[2014] JMCA Crim 21

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 45/2011

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE MANGATAL JA (AG)

NEVILLE FEARON v R

Chumu Paris for the appellant

Miss Melissa Simms for the Crown

13 January and 2 May 2014

PHILLIPS JA

[1] The appellant was convicted on 19 May 2011 in the Western Regional Gun Court in Montego Bay by Straw J on an indictment containing two counts - illegal possession of firearm and assault with intent to rob. He was sentenced on the same date to 15 years imprisonment at hard labour on both counts, with the direction that the sentences imposed were to run concurrently.

[2] His application for leave to appeal conviction and sentence was reviewed by a single judge of this court and the application for leave to appeal against conviction was refused. However leave to appeal was granted in respect of the sentence imposed on

count two, as the learned judge of appeal opined that the learned trial judge had erred in sentencing the appellant to 15 years imprisonment for the assault offence as the maximum sentence is two years according to statute.

[3] This matter related to an incident which took place in the vicinity of the Albion High School in the parish of Saint James, when the virtual complainant, a taxi operator was assaulted by the appellant with another, intent on robbing him of his money, with the use of a firearm. The complainant stabbed one of the assailants and both of them ran away from the scene.

[4] The appeal, in the main, concerned the question of circumstantial scientific evidence. The verdict in the case was not dependant on visual identification evidence as the virtual complainant did not see the face of the appellant at any time throughout the incident, could not describe him, and did not identify him on an identification parade. The case for the prosecution relied essentially on deoxyribonucleic acid (DNA) evidence.

[5] The appellant was granted leave to file and argue three supplemental grounds of appeal namely;

> Ground one
>
> "Her Ladyship erred in finding that the object described as [sic] a gun as there was insufficient evidence adduced for the Court to make a proper finding that a firearm was used in the course of the offence.

Ground two

"Her Ladyship erred in law in allowing the DNA evidence as there was an insufficient nexus between blood recovered from the scene with that of the Appellant."

Ground three

"Her Ladyship erred in law in committing the 'Prosecutor's Fallacy'."

[6] Before dealing with these grounds of appeal however, an outline of the background facts will assist in the analysis of the submissions. The trial lasted eight days. The prosecution called nine witnesses; the virtual complainant, four police witnesses, and four forensic witnesses. The appellant gave sworn evidence and called one witness on his behalf.

The case for the prosecution

[7] Mr Owen Mckenzie, the virtual complainant, operated a Toyota Corolla Sprinter (station wagon) as a taxi in Glendevon, Montego Bay, in the parish of Saint James. He testified that on 29 July 2008 at about 12:50 pm he was operating his taxi when on reaching the vicinity of the Albion High School, two men stopped him. He stopped and one of the men came into the front passenger seat of the motor vehicle and the other, the appellant, went into the rear seat behind him. He said that he proceeded and when he got to the intersection where the 'poor house' is situated, and he stopped, the man in the front said to the man at the back, "Bad man, duh yuh ting nuh". He also said, "Bad man, gi mi di gun, gi mi the gun nuh, bad ma.." Mr McKenzie said that he turned around and "take a glance". When he did that, he saw "a man with a gun that is about

six inches, with a shine handle". This was the male passenger in the back of his taxi who then said to him, "Bwoy, gi mi di money".

[8] He said that he immediately took up a small, five to six inches, silver looking shine knife that he had and stabbed the man who was in the back twice, in his upper and lower body. The men ran away. He never saw their faces, only their retreating backs. He was therefore unable to visually identify them. He said that he drove immediately to the Area One Police Station, and he was directed to go to the Freeport Police Station where he made a report to Constable West. He pointed out to Constable West certain things which were in his car which had not been there before the men came into it, namely one foot of old black shoes in the front, and a bottle of Red Label in the back. He also pointed out that the back of his vehicle was messed up with blood, some of which was on the cardboard on the floor "in the truck there".

[9] He gave a statement to Constable West and then he drove his vehicle to Summit Police Station, where he said Corporal Radcliffe took a blood sample from a piece of the cardboard in the car, which Corporal Radcliffe had cut off. He said that he had handed over his knife to Constable West at the Freeport Police Station and he had seen when Constable West placed it in an envelope. He admitted however that giving his knife to Constable West was not in the statement which he had given to the police. Nor was it in his statement that he had gone to Summit Police Station, and that any samples of blood had been collected from any cardboard from his car there. He maintained that he had seen the gun in the hand of one of the assailants, although it was just a glance, and he was unable to see the handle of the gun as it was in his

assailant's hand, but he saw the nozzle and the trigger and he had used his knife to stab his assailant, as he considered that his life was in danger. He had been afraid, he said, but he was "conscious".

[10] Constable Lardel Collin West gave evidence that on 29 July 2008 he had been stationed at Freeport Police Station when at approximately 1:00 pm Mr McKenzie, whom he had not known before, attended on the station and made a report to him. He also handed him a black-handle knife which he placed in a brown paper envelope, marked it with a "D" and labelled it. He said that Mr McKenzie also took him into the car park and showed him a white Toyota Station Wagon motor car bearing registration plate PA 9795. He observed that there was blood splattered "to the right rear of the vehicle both just behind the passenger seat and along the speaker box in the back… of the car". He said that he directed Mr Mckenzie to drive the car to Summit Police Station where scenes of crime is located, and he followed him there. He spoke to Detective Corporal Radcliffe who processed the car. He could not recall whether he had taken the statement from Mr McKenzie before or after the car had been processed.

[11] Constable West also testified that at 3:00 pm that same day, having received a report, he went to the Accident and Emergency Room at Cornwall Regional Hospital. He saw a man lying on a hospital bed who "appeared to be weakened as his clothing was covered with blood". He appeared also to have a stab wound to his neck. Having identified himself to this man as a policeman, the man told him that he was Andrew Lawrence. Constable West identified the man as the appellant. Having also indicated to the appellant that he was investigating a case of attempted robbery, the appellant,

after caution, said to him, "is some bwoy a dem a fight over Albion and dem stab mi up... Some bwoy a fight over Albion and gang mi". The appellant said, according to the officer, that he was willing to go on an identification parade.

[12] Constable West said that the appellant had on an underpants which was soaked with blood. He asked the doctor who was attending to the appellant to give him the underpants for evidential purposes which the doctor did, and in the presence and view of the appellant, he placed the underpants in a brown paper envelope, marked it "C" labelled it and sealed the envelope. He said that he took the envelopes containing the knife and the underpants to the storekeeper at Freeport Police Station for safekeeping. He collected these items from the stores on 31 July 2008, and they were in the same condition in which they had been when he had handed them in.

[13] He testified that he gave the items to Woman Corporal Graham for transmission to the forensic lab in Kingston and he obtained the forensic certificate from her on her return from Kingston. The certificate bore the Forensic Lab (FL) number 1775/2008. He identified the knife and the underpants in court by his handwriting on the envelopes which were still sealed, and through his recognition of the items themselves. The knife and underpants were tendered into evidence as exhibits one and two respectively. Additionally, Mr McKenzie was recalled to identify the black handle knife as his and, as the knife used to stab one of the men who came into the taxi on 29 July 2008.

[14] Constable West was challenged as to when he handed over both exhibits to the stores. Did he hand over the knife immediately after it was given to him or did he

have it with him when he went to Summit Police Station or when he was at the hospital? He was uncertain whether he had gone to the Summit Police Station after he had gone to the hospital, although he said that he went to the hospital at 3:00 pm. He was uncertain when in that chronology he had taken the statement from Mr Mckenzie. He accepted that he had not mentioned in his statement that he had gone to the Summit Police Station. He indicated that Mr Mckenzie had not been with him at the hospital, but the knife which he had said that he had handed over to the stores for safekeeping, had been with him at the Summit Police Station. He was adamant that the underpants and the knife were not at the Summit Police Station as the underpants had not yet been collected.

[15] He maintained that the underpants of the appellant had been given to him by the doctor attending him at the time when the appellant was being put into hospital clothes. He agreed that in his statement he had not given a description of the underpants. He was also unable to give the name of the doctor who had given him the underpants, and he confirmed that he had not signed for the receipt of them. He insisted however, that he had followed general protocol in the collection and care of the exhibits and had handled them with gloves at all material times. He averred that they were properly marked and labelled. He also insisted that the knife had always been with him in his pouch, with Mr McKenzie present. He admitted though that he had removed the knife from the pouch after he had sealed the envelope, "by request".

[16] Detective Corporal Marvalyn Graham testified that on 31 July 2008 she had received two sealed envelopes from Constable West, marked "C" and "D" respectively.

[17] She stated that she had given the two envelopes to the forensic analyst who had opened them, examined the items contained therein, and handed her a forensic receipt bearing FL number 1775/2008. She filed the receipt in the records office on her return to the office to which she has the keys. On 27 July 2009, she returned the receipt to the forensic analyst, and was given the forensic certificate along with the said two envelopes bearing FL number 1775/2008. On her return to office, she handed the certificate to Constable West and took the envelopes to the stores.

[18] It was her evidence that she was unable to recall the name of the clerk to whom she had given the envelopes but she indicated that that person was a forensic analyst and she knew all persons who worked at the forensic laboratory. She indicated that the name of the person to whom she had given the envelopes would be on the forensic receipt and the forensic certificate, and that was the same person to whom she had given the forensic receipt.

[19] Mr Lymano Wishart testified that he was employed at the forensic laboratory, as a forensic officer, and his duties included assisting the government analyst in the receipt and processing of exhibits and the preparation of certificates. He gave evidence that he had received two sealed envelopes from Corporal Graham. He stated initially that the envelopes received were marked "A" and "C" and "B" and "D" respectively. He later clarified that to say that the envelopes were marked "C" and "D" and he had re-labelled them "A" and "C" respectively as these were the first exhibits to have been received by the laboratory and so were given that notation by him. It was his evidence that the envelope he marked "A" was marked one paper envelope marked "C"

containing one plaid underpants with blood taken from Andrew Lawrence, twenty-eight years old of Albion, St James". The envelope he marked "B" was marked, "[o]ne paper envelope marked "D" containing one black handle knife with blood taken from Owen McKenzie, sixty years-old taxi operator of Lilliput, St James, complainant in the case". He said that he assigned the FL number 1775/2008 to the "exhibits" as he referred to them, wrote, he said, "the case on it, the title of the case and assigned the envelopes their correct lettering "A" and "B"". He said that when he took out the exhibits for examination he wrapped them in newsprint in order to prevent foreign items "getting to the exhibits". He said that in doing his work he was clad in a lab coat over his regular garments and he wore latex gloves, all in an effort to prevent contamination of the exhibits. He identified the items he had examined as exhibits one and two, in the case.

[20] Detective Corporal Fenton Radcliffe gave evidence that he was attached to the Area One scenes of crime with offices at the Summit Police Station. He was a trained forensic officer whose duties included dealing daily with the processing of crime scenes, the collection and packaging of exhibits and preparing statements at the request of the investigating officer in respect of court proceedings. On 29 July 2008, he was introduced to Mr McKenzie and shown his Toyota Corolla motor car. He observed he said, that; "bloodstains were seen inside of the said motorcar. Inside of the trunk of the motorcar, there was a board speaker box, which measured 29 inches long, by sixteen inches wide and 11 and-a-half inches high. On top of this speaker box, there was bloodstain". He said the bloodstain appeared "scattered, spewed all over the car, the seat". Some areas of the bloodstains, he indicated were dry, and some were still

wet. He stated further that inside the trunk there was also a piece of cardboard with bloodstains on it. He photographed the car and the contents that he had noted. He said that Constable West showed him a knife which was black in colour and wrapped with black electrical tape. It measured 7¾ inches long. He photographed the knife, he noticed that it had blood on the blade and he gave the knife back to Constable West. He identified the knife that he had photographed as the knife which had been entered as exhibit one in the case.

[21] He told the court that he had obtained a cotton swab, taken samples of blood from the speaker box, placed the swab into its wrap and then in an envelope, sealed it and marked it "B" for identification. He also took a swab of blood from the cardboard removed from the trunk of the car, made a parcel wrap taken from brown paper, put the cardboard into it, sealed and labelled it "A" for identification. He said that while he was processing the car, Mr McKenzie was in the immediate area and could have seen what was happening. He filled out the forensic form and placed the envelopes in the refrigerator for storage. On 5 August, he retrieved from the refrigerator the exhibits lettered "A and "B" and he gave them to Constable Linton Gordon with the completed forensic form. On 6 August, Constable Gordon gave him a forensic receipt bearing FL number 1820/2008.

[22] He testified that whenever he is called to a crime scene he habitually wears his lab gown and gloves which was standard operating procedure. In relation to the matter before the court, he had not only worn gloves but had replaced them each time

he dealt with a new exhibit, a process he utilized, he said, for health safety and also to prevent contamination of the exhibit and so as not to erase the evidence.

[23] He was challenged on the fact that he had given his statement in 2010, which was nearly three years since he had processed the vehicle, and it was suggested that he had only done so to fill in gaps which existed otherwise, and "to pretty up the thing!" He indicated that he had prepared his statement when the investigating officer had requested it. It was also his evidence that whenever he was dealing with a crime scene he made notes, which he could easily refer to subsequently, and he had written his statement with reference to and with assistance from those notes.

[24] Detective Constable Linton Gordon, said that on 5 August 2008, he had been given a paper parcel and an envelope, both of which were sealed, and a completed Government forensic form. He delivered those items to the Government analyst, who checked them in his presence and gave him a receipt bearing FL number 1820/2008. He gave this receipt to Detective Corporal Radcliffe.

[25] Miss Voneta Spence gave evidence that she has a Bachelor of Science degree in Zoology from the University of the West Indies, Mona was a forensic officer deployed at the forensic science laboratory and her duties consisted of assisting the analyst in the processing of exhibits brought into the laboratory by police officers. On 5 August 2008, she received from Constable Gordon two exhibits. There was one sealed paper parcel labelled exhibit "A", and marked "one sealed paper parcel marked "A" containing one piece of cardboard marked "ashly" containing bloodstain, taken from trunk of white

Toyota 1998 station wagon M/R registered, PA 9795, Re: attempted robbery on 29.07.08, about 12:50 pm, along Albion Main Road, Montego Bay, St James. Constable West in case". The other, she stated, was a sealed envelope, labelled Exhibit "B", and it was marked, "one sealed envelope, marked "B", containing, one blue and white paper parcel containing one cotton swab, with bloodstain collected from speaker box in motor car registered PA 9795 re: Attempted Robbery on 29/07/08, about 12:50 pm along Albion Road, Montego Bay, St James. Constable West in case". Having opened the exhibits, checked that the contents in the parcel and the envelope were consistent with their labelling, she signed the receipt and assigned FL number 1820/2008 to the said exhibits. She gave a copy of the receipt form to the police officer and the original exhibits were taken to the biology department of the laboratory and placed in the vault there.

[26] Dr Judith Mowatt, gave evidence that she was responsible for, among other duties, forensic examinations and analysis. She has a Bachelor of Science degree from the University of the West Indies, Mona, in Biochemistry and Microbiology, a Master of Science degree from the University of Liverpool, England, in Pharmacology and a PhD from the University of Manchester in Genetic Toxicology.

[27] She had examined the contents which bore the FL number 1775/2008 (the underpants and the knife). She cut two holes in the underpants and found that there was blood present in clots on the front and back of the underpants and brown serosanguineous stain that was diffused throughout the garment. The "clots' meant that the blood had congealed, was a solid mass and had solidified. The blood, she said,

was human. Human blood was also found to be present in brown stains and film on the blade of the knife, two samples were taken. With regard to the contents which bore the FL number 1820/2008, the swab had one portion of black cardboard and two portions of brown cardboard all of which contained human blood in brown droplets. With regard to the swab taken from the speaker box, human blood was also present. She prepared a report of her findings and submitted the samples on 22 January 2009, to Miss Sherron Brydson for DNA analysis. She identified the items she examined, which were marked with her initials and tagged, as exhibits one and two in the case.

[28] Miss Sherron Brydson gave evidence that she had been deployed for the past 28 years at the forensic laboratory. Her work entailed examining and analyzing physical evidence, reviewing examinations and analyses of her colleague forensic officers and preparing certificates of her findings for the court. She has a Bachelor of Science degree from the University of the West Indies, Mona in Botany and Zoology and a Master degree from the University of Strathclyde, Glasgow, Scotland, in forensic science specializing in Biology.

[29] Miss Brydson explained that the DNA is;

> "the inherited material of an individual from both parents during conception, it pairs the genetic coding of the individual, it is like the blueprint of the individual. DNA is unique to an individual unless that person is an identical twin or triplet, etc triplet [sic]. So things like the person's eye colour, hair colour and length, complexion, other features to an individual are determined by the DNA. It appears as two strands, one from each parent which are linked together by certain bonds and along the length of the DNA are certain markers."

[30] She explained that there are five steps in the DNA testing, namely extraction, quantification, amplification, and gel electrophoresis and analysis. However, as there was no issue in this case, in respect of the process of the DNA testing, no detail of that evidence is necessary.

[31] Miss Brydson indicated that she had conducted the DNA tests on the samples given to her labelled FL 1775/2008 and FL 1820/2008. The tests on the knife and the underpants were conducted in April 2009, out of which the analysis targeted eight markers, as against the tests completed on the bloodstained cardboard and the speaker box which were done in August 2009 when 16 markers were used and a report given in respect of 13. Miss Brydson testified that although there was no result produced on the second sample in respect of the underpants, due, she suggested, to an insufficient amplification of DNA strands, and that no result had been obtained on one of the markers on the first portion of the cardboard, she found that the DNA results from the underpants matched those from the knife, and that both pieces of cardboard samples and the speaker box matched each other, in that, the result was the same. On comparison of the markers in respect of the samples in FL number 1775/2008 and FL number 1820/2008, it was her evidence that all markers from both sets matched each other, save those from which, as stated, she had not obtained a result.

[32] Miss Brydson did testify however that the DNA results from the first sample in respect of the knife had produced a mixed profile, which meant that the DNA analysis on that area of the knife was coming from at least two individuals. However the results, she said, on the other area of the knife which gave a pure profile and, the one

area of the underpants from which she had obtained a profile were comparable, in that, they matched, giving similar results. She conceded that she would be unable to say when any of the blood, whether the samples that matched or otherwise, had been placed on the knife.

[33] Miss Brydson indicated that she had, on the basis of the results that she had obtained from the markers, obtained genotypes, which, she stated, had been produced from the results of the parental strands in respect of the markers of the particular individual. She explained that she had from the genotypes generated, a match probability or random occurrence ratio frequency in respect of the profiles produced. Each genotype, she said, has a particular frequency in the Jamaican population and that had been determined by testing a little over 200 blood samples collected at blood banks across the island from around 1994.

[34] The analysis, she explained, was to determine the frequency of each of these markers in the Jamaican population, that is the chance of finding another randomly selected person in the Jamaican population with the same profile. She stated that with regard to the samples bearing FL 1775/2008 using the eight markers, the random probability frequency, was one in 44,200,000,000, and in the case of the samples bearing FL number 1820/2008 using the 13 markers, the random probability frequency was one in 12,000,000,000,000,000. The upshot of this analysis, she stated, therefore, was that, "the source of the DNA profile obtained from the underpants, from the knife, from the cardboards and the swab from the speaker box in the car, could have come

from the same person". And the probability of that occurring, she indicated would be the same as previously stated, a chance of one in 44,200,000,000.

[35] Constable West was recalled and stated that a reference sample had been requested from the appellant for DNA testing, but the request had not been granted.

The case for the defence

[36] The appellant gave sworn evidence. He said that he was Neville Fearon, but he had been called Andrew Lawrence "when he was growing up". He stated that he was a clothes designer. He told the court that on 29 July 2008, he had been coming from Paradise on his way to a match at the Youth Centre when he was attacked by a group of men and stabbed several times. He received injuries to his upper body, that is the back part of his shoulder. He ran off and was taken to the hospital in an ambulance. He said that he was treated in the emergency unit. Tubes were inserted in him resulting in him not being able to breathe properly. He said that he was taken to the hospital in a white underpants only, and while there he was put in hospital clothes. He recalled being visited by the police at about 3:00 pm but he was unable to, and so did not, speak with any police officer. He denied that the police had taken any clothing from him or that he had given anyone any authority to give any of his clothes to the police. He stated that the plaid underpants which had been exhibited in the case did not belong to him and he was seeing them for the first time in court. He indicated that he had not been pointed out on an identification parade. He averred that on 29 July 2008, he had not taken Mr McKenzie's taxi, nor had he put a gun to the back of Mr

McKenzie's head and, Mr Mckenzie had not stabbed him at any time on that day. He also denied being requested to provide a sample of blood. In fact he stated that although he had received stab injuries, there had been no bleeding.

[37] Dr Carol Thompson-Forbes, a registered medical practitioner, was the only witness for the defence. She told the court that Andrew Lawrence had been a patient in the hospital in July 2008. He had received injuries to his upper back, namely two wounds to the right and to the left, just above the shoulder. He was treated by the insertion of a chest tube on his right side and given pain management. The appellant, she said, was alert, when he came to the hospital and she was of the impression that he would have been able to speak. She also indicated that as he had received two stab wounds there may have been bleeding.

The appeal

Ground of appeal one - Was there sufficient evidence to satisfy the court that the object used was a gun?

Submissions

For the appellant

[38] Counsel for the appellant submitted that the evidence given by the complainant on the description of the firearm was "slight" as the learned trial judge had accepted, and it did not meet the threshold which has long been established. It is not enough, counsel stated, to say that "everyone knows guns", the witness must show the means whereby he was able to say that what he saw was a firearm. Counsel referred to the

transcript to demonstrate that the complainant had only had a fleeting glance of the object, which is why he submitted, that the only description of the object that he could give was that it was 6 inches with a shine handle, and then later admitted in cross-examination that he could not see the handle as "that part was being held by the man in the back seat".

Counsel referred to and relied on the dictum of Morrison JA in **Julian Powell v R** [2010] JMCA Crim 14 to submit that there was insufficient evidence for a tribunal of fact to decide that the instrument described as a gun satisfied the statutory definition of a firearm, and that the learned trial judge had erred when she did so on the evidence adduced in this case.

For the prosecution

[39] Counsel also relied on the dictum of Morrison JA in **Julian Powell** and submitted that it was important for this court to review the transcript in order to determine whether the evidence adduced was sufficient for the tribunal of fact to have concluded that the object used was a firearm, and she argued that in this case, it was. Counsel adverted the court's attention to the many instances where the complainant spoke about the gun, and submitted that a clear description of the gun had been elicited and, coupled with the words spoken by one of the assailants, particularizing the object as a firearm, made the evidence adduced, satisfactory. Counsel submitted, that this was so in spite of the fact that the complainant may only have had a fleeting glance at the firearm. Counsel also argued that the complainant was not shaken in respect of

his description of the firearm under cross-examination, which was instructive. Counsel therefore submitted that even though the complainant had conceded that he could not see the handle of the firearm, notwithstanding that, sufficient evidence had still been established, for a finding that the instrument used was a firearm. The threshold had been met, she argued, and the fact that the sighting was a mere glance, did not "diminish the potency of such evidence given that identification evidence based on a 'fleeting glance' is accepted by the courts". She submitted that the learned trial judge had not erred.

Analysis

[40] The appellant was charged under section 20(1)(b) of the Firearm's Act, which makes it an offence for any person to be in possession of a firearm or ammunition other than in accordance with the terms and conditions of a Firearm User's Licence. Section 2 (1) defines a "firearm" as follows:

> "firearm means any lethal barreled weapon from which any shot, bullet or other missile can be discharged, or any restricted weapon or, unless the context otherwise requires, any prohibited weapon, and includes any component part of any such weapon and any accessory to any such weapon designed or adapted to diminish the noise or flash caused by firing the weapon, but does not include any air rifle, air gun, or air pistol of a type prescribed by the Minister and of a caliber so prescribed."

[41] Morrison JA in **Julian Powell**, on behalf of this court, canvassed several authorities which have articulated the role of the tribunal of fact when endeavouring to determine whether the evidence in respect of the firearm had satisfied the statutory

framework, and whether on the evidence adduced the conviction of the illegal use of the firearm can be sustained.

[42] In **Purrier & Bailey** [1976] 14 JLR 97, the only evidence came from the complainant who said that the defendants had held a gun at her ear when snatching her money. There was no description of the gun, no recovery of it and no bullet or missile fired from it. The judge taking judicial notice that it was a gun was rejected by the Court of Appeal. The situation was different in **R v Paul Lawrence** (SCCA No 49/1989, judgment delivered 24 September 1990) as the witnesses had seen what they thought was a firearm, and one was particularly familiar with guns as some of her relatives were police officers. The finding that the appellant had either a firearm or an imitation firearm was upheld on appeal. In both **Christopher Miller** (SCCA No 169/1987, judgment delivered 21 March 1988) and **Kirk Manning** (SCCA No 43/1999, judgment delivered 20 March 2000) the court found that the description of the firearms, namely;

> "the mouth was brown coloured resembling small arms that policeman carry.."

and

> "… a short gun… it has a trigger black.. and have a long mouth with the something where the shot come through..",

respectively was sufficient evidence to support a finding that the description fit that of a firearm or at least an imitation firearm.

[43] Having given a comprehensive review of the authorities, Morrison JA concluded at paragraph [19] of the judgment that the cases seemed to establish:

> ".. that it is for the tribunal of fact to decide whether the evidence adduced by the prosecution is sufficient to support a finding that the instrument described as a gun satisfies the statutory definition of a firearm. But it is a matter to be resolved on the evidence and not, in the absence of any evidence, by resort to the doctrine of judicial notice. In assessing that evidence, however, the court is entitled to take into account the relatively high visibility of guns in the country and any special reason for being able to recognize guns put forward by the witness."

[44] In that case the witness had said that she knew how a gun looked; when she saw police officers she took a good look at their guns and, in the particular circumstances of the case, in relation to the gun, she had seen "the part that the bullet came through and the part you hold on, the trigger or something like that...". The court found that there was sufficient evidence to support the judge's finding that what the complainant described as a gun was in fact a firearm within the statutory meaning.

[45] With the assistance of both counsel, the various statements made by the complainant in respect of the firearm in this case had been culled, referred to and relied on with regard to their respective positions taken. We will set out the relevant excerpts from the transcript:

On **page 8** of the transcript the following was elicited on the examination-in-chief of the complainant:

"Q. What, if anything, did you see when you glanced?

A. I saw a man with a gun that is about six inches, with a shine handle."

On **page 11** of the transcript the complainant stated that before the men exited his vehicle, he heard the following exchange:

"A. Bad man, gi mi di gun, gi mi the gun nuh, bad man."

On **page 22**, the complainant further disclosed that:

"A. Just a glance, just like that, I glanced and I saw the gun pointing at my head."

On **page 28** the complainant said in cross-examination:

"If the gun was to the back of my head, your Honour, then I could not identify to say the gunman was about six inches, it was to the side where I glance, I just come like this, ease off and go straight fe mi knife, the small knife that I have [sic]."

Page 32 in further cross-examination:

"The gun was placed at the back of head then, I realized that it was a gun I shift my head and the gun come [sic] to the side of the head."

On **page 35** of the transcript, also in cross-examination the following evidence was elicited:

"Q: You didn't see any gun Mr. McKenzie?

A: Of course, I saw a gun, of course I saw a gun, and the reason why I stab [sic] him [was] because my life was in danger; I saw the man with a gun.

Q: You did not describe this person, did [sic] you did not describe this gun?

A: I describe [sic] the gun, shine handle about six inches long

Q: That is the description?

A: I am not familiar, I could not say what the gun name, just a gun, anybody can know gun, I am not familiar with gun, I don't know what the name of the gun, but it is a gun.

Q: You said it was a shine short gun, is that correct?

A: Handle

Q: You said shine short gun?

A: It is [sic] about six inches, I am not familiar to the name of guns, but I si guns, I know gun."

On **page 36** he said:

Q. Did you tell the police it was a shine short gun?...

A. Six inches with a shine handle, that is what I told the police."

On **page 59** of the transcript when he was again pressed on his ability to have seen the gun and to have had knowledge of it, he said:

"Q: In fact, if anything, was at all put to your headback, it wasn't a gun?

A: It is [sic] a gun

Q: Sir, you are not familiar with guns?

A: Ah

Q: You admit that you are not familiar with guns?

A: I am not familiar with guns, but I know gun.

Q: Just answer. You are not familiar with gun?

A: I am not familiar with guns to know the name of guns or whatever but I know gun.

Q: What you saw?

A: Is a gun. I am old, sixty and three, I know gun."

On **page 64** of the transcript in re-examination, the following was elicited:

"Q: Now, you said to my friend that you are not familiar to the name of guns, but you, but what you saw you know it is a gun, what do you mean by that?

A: I, madam, I know, but I am not familiar to know the name of gun, people will know that's a M16 or whatever, I don't know the name definitely, I don't know anything about that, what I mean, you know how people can tell you about gun, I can't tell you about anything about the difference of the gun.

Q; When you say it is a gun, what you mean?

A: I saw the handle, I saw the handle, the nozzle and his hand was in the trigger."

On further cross-examination as captured on pages 67 to 68 of the transcript, the complainant conceded that he could not see the handle fully as it was held in the hand of the assailant.

[46] The learned judge having heard that evidence set out her findings on page 314 line 25 to page 316 line 14, in this way.

> "The man in the front said words to the effect, hey bad bwoy do you thing. As a result of that, he glanced and this gun which he said he saw he was able to see the gun because it was at this head. The gun had shifted, when he shifted his head he saw the gun. Description he gave of the

> gun. He say [sic] about six inches, the handle was shine, that's all he said about it. Because having seen that gun according to Mr McKenzie he just ease down to the right side to the driver side, pulled a knife quickly, stabs the man behind with the gun. The two men ran out of the car. So the description of the firearm is slight. He glanced, he saw the gun which was to the side of his head, according to him, because he came to that is [sic] life was in danger. He pulled the knife and just stabbed, so it would be a long observation of this weapon. One lasted only a couple of seconds. He was challenged whether he had given, he has said to the police that he had seen the handle and he agree he did not see the handle as the man held the handle with his hand. But he explained to the Court he did not see the handle fully, but he glanced it. He also said in his evidence anyone can know gun. I accept that Mr McKenzie saw a weapon has [sic] he described it. I accept that he did have a long observation of it. But bearing in mind all the evidence including his reaction because he saw the gun that's why he went for the knife. I accept that jurisdiction of this Court is made out that there was someone who had a firearm or imitation firearm or something resembling a firearm that he saw. And that the firearm was or imitation firearm was pointed at his head at the time of the demand for money was made. I also accept that the two men did come into his car with intention to rob him and that money was demanded."

[47] In our view, on the basis of the evidence adduced there was more than sufficient reason for the learned trial judge to find that the statutory threshold had been met. It was clear that Mr McKenzie knew what guns looked like, although he could not give the specific name of the one he saw. He was an experienced 63 year old taxi operator, who had seen guns. It is true that on the evidence he only had a glance of the firearm, but the incident did take place in the middle of the day, and he had sufficient time to detect danger, and to be fearful for his life, due to the handling of the gun by the appellant. Additionally, he did say that the gun was 6 inches, with a shine handle, he

had seen the nozzle and the appellant's finger was in the trigger. The evidence that the appellant had demanded money of the complainant and that the other man had asked the appellant for the gun was also telling. The evidence, in our view, was clearly satisfactory; this ground is without merit and must fail.

Ground of appeal two – Was the DNA evidence admissible as there was no sufficient nexus between the blood recovered and the appellant?

Submissions

For the appellant

[48] Counsel for the appellant submitted that the blood samples were only retrieved from the trunk of the car. Samples were taken from the cardboard and the speaker box in the trunk. No samples were taken from the back seat of the car where the complainant said that the appellant had been sitting, and no explanation had been given for having not done so. Additionally, there was no explanation that the blood recovered from the trunk came from the same source as that seen on the back seat of the car.

[49] Counsel argued that there had been wet and dried blood in the car, however there was no evidence to say whether there had been any blood in the car before the incident, or whether the blood was there one hour before or days before the incident. Additionally there was no evidence to indicate whether the blood on the back seat matched the blood taken from the cardboard and the speaker box. So the question

would be, said counsel, why was the blood taken from the trunk compared with that taken from the underpants?

[50] Counsel submitted that the DNA results in respect of the knife indicated that there were mixed profiles, which meant that the DNA analysed came from at least two individuals, that is two different sources. The analyst, he said, had stated that the results were comparable, that is one area of the knife to one area of the underpants. The owner of the knife, he said had not been excluded, and so prima facie, one could not even conclude that the blood belonged to the appellant and another. Counsel submitted that the learned trial judge had not dealt adequately with the fact that there were at least two persons' DNA on the knife. Counsel asked the question, does the DNA result mean that there were more than two persons in the back seat of the car? Do the results suggest that one set of the DNA was introduced to the knife at some later date bearing in mind the sequence of events in respect of how the exhibits were collected?

[51] Counsel argued further that the evidence with regard to where the injuries were received was not consistent with the complainant's position, but the learned trial judge had found the appellant guilty based on the matching DNA samples simpliciter, and she had therefore erred by way of the prosecutor's fallacy. Counsel referred to the judge's summation in support of this submission as well as the case of **Alan James Doehery**, **Gary Adams v R** [1977] 1 Cr App R 369.

For the prosecution

[52] Counsel referred to the evidence of Detective Corporal Radcliffe with regard to his observations of the bloodstains inside the trunk of Mr McKenzie's car and scattered all over the car and the seat. Counsel argued that the fact that no blood sample had been taken from the back seat of the car did not affect the validity of the DNA result in respect of the cardboard and the speaker box. The court ought not to be asked to speculate about the absence of the blood samples from the back seat and what if any significance those results may have had. Counsel submitted that the fact that the blood found its way into the trunk of the car was largely unimportant as the DNA profile extracted matched that of the DNA profile obtained from the appellant's underpants. Counsel submitted serious weight ought to be given to the DNA results.

[53] With regard to the mixed profile found on the knife, counsel submitted that the appellant's arguments were "speculative at best" as there was no need for the learned trial judge to determine the import of the DNA profile which did not belong to the appellant as there was a matching profile with one area of the knife and the underpants taken from the appellant. Additionally, counsel argued that since the evidence was that the complainant had used the knife to stab the appellant, the unaccounted for DNA profile could be assumed to belong to the complainant. Also, the court should be reminded that there were only three persons there that night.

[54] Counsel submitted that if the appellant's ground of appeal really equated to a challenge to the integrity of the DNA, there was on the evidence no possibility of

contamination. The exhibits had been preserved and proper processing had been followed. Further, that was a matter of credibility of the witnesses. Constable West gave evidence that when he was at Summit Police Station he had not yet collected the underpants. And in any event, the knife, he said, was always in his pouch in his pocket, so there was no possibility of contamination between the knife and the underpants. It was, at the end of the day, a matter with regard to whom the judge believed, as to whether the appellant's underpants had been given to Constable West and whether the appellant was in a condition to speak and to understand what was taking place with regard to the underpants.

[55] Counsel submitted that there had been no gaps in the chain of custody in this case, and in any event that had occurred, that would not be fatal to the conviction. Counsel relied on **Clyde Anderson Grazette v The Queen** [2009] CCJ 2 (AI) for that assertion. Counsel submitted further that the "almost indestructible nature" of the DNA would have to be assessed against any evidence of possible taint or contamination of the samples. Further, since in this case there was no such evidence, the learned judge could not have erred in accepting the DNA results as credible.

Analysis

[56] As stated previously, the verdict in this case depended entirely on the DNA evidence. It is true that Phillips LJ opined in **Doheny and Adams**, at page 372 that:

> "The characteristics of an individual band of DNA will not be unique. The fact that the identical characteristic of a single band are to be found in the crime stain and the sample from

> the suspect does not prove that both have originated from the same source. Other persons will also have that identical band as part of their genetic make-up. Empirical research enables the analyst to predict the statistical likelihood of an individual DNA band being found in the genetic make-up of persons of particular racial groups, 'the random occurrence ratio'."

Phillips LJ further opined that much will depend on other evidence, for instance, did the appellant have a convincing alibi? However, while issuing the caution that the significance of the DNA evidence will depend critically on the other evidence in the case, he commented on page 373, F-G that:

> "The reality is that, provided there is no reason to doubt either the matching data or the statistical conclusion based upon it, the random occurrence ratio deduced from the DNA evidence, when combined with sufficient additional evidence to give it significance, is highly probative."

[57] In this case the complainant said that after the men ran from the car, he went straight to the Area One Police Station, then the Freeport Police Station and pointed out the blood which had messed up the car and which was on the cardboard on the floor in the "truck there". Although he did not specifically say that this blood had not been there before the incident, he pointed out to Constable West items which had not been there before, namely the old pair of black shoes and the bottle of Red Label. He said he then pointed to the blood in the car. In our view, the inescapable inference to be drawn from that evidence, was that the blood had not been there before. When the car was shown to Detective Corporal Radcliffe, he saw the blood stains "scattered and spewed" all over the car, the seat, inside the trunk, on the cardboard and on the

speaker box, and he said that, "some areas were dry and some areas were still wet". It is clear therefore why the blood samples were taken from the trunk of the car, as that is where they were seen, were wet, and could be considered fresh, and were pointed out by the complainant. The car was a station wagon. The blood could easily have run down into the trunk. The fact that no blood was taken from the rear seat of the car, is therefore of no significance and, counsel arguing that the DNA results are unhelpful in the absence of a blood sample from the car seat, is in our view, speculative and without any merit whatsoever.

[58] The evidence showed that the knife, which had blood on the blade and, the underpants which was "soaked with blood" were both given to the investigating officer, Constable West, by the complainant and the doctor attending the appellant respectively, for delivery to the forensic lab for DNA testing. There was evidence also that the two exhibits, whenever they were collected, were not placed together so that either could be contaminated by the other.

[59] The evidence in the case is also very clear, with regard to the safe, care and custody of the above items. They were marked and labelled and given the appropriate FL numbers from the forensic lab. The evidence of the chain of custody of the exhibits from when they were first obtained to when they were examined by the forensic analysts showed that it was unbroken and, the analysts were therefore able to give their testimony focused on the scientific forensic results. The blood stains on the exhibits were all human blood and the DNA profiles matched.

[60] The learned trial judge considered the evidence and stated this at page 338, lines 1-24:

> "So, at the end of the day the crown has put before me evidence that DNA profile on the knife matches DNA profile on the underpants and they all matched the DNA profile on the swab taken from the speaker box and blood stains on the cardboard. The crown has asked me to consider the probability ratio, is it possible, because the probability ratio is a rare one in forty four million. At the end of the day, the court has to ask itself, is it possible that with this ratio that Mr Ferron was not the person in the vehicle that day?
>
> The court also exams [sic] the fact that Mr Fearon himself was stabbed that day twice and I have to ask myself is it a coincidence that the same day, in the same general time frame, because he is at the hospital at two o'clock, he is admitted to hospital with two stab wounds, is that coincidence?
>
> According to Mr Fearon he was stabbed somewhere around in that Albion area where he was walking in some tracts. [sic]. So, it is even in that same general area, is it a coincidence?"

[61] She reviewed further evidence relating to the incident, stated that the court had to consider the totality of the evidence and concluded at page 339, line 24-340 line 13:

> "I do accept bearing in mind, all the circumstances, bearing in mind the matched DNA profile, that it was none other than Mr Fearon in the back seat of Mr McKenzie's car that day. I reject his alibi. Although the crown must satisfy me so that I feel sure, I accept the evidence that has been put before me in relation to this matching DNA profile, having accepted that the underpants was taken from Mr Fearon and I accept that it was Mr Fearon armed with a gun or an object imitating a firearm that was present with this object

> on Mr Mckenzie's head that day, and that he demanded money from Mr Mckenzie."

[62] There is no doubt that the learned trial judge considered all the evidence, particularly that related to the DNA and as Harris JA stated on behalf of this court in **Richard Francis o/c Delroy Reid v R** [2010] JMCA Crim 68 at paragraph [20]:

> "The issues as to the chain of the custody of the blood sample or the integrity of the blood sample are questions of fact. Questions of fact are matters exclusively within the province of the tribunal of facts and this court will not interfere with a trial judge's decision on questions of fact unless the judge was palpably wrong - see **R v Joseph Lao** 12 JLR 1238. The learned trial judge, being the tribunal of the facts, was entitled to decide what facts she accepted."

In our view, the learned trial judge as the tribunal of fact indicated what facts she accepted as she was entitled to do. This ground has no merit and must fail.

Ground of appeal three – Did the learned trial judge commit the Prosecutor's fallacy?

Submissions

<u>For the appellant</u>

[63] Counsel submitted that there were too many unanswered questions and gaps in the evidence for the expert to make the statement that she did in respect of the DNA results, which makes the prosecutors fallacy that more egregious. Counsel argued that the doctor did not give evidence to say that the underpants were taken from the appellant. Constable West had not been able to describe the underpants clearly. In

fact, he had been evasive. There was a discrepancy in the description of the knife, by the complainant, it had a black handle, but Detective Corporal Radcliffe said that the handle was wrapped with duct tape, which had not been explained. There was no clarification on the evidence with regard to when the knife and the underpants had actually been collected. Counsel said it was important for the court to look at the extraneous circumstances of the case. It was his contention that the mixed profile result should itself preclude accurate exclusionary conclusions. On the evidence, counsel submitted, one could not say that the blood on the knife and the blood on the underpants came from the same person. There was too much speculation, he argued, and that is when the fallacy is committed.

[64] Counsel submitted that one could not say when the blood came to be where it was, that is on the backseat or in the trunk of the car, or as already stated that it was from the same source. There were, he said, inexplicable gaps in the evidence. The inconsistencies in the evidence relating to the injuries received by the appellant, had not been explained and it would have been, he asserted, a "virtual impossibility for a 63 year(s) [sic] old person to stab the appellant on either side of his back". The learned judge accepted the evidence only because, counsel submitted, she had accepted the DNA evidence, and that is how she fell into error. Once that evidence was discredited, counsel argued, the appellant's case could be looked at objectively and there were many factors which supported it. These factors were:

(i) The medical evidence;

(ii) the identification parade;

(iii) the sworn evidence of his alibi;

(iv) there was no source sample;

(v) the knife had more than one blood profile;

(vi) the sequence of collection of the knife and the underpants was suspect;

(vii) there was no nexus between the blood on the backseat of the car and the blood in the trunk;

(viii) there was no evidence that there was no blood in the car before that day;

(iv) there was no evidence to exclude another individual in the car that day, or not beyond reasonable doubt.

[65] Counsel submitted that in the above circumstances the expert ought not to have stated her opinion on the likelihood of the appellant being the source of the DNA samples obtained. In doing so, counsel submitted, she had "crossed over into the terrain of the fact finder" and the prosecutor's fallacy had thereby been committed. The expert should only have commented on whether the suspect could have been excluded and left the issue as to whom the samples belonged, for the determination of the learned trial judge. Counsel relied on **Doheny and Adams** for these contentions.

<u>For the prosecution</u>

[66] Counsel submitted that the expert had given an opinion on the "rarity and random occurrence probability of the DNA profile, which she is competent to do". Counsel said to the contrary, the deliberation and determination on the evidence elicited from the expert, was left to the trial judge. Counsel pointed to the summation to show that the judge had reflected on all the relevant factors and considered them.

Counsel referred to **Paul Maitland v R** [2013] JMCA Crim 7 for the submission that, in any event even if the prosecutor's fallacy had been committed that was not necessarily fatal to the conviction, and the court could if it thought it applicable, apply the proviso to section 14 of the Judicature (Appellate Jurisdiction) Act, given the strength of the prosecution's case.

Analysis

[67] As counsel for the appellant submitted, Phillips LJ in **Doheny and Adams** had set out the role of the expert in cases dealing with DNA evidence. The judge said firstly, "when the scientist gives evidence it is important that he should not overstep the line which separates his province from that of the jury". He went on further to detail the manner in which the evidence should be circumscribed. On page 374 D-F of the judgment, he said this:

> "He will properly explain to the jury the nature of the match ("the matching DNA characteristics") between the DNA in the crime stain and the DNA in the blood sample taken from the defendant. He will properly, on the basis of empirical statistical data, give the jury the random occurrence ratio--- the frequency with which the matching DNA characteristics are likely to be found in the population at large. Provided that he has the necessary data, and the statistical expertise, it may be appropriate for him then to say how many people with the matching characteristics are likely to be found in the United kingdom---- or perhaps in a more limited relevant sub-group, such as, for instance, the caucasian, sexually active males in the Manchester area.
>
> This will often be the limit of the evidence which he can properly and usefully give. It will then be for the jury to decide, having regard to all the relevant evidence, whether they are sure that it was the defendant who left the crime stain, or whether it is possible that it was left by someone else with the same matching DNA characteristics."

[68] In this case, Miss Brydson gave evidence that on the basis of the DNA results that she had obtained and, also on the random match probability generated, the source of the DNA profile could have come from the same person. She said that to find another person with the same match, unless an identical twin, would have been very rare. In our view, she did not overstep the line which indicates what ought to be left for the jury. She did not say that the appellant was the person from whom the DNA source emanated. She said that he could be. It is also clear from the transcript, that the judge in her summation, as can be seen from para [61] above, did not understand the expert to be saying that based on the DNA profile results, the perpetrator must be the appellant. She recognized that it was a matter for her at the end of the day to ask herself if it was "possible, that with this ratio that Mr Fearon was not the person in the vehicle that day". It remained her duty to consider and to arrive at a verdict after deliberating on all the evidence in the case. The issues raised by counsel with regard to the discrepancies on the evidence have already been addressed in respect of ground of appeal two, and the factors on which counsel relied which he said, supported the appellant's case, were all before her, recounted and canvassed in the summation, were all matters of fact for her jury mind, and in our opinion there was sufficient evidence to support the verdict arrived at by the learned trial judge.

[69] We are not of the view that she erred and committed the "prosecutor's fallacy", and in any event we agree with counsel for the prosecution that even if she had done

so, that would not necessarily have been fatal to the conviction (**Paul Maitland v R**), This ground is therefore without merit and must fail.

Conclusion

[70] In the light of all of the above, the application for leave to appeal against the convictions on both counts and the sentence in respect of count one is refused. The appeal in respect of the sentence on count two is allowed and the sentence is set aside; substituted therefor is a sentence of two years imprisonment which is the maximum period provided by the Offences Against the Person Act. The sentences are to commence as of 19 May 2011 and are to run concurrently.