JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 61/2005

BEFORE: THE HON. MR. JUSTICE HARRISON, P.
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE MARSH, J.A. (Ag.)

R v ANDRAE DAVIDSON

Miss Althea McBean for the appellant
Miss Natalie Brooks, Crown Counsel for the Crown

5th October 2006 and 14th December 2007

SMITH, J.A.

On the 14th April, 2005, the applicant, Andrae Davidson, was convicted in the High Court Division of the Gun Court for the parish of St. James of illegal possession of firearm and of assaulting Derrick Sharpe.

On the 5th October, 2006, we treated the hearing of his application for leave to appeal as the hearing of the appeal. We allowed the appeal, quashed the convictions, set aside the sentences and entered judgment and verdicts of acquittal. We then gave oral reasons for our judgment. As promised, we now put the oral reasons in writing.

At about 6:30 p.m. on the 22nd of January 2005, Derrick Sharpe, at the request of his wife, transported his wife's daughter, Zahria Rhoden and her two children from the appellant's house at Water Works in the parish

of Westmoreland, where she lived with the appellant, to his (Sharpe's) house, half a mile away.

The complainant, Sharpe, thereafter took Miss Rhoden to the Whithorn Police Station, where she made a report against the appellant. Two police officers accompanied them to the appellant's house. Miss Rhoden went inside the house with the police officers. Mr. Sharpe did not go further than the gate. Subsequently, he saw Miss Rhoden run from the house crying and the appellant come on to the verandah, quarrelling. Miss Rhoden took up food stuff and clothing, placed them in the car, and the complainant drove her to his house.

At about 9:00 p.m. that night the appellant drove his motor vehicle unto the complainant's premises, went to the front door of the house and said that "the police sent him to defend his children." The appellant began to beat on the door with his hand. The complainant told the appellant to leave. He did not. The complainant, with two stones in his hands confronted the appellant and told him to leave or he would hit him with the stones. The appellant pulled a firearm from the right side of his waist, pointed it at the complainant and said, "You want a shoot you." The complainant, then arms length from the appellant, was fearful. Two policemen arrived on the scene. The appellant was then going back to his car. The complainant "screamed out that the man had a firearm" and wanted to shoot him, the complainant. The appellant got into his car and

drove off down the road. The police officers who had stopped at premises in front of the complainant, also left. The appellant returned later and cursed the complainant's wife and then left. The following morning a report was made to the police.

The police searched the home of the appellant. No gun was found. The appellant was apprehended for the offences, and after caution, denied that he had a gun.

At the trial the appellant gave evidence in his defence. He agreed that he went to the complainant's home on the night in question, knocked on the door and called out to Miss Rhoden, the mother of his children. The complainant ordered him to leave. He refused to do so, saying that he would not leave until he had gotten his infant son. The police came and he left. He admitted that he returned and that he did curse the family. He denied that he had a firearm and further denied that he pointed a firearm at the complainant.

Miss Zahria Rhoden was called as a witness for the defence. She testified that the appellant was on the verandah of the complainant's house on that night and that she saw him and the complainant from where she was inside the house. The appellant was "beating on the door." She did not see him with a gun. Her statement, which she had given to the police, was put to her in cross-examination, and she admitted that she did say that the appellant had a gun which he pointed at the

complainant, but that when she said so, she had lied. Sebastian Sharpe, her brother and the son of the complainant, also gave evidence. He said that he saw no gun.

Miss McBean for the appellant argued three grounds of appeal, namely:

> (1) "The verdict was unreasonable having regard to the evidence.
>
> (2) The learned trial judge erred in accepting as the truth the contents of a statement she, Miss Rhoden, had given to the police.
>
> (3) The sentence was excessive."

Ground 1

Miss McBean argued that the complainant's evidence was that the appellant pointed a gun at him. He shouted that fact to the policemen who came upon the scene. The policemen did not search the appellant, but instead allowed him to drive away. The complainant's son, Sebastian, gave evidence against his father and the evidence of the appellant's girlfriend supported the appellant. The credibility of the complainant was in question. The learned trial judge should have rejected the prosecution's case.

Ground 2

Miss McBean complained that the learned trial judge erred in treating the contents of Rhoden's statement to the police as evidence of the truth which the learned trial judge could rely on. The learned trial

judge was wrong to find that Rhoden's statement was true and that it strengthened the prosecution's case. That finding prejudiced the learned trial judge's mind, sitting as a jury. Counsel relied on ***R v Talbot & Kerr*** (1974) 12 J.L.R. 1667.

Ground 3

The sentence was excessive in that the learned trial judge employed the wrong principles in sentencing. The learned trial judge was wrong in using the statement of the witness Rhoden in the sentencing process and holding, as paramount, the sending of a message to members of the pubic instead of dealing with the character of the individual offender and the circumstances of the case.

Crown Counsel, Miss Brooks, was called upon to answer the complaint in Ground 2. Counsel for the prosecution conceded that the learned trial judge was wrong to treat the previous statement of the witness as evidence of the truth. However, she contended that the complainant's evidence was sufficient to uphold the conviction. There was therefore no miscarriage of justice. She asked the Court to apply the proviso to Section 14 of the Judicature Appellate Jurisdiction Act.

We agree with the concession made by Crown Counsel. Inconsistency goes to credit. Generally, a former inconsistent statement cannot be treated as evidence of the truth of its contents (see ***R v Oneil*** [1969] Cr. L.R. 260.

The contents of such a statement can only be treated as evidence of the truth if the witness, when giving evidence, says that the statement contains the truth. Should the proviso referred to above be applied?

The proviso to section 14 of the Act reads:

> "Provided that the Court may, notwithstanding that they are of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

In our opinion the test laid down by the House of Lords in ***Stirland v D.P.P*** [1944] A.C. 315 is applicable to this case.

The proposition is as follows:

> "Where evidence has been wrongly admitted or excluded, this will render the conviction unsafe unless the Court of Appeal is satisfied that had the error not been made the only reasonable and proper verdict would nevertheless have been one of guilty."

Now the sole issue in this case was credibility. The learned trial judge had to decide whom to believe. At page 200 of the transcript the judge said:

> "I reject the evidence of the accused and his witnesses as an attempt to deceive the Court. I find that the complainant spoke truthfully, as also Miss Rhoden when she first spoke to the police. In the final analysis, the evidence of the accused and his witnesses only strengthen the prosecution's case."

The learned judge found, as a fact, that Miss Rhoden spoke the truth when she first spoke to the police. The statement referred to was a

previous inconsistent statement which supported the evidence of the complainant, Mr. Sharpe. The evidence of Miss Rhoden was that what was in the statement was not the truth. In our view, if the learned judge had correctly directed herself as to the evidential value of Miss Rhoden's out-of-court statement, it is highly probable that she would not have come to the conclusion that Mr. Sharpe was a credible witness. We were of the view that the submissions of Miss McBean on Count 1 as regards the credibility of the complainant were relevant to her contention in respect of Count 2.

We were not satisfied that had the error not been made, the only reasonable and proper verdict would nevertheless have been one of guilty.

In the circumstances, we allowed the appeal and made the order stated at the outset.