

Judgment Book

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 25/85

BEFORE: The Hon. Mr. Justice Rowe - President
The Hon. Mr. Justice White, J.A.
The Hon. Mr. Justice Campbell, J.A.

R. v. JUNIOR CAREY

Mr. B. Macaulay, Q.C., Mrs. M. Macaulay & Mrs. P. White
for Appellant

Mr. G. Andrade, Q.C. & Mr. Walter Scott for the Crown

June 11, 12 & July 31, 1986

CAMPBELL J.A.

On June 12, 1986 we dismissed this appeal and confirmed the conviction and sentence. We however ordered the sentence of imprisonment at hard labour to commence on March 7, 1985, which was the date of sentence. We then promised to put in writing our reasons for dismissing the aforesaid appeal. This promise we now fulfil.

The case for the prosecution given in evidence by Detective Corporal Errol Barnes and Detective Acting Corporal Michael Simpson is that on February 18, 1984 at about 2.15 p.m. the appellant was seen by Barnes standing on a piazza of a shop opposite the intersection of Cumberland Road and Manchester Street. The appellant had a green travelling bag clutched under his arm. Barnes approached the appellant, identified himself, and enquired as to the contents of the bag. The appellant denied that there was anything in it. Barnes attempted to hold the bag whereupon the appellant dropped it and ran on Cumberland Road in the opposite direction towards Old Market Street.

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Barnes picked up the bag and discovering that it contained a firearm, immediately gave chase of the appellant. He also alerted Simpson who was at the upper end of Cumberland Road nearer to Old Market Street. Simpson saw the appellant being chased by Barnes. He apprehended him and Barnes approached them with a firearm. The appellant was asked by Barnes after caution how he came into possession of the firearm, in response to which the appellant said, "Officer, is a boy name Ben give me to give a man." The firearm was opened and therein were five rounds of .38 ammunition. The firearm itself was a .38 Smith and Wesson revolver the serial number of which was recorded and given in evidence.

The appellant was duly charged with illegal possession of a firearm.

Under cross-examination of Barnes it was suggested to him that a police officer by the name of Crooks was also on patrol with Simpson and himself on the day in question. Barnes said he could not recall any person by the name of Crooks being on the patrol. It was suggested to him that police officers Kelson and Small / Errol McPherson were on the patrol. Barnes admitted this. He however said he did not know the exact point where McPherson and Small were save that McPherson was somewhere along Cumberland Road and Kelson Small was in the area. He denied the suggestion that the appellant was taken at the corner of Old Market Street and French Street which would be away from Cumberland Road. He further denied the suggestion that the appellant was apprehended by Kelson Small / Errol McPherson and taken back to the intersection of Cumberland Road and Old Market Street. He denied the suggestion that Mr. Crooks came up to where the appellant then was with a green bag in his hand. He denied the suggestion that the appellant was never at any time on that day at the intersection of Manchester Street and Cumberland Road. It was suggested to Barnes that McPherson had searched the accused

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further down Old Market Street prior to his apprehension and had found nothing. Barnes, consistent with his evidence that he could not say the exact point where McPherson was, answered that he did not know about any such search.

Under cross-examination of Simpson, the latter was asked if he recalled whether Kelson Small and McPherson were in the "Cumberland/Old Market Street/French Street/Manchester Street" area. He said neither was there. It was suggested to him that the appellant was in fact held by McPherson and Small, this he denied and ^{instead} affirmed that he held the accused. It was suggested to him that the appellant was held at the corner of French Street and Old Market Street. He denied this, and affirmed that he held the appellant at the corner of Old Market Street and Cumberland Road. He further denied that he apprehended the appellant in the presence of Small or that Crooks came along to Small with a green bag. He affirmed that it was Barnes whom he saw with the green bag and that it was Barnes who showed the appellant the firearm.

In the light of the cross-examination, the case for the defence which was being disclosed was that the appellant was never at any time at the intersection of Cumberland Road and Manchester Street. He was on Old Market Street where he was searched by McPherson and nothing was found on him. He proceeded on Old Market Street to its junction with French Street. McPherson and Small then apprehended him and took him to the intersection of Old Market Street and Cumberland Road where Crooks came along with a green bag. Nowhere was it suggested to the Crown witnesses that Crooks at any time searched the appellant, or that Crooks had anything whatsoever to do with the case, because it was not suggested that any firearm was in the green bag which Crooks had, or that he delivered this green bag whatever its contents, to either Small or McPherson. It was the

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appellant who first mentioned that Crooks handed the green bag to Small while Crooks for the defence said he handed the said bag to Barnes.

Contrary to the defence case/^{as}disclosed from this cross-examination of the Crown witnesses, the appellant gave evidence that on the 18th February, 1984 in the early afternoon he was on Cumberland Avenue. Near to its intersection with Manchester Street, he was accosted by Police officer Crooks who searched him. Nothing was found on him. He proceeded up Cumberland Road which would be in the direction of Old Market Street. He saw a man coming down Cumberland Road with a bag over his shoulder. He said Barnes (sic) asked the man to bring the bag to him, the man dropped the bag and ran down Cumberland Road. Crooks (sic) took up the bag. In the meantime he the appellant had proceeded up Cumberland Road and had turned down Old Market Street when he came upon a police party including McPherson. McPherson searched him, found nothing but nevertheless detained him because McPherson said he appeared suspicious. Small and other policemen came along. Crooks also came along and handed a green bag to Small. Simpson who also was there, told Small that it was he, the appellant, who ran and left the bag. He never saw Barnes at any time that day on the street at Cumberland Road/Manchester Street or Old Market Street. Barnes whom he knows very well was not on that operation, he was in his office.

Under cross-examination, he said it was Crooks who accosted the man with the green bag, but he did not see Crooks chase this man who dropped the bag and ran. He only saw Crooks take up the bag. Under further cross-examination, he changed his evidence by saying it was Small, and not Simpson, who had accused him of running and leaving the bag, even though he conceded that he did not see Small on Cumberland Road. Crooks was present but said nothing when he gave the bag to Small nor did he say anything thereafter en route to the Police Station. He said he was taken

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into custody, and the following morning he was severely beaten by Barnes and Simpson who burst his head causing it to bleed very badly. He was not medically treated and had to wear a cap to cover the wound.

Lance Crooks was called by the defence. He testified that he is a constable. That on 18th February 1984 about 11 a.m. he was on foot patrol in plain clothes with two special constables who were in uniform. At the corner of Wellington Street and Manchester Avenue he observed the appellant and another man standing close together conversing. The other man had a bag in his hand. This other man was in the process of handing the bag to the appellant when on seeing him, Crooks, the man threw the bag in the lap of a woman who was sitting nearby. Both men ran. He took the bag from the woman's lap and found that a .38 Smith and Wesson revolver was in the bag. He alerted one of the two special constables of his discovery. This special constable chased the fleeing men but did not succeed in apprehending any of them. The appellant was caught by a police patrol, including Detective Corporal Barnes, which was in the area. On the street where the appellant was caught, the name of which street he cannot recall, he saw Barnes and informed him of what had previously transpired. He handed Barnes the bag with the revolver and the revolver was shown to the accused by Barnes. He denied that at any time that day he had stopped and/or searched the appellant. He denied seeing the appellant with a wound to his head or wearing a cap during the time he was detained in custody. He, the officer, was on duty at the cell block while the appellant was detained therein. He was transferred a few weeks later. He did not prior to his transfer or at any time thereafter record any statement on the matter. In answer to the learned judge he reiterated that it was a little after 11 a.m. that he recalled seeing the appellant and recovering the firearm.

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One Elaine Hamilton who was also called for the defence said on the day in question, along Manchester Street and Cumberland Road, she saw police officer Crooks search the appellant and nothing was found on him. Crooks told the appellant to go. Thereafter Crooks saw a man coming down Cumberland road with a bag over his shoulder. He called to this man who threw the bag on the ground and ran. Crooks took up the bag, opened it. She did not see if there was a gun inside as Crooks did not take anything therefrom. The man who ran leaving the bag was named "Busha," and he had been walking on the road with his girlfriend a little ahead of him. Crooks held her. Though the witness said she saw Simpson, Small and McPherson she said she did not see Barnes anywhere. She said Crooks handed over the bag to Small. She saw no one give chase to Busha though Crooks was shouting to him to stop. Small and Simpson saw when Busha threw down the bag and fled so they came down to where Crooks was.

It is against this background of evidence that the learned judge, who in exercising his Gun Court Jurisdiction was sitting without a jury, delivered himself in these words:

"I propose to deal with the evidence put forward on behalf of the defence first because in my view, certain basic and fundamental discrepancies arise in that defence which cause me to have no hesitation whatever in rejecting it. Apart from the statement, sworn evidence was given by the accused man that he was searched by constable Crooks which evidence is contradicted by the said constable Crooks who is called by the defence. I can "concede" (sic) conceive but nothing more basic than there being agreement in relation at least to the search of the accused man by the constable who has testified supposedly on his behalf. Then of course, the lady who testified this morning also said Mr. Crooks searched the accused and found nothing on him. The material discrepancy is in relation to the search and that discrepancy is so vital, so material as to discredit in my view the evidence of the accused and Crooks and the lady who testified this morning. In addition to that, on the evidence I would come to a

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"finding of fact that Constable Crooks, if he was on the scene at all, took no part whatever in the apprehension or finding of any firearm on this accused man. I accept the evidence of the prosecution that between Corporal Barnes and Simpson, they and they alone were the principal actors in this drama."

Mr. Macaulay, Q.C., for the appellant submitted that the above pronouncement of the learned judge on the contradiction in the defence evidence, relative to the search, amounted to a misdirection, in that the learned judge mistakenly led himself to the conclusion that the discrepancy was so material that it discredited the evidence of both the appellant and Crooks. Mr. Macaulay, in developing this submission, conceded that discrepancies or contradictions in the evidence of two or more witnesses, if fundamental would provide ground for rejection of the whole of the evidence of these witnesses. But, says he, in this particular case the contradiction in the evidence on whether the appellant was searched by Crooks was not fundamental since it did not impinge on the basic issue which had to be resolved, which issue was whether the appellant was in possession of a travelling bag in which a firearm was found. He says, too, that since the contradiction was not a fundamental matter, the rejection of this aspect of the appellant's evidence does not legally justify the rejection of his evidence that he was never in possession of the bag. Mr. Macaulay further submits that the learned trial judge by his treatment of the contradiction abovementioned was inconsistent in that, on the assumption that the contradiction was not fundamental, his rejection of the appellant's evidence of the search having regard to Crooks' evidence, implied that the learned trial judge regarded Crooks as a credible witness. It was therefore inconsistent for the learned trial judge thereafter to treat Crooks as not being a credible witness.

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In our opinion the learned trial judge did not, having regard to what he said, reject the defence case solely on account of the contradictory evidence relative to the search of the appellant by Crooks. He rejected the defence case because as he expressly stated "certain basic and fundamental discrepancies arise in that defence." There were in fact basic and fundamental discrepancies as the evidence eloquently disclosed. He concluded that because of these basic and fundamental discrepancies he had no hesitation whatever in rejecting it. It is clear in our view that the learned trial judge's reference to the contradiction in the evidence as to the search was merely an illustration, and not exhaustive of basic and fundamental contradictions of which the defence case, as earlier stated, was replete. In this regard we do not in any case agree with Mr. Macaulay that the evidence of the search was not basic and fundamental. It is basic and fundamental because if the appellant had in fact been searched by Crooks and nothing was found on him, that fact would be very cogent and compelling evidence going directly to the issue whether he had a bag with a firearm therein as given in evidence by Barnes.

Mr. Macaulay next complained that the learned trial judge did not consider adequately or at all the discrepancies in the Crown's case and that he did not consider and analyse in its entirety all the evidence given before him and this has resulted in a miscarriage of justice. This criticism does not appear to be justified, unless it is being suggested that a trial judge exercising jurisdiction to try cases summarily under the Gun Court Act, is obliged to take each piece of evidence, and viva voce minutely analyse it so that his analysis appears in the record. The learned trial judge is not statutorily required to do any^{such}/thing even though a desirable practice has developed which it is hoped will be continued of setting out salient findings of fact which^{is}/of inestimable value should an appeal be taken.

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In this case the learned trial judge clearly revealed that he had considered the entirety of the evidence before him. This is reflected in his concluding words which is here quoted:

"Apart from the pointing out by the defence of the failure or omission or denial by the Prosecution witnesses as to Crooks' presence on the scene, there has been no area in which I can find that the finger of criticism can be pointed with any justification towards the testimony of Barnes and Simpson. There is no area in which I can find that there has been discrepancies material or relevant or there is no area in which I can say they have impressed me as being untruthful or unreliable. But as I said the absence of the green travelling bag is an omission which I take into consideration."

Prior to so concluding the learned trial judge had specifically considered the unusual and singular nature of the case due to the evidence given by Crooks. He made a specific finding that Crooks is not to be believed having regard to his demeanour, his inexplicable failure to record any statement of an event of which he in fact, if believed, would be the key witness.

It was for these reasons that the appeal was dismissed.