[2016] JMCA Crim 19

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 53/2011

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA (AG)

MICHAEL EWEN v R

Mrs Valerie Neita-Robertson QC and Peter Champagnie for the applicant

Miss Kerri-Ann Kemble for the Crown

11 and 30 May 2016

EDWARDS JA (AG)

[1] This is an application for leave to appeal against conviction and sentence for the offences of illegal possession of firearm and shooting with intent. The applicant was convicted after a trial before McDonald Bishop J (as she then was) in the High Court Division of the Gun Court holden in Kingston on 1 June 2011. On 8 June 2011, he was sentenced to nine years and 10 years imprisonment, respectively. The sentences were ordered to run concurrently.

[2] His application for leave to appeal was considered and refused by a single judge of this court on 17 September 2013.

[3] As a result of that refusal, the applicant exercised his right to renew his application to this court. At the hearing before this court his counsel abandoned the original grounds which were filed by the applicant himself and sought and was granted leave to argue three supplemental grounds of appeal.

The background facts

[4] The skeleton arguments filed by both counsel proved most useful in providing the basic facts of this case. On Tuesday, 6 April 2010, at about 5:30 pm two officers were on mobile patrol in the Mountain View area of Kingston when they heard several gunshots coming from the Goodridge Lane area of Mountain View. They parked the service vehicle in which they were travelling at the entrance to Goodridge Lane and called for assistance before alighting from the vehicle. The officers then proceeded on foot some distance along Goodridge Lane. There they saw a number of persons consisting of men, women and children. They also saw three men standing together. The three men were closest to them, that is, the other persons were behind the three men. When the officers came within 22 feet of these men they saw the applicant, whom they knew before, touch one of the other men, whom they also knew, and the applicant pointed in their direction. All three men then pulled firearms from their waists. The firearms appeared to one of the officers to be Glock pistols. Each man fired in the direction of the officers before running off, disappearing into a nearby gully. For the safety of the citizens who were in close proximity to the men, the officers did not return the fire.

[5] The two police officers left the scene of the shooting and returned to where the service vehicle was parked at which time other police personnel came and they returned to the scene of the incident. A search of the area where the shooting took place yielded no spent shells or firearms and the men were not seen after a search of the gully. A report was made of the incident and this report was passed to the divisional intelligence unit. An investigation commenced with regard to the report and on 5 June 2010 the investigating officer, Sergeant Granston, went to Central Police Station, where he spoke to the applicant who was in custody there. The applicant, after being cautioned and on being told of the report made against him, said, "me officer, make sure you check out that thing yah good yuh nuh officer". He was charged for illegal possession of firearm and shooting with intent and on being cautioned he made no statement.

[6] At the trial in the High Court Division of the Gun Court before McDonald Bishop J both officers gave evidence along with the investigating officer. The applicant gave sworn evidence and called a supporting witness. He denied shooting at the police. His defence was one of alibi. He said he was not on Goodridge Lane that day at the time alleged but was in Vineyard Town delivering gas. His evidence was that it was only in the media that he heard he was a person of interest and turned himself in to the police. All this time between the date of the alleged incident and the day he turned himself in he was still residing at his home and conducting his business. The learned trial judge rejected the applicant's evidence and that of his witness and accepted the evidence of

the police officers, who she found to be truthful and honest witnesses and thereby found the applicant guilty of both counts on the indictment.

The grounds of appeal

Ground 1

The learned trial judge failed to appreciate or accept the extent to which the subsequent actions of the police officers and the absence of any physical evidence of the events affected and/or weakened the veracity of the police witnesses as to the identification of the applicant as the assailant.

[7] Ground 1 of the supplemental grounds was ably argued by counsel, Mr Champagnie, on behalf of the applicant. Counsel submitted that "I see" evidence had inherent dangers which were greater when it was unsupported by physical evidence because such evidence could easily be fabricated. It was submitted that the learned trial judge should have taken greater care in arriving at a verdict by examining the surrounding circumstances to see if there was any evidence to support the allegations. Counsel's complaint may be summarised as follows:

1. The witnesses knew the applicant and knew where he lived but failed to go to his home to apprehend him.
2. It was questionable that no entry was made in the station diary or crime diary.
3. No warrant was obtained to arrest the applicant.
4. They failed to investigate the shooting or collect spent shells.
5. The absence of spent shells on the scene was questionable and peculiar in the circumstances.

[8] Counsel submitted that these circumstances should have put the learned trial judge on alert concerning the veracity of the witnesses and created a doubt. He argued that the learned trial judge should have paid closer attention to the possibility of a wrongful conviction and looked for evidence to "shore up" the conviction. In doing so, such evidence would have been found not to exist.

Analysis of ground 1

[9] This case was heard by the learned trial judge sitting alone as judge and jury. The main issues before the learned trial judge for consideration were: the credibility of the witnesses, the correctness of the identification of the applicant and the defence of alibi. The learned trial judge adequately dealt with all the issues and her directions and warnings were unimpeachable.

[10] We will consider the complaint regarding the learned trial judge's treatment of the lack of physical evidence first. The importance of the lack of physical evidence was drawn to the attention of the court by the applicant's trial counsel. In considering his submission on the point, the learned trial judge said, at pages 128-129 of the transcript:

> "... He asked me to look at the geography of the area and the absence of physical evidence, of course, I have to look carefully because this is a case where I have no firearm recovered, this is a case where I have no evidence of any spent shell, any casing, any damage to person or property and it is critical in the context of Shooting with Intent. Does it mean that absence of these things mean that the incident did not happen?"

[11] Having considered the submission of counsel and the absence of the physical evidence, the learned trial judge then went on to consider the evidence of the prosecution witnesses which may have offered an explanation as to why there was no physical evidence. This is how she put it:

> "...[T]hey told us that they left the scene before they could have searched the scene, when they returned persons were gathered at the point at which the men were, it means therefore that the crime scene would not have been preserved if there is evidence remaining for the police to even have gone to. I can't say therefore because nothing was found nothing happened. [T]his is not a case where the police immediately even embarked on a search so the gravity - and I would agree with Crown Counsel, Mr. Smith, that the weight of this is diminished in all the circumstances if I am to believe that police officers spoke the truth." (at page 129)

[12] Later at pages 130-131 the learned trial judge said:

> "...I am mindful that a Shooting with Intent case is without gun recovered and physical evidence can be such that anyone can make up a story on someone and lie that they shot at them and because of that I have to think carefully about this case. I have listened to the accused and his witness and watched them, there is no evidence put, nothing before me that I could discern why it is that these two officers would come here to lie so blatantly on Mr. Ewan."

[13] Again, the learned trial judge, after considering the evidence of the police witnesses and any possible reason for them concocting the story, went on to state at page 131:

> "...I have to consider: are these policemen really, really lying? It is never easy in a case where there is no

> corroborating evidence, forensic evidence, to convict and so I have said to you every time I tried to think, are these police officers lying, I say that I find it virtually impossible to disbelieve them."

[14] It is clear from her treatment of the evidence that the learned trial judge did give weighty consideration to the lack of physical evidence but came to the conclusion that the witnesses were telling the truth. In concluding on the point she said:

> "...I find that I am satisfied to the extent that I feel sure albeit that there is no evidence of spent shell around the property or damage to property that the accused did what these officers said."

[15] We can only conclude from this that, even with the lack of physical evidence, the learned trial judge had no doubt of the guilt of the accused. It, therefore, cannot be said that in so exercising her jury mind she fell into error.

[16] With respect to the failure of the police to take out a warrant of arrest for the applicant, the learned trial judge considered the evidence given by the investigating officer that it was now force policy for investigators not to be involved in the apprehension of suspects. She took account of the fact that evidence was given that the force did not utilize the use of warrants anymore and there was a unit which conducted the search for suspects (at pages 129-130). In concluding on that point she noted:

> "...[T]hat even if a warrant was not issued the police officers claimed to have known the accused before, they give his name, Michael Ewan, otherwise called Mikey 1-2, they gave a name and an address to the investigating officer. The question is really, [d]id they know this man and are they

> speaking the truth when they said they know him? That is the critical issue. Do I believe these police officers?"

[17] It is clear, therefore, that the learned trial judge did consider the absence of a warrant but concluded that it was not conclusive of what she was required to determine.

[18] The learned trial judge at the start of her summation did say that she would only be highlighting features of the evidence pertinent to what she had to determine. It is not altogether troubling therefore, that the learned trial judge did not specifically make reference to the absence of an entry in the station diary. The evidence of the witness Sergeant White was that he made a report to Detective Sergeant Granston, the investigating officer, and he expected that an entry would be made by him. He did admit, after being persistently cross-examined on the issue, that, if something occurred whilst he was on patrol it would be his duty to make an entry in the diary. Although these questions were asked of the witness regarding not making an entry in the station diary, no such question was asked of the investigating officer to whom the report was made and who the witness said he expected to have made the entry. There was therefore, no evidence that an entry had not been made in the station diary or crime diary. The diaries were not before the court and the only evidence before the court was that Sergeant White had not made an entry but had made a report. The investigating officer did confirm that a report was made and he commenced investigations as a result.

[19] In considering this evidence and in accepting the prosecution witnesses as witnesses of truth, the learned trial judge must be taken to have considered the fact that Sergeant White did not make an entry of the incident in the station diary or crime diary but did make a report, a fact which did not diminish his credibility in her eyes. Speaking of the evidence of the investigating officer Sergeant Granston, she recounted it thus:

> "... [H]e said he received the report about 6:30 on the day in question from Sergeant White and Constable Smith. He commenced investigations into a case of shooting against Michael Ewan also called Mikey 1-2, same name given by the two witnesses, whom he said he knew before. He said he gave the name and particulars of the accused to another unit of the Force in charge of apprehension of suspect[s] for the accused to be apprehended." (at pages 114-115).

[20] In the light of that, any complaint regarding the treatment of the questionable absence of entry in the diaries loses its force.

[21] Counsel also submitted that the learned trial judge should have been on alert as to the veracity of the witnesses for the prosecution regarding the identification evidence and the actual events in light of the circumstances of the case which ought to have created a doubt. However, in our view, there is no merit in this criticism. The case being mainly one of credibility, the trial judge was entitled to accept the prosecution's witnesses as credible. The trial judge, in accepting that the incident took place, highlighted the inconsistencies and discrepancies, those she considered material and those she considered immaterial. She considered the major inconsistencies regarding the distance the officers were from the applicant when he fired, the number of persons

present on the scene at the time, the length of time the witnesses had him under observation and whether the shots fired were sporadic or continuous. As the tribunal of fact, she did not find that they had any impact on the credibility of the Crown's case. As to the length of time the applicant was observed by the witnesses one said it was 15 seconds and the other said it was 15 to 20 seconds. The trial judge took the view that 15 seconds was more than adequate time for a proper observation.

[22] In **Steven Grant v R** [2010] JMCA Crim 77, which was relied on by the Crown, it was held that discrepancies and inconsistencies are not uncommon features in a trial. The fact that they exist on the prosecution's case does not mean, without more, that a case has not been made out against the accused. It is a matter going to the credibility of the witnesses. The trial judge also need not comb through the evidence to identify all the discrepancies and inconsistencies that may exist in the evidence (See **Fay Diedrick v R** SCCA No 107/1989 delivered 22 March 1991).

[23] The learned trial judge took into account several significant factors in the evidence; firstly, that the applicant was known to the witnesses 10 years and four years in each case; secondly, that although the incident lasted a short time, there was ample time to see and observe the applicant; thirdly, that the view of the witnesses was unobstructed; and that even though there was a shooting, the witnesses being officers they would be less affected than lay persons in terms of the effect on their ability to recognise the applicant in those circumstances.

[24] In our view, the learned trial judge also dealt amply with the identification evidence at pages 120-127 and gave herself the necessary warnings. She dealt with the fact that no identification parade had been held, observing that in this case one would not have been useful except for the witnesses to point out Mikey 1-2 as the person who shot at them. The fact that there was dock identification in those circumstances she found not to have affected the cogency of the Crown's case.

[25] Fully recognizing that the veracity of the witnesses and their credibility was critical, the learned trial judge was scrupulous in her consideration of the evidence of the prosecution's witnesses. At page 110 she noted:

> "I have therefore turned the evidence of Sergeant White and Constable Smith upside down and scrutinized it with the utmost care to see whether I accept them as witnesses of truth because I have recognised that fundamentally this is a case that rests squarely on credibility. Who do I believe?"

[26] Later in her summation she said:

> "Sergeant White said, and I listened to him and there is a ring of sincerity that I cannot escape in his evidence when he said he knew him for ten years. He said it's [sic] someone who he would call to as part of his policing of the area and over these ten years one of them even searched his home and I accept that...." (at page 131)

[27] Then having considered why they would concoct such an elaborate story, she concluded that their account was unblemished. The learned trial judge not only considered the prosecution's case but she also considered the evidence of the applicant

and his witness and found that there was no reason to doubt the veracity of the officers.

[28] We find no merit in this ground.

Ground 2

That the learned trial judge appeared to have rejected the defence of alibi on the basis that she could find no reason why the police officer would have lied on the applicant and in doing so failed to demonstrate her reasons for rejecting the defence and arriving at the view that the defence witness was a "witness of convenience".

[29] The gravamen of this ground is that the learned trial judge did not treat with the evidence in a balanced and a fair manner. Learned Queen's Counsel complained that there was no reasonable analysis by the learned trial judge to substantiate or demonstrate why she rejected the defence of alibi or why she found the defence witness to be a "witness of convenience". This, it was argued, was even more unfair as the applicant's evidence was impeccable and neither he nor his witness was discredited in cross-examination. It was argued that in light of those aspects of the evidence which weakened the Crown's case, such as the absence of diary entry, lack of physical evidence and the fact that no one searched for the accused at his home after the shooting, the learned trial judge failed to analyse how these affected the credibility of the witnesses and how they affected her.

[30] It was also argued that the basis of the learned trial judge's reason to reject the alibi was because she could find nothing on the prosecution's case to reject it. This court was asked to consider and find that, in the absence of a reasoned demonstration

as to how she arrived at a rejection of the applicant's evidence, the learned trial judge's findings were flawed.

Analysis of ground 2

[31] In order to consider whether there is any merit in this submission we must first look at how the learned trial judge treated with the issue of alibi. At page 108 of the transcript where the learned trial judge was summarizing the evidence led before her, she noted that the defence to the Crown's case was one of alibi and that the applicant was saying he was not where the Crown alleged he was on the day in question. She noted that the applicant had nothing to prove and that the onus was still on the prosecution to prove that he was present and it was the prosecution that must rebut his alibi. In addition, she considered that the applicant's sworn evidence and that of his witness must be assessed with the same fair standard as those of the prosecution's witnesses. She also indicated that she had carefully considered the applicant's evidence and that of his witness.

[32] In rejecting the evidence of the applicant she not only rejected his alibi but also rejected his evidence that he did not know the witnesses before. She accepted that Sergeant White knew him for 10 years and that Constable Smith knew him for four years. In her reasoning, she noted that she found it surprising that it was never suggested to the witnesses that they in fact did not know the applicant or had never spoken to him before. She considered the evidence of Sergeant White that the applicant

had political influence in the area and that he knew where he lived and that he knew the applicant operated a business in the area and knew his girlfriend.

[33] At page 118, the learned trial judge summarized the evidence of the applicant and his witness. The applicant had testified that it was a busy day for him and he was in Vineyard Town delivering gas at the time the witnesses said the shooting took place. He came back to exchange empties and went out again. He came back again at half past six at which time he saw no police, heard no shots fired and on 1 June he heard that he was wanted by the police. Between the date of the shooting and 1 June he continued to reside at home and conduct his business. He said he only saw Sergeant White before but never spoke to him. He also said he only saw Constable Smith since being in custody but denied he was one of the officers who had previously searched his home.

[34] The learned trial judge took account of the evidence of the defence witness Ms Richards which was given in support of the applicant's claim that he was not there on Goodridge Lane at 5:30 pm on the day of the incident. Her evidence was that she was at a stall at her gate, where she lives next door to the applicant, when she saw him leave in his van at 5:30 pm and did not return until 6:30 to 7:00 pm. She saw no police on the lane and heard no shots fired that day.

[35] The learned trial judge accepted that the "defence is challenging the credibility of the prosecution witnesses when they say that the accused committed the offence". Even though credibility was critical in her view, she considered it her duty to assess the

evidence of identification because, as she noted, even if they were credible they could also be mistaken especially in the light of the defence of alibi. The issue of identification was exhaustively dealt with at pages 120-127 and, having determined that the circumstances were such that there was no room for error, she then went on to consider whether the witnesses could be believed. In considering this the learned trial judge said:

> "... In determining this question I have closely scrutinized the witnesses.... when I say witness I mean the accused and [his] witness as well. I have subject the Crown's case and the accused with the closest scrutiny. I have noted all the points raised by Mr Gilbert Roberts on the point of the accused man closely examined [sic], he asked me to look at the circumstances under which the officers came to be on Goodridge lane...."

[36] The learned trial judge considered all the issues raised by counsel for the applicant at the trial and any explanation given by the witnesses for them. She also considered whether, given the absence of any physical evidence, there was a reason for the prosecution witnesses to lie. She further considered the testimony and the demeanour of the witnesses and found them to be truthful and concluded "I can discern no spirit of falsehood. The accused man's version is rejected".

[37] It is in this context that the complaint of Mrs Neita-Robertson QC is to be considered. The question is whether as the tribunal of fact, the learned trial judge was entitled to reject the applicant's defence. We find that contrary to counsel's submission, the learned trial judge's rejection of the applicant's alibi was not without reasoning. The learned judge considered all the evidence led before her as it related to the shooting

and in particular the evidence from the defence that there was in fact no shooting that day and concluded that:

> "... These people are saying to me, no shooting at all took place on Goodridge lane that day: Why would these two officers, even call for back up? Why would they go out of the way calling the Superintendent and go making a report...if there was not even a shooting?"

[38] As we have already noted, it was not only the alibi evidence which was rejected but also the evidence that the applicant did not know the witnesses. The learned trial judge positively said she rejected the evidence noting that it was never put to Constable Smith in cross-examination. At page 134 of the transcript the learned trial judge said:

> "... Now, what do I find as a fact therefore, having found the prosecution witnesses as witnesses of truth? I reject the alibi presented by the accused man and I must say it is a false alibi and I am mindful that a person can make up a false alibi although the person is innocent... It is incumbent on me having rejected his alibi to go back and look at the prosecution's case and it is only if I am satisfied to the extent that I [am] sure of his guilt can I convict him and that is what I have done."

[39] It is clear therefore, that in rejecting the applicant's version the learned trial judge must have rejected his witness' account as well. It is also clear that the prosecution's version and the applicant's version cannot be true. In a case involving the credibility of the witnesses, the learned trial judge, as a judge of fact and law, was entitled to reject the evidence of witnesses she did not believe and accept the evidence of those she did believe. In accepting the evidence of the prosecution's witnesses, who the learned trial judge described as unblemished, honest and not mistaken, it

necessarily meant a rejection of the applicant's evidence and that of his supporting witness which was in direct contradiction to the prosecution's case.

[40] In describing the alibi as a "false alibi" it must necessarily have meant that the learned trial judge found the applicant and his witness to have lied. The question is whether there was any basis for such a finding in the evidence given by both. Ms Richards in giving evidence was led by counsel to seeing the applicant on the lane at 5:30 pm. At that time she said he drove out of his business place and a man shouted to him and he stopped. He spoke to the man and then drove away. It is the applicant's evidence however, that at 5:30 pm, he was in Vineyard Town delivering gas. The learned trial judge was entitled to find that at 5:30 pm he could not be at two places at the same time. The applicant's witness also said she saw him return at 6:30 to 7:00 pm that evening. The evidence of the applicant however was that he returned twice that day; the first time was to refill empties and this was sometime after 6:00 pm or about 20 minutes past 6:00 pm and he went out again at 6:35 pm and returned sometime later. He did not say what time he last returned that day.

[41] Although Ms Richards' evidence was that she was seated at her stall, nowhere in the applicant's evidence does he indicate seeing her that day. He was led as to who he spoke to when he returned to the lane that evening and he told the court that he spoke to a lady standing right at his business place asking about gas. It was after speaking to that lady that he drove out again having gotten a call for more deliveries. He was asked if he did anything in particular in relation to that lady and he said no. Ms Roberts'

evidence is that she saw him come out of his house which was next to hers at 5:30 pm. She was at her gate at her stall. He gave no evidence of seeing her. She gave no evidence of seeing him return and go out again. In fact, the time she said he returned was the time he would have gone out on the second occasion. In those circumstances the learned trial judge could not be faulted for finding the alibi to be a false one and for finding the alibi witness to be one of convenience.

[42] There is also no merit in this ground.

Ground 3

That defence counsel failed to adequately advance instructions from the applicant in respect of the issue of malice which placed the applicant's case in a particular context and in failing to do so he deprived the applicant of the benefit and consideration of vital material which went to the issues of credit and motive on the part of the police witnesses. That in failing to put the details of the malice and confrontations the applicant was deprived of a fair trial.

[43] We turn now to the complaint which has given this court the most concern. It relates to the conduct of the trial by the then applicant's attorney-at-law, who was no stranger to the applicant or to defending him in the courts of the land. Learned Queen's Counsel argued this ground by stating firstly, that the issue of malice and confrontation was raised by the applicant's counsel at the trial which clearly demonstrated that they formed part of his instructions. However, she complained that no details were given for the judge's consideration of what the malice and confrontation involved. It was argued further that, if the issues of malice and confrontation had been

fully ventilated by the applicant's attorney-at-law, there may have been a different outcome.

[44] The applicant gave an affidavit filed on 27 April 2016 in support of his application. In it, he alleged that he was a community leader and a Jamaica Labour Party activist and that a particular inspector of police at the Elletson Road Police Station had made him the target of his malice. He alleged that since that inspector came to Elletson Road Police Station his residence had been raided regularly and he and his family had been harassed by officers from that station. He claimed that he was the target of some police officers at the Elletson Road Police Station because of his political affiliation. He claimed that this began from 2008.

[45] As regards the two police witnesses who gave evidence against him in this case, he alleged, that whilst he was on bail for this matter, the two officers would come to his house to see if he was adhering to the curfew conditions and would report to the inspector by telephone, in his presence. He also alleged that on one occasion the inspector came to his house accompanied by the two police witnesses to ensure he was obeying his curfew and a confrontation developed between himself and the inspector regarding his curfew time. He alleged that one of the witnesses, Constable Smith threatened him with words, to the effect that, he was going to make sure that he "get a sentence on this case" and "[Yuh] nah go get weh pon dis one like the others". He outlined instances where he or other family members were charged with various

offences all of which were successfully defended with the help of his attorney, who was the said attorney who represented him at the trial which is the subject of this appeal.

[46] The applicant also claimed in his affidavit that his trial attorney was aware of all these confrontations, threats, false arrests and charges. In addition, he claimed that the instances of malice and the confrontations with the two witnesses were part of his instructions to his trial attorney as to why the police were making false accusations against him. He also alleged that he had not been asked by his trial attorney about these matters, which, he said, if he had been asked, he would have explained fully. He also claimed that he had expected the attorney to put all the details and when he failed to do so he assumed that there was a legal basis for the omission. It was his belief that the malice held against him by the inspector was "transferred" to the two witnesses and other police officers at the Elletson Road Police Station.

[47] Queen's Counsel requested and was supplied with an affidavit from the trial attorney which she supplied to this court. In it, he deposed to the fact that he had successfully represented the applicant and his family in matters they had before the criminal courts in Jamaica. He said that in this particular matter, he:

> "took instructions from Mr Ewan and crafted a trial strategy around these instructions based on:
>
> (a) alibi evidence
> (b) establishing the absence of or lack of physical evidence collected by the police to connect the then accused to the crime
> (c) testing the credibility of the police officers;
> (d) alleged political bias on the part of police officers, based on the fact of the State of Emergency in May and June

2010 which was theorized to be driven by political expediency.

3. My instructions were explicitly put to trial witnesses where appropriate. In addition, the then accused was led in his examination in chief on relevant particulars.

4. I was not instructed that there were any connections between the matter at trial and the matters for which he was previously before the court.

5. Furtherto, Mr. Ewan's own evidence at trial establishes that whilst he had seen Constable White before, they had never had any interactions and that he did not know Constable Smith.

6. At all times, I followed the instructions of Mr. Ewan and put his case to the Prosecution witnesses and court accordingly.

7. The facts outlined in this Affidavit are true."

[48] Learned Queen's Counsel argued carefully and with utmost sincerity that on the affidavit evidence of the trial attorney it is clear that he was instructed as to the issue of motive and confrontation. She pointed out that, whilst he suggested to the witnesses that they were acting with malice and that there was a confrontation, the particulars of this malice and confrontation were not put before the court. She also argued that the trial attorney failed to ask any questions of the applicant to elicit those details which resulted in an unfair and unbalanced trial of the applicant. She pointed out that it was clear that the learned trial judge was searching for a motive in the officers and if the details of the malice and confrontation had been elicited, it may have provided such a motive and may have had an impact on the outcome of the trial.

[49] No written instructions were supplied to the court by the trial counsel. However, as far as malice is concerned, it seems to us that his account of his instructions accords with the applicant's. He says it was based on political bias and the applicant stated in paragraph 12 of his affidavit that "I have been targeted by some Police at the Elletson Road Police Station because of my political affiliation". This was after he spoke of the harassment by police officers from that station after the "emergence" of the inspector. He then went on to give details of the raids on his home and charges made against him and members of his family. None of these raids or arrests and charges involved the two witnesses so the only conclusion this court can come to is that his instruction to the trial attorney was that he was a target based on political bias.

[50] In this case, the applicant gave sworn evidence and so did his witness so his evidence and that of his witness fell to be treated in the same manner as that of the prosecution. The question therefore, is whether credence should be given to the applicant's complaints and, if so, whether, had his instructions been followed by the trial attorney it would possibly have made a difference to the outcome of his trial.

[51] This issue must be considered against the background of the applicant's evidence at trial that he had only seen Sergeant White, never spoken to him before and contrary to what was said by Sergeant White in his evidence, he had never shared any jokes with him. He testified that he did not know Constable Smith and had only seen him for the first time since being in custody and denied that Constable Smith had been one of the officers to search his home on a previous occasion before the alleged

shooting. These are the persons he now claims acted with "transferred malice" and with whom he had confrontations which were not put before the tribunal of fact and law.

[52] Learned Queen's Counsel cited four authorities in support of her contentions. She argued that the principles outlined in the authorities for dealing with the failure of counsel to put his instructions may be summarised as follows:

> (1) The problem of the failure to put instructions on behalf of a client by counsel should be assessed in terms of what was not done at the trial rather than to assess the qualitative effect of the failure to do so.
>
> (2) The court will only overturn a conviction in exceptional circumstances.
>
> (3) The court will only overturn a conviction in those circumstances where it has affected the fair trial of the appellant resulting in a miscarriage of justice.

[53] Learned Queen's Counsel noted that the trial judge had made heavy weather of the absence of any evidence of malice. She argued that there was no doubt that in these particular circumstances, had the motive of malice been provided it would have been a matter considered by the learned trial judge. She argued further that the false arrest and numerous cases brought against the applicant by police personnel from Elletson Road Police Station should have been placed before the trial judge, as they were of great probative value in providing a motive, since they all came to nothing. She

pointed out that although the trial attorney had suggested malice and confrontation, he failed to develop the details and failed to weigh the probative value of the information against its prejudicial effect and see that it was more probative than prejudicial. Queen's Counsel argued that if this court accepts that the evidence of malice and confrontation would have had the effect suggested then one is bound to accept that there was a miscarriage of justice and that the applicant had been deprived of a fair trial.

[54] We did not require counsel for the prosecution to respond to grounds 1 and 2. With regard to ground 3, counsel argued that the applicant in his own evidence had distanced himself from the two witnesses and even in his affidavit before this court, the alleged confrontation on which he was relying was after the shooting. Counsel pointed out that there was no allegation of confrontation before the shooting and the one incident after the shooting did not provide support for the existence of malice before the shooting. Counsel also noted that the complaints were specific to the two witnesses for the Crown and there was nothing in the alleged confrontation after the applicant had been charged and released on bail to suggest that there was malice on the part of the two prosecution witnesses on the day of the shooting.

[55] Counsel further argued that the trial attorney had brought out the defence of alibi, had adequately traversed the issue of lack of physical evidence and had rigorously cross-examined to test the credibility of the witnesses. She argued further that the applicant had discounted the evidence of the witnesses' knowledge of him. She pointed

out that the trial attorney in his affidavit denied any instructions as to a connection between the current matter and the previous charges before the court and pointed out that the applicant's own evidence established that he had no connections with the witnesses prior to being charged with these offences.

[56] Counsel argued that in those circumstances, this court is to be mindful of any strategy to blame the trial attorney. She noted that with respect to the confrontation alleged in the applicant's affidavit, the trial attorney did suggest to the witness Sergeant White that there had been a confrontation and he denied it. Counsel asked the court to accept that the trial was not unfair, that the applicant was adequately represented by counsel of his choice who had successfully represented him in all his previous charges before the court and that the summation by the learned trial judge was a carefully worded one.

Analysis of ground 3

[57] As was pointed out before, learned Queen's Counsel relied on four authorities in support of this ground. These were:

(1) **Bethel v The State** (1998) 55 WIR 394

(2) **Gerald Muirhead v R** [2008] UKPC 40

(3) **Sankar v The State of Trinidad and Tobago** [1995] 1 All ER 236

(4) **R v McLoughlin** [1985] 1 NZLR 106

[58] In the first two, **Bethel** and **Muirhead**, it was said that the court should approach these types of complaints with caution and certainly, in our view, that

guidance with regard to taking a cautious approach has much to commend it. However, if there is any merit in the complaint, equally the court must act to ensure that the applicant's right to a fair trial has not been compromised by his counsel's failure in his duty towards his client.

[59] In the case of **Bethel**, the Board stated that it was cognizant of the ease with which allegations of incompetence or refusal to accept instructions may be invented against counsel. In **Muirhead**, the Board cautioned against the acceptance of self serving statements of convicted persons after trial as to discussions with and instructions given to counsel before and during trial which are easy to make and difficult to refute.

[60] **Bethel** was an appeal to the Privy Council from Trinidad and Tobago. It was a capital case. In the applicant's second petition to the Board (having previously unsuccessfully petitioned against the merits of the conviction) he complained of misconduct by his attorney at the trial. Their Lordships in considering the complaint said:

> "They are very conscious of the ease with which it is possible for condemned prisoners, as a last resort, to invent allegations of refusal to accept instructions or incompetence on the part of counsel who defended them or conducted their appeals. It is also for practical reasons not possible for their lordships to investigate such allegations and the only course open to them is either to dismiss the petition or to refer the matter back to the Court of Appeal for investigation. Their lordships wish to make it clear that the fact that such allegations are made and persisted in, despite denial by counsel involved, does not amount to a reason for referring the matter to the Court of Appeal. Ordinarily, their

> Lordships would not be inclined even to entertain such allegations when they are raised for the first time before the Board and, in those cases in which they think it appropriate that counsel should be asked to respond to the allegations, they will accept his explanation."

[61] Their Lordships sent the matter back to the Court of Appeal for further enquiry, seemingly for three reasons. The first was that it was a capital case in which the applicant was claiming he had been denied the right to give sworn evidence; the second was the fact that there was no written record of counsel's instructions in circumstances where the applicant's account of his instructions as to the voluntariness of his caution statement was diametrically opposed to that of his trial attorney; and thirdly, that counsel had disclosed that his client had made a full confession to him which they felt, must have placed him in a "gravely embarrassing position". The Board also made it plain that this was an exceptional case and was not to be taken as an encouragement for allegations against counsel to be raised for the first time before the Board.

[62] In **Muirhead**, which was an appeal to the Privy Council from Jamaica, the complaint before the Board was that the appellant had not been allowed to give sworn evidence, even though he wished to do so, and that no evidence of good character had been led by counsel on his behalf, even though the appellant had no previous convictions. This was a retrial and on the first trial he had given sworn evidence, his good character had been put in issue and there had been a hung jury. The difficulty, as seen by the Board in **Muirhead**, was that there was no response from counsel

regarding the complaint. The court considered that there was no information to contradict the appellant's account of what he claimed counsel had said to him. The Board referred to the practice recommended in **Bethel v State** for counsel to make a written note of his instructions. The Board considered that "counsel has a duty to the court and the administration of justice to follow the practice recommended in *Bethel*".

[63] With respect to the failure to put the appellant's good character into evidence, the Board in **Muirhead** noted that the focus should be on the effect of the failure on the fairness of the trial, rather than on the extent or degree of the error on the part of counsel. No doubt that is also the approach to be taken with the failure to put the defendant's instructions for consideration by the jury. This is in direct contradiction to Learned Queen's Counsel's submission on how the authorities approach the question of any failure on the part of counsel, with respect to his instructions.

[64] One would therefore have to look at the evidence against the applicant and see whether firstly, there had been a failure on the part of trial counsel and secondly, what effect it could have had on the verdict. It is important to note that in **Muirhead** the allegation made by the appellant was uncontradicted. The Board took the view that in the circumstances where the case depended "heavily" on a very young identifying witness and where the defence was a strong denial, it was difficult to be satisfied that the jury would have been bound to reach the same conclusion if a good character direction had been given.

[65] **R v McLoughlin** was a case from the Court of Appeal of Wellington in New Zealand in an appeal against convictions for rape where the trial attorney refused to carry out the client's instructions to call alibi witnesses because he formed the view that their proposed evidence was unreliable and the accused was convicted. It was held that the accused was deprived of an opportunity to put his defence and as a result he did not receive a fair trial. His appeal was allowed and a retrial ordered. The court noted that a barrister may not disregard a client's instructions and conduct the case in a manner he thinks fit.

[66] In **Sankar v The State of Trinidad and Tobago** counsel took the decision to have his client remain silent and in his address to the jury told them that if they accepted the Crown's case they should find him guilty. He was found guilty. Counsel's explanation was that his client had told him something which caused him, out of professional duty, to advise him to remain silent. The appellant claimed he wanted to give evidence but did not want to argue with his attorney in front of the jury. The Privy Council held that the attorney had failed in his duty to his client and there had been a miscarriage of justice. This case was also thought to be exceptional. It was also noted that the approach should be to assess the effect on the trial.

[67] Also in **Michael Reid v R** SCCA No 113/2007 judgment delivered on 3 April 2009, which was not cited by learned Queen's Counsel but which we found to be helpful on the point, the court crafted the principle (the 4th principle in that case) that:

> "On appeal the court will approach with caution statements or assertions made by convicted persons concerning the

> conduct of their trial by counsel bearing in mind that such statements are self-serving, easy to make and not always easy to rebut. In considering the weight, if any, to be attached to such statements, any response, comments or explanation proffered by defence counsel will be of relevance and will ordinarily, in the absence of other factors, be accepted by the court."

[68] We will therefore, take a similar approach in considering the issue in this case. Having looked at the applicant's affidavit we have considered it with the necessary caution, bearing in mind the explanations given by the trial attorney in his affidavit, which we accept.

[69] Reference has already been made to the trial attorney's affidavit explaining his instructions in this matter. It is necessary to look now at how he dealt with the issue. It had been asked of the witness Sergeant Smith whether he had cause to get into any confrontation with the applicant and the answer was no. It was also suggested to him that the applicant had not shot at him but that he had made the allegation out of malice. The witness denied this. It is to be recalled that this was the witness who the applicant said had "threatened" him that he would not get off this case like he did the others. It is this aspect of the trial attorney's handling of his instructions which learned Queen's Counsel is concerned did not go far enough.

[70] Apart from the fact that these two officers were stationed at the same station as the inspector complained of, whose malice was said to have been "transferred" to them by virtue of being stationed at the same station or division, it is difficult to see how much further counsel could have gone in cross-examination on this point. It is true that

he could have put the exact time and place of the incident which was termed as a confrontation by the applicant, but bearing in mind that the confrontation was with the inspector and the witness was merely present, the suggestion by counsel went further and was more than his apparent instructions. Certainly counsel, who had no instructions that there was a connection between the instant case and the previous ones, in which he himself was involved as counsel, could hardly have put what he was not instructed to put. He also could not put to the witness that he was acting out of malice transferred to him by association with the inspector. It would have been improper for him to put such a suggestion for which he could not possibly provide any proof.

[71] Since a suggestion is not evidence, the witness' answer to the suggestion is final on the point unless the applicant was able to bring evidence in rebuttal. One would expect that any evidence the applicant could present to the court was the same evidence in his affidavit of the false arrests and charges against him and his family as well as the raids on his home. This was done according to the applicant by the inspector and other police officers not the two witnesses in this particular case. The theory that this malice was "transferred to the witnesses" goes to the state of mind of the applicant and was really a matter of speculation. The end result, in our view, is that potentially prejudicial material of questionable probative value would have been placed before the learned trial judge. The learned trial judge would have been obliged to discard that evidence in any event, and the effect on the outcome of the trial would have been nil.

[72] Both prosecuting and defence counsel should be mindful of the observations made by the court in **R v Baldwin** 18 Crim App Rep 175 at 178 and **Christopher Thomas v R** [2011] JMCA Crim 49 at paragraphs [16]-[21], in relation to questions put to witnesses during a trial and the implications for their client's case.

[73] The learned trial judge did consider whether there was any motive for the prosecution witnesses to lie and found there was none. She expressly indicated that she would not use Constable Smith's evidence of having been part of a search of the applicant's home against the applicant. Also that, she had not considered the evidence of the applicant being under house arrest nor did it influence her decision. In addition, by denying or discounting the evidence of the witnesses for the prosecution regarding their knowledge of him, the applicant weakened, if not completely eliminated any reason for the existence of malice in the witnesses.

[74] The applicant's evidence is that he heard over the television that he was to turn himself in. The evidence of the police witness in cross-examination was that the applicant had political interest in the area. This was put to him by counsel for the defence and he agreed. The applicant himself raised no question of malice in his evidence or the evidence of his witness even though he did give evidence of his political activism. The learned trial judge considered (at pages 130 - 131) the evidence of the applicant and his witness and found that there was nothing in the evidence which suggested a reason for the prosecution witnesses to lie.

[75] At page 137 of the learned trial judge's summation she said this:

> "... The police in my view has given an unblemished account of what transpired, I find them to be honest witnesses who were not mistaken. Having given myself the necessary warning along the Turnbull guidelines, having considered that the accused have nothing to prove and that the prosecution bears the burden to the end to satisfy me of its [sic] guilt, I find that I am satisfied to the extent that I feel sure albeit that there is no evidence of spent shell around the property or damage to property that the accused did what these officers said. I have considered it thoroughly and I have tried to see if any part of me has a doubt that can be attributed or go to the benefit of the accused and I can't find it, I must say. In the circumstances I find that the accused is guilty on both counts of the indictment having considered all the evidence and the submissions made by counsel. There is no proof of any malice, there is no suggestion to ground malice in the officers and I find they acted from no motive."

[76] Pointing to this aspect of the learned trial judge's summation, learned Queen's Counsel argued that if details had been led as to the confrontation and malice it would have provided material for the learned trial judge's consideration. Of course we consider that learned Queen's Counsel is correct, that details of malice and confrontation, where it exists, would provide a motive which necessarily must be taken into account when one is assessing the credibility of witnesses. It is altogether even more important where it is the word of one against the other. But motive cannot be manufactured and an attempt to do so can also backfire and discredit the person who manufactured it. It is in this light that one must consider the explanation of counsel and the affidavit of the applicant in determining whether the trial attorney failed to properly carry out the instructions of his client.

[77] It is clear that counsel sought to go as far as he dared without proof based on his instructions. The evidence of his client, which he must have been aware of before

placing him in the witness box, was that he had only seen one of the police witnesses prior to the shooting and he did not know the other. There could therefore, have been no motive of malice known to the applicant prior to his arrest. Counsel's statement is that he was instructed as to an alleged political bias on the part of police officers. There was no allegation that it was these two witnesses who had the political bias. The witness Sergeant White was cross-examined as to the nature of his relationship with the applicant and he said he knew him for 10 years by way of community policing. He agreed that the applicant had political interest in the area. Counsel went no further with that line of questioning. Indeed, one may say he could not have gone any further as it would not have been proper for him to suggest that this witness had political bias when that was not his instruction and the witness could hardly have answered whether other persons had political bias against the applicant.

[78] However, on re-examination it was asked of the witness when was it that he next saw the accused after the shooting. In answer to that question, he indicated it was when he came into Elletson Road Police Station with his attorney after the Tivoli incursion when it was announced on the radio that he was a person of interest. It is clear therefore, that the issue of political affiliation had been placed before the learned trial judge. The learned trial judge herself asked Constable Smith if he was making the allegations out of malice and he said no. Counsel did seek to ask the investigating officer questions regarding how the applicant came into custody but was warned by the learned trial judge of the danger of letting in hearsay statements and he abandoned his attempts. As to whether counsel should have led evidence of the previous incidents of

false arrests and raids which came to nought, it is clear from the learned trial judge's stance that it would not have been allowed even if he had attempted to do so since its prejudicial effect would have outweighed its probative value. In addition, none of the prosecution's witnesses were involved in those incidents. Any answers to questions related to those incidents given by these witnesses would merely have been hearsay or speculative.

[79] The learned trial judge was therefore correct to find that there was no proof of malice. She made a definite finding that they did not act from any motive. A suggestion made to a witness is not evidence and it is highly improper to make suggestions of malice and motive where there is no intention or possibility of bringing evidence of this. The applicant in his evidence denied knowing the two police officers and this closed the door to any evidence of malice and motive directly attributable to them. It is difficult to see how counsel would have managed to elicit evidence of this "transferred malice" or political bias in other persons without leading the applicant in examination-in-chief into giving speculative evidence which had the risk of being more harmful than helpful to his case.

[80] Learned Queen's Counsel has no support in the cases cited, as they are all peculiar to their own exceptional circumstances. It seems to us that trial counsel did the best he could and as counsel who admittedly has successfully represented this applicant previously, it is difficult to believe he would have deviated from his clear instructions. Therefore, in light of the explanation given by the trial counsel and applying the

principles from the authorities cited above, it cannot fairly or reasonably be said that the trial attorney failed in his duty to the applicant.

[81] This ground too is without merit.

Sentence

[82] Although learned Queen's Counsel made no submissions in relation to the sentence imposed, since the notice of application for permission to appeal challenged both the conviction and sentence this issue will be addressed briefly.

[83] The sentences imposed on the applicant are within the range of sentences normally given for these offences and cannot be said to be manifestly excessive. The learned trial judge gave due consideration and weight to the factors relevant to the exercise of her discretion in a sentencing hearing. She considered the fact that he had no previous convictions, that he called witnesses who spoke well of his character, that he was gainfully employed and was the father of five children for whom he was the main bread winner. There is no basis to conclude that the learned judge erred in principle and there is no reason for this court to disturb the sentences imposed on the applicant.

Order

[84] The application for leave to appeal is refused and the sentences are to run from 8 June 2011.