[2010] JMCA Crim 6

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 62/2004

BEFORE: THE HON. MR JUSTICE PANTON, P.
THE HON. MRS JUSTICE HARRIS, J.A.
THE HON. MR JUSTICE MORRISON, J.A.

STEVE HUNTER v R

L. Jack Hines for the applicant

Mrs Ann-Marie Feurtado-Richards and Miss Michelle Salmon for the Crown

February 22 and 23, 2010

ORAL JUDGMENT

PANTON, P.

[1] The applicant in this matter was convicted and sentenced in the High Court Division of the Gun Court on 30 January 2004 of the offences of illegal possession of firearm and robbery with aggravation. The trial was presided over by Mrs. Justice Norma McIntosh. The applicant was charged with two other persons, Dean Phipps and Derron Hewitt. The offences are alleged to have occurred on 5 September 2003. The count for illegal possession of firearm charged that they Steve Hunter, Dean Phipps and Derron Hewitt on 5 September 2003 in the parish of Clarendon unlawfully had in their possession a firearm not under and in accordance with the terms and conditions of a Firearm User's Licence. Counts two and three charged them with robbery with aggravation. The

particulars of count two being that they being together and being armed with a firearm robbed Mr Kevin Josephs of two cellular phones valued at $8,500.00 and one silver chain. The third count charged them with being together and being armed with a firearm they robbed Evadney Ferril of cash in the sum of $12,000.00, one gold chain and gold earrings valued at $11,000.00 and one Nokia cellular phone valued at $4,500.00.

[2] Mr Hewitt was discharged at the end of the prosecution's case and the other two being the applicant Mr Hunter and Mr Phipps were found guilty and sentenced. In the case of Mr Phipps, he was sentenced to 10 years imprisonment at hard labour and in the case of Mr Hunter, the applicant, he was sentenced to 15 years imprisonment at hard labour on each count. The sentences were ordered to run concurrently.

[3] The main witnesses in the case were Kevin Josephs and his mother Evadney Ferril. Josephs, a teenager and a recent high school graduate, was living in New Town, Haynes, in the parish of Clarendon with his mother. The circumstances of the offence at this particular point in the proceedings, are not really in dispute, in that, the applicants, as presented by the prosecution, entered the house of Miss Ferril where she lived with her son at about 7:00 p.m. At that time Kevin Josephs was in the process of getting himself ready to attend a "nine night". He did not make it to the "nine night" because the applicant and Phipps entered the house, tied him up and later robbed him of those items listed in the indictment. They apparently moved him from the bedroom, in which he was, to

another room and after this process of tying him up was over, they waited for about three to four hours for the arrival of Miss Ferril. The intention was to rob her of money.

[4] Miss Ferril duly arrived. She, a business woman who operated an electronic variety store, returned home with a view to enjoying a relaxing evening. She removed all her clothes with the exception of her panty and proceeded to watch television in her bedroom. She recalled that she had items of grocery to be removed from her vehicle into her kitchen, so she set out to place those items in her refrigerator. At that point she heard a sound and felt someone behind her. She turned around to find that she was facing the applicant. Also there was Mr Dean Phipps. They proceeded to harass her for money, tied her hands, searched her house and removed the items listed in the indictment. She made much noise and eventually they fled from the house. In all of this, both Mr Josephs and his mother knew the applicant and Phipps quite well. These are persons who lived in the same area and they knew them for periods ranging from a year and a half up to five years. After they left, an alarm was made and the police was called and the investigations began. Eventually they were arrested.

[5] The applicant gave evidence in which he denied being there. Mr Phipps, during the investigation, gave a statement to the police in the presence of a Justice of the Peace and that statement was admitted in evidence. The statement clearly implicated the applicant Hunter. However, in the summation,

the learned trial judge did not say that she had taken into consideration the fact that in law any statement given by one accused person is not evidence against a co-accused. That failure on her part prompted the filing of the only ground which was relied on by Mr Hines to challenge the conviction. The ground reads:

> "The learned judge erred when she wrongly admitted into evidence the statements of the co-accused Dean Phipps the overwhelming majority of which was against the applicant and which was given in the absence of the applicant without any mention of the fact or treatment in her summing-up that such overwhelming evidence was not evidence against him and this unchallenged evidence was not just prejudicial but must or may well have played a part in her finding of guilt."

[6] We have noted the submissions made by Mr Hines at this point and we say that those submissions are well-founded, in that, it is clear that the learned trial judge erred in that respect. However, we have considered the totality of the evidence and are of the view that it is so overwhelming in a situation where the witnesses and Mr Hunter clearly knew each other and that there would have been no mistake in respect of the identification of the applicant. In keeping with our view of the overwhelming nature of the evidence and the failure of the learned trial judge to voice what she, as an experienced judge, no doubt, knows, we will apply the proviso to section 14(1) of the Judicature (Appellate) Jurisdiction Act. Section 14 (1) of the Act provides that:

> "The court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable and it cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should

> be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:
>
> Provided that the Court may, notwithstanding that they are of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

That is the position in which we find ourselves in respect of the failure on the part of the learned trial judge. That is, although the point may be decided in favour of the applicant, we find that no substantial miscarriage of justice has actually occurred given the circumstances of the case.

[7] We have examined the summation and find that there is no other legitimate complaint that can be made of it and in the circumstances we are refusing the application for leave to appeal.

[8] Mr Hines submitted that so far as the sentences imposed are concerned the learned trial judge took into account the previous offence of possession and importation of cocaine which are unrelated to the offences involved here. We have examined the transcript and agree with Mr Hines that it seems that the learned trial judge did impose sentences which took into consideration the influence of drugs on the applicant as if he was before the court on such a charge. This is what the record shows her as saying at page 197:

> "Mr. Hunter, as it relates to you, certainly, there were a few matters that I had meant to deal with at the end of the trial during my summing-up because of what your attorney said to me in closing, and I think I should mention them here, especially now that I have seen

> your antecedent and seen that you are not a stranger to the court, albeit that it was what Mr. Reece regard as an unrelated matter. When it comes to drugs I really wonder how unrelated it is from other offences by persons who are an associate with drugs, and especially hard drugs like cocaine."

The learned trial judge also, at page 201, delivered herself thus at line 5:

> "If you were earning this kind of money, why were you into cocaine; why were you going into this woman's home seeking to deprive them of their profit? It can only be greed, and the result of drugs."

It thus seems that the learned trial judge did allow this previous conviction in relation to drugs to colour the sentence imposed and we find that that was an error which requires correction. In the circumstances, we are reducing the sentences of 15 years to 12 years. The position is thus, that the application for leave to appeal against conviction is refused. The application for leave to appeal against sentence is granted and the hearing of the application is treated as the hearing of the appeal which is allowed. The sentences of 15 years imprisonment at hard labour are set aside and substituted therefor are sentences of 12 years imprisonment at hard labour to run concurrently. These sentences will run from 30 January 2004.