

2/11/02

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 161/2000

BEFORE: **THE HON MR. JUSTICE BINGHAM, J.A.**
 THE HON MR. JUSTICE HARRISON, J.A.
 THE HON MR. JUSTICE SMITH, J.A. (Ag.)

CECIL MEDDER V R

Leroy Equiano for the appellant

Donald Bryan for the Crown

April 8, 9, and July 5, 2002

HARRISON, J.A:

The appellant was convicted in the High Court Division of the Gun Court on the 15th day of September 2000, of the offence of illegal possession of ammunition (29 counts) and sentenced to twelve (12) years' imprisonment at hard labour on each count. The sentences were ordered to run concurrently. We treated his application for leave to appeal as the hearing of the appeal. We affirmed the conviction on each count but allowed the appeal as to sentence. The sentence of twelve (12) years' imprisonment at hard labour on each count was set aside and a sentence of ten (10) years' imprisonment at hard labour was substituted. As promised, these are our reasons in writing.

The relevant facts are that between the relevant period 4th April 1995 to 4th February 1997, the appellant was employed as a supervisor at Guardsman

Limited, a security firm in Kingston. He was in charge of the armoury at the company's premises. The system in existence and use by the said company in purchasing ammunition for use in its business was explained by prosecution witnesses Lloyd Walker, the recruiting officer and Dalton Griffith, the accountant and financial controller, both employees of the said company at the relevant period. Whenever ammunition is to be bought a purchase order is signed by the general manager or one of the directors, and given to the person in charge of the armoury, that is, the appellant, who would take the said order along with the relevant firearm licence booklet to the dealer from whom the ammunition is being purchased.

The dealer, on receipt of the purchase order and firearm licence booklet tendered, verifies that the said booklet is then currently unexpired and that the order is within the amount of ammunition permitted to be purchased. The dealer then prepares its invoice in triplicate which document contains the name of the firearm licensee, the booklet number, the quantity and description of the ammunition and the price. The invoice in triplicate is then signed by the bearer, in this case, the appellant, and the original along with the ammunition ordered, is delivered to the appellant. The dealer retains the purchase order. The appellant is then required to deliver the ammunition into the company's stock in the armoury, and the original invoice is submitted to the general manager who approves it and issues an order for payment to the dealer by cheque. A cheque is then issued and sent to the dealer for payment for the said ammunition.

Kenneth Benjamin, executive chairman of the company, and in whose name the firearm licence booklets were issued, confirmed that that was the system in use, that the appellant was responsible for the renewal of the firearm licence, that the company purchased firearms and ammunition by the use of purchase orders, and payment therefor was by cheque and never by cash. In particular, the company made no purchase of ammunition by cash payments during the period 1995 to 1997. The witnesses Cherata Hall and Maxine Sterling, both employees of the company, were each responsible for a petty cash "float" of \$10,000.00 maximum. Each said that this "float" was for the purpose of purchasing items such as tyres, petrol and cleaning articles for the company's use. Neither witness had ever disbursed any portion of such petty cash for the purchase of ammunition, nor had they done so to the appellant for the period 1995 to 1997. Nichola Mills, secretary and sales clerk, employed to Arms and Ammo Ltd., a company dealing in the sales of firearms and ammunition, would receive the purchase order and the relevant firearm licence booklet. She would verify, that the latter document is validly in force within its five-year period of duration, that the name, address, and photograph of the licensee are valid, and that the quantity of ammunition may be purchased. She dealt with the appellant on behalf of Guardsman which did not use a system of cash payment. A credit system was in force and after delivery of the goods to the representative of Guardsman, the company would send its cheque to Arms and Ammo Ltd., within two to four weeks thereafter. During the period April 1995 to February 1997,

she sold ammunition to the appellant several times using the invoice procedure. The appellant would sign the invoice, receive the original and he would pay "mostly by cash". She knew his signature. This witness identified Exhibits 1 to 29 as the invoice documents signed by the appellant in the purchasing of ammunition and verified that the firearm booklets used were Nos. 58207, 50379, 74796 and 58095.

Corporal Millicent Bailey the firearm clerk at the Elletson Road Police Station had issued to Guardsman Ltd. twenty-five (25) firearm licences, in booklet form, in March 1995, in replacement of corresponding licences which are renewed annually, but expire after five (5) years. Among the expired booklets which were replaced were Nos. 58207 and 50379 which were retained in the custody of the police, along with other expired booklets. Booklet No. 58207 was replaced by booklet No. 74795 on 18th April 1995. These said booklets Nos. 58207 and 50379 were subsequently missed and still not found after a search, at the police station. However, these said booklets Nos. 58207 and 50379 were used by the appellant to purchase ammunition during the period 1995 to 1997, as evidenced on invoices, exhibits 1-29 containing his signature, as identified by the witness Nicola Mills, the sales clerk at Arms and Ammo Ltd.

Senior Superintendent of Police Glenmore Hinds, who was the appropriate authority responsible for the issuing and renewal of firearm licence booklets at the Elletson Road Police Station in 1995, supported the evidence of the firearm clerk Corporal Bailey relative to the system governing the issue and the renewal

of firearm licence booklets. However, he said in evidence in chief that firearm booklet no. 58207 expired in 1995, but in cross-examination said:

"My recollection is that that book (No. 58207) would not have expired in 1995"

These utterances revealed a discrepancy in his evidence and contradicted the witness Corporal Millicent Bailey, on that point.

The appellant was arrested by Deputy Superintendent of Police Delroy Hewitt.

In an unsworn statement to the Court, the appellant stated that an expired firearm licence booklet is stamped, cancelled and retained by the police and cannot in any way be thereafter used by anyone to purchase ammunition; that new booklets were issued and those were used to offset such purchases; that all the purchases evidenced by the invoices, exhibits 1-29 were done by him under orders by the management staff of Guardsman who authorized him to do so; that he was in possession of all the booklets for firearms of the company and his firearm user's permit had listed therein all the guns of the company; that the managers at times would themselves order ammunition from the dealers for their private practice for themselves and families and he would merely go and sign for and receive the ammunition and deliver to them; that it is not correct as Mr. Kenneth Benjamin states, that ammunition can only be purchased by the use of purchase orders signed and issued by the company and that he was employed to the company for fifteen (15) years and was not in possession of any ammunition illegally.

With the leave of the Court Mr. Equiano, for the appellant argued several grounds of appeal.

Ground one reads

"The evidence presented to the court does not support the verdict of the learned trial judge, as such the judge erred in finding the appellant guilty".

Mr. Equiano argued that although the learned trial judge relied mainly on the evidence of Nicola Mills and Corporal Millicent Bailey, the latter's evidence that booklet 58207 issued in 1991 for five years would have expired in 1995 and replaced, is incorrect. Senior Superintendent Hinds' evidence that booklet No. 58207 would not have expired in 1995, is therefore in conflict with that of Corporal Millicent Bailey.

The evidence of Corporal Millicent Bailey who said that firearm licence booklets are renewed annually in the month of March, reads, in examination in chief:

"Q Now, in respect – you said that you renewed all twenty-five (25) of the Guardsman's booklet in March of 1995?

A. Yes, ma'am.

Q After you had renewed all those booklets, did you receive any report in respect of any booklets, you said you had renewed all twenty-five (25), all the booklets?

W/CPL. Bailey: During the renewal process, I had.

Miss Walters: Yes?

A I had booklets that had been expired and these booklets were replaced.

Q Now, do you recall which booklet you replaced?

A 58207 and 50379

Q And what did you replace them with?

A 5820479

Q And what of 50739?

A (No answer)

Q Yes, what of 50739?

A I can't recall that number.

Q You can't recall, what?

A The booklet that it was replaced with.

Q No, what became of 958207 and 50379?

A The booklets were taken from Mr. Medder ...

Q Yes?

A ... and placed among other expired booklets.

Q Now, if ammunitions were purchased on those two booklets, could ammunition be purchased under those booklets subsequent to your replacing them?

A You mean before replacement?

Q After.

A No, ma'am.

The witness went on to state that the two booklets Nos. 58207 and 50379 were both taken from the appellant but were missing. The replacement booklets for the said Nos. 58207 and 50379 were given to the appellant. The cross-examination of this witness Bailey reads:

Q When was it if you can remember firearm booklet No. 58207 issued to Guardsman Limited?

A Some time in April 1991.

Q And it was replaced by 74795?

A That is correct sir.

Q That was on the 18th of April 1995?

A. That is correct sir.

Q Did you keep that expired booklet?

A Yes, I did sir".

and

Q I don't want to confuse you, 50379, can you recall when it was issued to Guardsman Limited? Okay, could it have been the 28th of February, '89?

A Can't recall, sir.

Q But it was in '89?

A Yes, sir".

Senior Superintendent Hinds said in examination in chief:

"58207 Firearm Booklet had expired in 1995".

and in cross-examination:

"My recollection is that that book (58207) would not have expired in 1995".

The learned trial judge in dealing with the evidence of Corporal Bailey said, at page 269 of the transcript:

"In March 1995, she said whilst renewing booklets for Guardsman Limited during that process, some books were expired and they were replaced with new booklets. In particular, booklet bearing number 58207 and 50379 were replaced with new booklets."

"She said the expired booklets were taken from the accused and placed among other expired booklets and said she, ammunition should not be purchased on expired booklets 58207 and 50379. She said that they were replaced. She said that she cannot now find these booklets and had made extensive search for them and they cannot now be found, however, said she when she had replaced these two old expired booklets with new booklets she handed the new booklets to the accused.

She was cross-examined and she said that she made extensive searches but she was still unable to locate these missing booklets. At that time firearm booklet 50807 was issued some time in 1991 and it was replaced in April 1995 by booklet 47495. She repeated that she kept the expired booklets and she cannot find them".

He also said, at page 276:

"Now at this stage I must make an observation, the observation I make is that whilst there were two books, two new books which replaced these expired booklets, so the accused would be in possession of four booklets which would entitle him to double the amount of ammunition. There are several dates here and I won't mention all the dates but all the dates over the period 6th July 1995 to 4th February 1997, the accused man used these expired booklets and received on them ammunition. This is not denied by

them. In fact, his signature appears on each of these invoices which were tendered in evidence.

In support of the evidence given by Miss Nichola Mills, a very large amount of ammunition was over this period sold to the accused on these booklets, some twenty-two thousand, three hundred. So, the evidence coming from Miss Nichola Mills tells of the accused purchasing on these booklets and further that he purchased outside of the system employed by Guardsman Limited, that is to say that all these purchases were done without purchase orders".

The learned trial judge, no doubt, aware of the conflict in the evidence of Senior Superintendent Hinds, did not rely on his evidence in respect of the expiry of licence booklet No. 58207. However, although the latter booklet, issued in 1991, and would not have expired in 1995, was in fact replaced and officially withdrawn from the possession of the appellant in 1995. It was not thereafter properly or legally available for use in acquiring ammunition. Furthermore, booklets Nos. 58207 and 50379 would have expired in 1996 and 1994 respectively. Exhibits 1-29, tax invoices, reveal that booklet No. 50379 was being utilized up to the 4th of February 1997, having expired in 1994, by the appellant to purchase ammunition (See for example exhibit No. 29 with the signature of the appellant). Similarly, booklet No 58207, was being utilized up to the 17th day of January 1997, having expired in 1996, by the appellant. (See for example exhibit No 27 with the signature of the appellant). We agree with counsel for the Crown, that in order to succeed the appellant needed to show that the verdict was so much against the weight of the evidence that it was unsupportable (*R v Joseph Lao* (1973) 12 JLR 1238). There was therefore

ample evidence on which the learned trial judge could have found as he did. This ground therefore fails.

Ground two reads:

"(2) The learned trial judge erred in allowing exhibits 1 to 29 to be accepted as exhibits in the case, as the crown failed to follow the correct procedure".

Counsel for the appellant argued that the prosecution witness Nicola Mills did not identify properly exhibits 1-29 before they were admitted in evidence and accordingly they were not admissible.

The evidence of the witness Mills is that whenever the appellant sought to purchase ammunition, he would give her the information of the amount desired, show her the firearm licence book which she verified, and she would enter the said information in a computer which would print an invoice. The invoice consists of "... three parts to one invoice". The top copy, white in colour, is given to the customer, and the other two copies, yellow and blue, are retained in the sales office. The appellant commenced transacting business with her company on behalf of Guardsman since 1994. She said "Within a week he would probably come at least two times". She said that she was "... familiar with Mr. Medder's signature".

The blue copies of the invoices signed by the appellant were by description, duplicate originals of the document. They were identified by the witness as bearing the signature of the appellant. Exhibits 1 to 29 were therefore all identified as associated with the appellant by his signature on them.

They were clearly admissible and properly admitted in evidence by the learned trial judge. In any event, at no time did the appellant challenge the signatures as not being his. There is no merit in the arguments on this ground.

Ground three was abandoned and therefore no arguments were advanced thereon.

Ground four reads:

"(4) The learned trial judge failed to consider the unsworn statement made by the appellant, further having allowed exhibits 30 and 31 the judge erred in saying that nothing turned on them".

In his summation the learned trial judge said of the defence:

"The accused gave an unsworn statement and throughout his statement he told the Court of the system and he said there is no way that a booklet that is expired can be used in any shape or form. He said when a book is cancelled it is turned over to the police and the police in turn would give a new book for which he would receive a receipt and he gave detail of how the expired book would be marked 'cancelled' and stamped in the center and then replaced with new booklets. He said of the twenty-nine invoices which were tendered only about six he paid personally with his cash. There is no explanation given why he is using his own cash to pay for ammunition supplied but he went on further to say from time to time some managers would make orders and he would go down, collect and pay for them. He denied ever making any report to any member of staff that he had lost two booklets. Now, this was not challenged in the evidence given by witnesses who said that he had reported the loss. He said that he had never done that. He said that what he had reported was the loss of one booklet.

He said that he was never in possession of licences himself, he was only working under the supervision of his manager and everything he did was under

supervision and instruction. So, in essence, from his unsworn statement he is saying that any transaction he took influencing these twenty-nine counts on the indictment, he did them on the instructions of Guardsman Limited and it was done with their permission".

The learned trial judge thereafter examined the case for the prosecution and concluded:

"Even the police system was subverted and the police must have something to do with the subversion because if Cpl. Bailey is saying that she took them from the accused and he later ended up with these booklets, was there some accomplice in the police force? All these reached his hand and there must be something to indicate a validity of these books albeit they were no longer valid. In the circumstances I find that when the accused man received all these cartridges as they relate to each count of the Indictment, that is, counts 1 to 29, he had received them illegally into his possession. The verdict therefore is that he is guilty of all twenty-nine counts".

The learned trial judge considered exhibits 30 and 31, the questions and answers in relation to the appellant. He said:

"The next witness called was Supt. Reginald Grant and he spoke to the taking up of a questions-and-answers from the accused man, in fact, two sets of questions-and-answers of which the defence said was oppressive but I find no evidence to find that it was oppressive but nothing much turned on it".

Counsel for the appellant argued that the learned trial judge misdirected himself by stating in relation to exhibits 30 and 31 that "nothing turned on it", because the said exhibits "... contained details of the appellant's work, supervision and procedure for the purchase of ammunition".

The learned trial judge did examine the unsworn statement of the appellant and in his subsequent examination of the prosecution's case, his reasoning and conclusion, demonstrated that he placed little or no weight on the said statement of the appellant. Because of the nature and the strength of the documentary evidence exhibits 1 to 29, the learned trial judge could not justifiably have concluded otherwise. Having given ample consideration to the unsworn statement of the appellant, who adopted and incorporated in his statement exhibits 30 and 31, the questions and answers, the learned trial judge rejected the complaint that they were taken under a state of oppression. By saying "... nothing much turned on **it**" (emphasis added), the learned trial judge was no doubt dealing with the complaint "... that it was oppressive". This ground also fails.

Ground five reads:

"(5) The learned trial judge misinterpreted, and misdirected himself on some critical parts of the evidence".

Counsel for the appellant argued that the learned trial judge in his summation, stated that, in his evidence Senior Superintendent Hinds said that "... booklet No. 58207 was expired in 1995 ..." but that the said witness' evidence "... was to the effect that booklet No. 58207 would not have expired in 1995".

On an examination of the transcript of the evidence of the said witness, it shows that the said witness had contradicted himself in that respect. In so far as

the learned trial judge omitted to state, in his summation that the said witness also said, in cross-examination:

"My recollection is that that book would not have expired in 1995",

he was in error. However, that omission created no prejudice to the appellant. As observed earlier, the learned trial judge relied on the evidence of the witness Corporal Bailey that booklet No. 58207 was in fact cancelled and replaced by booklet No. 74795 on 18th April 1995, and therefore should no longer have been validly available for use by the appellant for the purchase of ammunition. This ground also fails.

Counsel for the appellant, in conclusion, argued before us that the sentence imposed was excessive, in the circumstances. In imposing the sentence, the learned trial judge, said, inter alia:

"Now, this is a vast quantity of ammunition that has not reached the company to which you were employed and this amounted to some twenty-two thousand over the years. You kept it for yourself. Inescapable I draw this inference that this amount of ammunition found its way into the wrong hands, for certainly for you to sell them to people you would have to be a licenced dealer hence only those who would prefer or have no licence would purchase from you.

Now, sometimes one wonders where people of criminal intent get the ammunition for the guns, the illegal guns they have but certainly there is a method because what would you be doing with twenty-two-thousand ammunition. Now, because of this some persons might have been injured, fatally or otherwise. I look at it and I think it is through greed".

(Emphasis added)

However, the only reference in the case in relation to the disposal of the ammunition was contained in the unsworn statement of the appellant. He said, inter alia, at page 240 of the transcript:

"The management of Guardsman Limited does not go to the range with the guards and supervisors for practice, they practice themselves so Mr. Drummonds, Mr. Smith and the rest would buy rounds cash.

I was a supervisor who worked with all of those two gentlemen so I would take instructions from them. In lieu of that, M'Lord, each weekend managers at Guardsman, M'Lord, Capt. Watt, Gary Ho Sue, Nick McAdams, McNeal, O.J. Smith and Samuels Drummond, preferably O.J. Smith because he was the one in charge of my office would call Arms & Ammo and order what they wanted.

My job, sir, was only to go for it and pay for it. M'Lord, the order that I get from the operations manager is that I must go over to Mr. Hoo and he would give me some goods and I would leave it in the head office.

I only work by orders. I cannot leave the office and drive to Spanish Town. I must record why I am going to Spanish Town. I was not working on my own, M'Lord. I was working under supervision. I was advised and instructed and directed by all these persons mentioned to go and buy ammunition for private practice".

And at page 243:

"The managers of Guardsman, the majority of them are ex-soldiers. They are members of the Rifle Club up by Mountain View. Each week you have a set of them who take families, train their families, wife, daughter, son to shoot. Most of the managers at Guardsman Limited have their licenced firearm of

which, M'Lord, they carry on their person. So, again M'Lord they cannot go to Arms & Ammo without me and pay for the rounds and take it to Montego Bay or anywhere, they would have to have me to take the rounds".

In addition, the appellant stated that managers from Negril or Montego Bay would order ammunition and because their permits were restricted to the firearm that each carried on his person, he, the appellant, would have to collect any additional ammunition ordered and pay for it. There was therefore no basis on which the learned trial judge could properly ground his particular comments when imposing the sentence.

For the above reasons we came to the conclusions indicated.