JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 2/2007

BEFORE: THE HON. MR JUSTICE COOKE, J.A.
THE HON. MR JUSTICE HARRISON, J.A.
THE HON. MISS JUSTICE SMITH, J.A. (Ag.)

BRYAN RUSSELL v REGINA

Norman Godfrey instructed by Brown, Godfrey and Morgan for the Applicant

Miss Maxine Jackson for the Crown

21 & 22 January 2008

ORAL JUDGMENT

HARRISON J.A:

[1] This applicant was convicted on 13 December 2006, in the Gun Court held at Mandeville before Pusey J, on an indictment which charged him on two counts for illegal possession of ammunition and one count for illegal possession of a firearm. He was convicted only on count 1 which charged him for illegal possession of seven (7) rounds of ammunition and was sentenced to a term of three years imprisonment at hard labour. He now applies to this Court for leave to appeal against the conviction after a single judge had refused him leave to appeal.

[2] The prosecution's case was based on the evidence of three witnesses: Detective Sergeant Pat Wallace, Detective Sergeant Henry Duncan and Detective Corporal Errington Beech.

[3] On 7 February 2003 the police went to the home of the applicant at Wardville Meadows in Manchester, and a search of the house was carried out in his presence. His bedroom was searched and on top of a dresser was a chest. It was locked with a key and the applicant took from his pants pocket a key which he used to open the chest. In that chest were seven (7) live rounds of 9mm ammunition. Also found on top of the chest was a holster for a gun. The applicant was arrested and charged for these rounds and upon being cautioned he said:

"Officer, a one a me friend left them with me fe keep."

[4] The applicant was taken to Area 3 Flying Squad Office where the rounds of ammunition were placed in an envelope in the presence of the applicant.

[5] Whilst the applicant was at the station he showed the police some scars on his hand and said:

> "Officer look pon mi hand, a Greenvale mi live..... and a man up yah do me soh, because me a build me house and, me go a station and report it and the police nuh do nutten bout it, and soh mi haffi protect myself."

[6] Detective Sergeant Wallace said that he was alerted by what the applicant said and concluded that they might have missed a firearm

on their search of his house. Detective Sergeant Wallace, Detective Sergeant Duncan and other police officers returned with the applicant to his house and a young girl who was there used a key to open a padlock on the gate for the verandah and allowed them entry.

[7] Another search was done and a barrel was found behind the refrigerator in the kitchen. Sergeant Duncan found a tennis racket case in the barrel. He opened it and found an AK 47 Assault Rifle and a magazine which contained two rounds of ammunition. The applicant was shown the rifle and ammunition and he repeated what he had said to the police at the Flying Squad Office. He also said, "mi nuh rob nobody". He was taken back to the station where he was further charged for the rifle and other two rounds of ammunition.

[8] The applicant made an unsworn statement from the dock. His defence was that his house was searched and that a gun holster was found in the bedroom. He was also searched and marijuana was found in one of his pants pockets. He said he was taken to the station and that there was a discussion there about the holster. Detective Sergeant Hutchinson then said that if there was a holster, there must be a gun and that they should return to the house to carry out another search. He was kept outside of the house whilst the search was conducted. He heard when Detective Sergeant Duncan called to Detective Beech. They went inside the house and the cover for a barrel which was inside the kitchen was removed. The applicant said he saw a tennis racket

case in the barrel. He was questioned about the case and he denied knowledge of it. He said that the case was opened by the police and something resembling ammunition fell from it. He was asked if he knew what "this is" (in reference to the AK 47) and he said, "It look like a gun". He said he had no knowledge of the firearm and ammunition.

[9] The learned judge found him not guilty on counts 2 and 3 but found him guilty on count 1. It is our view however, that the applicant was most fortunate when he was discharged in respect of counts 2 and 3. This appeal is therefore in respect of the conviction and sentence on count 1 (the illegal possession of 7 rounds of 9mm ammunition).

The Grounds of Appeal

[10] The original grounds of appeal are as follows:

> "(a) The verdict is unreasonable and cannot be supported by the evidence.
>
> (b) The learned trial judge erred in law when he entered a verdict of guilty against the appellant before considering his defence.
>
> (c) The sentence of three (3) years imprisonment is in the circumstances manifestly excessive;
>
> AND the appellant seeks leave to file and argue additional and/or supplemental grounds of appeal when the transcript of the trial becomes available."

[11] Mr. Godfrey was granted leave to argue a supplemental ground which states:

> "4. The learned trial judge misdirected himself on the case for the Defence when he directed that the Appellant admitted that ammunition was found on the first visit by the Police to his home."

The original grounds as well as the supplemental ground were argued. We propose to deal first with ground 4.

[12] The complaint is that the learned judge had misdirected himself on the case for the defence. Mr. Godfrey submitted that in directing himself on the applicant's unsworn statement he had misconstrued the unsworn statement and had inferred from it that the applicant had admitted to the finding of the seven 9 mm rounds of ammunition on the first occasion when the police searched the premises. The impugned passage is at p. 190 of the transcript where the judge stated inter alia:

> "... he said that among other things, they had found, he admitted they found on him some ganja and I will formally warn myself, a judge of fact, that the fact that they may fine (sic) other contraband substance have nothing to do with this matter. He admitted that they had found it and he was taken to the Flying Squad and the other officers, including Mr. Hutchinson, said that if bullets were there that means a gun was there ..."

[13] Mr. Godfrey submitted that what the applicant said was that the police had found a holster and that this statement by him had caused the police to return to the premises a second time in order to carry out a further search. He argued that the applicant's defence is that he saw ammunition falling from the racket case in the kitchen on that

occasion. In the circumstances, he submitted that by misconstruing the statement this would have coloured the verdict. He therefore prayed that the conviction be set aside.

[14] Miss Jackson, in a valiant attempt, submitted initially that she did not agree that the judge had misconstrued the evidence but subsequently submitted that notwithstanding that the learned judge could have misconstrued that aspect of the applicant's statement, he had dissected the evidence and arrived at a proper finding of guilt on count 1. She argued nevertheless, that if the court found against her, then a re-trial should be ordered.

[15] We have thought over this matter and have concluded that there is merit in the submissions of Mr. Godfrey. We are obliged to conclude that reference to the admission at page 190 (supra) amounted to a misdirection of the facts.

[16] The authorities show that when the appellant's case is not that the judge erred in law but that the judge erred in his handling of the facts, the questions must be, first of all, was there error, and secondly, if there was, was it a significant error which might have misled the jury or the judge who sits alone? (see ***R v Wright*** (1974) 58 Cr. App. R 444). The question for this court is whether the applicant in view of the error, had a fair trial. If this Court considers that he did not have one, it is its duty to quash the conviction.

[17] The misdirection, in our view, was clearly of significance. It seems quite probable that this error may well have had the effect of what Mr. Godfrey describes as "colouring" the learned trial judge's verdict on count 1. For this reason, the conviction cannot stand.

[18] Because of the decision we have arrived at with respect to ground 4 there is no need to say anything in relation to the other grounds of appeal.

[19] We have heard further submissions from Mr. Godfrey regarding the likelihood of an order being made for a re-trial but we have not been persuaded by his argument that the applicant ought to be acquitted of the charge.

[20] In the interests of justice and in light of the decision in ***Reid v Regina*** (1978) 27 WIR 254, we are of the view that a new trial should be ordered. In ***Reid*** (supra) Lord Diplock stated at page 258:

> "Their Lordships would be very loth to embark upon a catalogue of factors which may be present in particular cases and, where they are, will call for consideration in determining whether upon the quashing of a conviction the interests of justice do require that a new trial be held. The danger of such a catalogue is that, despite all warnings, it may come to be treated as exhaustive or the order in which the various factors are listed may come to be regarded as indicative of the comparative weight to be attached to them; whereas there may be factors which in the particular circumstances of some future case might be decisive but which their Lordships have

> not now the prescience to foresee, while the relative weight to be attached to each one of the several factors which are likely to be relevant in the common run of cases may vary widely from case to case according to its particular circumstances. The recognition of the factors relevant to the particular case and the assessment of their relative importance are matters which call for the exercise of the collective sense of justice and common sense of the members of the Court of Appeal of Jamaica who are familiar, as their Lordships are not, with local conditions."

His Lordship continued by suggesting certain factors that would determine whether or not to order a re-trial. He said:

> "Their Lordships have already indicated in disposing of the instant appeal that the interest of justice that is served by the power to order a new trial is the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing-up to the jury. Save in circumstances so exceptional that their Lordships cannot readily envisage them it ought not to be exercised where, as in the instant case, a reason for setting aside the verdict is that the evidence adduced at the trial was insufficient to justify a conviction by a reasonable jury even if properly directed. It is not in the interests of justice as administered under the common law system of criminal procedure that the prosecution should be given another chance to cure evidential deficiencies in its case against the accused."

[21] There can be no doubt about the seriousness of the offence for which the appellant in the instant case was charged. The case was not one of any complexity. It narrowed to a straight issue as to whether the applicant had used a key to open a chest in which seven live rounds of

9mm ammunitions were found. The possibility of the prosecution filling any evidential gaps or providing a remedy for any deficiency will not arise in this case. The prosecution will have to stand or fall on the evidence on which it now relies.

[22] We have therefore treated the hearing of the application for leave as the hearing of the appeal. The appeal is allowed; the conviction is quashed and sentence set aside.

As already said, in the interests of justice a new trial is ordered. We recommend that the new trial takes place in the Manchester Circuit Court which commences on January 28, 2008.