

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 5/2010

**BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA**

ANDREW MITCHELL v R

Dwight Reece for the applicant

Ms Sascha-Marie Smith for the Crown

25 and 27 January 2012

ORAL JUDGMENT

BROOKS JA

[1] On 25 January 2012 we heard Mr Andrew Mitchell's application for leave to appeal. At that time counsel for the applicant very helpfully indicated at the outset of the hearing that, having considered the matter very carefully, he could find nothing to argue, either in respect of the original grounds filed by the applicant, or in any other respect. Having had the benefit of a full review of the transcript of the trial, we were in full agreement with the views of both counsel who appeared before us, that there was no reason to disturb the findings of the learned trial judge or any of the sentences imposed by her in this matter. We, therefore, made the following orders:

1. Application for leave to appeal refused;
2. Sentences to commence from 15 January 2010;
3. Reasons to be given on 27 January 2012.

In fulfillment of our promise, we set out below the reasons for our decision.

[2] Mr Mitchell was convicted 27 November 2009 in the High Court Division of the Gun Court during the sitting of the Circuit Court for the parish of Clarendon. This was on an indictment containing four counts. The first charged him with illegal possession of a firearm, the second with robbery with aggravation and the third and fourth with wounding with intent to cause grievous bodily harm. He was sentenced to 10 years imprisonment on each of the first two counts and 17 years imprisonment on each of the remaining two. The sentences were ordered to run concurrently.

[3] The events which led to Mr Andrew Mitchell's arrest and charge on these counts occurred in the early morning of 4 July 2008. On that date Mr Fitz Thomas and Mr Peter Saunders were attacked, robbed and shot while they were in the process of opening their store at Manchester Avenue in the parish of Clarendon. There were two perpetrators. One first approached Mr Saunders and was present, while the other perpetrator carried out the offences. Both were armed with firearms. Only Mr Saunders gave evidence at the trial and he gave no testimony concerning the identity of the perpetrators.

[4] That evidence came from a Mr Reuben Lewis who testified that he is a taxi driver and that on the morning in question, he transported three men to a location near to the store mentioned above. One of the men waited with him, out of sight of the store, while the other two went in that direction. He said some minutes later he heard the sound of gunshots. He was alerted by the man, who was with him, to move his car forward and on doing so, he saw the other two men running toward the vehicle. Both had guns in their hands. They alighted the vehicle and he drove away. He deposited them at another location within the parish.

[5] He testified that the applicant was one of the two men who had gone in the direction of the store and had returned with guns in hand. He had known him before the date of the incident and he identified him as such and on an identification parade held sometime thereafter.

[6] In cross-examination of Mr Lewis, it became clear and he admitted as much, that he had known the applicant before because he had transported him on other ventures, at least one of which he had seen him with a firearm.

[7] In his unsworn statement the applicant denied being involved with the offences. He accused Mr Lewis of telling lies on him and denied that he was ever in his company.

[8] The issues raised by the evidence concerned identification, circumstantial evidence, joint enterprise, alibi and the treatment of the evidence of a person who could be deemed an accomplice. One further issue was raised by the fact that the applicant was identified by Mr Lewis on two separate identification parades, held on the same day, but in respect of different incidents. The applicant was the suspect on both parades.

[9] The learned trial judge in a commendable summation carefully dealt with all these issues. After warning herself about the dangers inherent in Mr Lewis' testimony, she accepted his testimony as to the events of the morning in question. This is despite the fact that that evidence was not corroborated. She accepted his evidence that the applicant was armed with a firearm on the morning in question and found that he had committed the offences in question.

[10] She dealt with the relatively minor discrepancies in the evidence between the testimony of the victim Mr Saunders and of Mr Lewis, concerning the number of shots fired and the amount of time that the incident took. In respect of the identification parades, the learned trial recognized that the applicant had only been known to Mr Lewis before by an alias. She, however, pointed out that because of that previous

knowledge, the holding of two separate identification parades for the benefit of Mr Lewis' identification of the suspect, although undesirable, was not unfair to the suspect.

[11] Based on that summation, we came to the conclusions and made the orders mentioned above.