[2024] JMCA Crim 11

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA
THE HON MR JUSTICE BROWN JA

SUPREME COURT CRIMINAL APPEAL NO 46/2015

BRIAN RUSSELL v R

Terrence Williams and Miss Celine Deidrick instructed by John Clarke for the applicant

Miss Syleen O'Gilvie for the Crown

27, 28, 31 July 2023 and 1 March 2024

Criminal law - Application for leave to appeal against conviction and sentence - Challenge to adequacy of summation - Illegal possession of firearm - Robbery with aggravation

Criminal Law – Prejudicial hearsay – Whether learned trial judge erred in the admission and treatment of prejudicial hearsay evidence which filled a gap in the prosecution's case

Section 20(1)(b) of the Firearms Act- Section 37(1)(a) of the Larceny Act – Delay - Breach of constitutional right to a fair hearing within a reasonable time - Relief for - Section 16(1) and (7) of the Constitution of Jamaica

F WILLIAMS JA

Background

[1] This application for leave to appeal arises from the applicant (Brian Russell's) conviction and sentencing for the offences of: (i) illegal possession of firearm, contrary to section 20(1)(b) of the Firearms Act; and (ii) robbery with aggravation, contrary to section 37(1)(a) of the Larceny Act. He was convicted in the High Court Division of the Gun Court, holden at King Street, Kingston, by a judge ('the learned trial judge') sitting without a jury, on 19 June 2015. On 26 June 2015 he was sentenced to 11 years'

imprisonment for illegal possession of firearm and eight years' imprisonment for robbery with aggravation, with the sentences to run concurrently.

The application for leave to appeal

[2] The applicant, being dissatisfied with the outcome of his trial, filed an application for leave to appeal against his convictions and sentences. This was refused by a single judge of this court on 21 October 2022. As is his right, the applicant renewed that application before us.

The decision

[3] At the end of the hearing of the application, on 31 July 2023, we made the following orders:

> "1. The application for leave to appeal against conviction and sentence is granted.
>
> 2. The hearing of the application is treated as the hearing of the appeal.
>
> 3. The appeal is allowed.
>
> 4. The convictions are quashed and the sentences are set aside.
>
> 5. A judgment and verdict of acquittal are entered."

[4] This judgment is a fulfilment of our promise, made then, to provide brief reasons for making these orders.

Summary of the evidence at trial

<u>The Crown</u>

[5] At the trial, the Crown called five witnesses.

Ray Wynter

[6] The complainant, Ray Wynter ('Mr Wynter') testified that on 2 July 2014, the applicant, being armed with an unlicensed firearm, and in the company of another,

robbed him while he was at the Kingston Cricket Club at Sabina Park in the parish of Kingston. Mr Wynter testified that the robbery occurred in the dressing room on the construction site by the club, as he was about to pay two "steelmen" for the work they had done. His evidence was that, whilst conversing with the steelmen, a man entered with a firearm, pointed it at him, and said "this is a hold up". Shortly after, another man (who, he testified, was the applicant) who was also armed with a firearm, appeared and proceeded to rob him of: cash; a gold chain and pendant valued at $300,000.00; a wrist watch valued at $30,000.00 and a Samsung Galaxy S4 cellular telephone valued at $90,000.00.

[7] Mr Wynter testified that three to four weeks after the robbery, he saw Sergeant Carl Simpson ('Sergeant Simpson', who was a Corporal at the time) along South Camp Road. Mr Wynter said he spoke with him about the robbery and some time after he gave him the box that the telephone came in. A few days later Sergeant Simpson showed him a blue and silver Galaxy telephone which he confirmed was his telephone as the code on the box matched the code on the telephone. Mr Wynter testified that he subsequently identified the applicant at an identification parade.

[8] After a question and answer session on 28 August 2014, the applicant was charged for the offences.

Sergeant Clive Fenner

[9] Sergeant Clive Fenner ('Sergeant Fenner'), who was at the time stationed at the Visual Identification Unit, testified that on 21 August 2014 he received an application for an identification parade to be held for the applicant who was arrested on suspicion of robbery with aggravation and illegal possession of firearm. Subsequent to receiving the application, the witness said he made arrangements for the video identification parade to be held on 22 August 2014 at the Greater Portmore Police Station. After viewing the parade lineup twice, Mr Wynter identified the applicant at number 3 – the number under which the applicant was standing. He recorded a further statement from the witness and he informed the investigator of the outcome of the parade.

Sergeant Carl Simpson

[10] Sergeant Simpson testified that on 16 August 2014 at about 6:00 pm he was on mobile patrol in the Kingston Central Division when he saw Mr Wynter who gave him "certain information". Thereafter, Sergeant Simpson said he gave Mr Wynter some instructions and Mr Wynter left and later provided him with a creamish colour Samsung Galaxy S4 box with the IMEI number 358851/05/554092/0. Subsequently, Sergeant Simpson got a search warrant and went to 4 ½ Clovelly Road in search of the applicant who was known to him as Richard Pike, otherwise called 'Bangolus'. His evidence was that he went to the rear of the premises where he saw the applicant, read the warrant to him and informed him that he was a suspect in a case of robbery. The applicant identified his dwelling house on the premises and during a search of the applicant's one-room apartment, a Samsumg Galaxy S4 telephone was found under the mattress in the applicant's one-room apartment. Sergeant Simpson further testified that he showed the telephone to the applicant and enquired if it belonged to him and the applicant said no. He also gave evidence that, upon inspecting the telephone in the presence of the applicant, he confirmed that the numbers were identical to those on the box Mr Wynter had given him. As a result, Sergeant Simpson said he cautioned the applicant and took him to the Kingston Central Police Station. Sergeant Simpson's further evidence was that when he got to the station he handed over the telephone and the box to a detective at the Criminal Investigation Bureau ('CIB') office. He testified that on the following Monday, he retrieved the telephone and the box from the Divisional Detective Inspector's office at the Kingston Central CIB office and on that same day he saw Mr Wynter, to whom he showed the items which Mr Wynter positively identified to be his, based on the IMEI number on the box and the telephone. Thereafter, Sergeant Simpson testified, he handed the items over to Detective Sergeant Joseph Wilson ('Detective Sergeant Wilson').

Detective Sergeant Joseph Wilson

[11] Detective Sergeant Wilson testified that at about 10:00 am on 7 July 2014, he was at the CIB office when Mr Wynter entered and made a report to him. The witness said he took Mr Wynter's statement and carried out investigations, during the course of which

he received information which resulted in his alerting the police on patrol to look out for the applicant. Detective Sergeant Wilson's evidence was that when he arrived at work on 18 August 2014, Sergeant Simpson handed him a search warrant that had been executed at 4 ½ Clovelly Road, along with a Samsung Galaxy S4 telephone and a Samsung Galaxy "telephone box [sic]". The witness said he confirmed in the presence of Sergeant Simpson and other police personnel that the IMEI number on the box matched the one on the telephone. He testified that he thereafter went to the Half-Way-Tree Police Station lock-ups, introduced himself to the applicant and informed him of the information he had received concerning the telephone that was found under the applicant's mattress. Detective Sergeant Wilson's evidence was that he cautioned the applicant who said he did not know what Detective Sergeant Wilson was talking about.

[12] Detective Sergeant Wilson also said he received information on the outcome of the video identification parade from Sergeant Fenner on 2 August 2014. He further testified that on 18 August 2014, he placed the telephone and the box in an envelope which he sealed, labelled and handed to the storekeeper at the Kingston Central Police Station but that that was not done in the presence of the applicant. Detective Sergeant Wilson testified that he subsequently, on 20 August 2014, arrested and charged the applicant with robbery with aggravation and illegal possession of firearm.

Divisional Detective Inspector Glasspole Brown

[13] Detective Inspector Glasspole Brown ('D I Brown') testified that, at about 10:00 pm on 16 August 2014, he was at the Kingston Central CIB office when Sergeant Simpson gave him a cream-coloured telephone box along with a blue and silver Samsung telephone. He said he opened the strong room (where exhibits are stored) and placed the box and the telephone inside and closed the strong room. D I Brown said that, on 18 August 2014, he retrieved the telephone and the box from the strong room and gave them to Sergeant Simpson, who had asked him for them. His evidence was that, at that point, the telephone and the box were in the same condition as when he had placed them there. In cross examination D I Brown said he had not given a statement in 2014 but

maintained that the Samsung telephone and the box looked like the items he received, although he could not say if there were others that looked like them because he did not make any mark on the box to indicate that it was the same one he had received.

The defence

[14] At the trial, the applicant gave an unsworn statement from the dock, in which he stated that he was arrested after 8:00 pm on 16 August 2014 whilst working at the Mark Lane Arcade in Kingston and was taken to the Kingston Central Police Station and then taken to the Half-Way-Tree Lockups and from there to court. He stated that he was not involved in any crime, that he was never taken to 4 ½ Clovelly Road and that the police did not find any telephone under his mattress, as they claimed.

The grounds of appeal/application

[15] Four grounds of appeal/application were originally outlined in the Criminal Form B1 filed by the applicant. They were as follows:

> "1. **Misidentify by the Witness: -** That the prosecution witnesses wrongfully identified me as the person or among any persons who committed the alleged crime.
>
> 2. **Unfair Trial: -** That the evidence and testimonies upon which the learned trial Judge relied on for the purpose to convict me lack facts and credibility thus rendering the verdict unsafe in the circumstances.
>
> 3. **Lack of Evidence: -** That the prosecution failed to present to the Court any 'concrete' piece of evidence (Material, Forensic or Scientific evidence to link me to the alleged crime.
>
> 4. **Miscarriage of Justice: -** That the Court failed to recognised [sic] the fact that I was wrongfully convicted for a crime that I knew nothing about and could not have committed."

[16] At the hearing of the application, however, the applicant sought, and was granted, leave to abandon the original grounds of appeal or application and to argue the following nine supplemental grounds:

"Supplemental Ground 1: The court erred in admission and treatment of the evidence of the comparison of the serial numbers on the telephone and on the telephone box in that:

a. the learned trial judge failed to consider the relevant admissibility criteria;

b. no evidence was advanced to satisfy any statutory exception to the hearsay rule; and

c. the learned trial judge misstated the evidence.

Supplemental Ground 2: The Learned Trial Judge (LTJ) failed to direct her jury mind sufficiently on the law of identification to demonstrate that she was aware and applied the special need for caution in relation to a mistake by an 'honest' and/or 'recognition' witness based on the special facts of this case. There was 'inscrutable silence' in the identification warnings on these points.

Supplemental Ground 3: The Learned Trial Judge (LTJ) erred in law by failing to properly analyse the specific weaknesses in the identification evidence in this case.

Supplemental Ground 4: The cumulative effect of the foregoing grounds was to deny the Appellant a fair trial. This ensures that the resultant conviction is unsafe.

Supplemental Ground 5: The Learned Trial Judge (LTJ) erred when she:

a. misstated the evidence in relation to the phone and

b. failed to direct her jury mind in relation to the proper treatment of circumstantial evidence/inference

Supplemental Ground 6: Delay: The Applicant['s] constitutional right to review his conviction within a reasonable time was breached by [the] more than nine (9) years after the indictment date it took the criminal appellants system [sic] to hear this appeal.

Supplemental Ground 7: The learned trial judge did not demonstrate any adherence to the principle of sentencing in arriving at the appropriate sentence in this case.

Supplemental Ground 8: The Applicant's appeal against sentence should be allowed, and his sentence reduced based on the inexplicable delay of eight years caused in the appeal process.

Supplemental Ground 9: The learned trial judge erred in the reception and treatment of hearsay evidence with respect to reports made to the police by unknown persons regarding the alleged involvement of the applicant in the offence."

Issues

[17] Based on the grounds of appeal or application filed and the submissions advanced herein, the main issues to be addressed are:

1. Whether the evidence of Detective Sergeant Wilson regarding the alleged involvement of the applicant in the offences constituted hearsay evidence and whether the learned trial judge erred in her treatment of it. (Supplemental Ground 9)

2. Whether the learned trial judge erred by failing to address the specific weaknesses in the identification evidence or demonstrate that she applied the special need for caution in relation to honest mistake. (Supplemental Grounds 2 & 3)

3. Whether the learned trial judge erred in the treatment of the evidence in relation to the telephone and the serial number thereon. (Supplemental Ground 1)

4. Whether the eight-year delay in the hearing of the appeal or application breached the applicant's constitutional right to have his conviction reviewed within a reasonable time. (Supplemental Ground 6)

5. Whether the learned trial judge fell into error by failing to adhere to modern principles of sentencing. (Supplemental Ground 7)

6. Whether the applicant's sentence ought to be reduced on account of the delay in the resolution of the case. (Supplemental Ground 8)

7. Whether the learned trial judge misquoted the evidence and dealt inadequately with the matter of circumstantial evidence (Supplemental Ground 5)

8. Whether the cumulative effect of the foregoing grounds deprived the applicant of a fair trial (Supplemental Ground 4).

[18] In his oral arguments, Mr Williams first advanced supplemental ground 9 and directed the brunt of his arguments to that ground. In light of this, and in the light of how the application was resolved, it is best to first consider the issue concerning that ground.

Issue 1 (Supplemental Ground 9): Whether the evidence of the investigating officer regarding the alleged involvement of the applicant in the offences constituted hearsay evidence and whether the learned trial judge erred in her treatment of it.

<u>Summary of submissions</u>

Submissions for the applicant

[19] On the applicant's behalf, Mr Williams argued that the learned trial judge incorrectly admitted prejudicial hearsay evidence about the applicant from unnamed source(s) and, despite an objection from defence counsel, she made no correction to her earlier incorrect indication that it was not inadmissible hearsay. He cited the case of **Delroy Hopson v R** (1994) 45 WIR, 307 ('**Hopson**') as a basis for submitting that evidence from anonymous sources on the facts of this case was hearsay and highly prejudicial and deprived the applicant of a fair trial. In counsel's submission, in **Hopson**, the Privy Council allowed the appeal in similar circumstances, because, based on the evidence given in that case, it was open to the finder of fact (the jury) to wrongly conclude that inadmissible hearsay evidence that was prejudicial to that appellant, could have been

added to the other evidence adduced against him in their deliberations on the verdict. Counsel further submitted that the Privy Council held that it was required for the jury to have been told to ignore the inadmissible prejudicial hearsay evidence.

[20] Counsel further submitted that the case of **Norman Holmes v R** [2010] JMCA Crim 19 ('**Norman Holmes**') was indistinguishable from the instant case. In counsel's submission, this court in that case held that the evidence adduced (which, he argued, was similar to the evidence led in this case) was hearsay and entirely inadmissible, as it only, through inadmissible evidence, improperly confirmed that applicant's participation in the crimes for which he was charged. Counsel also emphasized that in that case, the trial judge's failure to dispel or mitigate the prejudicial effect of the improperly-admitted hearsay evidence in his summing up, was what led to the quashing of the conviction.

[21] Mr Williams also submitted that this court ought to take the approach taken in **Norman Holmes** in the instant application. He argued that, in a manner similar to that of the investigating officer in that case, the arresting officer in this case, Sergeant Simpson (which was his rank when he testified at the trial), also claimed to have acted on information. Thus, he argued, there arose the inescapable inference from the police claiming to have acted on information, that the police had been given information about the applicant, by someone who was not called to testify, which evidence was inadmissible and prejudicial hearsay. In these circumstances, counsel submitted that the result sought by the applicant (the quashing of his convictions) should be granted.

Submissions for the Crown

[22] Miss O'Gilvie submitted that the evidence complained of by the applicant is not hearsay and in the event that it was hearsay, it was not prejudicial to the applicant because that evidence was not critical to the issues, and thus had no bearing on the learned trial judge's findings. She cited the case of **Moulton v R** [2021] JMCA Crim 14 ('**Moulton**'), which she submitted was quite instructive and she made extensive references to it.

Discussion

The law on hearsay evidence

[23] There are numerous cases that govern the treatment of hearsay evidence and it is useful to explore a few that will provide guidance in the resolution of this issue. The case of **Norman Holmes** was cited by Mr Williams for the applicant and is applicable to the instant application. In **Norman Holmes** the applicant was convicted on two counts of an indictment charging him with the offences of illegal possession of firearm and robbery with aggravation. He was sentenced to 12 years' imprisonment on both counts, with the sentences to run concurrently. Dissatisfied with that outcome, he sought leave to appeal from this court with six grounds of appeal or application, the first of which concerned what he challenged as hearsay evidence that formed the crux of the prosecution's case. The issue of hearsay evidence arose in that case due to the gap between the complainant's statement (in which she only gave a description of her attackers) and the arrest of the applicant by one Detective Corporal Jennings, on 28 November 2007 at a specific location in Twickenham Park, Saint Catherine. Further, in that officer's evidence, she indicated that she searched for the applicant based on "certain information" that she had received.

[24] Counsel for the applicant in **Norman Holmes** submitted that the inescapable inference to be drawn from Detective Corporal Jennings' evidence was that a person or persons unknown gave her information which identified the applicant as the attacker, yet they were not called as witnesses. Counsel also submitted that, based on that inference, the material that assisted the officer in locating and arresting the applicant should be treated as "hearsay, highly prejudicial and wholly inadmissible". This court, in that case, agreed with counsel that there was a gap between the statement and evidence given by the complainant, on the one hand, and the accused man's arrest some four weeks later, on the other, which was bridged with what constituted hearsay material. Morrison JA, (as he then was) at para. [37] of that judgment stated:

> "[37] In our view, the evidence given by Detective Corporal Jennings in this case (which passed completely without comment by the judge either at the time it was given or in his summing up) clearly falls into the same category, with the result that it was, as Mr Harrison contended, hearsay and entirely inadmissible. It could have had no other effect than to convey the impression that information had been received by her from some unnamed and unknown source or sources that the applicant was the person who had held up the complainant at gunpoint on the night of 1 November 2007 in Central Plaza. It accordingly carried absolutely no probative value and could have had no effect other than prejudice, which the judge made no attempt whatsoever to dispel or mitigate in his summing up. On this basis, therefore, ground 1 clearly succeeds."

[25] The case of **Winston Blackwood v R** (1992) 29 JLR 85 ('**Winston Blackwood**') was cited in **Norman Holmes**, and an exploration of some aspects of **Winston Blackwood** will be useful. The factual background of that case was similar to the factual matrix both in **Norman Holmes** and in the instant application. In **Winston Blackwood**, Wright JA, at page 90, observed of the evidence adduced in that case, that:

> "Accordingly, the evidence complained of was plainly hearsay and ought not to have been allowed. And the danger passed without being recognized because in his summing-up the trial judge repeated the evidence without any comment let alone a direction to disregard such evidence as being hearsay. Indeed, had he recognized it at all he may well have ruled differently on the 'no case' submission."

[26] Another helpful case is that of **Gregory Johnson v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 53/1994, judgment delivered 3 June 1996 ('**Gregory Johnson'**). In that case, Patterson JA, at pages 7-8, also considered the issue of hearsay, inadmissible evidence being used to fill gaps in the evidence in that case. After rehearsing the arguments and submissions, he concluded as follows:

> "The evidence of [the police officer] went no further than to show that he obtained warrants for the arrest of the appellant on two charges of murder. His evidence had no probative value whatsoever, it was hearsay, inadmissible and must have conveyed to the jury that the appellant had been identified by

> person or persons other than [the eyewitness] as the murderer. The prejudicial effect of such evidence could not be cured in the judge's summation, and for that reason alone, the conviction could not stand."

[27] The case of **Delroy Hopson** is also of considerable importance in this discussion. In that case, the discussion not only emphasized the effect of hearsay "material" but provides guidance on how trial judges ought to address it in their summations. Its relevance and importance to this application require the reproduction of a section of the judgment (pages 4- 5) as set out below:

> "The judge had completed his summing-up and was about to send the jury out to consider their verdict when the point was raised by the foreman of the jury. The transcript reads as follows:
>
> > Foreman: 'If it pleases, m'lord, today or yesterday in Det Grant's statement he mentioned that he went to the hospital and he was told something by the [victim]. If it pleases, m'lord, why that something could not be revealed in court?'
> >
> > His lordship: 'I will explain it to you. I will explain it to you. It was not followed up because, presumably, whatever was said by the [victim] was said with the [appellant] not present, so if the Crown counsel had attempted that little piece – get out what was said – or even the defence attorney, if he attempted to get out what was said I would have stopped him, because that is known as hearsay … No evidence can be given about what was said, because the [appellant], presumably, was not present. If he had been present, what was said could have been said; so please don't consider it. You remember that the corporal said that – the corporal even went as far as to say that after "I spoke to [the victim] and he spoke to me I left the hospital with the intention of looking for somebody". Well, you can't – you know, you have to be careful how you use that piece of evidence. Suffice it to say that the next day he got a warrant for [the appellant]. You have to be very careful about that aspect of the case and I ask you to consider your verdict now. I hope I have explained it satisfactorily."

[28] While the series of events giving rise to the applicant's arrest were different in **Norman Holmes**, the issue and discussion of the law surrounding hearsay evidence in that case are relevant and almost identical to the issue arising in the instant application. This can be seen from a brief recounting of the facts in this application compared with those in **Norman Holmes**.

[29] The applicant, in **Norman Holmes**, was charged with the same offences as the applicant in this application, and the main issue surrounded hearsay evidence. In the instant application, Mr Wynter, gave evidence that he saw Sergeant Simpson at the corner of South Camp Road and East Queen Street and told him what had happened to him. However, there was no indication anywhere in his evidence that he gave the police a name and/or address of the applicant. Mr Wynter's evidence during his examination in chief from page 29 to 33 of the transcript is of sufficient importance for it to be reproduced in full below, despite the length of the extract. This is the relevant part of his evidence:

"A:	One evening I was coming from Test Match at Sabina Park, I was on South Camp Road and East Queen Street, right at the corner and I saw Corporal Simpson and I said to him…
MRS JOHNSON:	Don't tell us what he said to you. I want to know whether Corporal Simpson did anything in relation to this case?
	…

MRS JOHNSON:	You made a report to him about what happened?
A:	Yeah, I told him.
MRS JOHNSON:	And what happened after that?
A:	And he said to me…
MRS JOHNSON:	Don't tell us what he said. After he spoke to you, did you see him again about anything in the case?
A:	Yes
MRS JOHNSON:	When was that?
A:	I took the box that I had at home
MRS JOHNSON:	This is the box for what?
A:	That the telephone came in.
MRS JOHNSON:	When was it?
	…

A:	In the same month, probably about- it could have been about three or so weeks after.
MRS JOHNSON	After what?
A:	After I was robbed
	…
HER LADYSHIP:	Three or four weeks after you were robbed you were speaking to him [Corporal Simpson] at South Camp Road?
A:	Yes, I saw him in his car and I was talking to him.
	…
MRS JOHNSON:	Listen to my question Mr Wynter. What I am asking you, within the same three or four weeks sometime after you spoke to him and you told him what happened, you brought the box to him?

A: That same evening when I spoke to him.

…

MRS JOHNSON: Did you ever have occasion to meet with him in relation to the box after you had given it to him the first time?

A: I got a call one day from Central to…

MRS JOHNSON: Don’t tell me what they told you. After you got that call you went anywhere?

A: I went to Central

……

And then they showed me.

MRS JOHNSON: Hold on. Corporal Simpson showed you what?

A: Showed me the phone.

…

MRS JOHNSON:	Don't tell us what me [sic] he told you. When he show you that phone, had you ever seen that phone before that time when Corporal Simpson was showing you?
A:	It looks like my phone that I had."

[30] The evidence of Detective Sergeant Wilson, during his examination-in-chief, is that which makes it palpably clear that there was a gap in the information that led to the applicant's arrest. Page 82, lines 14 to 30 of the transcript are reproduced below:

"A:	The complainant, Ray Wynter, came to the station and made a report… <u>I carried out investigations and received information.</u>
Q:	You received certain information?
A:	Yes
Q:	And upon receiving this information what, if anything, did you do?
A:	I caused the police personnel specially those on patrol <u>to be aware of one of the suspects [sic] whose name I got and the area he frequent.</u>

Q:	You said you- when did you get the name of this suspect?
MR. PETERKIN:	M'Lady, my objection would be that this would be hearsay evidence.
HER LADYSHIP:	The question asked is when did he get the name of the suspect. I would not agree that this is hearsay.
A:	In the afternoon of the 2nd of July, 2014.
	…
Q:	What, if anything, else did you do following up on the report by Mr. Wynter?
A:	I carried out, I made enquiries and received, I will say this, I received information as to the name of the suspect." (Emphasis added)

[31] It bears repeating that these sections that have been reproduced make it clear that there is a gap in the evidence from the time Mr Wynter made the report to Sergeant Wilson at the Kingston Central CIB office, gave the telephone box to Sergeant Simpson, and when the telephone was found and the applicant was arrested. In addition, none of the prosecution's witnesses in their evidence stated the source of the "information" that they acted on, and the prosecution did not call any other witnesses to account for how they obtained this "information" which led to the applicant's arrest. Therefore, it remains a mystery how the police arrived at the suspicion or conclusion that the applicant was in

fact the person who robbed Mr Wynter. In the face of this deficiency, how did the learned trial judge deal with the evidence?

[32] It is interesting to note that the learned trial judge referred to some of the hearsay evidence in her summation. This can be seen in a portion of her summation at page 149, lines 11 to 29 of the transcript, which is reproduced below:

> "…Mr Wynter left the location and returned some time later that day with greenish a greenish colour Galaxy cellphone box. Sergeant Simpson stated that the box contained an identification number and that number on the box correspond with the telephone which it contained. He gave the precise number on the box that he had received and that was 358851\05\554092\0. So having received the box with that number the officer obtained a search warrant and he and his team went to 4 ½ Moberry [sic] Road. Sergeant Simpson testified that at Moberry Road he went to the rear of the premise where he saw the accused man who he knew as Pike. He read the warrant to him and told him that he is a suspect in a robbery" (Emphasis added)

[33] However, despite obliquely mentioning the hearsay evidence the learned trial judge did not address its deficient nature, or its effect on the prosecution's case and its effect on the applicant's defence.

[34] Having applied the guidance outlined in the abovementioned authorities to the facts of the instant application on the ground alleging the incorrect admission of inadmissible hearsay evidence, we had no reservation in finding that the impugned evidence constitutes inadmissible and prejudicial hearsay. The learned trial judge erred in her treatment of the evidence of Detective Sergeant Wilson concerning the information that he received upon which he acted in arresting and charging the applicant that was relied on by the prosecution in the trial below. This conclusion was arrived at on the basis that there is no account given to fill the gap for the information that connected the applicant to the robbery which led to his arrest and charge and ultimately his conviction and sentence.

[35] In keeping with **Winston Blackwood**, it was not enough for the learned trial judge simply to have stated in her summation that she accepted the "evidence" without demonstrating that she considered whether there was a possibility of inadmissible and prejudicial hearsay being a part of the evidence in the trial. This concern is heightened by the learned trial judge's failure to treat with it in the summation, even though counsel for the defence objected to the admission of what he viewed (in our view, correctly) as inadmissible hearsay evidence at page 82 lines 26 to 27 of the transcript. The learned trial judge simply said that she did not agree that it was hearsay during the trial in response to counsel's objection but did not state the basis for her view and did not address it in her summation. However, it is important to note that, (accepting the guidance in **Gregory Johnson**), even if the learned trial judge had directed herself on the hearsay evidence, the conviction still could not have been allowed to stand, due to the severely prejudicial effect of that inadmissible evidence and its lack of any probative value.

[36] With respect to the case of **Moulton**, cited by the Crown, that case is distinguishable from the instant application.

[37] The main point on which **Moulton** can be distinguished is to be found at para. [85] of the judgment itself, where it was observed as follows:

> "[85] Whilst the evidence of both police officers was hearsay and irrelevant, there was no prejudice to the accused as was found to have occurred in the cases relied on by the applicant. Neither of the officers' statements could have given the impression that the applicant had been identified, as the perpetrator, by anyone not called as a witness. We agree with counsel for the Crown that the authorities cited by the applicant can be distinguished. In all the cases, the evidence led tended to show that the appellants were possibly identified by persons not called as witnesses. No such inference can be drawn from the impugned evidence in this case."

[38] This court has considered the submissions on all grounds from both the applicant and the Crown but this application was decided primarily on this issue of the admission

of inadmissible and prejudicial hearsay evidence, reflected in supplemental ground nine. The evidence at the crux of the Crown's case which connected the applicant to the crime is inadmissible hearsay and, whilst having no probative value, its effect was prejudicial to the applicant, thus denying him a fair trial.

[39] Based on this finding (which goes to the heart of the conviction), there is no need to address the other grounds or issues in this application because, even if that was done and the Crown succeeded on some of them, the outcome would be the same. Without admissible evidence more directly linking the applicant to the crime and filling the evidential gap that existed, the Crown did not prove beyond a reasonable doubt that it was the applicant who had in fact committed the robbery. It was for the foregoing reasons that we made the orders that are reflected at para. [3] of this judgment.