

Criminal Law - Gun Court ① illegal possession of firearm - ②
wounding with intent - Appeal - Application for leave
to appeal - Review of refusal of single judge of
application for leave to appeal - whether verdict unreasonable
and not supported by evidence - Evidence - Application
for leave to appeal refused JAMAICA Case referred to (as bound)

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 7 & 8/88

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA

VS.

PETER STEWART
&
PAUL STEWART

Mr. Enoch Blake for applicants

Mr. Hugh Wildman for the Crown

April 24, 1989

CAREY, J.A.:

In the High Court Division of the Gun Court held on the 7th of January, 1988, these applicants were convicted before Harrison, J., on an indictment which charged them for illegal possession of firearm and wounding with intent. They were each sentenced to concurrent terms of seven years imprisonment at hard labour. They now apply for the Full Court to review the single judge's refusal of the applications for leave to appeal.

Mr. Blake has argued very strongly this morning that the verdict of the learned trial judge was unreasonable and unwarranted and could not be supported having regard to the evidence, in that the Crown's case contained several major discrepancies which tended to cast doubt on the presence and participation of either of the applicants. He condescended to particulars of that general ground, and these were stated in this way:

- "(a) There were serious unexplained contradictions in the testimony of the witness Orville Smith concerning 'the presence of the twins' and what each did.
- (b) There were unreconcilable contradictions between the testimony of Carol Douglas and that of Orville Smith as to events both were said to be observing simultaneously."

In order to understand the ground argued, it is enough, we think, to give a summary of the facts upon which the convictions are based.

On the 7th of July, 1987, at about 10 o'clock in the morning, a young man called Orville Smith, who lives somewhere in Kitson Town in St. Catherine, was, he said, waiting the arrival of his brother by his business place at a district called Fraser's Content in that parish. While there, he said, four men came up, two of whom he knew, those being these applicants. Upon their arrival, one of these persons, whom he identified as Paul, said, "see the man there", whereupon guns were pulled and he was fired upon. He stated that one of the twins, these applicants are twins, that is Peter, was armed as indeed was another man whom he did not know before that date. He said some four shots were fired and they found their mark in his body; one hitting him in his belly, the other in his knee and he was hospitalised for some time thereafter; he was taken to the hospital at Spanish Town.

The other witness for the prosecution, a lady named Carol Douglas, at the time of these events, was in the shop and her story was somewhat at variance in its particulars because she said that four men came up, all fired and she also stated that she heard several shots. The defence, as is usual in these cases, was alibi: each man was elsewhere at the time of these events.

The defence, both as projected in the cross-examination of the Crown's witnesses and in the evidence given by both applicants, was that the evidence given by both of these witnesses was really perjured evidence. There was malice existing between Orville Smith and his brother and these applicants, and that was the basis for the charge.

Learned counsel who appeared before us and indeed appeared below,

focussed upon the discrepancies which arose between these witnesses in his endeavour to demonstrate that their credit was of the value of zero and that the learned trial judge ought to have acquitted each of his clients.

The learned trial judge in a very careful summation of the facts isolated the various discrepancies which were brought to his attention, analysed them and resolved them. His resolution was adverse to these applicants.

Before us Mr. Blake identified some six areas of discrepancies which he regarded as major discrepancies. He pointed out that there was a discrepancy as to the number of guns which the assailants were alleged on the Crown's case to be carrying at the time. The witness Smith said there were two guns. Douglas, the witness who was in the shop, said there were four. The second area of discrepancy was the number of shots which were actually discharged; while Smith said four, Douglas said ten. The third aspect was the manner in which the assailants left the scene after the shots were fired. Smith said they went in the same direction while Douglas said they went in the direction opposite to that from whence they had come. Number four was, did the applicants speak before the attack; Smith, in evidence, said that the applicant Paul spoke but on another occasion said no one spoke. The fifth, how did the assailants approach Smith; Smith said they were in two groups. Specifically, he said that they came together but presumably when the shots were fired, two were some four or five yards off. Douglas said they arrived together and they were firing as they arrived. The sixth and final discrepancy identified was, was there another person present at the time Smith was attacked; Smith said, at the hearing before the learned trial judge, that no one was there with him but his police statement showed that he had said earlier that youth was present at the time.

As we have said, the learned trial judge considered all these discrepancies, i.e. conflict between witness and witness and internal discrepancy as identified. So far as there was conflict between witnesses, the learned trial judge said this at page 180:

"Now, there are various discrepancies in the case in respect of the Prosecution's case, and I just alluded to one in respect of the accused Paul Stewart having said, 'See the man deh', pointing, because Mr. Orville Smith subsequently said, when he was cross-examined, said none of the twins spoke.

He said he did not remember then. He said one spoke and he pointed on the accused Paul Stewart, who was then in the Dock. He said one of the strange men said, 'Turn around', and he saw fire coming from the two guns that were in the hands of - one in the hand of Peter Stewart and the other in one of the hands of the strange men. So there is a discrepancy there in the evidence of Orville Smith.

As to the statement as made by the accused Paul Stewart - he said at first Paul Stewart had said, 'See the man deh', pointing. Subsequently, he said none of the men spoke, then he said he did not remember, then he said one spoke and pointed out Paul Stewart as the one who had spoken. He also said that one of the strange men did, in fact, make a statement.

There is an area of discrepancy, it is true, which is vital in respect of whether or not the identity of the two accused is sound, as far as the witness Orville Smith is concerned, whether or not the discrepancy arises from the fact, as the Defence is alleging, of malice on the part of Orville Smith because of the involvement of the two accused with members of his, Orville Smith's family - "

Then he said this:

"I find that this is a discrepancy important to the aspect of the identification, but I don't find that this vitiates the identification as far as the witness Orville Smith is concerned."

We pause to note that Mr. Blake endeavoured to argue that once the learned trial judge had found that there was a fundamental discrepancy, he was obliged to find in favour of the applicants. We are not attracted by that argument. We think it has no vestige of merit.

The tribunal of fact, where there are discrepancies, must consider the materiality, if it is an internal discrepancy, and where there are conflicts between witnesses, it is open to the tribunal to accept the one and reject the other. The learned trial judge, in this case, did precisely

that. Insofar as there was conflict between Orville Smith and the witness Carol Douglas, he preferred the evidence of Orville Smith. And he did so for a reason which seems to us eminently reasonable. At page 182 the learned trial judge said this:

"As far as Orville Smith is concerned, I prefer the evidence of Orville Smith to that of Carol Douglas. I find that she was, in fact, inside the shop at the time of the incident, not outside as Orville Smith was and it seems where she said that she knew the two accused, of course, for seven years from the time she came to live in the district. Orville Smith said that he used to go to school with the two accused man, that is Friendship All-Age School. Where his evidence conflicts with hers I find that I accept his."

Identification was not, in reality, the issue in this case for it was not being suggested that the witnesses were mistaken, but really that they were motivated by malice. So what was important was whether or not the witnesses called by the prosecution could be believed on their oath.

The learned trial judge was well aware of this, he said:

"I am mindful also of the fact that what the Defence is saying is that the evidence of Orville Smith and also of Carol Douglas is tainted with malice against the two accused. That is why they do, in fact, say that the two accused were present on the scene, and that also, is the reason why they say that the two accused were the persons who fired shots on that day."

So, it is incorrect to assert that the learned trial judge did not adequately or correctly deal with the discrepancies because he identified and set out all of them and these Mr. Blake himself has brought to our attention, and as we said before, he analysed them and resolved them in any way which seems to us quite reasonable.

This was a case which required a determination as to credit and the learned trial judge had before him the witnesses called by the prosecution and the two applicants who gave evidence on oath. And he was in a position of advantage to make up his mind where the truth lay. As to his approach, we do not think that can be impugned in any way. Mr. Blake referred us to a case of Lincoln Golding (unreported) S.C.C.A. 134/83 dated 10th October, 1985, but we do not think that case particularly helpful in resolving any problem that arises in this case. Although it was intended to argued sentence, Mr. Blake refrained from putting forward any arguments. We think he was eminently right in that approach. Both applicants were sentenced to seven years imprisonment for a most serious offence. This appeared to have been a gun battle, and in these days of tremendous violence where firearms are frequently used, we think that where a person is injured, as Mr. Smith was, one shot finding its mark in his stomach another in his knee, that sentence, if error there was, would be on the side of leniency.

We see no reason whatever to interfere with that sentence. In the result, the application for leave to appeal is refused. The Court directs the sentences to commence on the 7th April, 1988, which we reckon would be the appropriate date when this application ought properly to have been heard by the Court.

Case referred to

Lincoln Golding (unreported) S.C.C.A 134/83
10/10/85