

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 75/2011

**BEFORE: THE HON MR JUSTICE MORRISON P (AG)
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA**

OMAR BROWN v R

Leonard Green for the applicant

Mrs Sharon Milwood-Moore for the Crown

24, 25 November and 3 December 2015

MORRISON P (AG)

[1] On 2 December 2011, after a trial before Daye J sitting without a jury in the High Court Division of the Gun Court held at Montego Bay in the parish of Saint James, the applicant was convicted of the offences of illegal possession of firearm and shooting with intent. He was sentenced to 10 years' imprisonment on the first count and 18 years' imprisonment on the second count, and the court ordered that these sentences should run concurrently.

[2] The applicant applied for leave to appeal against his conviction and sentence on the following grounds:

“(1) **Unfair Trial: -** That the evidence and testimonies upon which the Learned Trial Judge relied on for the purpose to convict me lack facts and credibility, thus rendering the verdict unsafe in the circumstances.

(2) **Misidentity by the Witness:-** That the prosecution witnesses wrongfully identified me as the person or among any persons who committed the alleged crime.

(3) **Lack of Evidence: -** That the prosecution failed to provide any form of ‘concrete’ evidence to link me to the alleged crime.

(4) (A) That the Learned Trial Judge failed to uphold [sic] a no-case submission as put forward by my attorney.

(B) That the witnesses presented to the Court contrary and contrasting testimonies which calls into question the soundness of the verdict.”

[3] The application was first considered on paper by a single judge of this court. On 18 April 2013, the learned single judge refused the application and ordered that the applicant’s sentences should commence on 26 October 2011. As is his right, the applicant renewed the application before the court itself. At the conclusion of the hearing on 25 November 2015, the court announced that (i) the application for leave to appeal against both conviction and sentence would be refused; and (ii) the applicant’s sentences should be counted from the date on which they were imposed at trial, that is, 2 December 2011. These are the promised reasons for this decision.

[4] The facts of the case can be briefly stated. At about 8:00 pm on 15 April 2011, a group of four men, three of whom were the complainants in relation to the charge of shooting with intent, were sitting together on the roadside on Green Tank Road in Rose Heights in the parish of Saint James. There was a streetlight opposite to where they

were. As the men sat there talking, a man was seen walking quickly - and then running - towards them. The man appeared to remove an object resembling a firearm from his waist and fired at least one shot in their direction. While no firearm was ever recovered, all three complainants gave evidence to the judge's satisfaction that what the man had in his hand that night was indeed a firearm. In addition, one spent 9mm shell was later found at the scene.

[5] Each of the complainants testified that the applicant, who was well known to them before, was the man who shot at them that night. The incident took place at night, but the evidence was that the area was well lit. Giving evidence in his defence, the applicant did not deny that he was present at the place where the complainants said he was that night, but he denied having a firearm or firing at them, as they alleged. On his account, it was in fact one of the complainants who, after accusing him of being a police informer, fired shots at him, forcing him to run away.

[6] So the learned trial judge took the view that the evidence of identification was supported "by the sworn evidence of the accused as to his presence" and, on that basis, turned to a consideration of the issue of credibility. Having carefully analysed the evidence of each of the complainants, on the one side, and that of the applicant, on the other, Daye J rejected the latter and accepted the former. The learned trial judge accordingly found the applicant guilty on both counts of the indictment.

[7] On the question of sentence, Daye J had the benefit of a social enquiry report on the applicant. It indicated that the applicant had one previous conviction for illegal

possession of firearm and it appears that he was given a sentence of nine years' imprisonment for that offence. It further appeared that, at the time when the instant offences were committed, the applicant had only four months before completed a period of parole after spending some time in prison for the previous offence. In considering what would be the appropriate sentence in the circumstances, the learned trial judge took into account the fact that, no firearm having been recovered, "an illegal gun ... is still out there on the streets". However, he took as a "redeeming factor" the consideration that, as the social enquiry report had revealed, the applicant had recently married and was a father of young children. In the result, the learned trial judge addressed the applicant as follows:

"That's the redeeming factor but it does go so far. You must get a prison term proportionate to this offence, you must get a prison term. The last time you went to prison, you got nine years. I couldn't give you nine years for this and this is more serious that you couldn't expect to get nine years in prison for this offence. You couldn't - - you got that and this means the next four months you commit the same offence again and for little reason and that is the point. That it was the intent to kill four persons who, as I said, I know for sure two of them they did nothing. One grew up with you and they were just trying to be peaceful in their community.

So, that's it. You need more time in a custodial institution to reflect on your ways and to see how you can change your mindset to be a contribution to your own family that you have now and to society.

So, for the offence for Illegal Possession of Firearm, you are to spend ten years in prison for that, for having a gun which is not recovered and I find it did exist and the sentence must

reflect that and for the Shooting with Intent; that is, intent to kill and it is not one person, it's aggravated, at least three persons who were shot at that day. So you are to spend eighteen years imprisonment for that, and I take into account when I give the eighteen years the mitigating factor about your family and your attempts to be even employed. I take that because outside of that, it could be more."

[8] When the renewed application for leave to appeal against conviction and sentence came on for hearing before us on 24 November 2015, Mr Leonard Green for the applicant candidly told the court that there was nothing which he could properly urge on the question of the propriety of the conviction. We entirely agree. As the learned trial judge readily appreciated, the issue of identification was effectively foreclosed by the applicant's own evidence, which placed him on the scene at the material time. So the outcome of the trial thereafter turned entirely on issues of credibility. As it seems to us that he was fully entitled to do, on the evidence, the learned trial judge rejected the applicant's evidence and accepted that given by the complainants. In these circumstances, as Mr Green realistically accepted, any challenge to the judge's findings could only be based on the contention that he took a wholly erroneous view of the evidence. In the absence of anything to suggest this, we consider that the application for leave to appeal must fail.

[9] Mr Green was only slightly less diffident on the matter of sentence, submitting that the sentence imposed by the learned trial judge for the offence of shooting with intent was manifestly excessive. It is clear that the judge sought to strike a balance between the factors which were unfavourable to the applicant (such as the fact that

this was his second conviction for an offence involving a firearm and that, having only recently completed a period of parole, he again found himself on the wrong side of the law) against those which weighed in his favour (such as his recent status as a family man and provider). In all the circumstances, taking into account that (i) the minimum sentence to which the applicant was liable by virtue of section 20 of the Offences Against the Person Act was 15 years' imprisonment; and (ii) this was the applicant's second conviction for an offence involving the use of a firearm, we are quite unable to say that the sentence of 18 years' imprisonment imposed by the learned trial judge was manifestly excessive.

[10] These are the reasons for the refusal of the application for leave to appeal on 25 November 2015.