams, the latter called "Bobby or Speckle Face". He saw men move quickly across Oakland Road and he alerted the others and drove towards the men. Reaching the vicinity of "No. 49" he saw three men standing under a light at a light pole. He then heard three explosions. Det Cpl. Gunter was shot and bleeding from the region of his face. He drove to the Kingston Public Hospital and Det. Cpl. Gunter was admitted. He received information and went to the Casualty Department where he saw the appellant with gunshot wounds. When asked, the appellant told this witness that he did not know who had shot him. This witness stated that he did not see the appellant at Oakland Road. Det. Cpl. Gunter did not open the door of the jeep, nor did he see Dist. Con. Williams fire any shots.

Detective Corporal Gunter also gave evidence that he was on that occasion sitting on the left front seat of the said jeep, saw men going across Oakland Road, saw the three men standing together at the entrance to No. 49, when Det. Sgt. Ashman drove up to them and slowed the jeep. He heard gunshots and saw the three men run into the lane. He realized he was shot and bleeding from a wound to his left jaw. He was driven by Det Sgt. Ashman to the Kingston Public Hospital. He denied opening the door of the jeep and said no one fired any shots from the jeep.

District Constable Selford Williams also told the learned trial judge that he also was in the said jeep sitting at the back on the left side and he was armed with an M-16 rifle and a 38 revolver. He saw the men cross the road, saw the three men standing at 49 Oakland Road, heard about three gunshots. Det. Cpl. Gunter was shot and taken to the Kingston Public Hospital. He saw the appellant at the hospital "lying on a stretcher". Asked if he knew who shot him, the appellant said, "No is some boys shot him". The witness denied that he fired and shot the appellant. The learned trial judge thereafter entered judgment for the respondent with costs.

Before this Court, counsel for the appellant argued:

> "(1) That the learned trial judge erred in law in finding that the written statement tendered into evidence as having been given by the plaintiff to the police was on a balance of probabilities

> given on the night of the incident, and was a true and authentic statement of what the plaintiff told the police as to how he had been shot and injured.
>
> (2) That the decision of the learned trial judge was unreasonable having regard to the evidence."

Mr Smellie for the appellant argued that the learned trial judge should not have admitted the statement exhibit 2, because it was not admissible as a previous inconsistent statement, the appellant having denied giving the statement to the police at the hospital or at all. The contradictory elements could not therefore have been put to the appellant. Further, the omission from the statement, exhibit 2, of matters related by the police such as the men crossing the road, the appellant's brother and friend being present and the police being shot at, throws a doubt on the respondent's witness's account of the incident and should have led the learned trial judge to doubt the authenticity of exhibit 2. The relevance and fluency of the nature of the statement by the appellant who could hardly read and write and who was probably not then lucid should have led the learned trial judge to doubt the authenticity of exhibit 2. The learned trial judge neglected to examine the evidence properly and so failed to come to the unmistakable facts in the plaintiff's favour. Accordingly, the learned trial judge's reasons for his findings were not cogent and entitles this court to intervene.

Where a trial judge sitting without a jury, having seen and heard the witnesses, has examined their demeanour, and who has not misdirected himself and arrives at a finding of fact, an appellate court will not interfere unless it is satisfied that that advantage enjoyed by the learned trial judge cannot explain or justify his conclusion. If the reasons given by the learned trial judge are not satisfactory or because "... it unmistakably so appears from the evidence...", the appellate court may be satisfied that "... he has not taken proper advantage of his having seen and heard the witnesses ...", and may itself make the findings it deems reasonable (***Watt (or Thomas) v Thomas*** [194] 1 All ER 582).

In the instant case the learned trial judge heard the witnesses, examined their demeanour and accepted the evidence of witnesses for the defence, in preference to that of the appellant. The learned trial judge on page 24 of the Record (the Notes of Evidence) said that he was:

> "... Impressed with demeanour of witnesses for defence."

There was ample opportunity available to the learned trial judge from which he could justifiably make that finding of fact.

Consistent with this finding is the further material finding of the learned trial judge that, the statement exhibit 2, was made by the appellant, and was admissible.

A previous inconsistent statement of a witness may be put to the witness, in cross-examination, in order to test that witness' credit-worthiness. Sections 16 and 17 of the Evidence Act, read:

> "16 If a witness, upon cross-examination as to a former statement made by him relative to the subject matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement
>
> 17. A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the cause, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him ...". (Emphasis added)

A written statement, exhibit 2, was tendered in evidence by the respondent as the statement and admitted as the statement of the appellant given to the police, at the hospital on June 29, 1990 written by Det. Cpl. Fearon, and signed by the appellant. The appellant admitted that the signature "Errol Hardy" on the statement was his, but contended that he had signed a blank sheet of paper given to him by the police, and what is contained in the statement was not told by him to the police.

The learned trial judge on the evidence found as a fact that the appellant gave the statement to the police, and ruled it admissible, as exhibit 2.

The appellant, in examination in chief at page 15, said:

> "In hospital Bobby asked me about the incident. He asked me who shot me. I did not answer as I was afraid. I know who shot me." (Emphasis added)

However, in cross-examination, he said:

> "(I) saw Bobby at hospital that night. He did not speak to me." (Emphasis added)

Further in cross-examination, on being shown the statement, exhibit 2, at page 16 he said:

> "Signature on document is mine. I signed blank sheet of paper at station. I signed first then gave my report and police wrote on same sheet of paper. Did not read what was written on paper. No one read it to me – exhibit 2."

The appellant did not explain why he agreed to sign his name on a blank sheet of paper.

The learned trial judge, in respect of the appellant, on page 24 said:

> "Demeanour of plaintiff changed when confronted with statement. He did not impress. I find that he did make the statement – Exhibit 2 on the night he was shot."

The finding of the learned trial judge was one which he could properly make, bearing in mind the nature of the evidence and his own assessment of the demeanour of the appellant and the witnesses for the

The above was evidence, however, available to the learned trial judge, of previous inconsistent statements of the appellant, justifying the finding of the said judge that the appellant's version of the said events was unreliable.

The learned trial judge, accordingly, correctly found on a balance of probability, that the written statement exhibit 2, was given by the appellant to the police on the night of the incident as his account then of the circumstances in which his injuries were inflicted. There was no basis for intervention of an appellate court. For the above reasons ground 1 fails.

Counsel for the appellant advanced as ground 2 that "the decision of the learned trial judge was unreasonable having regard to the evidence." It is sufficient to state that, for the reasons stated previously, there was more than ample evidence available to the learned trial judge to enable him to arrive at his decision. There is no merit in this ground.

In the circumstances, this appeal ought to be dismissed with costs to the respondent to be agreed or taxed.

respondent. The learned trial judge cannot be faulted in that regard, when he found that the statement of the appellant, exhibit 2, was a statement previously made by him and inconsistent with his then testimony. Consequently, he found his testimony not worthy of belief.

Besides the written statement, exhibit 2, there was also the testimony of the respondent's witnesses, of oral statements made by the appellant, inconsistent with his evidence-in-chief. Det. Fearon said that at the Kingston Public Hospital he asked the appellant what happened to him. Det. Fearon at page 17 said:

> "He told me that he was standing at 49 Oakland Road, when he saw a group of men approached (sic) him. He said one asked him who he was and where he was from. He said he heard explosions and ran off and felt pain and numbness to back and stomach."

Detective Sergeant Ashman, at page 19, said:

> "While at K.P.H. I received information. Went back to Casualty Department and saw plaintiff with what appeared to be gunshot wounds. I asked him who shot him and he said he did not know."

District Constable Selford Williams, at page 22 said:

> "At hospital someone told me Errol got shot at Oakland Road. It was Errol's sister. Errol is plaintiff. He was lying on a stretcher. I asked Errol if he know who shot him and he said "no" is some boys shot him."

The appellant denied in cross-examination, that he made the said oral statements while he was in the hospital or at all.