JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 106/06

BEFORE: THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE MORRISON, J.A.

CARLTON MERCURIUS v REGINA

Ravil Golding for the applicant

Mrs. Karen Seymour-Johnson, Crown Counsel for the Crown.

December 10, 2009

ORAL JUDGMENT

COOKE, J.A.

1. Carlton Mercurius has renewed his application before us seeking leave to appeal against sentence and conviction. He was convicted in the High Court Division of the Gun Court in Kingston on the 16th June 2006, on two counts. Count one charged illegal possession of firearm for which he received twelve years imprisonment and count two pertained to illegal possession of ammunition for which he received a sentence of five years imprisonment. The sentences were to run concurrently.

2. The facts briefly are that on the 2nd March 2005 at about 6:30 a.m. a group of policemen armed with a search warrant descended on 16 Myers Street, Kingston. There was a knock at the door, but the door was not immediately

opened. When it was subsequently opened and the police entered the one bed-room house, inside were the applicant and his "lady-friend". A search was made and during the search, part of the solitex which formed the ceiling was removed and in the aperture occasioned by this removal, was a black plastic bag with a beretta 9mm pistol which contained nine unexpended rounds. The applicant it is alleged, and which was accepted by the learned trial judge, in respect of his lady friend, begged a chance for her because she did not know anything about it.

3. The learned judge accepted as credible and convincing to such an extent that he felt sure, the evidence proffered by the prosecution and accordingly came to verdicts adverse to the applicant. Mr. Ravil Golding has filed two supplementary grounds of appeal, the first dealing with conviction, which is that:

> "the learned trial judge erred in law when at the close of the Prosecution's case and before the opening of the Defence case he made a determination that the firearm was found in the room occupied by the accused thus warranting an explanation from the accused thereby implying that there was a legal or evidential burden on the accused to prove his innocence or alternatively to disprove his guilt. As a consequence of this error the accused was not afforded a fair trial."

We were adverted to a passage at page 63 where there was an exchange between the bar and the bench pertaining to a no case submission which was, in our view, quite bravely made in the circumstances. The impugned comments by the judge were as follows:

> "So therefore there is an explanation required of him if he is in possession of something and in this case

> the allegation is that he was in control of the room in which the firearm was found, is that correct?"

Now, it is clear to us that all that was happening was that there was an exchange between the bar and the bench pertaining to the relevant law that could affect and concern possession in circumstances where the gun was not taken off the person of the applicant, and it is quite unfair to say that the judge had reached any predetermined view, before the defence had been called, that he was finding as a fact that the gun was found in the room. All he was doing, was positing to counsel, what would be the legal constituents evidentially that would or would not amount to possession in the applicant if the gun was found in the room. Accordingly, that ground is without merit and Mr. Golding properly and readily moved on to the ground pertaining to sentence.

5. The thrust of Mr. Golding's submissions in challenging that the sentence was manifestly excessive was of two limbs. One was that it is outside the normal tariff and he put forward that the normal tariff would be nine years. And then he pointed out that the learned judge took into consideration in sentencing, a factor which he ought not to have taken. The factor was that in the aperture beside the gun, were ski-masks and it is a rather disturbing aspect of this case, that the object was found in close proximity to the ski-mask. In the submission of Mr. Golding, the judge erroneously inferred from this that the applicant was on the spot with the object of the pursuit of some criminal activity involving

disguising his identity. We do not think that it is unarguable that that is so and therefore there is some merit in Mr. Golding's submission in this regard.

6. Accordingly, we are going to set aside the sentence and substitute therefor a sentence of ten years imprisonment. Sentence is to commence on the 16th June 2006.