

NMCS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 150/01

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

REGINA V ELWIN DEANS

Roy Fairclough for the Applicant

Anthony Armstrong for the Crown

April 17 and JULY 5, 2002

BINGHAM, J.A:

The applicant was tried and convicted in the Western Regional Gun Court at Montego Bay, St. James, following a hearing on 21st and 22nd June 2001. He was charged on an Indictment for Illegal Possession of a Firearm (count 1) and Wounding with Intent (count 2). He was sentenced to seven years at hard labour (count 1) and ten years at hard labour (count 2).

Following an unsuccessful application for leave to appeal to the single judge, the applicant renewed his application before the Full Court. Having heard the submissions of his counsel, we refused the application for leave to appeal, affirmed the conviction and sentences and ordered that the sentence shall commence as of 21st September 2001.

We promised then to put the reasons for coming to our decision into writing and this now follows.

The Facts

The facts out of which charges arose may be summarized as follows: On Tuesday 20th March 2001, about 7:30 a.m. the complainant Carlton Smith also known by the name "Jubbie" was working as a liaison officer at a work site along the highway at Bloody Bay in Hanover. While there the applicant Elwin Deans also known as "Natty wind" and another man rode up on a motor cycle. There was a conversation between the complainant and the applicant. The complainant boxed the applicant who was seen to pull an object from his waist resembling a gun. On seeing this the complainant ran off chased by the applicant and the other man. Shots were fired at the complainant, the first shot hitting him in the right buttock. He continued to run for about another chain at which stage on hearing footsteps close behind him he turned around. He was then shot in the right side of the neck and left side. The wound to his buttock damaged his testicles.

The complainant's account was supported by Mervin Jones the payroll supervisor who described what took place on the morning in question. He told of the applicant and another rasta man coming to the worksite on a motor bike, and of a conversation taking place between the complainant and the applicant. He saw the boxing incident and the applicant lifting up his shirt and pulling a shine object resembling a gun from his waist. On seeing this he moved away and subsequently heard several gunshots being fired. After sometime the applicant returned to where the motor cycle was left and rode away. The complainant then came back to where he was standing and he observed him

bleeding from wounds to his body. A vehicle was stopped and the complainant was sent off to the hospital for treatment.

Corporal Denton Black the investigating officer was stationed at Green Island Police Station in Hanover. On the day of the incident he got certain information and went to Salt Creek Bridge along the main road leading from Green Island to Negril. He saw men there working with heavy equipment. They were engaged in a highway project. After making enquiries he next proceeded to the Savanna-La-Mar Public Hospital where he saw Carlton Smith o/c "Jubbie" whom he knew before. He was being treated by a doctor.

Having received certain information he then went in search of Elwin Deans o/c "Natty Wind" whom he know before. He went to Logwood District and March Town but did not locate the applicant. Later that day Corporal Black obtained warrants on information for the arrest of the applicant for the offences of Wounding with Intent, Illegal Possession of Firearm and Illegal Possession of Ammunition.

On 9th May 2001, while in his office at the Green Island Police Station, Corporal Black obtained certain information. As a result he spoke to one Constable Gentles of the Cross Roads Police Station. On 29th May 2001, Corporal Black went to Cross Roads Police Station where he saw the applicant who was being detained in a cell at the station. The applicant was handed over to him and he escorted the applicant to the Green Island Police Station where he was taken to Corporal Black's office where he was arrested on the warrants which were read over to him, and cautioned. The applicant then said "Mi go pon the work site fi go check out some work and the boy Jubbie box mi and mi just deal with him case".

Following a no case submission by learned counsel for the applicant which was overruled the applicant upon being called upon made a brief unsworn statement from the dock. Having given his name and address, he said "My work is operating a taxi. I was at the site that day and I never had a gun and I did not shoot Jubbie, I swear".

The following original grounds of appeal were advanced by the applicant viz:

- (1)** Unfair trial
- (2)** The Court has no evidence that a firearm offence has been committed by the accused.

Learned counsel for the applicant did not seek to file any supplementary grounds, electing rather, to argue ground 2 with the following amendments with the leave of the Court. These were to substitute the word "had" for "has" where the word appears, and add a colon after "accused", and state that the Court erred:

- "(a)** In accepting the evidence of the police officer as expert opinion.
- (b)** In accepting the state of mind of the witness Jones, as proof of the presence of a firearm.
- (c)** In accepting the evidence of the complainant Smith, that he had been injured by bullets.
- (d)** In eliminating identification as an issue in the case".

On an examination of (a)-(c) of ground 2, learned defence counsel in advancing his submissions sought to deal separately with the learned trial judge's findings on each of the component parts outlined in ground 2 which when taken together and examined cumulatively in the manner the learned trial judge did, caused her to draw the inference which led irresistibly to the conclusion that:

- (i)** The applicant had a firearm on the morning in question.

- (ii) That he used that firearm to discharge live bullets at the complainant Smith injuring him.

What was the evidence that the learned trial judge was presented with which caused her to come to the conclusion that she did? For the answer to this question it is necessary to resort to an examination of the summation and findings made by her.

Having reviewed the prosecution's case and the unsworn statement made by the applicant she then proceeded to deal with the issue as to the presence of a firearm in the possession of the applicant.

At page 57 of the transcript the learned judge said:

"Now the Court considers the evidence of the presence of the firearm that morning, there is evidence from Mr. Jones that the accused had drawn this object which he said was shiny and resembling a gun. At one point he was asked to describe it and he said the gun he saw was shiny and his reaction having seen that object is something for the Court to consider because upon seeing it he withdraws from where he was talking to the accused for about five minutes until it reached that the men had this heated argument and the accused drew this object from his waist. Clearly in his mind he was convinced that there was a need to withdraw, to protect himself. He sensed that he was indeed to go and secure himself and he was behind a machine and shortly after that he heard these explosions, which he said sounded like gunshots".

At this stage although there was evidence of a description of the object which the applicant pulled from his waist, followed shortly thereafter by the witness speaking of the sound of gunshots being fired, the learned judge did not stop there but she went on to alert her mind to the testimony given by the complainant when she said that:

"There is evidence from the complainant that the accused and another were chasing him, just those 2 persons were chasing him, and when they were coming towards him they (sic) were gunshots coming from them and that he received gunshot injuries".

This was evidence which if accepted by the learned trial judge would have laid the basis for a foundation of facts from which the only reasonable inference that could be drawn was not only that the object was a firearm but that it was being used in a manner and with an intention to cause serious bodily harm to the complainant by the firing of live bullets at him. On this evidence without more it could safely be concluded that the injuries which the complainant received, in the circumstances he outlined in his evidence, and supported by the testimony of Jones, were gunshot wounds. The evidence given by the investigating officer Corporal Black in essence, neither adds to, nor takes away anything from the prosecution's case. It follows therefore, that it cannot be the subject of a valid complaint as is being advanced in ground 2(a).

Ground 2(d) sought to challenge the finding of the learned trial judge that identification did not arise as an issue in the case.

There is no merit in this complaint. The evidence which led the learned trial judge to this conclusion was based on the unchallenged evidence emanating from Corporal Black that following his arrest of the applicant and cautioning him, the applicant said, "Mi go pon the work site fi go check out some work and the boy Jubbie box mi and mi just deal with him case". The applicant in his unsworn statement admitted to being on the work site where the incident took place on the morning in question. In the light of this evidence no question of identification arose for a determination by the learned judge.

When the evidence as presented by the prosecution is considered and examined against the background of the statement made after caution by the applicant to Corporal Black, the verdict reached by the learned judge was one fully warranted on the evidence.

As there was no complaint made as to the sentences imposed on the applicant for the foregoing reasons we refused the application for leave to appeal and made the order which is set out at the commencement of this judgment.