CRIMINAL LAW — Appeal from Gun Court ① Illegal possession of fire-arm ② Robbery with aggravation. whether trial judge improperly received evidence of a statement to the prejudice of the applicant. Whether fundamental discrepancy in evidence of prosecution witness and, if so whether this militated against conviction.

APPLICATION for leave to JAMAICA appeal refused.

No case referred to.

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 137/87

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

REGINA

VS.

ANTHONY BRYAN

Dr. Winston McCalla for applicant

Miss V. Bennett & Miss A. McKain for the Crown

May 30, 1988

CAREY, J.A.:

This applicant, Anthony Bryan, stood his trial in the High Court Division of the Gun Court on the 14th of August, 1987 for the offences of illegal possession of firearm and robbery with aggravation. Upon conviction before Panton, J., sitting alone, he was sentenced to concurrent terms of 5 years and 7 years imprisonment at hard labour.

This morning before us, Dr. McCalla has sought to argue that the learned judge improperly received evidence of a statement to the prejudice of the applicant, and secondly, that because there was a fundamental discrepancy in the evidence of Jean Carr, as compared to the evidence of a report in a station diary, that militated against the conviction because the learned trial judge ought not to have accepted her evidence wholly.

The facts, of which a summary would be adequate, are these: On the night of the 6th of February, 1986, Miss Jean Carr

was in bed asleep when she was awakened by some noise from a window and when she looked out she saw this applicant coming off a telephone pole which is near her house; she found that the telephone was dead. She opened the door to her living room. When she looked out, she saw five men, among whom she recognised this applicant. These men were all armed with guns. She had known the applicant for over 12 years. The men demanded entrance; they said that she should open the door but she declined to do so. They forced the grille and came in, locked her in the bathroom and proceeded to remove a vast quantity of her jewellery and other electrical appliances. She reported the matter to the police and subsequently this applicant was arrested. He did not deny in his defence that he knew the victim, but said that this was a matter of spite that had constrained her to accuse him of the offence.

Insofar as the grounds which we have already noticed are concerned, we propose to deal first with the second point which was raised. Dr. McCalla endeavoured and in fact did succeed, in putting in evidence, a station diary. The diary was produced by a police officer who himself had received the report from Miss Carr; and what learned counsel attempted to do was to use that report in the diary as constituting a previous statement made by Miss Carr and endeavoured then to show that while she had said to the police that she had given names, no such names were recorded in the station diary. Dr. McCalla had to concede that the station diary, not being evidence of the truth of its contents, could only be used for the purpose of refreshing the memory of the police officer himself and for no other purpose. It plainly could not be used as being tantamount to a previous statement made by Miss Carr; she not having made the diary her own document. That we think should be enough to dispose of that point.

Another point being made by Dr. McCalla was that the learned trial judge erred when he looked at the police statement made by Miss Carr, when it had not been tendered in evidence. It appears

that in the course of the trial, Dr. McCalla had referred to the police statement made by Miss Carr and endeavoured to contrast it with the note of a report made by Miss Carr to the police and recorded in a police diary. It is also plain that in the course of his address, that was made into a very important point by Dr. McCalla. The following colloquy then followed at pages 57-58:

"His Lordship: Dr. McCalla, you made reference to a statement. You are saying that there are contradictions based on the evidence?

Dr. McCalla: Yes.

His Lordship: You really did not put in any evidence.

Dr. MaCalla: I only put in the report what I said is the contradictions between her evidence in court. What I asked sir, was, did she at the Rockfort Police Station make a report: she agreed that she made a report. I asked her further, was it on the 6th, she agreed. I asked her if in her report did she mention seven or five men, she said five, and I asked her about the sixth time if she had mentioned anybody's name, she said yes. I asked, did you mention the name of Anthony Bryan at the Rockfort Police Station, she said she did. That is what I am saying M'Lord.

His Lordship: Yes. Although the statement is not in evidence you are saying that I should look at it though?

Dr. McCalla: I am saying you should look at it and we have the author, the person who made that report.

His Lordship: I am not dealing with entry, her statement.

Dr. McCalla: When she makes the statement in the box.

"His Lordship: What I am dealing with is her statement, her written statement. Are you saying that her written statement reveals some contradictions or inconsistency with what she said.

Dr. McCalla: What I am dealing...

His Lordship: Or what has happened?

Dr. McCalla: I am just dealing with that what I put to her. What I put to her was that a report was made to the Rockfort Police and what I put to her was that she did not say certain things to the Police. She specifically said that she made those statements.

His Lordship: Alright, I understand. I am going to look at the statement although it is not in evidence, but because of the nature in which the defence is conducted I think I ought to look at the statement as well. Do you have it here?

Dr. McCalla: May I say - well, what I am dealing with, just to make it clear; in her verbal evidence it contains a fundamental contradiction in relation to names.

His Lordship: In other words, she never told the Police names but she is telling us.

Dr. McCalla: And in her evidence itself she said that the first report she had made was to the Rockfort Police and some days later she made a report to the Flying Squad.

His Lordship: Yes.

Dr. McCalla: May I just mention this M'Lord, if you are looking at that statement there was clearly an area which I drew to Your Lordship's attention, but not relying on the statement per se.

"Dr. McCalla: In her description of Mattis she gave a full description and I am asking if she could ever have mistaken Mattis. May I just add two points M'Lord. That of course was not evidence what I had put to her M'Lord and I made it very clear 'Where did you make your first report, what was the circumstances of your first report, what did you do at the time. According to her she knew Bryan very well. Your Lordship will recall I was not dealing with any Flying Squad report, only report at Rockfort and in regard to that she was asked specifically, did she name the accused in that report or did she give any other names and she expressly stated that she did name the accused in that report.

His Lordship: Yes, I understand.

Dr. McCalla: So it is really a comparison of her evidence and the station diary entry which I was asking the court to review."

Now it is plain that learned counsel invited the judge to look at the statement. Indeed, we do not see how he could have done otherwise although counsel chose not to tender the statement but to address comments based on it. It cannot lie in his mouth at this point to put forward such an argument.

We are of the view that having regard to the conduct of the case, the trial judge in the interest of a fair trial was obliged to call for and look at the statement. Contrary to the suggestion of Dr. McCalla, that statement was never used by the judge to the prejudice of the applicant but to assess the validity of the arguments being put forward by learned counsel on behalf of his client, the applicant. There was nothing in the summation of the learned trial judge which showed that looking at the statement provided proof of other

than what the witness had testified. The point is not only without merit, it is mischievous.

Accordingly, we are not persuaded that the learned trial judge in any way acted improperly: his conduct was, without doubt, correct and demonstrated the concern of the judge for a fair trial.

The application for leave to appeal is refused. The sentence will run from the date of conviction.