JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 127/89

COR: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE GORDON, J.A (AG)

R. v. ERROL FOLKES

Bert Samuels for the Applicant

Kent Pantry Deputy Director of Public Prosecutions for the Crown

11th March, 1991

GORDON, J.A. (AG.)

The applicant was convicted on charges of illegal possession of firearm, count I, and shooting with intent, count II, in the Gun Court in Kingston on the 1st of August 1989 and sentenced to concurrent terms of imprisonment of 5 years and 8 years hard labour, respectively.

The Crown's case rested on the evidence of Corporal Colville Ebanks and Acting Corporal Lyndale Nembhard, who along with Acting Corporal Irving went on operation duty in the Mountain View Avenue area of Kingston on the 13th of November 1988. At about 5:15 p.m the three policemen went on Goodwich Lane, there they saw a group of 10 to 12 men sitting on the sidewalk. After identifying themselves to the men, they searched them. They were looking for firearms and drugs; they found nothing on these men. The applicant who was one of the men, was then asked to indicate where he lived and he took them to a one room unit on premises on McGregor Gully bank. The applicant pushed open an unlocked door and all four men entered. While Ebanks and Irving searched, Nembhard stood near the door looking on. While the search was in progress, the applicant was seen to rush to a bundle of soiled clothes which was on

the floor, he removed therefrom a .38 revolver and he ran from the room with it. He was chased by the policemen and when he reached a wall he turned and fired three shots at the policemen from the firearm. Corporal Nembhard returned the fire, discharging two shots. The applicant dropped the firearm, scaled the wall and disappeared. The police examined the area that he scaled and observed blood-stains. The firearm was taken up by Acting Corporal Nembhard and handed to Corporal Ebanks who examined it and found it contained three live rounds and three spent shells. Later that day Corporal Ebanks went to the University Hospital. There he saw the applicant as a patient with gunshot injuries to his right foot and the right side of his chest.

The applicant in a statement from the dock told of taking the police party to his home where he was made to put on a shirt. Before that, he was clad only in a pair of shorts. The police began searching the house. He saw two of the officers leave the room and go to the gate whispering. He was left with one officer and as the men whispered, he (in his words) "get panic" and he rushed out of the house, because he did not know what they were whispering about. He tried to escape and he got shot in his right foot and right side when he tried to climb over the wall.

Daniel Folkes, the applicant's father, gave evidence describing the layout of the premises. Maxine Thompson another witness for the defence told of seeing the police and the applicant entering the applicant's room. Then she saw the police leave and go to the gate, and the applicant was called from his room by the police. He came out, walked towards his grandfather's house and some ten minutes later she heard a little rush and she saw a policeman pulling his gun and soon after she heard two shots discharged. She also gave evidence of the physical layout of the premises. Natalee Taylor the third

witness called by the defence was in her apartment on the compound when she heard the sound of someone running. She saw the applicant running. He turned a corner and scaled the fence. He was chased by two policemen. While he was on the fence, she said, his clothes got stuck in the barbed wire and the police fired two shots at him. He then managed to release himself and he disappeared. Her evidence is that only two shots were fired on that day.

The defence challenged the description of the premises given by the police and said that the incident did not happen in the manner testified to by the officers. The suggestion was made to Corporal Ebanks in cross-examination that the police discovered the gun in the room and then the applicant fled therefrom and was chased and shot.

There was no challenge of the discovery of the gun. What was challenged, was that the applicant shot at the police. The defence put forward that the applicant never had a gun in his hand.

Before us, Mr. Bert Samuels for the applicant, obtained leave to argue four grounds of appeal. First, that there was material misdirection by the learned trial judge on the defence put forward by the accused when he said at page 143:

> ".....The accused man in his statement said he was shot in the foot, 'I got shot in my right foot', he said nothing about the chest ....."

The learned trial judge, he argued, utilised this misdirection in coming to his findings of fact when he said at page 146:

> "Now, as I said I find that this accused man was shot in the chest and the right foot. Having said that I find as a fact thatthe accused man was facing the policemen whilst he was shot. ....."

He maintained that this misdirection and the conclusion drawn therefrom prejudiced the defence in that he discredited the accused and his witnesses on the misdirection and regarded it

as material in the founding of a verdict.

The second ground of appeal argued was that the learned trial judge's refusal to accede to the application of the defence to visit the locus in quo was based on reasons unknown to law. It therefore resulted in a wrongful exercise of his discretion and deprived the Court of the empirical evidence available to it regarding the physical layout of the premises in which the offences allegedly took place which was a material consideration in determining guilt or otherwise having regard to the Crown's allegation and the evidence offered by the witnesses for the defence. The third ground that he presented was that the learned trial judge in his summing-up lost sight of the significance of the calling of the witnesses by defence, the real reason being to discredit the witnesses for the Crown regarding the physical layout of the premises and to establish the case for the defence which if accepted (and he failed to state whether he did it or not) would render that version of the shooting impossible. This resulted in a non-direction which amounted to a misdirection and deprived the accused of a fair trial. The fourth ground of appeal was that the witness for the prosecution Corporal Ebanks did agree with the defence when he said on page 4:

> "..... we took up a firearm, a revolver from under some dirty clothes that were inside the room."

and continued at page 5 saying:

> "After we picked up the firearm he ran outside and out of the room."

The learned trial judge failed to state how he resolved this evidence of Corporal Ebanks in reaching a verdict adverse to the accused."

This fourth ground of appeal is based on what obviously is an error in transcription because on the evidence of Corporal Nembhard who was on observation and saw what happened, it was the accused who took up this gun from under the clothes and ran from the room and on the evidence, he alerted the others

to what had transpired. Therefore the word "we" should be "he". The learned trial judge obviously made an error when he said that the accused was shot in the foot and did not refer to his being shot in his chest. It was later on in his summation of the evidence that he referred to the accused injury to the chest. That error on his part really did not affect his findings.

In our judgment, there were a number of questions which the learned trial judge had to resolve, namely:-

1. Was the firearm taken up by the applicant from under the pile of clothes or was it taken by a police sergeant from a cabinet?

2. Did the applicant run from the room with the firearm or did he run away in panic when he saw the police officers whispering?

3. Did the applicant turn around when about 22 yards from the police officers and fire shots at them?

4. Having regard to the configuration of the buildings on the premises at Mountain View Avenue, could the police officers have an unbroken view of someone 22 yards away?

The learned trial judge answered the questions 1 - 3 adverse to the applicant and inferentially question 4 also. It is unfortunate that no diagram or photograph of the premises was put in evidence. However, since the issue could be resolved on the credibility of the witnesses, Pitter J. rejected the evidence of the defence witness in arriving at his conclusion adverse to the applicant. On the evidence, the applicant was shot in his right foot and his right side. The unchallenged evidence is that when he was going on the wall, his left side was to the police. The defence evidence that he was shot when he was going over the wall, he said so, and his witness Taylor confirmed this, but he had no injury to the left of his body. The injuries he sustained were to the right. The learned trial judge found that he was facing the police when he

was shot and the evidence of the police is that he fired at them, they returned the fire and then he scaled the wall. Questions of fact were for the resolution of the learned trial judge and he resolved the issues adverse to the applicant.

The evidence of the police as to the physical layout of the premises was challenged by the defence. The fact is that on the prosecution and on the defence cases, the applicant ran, he was chased by the police, he was shot at (according to the police evidence in return) and he was injured by the police fire. The police said he was in their line of vision and being in their line of vision he was in the line of shooting. Whatever the physical layout of the premises may have been, they saw him at the time they fired at him and he was in view when he was shot. Accordingly, the physical layout of the premises would not affect this fact and this fact could be resolved by the learned trial judge without resort to a visit to the locus.

On the totality of the evidence before the learned trial judge, his decision on the facts in our view cannot be disturbed. The application for leave to appeal is refused. Sentence to commence from November 1, 1990.