

NMCS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS 90 AND 91/98

**BEFORE: THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE PANTON, J.A.**

**REGINA
v.
HARVEY HARRISON
AND
LEONARD HARRISON**

Lowell Marcus for the applicants

Evan Brown for the Crown

November 22, 1999 and April 14, 2000

PANTON, J.A.

The applicants were convicted on July 24, 1998, by Granville James, J. sitting without a jury in the High Court Division of the Gun Court, on charges of illegal possession of firearm and wounding with intent. They were given concurrent sentences of seven (7) years imprisonment at hard labour on each count. They have challenged their convictions on the following grounds:

- "1. That the case for the prosecution was wrought with discrepancies and inconsistencies which, as a result, could not satisfy the burden of proof required by law.
2. That the learned trial judge failed to direct himself on the nature and quality of the evidence for the

prosecution, whereas had he properly done so, would have resulted in a verdict of not guilty.

3. That the learned trial judge failed to direct himself properly on the evidence given by Lorna Williams, and, had he done so, would have rejected her evidence.
4. That the learned trial judge failed to direct himself on the neatness of the prosecution's case; on the contrary, he made no assessment of the inconsistencies and discrepancies.
5. That the verdict is unreasonable, having regard to the evidence."

Mr. Lowell Marcus, in his attempt to advance what he regarded as the merits of this appeal, concentrated his efforts on the existence of discrepancies and inconsistencies in the evidence presented by the prosecution. He criticized the learned trial judge for not dealing adequately with these features of the prosecution's case, and also for not making a proper assessment of the evidence that was presented.

THE PROSECUTION'S CASE

The applicants, who are brothers, and the complainant Excel Thomas, who is aged 39, grew up in Crawle Rd., Harewood district in the parish of St. Catherine. On November 17, 1997, at about midday, the complainant saw both applicants on a road in the said district. The applicant Leonard Harrison advised him (the complainant) that he had come to kill him; whereupon the latter inquired as to the meaning of that statement. Leonard then pulled a gun from his right trousers pocket, and fired.

It is quite clear that the complainant was injured in his stomach. What caused some confusion at the trial was whether the shots fired numbered two and, if so, whether both found their mark in the body of the complainant.

The applicant Harvey was with Leonard at the time of the shooting, and after the shooting he used a piece of iron to hit the complainant. Harvey and Leonard were a mere five(5) yards apart at the time of the shooting. Both ran after the shooting.

When Leonard fired the first shot, he had a "Dragon" bottle in his hand. According to the prosecution, he then put away the gun and used the bottle to hit the complainant on the left hand. In all this, the complainant had pulled a bread knife at Leonard Harrison after the latter had shot him.

The applicants, when arrested and cautioned, disclaimed involvement in the crimes. Harvey said, "a no me do it," whereas Leonard said, "mi nuh know nothing about it."

The witnesses for the prosecution included Donovan Wright, the step-brother of the complainant Excel Thomas, and Lorna Williams, Wright's common-law wife.

THE DEFENCE

The applicant Harvey Harrison made as brief an unsworn statement as has ever been made. It was no more than a sentence. He simply said he was not at the scene and had nothing more to say.

Leonard Harrison also made an unsworn statement. He said he was in his shop when two men known to him ordered four bottles of stout. He satisfied the order. They left without paying. He flung a bottle which caught one of the men who then drew a gun from his waist. Leonard Harrison ran. The men chased him. He saw the complainant and Donovan Wright coming down the road, the former with something that resembled a gun, the latter with a piece of iron. He (Leonard Harrison) was "sandwiched" by the four men. Death stared him in the face. As he was about to jump

over a gully, he heard the sound of two gunshots. He does not know what happened after that as he jumped over the gully and continued running.

THE ISSUE – CREDIBILITY

In view of the fact that the applicants and the witnesses had known each other for many years, and the applicant Leonard Harrison had placed himself at the scene, the learned trial judge was correct in identifying “credibility” as the important factor in this case. This is how he put it:

“Now, taking all those circumstances into consideration, it is very unlikely that there could have been mistaken identification and as Mr. Finson indicated, it is a question of the credit or credibility of the witness.

In other words, either the witnesses, apart from the investigating officer, the witnesses as to fact, are not telling, either telling deliberate lies or in fact they saw what they said they did.”

DISCREPANCIES AND INCONSISTENCIES

Mr. Marcus submitted that the discrepancies and inconsistencies so weakened the case for the prosecution that the learned trial judge ought to have acquitted the applicants. He referred in particular to the conflicting evidence given by the complainant on the number of shots fired by Leonard Harrison and on whether both had injured him. Mr. Marcus also mentioned what he perceived as a discrepancy in respect of whether a nearby shop operated by Lorna Williams was open. He complained that the learned judge never considered these discrepancies.

Notwithstanding this complaint, an examination of the transcript reveals that after he had specifically identified several discrepancies and inconsistencies in the evidence, the learned judge said:

"Now, where inconsistencies and discrepancies are concerned, the court must look at them carefully and the court should ask itself, are these important, do they go to the root of the case? And if the court is satisfied that the inconsistencies or discrepancies are important and that they do go to the root of the case, then the court asks itself, can the witness be believed over the witness who is inconsistent, can that witness be believed at all as to the credit of the witness?

Now, I have taken into consideration these two inconsistencies and discrepancies and the other inconsistencies that there have been on this case; I consider them important but I consider that they don't go to the root of the case and I look at the totality of the evidence in arriving at a decision in this matter."

Mr. Marcus submitted that once the discrepancies or inconsistencies are important, then they do go to the root of the case. We cannot, in the context of this case, agree with this submission. The learned judge was clearly saying that the discrepancies or inconsistencies were not trifling; however, they were not so important that they went to the root of the case so as to shake its foundation.

The learned judge was obviously right when it is considered that in respect of the number of gunshots, the complainant notwithstanding earlier difficulties in his evidence ended up indicating that there were two gunshots. This was agreed to by the applicant Leonard Harrison who said that he heard two shots. The importance of this discrepancy has therefore fizzled.

WITNESS LORNA WILLIAMS

Miss Williams gave evidence that she had known the applicants for about eight (8) years. She looked through the window of her shop and saw the complainant coming up the road. He called to her. She heard an explosion, saw Leonard pointing a gun at the complainant and saying, " a come mi come fi kill you." According to her,

she was advised by Donovan Wright to close her shop. She obeyed. She also said that Donovan Wright had gone up to the men (the complainant and the applicants) and that the gun was pointed at his neck. She also saw Harvey hit the complainant with a piece of iron.

Miss Williams' evidence was the subject of criticism in the court below as well as in this court. The learned trial judge, in his summation, mentioned the strictures of Mr. Tavares -Finson who appeared for Leonard Harrison. The judge, it cannot be denied, reflected on the alleged shortcomings in her evidence, when compared with the other witnesses.

For example he said:

"Now Mr. Tavares-Finson has said that there was no mention by Lorna Williams the last witness for the prosecution who testified of this accused Harvey Harrison going on the van top but the fact that she omitted to say that this had taken place, it does not follow necessarily that it did not happen. It is a bit of evidence that she did not mention."

He went on to say in respect of Miss Williams:

"And here the defence is asking the court to find that this witness has an axe to grind because of her relationship to the complainant and to Donovan and her relationship towards the witnesses in the case. She said she didn't give a statement to the Police and she said in re-examination that there was no reason for not giving such a statement.

Now, what the defence is saying here, and quite rightly so, is if she saw all that she said she saw, if she witnessed this incident and she knew that the accused were in custody, so she said, and a considerable time elapsed comparatively speaking, and she did not go to the Police and say anything to them in relation to this matter, and this is a matter that I must take into consideration and ask myself the question, is this a witness of afterthought and not a witness who should be believed?"

These extracts clearly demonstrate that the learned judge gave due consideration to the evidence of Miss Williams, and that he accepted her as a witness of truth in respect of the possession of a firearm by the applicant Leonard Harrison and the infliction of injuries by the applicants on the complainant.

This is how he concluded:

"I don't believe what was said in defence of the accused, that it was true. I believe that both of them were seen by the witnesses, by the witness Excel Thomas, by the witness Donovan Wright and by the witness Miss Williams. I believe that Leonard Harrison had a gun and that he used that gun to fire shots at Excel Thomas, and that he shot him."

Having carefully considered the evidence that was before the learned trial judge as well as how he addressed his mind to the issues of credibility and the discrepancies, we agree with the submission of Mr. Evan Brown for the Crown that the applications should be refused. The discrepancies and inconsistencies were of no serious moment, and had no effect on the question of credibility which was the important and vital issue in the case. The evidence that the learned trial judge accepted was cogent. The applicant Leonard Harrison used a firearm to shoot the complainant. He and the other applicant Harvey Harrison were acting together in this attack, and so by virtue of section 20(5) of the Firearms Act both applicants were properly convicted.

The applications are accordingly refused. The sentences are to run from October 23, 1998.