JAMAICA

Judgment Book.

IN THE COURT OF APPEAL

HIGH COURT DIVISION OF THE GUN COURT CRIMINAL APPEAL NO. 122/76

BEFORE: THE HON. PRESIDENT
THE HON. MR. JUSTICE WATKINS J.A.
THE HON. MR. JUSTICE ROWE J.A. (Ag.)

REGINA

v

PETER BLAKE

Mr. Richard Small and Mr. Roy Fairclough for the appellant

Mr. Soares for the Crown

April 27 and 28, October 21, 1977

WATKINS J.A.

The appellant was convicted by White J. on July 7, 1976, in the High Court Division of the Gun Court on two counts of a three-count indictment which charged him respectively with illegal possession of a firearm and of ammunition on February 18, 1976. At the end of the case for the Crown and after a no-case submission by Counsel for the appellant, the third count for shooting with intent was withdrawn. After hearing arguments on April 27 and 28 we ordered that the application for leave to appeal be treated as the hearing of the appeal, that the appeal be allowed and that the convictions and sentences be set aside. We promised to put our reasons in writing and now do so.

This appeal raised three points of law, one concerning a matter of evidence and procedure, the other affecting the power of this court to disturb a finding of fact by a trial judge based upon the credit of a witness and the third concerning proof of ammunition.

Evidence led by the prosecution was to the effect that on the night of February 18, 1976 a party of security forces were on foot patrol in the Lyndhurst Road area of St. Andrew. Constables Lawrence and Wilson and Private Barrington Clarke were members of the party.

From Lyndhurst Road they walked north into and up Elgin Road, and having proceeded along this latter road to the vicinity of a club called "Three Sisters" they saw a person who later turned out to be the appellant; coming down Elgin Road and some thirty-five or forty yards away from them. As the appellant saw them he turned about and quickened his steps. The party shouted "Police" whereupon the appellant began to run. As he ran he took a fire-arm from his waist and looking back over his shoulder he discharged it in the direction of the police party. Private Barrington Clarke replied with two shots from his rifle but, the appellant continued to run for a further five or six yards and then fell. The Police party reached where he fell within four or five minutes and there they saw him still clutching in his right hand a weapon which the ballistic expert described as a .25 calibre semi-automatic pistol. In it were three .25 calibre automatic unexpended cartridges (Exh. 3) which in the words of the ballistic expert "were not capable of being fired from a firearm as their primers have deteriorated with age." Apprehended and charged by Constable Wilson, the appellant is said to have said "Officer, beg you a chance."

Save in one most important respect, the case for the appellant was quite the opposite of that of the Crown. The appellant did not give sworn evidence but from the dock he stated, so far as material, that on the night in question he was walking down Elgin Road. As he approached the intersection of this Road with Lyndhurst Road, a taxi filled with members of the Security Forces, including those already named, swiftly came around the intersection into Elgin Road, doors wide open. He was nearly hit down. However, he jumped out of the way and started to run. He heard two explosions behind him. He felt a burning in his right shoulder and he fell to the ground. Soldiers and police began to beat and to kick him about, demanding "where the gun that you have, boy." The soldiers and police carried him up Elgin Road to the club "Three Sisters" where a soldier enquired of the mangeress

if she had seen the appellant there with a gun. She said "no". He next saw a soldier come into the premises of the club saying that he had found a gun. Finally he was carried off to a Command Post in Trench Town where he was again beaten and a soldier stuck him near his eye with a rifle. The appellant all along vehemently denied possession of a firearm or of ammunition on that night or that he discharged a firearm at anyone.

The medical evidence was illuminating. As to gunshot wounds Dr. Dundas said that the appellant had a badly comminuted fracture on the upper third of the right humerus and a comminuted fracture of the outer third of the right clavicle. The entry wound was that in the arm, the exit wound, that in the clavicle, and from all appearances the appellant was shot from the side. In addition to these gunshot wounds the appellant had not only multiple abrasions to his jaws and face, but also a clinical fracture beneath his left eye When Dr. Dundas saw the appellant his left eye was haemorrhaging and to a question from Mr. Fairclough he replied:-

> "I have the conjunctional picture of a man being shot and falling with that, the severity of the injury to the shoulder from pain alone it is more than likely he would have let go what he had in his hand, although all the powers of holding per se within the forearm were not seriously affected, then it is quite unlikely that a man would have had something in his hand and be able to hold on with it after falling with that degree of discomfort that he had experienced."

On this same subject the following exchanges in cross-examination took place between Crown Counsel and the Doctor:-

Mr. Soares: "Doctor, you said that the patient had apparently been shot from the side. It is not possible that he would have been shot, most unlikely, the injury occurred during the course of running because that part of his shoulder would not be behind.

A: I Didn't say could not, I said it is unlikely that he had been shot from behind in the course of running.

Q: Could the injury occur while running if he turned?

Mr. Small: As far as I know there is no evidence in this case in relation to that.

His Lordship: Just a moment. This is what the constable said.

Mr. Small: M'Lord, is this evidence-in-chief?

His Lordship: No, cross-examination. This was in the afternoon session. I am just going to read a long passage. "Immediately before I saw accused pull something from his waist" - his hand would then have been in motion - "he pushed his hand into his waist, pulled something and fired; he ran as far as the intersection of Elgin Road. The soldier fired about two minutes after the man had fired." The mand is not running between these two times when the accused is alleged to have fired and when the soldier was allegedto have fired and when the soldier was alleged to have fired - he turned around and fired and he said 'immediately after that he was running' between the period of time - '..... away from the soldier, I cannot recall the distance.' So apparently there is no evidence there that when he got shot he was actually turning.

Mr. Soares: As Your Lordship pleases.

(To witness) Doctor, you said it is unlikely that one could hold on to an object with the degree of discomfort that would have been suffered, would be felt, after he had been shot if he had fallen, it is not unlikely but it is not impossible?

A: Definitely not."

The only witness who gave evidence for the Crown, apart from the ballistic expert, was Constable Wilson. Private Barrington

Clarke whom count 3 alleged had been shot at could not be located and was not called. In the circumstances Constable Wilson became the central figure around whose credibility the case for the Crown revolved. That case was pregnant with discrepancies and inconsistencies which needed to be explained and clarified before a conclusion unfavourable to the appellant could beyond reasonable doubt be arrived at. There were the injuries other than the gunshot wounds which the appellant had undoubtedly received. The police testimony accounted only for the gunshot wounds. Did the appellant receive the others in the circumstances he had described, namely in the course of being coerced by the police to tell them where the firearm was which he denied that he had. Was it at that time that the appellant had received the injury to his left eye at the instance of the soldier? Next the prosecution's case was that the firearm was found still clutched in the hand of the appellant filled by the bullets of Private Barrington Clarke. The Doctor's evidence was that though this was possible it was most unlikely. Then there was the matter of the sealed envelope containing the exhibits which noted the charges of illegal possession of the firearm and of the ammunition but omitted the charge of shooting at Private Barrington Clarke. Finally there was the matter of the point (intersection of Elgin and Lyndhurst Roads) at which the appellant, struck by bullets discharged by Private Clarke, had fallen, the only matter indeed on which both prosecution and defence had agreed. Whilst this location fitted with the story told by the appellant, it was wholly impossible on the account of the prosecution, as we shall soon see.

In his summation of the case the learned trial judge had this to say:-

> "I have taken into account the submissions made by Mr. Small in pointing out what he says are discrepancies in the witness' evidence that is the witness Police Constable Wilson and also the Court takes into account the inability of the constable to recall distances and I note his estimate of time, from time to time during his evidence, and I have to decide whether these are so vital that they can be

> said to undermine the Crown's case and make it impossible for me to say that I am satisfied so that I feel sure of the guilt of this accused.
>
> I have listened to this constable who has been in the Police Force for two years and seven months. I have watched him and I am satisfied beyond a reasonable doubt that this police constable spoke the truth on the central point of this whole case, one, whether the accused was seen on Elgin Road, two whether the accused ran from the police party, three, wh whether he shot at the police, four, whether a gun was found in his possession and I am satisfied that a gun bearing the three cartridges, despite the discrepancies, were found in the accused possession."

The Learned Trial Judge seemed to have satisfied himself of the truthfulness of Constable Wilson's testimony on the basis of his demeanour in the witness box. The advantages of a trial judge in this regard have been re-iterated throughout the cases, but in Yuill v Yuill (1945) 1 All E.R. 183 at p. 189 Lord Greene gave a timely reminder, however, that "an impression as to the deamonour of a witness ought not to be adopted without testing it against the whole of the evidence of the witness in question." When tested in this manner the evidence of Constable Wilson seems deprived of important elements of acceptability. Wilson had said that having turned up Elgin Road from Lyndhurst Road the Police Party saw the appellant for the first time some 35 to 40 yards ahead of them, that upon seeing the party the appellant ran in the direction from which he was coming, that the Police Party gave chase, that he fired at the Party, ran another four to six yards and fell, having been shot. If this testimony is correct, then both the appellant as he ran and the Police Party as they gave chase, were moving further and further away from the intersection of Elgin Road and Lyndhurst Road. This is a physical fact not requiring proof and incapable of disproof. Yet Constable Wilson testified that the appellant fell at the intersection of Elgin and Lyndhurst Roads where they apprehended him and this startling and inexplicable disclosure excited the following cross-examination in which the Learned trial judge himself was constrained to intervene:-

Defence Counsel: "Where was it that you said you saw the man lying on the ground?

Witness: By Elgin Road.

Defence Counsel: What part of Elgin Road?

Witness: Right by Elgin Road and Lyndhurst Road, sir.

His Lordship: Elgin Road and Lyndhurst Road, lying on Elgin Road, sir or at the intersection?

Witness: At the intersection, sir."

If it is true, as the appellant contends, that he fell, injured by bullets from the Police Party, at the intersection of Elgin and Lyndhurst Roads, then it is manifest that the incident did not happen in the way or in the circumstances meticulously outlined in his evidence by Constable Wilson and this is a conclusion on the evidence to which this Court is at no less advantage in arriving then the court below -, and in so doing, quite independently of the demeanour of the witness. Agreed as it is on both sides that the appellant fell, stricken by the soldier's bullets, at the intersection of the roads, that fact, it only remains to be stated, seems consistent with the appellant's account and wholly irreconcilable with the account of the incident given by Constable Wilson.

It was Constable Wilson who had arrested, and charged the appellant with the three crimes stated in the indictment and it was he who had prepared the exhibits for the examination of the ballistic expert. It was the contention of the Defence that the charge of shooting with intent had been wholly an afterthought, a concoction without foundation in fact and they sought to prove this in three ways, Firstly, Constable Wilson had testified that he had placed the firearm and ammunition taken from the appellant in an envelope which he had sealed and taken to the ballistic expert and had later received from the expert that self-same envelope together with the firearm and ammunition. On this envelope which was received in evidence as Exhibit I notations were made indicating that the contents related

to charges against Peter Blake of illegal possession of firearm and of ammunition. The envelope bore no reference whatever to a charge against the appellant of shooting with intent. Deputy Superintendent Wray, the ballistic expert, testified that in conducting tests on exhibitshe limits himself to tests that are relevant to the charges indicated on the parcelled exhibits and accordingly he made no tests on the firearm in the instant case as to how recently it had been fired. Now, the appellant contends, that if at the time that he had been apprehended he had been charged with shooting with intent such a charge would have almost certainly appeared on the sealed envelope bearing the exhibits in order to ensure that the ballistic expert would undertake all the tests on the firearm that were relevant to the charges brought or about to be brought. Constable Wilson did not do so. Was this because at the material time no real offence of shooting with intent had been committed and so no such charge was then laid? In this connection the undermentioned exchanges between Counsel for the Crown and this constable may not be unenlightening.

Constable:	"I then arrested and charged him.
Crown Counsel:	With what?
Constable:	Illegal possession of firearm.
Crown Counsel	Anything else?
Constable:	Illegal possession of three rounds of ammunition.
Crown Counsel	Anything else?
Constable:	And three, shooting with intent.
Crown Counsel:	Cautioned him?
Constable:	I cautioned him separately on <u>both</u> charges.
Crown Counsel:	You said both charges, you have given us three. You cautioned him in each charge?
Constable:	Yes sir."

Counsel for the appellant sought in yet another way to challenge the veracity of the story told by this Constable that the appel-

lant had shot at them, he placed a document, namely a piece of paper which had on it a clipping from a newspaper, in the hand od Constable Wilson and sought to ask him questions relating thereto, but he was stopped by the learned trial judge. The relevant portion of the record now appears:-

Defence Counsel: "Did he (i.e. Constable Lawrence) make any report, to your knowledge at the Command Post?

Constable Wilson: Yes Sir.

Defence Counsel: I want you to look at this (document passed to witness).

Mr. Soares: Just a minute; you have to show it to me please.

Mr. Small: I beg your pardon, M'Lord.

His Lordship: What is that you are putting to the witness?

Mr. Small: I am putting to him a piece of paper which has on it a clipping from a newspaper.

Mr. Soares: But I have not seen it.

His Lordship: You can't just put a piece of paper to him; you must establish the grounds on which you are putting it to him.

Mr. Small: I don't quite understand Your Lordship what you mean by establishing grounds.

His Lordship: What are you trying to prove by putting that piece of paper? I just want to know what you are doing, what line of approach is that?

Mr. Small: With respect, sir, I submit it is perfectly permissible in cross-examination to place something in the hands of a witness.

His Lordship: What is that relating to, Mr. Small?

Mr, Small: Related to the defence of the accused.

His Lordship: What you have just asked him is whether he made any report to the Police Station or to Command Post and similar questions were asked about Constable Lawrence. Now, he has given you negative answers and as far as he is concerned he gave you a positive answer as far as one aspect of his knowledge of Constable Lawrence's action was concerned.

Mr. Small: It had to do with what the Defence says and I submit that it is perfectly permissible in cross-examination to put a thing into the hand of a witness and to ask -

His Lordship: What is it, Mr. Small, are you saying that something has to do with him, the witness?

Mr. Small: Yes, I am saying it has to do with him.

His Lordship: Mustn't you first establish that thing in evidence before you can put it to him?

Mr. Small: With respect no, sir, I submit it is not necessary, I am not seeking to tender it as evidence.

His Lordship: I understand that you are not seeking to tender it as evidence but you are putting it to him for what purpose then?

Mr. Small: For the purpose of my asking him questions on matters which are relevant to this charge.

His Lordship: No. I don't think you can do it like that. You can't just show a witness a document and then start asking him questions about it; you must establish the relevance to this witness.

Mr. Small: M'Lord, I submit it is perfectly permissible to show a witness a thing then to ask ques-

tions which are relevant to the charge before the Court.

His Lordship: I don't know that I agree with you, Mr. Small, unless you can show some ground for showing this witness that document.

Mr. Small: Very well, as Your Lordship pleases."

Counsel contended before us that this denial by the learned trial judge of his right to cross-examine the witness prejudiced the appellant in that he was deprived of the opportunity of challenging the witness' account by a permissible method of confrontation and that the appellant lost the opportunity of persuading the witness to the appellant's view of the facts or alternately to undermine the general credit ofthe witness either by his demeanour or answers or both in response to the cross-examination that would have followed. It appears from the record that both the learned trial judge and Counsel for the Crown, were mistakenly of the view that Counsel for the appellant was seeking to put to the witness a previous statement that he had given which was contrary, to whatever degree, to the testimony he had given in court, and pursuant to this view were enjoining Defence Counsel to lay the proper evidential basis for such questions. In fact Defence Counsel was seeking to invoke another rule of evidence at common-law of some antiquity and far less commonly met in practice than the one referred to above. Unfortunately Defence Counsel though importuned by the court did not speak on the subject with his usual precision or clarity nor did he seek to ventilate the matter by reference to authoritative cases with the results already adverted to. In Buchall and others v Bullough (1896) 1 Q.B.D. 325, an action for money lent, an insufficiently stamped promissory note purporting to be signed by the defendant and expressed to be given for money lent, was put into the defendant's hands by the plaintiffs' counsel for the purpose of refreshing his memory and obtaining from him, an admission of the loan. It was held that the plaintiffs were entitled to use the note for that purpose notwithstanding the provision of the Stamp

Act 1891 that an instrument not duly stamped "shall not be given in evidence or be available for any purpose whatever." Regina v Duncombe (172) E.R. 535 was a case of obscene libel. A witness who had proved the buying of the book at the defendant's shop, said in cross-examination that he had left a paper with the defendant on which he the witness wrote something. This paper was placed in the witness' hand and he was asked by Defence Counsel "Look at that paper and tell me whether you did not order Nos. 3 and 4 of the Magazine, saying thay you had No.2" to which the witness replied "I did not." Counsel for the Crown demanded to see the paper but Defence Counsel replied that he had no right to. In his ruling on the matter Denman C.J. said "I take the distinction to be this, if a paper is put into a witness' hand, and it leads to anything, that is, if anything comes of the questions founded upon it, the opposite counsel has a right to see the paper, and re-examine upon it, but if the thing misses entirely, and nothing comes of it, the opposite counsel has no right to look at it." In R v Mullarkey (1919) 14 C.A.R. p. 44 it was held that if counsel cross-examines a doctor on the contents of a medical report which the latter has seen but did not make he lets in that report as evidence, provided it is properly identified as referring either to the defendant or the sufferer whose state is the subject of inquiry, In R v Gillespie et al (1967) 51 C.A.R. 172 the defendants were convicted of larceny, falsification of accounts and forgery. The defendants were employed in a shop in the conduct of the business of which certain documents were prepared by them whilst certain other related documents were prepared by others. Both sets of documents were put to the defendants in cross-examination, in relation to the latter of which it was held "If a document written by another person is put to a defendant in cross-examination and the defendant accepts what the document purports to record as true, the contents of the document become evidence against him; but if the defendant refuses to accept as true what the document purports to record, its contents cannot be evidence against him." That what counsel for the appellant

sought to do is founded in authority there can be no doubt. He informed this Court that the newspaper clipping carried the following information:-

(i) an allegation of a robbery by two gunmen who held up a taxi-cab driven by one Richard Barrett;

(ii) that the gunmen were challenged by the police and that one was shot;

(iii) that an automatic pistol was taken from one of the gunmen;

(iv) that the other gunman escaped; and

(v) that the story did not contain any allegation of a shooting at anyone by any of the gunmen.

The alleged contents of the newspaper clipping are referred to because it is necessary to observe that they leave uncertain what was the locale of the incident and as to whether this was indeed a report on the incident in the instant case. Whatever may be the truthfulness or otherwise of this newspaper clipping there can be little doubt that the denial of counsel of his right to solicit answers from the witness on it as it was put into his hand deprived his client of the right to a fair trial of his case, however, unintentional and mistaken or misled the court was. It is neither necessary nor desirable to speculate what answers would have been elicited from the witness. It is enough to say that the court deprived itself of a vehicle of testing the credit of the witness on an issue in the case on the outcome of which the guilt or innocence of the appellant largely depended.

Taking all these matters into consideration - and in particular the hopeless and inexplicable inconsistency in the arresting Constable's version as to the movements of the appellant - several chains away from the intersection of Lyndhurst and Elgin Roads when he is shot, yet he runs another 5 or 6 yards further away from that intersection and falls in it - we experienced no hesita-

tion in coming to the view that if the Court below had properly advised itself of the facts it could not but have found that the case for the Crown had not been established beyond reasonable doubt. In the light of the above we do not find it necessary to come to any conclusion on the arguments raised by Mr. Fairclough that in the light of the ballistic expert's evidence on the state of the ammunition the Crown had failed to prove that exhibit 3 was ammunition within the statutory definition of same.

Accordingly we allowed the appeal quashed the convictions and set aside the sentences.