[2010] JMCA Crim 14

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 154/ 2007

BEFORE: THE HON. MR JUSTICE HARRISON, J.A.
THE HON. MR JUSTICE MORRISON, J.A.
THE HON. MISS JUSTICE PHILLIPS, J.A.

JULIAN POWELL v REGINA

L. Jack Hines for the Applicant

Dirk Harrison and Alwayne Smith for the Crown.

15, 26 February and 16 April 2010

MORRISON, J.A.

[1] The applicant was convicted in the High Court Division of the Gun Court on 3 December 2007, after a trial before Donald McIntosh J, of the offences of illegal possession of a firearm and indecent assault. He was sentenced to 10 years imprisonment on the first count and 3 years imprisonment on the second count, both sentences being ordered to run concurrently.

[2] The applicant's application for leave to appeal was considered by a single judge of this court and refused on 29 June 2009, on the basis that

what was in issue in the case was the question of credibility, in respect of which the trial judge had accepted the complainant's version of what had occurred on the night in question in preference to the applicant's, and that the judge was fully entitled to do this on the evidence which had been adduced. The applicant has, as is his right, renewed his application for leave to appeal before this court.

[3] The case for the prosecution was that at approximately 8:30 pm on 2 November 2007, the complainant was walking towards her home in the Boscobel Heights Housing Scheme in the parish of St. Mary, when she was held up at gunpoint by the applicant, who was known to her before. The applicant spoke to her, with a gun pointed towards her belly, saying "mi waan talk to yuh, a long time me a tell you seh mi waan to fuck you". Thereupon, the applicant indecently assaulted the complainant by fondling her vagina, with his left hand, while still holding the gun in his right hand pointing towards her belly. As she stood there in fear, the applicant then said to her "Yuh si how mi get yuh scare now, tru' yuh si mi wid mi gun".

[4] Just then, a gentleman also on his way home approached and, as he walked past, the applicant put the gun in his waist and started walking towards a shop ahead of them. Frightened, the complainant asked the applicant if he wanted her to get him a beer from the shop, to which offer

he replied positively, telling her that he wanted a "Matterhorn" as well. She went into the shop and purchased these two items, came back out onto the street and handed them to him, whereupon he turned to her and said "memba my girl, nuh tell nobody what happen, else mi a goh kill yuh", before walking off into the housing scheme. On the day following this incident, the complainant made a report of it to the police.

[5] No issue of identification arose at the trial, as the applicant, in an unsworn statement from the dock, agreed that he and the complainant did encounter each other on the evening in question (implying that they had been in an intimate relationship), that she had offered to buy him something at the shop and that she had brought him back a beer and two "Craven A" cigarettes. However, he denied pointing a gun at her and also denied putting his hand "under her dress", as she had alleged.

[6] As already indicated, the trial judge rejected the applicant's defence and accepted the complainant as a witness of truth, with the result already described at para [1] above.

[7] Mr Hines, who appeared for the applicant in this court, did not seek to challenge the judge's acceptance in general terms of the complainant's version of what had taken place that evening. However, he did take issue with the finding that the applicant was at the material

time in unlawful possession of a firearm. This is how he framed the single ground of appeal filed on the applicant's behalf:

> "1. That the learned Judge erred in that he failed to demonstrate that he was satisfied beyond reasonable doubt that the applicant was in unlawful possession of a firearm at the material time (see pages 30 to 32 and in particular pages 31 lines 5 to page 32 lines 1-2) and as a consequence of this failure the conviction of the applicant on both counts of the indictment cannot stand (see ***R. v Purrier and Bailey*** (1976) in 14 JLR at page 97 et cetera)".

[8] In support of this ground, Mr Hines submitted that where, as in this case, a firearm is not produced and tendered at the trial, evidence must be given that what the defendant was said to have had in his possession was a firearm within the relevant statutory definition (Firearms Act, section 2 (1)). In this case, on the complainant's own evidence, she would have had a very limited time to actually see what she described as a gun and this was accordingly no more than a fleeting glance. The trial judge was required, Mr Hines submitted, further, to demonstrate for the record that he was satisfied beyond a reasonable doubt that the applicant was unlawfully in possession of a firearm. This the judge had manifestly failed to do, as is evident from his having said in his summing up firstly, "that one takes judicial note of, that everybody in our society, even the children, know what guns are", and secondly, that if the complainant "was

convinced in her own mind that it was a firearm, then that satisfies the law in respect to the illegal possession of firearm".

[9] In support of these submissions, Mr Hines referred us to the case of **R v Purrier & Bailey** (1976) 14 JLR 97 and concluded that it had not been demonstrated by the trial judge in his summing up that he was satisfied beyond a reasonable doubt that the applicant was at the material time in unlawful possession of a firearm.

[10] For the Crown, Mr Harrison submitted simply that the judge had adequately addressed his mind to the issue raised by Mr Hines. He directed us to the passage in the summing up in which the judge had said that the court was satisfied from the description given by the complainant that what the applicant had in his possession was indeed a gun, in accordance with the criteria set out by this court "in that case when Justice U.D. Gordon was over by the road". Further, Mr Harrison pointed out, the judge at the very end of his summing up reiterated his finding, "beyond all reasonable doubt", that on the day in question the applicant "was armed and in possession of an illegal firearm".

[11] With regard to the decision in **Purrier & Bailey**, Mr Harrison pointed out that in that case no description of the 'gun' had been given by the witness, which sufficed to distinguish it from the instant case, in which the complainant had indeed given a description. Basing himself on **R. v Paul**

Lawrence (SCCA No. 49/1989, judgment delivered 24 September 1990), Mr Harrison submitted, finally, that the description given by the complainant was adequate and fully justified the trial judge's conclusion.

[12] The applicant was charged under section 20 (1) (b) of the Firearms 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."

[13] In **Purrier & Bailey**, this court held that in order to sustain a conviction for possession of a firearm in a case in which the instrument alleged to be a firearm was not recovered, it was necessary for the prosecution to adduce evidence sufficient to satisfy the court that what was alleged by the prosecution witness to be a gun did in fact accord with the statutory definition. In that case, the only evidence on the point was that of the complainant, who testified that one of the defendants had held a gun at

her ear while her money was snatched from her by the other defendant. No gun was recovered and the complainant gave no description of any kind of the instrument which she said was a gun. There was no evidence that any bullet or other missile or anything else had been ejected from it, "nor was there any evidence of injury to persons or damage to property inflicted with it of a nature such as to confirm inferentially that the instrument was a firearm within the meaning of the section" (per Watkins JA (Ag). at page 101).

[14] Faced with this evidential deficiency, the trial judge in that case invoked the doctrine of judicial notice, with the comment that "No one in Jamaica with a scintilla of sense can fail to recognize a gun when he sees it, guns having received such publicity". This court held that he had erred in doing so, observing that there was "no credible factual basis for the assumption that the knowledge of [guns] .... is notorious, nor is such an assumption presently capable, it would seem, of immediate accurate demonstration by resort to readily accessible sources of indisputable accuracy "(per Watkins JA (Ag), at page 101).

[15] **Purrier & Bailey** was distinguished by this court in **R v Paul Lawrence**, the case cited by Mr Harrison. That was a case in which the witnesses for the prosecution stated that they had seen what appeared to them to be a firearm stuck in the waist of the applicant and one of the witnesses said

that she was particularly familiar with firearms, as her relatives were police officers who from time to time carried guns in her presence. The trial judge's findings that that evidence supported the inference that the applicant was armed with either a real firearm or an imitation firearm was upheld on appeal, on the basis that there was evidence to support that finding in this case. This stood in contrast to **Purrier & Bailey**, in which the witness had said that she felt something at the side of her neck which she did not see, but thought to be a firearm.

[16] During the course of the hearing in this matter, counsel were referred by Harrison JA to two other decisions of this court in which the question of the sufficiency of evidence describing a firearm was considered. The first is **R v Christopher Miller** (SCCA No. 169/1987, judgment delivered 21 March 1988), in which the witness described what was alleged to be a firearm in these terms: "The mouth was brown coloured resembling small arms that policemen carry". On appeal, it was contended that that was not a sufficient description to support the trial judge's finding that it was indeed a firearm. This is how Carey, JA speaking for the court, responded to that submission:

> "In our view, that is ample evidence. It is not necessary to give detailed descriptions of the firearms, because it must depend on the intelligence and the power of observation of the witness; it must be extremely difficulty now-a-days to find a person who doesn't know a gun when he sees a gun. Insofar as we are

> concerned, the evidence that was put forward by this applicant was more than ample."

[17] The second case is **R v Kirk Manning** (SCCA No. 43/1999, judgment delivered 20 March 2000), in which the complainant stated that she had seen the appellant with a gun, described as follows:

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

[18] This court affirmed the trial judge's finding that this was sufficient evidence to fit the description of at least an imitation firearm (and see also the more recent case of **R v Scott & Bennett,** SCCA Nos. 35 & 37/1998, judgment delivered 20 December 2002), in which **Christopher Miller** was followed and **Purrier & Bailey** again distinguished).

[19] These cases appear to us to establish, therefore, 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.

[20] In the instant case, the complainant's evidence was that she saw when the applicant "took out a black gun out of his waist" and, when pressed to state how she knew that it was a gun, the following exchange took place:

> "A. I know guns, ma'am`
> HIS LORDSHIP: Sorry?
> WITNESS: I know guns
> HIS LORDSHIP: Sorry, can't hear you.
> WITNESS: I know how a gun look, Your Honour.
> Q. Yes, you know how a gun look like, what part…?
> HIS LORDSHIP: How yuh know how a gun look?
> WITNESS: Because many times when I saw police officers, I always take a good look at their guns.
> Q. And you were saying?
> HIS LORDSHIP: you're being asked what part of the gun you saw.
> WITNESS: The part that the bullet come through and the part you hold on, the trigger or something like that.
> Q. And when you said you saw him pull this gun from his waist, about how far were you from him?
> A. Can I come and show you how far? It was almost there where those ladies are. (indicating)
> MISS K. HENRY: About 15 feet?
> HIS LORDSHIP: Yes"

[21] And then, subsequently, the applicant having fondled her vagina while holding the gun in his right hand pointing towards her belly, this is the complainant's account of what happened next:

"Q. And did you do anything at that point?
A. I was just there standing. He said to me, "Yuh si how mi get yuh scare now, tru' yuh si me wid mi gun."
Q. And he said that how he got you scare and were you scared at that time?
A. Yes, ma'am
Q. And then what happened?
A. There was a gentleman coming. He was going into the scheme, but because it was so dark he didn't know what was going on, because he said I must not make any noise because he doesn't want anybody to know that he has his gun."

[22] It appears to us that this was plainly 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. So that although Mr Hines is obviously correct in his submission that the judge erred in stating that once the complainant was convinced in her own mind that it was a gun, "then that satisfies the law in respect to the illegal possession of firearm", this is not, in our view, the end of the matter. Despite this lapse, the judge also said in clear terms that the description of the firearm by the complainant "satisfies this tribunal of fact that this was a gun" and, again, that "this court finds beyond all reasonable doubt that on the 2nd day of November, in the year 2007, in the parish of St. Mary, this accused man, Julian Powell, was armed and was in possession of an illegal firearm". This is a finding that the judge was clearly entitled to make on the evidence adduced in this case.

[23] In the result, the application for leave to appeal is dismissed and the applicant's sentences are to run from 3 March 2008.