NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 155/2002

COR: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE WALKER, J.A.

R. V. HANIFF MILLER

Norman Wright, Q.C. for Applicant

Terrel Lawrence-Butler for Crown

June 30, July 1, 2003 & March 11, 2005

BINGHAM, J.A.

The applicant was on the 25th July 2002 tried and convicted in the High Court Division of the Gun Court of this Island for the offences of illegal possession of firearm (count 1), illegal possession of ammunition (count 2) and shooting with intent (count 3). He was sentenced to concurrent sentences of ten years imprisonment, ten years imprisonment and fifteen years imprisonment on these counts, respectively.

His application for leave to appeal against his convictions and sentences was considered and refused by the single judge. This application was renewed before the Full Court. Having heard the

submissions of counsel we granted the application for leave to appeal. We treated the application for leave as the hearing of the appeal which was allowed. We quashed the convictions and set aside the sentences. A judgment of acquittal was entered.

At the time of handing down our decision we promised to reduce our reasons into writing. After some delay which is regretted, this is now a fulfillment of that promise.

The Facts – The Prosecution's case

On Thursday the 20th December, 2001 at about 3.15 p.m., two policemen were in an unmarked motor vehicle on mobile patrol on Blake Road in Kingston. The vehicle was proceeding in a northerly direction. According to the driver of the vehicle, Detective Constable Fagan, he saw two men just ahead of them, one on a bicycle and the other on foot. He stopped the car immediately behind the men and shouted "Police!" The cyclist rode across the road to a place where there were some parked cars. He then pulled a firearm, took cover behind the car and started firing shots at the officers. Both policemen returned the fire and the pedestrian fell to the ground dead. The cyclist (accused) ran up Blake Road and on to North Street. During this period the exchange of gun fire was continuing.

The accused was seen scaling a fence at 17 South Camp Road and going behind a grill gate. Detective Constable Fagan summoned

assistance by radio and a large contingent of police arrived on the scene. After a lapse of about five minutes Detective Fagan accompanied by other officers entered the premises and went upstairs to a room where there was a television that was turned on. A search of the room was conducted and under a bed in the room the accused was seen lying down. He was taken out. A further search was made and a gun was found under a pile of dirty clothes. The accused and the firearm were taken downstairs. About ten to fifteen minutes later Detective Sergeant Wilson came to the premises and the accused and the firearm were handed over to him.

Detective Constable Green who was in the police vehicle with Detective Constable Fagan in the role of the observer also testified but was not relied on by the prosecution as a witness to the facts. He was put up for cross examination. Detective Sergeant Wilson who also testified was treated in a similar manner.

The next witness as to facts was Detective Sergeant Simpson from the Bureau of Special Investigations. His role was to investigate and report to the officer in charge of this section of the Constabulary as to the circumstances in which the man who was shot dead came to his demise. He testified to visiting Blake Road shortly after the incident and recovering a number of spent shells. He took these shells along with the firearm which was reported to have been recovered from the room in which the

accused was seen. He also retrieved two other firearms from Detectives Fagan and Green. He took these along with the spent shells to the Forensic Laboratory and handed them over to the Ballistics Expert Carlton Harrisingh.

As to the firearms, when they were examined, tested and comparisons made, the expert found that two expended shells came from the firearm taken from Fagan, two came from Green's firearm and two came from the gun which Fagan testified to recovering from the room where the accused was found. Two were not identified as coming from any of these firearms.

The next witness called for the prosecution was Constable Milton Henry. Following the incident on 20th December 2001, he received certain instructions from Detective Sergeant Wilson and at 4.30 p.m. that same day he swabbed both palms and the back of the accused's hands and placed each swab in separate envelopes which he sealed and sent to the Government Forensic Laboratory. They were subsequently examined by Mrs. Dunbar the Government Analyst and her examination revealed elevated levels of gun powder residue on both palms of the accused's hands and moderate levels of gun powder residue on the back of each hand.

The accused was arrested and charged for the offences.

The Defence Account

The accused gave sworn evidence. He lived at Clovelly Road; he had lived there all his life. He also knows 17 South Camp Road. He had been going there for about a week and was painting the perimeter walls of that premises during that time. He was employed by a contractor named Pablo. They were five persons in all employed at this address doing the painting. 17 South Camp Road had three entrances, one on South Camp Road and two on Blake Road. The only entrance that was open was one of those on Blake Road. The premises consisted of a business place as well as a dwelling. Mechanics who sold appliances and distributed cooking gas carried on business there. One Mr. Robbie was the caretaker who lived upstairs the premises.

At about 3.15 p.m. on the day in question the accused said that he was upstairs in Mr. Robbie's room. He was sitting on the bed watching television. He was wearing his blue overall over his jeans pants and green mesh merino. He saw about four or five policemen came into the room, they were all dressed in blue denim. He was the only person in the room before they came. Mr. Robbie the care taker was with them. He was asked what he was doing there and he answered saying that he was waiting on his pay. It was his lunch time and his co-workers were outside. He had reported for work that day around 8.00 a.m., and had stopped working around 10:15 a.m. After that he and his co-workers

were waiting on their pay to be brought to the worksite. The applicant (accused) said that no gun was found in the room. The first time he saw the shirt which the police testified to taking from the room was in Court at his trial. He denied that Detective Sergeant Wilson was one of the officers who came to the house that day. He denied that he was ever charged for shooting at the police. He was charged with murder of the man who was shot and killed on Blake Road. He denied that any police man had put on plastic gloves and sealed envelopes in his presence. He testified to hearing explosions which he assumed to be the firing of either clappers or gun shots as it was near to Christmas.

Lonie Roberts (Mr. Robbie) the caretaker gave evidence for the defence. He testified that on the day in question about 3.00 p.m. he felt hungry so he went up to his room but there was nothing there for him to eat. He then went downstairs to the gate which opens on to South Camp Road intending to go across to a shop to purchase something to eat. While at the gate he heard a lot of explosions and saw about four or five persons running down the road. He went back over to the house where he saw the applicant sitting on the bed in his room. He was watching television. This was the first time he was seeing the applicant that day. He noticed that the applicant was sweating. He could not recall whether the police took the applicant from the room or from the passage.

On these facts which have been taken from the summation of the learned trial judge sitting as judge of the law and the facts, the matter was reduced in the main to an issue which turned on credibility, and which of the two diametrically opposite accounts the tribunal of fact accepted as the truth. This of course was dependent on an overriding consideration of the manner in which the evidence which emerged for the assessment of the learned trial judge was elicited in the course of the trial. The defence's challenge to the convictions in this matter is directed at the manner in which the trial was conducted.

Learned Queen's Counsel Mr. Norman Wright applied for and was granted leave to file and argue five supplemental grounds of appeal. For the purposes of this judgment it is necessary only to refer to grounds 1 – 3. These read:

> "1. That the Learned Trial Judge throughout the course of the trial conducted the proceedings in a manner which prevented the Appellant from having a fair trial in that (inter alia):
>
> (a) On numerous occasions during the evidence-in-chief and cross-examination of the witnesses for the prosecution, he repeatedly and consistently intervened and obstructed the responses of the witnesses and supplied evidence (i.e. put words into the mouths of the witnesses), which was accepted by the said witnesses for the prosecution and formed a part of the evidence and
> (b) he repeatedly and persistently intervened, interrupted and interpolated comments during the evidence-in-chief and cross-examination of the Appellant and the Appellant's witness,

which were highly prejudicial and unfair to the Appellant and had the effect of preventing the Appellant and his witness from telling their story in their own way.

2. That the Learned Trial Judge erred throughout the course of the trial by making interpolations and interventions, as well as comments, remarks and observations to, of and about Defence Counsel, which were intimidatory and disparaging with the result that she was obstructed from addressing several important issues which arose on the Crown's case and it was further made impossible for Defence Counsel to do her duty in properly presenting or conducting the defence.

3. That the Learned Trial Judge erred in that throughout the course of the trial he descended into the arena and by his interventions and participation in the proceedings became prosecutor and advocate as well as leading witness for the Crown, with the result that the adversarial nature of the entire trial was totally and completely eroded."

These grounds which are inter-related may be considered together. They relate to the manner in which the learned trial judge dealt with the case.

Learned Queen's Counsel submitted that the Attorney-at-law who appeared at the trial for the defence was constantly interrupted in her attempt to properly present the applicant's case. Counsel submitted that as a careful examination of the transcript of the trial shows the learned trial judge descended into the arena. He constantly took over the role of prosecuting counsel by examining the witnesses called to give evidence for the Crown. When the accused (applicant) gave evidence, defence

counsel was interrupted in examining the accused in her own style and the learned judge, by these interruptions, prevented the accused from being able to tell his story in his own way.

Counsel submitted that the question for this Court is whether the learned trial judge went beyond what can be considered as fair given the manner in which he intervened during the trial.

Learned Queen's Counsel relied in support on ***R. v. Hulusi and Purvis*** [1974] 58 Cr. App. Rep. 378 a decision of the Court of Criminal Appeal (England). Having regard to the principles to be extracted from the cited case, he submitted that one needed to ensure that the learned trial judge was at all times fair to counsel and to the accused. The applicant here was not saying that the case for the accused was a weak one. Even if the case for the prosecution was a strong one on the facts, the principles to be applied were the same. The crucial issue was whether the trial was procedurally fair.

Learned Counsel for the prosecution in responding submitted that despite the many interruptions by the learned trial judge there was independent expert evidence which linked the accused (applicant) to the offences charged on the Indictment.

Having examined the transcript of the trial we were firmly of the view that the interruptions which were several in number and went to the material aspects of the trial, were such as went beyond the bounds

permitted to a trial judge. These were not interventions done to clear up ambiguities, or questions asked to enable the judge to make certain that he was making an accurate note of what a witness had said, which, of course, would have been perfectly justifiable.

At this stage it may be necessary to refer to the dictum of Lawton, L.J. in ***R. v. Hulusi and Purvis*** (supra). He said at page 381 of the report:

> "It is now well established how, when complaints of this kind are made about the conduct of a trial judge, this Court should approach the questions which have to be resolved."

The Court then referred to the dictum of Lord Parker of Waddington, C.J. in ***Hamilton*** (an unreported judgment of the Court of Criminal Appeal (England)) delivered on June 9, 1969. There the learned Chief Justice said inter alia:

> "The second and real ground for the appeal in the present case concerns these interventions. Of course it has been recognised always that it is wrong for a judge to descend into the arena and give the impression of acting as advocate. Not only is it wrong but very often a judge can do more harm than leaving it to experienced counsel. Whether his interventions in any case give ground for quashing a conviction is not only a matter of degree, but depends to what the interventions are directed and what their effect may be."

The learned Chief Justice then went on later in his judgment to set out three instances which, if present in a trial, would be sufficient grounds for quashing a conviction resulting from such interruptions. He described these instances as follows:

> "... there when invite the jury to disbelieve the evidence for the defence which is put to the jury in such strong terms that it cannot be cured by the common formula that the facts are for the jury and you, the members of the jury, must disregard anything that I, the judge, may have said with which you disagree.
> The second ground ... is where the interventions have made it really impossible for counsel for the defence to do his or her duty in properly presenting the defence, and thirdly, cases where the interventions have had the effect of preventing the prisoner himself from doing himself justice and telling his story in his own way."

In the instant case the learned trial judge, cast as he was in the role of judge of law and fact, by acting as he did during the course of the trial, placed himself in such an unenviable position as to render any attempt by him to undertake a proper evaluation and assessment of the evidence virtually impossible. Accordingly, the trial process was not fair to the applicant.

In the result it followed that the convictions could not stand. Consequently, they were quashed and the sentences set aside.

On the question whether or not a new trial was to be ordered, we were of the view that the interests of justice would not be served by ordering another trial of the applicant. The present situation was not brought about by the actions of the applicant or his counsel, but by the manner in which the trial was conducted by the learned trial judge.

In the circumstances it would not have been fair to the applicant to submit him to the ordeal of a re-trial. A judgment of acquittal was accordingly entered.