JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 34/2008

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE HIBBERT JA (Ag)

RAUL KHOURI v R

Robert Fletcher for the applicant

Miss Sanchia Burrell for the Crown

10 May 2011 and 21 May 2012

MORRISON JA

[1] The applicant was originally charged, jointly with two others, on an indictment containing (as amended) three counts of illegal possession of firearm (counts one, three and four) and a single count of illegal possession of ammunition (count two). On 3 March 2008, when the matter came on for trial before Pusey J, sitting as judge alone in the Western Regional Gun Court in the parish of St James, after the defendants had all entered pleas of not guilty, the Crown offered no evidence in respect of the two others charged with the applicant. The matter therefore proceeded to trial against the applicant alone.

[2] On 20 March 2008, after a trial of the matter lasting several days between 3 and 12 March 2008, the applicant was convicted by Pusey J on all four counts of the indictment and sentenced to 15 years' imprisonment on counts one, three and four and five years' imprisonment on count two. All sentences were ordered to run concurrently.

[3] An application for leave to appeal against conviction and sentence was considered on paper on 21 November 2008 by a single judge of this court, who refused leave to appeal against conviction, but granted leave to appeal against sentence. The application for leave to appeal against conviction was renewed before the court itself and heard on 10 May 2011, when it was again dismissed. However, the appeal against sentence was allowed and the sentences of 15 years' imprisonment on counts one, three and four were set aside and sentences of 12 years' imprisonment substituted therefor. The court ordered that the sentences, which were to run concurrently, should commence from 20 March 2008. These are the reasons which were then promised for that decision, with profuse apologies for the delay in their production.

[4] Notwithstanding the fact that the prosecution called a total of 10 witnesses, while, in addition to the applicant himself, the defence called a single witness, the facts as they appeared from the prosecution's case can be stated relatively quickly. In the early morning of 16 December 2007, a team of police officers and members of the Jamaica Defence Force was on special operation duties in the Montego Bay Police Division in the parish of St James. At about 1:30 am, acting on information received, the team went to the Bogue Village Plaza where they observed a black Toyota Camry motor car ('the Camry') parked along the roadway in front of the plaza. There were five men in the

vicinity of the Camry, three standing beside it and two lying face down. After a shout of "Police get down" went out from the police officers, one of the three men standing beside the Camry shouted back that he was a police officer stationed at the Montego Bay Area One Police Station and that he had a licensed firearm and two magazines in his possession. This man was instructed to place the firearm, which turned out to be a 9 mm Glock semi-automatic pistol, on the bonnet of the Camry. He and the two men with whom he was standing were then ordered to lie, face down, on the ground. This man, who gave his name as Raul Khouri, is the applicant and he stated his registration number to be 8789.

[5] When asked for his police identification card, the applicant did not produce one, but handed over a firearm booklet in respect of the firearm, with his name and photograph in it. He also identified himself as the owner of the Camry, stated that he was the person who had driven it to that location and produced satisfactory documentation as regards the registration, fitness and title to the car.

[6] All five men were searched by members of the police party, but nothing of significance was found on them. In the presence of the applicant, the men who had been observed lying on the ground told the police officers that at about 1:30 am that morning they had been running away from a building carrying a 'pool bag' when they heard a gunshot. A male voice, which turned out to be the applicant's, told them to lie on the ground, which they did. For his part, the applicant told the police officers that he had seen two men running from the Bogue Village Plaza and that this had aroused his suspicion. He had therefore fired two shots in the air in order to stop them, thinking

that they might have been robbers. Further, he said, he had also placed a call to police control to report what he had observed, but the officers were not able to verify this information immediately.

[7] Two members of the police party were then ordered to carry out a search of the car. Just before the search commenced, however, the applicant suddenly moved around to the driver's side of the Camry and took a red drawstring bag from inside the car. He was instructed not to remove anything from the car and was ordered to stand beside the car while the search was conducted. As a result of this search, several items were found in the Camry, as follows:

1. Under the floor mat on the left front passenger side of the car, one .40 Smith & Wesson model Sigma SW40F, single action, auto-loading pistol without magazine, serial no. PAK9173 (count one);

2. One 15 rounds capacity Smith & Wesson magazine with 15 .40 Smith & Wesson calibre cartridges (part of count two);

3. In the ashtray of the dashboard of the car, three live .38 cartridges and one .357 Magnum cartridge (part of count two);

4. Inside the red bag on the front seat of the car, one .38 Special Smith & Wesson model 12-1 frame, a six rounds capacity cylinder, a trigger, a hammer, an ejector and a rod, mainspring,

redound board, grip and a one side plate (all component parts of one firearm) serial no. c58253 (count three);

5. one homemade handgun (count four);
6. Between the arm rest and the driver's seat, one black Glock extension magazine with 29 .40 cartridges and one Uzi magazine without cartridges;

7. on the floor of the driver's side of the car, one 9 mm spent shell; and
8. on the back seat of the car on the left side, a web belt with three empty 9 mm magazines and, underneath, a police bullet proof vest, a yellow rain cloak and a silver tape recorder.

[8] As each of these items was found and shown to the applicant, who was present throughout the search, his unvarying response after caution was, "Me a good police." According to the prosecution (but denied by the applicant), the applicant also volunteered that the reason he had the guns was that whenever police officers were involved in shootings he was the person who transported weapons to the scene, to be placed on the victim or victims.

[9] The applicant and others were taken to the Montego Bay Police Station by the police team, where the firearms and other items found in the Camry were handed over to officers at the station. When again cautioned and asked if there was anything that

he wished to say, the applicant's response was that he had tried to explain the position to the police officers at Bogue Village Plaza, but that no one had been willing to listen to him. The applicant then explained that the firearms and ammunition had been given to him by a person, whose name he declined to mention out of fear for his life, who had told him that he had discovered another person, also unnamed, secreting the firearms and ammunition and wanted the police to take the stash before that person came back to collect it. He had accordingly taken up the firearms and ammunition and put them into his car, before setting out for the police station, accompanied by the two men who had been seen standing with him beside the Camry at the Bogue Village Plaza. It was while he was on his way to drop off one of the two men, at whose request he had made another stop to pick up a loaf of bread, the applicant said, that on reaching the plaza he had seen two men running out of a building. His suspicions aroused, he stopped the car, called out to the men, saying "police" and fired two shots in the air, whereupon the men stopped and were instructed by him to lie on the ground. According to the applicant, he then placed a call to the police to report the suspicious circumstances in which he had seen these men running from the building on the plaza. This was the situation in which the police party in due course came upon him, his two passengers and the two men lying on the ground.

[10] It was subsequently confirmed by the Area One Control Centre, which was at the material time responsible for the receipt and dispatch of information by radio and telephone to police personnel and other departments, that some time after 1:30 am on 16 December 2007, among several other calls received, one had been received from

the applicant. The applicant was reported to have told the police officer who took the call that he was at that time at Bogue Village in front of a wholesale supermarket, had in custody two men, who were seen running from the area, and was in need of assistance to take them to the police station.

[11] The firearms and ammunition found in the Camry were submitted to the ballistics expert for analysis. The expert's conclusion was that, under the provisions of the Firearms Act, the .40 Smith & Wesson automatic pistol, the homemade handgun and the component parts of the .38 Special Smith & Wesson revolver were all firearms, while the various items of ammunition were all firearm cartridges and ammunition.

[12] On 2 January 2008, following on from a ruling by the Director of Public Prosecutions, the applicant was charged with the offences of illegal possession of firearms and ammunition. The applicant said nothing when cautioned.

[13] In addition to the witnesses as to fact who gave evidence at the trial along the lines already generally outlined, the prosecution also called a retired sergeant of police, who up to 2003 had been the storekeeper for Divisional Stores, St James, stationed at Freeport Police Station in that parish. Among his duties was the receipt of all court exhibits for safekeeping and storage and the keeping of a record of the movement of exhibits received at the stores. Counsel for the prosecution made an elaborate - and ultimately unsuccessful - attempt to put the Exhibit Register, for which the sergeant had responsibility in December 2002, in evidence. However, the sergeant was finally permitted to tell the court that, from a particular entry in the register, he was able to

conclude that a firearm exhibit had been collected from the stores on 6 December 2002, by one Constable Prince, the arresting officer in a particular case, and, it appeared, had not been returned to the stores.

[14] After an unsuccessful no case submission was made on his behalf by his counsel, the applicant gave sworn evidence in his defence. In effect, his account of the events of the early morning of 16 December 2007 followed closely the account which he had given at the police station. He confirmed that he had been a policeman for nine years, had been working in Montego Bay for five to six years and was at the material time stationed at the Area One Headquarters. On the night in question, while the applicant was seated with one Clive Atkinson in a bar in Anchovy in the parish of St James, Mr Atkinson received a telephone call on his mobile telephone. He in turn passed the phone to the applicant, who ascertained that the call was from one Linval Topey, who was known to him before. After Mr Topey said to him, "Yow a Linvey, mi have a vibes fi show you", the applicant, accompanied by two others, immediately went to that gentleman's house in the Bogue Village Housing Scheme. There, after speaking to Mr Topey, the applicant went to the side of the house, closely followed by Mr Topey. Aided by his flashlight, the applicant after a search of the area discovered a grey plastic bag containing firearms. He then went to the Camry, intending to take his find to the Montego Bay Police Station. He was accompanied by Mr Atkinson and another man, Orville Spence. At the request of one of these men, the applicant made a brief stop to enable him to purchase a loaf of bread. He then set out for the police station and, while still in Bogue Village, in the vicinity of the "supermarket wholesale", he saw two

men running from the building, one of them with what appeared to be a firearm under his arm. The applicant brought his vehicle to a complete stop and ran out after the men, shouting, "Police, stop"; however, they continued to run and the applicant then discharged two rounds in the air from his licenced firearm, whereupon the men came to a halt. The applicant then advised them that he was a police officer and it was while he was in the process of searching and interrogating the men that the team of security personnel that eventually arrested him arrived on the scene. The applicant did not suggest that the firearms and the ammunition reportedly found in the Camry were not in fact found there, though he did dispute the exact places in the car in which the firearms and ammunition had been found. His evidence was that it was he who had first told the police officers that there were firearms in a grey plastic bag at the back of the car. He also denied strongly that he was the owner of the Camry, or that he had given papers relating to his ownership of the car to the police officers who arrested him.

[15] When the applicant was cross-examined by counsel who appeared for the Crown, there was a veiled suggestion, with which the applicant agreed, that he was not on active duty as a policeman on 16 December 2007, in the light of his having received on 27 November 2007 a directive of some kind to turn over all government property in his possession, including his ballistics vest, to his officer in charge. The applicant also agreed that, as a result of this directive, he was not supposed to have been carrying out any "regular" duties as a policeman on 16 December 2007. However, the applicant

did maintain his position that he nevertheless remained a member of the Jamaica Constabulary Force and that he was acting as such on the night in question.

[16] Mr Linval Topey gave evidence on behalf of the applicant. At about 11:30 pm on 15 December 2007 he was at home in Bogue Village watching television, when he saw two suspicious men walking by his house. Upon seeing these men, he made a telephone call to his friend Mr Clive Atkinson and in the course of that conversation spoke to the applicant, whom he had known for about a year and a half before as a corporal of police. He had in fact made a separate report of suspicious activity to the Freeport Police Station previously that evening, but no one had come to investigate this report up to the time when he spoke to the applicant. Mr Topey told him, "Mi have a vibes fi show you", and about 40 minutes later, the applicant arrived at his home. Armed with a flashlight in one hand and his firearm in the other, the applicant and Mr Topey proceeded to the back of the house, where Mr Topey saw when the applicant picked up something and heard him say, "Topey, a gun dem yah yuh nuh." He also saw when the applicant returned to his car, where he appeared to put down something, saying that he had to go to the station and, again accompanied by the two men who had arrived with him, left his premises.

[17] That was the case for the defence, at the end of which, the learned trial judge summed up the case. After reviewing the evidence which he had heard, the following findings of fact were made by the judge:

(a) The Camry was "in the possession, that is, in the custody and

control of [the applicant]".

(b) The .40 Smith & Wesson pistol and its magazine were found under the mat of the left front passenger side of the Camry.

(c) The rounds of ammunition were found in the ashtray.

(d) The homemade gun and the disassembled .38 were found in a bag on the front seat of the Camry.

(e) The applicant attempted to take the bag out of the car right before it was searched.

(f) The applicant was in possession of the firearms and ammunition.

(g) The police officers who gave evidence of stopping and searching the Camry were persons whose evidence could be relied upon as witnesses of truth, notwithstanding that there were discrepancies between them.

(h) Neither the applicant nor Mr Topey was a witness of truth.

(i) The applicant had accordingly given no reasonable explanation for his possession of the firearms and ammunition found in the Camry.

[18] The applicant was therefore found guilty and sentenced as already indicated. When the matter came on for hearing, Mr Fletcher, who appeared for the applicant, with his accustomed skill and tenacity, sought and was granted leave by the court to abandon the original grounds of appeal filed by the applicant and to argue instead two supplementary grounds as follows:

> "1. The summation of the learned trial judge was deficient in that he failed to deal appropriately with certain critical issues and aspects of the evidence thereby denying the applicant a fair and balanced consideration of his case.
>
> 2. The sentence is manifestly excessive."

[19] In support of ground one, Mr Fletcher concentrated his efforts on three matters: firstly, that the judge erred in law in failing to assess the applicant's case in the context of his status as a police officer. Instead, and wrongly, he approached the applicant's evidence as he would have approached that of a civilian, thus undermining the basis of the applicant's defence; secondly, that the judge did not, as he was required to do, especially when sitting as judge and jury, carefully analyse the evidence placed before him and indicate the discrepancies and how he differentiated, reconciled or otherwise integrated them in the eventual decision; and thirdly, that by allowing evidence to be given about the removal and non-return of an exhibit from the stores, the judge admitted evidence which was highly prejudicial and not probative, and thus "cast a shadow on the applicant". In these circumstances, it was submitted, it was incumbent on the judge to have dealt with this evidence specifically in the summing up,

"preferably by indicating that it was not taken into account" in determining the applicant's guilt.

[20] We did not find it necessary to call upon Miss Burrell for the Crown to respond to Mr Fletcher's submissions.

[21] Section 13 of the Constabulary Force Act, to which Mr Fletcher had directed our attention, provides as follows:

> "The duties of the Police under this Act shall be to keep watch by day and by night, to preserve the peace, to detect crime, apprehend or summon before a Justice, persons found committing any offence or whom they may reasonably suspect of having committed any offence, or who may be charged with having committed any offence…"

[22] Based on this well-known provision in the statute, Mr Fletcher's argument, as we understood it, was that the applicant's conduct and credibility fell to be assessed within the context of the fact that, by virtue of section 13, as a police officer he was always on duty or on call for the onerous duty of keeping watch "by day and by night", etc.

[23] In considering this submission, it may be helpful to recall what Pusey J said about the applicant's status as a police officer in the summing up. It is obvious from the fact that the learned judge chose to deal with the point right at the outset of the summing up that he considered the applicant's status to be a matter of significance in the context of the case. This is what the judge said (at pages 614 – 616):

> "This has been a fairly long case. We have been blessed with ten witnesses. I wouldn't trouble to go through all of them. I will try to deal with the relevant issues in relation to

> this matter. Let me first say that since I am sitting as Judge and Jury, that I need to first publicly warn myself as Jury as to two things in relation to Mr. Khouri. First, that in relation to his status as a police officer that ought not to be taken as any advantage. He ought not to be given any advantage or any disadvantage when the Court determines guilt or innocence. It treats everyone equally and I will publicly warn myself in relation to that for Mr. Khouri that his circumstances, his position as a police officer is not any advantage or disadvantage in this matter.
>
> I say that in particular, because one has to be cognizant of the circumstances and of the time that we are in, and it seems as if this week almost everyday there has been some negative statement made in relation to police officers and statements have been made generally and in terms of this parish, and so, therefore, I deliberately warn myself in relation to that. And indicate that that ought not and has not taken any part in these deliberations.
>
> The second thing that I need to indicate is that in reviewing the evidence, there is some implication which came out during Crown Counsel's cross-examination of Mr. Khouri, which may have been [sic] implied that he was no longer an active member of the police force in regard to some disciplinary circumstances. I say that because although it was not directly said, the implication was clearly there. The Court is not deaf and therefore, I would want to say publicly and clearly in those terms it is not something that is taken against Mr. Khouri. Those circumstances, whatever they are, are [sic] before the court and cannot be considered in the circumstances of this matter.
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> Having said that, as we have said in this case before, this is clearly a case in which what one is dealing with is possession simpliciter and in terms of law, what the Court will determine is whether; (a) Mr. Khouri was in possession of these firearms, and secondly, whether there was any lawful exception which would allow his possession of the firearms."

[24] In our view, these directions are wholly unexceptionable. Although the applicant's credibility, like that of any other witness, obviously fell to be assessed within

the context of his evidence as a whole, he was not entitled to be treated differently from any other witness in this regard. It therefore seems to us that the judge was entirely correct when he said that the applicant's status as a policeman should give him neither advantage nor disadvantage in the assessment of the credibility of his evidence. The judge also quite properly reminded himself that the veiled implication that had arisen from the prosecutor's cross-examination of the applicant that, for some reason that remains unknown, the applicant was at the material time under interdiction of some kind, should be left out of account altogether and play no part in his assessment of the evidence.

[25] The applicant was charged under section 20(5)(b) of the Firearms Act, which provides that -

> "…(b) any person who is proved to have in his possession or under his control any vehicle or other thing in or on which is found any firearm shall, in the absence of a reasonable explanation, be deemed to have in his possession such firearm;…"

[26] There being no question that the Camry was found in the applicant's possession and under his control, by his own admission, it was for him to proffer a reasonable explanation for his deemed possession of the firearms and ammunition that were, again admittedly, found in the vehicle. After reviewing the evidence given on both sides in the case, the judge said this as regards the applicant's explanation (at page 630):

> "I also examined very carefully the explanation of Mr. Khouri, observed him giving evidence and Mr. Topey and I found that I am not able to believe Mr. Khouri's evidence. I don't believe that he is a witness of truth in relation to these

> matters. I do not believe that Mr. Topey was a witness of truth. I thought that significantly when I asked Mr. Topey, "When did you hear about this?", he said he heard about it the Monday after. I asked him, "What did you do?", and he said he did nothing. And I found it very strange that what he says are the very same words, coincidentally, that Mr. Khouri said he told him that, "I have a vibes I want to show you", and at 11:30 at night, nothing about you need to come here now, and Mr. Khouri comes. I don't believe that story, that explanation is unbelievable and therefore, as a question of law, I don't believe that Mr. Khouri has given a reasonable explanation for the possession of the firearms and therefore…I find him guilty on all four counts."

[27] It appears to us that this was a conclusion which, on the evidence before him, the learned judge was fully entitled to reach and no reason has been shown why, in a pure contest of credibility, this court should depart from the conclusion of the judge, who had the advantage of seeing and hearing the witnesses on both sides. In ***R v Smith & Jobson*** (1981) 18 JLR 399, 403, to which we were very helpfully referred by Mr Fletcher, Carberry JA, speaking for the court said this:

> "Section 20 subsection (5)(b) of The Firearms Act imposes on any person who is proved to have in his possession or under his control any vehicle or other thing in or on which is found any firearm the *onus* of providing a *'reasonable explanation'* failing which he should be deemed to have possession of a firearm. It was conceded in argument by [counsel for the appellant] that a '*reasonable explanation*' must be one which either convinces the trial judge or at least raises a reasonable doubt in his mind. From the reasons for judgment given it is clear the explanation in this case did not do either of these things. It is possible that a different judge might have reached a different conclusion and might have accepted the explanation or found that it raised a reasonable doubt but that possibility would not *per se* justify us in upsetting this conviction. The learned trial judge here saw and heard the witnesses. He rejected the

> explanation and it raised no reasonable doubt in his mind. To upset his conclusion, it must…be established that he acted on some wrong principle of law, or misapprehended the facts, or for these or other reasons this Court must be convinced that the judge's finding was clearly wrong."

[28] After careful, even anxious, consideration of all the evidence in this case, we are clearly of the view that no such error of law or misapprehension of fact has been identified or demonstrated by the applicant. As regards the issue of discrepancies, four of the nine police officers who gave evidence for the prosecution in this case were actually members of the special operations team which accosted the applicant and others in the vicinity of Bogue Village Plaza on the night in question. We would observe at once that, in these circumstances, it is perhaps hardly surprising that there should be some differences of recollection between these witnesses on matters of detail. As Mr Fletcher frankly accepted, Pusey J was fully alive to these discrepancies and inconsistencies, taking the time to go over them in great detail during the summing up (see in particular pages 618 – 625 of the transcript). The learned judge then said this (at pages 619 – 20):

> "So, we have these discrepancies. I have to look at them carefully and try to determine whether or not I would rely on the evidence of these officers, especially when the standard is so high and beyond a reasonable doubt. And, one has to be sure in relation to these things. What is clear from the evidence is that all the officers were, what I call search officers…were clear in terms of these things. One: That the .40 was found on the left front [sic] of the vehicle. [Three of the officers]…indicated that they [sic] came from under the mat. Two, that the four rounds were found in the ash tray of the vehicle, and, three, that the other two guns were

> found in the red bag which was on the front seat, right front seat of the motor vehicle."

[29] It is a fact that the judge did not in any explicit manner state the basis upon which he either disregarded or reconciled these discrepancies. But it nevertheless seems to us, from those items which he identified in the passage quoted in the foregoing paragraph as matters in respect of which the officers "were clear", especially when placed alongside his detailed findings of fact (see para. [17] above), that the judge was seeking to distinguish between the important, in respect of which he was able to identify relative consensus in the witnesses' evidence, and the unimportant. That the learned judge gave careful consideration to the matter of discrepancies and inconsistencies is, in our view, obvious from the manner in which he concluded his discussion on this aspect of the matter (page 629):

> "For the record, I found that the officers who spoke of the search that they were persons whose evidence I could rely on, being aware of the discrepancies that were in this matter. I still found that despite the discrepancies, that they were witnesses that I could rely on as witnesses of truth."

[30] As to Mr Fletcher's third complaint on this ground, that is, that the judge failed to give himself a specific direction to ignore the highly prejudicial evidence of a firearm exhibit having been removed from the stores, it is correct that Pusey J made no mention of this episode at all in the summing up. However, it is by no means clear to us, and neither did it seem to be clear to the judge, precisely what was the Crown's objective in seeking to lead this evidence of something that had happened some five

years before the incident for which the applicant was now being tried. It could well be the case, as Mr Fletcher suggested, that it was intended to suggest that the applicant had had something to do with the exhibit which had been taken from the stores and not returned. But if that was so, it seems to us to be clear that the evidence proffered by the Crown for this purpose did not come up to proof, the applicant's name not having been mentioned at all in the evidence of the retired sergeant.

[31] In any event, it is well established that, even in cases in which there has been inadvertent disclosure to the jury of the defendant's bad character, the decision what to do about it, that is, whether to discharge, or to give some kind of warning to, the jury (and, if so, at what point in the trial – immediately after the disclosure is made, or as part of the summing up), or to ignore it altogether by making no further reference to it during the trial, is one entirely within the discretion of the trial judge. The judge's exercise of this discretion is one which will not lightly be interfered with on appeal (see, for instance, ***R v Weaver & Weaver*** (1967) 51 Cr App R 77, especially per Sachs LJ, at pages 81-2). In the circumstances of the instant case, even if there had been a clear implication in the evidence that the applicant had had anything to do with the 2002 incident, it was plainly one of the options open to the learned trial judge to ignore it altogether and we cannot say that by choosing to adopt this course Pusey J fell into error of any kind.

[32] In support of ground two, Mr Fletcher submitted that the sentences of 15 years' imprisonment were manifestly excessive and outside of the normal range for similar offences. Although the sentences imposed by the learned trial judge were perhaps not

an egregious departure from the norm in this regard, we nevertheless considered, taking into account the applicant's unblemished antecedents, that this was a case in which a modest adjustment to the sentences imposed by the learned trial judge might be appropriate. Accordingly, we ordered that the sentences should be reduced to 12 years' imprisonment on each count, to run concurrently, commencing 20 March 2008.