

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 83/2008

**BEFORE: THE HON. MR JUSTICE PANTON P
 THE HON. MRS JUSTICE HARRIS JA
 THE HON. MR JUSTICE DUKHARAN JA**

DENHUE HARVEY v R

Everton Bird for the appellant

Miss Meridian Kohler, Brodrick Smith and Miss Kelly-Ann Boyne for the Crown

1, 12 February 2010 and 3 June 2011

HARRIS JA

[1] The appellant was on 2 July 2008 convicted in the High Court Division of the Gun Court on three counts of an indictment. The indictment on which he was tried contained four counts. On count one, he was charged with illegal possession of firearm, on count two, he was charged with wounding with intent, count three charged him with shooting with intent and on count four he was charged with assault. He was acquitted on count two. He was sentenced to seven years hard labour on count one,

12 years hard labour on count three and four years hard labour on count four. It was ordered that the sentences should run concurrently.

[2] On 12 February 2010, we allowed the appeal, quashed the convictions, set aside the sentences and entered a judgment and verdict of acquittal. We promised to put our reasons in writing. This we now do.

[3] The evidence upon which the prosecution relied originated from two witnesses, Miss Edna Burke and her daughter Nordia Henry. Miss Burke testified that at about 11 o'clock on the night of 7 April 2005, she was sitting at her gate at 47A Red Hills Road, with Nordia and several other members of her family. She observed a man pass with a gun in his waist. About five minutes later, having heard Nordia make a statement, she got up, armed with a machete. Nordia, she said, ran off. She then said that the appellant, who was armed with a gun, approached her, pointed it at her and held on to her gate. She chopped at him with the machete. He released the gate, she said, because his gun stuck. During this time, she said, she heard gunshots being fired in her yard.

[4] The appellant, she asserted, after releasing the gate, chased Nordia. She, Miss Burke, then ran into her yard. She said she heard shots being fired continuously and heard Nordia, who ran next door over to her (Miss Burke's) sister's yard, screaming and calling for help. She then proceeded to her house. Thereafter, one of her sons ran into the house and locked his bedroom door. As she was about to step up into the house, she looked behind and saw the appellant still armed with the gun. He fired two

or three shots through her living room door, she declared. After firing the shots, she stated that he walked up to her and held on to the living room door and she then went and leaned on her son's bedroom door. Thereafter, the appellant, she asserted, again pointed the gun at her, whereupon she told him to shoot her because he had previously shot two of her children. The appellant hissed his teeth and left. Following this, she said she unsuccessfully tried to communicate with the police, and having failed to do so, she ran to the Halfway Tree Police Station and made a report. She stated that she had known the appellant since birth and on the night of the incident she was able to view his face at the gate aided by a street light, light from a light post in her yard and from the neighbour's house. She also said, when he was in the house, she was able to view his face with the assistance of light from the ceiling.

[5] Nordia Henry testified that she was sitting at the gate with her mother and brothers when she felt something at her ear which she bounced off. She then heard "click", looked around and saw the appellant with a gun. After informing her mother that the appellant was armed with a gun, she ran off to the lane "mouth" towards Red Hills Road. Thereafter, she heard shots. She went on to say that when she was at the top of the lane she heard explosions, she looked around, saw the appellant struggling with her mother and she ran off again. In cross examination, she admitted that in her statement she told the police that she ran to the lane 'mouth' where the appellant pointed the gun at her, she heard explosion and saw fire coming from the gun. She spoke of being able to view his face for a few seconds while they were at the gate.

[6] She said that the relationship between the appellant and herself was hostile for two years preceding the night of 7 April 2005. It was further asserted by her that before the incident, there was an altercation between them, he having hit her.

[7] The appellant made an unsworn statement in which he said that he lived at 47A Red Hills Road. He said that he and Nordia had a little fight and he slapped her.

[8] The original grounds of appeal were abandoned and Mr Bird was granted leave to argue two supplemental grounds of appeal, which are as follows:

Ground one

“The verdict of the court was against the weight of the evidence adduced by the two purported eyewitnesses whose credibility was destroyed both as a result of the examination in chief and cross- examination.”

Ground two

“The learned trial (sic) erred on the facts and applied wrong principles of law in arriving at the verdict handed down.”

[8] The gravamen of Mr Bird’s complaint was that the credibility of Miss Burke and Nordia, the two main witnesses, was completely destroyed by the overwhelming and fundamental discrepancies in their evidence, which, as contended by him, went to the root of the prosecution’s case. The essence of his submissions was that there were two competing sets of allegations coming from these two witnesses upon which no reliance could be placed. He adverted our attention to several material discrepancies arising on

the evidence of each witness and in particular pointing to the conflicts in the narrative given by the witnesses as to the sequence of events occurring that night.

[9] Section 14 (1) of the Judicature (Appellate Jurisdiction) Act empowers this court to set aside a conviction if it is of the opinion that the verdict, on the whole, is unsafe or unsatisfactory. The section reads:

“14 (1) The Court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice...”

This court, in keeping with the statutory dictates, in many cases, has exercised its jurisdiction in favour of an appellant or applicant - see **R v Lester** (1974) 12 JLR 1659; **R v Neville Nembhard** (1974) 12 JLR 1576; **R v Lenford Harris** (1987) 24 JLR 360 and **R v Fitzroy Brown** (1992) 29 JLR 142.

[10] There is no dispute that the appellant lives at 47A Red Hills Road, which is the same address as Miss Burke's. The crucial question, however, is whether at 11 o'clock on the night of the 7 April 2005, he was at 47A Red Hills Road, armed with a gun, as stated by the witnesses. The evidence adduced presents grave concern as to the

credibility of the witnesses. Was the quality of the evidence sufficiently cogent to have warranted a sustainable conviction?

[11] It cannot be denied, as contended by Mr Bird, that there are significant differences in the accounts given by Miss Burke and Nordia as to what transpired that night. The starting point is the evidence as to that which emerged while they were at the gate. Miss Burke said the appellant chased Nordia after he released the gate. Her account in this regard is not in harmony with Nordia's. While at the gate, Nordia stated that when she saw the appellant with the gun, she spoke to Miss Burke and ran to the lane. Thereafter, she heard shots. It is somewhat mystifying that Miss Burke testified that after Nordia's encounter with the appellant at the gate, she ran to her (Miss Burke's) sister's yard, she heard shots being fired continuously and Nordia screaming by saying "wow wow help". There is no account from Nordia supporting this statement. Miss Burke spoke of three incidents of shooting occurring that night. While she was at the gate she said she heard shooting in her yard. She asserted that the appellant fired in her house while she was there and she also spoke of hearing shots being fired and that Nordia screamed. Nordia reported hearing explosions only once.

[12] It was contended by Mr Bird that in examination in chief, Nordia said that she told the police that the appellant fired a gun at her, she heard the explosion and saw fire emitting from it and that this was the truth. But significantly, in cross examination, she said that she did not know if the appellant shot at her that night as she was running when she heard the explosions. We are in agreement with Mr Bird that this is

clearly in stark conflict with her evidence that she ran off after seeing him with the gun. When asked which was the correct version, she said that the former was correct. Her explanation for the divergence in the two accounts was that the incident affected her greatly and she was trying to erase it from her mind. This could not, by any means, be acceptable as a plausible explanation for the obtrusive variance in her evidence.

[13] It is also necessary to mention that Miss Burke spoke of the appellant firing two or three shots through the door of her house. However, the investigating officer said that on his visit to the house, his observations only revealed the presence of bullet fragments. He did not mention observing damage to any door of the house and surely, if he had, he would not have omitted to so state. Interestingly, the learned judge spent some time making reference to the failure of the police to have collected the fragments but neglected to take into account the fact that the evidence from the police did not speak to the absence of bullet holes in the door.

[14] Miss Burke's testimony that she ran to the Halfway Tree Police Station to make a report was contradicted by her statement in which she told the police that she had taken a taxi to the police station. The statement was admitted into evidence.

[15] The learned judge, in dealing with the discrepancies arising in the case, only made reference to the discrepancies relating to Miss Burke's account in respect of the method by which she said she went to the police station and to that aspect of Nordia's evidence as to whether the accused fired at her. The learned judge dealt with this

aspect of the evidence at lines 3 to 16 on page 84 and on page 85 of his summation in this way:

“Yes, she did give evidence and when cross-examined, she did not acknowledge that she told anyone at any time that she had stopped and take a taxi to the Half Way Tree Police Station, she said she took a taxi on her way from the Half-Way Tree Police Station. Further cross-examined, she said she told the police that she had taken a taxi to the Half Way Tree Police Station, but she would not say that she had made up that story, which was charged by Defence counsel and she would say that the police officer made a mistake, that portion of the evidence was tendered and admitted as Exhibit One.

HIS LORDSHIP: In the end, she was steadfast and said that she has spoken the truth.”

[16] Continuing at line 25 of page 94 to line 24 of page 96 of the summation, he said:

“I am mindful that there are discrepancies, but as I said earlier, how these discrepancies are to be treated is to decide whether or not those discrepancies are material or immaterial. Discrepancies which has (sic) arose on the part of the mother is that she had taken a taxi to the police station. I do not find that that was material, it does not affect her availability to see what happened that night, to make out, first of all, the assailant and second of all, to describe the firearm. In relation to Exhibit Number 3 in which the witness had said she was running, so she didn’t know whether or not the accused man fired at her, she retracted and said when confronted with her witness statement, “Yes, he did fire at me,” and gave an explanation to why she had given two different accounts.

She said the story she gave in her statement that when she heard the explosions, she saw that Eddie pointed and fired. She saw fire coming out of the mouth of the gun. That is the correct version. That is what she had said in answer to Counsel in court. When asked for an explanation for the difference between the two, she said she was trying to erase all that had happened out of her mind, as it affected her a lot.

On that score, I will say that an explanation has been given and that explanation is – this Court accepts as being the truth.”

[17] As can be readily observed, the learned judge erroneously treated Miss Burke’s material discrepant evidence as immaterial for the reason that it did not prevent her from observing her assailant and/or her ability to describe the gun. The issue is one of credibility. But even if identification was a live issue, before relying on Miss Burke’s evidence of any identification of her assailant, she must be found to have been a credible witness and certainly she was not. Additionally, Nordia’s testimony that the appellant fired at her and her explanation for the conflict arising in her statement to the police, ought not to have been accepted as true.

[18] The prosecution’s case stood or fell on the evidence of Miss Burke and Nordia. Their credibility was crucial. The discrepancies arising in the evidence are material as they are serious and fundamentally affected the credibility of these two main witnesses. The conflicting accounts given by them affected the cogency of their evidence which severely weakened the prosecution’s case.

[19] It is clear from the learned judge's analysis and assessment of the evidence that he had not properly directed his jury mind to the highly material discrepancies arising therein which undoubtedly erodes the foundation of the Crown's case. He, having failed to have taken into account the full effect of the discrepant statements of the witnesses, had clearly misdirected himself.

[20] A further matter which is of relevance is that Nordia's evidence of the existence of discord in the relationship between the appellant and her was never considered by the learned judge. In addition, the appellant stated that he hit her. The obvious discordant relationship between them, would in fact, have also had an impact on Nordia's credit worthiness, yet the learned judge remained silent on this aspect of the evidence. We are satisfied that the learned judge, having not correctly applied his mind to the facts of this case, wrongly convicted the appellant. The conviction cannot be sustained. It being unsafe, could not have been permitted to stand.

[21] For the foregoing reasons we allowed the appeal.