JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 1/2003

BEFORE: **THE HON. MR. JUSTICE BINGHAM, J.A.**
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE COOKE, J.A.

R. v. COLLIN MANN

Jacqueline Samuels-Brown for the appellant
Ann-Marie Lawrence -Grainger, Crown Counsel for the Crown

June 14,15,16, 17,and July 30, 2004

WALKER, J.A:

On December 19, 2002, in the High Court Division of the Gun Court sitting in Kingston, the applicant was convicted on both counts of an Indictment which charged him with Illegal Possession of Firearm (Count I) and wounding with intent (Count 2). Following upon these convictions, the applicant was sentenced to concurrent terms of imprisonment of 10 years at hard labour on Count 1 and 17 years at hard labour on Count 2.

The case for the prosecution rested entirely on the evidence of three police witnesses, namely Deputy Superintendent Delroy Hewitt, Constable Dalkeith Ergas and Detective Sergeant Newton Simpson.

DSP Hewitt testified that on December 22, 2001, he was stationed at the Kingston Western Division of the Jamaica Constabulary Force with offices at the Denham Town Police Station. On that date at about 12:30

p.m. he travelled in a marked service vehicle while carrying out routine operations in the Denham Town area. At this time the vehicle in which he was being driven also carried Constable Ergas and two other members of the Force. Another marked service vehicle bearing other policemen embarked on the same mission followed in convoy fashion behind his vehicle. On approaching the intersection of Albert and Nuttall Streets he saw the applicant crossing that intersection. The applicant was previously known to him for about five years by his correct name and also by his alias name "Gummy Bear". According to the witness, after looking in the direction of the police, the applicant pulled a firearm from his waist and ran off along Nuttall Street eventually entering upon premises 14 Water Street. Hewitt, Ergas and other members of the police party gave chase to as far as those premises. Then as Ergas was about to push open the gate to the premises, the applicant was seen to point his firearm in the direction of the policemen after which the witness heard three explosions and saw flashes of light come from the muzzle of the gun being held by the applicant. Immediately Constable Ergas made it known that he had been shot. On examination Constable Ergas was observed to be bleeding from his right hand. Following this event the witness returned gunfire in the direction of the applicant who escaped capture by jumping over a wall. Constable Ergas gave evidence which corroborated the testimony of DSP Hewitt in every material particular. He

swore that prior to this incident he had known the applicant for about four years by the name Collin Mann. After sustaining his injury Constable Ergas said he was taken to the Kingston Public Hospital where he was admitted and remained for two days.

Detective Sergeant Simpson gave evidence that on December 22, 2001 he was stationed at the Denham Town Police Station. At about 3:00 p.m. on that date he received certain information as a result of which he visited the Kingston Public Hospital. There he saw Constable Ergas who made a report to him. At that time he observed Ergas to be bleeding from a wound to the palm of his right hand. On leaving the hospital he returned to the Denham Town Police Station where DSP Hewitt also made a report to him. Thereafter, he made an entry recording Hewitt's report in the station diary and commenced investigations into the matter. On December 24, 2001 he prepared a warrant for the arrest of the applicant. That warrant was executed on January 24, 2002 following the applicant's apprehension on January 3, 2002.

In his defence the applicant made an unsworn statement in which he denied having anything to do with the shooting of Constable Ergas. He called as his witness retired Senior Superintendent of Police, Carl Major. For reasons which he gave in evidence, Major opined that the diary entry made by Det. Sgt. Simpson was not all made at once, that part of the entry which followed the word "continuing" and which contained the

name and alias name of the applicant having been added to the rest of the entry at a subsequent time. The entire diary entry read as follows:

> "Det. Sgt. N. Simpson is reporting on behalf of DSP Hewitt and party of eight other ranks including Constable Ergas of the Denham Town Police Station a case of shooting with intent offence committed (along) at #14 Water Street, Kgn 14 at about 12:30 p.m. 22.12.01 effected by: as a result of information received DSP Hewitt and the above mentioned party went to #14 Water Street to conduct a search when they accosted a man armed with a hand gun this gunman then ran into #14 Water Street and the police party gave chase on reaching the gate of #14 Water Street the gunman open fire at the police hitting Constable Ergas in the right wrist the police was pinned down by this gunman for about 25 minutes until Cons. Ergas was rushed to the K.P.H. where he was admitted in a stable condition. One.45 expended cartridge was recovered from the scene investigations continuing to apprehend Colin Mann o/c Gummy Bear who was identified by the police and the other unidentified men."

An examination of this entry reveals that previous to that part of the entry coming after the word "continuing" and in which the applicant was named, the perpetrator of the crime was described three times as a "gunman" and once as " a man armed with a hand gun". Significantly, in either case the reference was to an unnamed person.

Mrs. Samuels-Brown for the applicant filed five grounds of appeal. Grounds 1,2 and 3 which were argued together read as follows:

> "1. The Learned Trial Judge erred in refusing to admit into evidence Entry #9 of December 22, 2001 from the Station Diary of the Denham Town Police Station

the said evidence being relevant and admissible and central to the Applicant's defence, whereupon there has been a miscarriage of justice.

2. In arriving at her verdict the Learned Trial Judge failed to consider or take sufficiently into consideration material supportive of the Applicant's defence of alibi and/or misunderstood the evidential and legal significance of entry in the Denham Town Police Station diary, being Entry No. 9 of December 22, 2001 namely:

   (a) it was a statement made by the crown witnesses which the Applicant was entitled to establish as so being made and to have it admitted in evidence as a previous inconsistent statement

   (b) it supported the Applicant's case that he was not seen by the police and his name was called by them as an afterthought. Accordingly the applicant was deprived of a verdict in his favour and there has been a miscarriage of justice.

3. In coming to her decision the Learned Trial Judge failed to take into account the fact that the statements of the witnesses who were all experienced policemen were undated and that this was supportive of the Applicant's defence and impacted on the credibility of the witnesses of alibi, accordingly the summing up was not fair and there has been a miscarriage of justice."

A perusal of the record of these proceedings discloses that at the trial of the applicant, counsel for the applicant, Mr. Tavares-Finson, was allowed to question the prosecution witness, Det. Sgt. Simpson, as to the entry that Simpson made in the station diary recording the report received from DSP Hewitt. In the course of that cross-examination the contents of

the entry were revealed to the court, the witness maintaining at all times that the whole entry was made at one and the same time. Simpson specifically refuted the suggestion that that part of the entry which followed the word "continuing" was made at a time subsequent to the part of the entry which preceded that word. However, despite the fact that the contents of the entry had all come out in the evidence the trial judge steadfastly declined to view the entry. At one stage of the proceedings, after dismissing the fervent and persistent pleas of Mr. Tavares-Finson to admit the entry into evidence, the learned trial judge ruled as follows:

> "Yes, having listened to the application of counsel for the station diary I have come to the decision that the station diary ought not to be admitted in evidence and I so rule."

At a later stage after the evidence of the defence witness retired Senior Superintendent Major had been taken counsel's application was renewed and was met with the terse order of the court:

> "Application denied. Come down Mr. Major".

We think that Mr. Tavares-Finson was altogether correct when in one of his manifold attempts to have the entry admitted in evidence he said in addressing the trial judge:

> "You know, Madam, I can't do any more and my arguments – I can't do anymore and my arguments are on the record. It is imperative, it is critical, it is crucial to the defence's case that the

> court looks at this entry. It is in the interest of justice for the court, for the court to look at it."

That plea of defence counsel was rejected and the reason for the court's rejection is to be found in the trial judge's summation where she said:

> "I do not find that Senior Superintendent Major's evidence assists the defence in taking their case any further. The station diary is not an exhibit in this case, and the maker of the document, Sergeant Simpson, is neither the investigating officer nor an eye witness. The contents of the diary are hearsay. It is settled law that the station diary is not a public document, and is not evidence of the truth of its content."

We do not doubt that the trail judge fell into error in not admitting the diary entry into evidence. So much was conceded by Mrs. Lawrence Grainger who represented the Crown on this appeal. In our view the trial judge completely misunderstood the purpose of defence counsel in seeking to adduce that evidence. She missed the point. The main thrust of the defence was as much to reveal the contents and tenor of that entry as it was to lay bare the format of it. The present case is to be distinguished from the decision in ***R v Anthony Bryan*** SCCA No. 137/1987 delivered May 30, 1988 on which Crown Counsel relied. In ***Bryan*** it was sought to put the entry in the station diary in evidence in order to prove the truth of the contents of the entry. That was not the situation here. In the present case the cardinal issues were twofold. Firstly, there was the issue of identification of the applicant, and, secondly, there was the issue of credibility of the several witnesses in the case. Chief among those

witnesses were the two eye-witnesses DSP Hewitt and Constable Ergas who both swore that the applicant had been previously known to them by name. DSP Hewitt said that following the incident at Water Street he called the name of the applicant in making his report to Det. Sgt. Simpson. On his part Simpson confirmed that Hewitt did so. Simpson, a member of the Jamaica Constabulary Force of 30 years experience, testified that in a case where the name of the perpetrator of a crime is divulged to him in a report, he would not fail to record such a name when making a diary entry of that report. Simpson denied the suggestion that in the present case he did so by way of what was described by defence counsel as an "addendum" to the original entry he made. That was the crux of the issue which the trial judge had a judicial responsibility to resolve one way or the other. Certainly, the entry became evidence in the case after Major's testimony was allowed and given. If the contention of the defence found favour with the court it would, as Mrs. Lawrence -Grainger conceded, have inevitably cast doubt upon the credibility of the prosecution witnesses including the two eye-witnesses, Hewitt and Ergas. It was therefore, imperative as, indeed, Mr. Tavares-Finson submitted, that the trial judge who was sitting as a judge and jury should, herself, have looked at the controversial entry. It was relevant evidence regarding the investigative process leading to the arrest and trial of the applicant. Again, in error, the trial judge appears to have

considered and assessed the identification evidence in the case in isolation rather than in conjunction with a resolution of the issue surrounding the contents and manner of recording of the station diary entry. Having, ourselves, viewed the entry in the diary (which was, in fact, a crime diary) we are satisfied that the issue relating to that entry was capable of resolution by a layman without expert assistance, and may have been resolved by the trial judge had she not disabled herself from doing so. In the result, the trial judge having erred as we have pointed out, it cannot be said that the applicant received a fair trial.

Entirely as an aside to what has already been said we feel constrained to point to certain curious features of this case. Firstly, by the strangest of coincidences, as it would appear, the witnesses for the prosecution who were all policemen, and two of whom were members of the Force of 30 years experience, produced statements which were all undated. So no one can say, as one should be able to say merely by looking at those statements, when they were written. Secondly, potential exhibits consisting of empty casings and a warhead taken from the crime scene were lost while in the custody of Det. Sgt. Simpson and not produced to the court. Thirdly, the applicant was apprehended by DSP. Hewitt, himself, on January 3, 2002, yet the warrant for the arrest of the applicant was not executed until three weeks later on January 24, 2002. According to Det. Sgt. Simpson that warrant had been in existence since

December, 24, 2001 when it was prepared. However, although the details of the warrant were given in evidence, no warrant was ever produced to the court. We, therefore, conclude that this was, indeed, a sloppy investigation of a crime.

Having determined that there is merit in grounds 1, 2 and 3 of these grounds of appeal, we find it unnecessary to address grounds 4 and 5 which deal with the issue of identification of the applicant and the matter of sentence, respectively.

In the result we grant this application for leave to appeal and treat the hearing of it as the hearing of an appeal. The appeal is allowed, the convictions are quashed, the sentences set aside and verdicts of acquittal entered in favour of the appellant.