

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 82/05

**BEFORE: THE HON. MR. JUSTICE HARRISON, P.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A**

ANTHONY RHODEN v R

Mr. Cecil J. Mitchell, for the appellant

Mrs. Caroline Williamson-Hay, for the Crown

November 21 & 22, 2006

ORAL JUDGMENT

COOKE, J.A.

1. Between the 1st and 2nd June 2005, there was the trial of Anthony Rhoden, Christopher Downer and Ewart Cleary in the Circuit Court of Manchester. They were jointly charged with two counts – with being in illegal possession of firearm and illegal possession of ammunition. Cleary was acquitted. The other two were convicted and on the 8th June 2005 were each sentenced to 10 years and 6 years respectively on those counts. Downer has abandoned his application for leave to appeal. In respect of Rhoden the single judge granted leave to appeal.

2. The bald facts of this case are that on the 21st October, 2004 at about 9:30 a.m., Detective Sergeant Own Santo was driving a marked police radio car. Beside him was Inspector Cespedes. Constable Baxter sat in the rear. They were on mobile patrol. As they approached the Melrose Bypass, a white Toyota Corolla approached them and then passed their vehicle. Cleary was the driver of that vehicle. Rhoden was in the passenger seat beside the driver and Downer was seated in the rear. It was Santo's evidence that when the approaching vehicle reached his car he "realized that something was not right" and determined to "stop it". At this time there was another police vehicle on Special Highway Patrol. This vehicle was being driven by Corporal Zena Harrison. Santo signaled to her. By this time Santo had activated his emergency mechanism — siren and flashing lights. The white Corolla stopped. Cpl. Harrison's vehicle was now behind it and Santo's alongside it. The occupants of the Corolla were ordered out of their car and searched. In the trunk (station wagon) a firearm was found which had three unexpended rounds of ammunition.

3. The main thrust of the appellant's complaint was stated in ground 2 of the Supplemental Grounds of Appeal which reads:

"That the evidence led by the Crown was not sufficient to support the conviction of the Applicant particularly in view of the serious contradictions in the Crown's evidence which were left without explanation or proper explanations namely..."

The "serious contradiction" lay in what Counsel Mr. C. J. Mitchell regarded as the "stark" inconsistency in the evidence of Det. Sgt. Santo on whose evidence alone the conviction of the appellant rested. The inconsistency is that in evidence in-chief Santo swore that the approaching Corolla was swerving over into his path. Both vehicles passed close to each other — slowly, and he saw Rhoden pass an object to Downer. It was "that which made him realize that something was not right", and was therefore the catalyst which triggered his subsequent actions. However, in cross examination he said that account was a "mistake". In fact he saw the object being passed after the Corolla had stopped. In any event, he was unable to give any description at all as to the object which was passed. The prosecution was faced with the task of satisfying the tribunal, to the requisite standard that:

- (a) Santo saw Rhoden pass an object to Downer; and
- (b) that the object which was passed, was the firearm which was found in the trunk of the Corolla station wagon.

4. As to (a) this was dependent on the assessment of the credibility of Santo's evidence. It is incumbent on a trial judge sitting alone to demonstrate, in arriving at a verdict, that the correct judicial approach is evident. In this case the question concerns the learned trial judge's treatment of the inconsistency which arose on the vital evidence of Santo. In broad terms the proper judicial approach is firstly to determine in light of the issue to be decided whether or not

the inconsistency is or is not significant. If it is not, then such inconsistency can be safely ignored. If it is, then — is there an explanation? If there is an explanation it then falls to the trial judge to critically consider the proffered explanation. This exercise is imperative in the assessment of the credibility of any given witness whose evidence contains significant inconsistency — or inconsistencies.

5. We now turn to the treatment by the learned trial judge, pages 182 -183.

She said:

“I recognize that there is a Discrepancy in Santo’s evidence as to how he found the firearm, but he has given an explanation, because he said he saw the passing of the firearm when his vehicle was passing the Toyota motor car and then he said, if he said so, it is a mistake. I have to ask myself, “Is this a reasonable explanation? Did Detective Sergeant Santo’s [sic] see Rhoden pass the firearm to Downer? And at what point?” [sic] I looked at the demeanour of Santo, when he was giving his evidence, closely at this point and I watched how he answered in cross-examination.”

6. Firstly, the learned trial judge stated that Santo has “given an explanation”. In respect of the inconsistency, this statement is not in harmony with the evidence. Further, she seems erroneously to utilize “demeanour” as a telling factor in resolving the inconsistency. Certainly, the most impressive demeanour is not a substitute for the requisite explanation.

7. As to (b) there is no evidence to link the object allegedly passed by Rhoden to Downer with the firearm that was found in the trunk of the Corolla station wagon. We are of the view that this appeal must succeed. The failure of the learned trial judge to exercise the proper judicial approach in respect of the "stark" inconsistency in the evidence of Santo has resulted in the appellant not having had a fair trial. As indicated earlier, there is a lacuna as regards the nexus between the passed undescribed object and the found firearm. Accordingly the appeal is allowed. The convictions are quashed. The sentences are set aside and judgments and verdicts of acquittal entered.