NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 68/2008

BEFORE: **THE HON. MR. JUSTICE COOKE, J.A.**
THE HON. MR. JUSTICE MORRISON, J.A.
THE HON. MISS JUSTICE PHILLIPS, J.A.

REGINA v HANSEL LYNCH

Terrence Ballantyne for the Applicant.

Ms. Natalee Ebanks for the Crown.

November 16 and 19, 2009.

COOKE, J.A.

1. This renewed application for leave to appeal concerns whether or not the learned trial judge was in error in finding the applicant guilty in his application of Section 20 (5) (b) of the Firearms Act. This reads:

> "(5). In any prosecution for an offence under this section –
>
> (a) ...
>
> (b) any person who is proved to have in his possession or under his control any vehicle or other thing in or on which is found any firearm shall, in the absence of a reasonable explanation, be deemed to have in his possession such firearm."

2. The case presented by the prosecution was within a narrow compass. At about 10:00 p.m. on the 29th January 2008, a police motorized patrol stopped a Toyota Corolla motor car along the Hatfield main road in the parish of Manchester. The applicant was the driver. There were two other male persons in the car, one of whom was in front beside the driver and the other person was in the rear. The prosecution led evidence that on the rear seat of the car were two firearms (pistols) and one hundred and twenty (120) rounds of 9mm cartridges. There were two cases with fifty (50) 9mm cartridges each and a black scandal bag with twenty (20 rounds). When confronted with the incriminating items the applicant is alleged to have said:

> "a Westmoreland we a come from fi drop off."

All three occupants of the car were arrested and jointly charged and subsequently tried before Pusey J., in the Manchester Circuit Court, when on the 21st May 2008 the applicant was convicted on two counts for illegal possession of firearm and illegal possession of ammunition respectively. He was sentenced to 5 years at hard labour on each count with such sentences to run concurrently. The other two jointly indicted accused were acquitted.

3. At his trial the applicant made an unsworn statement. In his statement he sought to provide "a reasonable explanation" within the context of Section 20 (5) (b) of the Firearms Act. The relevant part of that statement is as follows:

> "I turned on the roof light for him, he searched the back of the vehicle, the back compartment of the vehicle, then removed the backseat of the vehicle.

> Upon removing the backseat of the vehicle, he shout out that there he saw gun under the backseat of the vehicle. He asked me about the gun that he found under the backseat of the vehicle, that is where I indicated to him that the car was a rental and I had no knowledge that there was weapon or anything in, of the vehicle. Your Honour, at no point I made any admission to any of the policemen, I give any statement that I have any knowledge or any information about what was found into the vehicle. They continue to search the vehicle and question and so forth and then they lock, they handcuff, and take us to the Mandeville Police Station. That is what happened. That's my statement, Your Honour."

Essentially, in his unsworn statement the explanation was based on untested assertions:

(i) The statement attributed to him pertaining to carrying the firearms and ammunition from Westmoreland was a fabrication;

(ii) The car in his possession was rented;

(iii) The firearms and ammunition were found under the backseat of the vehicle; and

(iv) He had no knowledge of their presence in the car.

4. In dealing with the proffered explanation, this is what the learned trial judge said: -

> "In order to meet the charge, based, particularly, on Section 20, Subsection (5) of The Firearm's Act, Mr. Lynch offered an explanation that he had rented the motor vehicle, and that he had no knowledge of firearms being in the motor vehicle. It is my view that that explanation was not, is not sufficient as is required by law, that is not a reasonable explanation, nor that he has not given any explanation of his custody of the car and his dealing with the car, how

> long he had the car, where he had that car, in what circumstances he got the car, there is no explanation of that at all. And so, therefore, in those circumstances, I don't think he has discharged the burden, which the law has put upon him in these circumstances."

5. The applicant filed an original ground of appeal that:

> "The verdict is unreasonable and cannot be supported by the evidence."

Permission was granted to argue a supplemental ground which was: -

> "That bearing in mind the Learned Trial Judge's findings at page **321 line 15** and following, page **322 lines 2 to 5**, page **322 lines 18 to 23** and page **323 lines 3 to 7** the explanation given by the Applicant was reasonable in all the circumstances. And the learned trial Judge erred when he concluded that the appellant's explanation was not sufficient, as is required by law, that is not a reasonable explanation."

Both grounds were argued together.

6. At page 321 line 15 the learned judge stated that it was an important factor as to where the firearms were found in the vehicle. At page 322 lines 2 to 5, the learned trial judge said:

> "However, I cannot be sure beyond a reasonable doubt, based on the evidence of the witnesses, where in the vehicle the firearms were found."

On page 322 lines 18 to 23 the learned trial judge said:

> "I don't think I can, based on the state of on (sic) the evidence rely strongly on the statement which the accused, in fact both Lynch and Theogene (one of the

> co-accused) made according to the officers at the scene at Hatfield."

On page 323 lines 3 to 7 the learned trial judge repeated what he said at page 322 lines 2 to 5. In our view these comments by the learned trial judge provided in his view the basis on which he entered verdict of acquittals against both co-accused. As regards the applicant the learned trial judge found as a fact on page 322 lines 6 to 10 that the applicant was in control of the motor vehicle and further, that the firearms (and ammunition) were found in the vehicle. Those findings brought into operation Section 20 (5) (b) of the Firearms Act.

7. It was argued that the learned judge's reasons for not accepting the explanation given in the unsworn statement of the applicant as reasonable, was wrong. It was submitted that the concerns of the judge about the rental of the motor car pertained to the custody of the car and not to the critical question as to whether he had knowledge of the contents of the car. We do not agree that these issues can be so dissected as to make each discrete and therefore distinctly unrelated. Assertions, particularly if they pertain to the state of mind of he who asserts will most likely be insufficient unless there are attendant circumstances which tend to give credence to them. In this case, there was a bald assertion posited in an unsworn statement that he had no knowledge of the prohibited items. It cannot be said that the reasoning of the learned trial judge was plainly wrong.

8. We endorse the statement made in this court in **R v. Barrington Smith and Robert Jobson** (1981) 18 JLR 404 at p. 403, where Carberry J.A., in delivering the judgment of the court, said:

> "Section 20 subsection (5) (b) of the Firearms Act imposes on any person who is proved to have in his possession or under his control any vehicle or other thing in or on which is found any firearm the onus of providing a *reasonable explanation* failing which he should be deemed to have possession of a firearm. It was conceded in argument by Mr. Ramsay that a "*reasonable explanation*" must be one which either convinces the trial judge or at least raises a reasonable doubt in his mind. From the reasons for judgment given it is clear the explanation in this case did not do either of these things. It is possible that a different judge might have reached a different conclusion and might have accepted the explanation or found that it raised a reasonable doubt but that possibility would not *per se* justify us in upsetting this conviction. The learned trial judge here saw and heard the witnesses. He rejected the explanation and it raised no reasonable doubt in his mind. To upset his conclusion, it must I think be established that he acted on some wrong principle of law, or misapprehended the facts, or for these or other reasons this Court must be convinced that the judge's finding was clearly wrong."

9. We have treated the application for leave to appeal as the hearing of the appeal. For the reasons given the appeal is dismissed, the convictions and sentences are affirmed. The merciful sentences imposed are to commence 21st August, 2008.