

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 15/2010

**BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA**

BRIAN WILLIAMS v R

Ms Jacqueline Cummings for the applicant

Mrs Karen Seymour-Johnson and Miss Melony Domville for the Crown

24 April 2012

PANTON P

[1] This applicant was convicted in the High Court Division of the Gun Court sitting at King Street in the parish of Kingston and sentenced on 10 December 2009 to terms of imprisonment of 10 years and 15 years respectively for the offences of illegal possession of firearm and wounding with intent with an order that these sentences are to run concurrently. The trial was presided over by Mr Justice Martin Gayle.

[2] The applicant applied out of time for leave to appeal. The single judge granted an extension of time for the notice of application for permission to appeal to be filed. However, the single judge refused the application for leave to appeal and in that refusal the single judge indicated that the issues in the case were identification and the

credibility of the Crown witnesses and these, he said, were adequately dealt with by the learned trial judge.

[3] The applicant has, as is his right, renewed his application before us and today we heard submissions from Ms Jacqueline Cummings on his behalf and these were responded to by Mrs Karen Seymour-Johnson who, along with Miss Melony Domville, appeared for the Crown.

[4] The applicant himself set out as his grounds of appeal thus: unfair trial, lack of evidence, miscarriage of justice. Ms Cummings expanded somewhat on those grounds by seeking leave, which was granted, to argue the question of the reliability of the forensic evidence and also the question of the sentence being too harsh.

[5] So far as the facts of the case are concerned, the complainant herein, Miss Julian Hall, said that on the morning of 23 May 2007, she went to premises at Port Henderson Road in Saint Catherine to remove her furniture. She, apparently, used to live at those premises with her boyfriend and also the applicant and another man named "Chris", as well as two other females. She went at approximately 6:00 o'clock in the morning to effect the removal of her furniture. Upon her arrival there, she spoke with Chris and then she saw the applicant, who is called "Bitters", coming over the wall. When he came over, she enquired of him as to why he had thrown a stone and hit her fridge and smashed up her things. The response of the applicant, according to Miss Hall, was in these terms – "Hey gal, move from in front of mi". Miss Hall, in defiant mood, advised him that she wasn't moving from in front of him because both of them did not have

anything. Thereupon, the applicant, according to Miss Hall, boxed her and then used an iron board from off the bed and hit her on her head and on her back. She fell to the ground and then, according to her, she saw a guinness bottle which she took up, broke it on the wall and then chased the applicant and inflicted injuries on him with it. According to her, Chris himself had joined in and started to hit her with the iron. After this incident, the applicant left but returned not long after and drew a gun from his waist, fired at the complainant and injured her. She remarked, "Bitters shot mi, look how him shot mi and mi and him nuh have anything". Whereupon, according to Miss Hall, the applicant said, "Gal, a dead yuh fi dead, yuh fi go suck yuh madda". Eventually, Miss Hall was taken to the hospital and she remained there for two weeks receiving treatment. She had apparently received gunshot injury in the region of her back.

[6] The applicant was held that day, and was seen with injuries resulting from the use of the broken guinness bottle on him. His hands were swabbed that very day with a view to examination being conducted to determine whether he had fired a firearm.

[7] According to the forensic expert, Miss Marcia Dunbar, her office received swabs from the police and when those swabs were examined by her, they having being bagged, she found in bag number one, the presence of gunshot residue at elevated level. In relation to bag number three, she found presence of gunshot residue at trace level on the swab in that bag and also on the swab in bag number four. There was no evidence of gunshot residue on the swab in bag number two. Bag number one

contained a swab which was in respect of the palm of the right hand of the applicant. In bag number two, the swab was in relation to the back of the right hand of the applicant. Bag number three contained the swab which was in respect of the palm of the left hand of the applicant and bag number four contained a swab which was done in relation to the back of the left hand of the applicant.

[8] Miss Dunbar explained that elevated levels of gunshot residue could arise from the firing of a firearm or being in the path of gunshot residue as it is emitted from a fired firearm within a distance of 9 inches. In respect of trace level, she indicated that, trace level of gunshot residue could arise – (1) from an initial deposit of the higher level of elevation or intermediate and with lapse of time and as a result of activity there is loss of gunshot residue to the trace level, (2) there is an initial deposit from gunshot residue being emitted within 24 inches of a fired firearm and (3) arising from secondary transfer. She found that there has been no deterioration in respect of the samples, although her examination had taken place approximately a year after the swabbing had been done. The swabs had been received at the forensic lab on 14 June 2007 and the examination was conducted on 22 April 2008.

[9] The applicant made an unsworn statement. In that statement he recounted how he was stabbed on his ears, face and elbow by the complainant and that he bled a lot. He ran and while running he heard the police siren and he ran to the police and said, “a oona mi want si”. He said that they started to interrogate him saying that he had shot somebody, but he didn’t know who that person would be. His response to them was

that he hadn't shot anyone and that in fact, he was the victim; he was the one who had been stabbed. He said that the police started to beat him and asked for the gun and he told them that he did not know anything about any gun. He was taken to the Spanish Town Hospital and then his hands were swabbed at the police station. He said that another police was in the room and his (the policeman's) hand was wiped with the same cotton that they were using on his, the applicant's, hand and they put it in a plastic ziplock bag. He said he told them that he wasn't going to sign the form that they were giving him to sign after he had seen them do that but they started to beat him and said that he had to sign it. Apparently, he signed it and gave a tale of having been beaten repeatedly by the police and being asked for the gun that he had used to shoot Miss Hall.

[10] In that situation, the learned judge did a brief review of the evidence and found that Miss Hall was a witness of truth and that the applicant was the person who had shot her on the day in question and so he found him guilty.

[11] In challenging the conviction Ms Cummings raised the question of there being discrepancies as to the evidence given by the complainant that she was facing the applicant at the time that she was shot. Ms Cummings submitted that the complainant could not have been facing the assailant when the gun was fired. She also raised an issue as to the identification process, in that, there was evidence that the applicant had refused to attend a parade and an informal parade was held and the question raised by Ms Cummings was as to the purpose of Miss Hall's mission: was it to identify the person

who had shot her or was it to identify the applicant who is called "Bitters"? The third area of challenge by Ms Cummings was in respect of the forensic evidence. She questioned the fact that Miss Dunbar said that there had been no deterioration in the samples, notwithstanding that the swabs were taken in June 2007 and the examination was not conducted until April the following year. She questioned how the learned judge could have accepted that the applicant had fired a gun on the day in question when in fact, the evidence of the expert was that usually there is the deposit on the back of the right hand if a gun is fired with the right hand and in this case, there was no trace of any deposit on the applicant's hand.

[12] Mrs Seymour-Johnson has submitted that the challenge as to the forensic evidence needed more substance, in that, Miss Dunbar's evidence cannot be just discounted without there being something else of a scientific nature to put in its place.

[13] We have considered all that has been put before us, having combed the transcript carefully, and we cannot agree that there is any discrepancy which is of such a magnitude as to have shaken the evidence given by Miss Hall and which was accepted by the trial judge. Furthermore, in relation to the question of identification, we do not see where there was any need in the circumstances of this case for there to have been any identification parade. Miss Hall and the applicant were well known to each other and they had lived on the same premises for some time and in any event, this incident took place in broad daylight.

[14] Finally, on the question of the forensic evidence, we agree that we cannot substitute the opinion of counsel for the expert opinion of Miss Dunbar and we find that there is no inconsistency in her evidence in relation to the findings that she made which the learned trial judge has accepted. The case was basically a simple one, in that, in the early morning, the applicant and the complainant who knew each other well had a dispute; he left the scene and returned later and shot the complainant. The learned trial judge was perfectly right, in our view, in accepting the evidence presented by Miss Hall.

[15] So far as the sentences are concerned, they are perfectly within the range which one can expect in a situation where a firearm, an illegal one, is used to cause serious injury and at the same time the firearm has not been recovered. The applicant has convictions for robbery with aggravation and also illegal possession of ammunition. The fact that the ammunition may have been found on him the same day is neither here nor there; they are two separate incidents and the learned trial judge was quite right in concluding that the applicant has a propensity in this direction. He said "it would appear to me that you are a person who enjoys using the gun".

[16] In the circumstances, the application for leave to appeal is refused and the sentences are to run from 10 March 2010.