

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 164/06

**BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MR. JUSTICE, DUKHARAN, J.A. (Ag.)**

MOHINDER SINGH v R

Robert Fletcher, for the Applicant

Ms. Deneve Barnett, for the Crown

30th June 2008

ORAL JUDGMENT

PANTON, P.,

This applicant for leave to appeal, Mr. Mohinder Singh, was charged with the offences of illegal possession of firearm and shooting with intent and he was sentenced having been convicted by Mr. Justice Marsh. He was sentenced to 7 years imprisonment and 10 years imprisonment respectively on those counts.

The convictions were recorded on the 8th of September 2006. The application for leave to appeal was refused by the single judge. However, we gave leave to the applicant to argue the following ground of appeal:

"The learned trial judge's treatment of a critical discrepancy in the case against the applicant was deficient denying the applicant a fair and balanced consideration of the case against him."

Having examined the transcript and studied the skeleton arguments placed before us by Mr. Robert Fletcher who appears on behalf of the applicant, we felt ourselves constrained to immediately call on learned counsel for the Crown Ms. Deneve Barnett, to indicate whether she could really support the convictions.

Miss Barnett, after an attempt at justifying the convictions, and some exchanges between herself and the Bench, concluded - and concluded rightly in our view - that this application ought to be granted and the appeal ought to be allowed because there is an irreconcilable situation.

There are two police witnesses who claimed to have witnessed the events in broad daylight whereby Mr. Singh and another man known as "Dabby", but who counsel for the Crown at trial kept referring to as "Gabby", were seen exiting certain premises at Eighth Street in St. Andrew, Greenwich Farm area, Greenwich Town. According to one of the witnesses Cons. Morris Lee, Mr. Singh was seen with something in his hand but he the constable was not sure what it was but; what he was sure about was that Mr. Dabby the other individual had a gun and that Dabby fired at both of them. Mr. Lindsay, the other Constable and Cons. Lee, were the witnesses to the crime.

So far as Cons. Lindsay was concerned both men had guns and both men fired. Clearly that was a situation in which the evidence of those two witnesses could not harmoniously co-exist.

The learned judge at page 98 of the record of appeal dealt with it in this way:

"The discrepancy as to what one witness is saying that one man had a gun, that the accused had something in his hand, he could not say exactly what that was. One witness said that the men ran one behind the other across the train line, another witness said that one of the men ran across the train line."

Now, one officer said that he saw something in the hand of the accused but he could not say if it was a gun. The other officer said that what he saw in the accused man's hand was a gun. "Is that a fatal discrepancy?" asked the Judge. And he answered, "I say not." Those were the Judge's words and then he went on to say on page 99 that he found that both witnesses were not discredited by cross-examination that they impressed him as being witnesses of truth. He reasoned: "Granted there were discrepancies in their testimonies, but that's differences I blame on individual powers of observation, I found them to be witnesses that were credible." (That's taken from lines 8-12 on page 99)

An examination of that assessment by the learned trial judge has not, in our view, resolved the matter; the applicant either had a gun, or he did not. He either fired, or he did not. One constable is clearly saying, he was not sure what he had in his hand and he was also clearly saying that, that applicant did not fire, only Dabby fired.

Now, it is irreconcilable and in the circumstances we are of the view that the learned trial judge erred in this regard and the application has to be granted and the appeal which follows arising from the granting of the application has to be allowed. The convictions are quashed and the sentences are set aside and we hereby enter a judgment and verdict of acquittal.