C.A - CRIMINAL LAW Appeal from Gun Court ① Unlawful possession of firearm ② robbery with aggravation — Inconsistency between evidence given by witness to Court and statement to police material in a vital aspect of case and inconsistency not explained. Appeals allowed — Convictions quashed. Reasons for not ordering new trial.

JAMAICA

IN THE COURT OF APPEAL

v/comp

SUPREME COURT CRIMINAL APPEAL NOS. 51 & 52 OF 1986

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A. (AG.)

REGINA

VS.

NOEL WILLIAMS
JOSEPH CARTER

Mr. K.D. Knight and Mr. C.J. Mitchell for the applicants

Miss Y. Sibble for the Crown

April 9, 10; and June 3, 1987

KERR J.A.:

These applicants for leave to appeal were convicted in the Gun Court by Bingham J. sitting without a jury of the offences of unlawful possession of a firearm and robbery with aggravation and each was sentenced for each offence - ten years imprisonment at hard labour - the sentences to run concurrently.

On the fourth floor of Block 'E' of the Apartment Buildings in Wilton Gardens in the parish of St. Andrew in September 1984, there lived Sydney Grant, a watchman, his two daughters and grand-children. His common-law wife, Cynthia Johnson lived next door. On the night of the 11th of that month, while watching the midnight show on his T.V. he fell asleep. He was awakened by gun-shots to find that he had been shot in the left side of his face and left shoulder. He saw two men - one behind the other, going out through the door; their backs were to him. After they left he went out on the verandah in time to see six men leaving the yard. When he awoke he saw Cynthia Johnson standing by the bathroom door. There

was electric light on in the kitchen. Cynthia Johnson in evidence said that that night she was watching T.V. with Grant who fell asleep. The daughters and grand-children were asleep. About 12:30 a.m. she saw the shadow of a man entered from the verandah through an open door. She turned and saw two men and to her query one said: "Cool daughter" but thinking one was Mr. Grant's son she was not afraid and continued watching the T.V. when she heard a click and turning to where the men were she saw one of them fire two shots at Grant and then left. By the light from the kitchen she saw the face of the man who fired the shot. He had a silver looking gun. She did not know him before. She later heard his name was 'Joe Dog'. She identified him as the applicant Carter. She said she did not recognize the other man because he was behind the man who fired the shot. She did not know him before but pointed out the applicant Williams at a parade held at the Police Station as the other man. She denied that she pointed him out as the man who fired the shot. She later that morning found a bullet in the apartment and handed it in to the police. She was cross-examined to the effect that from her statement to the police she was unable to recognize the applicant Williams.

Of her evidence in respect of Carter the learned trial judge said:

> "The next time she saw him since the incident was at Court. Now, the evidence of this witness, even if I were to believe, is a matter of no suspect, suspect insofar as the purported identification of the accused Carter is concerned because based on her evidence that she did not know him before the night in question, the proper thing to have done was for the identification parade to have been held in respect of Carter and for the witness' power of recollection to be properly tested as to the person who she purports to identify as Carter. That was not done so I have to caution myself that it is dangerous to convict Carter on the unsupported evidence of this witness, ..."

For such supporting evidence he relied on the evidence of Winston Morris, a welder, who at the time lived in an apartment on the third floor of Building 'G' which is across from Building 'E.' In evidence he said that that night as he was about to go to bed he heard

two shots and he ran to his verandah and looking towards Building 'E' - he saw two men running from under the verandah of Building 'E'. He recognized the two men - Carter known to him as 'Joe Dog' and Williams whom he knew as 'Mark'. He knew both men for four to five years. He use to see them both quite often at Salt Lane. He attended an identification parade on 11th October, 1984 and pointed out 'Mark' as one of the men. When he saw the applicants running he also saw a man known as 'Bidia' in the mango tree with a long gun. As to the lighting he had when adverted by the question: "Out in the yard was bright or dark?" He answered: "Bright, the street light come to the yard". The light post, as he pointed out, was about four yards away. He saw the faces of both men as they ran from the verandah. The applicant Carter had a small .38 automatic pistol. The other man had a small gun but he could not make out the type.

The cross-examination centered around inconsistencies between his evidence in Court and the statement he gave to the police. It was suggested that in his statement to the police he said: "I got up and went on my verandah, I looked across Building 'E' where I saw 'Joe Dog' and 'Sour youth' standing in front of the building talking." His denial when pressed by the judge was: "I didn't tell him I saw them talking."

When his attention was drawn to the particular part of his statement he denied so telling the police. At this stage one would have expected the statement to be tendered in evidence or better still the police officer who took it would subsequently be called to contradict or confront the witness. Instead he was then challenged on another point thus:

> "HIS LORDSHIP: Did you tell the police that in your statement?
>
> MR. MORRIS: No, sir.
>
> MR. MITCHELL: Okay, so what is written there in your statement is not correct?
>
> A: 'Sour youth'!
>
> Q: Mr. Morris, what the Registrar has just read to you not correct?
>
> A: No, sir.

" Q: Did you Mr. Morris in that same statement that you gave to the police, did you say that, 'I saw Mark standing to the eastern corner of the building'?

A: Yes My lord.

Q: You told that to the police?

A: Yes, sir.

Q: Understand me, that is when you rushed out to your verandah you saw Mark standing to the eastern corner of the building, you told the police that?

A: Yes, sir.

Q: So tell me this, how is it you told the Court now that when you rushed out you saw two men running from under the first floor and one of them later turned out to be Mark?

A: I saw the two of them."

Thereafter both judge and defence attorney alternated in questioning the witness, sometimes interrupting the witness and at times not ad idem as to the answer sought. In the end the witness was never given an opportunity to give an explanation. Defence attorney was permitted to revert to the first challenge with an inaccurate premise thus:

"Q So tell me, you already admitted you can read and write and the police read the statement to you when you gave your statement, so why when the police read to you the part about when you came out on your verandah you saw 'Joe Dog' and 'Sour Youth' standing in front of the building talking, why didn't you correct the police, why didn't you tell him no, is not so it go, why didn't you stop him?

A: Because he was writing I did not see how he was spelling it.

Q: Don't matter how it spells. You already admitted that you can read and write. You gave a statement the police read it back to you, nothing is wrong with your hearing, you can hear good and your eyesight is good?

A: Yes, sir.

"Q: When the police read that part to you about 'Joe Dog' and 'Sour Youth' standing in front of the building talking, why didn't you stop them and say, no man, is not so, why didn't you stop the police?

A: Through when I was telling him the statement and calling the name so fast he was just writing.

Q: He read it afterwards, that is the point I am making, he read it to you afterwards and you never stopped him and corrected him. I am suggesting, sir, that you do not know what happened, you do not know who was there and you do not know what happened.

A: I saw the man dem."

There was no re-examination by Crown Counsel.

At the end of the Crown's case a no-case submission was made on the basis that the witnesses for the prosecution were so manifestly unreliable that no reasonable jury properly directed would convict on their evidence. It was submitted in effect that the evidence of Cynthia Johnson was hopelessly eroded by the cross-examination and Morris was discredited by the serious material inconsistencies between his statement to the police and his evidence in Court. In rejecting the submissions the learned trial judge said:

"I agree that there is a discrepancy but there is a case to answer."

In answer both applicants gave sworn testimony to the effect that they were not in those premises that night and knew nothing about the shooting of Grant.

Williams in cross-examination said he could not clearly remember where he was around mid-night on 11th September, 1984 but he was at that date living at 32 Princess Street at his uncle's place. He knew Morris but not by name. He had been seeing him for about five to six years. He knew Wilton Gardens Apartment and Buildings 'E' and 'G' but he did not know the occupants. His sister for whom he used to sell foreign goods is

Winsome Williams - he was also a carpenter's helper on the Seabed Authority building. He knew 'Sour Youth' and Carter as 'Joe Dog'. He is called 'Mark'. He has been with Carter at Salt Lane but not 'Sour Youth'.

Carter in cross-examination admits knowing Williams for four to five years. They moved together in the Salt Lane, Tivoli Gardens, Spanish Town Road area. He did not know Morris before he came to Court. He did not know Building 'E' or 'G' at Wilton Gardens. He knew 'Sour Youth' for about three months at Salt Lane.

Before us the following grounds of appeal were argued:

> "1. (a) The learned Trial Judge failed to properly assess all the evidence related to the identification of the applicants thereby denying them a real chance of acquittal.
>
> (b) The learned Trial Judge failed to properly assess the evidence of the witness Winston Morris as it related to both identification and participation by the applicants."

In support Mr. Knight argued that the judge did not give due consideration to the inconsistencies in Morris' evidence and he erred when he held (i) that Morris' evidence was "not shaken as to the sequence of events" and (ii) that his evidence that he saw the two applicants running from underneath the verandah had not been shaken. In passing, he criticized Morris' evidence of being able to describe the gun in Carter's hand as highly improbable and ought not to have been accepted.

It is clear from his full review of Morris' evidence and the opinion expressed by the learned trial judge that he rested his verdict on the evidence of Morris, whom he regarded as an independent witness with no apparent motive for falsehood and who had ample opportunity for identifying the applicants whom he knew before and had often seen. However, of the inconsistency in his evidence he had this to say:

> "Morris was challenged on his statement given to the police, the part or parts of that statement were not tendered in evidence, certain questions were put to Morris which sought to contradict him as to the roles played by each

> "of these accused persons, but what is of significance is that he has not been shaken as to the presence, his evidence to the presence of these two accused persons on the scene nor has his evidence been shaken as to the sequence of events which he has sought to relate. Yes, true it is that he was asked and has given evidence as to the relative position at one time or the other in the yard that night following the shooting of the accused Carter and the accused Williams as to their activities in the yard that night. His evidence was also challenged as to the fact that he did not see what took place in the yard that night but his evidence in that regard has not been shaken, his evidence as to the fact that he saw these two accused men running from underneath Building E on the night in question has not been shaken nor has his evidence been shaken as to the weapon that he had sought to place in the hands of each of these accused persons.'"

It is clear that the judge was impressed by the witness Morris. However, having in his own words admitted the inconsistency, then unless it is immaterial some explanation is essential before the evidence in Court can be accepted and relied on in relation to that particular point. It seemed to us that Morris' evidence that when he ran out on his verandah he saw the two men rushing from under the verandah of Apartment 'E' is clearly inconsistent with his statement to the police that when he rushed out on the verandah 'Mark' [Williams] was standing at the eastern corner of the building. If that is so then the sequence of events is certainly shaken. There may be a credible explanation but the explanation must come from the witness; it cannot be supplied by well-meaning conjecture.

Miss Sibble for the Crown submitted that assuming there was an inconsistency the conviction nonetheless, ought to stand. She argued to the effect that from the evidence of the prosecution witnesses Grant and Morris, a gang of men including the gunman 'Bidia', went to those premises to inflict serious bodily harm on Grant. There was ample opportunity for the witness Morris to identify the applicants who were well-known to him. It was a reasonable inference that the applicants were of that gang. Therefore on the basis of common design they would be guilty. The argument is plausible and attractive but it suffers from

inherent weakness. First, this was not the theory of the case for the prosecution. It was that the applicants armed with firearms entered the house of Sydney Grant and one of them shot him. The findings that the applicants were the two men clearly rested on an acceptance of Morris' evidence. In that regard the learned trial judge said:

> "He [Morris] did not actually see when Mr. Grant was shot but his evidence, if I accept it, his evidence from which I can draw the inference that the two persons who he has described as being the two accused, ..."

and later:

> "But as I said the evidence of Morris which I accept established the nexus between the shooting that took place and two accused men from the fact that they were seen running from the building shortly, leaving the building shortly after shots were heard both armed, the alibi raised by the two accused is rejected."

The learned trial judge was therefore never required to consider the alternative theory, namely whether from their presence there in the yard in the circumstances described by Morris the inference could be drawn that they were a party to the common design to injure Grant. Secondly, this alternative theory would rest upon an acceptance of the facts as stated in the police statement which would not be "evidence in Court" upon which a finding could be made.

In our view the inconsistency between the evidence in Court and the statement to the police was material in a vital aspect of the case and unexplained and standing by itself no positive finding of fact could be made on this point. Accordingly, the conviction cannot stand.

We gave anxious consideration as to whether we should order a new trial or enter a verdict and judgment of acquittal. This was a brutal and atrocious crime. For no apparent reason two gunmen invaded the sacred precincts of a man's home and shot him while asleep before his T.V. The transcript conveys the impression that the witness Morris was badgered and not given a fair opportunity to give an explanation to the inconsistency

appearing in the record. On the other hand, a new trial would give the prosecution "a second bite of the cherry", proverbally speaking, the opportunity at the trial to seek from the witness an explanation for the inconsistency having been missed, should not now be restored.

In the circumstances, the hearing of the applications are treated as of the appeals, the appeals are allowed, the convictions quashed and judgments and verdicts of acquittal entered.