

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO: 19/08

**BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MRS. JUSTICE HARRIS, J.A.
THE HON. MR. JUSTICE MORRISON, J.A.**

EVERTON ROBERTS v R

Leroy Equiano for the Appellant

**Ms. Kathy-Ann Pyke and Ms. Melissa Simms, Crown Counsel (Ag.)
for the Crown**

March 30, 31 and April 24, 2009

ORAL JUDGMENT

PANTON, P.

1. The appellant, a police constable was convicted on two counts of unlawful wounding in the Corporate Area Resident Magistrate's Court after a trial which lasted over a period of more than a year, beginning on the 12th of April 2006 and ending on the 6th of July 2007. At the end of that trial the appellant was sentenced to 18 months imprisonment at hard labour on each count to run concurrently and was granted bail after he gave verbal notice of appeal.

2. The complainants were one Courtney Smith, a mason of St. Andrew and Richard Peddler, a driver of a Kingston address. The injuries which they

sustained were gunshot injuries allegedly the result of the discharge of a firearm by the appellant. There was no medical evidence, although both complainants were treated at the Kingston Public Hospital.

3. The evidence, as presented by the prosecution, indicated that on the 2nd of May 2003 at the popular Four Roads area in St. Andrew, police personnel were on duty along with Transport Authority employees detecting and prosecuting breaches of the Road Traffic Act. In the process a motor vehicle in breach was being placed on a wrecker apparently to be impounded. There was, according to the evidence, about 80 – 90 persons, both men and women in the area behaving boisterously and at least one stone was thrown which hit the vehicle in which the appellant was. He allegedly fired a shot from the vehicle thereby injuring the complainants. The vehicle sped away. There were about four other police officers who were present including a lone female constable named Claudia Miller. She gave evidence at the hearing and she said, she had an M16 rifle. She spoke of missiles, stones, bottles, boxes and cans being thrown at the police vehicle. She saw the appellant pull his service firearm and point his arm through the window of the vehicle, upwards and then she heard shots and the crowd dispersed.

4. Detective Inspector Pauline Henry Harrison said she visited the scene and then she went on to the Constant Spring Police Station where she saw a small dent to the right rear door near the window in the middle of the car. She

retrieved the appellant's firearm for ballistic testing. She said she took more than one firearm from him but she cannot recall if one was a M16. She recalled though taking his side arm which was a 9mm pistol. She said she retrieved all the firearms that had been issued to the officers.

5. The appellant made an unsworn statement, in which he said that he had been issued with a 9mm Browning pistol. He denied shooting the complainants and he said, he was not placed on an identification parade but his hands were swabbed by Det. Sgt. Harris. Det. Sgt. Harris testified that he took swabs of the appellant's hands and handed those swabs, labeled and placed in transparent bags, to the Government Forensic Laboratory on the 6th of May 2003 and that he collected a Forensic Certificate from them in September 2003. It should be noted that Sgt. Harris was called by the defence. The defence also called Supt. Sydney Porteous, ballistics expert, who gave evidence of examining the weapons.

6. The learned Resident Magistrate rejected Cons. Claudia Miller's evidence as to the hostility that was allegedly being displayed by the Crowd. She found however, that a small missile had been thrown on the car. These findings would, in our view, dispose of any likelihood that the appellant may have been acting in self defence, if indeed, he had fired his firearm and if indeed it was his firearm that caused the injuries to Smith and Peddlar. So, the question of the identification of the appellant as one who was firing a firearm becomes crucial.

The Resident Magistrate acknowledged in her reasons for judgment that the appellant had been identified by means of dock identification. The evidence was, that the two complainant witnesses did not know the appellant before and that the next time that they were seeing him after the incident was a year or so later in the Court room. At page 51 of the transcript the Resident Magistrate stated and I quote:

"Without more, the Court felt the identification would have been flawed having regard to the Privy Council's decision in **Carl Brissett v. The Queen** P.C. Appeal No. 50/93."

The judgment in **Brissett** which is from an appeal from the Court of Appeal of Jamaica was delivered on the 29th of November 1994. At page 6, the Court said this, and I quote:

"It is well established that although a judge has a discretion as to whether or not to allow a dock identification he should as an almost invariable rule refuse to allow an accused to be identified by a witness for the first time when he is in the dock: see **R. v. Cartwright** (1914) 10 Cr. App. R. 219 and **R. v. Fergus** (1992) Crim. L. R. 363. The reason for this is that the very presence of the accused in the dock will suggest to the witness that it is the person who committed the crime."

7. The question arises as to what other evidence there is to connect the appellant because the learned Resident Magistrate had gone on to say that:

"The Court however considered the decision in **R v Cartwright** (1914) Cr. App. R. 219 that if there is other evidence connecting the accused with the offence then it would be proper to exercise the

discretion in accepting that evidence if it provides the nexus with the accused."

As said earlier, the question arises as to what other evidence there was to connect the appellant, and the simple answer is that there was none, as the ballistics evidence did not implicate him and this includes the evidence as to the result of the swabbing, which indicated that there was no presence of gunshot residue in relation to these swabs.

8. It is noted that Cons. Claudia Miller did not say that the appellant fired a shot. She said she heard shots. In any event the Resident Magistrate rejected her evidence in terms of her credibility. We are of the view, that the case was really not properly investigated hence the absence of the medical evidence, the failure to hold an identification parade and the imprecision at least of Inspector Pauline Henry Harrison, who was not even able to give satisfactory evidence as to what firearm she had taken from the appellant. Indeed, she seems to have given the impression that she had mixed up all the firearms and she did not know which one was given to whom.

9. In the circumstances, the conviction cannot be allowed to stand as the case never really came anywhere near proof beyond a reasonable doubt. We will not speculate as to whether this is sheer accident or whether it was by design. The fact of the matter is that the prosecution's case was not up to standard. The convictions on both counts are quashed and the sentences set aside. Judgment and verdict of acquittal entered.