

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 134/2007

**BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE HARRIS JA
THE HON MR JUSTICE PHILLIPS JA**

DWAYNE MORRIS v R

Lennox Gayle for the applicant

No appearance for the Crown

14 March 2011

ORAL JUDGMENT

PANTON P

[1] Dwayne Morris was convicted in the High Court Division of the Gun Court presided over by Mr Justice Marsh of the offences of illegal possession of firearm, (counts one and three) and illegal possession of ammunition (counts two and four). In relation to counts one and three he was sentenced on 25 October 2007 to eight years imprisonment on each count; on count two, two years imprisonment, and on count four, four years imprisonment. The sentences were ordered to run concurrently.

[2] A single judge of this court refused leave to appeal, indicating that the issue in the case was one of credibility and that the learned trial judge had fairly analysed the evidence of the prosecution's witnesses as well as that of the applicant and his witness. The single judge said that the trial judge had done a balancing exercise in assessing the evidence of each witness and had directed himself properly in making his findings.

[3] The applicant has renewed his application before us and relies on the following grounds:

- a) The verdict is not supported by the evidence.
- b) The trial Judge erred in Law by not upholding the no case submission
- c) ...
- d) The Learned Trial Judge misdirected himself with regard to the evidential requirement in terms of the vesting of possession in the Applicant as regards the offences of Illegal Possession of Firearm and Ammunition."

This latter ground was advanced as an additional ground by Mr Lennox Gayle who appears for the applicant. Incidentally, the respondent is not represented at this hearing.

[4] The circumstances which give rise to these convictions may be placed in two categories. Firstly, there was a finding that was made by Det. Cons. Rockhue Montgomery and secondly, there was another set of findings made by Det. Sgt. George Hall of the Caribbean Search Centre. In respect of the

evidence of Det. Cons. Montgomery, he said that on 2 May 2005 at about 10:00 o'clock in the morning, he was in the Jones Avenue area of Spanish Town when he received information which caused him to obtain a search warrant with a view to searching the premises of the applicant at Dempshire Pen in Saint Catherine. He proceeded with his search warrant to Dempshire Pen, identified himself to the applicant and presented him with a copy of the warrant. The applicant, he said, was at the time exiting what he, Det. Cons. Montgomery, described as a one-room house. The constable indicated his desire to search the house and the applicant accompanied him back into the house where the search took place and, wrapped in a sheet under a mattress on the only bed in the one-room house, was a Chrome Taurus Revolver with six live .38 cartridges. He said that he arrested the applicant and cautioned him. The applicant, on caution, said "officer a nuh my gun". He indicated to the officer that the gun belonged to his brother. Det. Cons. Montgomery escorted him and the find to the Spanish Town Police Station, where, shortly after, acting on instructions, he returned with the applicant to his house along with Det. Sgt. Hall. There a further search was carried out by Det. Sgt. Hall who on the occasion of this second search, indicated that he was acting under instructions from Dep. Supt. Nesbeth in respect of this search. Under the lid of a stove in the house, he found two cartridges and when he pointed out the offence of illegal possession of ammunition to the applicant, his response was "mi deh pon farm work thing and mi nuh waan lose it, ...". He was asked for the weapons for

these cartridges. The applicant replied "officer, uncle have them, come mek me go carry you go show you whey him deh".

[5] The officer came out of the house and stood up in the yard in the region of a huge stone. The applicant himself came out of the house and was looking in what may be described as consternation at the officer who was standing in the vicinity of the stone. Thereupon, it was observed that the applicant was relieving himself and bawling out for his grandmother. The officer, Det. Sgt. Hall, pushed away the stone and there he found a rifle wrapped in a bag in a hole. He asked the applicant for the magazine and cartridges. The response of the applicant was, "all right officer, I am going to cooperate with you". He then took the sergeant to his grandmother's house about 15 yards away and showed the officer an area to search, and the officer searched, and found ammunition there. During the process of this search at the grandmother's house, the officer indicated that he had not found that which he was being told was there. The applicant indicated to the sergeant that he was not searching properly; he needed to turn his hand in a particular way in order to be able to find what was there. The officer acted on the instructions of the applicant and did find these cartridges.

[6] In response to the charges the applicant gave evidence. He indicated that he was of good character in that he was a seasonal farm worker and had had no previous conviction. On the day in question, according to him, he had

stopped at an area known as Shelter Rock to purchase weed and there, according to him, soldiers seized the weed and a knife that he had and the police took him to Spanish Town Police Station, and then he was taken back to his house. On his arrival at his house he saw his yard (to use his words) "full with police" and the police were then searching. Det. Cons. Montgomery was in the group and Montgomery, according to him, asked him his name and when he told him his name, he told him that one gun was already found and he was told that there is a second gun and he needed to find it before the search was over. According to the applicant, the police said that they had found a gun wrapped in a sheet, and later on a second gun was found in the yard by the soldiers. He said that he was taken back into his house and he was beaten by the police. He said that there was a stove at the back of his house and the police said that they had strong lead about his brother and that if he were to give them (the police) information about his brother all would be well for him, the applicant, According to him, he told the police that he had no information and he denied that he was shown any ammunition or any magazines. He said nothing was found in his apartment.

[7] Before us, Mr Gayle has submitted that his major point is that possession was never "invested" in the applicant. He pointed out that there was a discrepancy between the prosecution and the defence in relation to the size of the house. Whereas the applicant was saying that he lived in a four bedroom house, the Crown was saying that there was a one-room structure but there

were other houses on the property. According to Mr Gayle, the learned trial judge ought not to have accepted the evidence of Det. Cons. Montgomery on his say-so, that it was a one-room house and that (to use Mr Gayle's words) corroboration was needed in respect of that find in that statement as to the size of the house as well as the find therein. So far as the finds in the yard are concerned, Mr Gayle submitted that at best the applicant merely had knowledge, and knowledge does not equate with possession and control. He said that the applicant's indication of a willingness to co-operate should not be construed as an indication of his having possession and control. He referred to the well-known case of *R v Monica Williams* (1970) 12 JLR 116; (1970) 16 WIR 74 and submitted that something more was necessary for the learned trial judge to have arrived at the verdict of guilt.

[8] We have considered these submissions and we have looked at the very careful and detailed summation by the learned trial judge and we see no reason to disturb his findings. In respect of what Det. Cons. Montgomery said and on the basis of his acceptance of his evidence the conviction in respect of count one is proper, that is, the finding of the Taurus Revolver. In relation to the indictment, the particulars have not been set out in respect of the various finds as to what the ammunition is supposed to be. We are interpreting count two to be relating to the ammunition that was found in the Taurus Revolver and so the convictions on counts one and two are upheld. So far as count three is concerned, we are interpreting the indictment as regards to counts three and

four to be relating to the second search. So far as the finding of the firearm in respect of count three is concerned, we are not satisfied that there was sufficient evidence of control in respect of the weapon that was found under the stone. So far though, as regards the ammunition that was found on the second search of the stove, and indeed on the outside of the premises where the applicant gave instructions as to how the search was to be conducted, we find that there is sufficient evidence of possession of such ammunition.

[9] In the circumstances, the application for leave to appeal is refused in respect of counts one, two and four. So far as count three is concerned, which relates to the firearm that was found under the stone, the application is granted. The convictions and sentences are affirmed in respect of counts one, two and four. In respect of count three, the application having been granted, the hearing of the application is treated as the hearing of the appeal which is allowed in respect of that count. The conviction is quashed and the sentence set aside, and a judgment and verdict of acquittal is entered in respect of count three. The applicant will serve a maximum of eight years with effect from 25 January 2008.