JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 214/88

BEFORE: The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Forte, J.A.
The Hon. Mr. Justice Downer, J.A.

R. v. DONOVAN CLARKE

Application for leave to appeal

Ms. Cheryl Richards for the Crown

September 26, 1989

CAMPBELL, J.A.

The applicant Donovan Clarke was convicted by Harrison J. in the Gun Court on November 3, 1988, of the offences of illegal possession of firearm, shooting with intent and robbery with aggravation. He was sentenced to 4 years imprisonment at hard labour in respect of the offence of illegal possession of firearm and for 6 years respectively on the counts for shooting with intent and robbery with aggravation, the sentences were to run concurrently.

The issue which was raised fairly and squarely in the case was that of mistaken identification. The facts briefly were that the complainant Vincent Hunter who was the sole eye-witness to the incident said that on the 21st of June, 1988 at about 1.00 p.m. he was riding his bicycle on the Spanish Town Road towards Weymouth Drive intersection

On the opposite side, emerging from a lane or passage way he saw four men who were each armed with a firearm. On seeing these men, he accelerated his speed intending to pass where these men were emerging. He said that the men on reaching the roadway on the opposite side opened fire on him. He immediately jumped from his bicycle and ran a distance of 120 yards leaving behind his bicycle. He then turned to look in the direction where he had been shot at, he said he saw the applicant picking up the bicycle and retracing his steps into the lane. He did not then see the others. He admitted that the reason why he did'nt see the others was because the roadway was busy and that the other three could have retreated before he could see them.

The critical issue which presented itself to the learned trial judge, was whether having regard to this admission that the roadway was busy, this witness would have had a reasonable time, without obstruction, within which to observe the applicant, bearing in mind that the applicant when first seen was not alone but was in the company of others and when later observed was at a distance of about a 120 yards away on the aforesaid busy roadway. Considerable effort was made to elicit from the witness some estimate of the time which elapsed during which he would have had the opportunity of observing the men who fired at him. He was unable to assist the court. When pressed, he said that it happened in June and he cannot remember what time he had to observe the men. He was asked if he could assist the court in determining how long a time elapsed between the moment when he first observed the four men and the time when he looked back after having ran for 120 yards. To this he answered that it was "some seconds."

When pressed further as to how many seconds, he was silent. Nowhere in the evidence is it recorded that he did say he observed these men for "fifty seconds" or for any other specific number of seconds. To clear up difficulties presented by his inability to say how long a time elapsed during which he observed the men, he was asked how long he was giving evidence in Court, his response was that he was giving evidence for 10 minutes which appeared to be a correct assessment of the time during which he was giving evidence. The defence was that he could not be relied upon as a person who could reasonably have observed the applicant, notwithstanding the admitted fact that they were known to each other for many years, because the time could not be more than just a few seconds as stated and would not amount to more than a fleeting glance. The learned trial judge in considering the evidence found as a fact that 50 seconds had elapsed within which the applicant had been observed and he considered that this was a reasonable time within which the witness could have recognized the applicant. We are unable to determine the source from which the learned trial judge made his finding of fact that 50 seconds had elapsed. The record do not disclose this. It may well be that the learned trial judge in taking his notes recorded 50 seconds honestly believing that that is what he heard the witness say, however, the formal record of the proceedings disclose that all that the witness said and in relation to a matter which was not directly relevant, was that some seconds passed between the time when he first saw the men and the time when he looked back after having ran for 120 yards. The learned trial judge's summation is predicated on 50 seconds being the period of time within

which the witness observed the applicant who was a person well known to him. The learned trial judge found that this period of time would have been sufficient for the applicant to be recognized. This finding of fact and the conclusion therefrom, in our view, onstitutes a very serious misdirection as it is based on non-existent evidence and in the absence of this erroneous finding of fact there would certainly be no evidence which the learned trial judge could have considered as establishing that the witness did observe the applicant for any reasonable period of time on a busy roadway. Bearing in mind that the applicant and the others were on the other side of the road while the witness who was riding his bicycle would have to be looking in the direction where he was travelling, he could have had only occasional glances to the other side of the road to observe persons coming out of the lane or passageway on to the road. This in our view would not be a sufficient basis on which any reasonable conclusion could be arrived at that the witness was in a position to clearly observe who the persons were, who were emerging from the lane much less to assert that the applicant was one of these men. As regards the evidence of the witness that when he looked back he saw this applicant removing the cycle from the road, this at best could only be a sideview from a distance of 120 yards and without any evidence as to how long he was observing him, it could not be considered as satisfactory evidence on the basis of which a conclusion could be drawn that the applicant had been properly observed, identified and/or recognized.

In the circumstances we considered that the case against the applicant ought to have been dismissed at the conclusion of the case for the prosecution. We accordingly treat the application for leave to appeal as the hearing of the appeal and allow the appeal. The conviction is quashed and the sentence set aside and a verdict of acquittal entered.