

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 42/92

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A. (AG.)

R. V. MICHAEL BURRELL

Norman Harrison for Applicant

Lancelot Clarke, Jnr. for Crown

19th January & 15th February, 1993

GORDON, J.A.

On 16th April 1992, the applicant was convicted in the High Court Division of the Gun Court sitting in Kingston for illegal possession of firearm, count I, and for shooting with intent at Harry Daley and Richard Smith, counts II and III. He was sentenced to five years imprisonment at hard labour on count I and eight years imprisonment at hard labour each on counts II and III.

On 19th January 1993, we refused the application for leave to appeal and in pursuance of the promise we made, we now place on record our reasons.

Sgt. Harry Daley of the Port Antonio constabulary, acting on information he received, led a party of men which included Detective Constable Richard Smith, to the Princess Club in Port Antonio in Portland. They entered the club from the rear where the applicant was seen with a bag slung over his shoulder. Sgt. Daley and Constable Smith approached him. Sgt. Daley identified himself to the applicant and told him he had received information that Natty Morgan's men were about and that he the applicant filled the description given of one of them. He

requested a search and proceeded to remove the bag from the applicant's shoulder. The applicant was seen to plunge his hand to his waist and remove a pistol, the two policemen took evasive action while the applicant discharged shots at them. They returned the fire and saw the applicant fall. The pistol fell from his grasp and was recovered by Sgt. Daley who removed the magazine and found seven unexpended cartridges therein. The applicant had been shot. He was charged with the offences already mentioned. The pistol recovered was a 9 mm Helwan semi-automatic pistol with an eight shot capacity. Four spent shells were recovered at the scene. Three other men who had been in the club left hurriedly during the shooting.

The applicant gave evidence on oath and said he was seated in the club having a drink when he was approached by four men who had drawn guns in hand. They identified themselves as policemen and said they were going to conduct a search on him. He stood with his back to the counter and arms upraised while the search was conducted. He heard one man exclaim "Look what the bwoy have!" He looked and saw a policeman with two guns in his hand. As the words were spoken he said "I was shot in the leg, simultaneously in both legs." He fell to the ground and other shots were fired at him. He was hit by some of those shots. He was taken to the hospital and on the way a policeman wrapped a gun in a shirt, placed the muzzle on his chest and discharged a bullet at that range into his body. The injuries he sustained were a broken left hand, a broken left leg, injured right leg, wound to the left side of the stomach and a bullet entry wound to the right chest.

He said while he was in the club, he had placed his bag on a poker machine and on entering the club one of the policemen took it up and searched it. He denied having a firearm in his possession and denied pulling it and firing at the police.

Miss Laura Jones gave evidence on behalf of the defence. She said she was in the club gaming at the poker machine. She saw the four policemen enter, one of whom held the applicant in his shirt collar. All declared their identity. They questioned the applicant and searched his bag. She then saw two of the policemen draw their guns and shoot the applicant who fell. They continued shooting at him. She said, "I see they put the gun in his chest and shoot him." He was taken away to the hospital.

Mr. Harrison in a valiant effort challenged the manner in which the learned trial judge resolved inconsistencies in the evidence of the prosecution. He emphasized the impossibility of a gun capable of holding nine shots being found with seven shots after four had been fired therefrom. This arose, he argued, from a discrepancy between the evidence of Sgt. Daley who said the applicant fired two shots, then he said he saw two flashes of fire, while Constable Smith said he heard three or four shots discharged by the applicant.

We find on an overview of the evidence that in the scramble for cover and the concurrent shooting the applicant, Sgt. Daley and Constable Smith all discharged their guns. Four cartridge cases were recovered and the ballistic expert certified that two had been discharged from the exhibit recovered from the applicant. The physical evidence therefore supported the testimony of Sgt. Daley and the learned trial judge accepted his evidence. This decision we think is correct.

Mr. Harrison next challenged as unreliable the evidence of the "prosecution witnesses having regard to admittedly previous inconsistent written statements."

In considering the evidence adduced we see that the challenge was directed to the position of the applicant when the policemen entered the club and saw him. Sgt. Daley said he was standing

at the counter, Constable Smith said he was seated at the counter. In cross-examination Cons. Smith admitted he had written in his statement that the applicant was standing at the counter.

Sgt. Daley in evidence said he was sitting, and then he stood up.

As discrepancies go, these amounted to no more than a storm in a teacup: they were plainly peripheral. The learned trial judge addressed the issue of discrepancies thus:

"I have taken into consideration the discrepancies that have occurred in the case on both sides. As far as the evidence given by the accused man that the firearm was found in the manner in which he said it was and how he received his injuries, I don't accept that as being true at all. The evidence given by the two police officers was to corroborate each other and I have accepted those officers as witnesses of truth. I accept their evidence that having gone into the club, they identified themselves and was about to conduct a search on the accused when he drew a gun from his waist and started firing and the police fired back hitting him. I accept the Crown's case and reject the evidence given by the accused and his witness and find the accused man guilty on the three counts on the indictment as charged."

The learned trial judge had two conflicting versions of the event on which to decide the case. In a careful analysis he accepted the evidence of the prosecution witnesses and rejected that of the defence. In this exercise he had to resolve discrepancies as identified in the prosecution case and as well between the applicant and his witness Miss Jones. Indeed, the most glaring discrepancy arose on the defence where the applicant asserted he was shot in the chest by a policeman while he lay helpless in the motor car at the mercy of the police: Miss Jones on the other hand, said he was shot in the chest as he lay helpless on the floor of the club.

We consider the application is without merit and accordingly refused the same. The sentence of the applicant we directed, was to commence on 16th July, 1992.