

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 92/93

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.

REGINA
vs.
EVERTON MORRISON

Everton Bird for the applicant

Miss Vinette Graham for the Crown

July 18, 19, and 29, 1994

WOLFE, J.A.:

This applicant was tried in the Home Circuit Court between September 27 and 29, 1993, before Harrison, J., sitting with a jury, for the offence of capital murder arising out of the death of Joseph Hunter on the 28th day of October, 1988. He was convicted and sentenced to suffer death in the manner authorised by law.

Some ten grounds of appeal were filed by counsel on behalf of the applicant. We shall return to deal with the grounds as filed after a brief summary of the evidence.

The deceased and Joreen McLean, an office manager, were seated in the deceased's motor van at Hill Road, Norbrook, in the parish of St. Andrew. This was approximately 7:00 p.m. As they sat talking, a male voice was heard to say, "Don't move." Mr. Hunter, who was seated with his firearm between his legs, attempted to reach for it when an explosion was heard and Mrs. McLean observed that he had been injured. She heard footsteps as if they were retreating and then after a while she heard footsteps returning to the vehicle. She left the vehicle and

sought haven beneath it. While there she heard a voice say, "You got the gun, you find the gun?" A voice replied, "Yes". Next she heard a voice ask, "Where is the gal that was sitting in the van?" and another voice replied, "Come on." About some five minutes later she emerged from under the van and found Mr. Hunter in the same condition he had been prior to her going under the van. He was not responding to her. He was bleeding and breathing heavily.

She went to a nearby house and sought assistance. The police were summoned and on arrival a report was made to Detective Acting Corporal Sharon Johnson, who observed the body of the deceased in the van. He searched the area and found a 9mm warhead, a 9mm live round and a 9mm empty casing. He also attended the post mortem examination and saw Dr. Bhatt remove from the said body he had seen in the van a 9mm warhead which was handed over to him.

Detective Superintendent Donald Brown visited the scene of the crime on the morning following the incident and found a .38 special cartridge shell.

The most crucial witness for the prosecution was Juliette Plummer. The Crown's case depended entirely on the credibility of this witness. She and the applicant lived together at Mannee River in October 1988. She was his "baby mother", as we say in Jamaica. They had been living together for five years. She testified that on January 7, 1989, the police came to her home and she showed them two guns which were kept in a black plastic bag in the grass behind her house. These guns, she said, were the property of the applicant and that it was the applicant who had informed her that the guns were being kept there. She had seen him with both guns prior to Hurricane Gilbert which was on the 12th day of September, 1988. Before the guns were concealed in the grass behind the house, the applicant kept them inside the house underneath the bed. She further identified a Johnson's Baby Powder box containing a number of cartridges which she said

the applicant kept in a press in the room, which they both occupied.

Detective Sergeant Barrington Campbell was a member of a raiding party which visited the home of the applicant on January 7, 1989, at about 9:00 a.m. His evidence, if believed by the jury, was capable of corroborating the evidence of Juliette Plummer as to the finding of the guns. He said Detective Senior Superintendent Dwyer, who was also a member of the raiding party, spoke to Juliette Plummer and all three of them went to the back of the house where a "large piece of grass" is cultivated. Plummer pointed to a spot in the grass and Superintendent Dwyer went to the spot and picked up a black plastic bag from which he removed two semi-automatic pistols - a Smith and Wesson 9mm calibre and a Colt Super .38. The serial number on the Smith and Wesson firearm was erased. Miss Plummer, it must be noted, in her evidence said that she had seen the applicant rubbing down one of the firearms as if he was engaged in filing off something. Also found was "a Johnson's Baby Powder box containing a number of shots; firearm cartridges were also found."

On Monday January 10, 1989, he made sealed parcels of the firearms and the ammunitions which were handed over to him by Superintendent Dwyer on that same day. These parcels he handed over to the Government Ballistics Expert for examination and analysis.

Acting Corporal Laurel Campbell attached to the Constant Spring Police Station and who had been the Firearms Clerk since 1986, testified that he knew the deceased and that he was licensed to hold two firearms, a shotgun and a .38 Super pistol semi-automatic. The serial number of the latter being FG57670. He said this particular firearm licence was last renewed on April 5, 1986.

Assistant Commissioner Daniel Wray, duly appointed Government Ballistics Expert with over 25 years experience in the Forensic Science of Firearms Identification and Ballistics,

testified that on the 31st day of October, 1968, he received from Acting Corporal Sharon Johnson a sealed envelope marked "A" which contained:

- (a) one 9mm parabellum unexpended cartridge case
- (b) one .38 automatic expended cartridge case
- (c) a fragment of a 9mm fired firearm bullet which weighed 20 grams (exhibit 7).

These items, it will be recalled, were found at the scene of the crime by Acting Corporal Johnson.

On November 1, 1968, he received a sealed envelope marked "B" which contained one .38 Super automatic expended firearm cartridge case. This was the shell found by Detective Superintendent Brown at the scene of the crime on the following morning and which was admitted into evidence as exhibit 8. On November 3, 1968, he received another sealed envelope marked "C" which contained one 9mm fired copper-jacketed firearm bullet which weighed 120 grams. This was the bullet recovered from the body of the deceased by Dr. Bhatt and handed over to Acting Corporal Johnson. It was admitted into evidence as exhibit 9.

On January 10, 1969, he received from Detective Sergeant Barrington Campbell two sealed envelopes, one contained:

- (a) one 9mm Smith and Wesson model 459 semi automatic pistol with the serial number erased (exhibit 2)
- (b) thirteen 9mm unexpended firearm cartridges.

The other envelope contained:

- (a) one 9mm .38 Super Colt Government Model Mark IV Series 80 semi-automatic pistol bearing serial number FG57670 (exhibit 1)
- (b) eight 9mm unexpended firearm cartridges.

Exhibits 1 and 2 were test-fired and the bullets recovered. Microscopic comparisons of the fragment of the 9mm fired bullet, exhibit 7, and of the 9mm fired copper-jacketed firearm bullet, exhibit 9, led him to conclude that both exhibits were fired

through the barrel of exhibit 2, the 9mm Smith and Wesson model 459 semi-automatic pistol with serial number erased. It meant, therefore, that the bullet recovered from the body of the deceased and the fragment found by Acting Corporal Sharon Johnson at the scene of the crime were fired by exhibit 2 which was one of the firearms pointed out to Detective Superintendent Rudolph Dwyer by Juliette Plummer and which she said she had previously seen in possession of the applicant. This was what the prosecution relied on to create the nexus between the applicant and the slaying of Joseph Hunter.

Comparison of the .38 Super automatic cartridge case, exhibit 8, with the test cartridge cases fired and discharged from the Colt semi-automatic pistol revealed matchings of the firing pin and breech face impressions which led the witness to conclude that the cartridge case (exhibit 8) was fired from the 9mm .38 Super Colt (exhibit 1), which it will be recalled, is the firearm of the deceased and, if Assistant Commissioner Wray's evidence is accepted, it would mean that the firearm was discharged at the scene on the night the deceased came to his death.

Dr. Bhatt, who performed the post mortem examination, was not called to testify as all his records touching upon the case had been consumed by a fire which occurred at his Laboratory.

The applicant gave evidence on oath. He denied being involved in the killing of Joseph Hunter. His alibi was that he was at home at the material time. He further denied having any conversation with Juliette Plummer about the firearms, exhibits 1 and 2, and that he was never in possession of them or the bullets found on the premises where he lived at Mamme River.

As was mentioned previously, ten prolix grounds of appeal were filed. We are of the view they could be encapsulated as follows:

1. That the evidence adduced by Crown to establish possession of the firearms in the applicant was unreliable.
2. That the learned trial judge failed to point out to the jury that the witness Juliette Plummer ought to have been regarded as an accomplice vel non or as a witness with an interest to serve and therefore ought to have warned them of the danger of acting on her uncorroborated evidence.
3. That the circumstantial evidence adduced by the prosecution was equivocal and did not point conclusively to the guilt of the accused.

Mr. Bird for the applicant submitted that given the number of persons who had access to the premises and to the place where exhibits 1 and 2 were allegedly found any number of persons other than the applicant could have been responsible for placing exhibits 1 and 2 where they were alleged to have been found. He further submitted that Juliette Plummer's evidence as to the applicant's possession of the exhibits was severely discredited in that her evidence suggested that the applicant would have been in possession of the deceased's gun long before the deceased lost possession of his firearm.

This submission is rendered untenable by two basic flaws. Whilst in the ordinary course of things, the number of persons having access to a particular place can affect the question of possession of articles found in that place, in the instant case there is positive evidence given by Juliette Plummer, the baby mother of the applicant, that she had seen him in possession of the guns which were kept under the bed in the room which they shared and which were later removed by the applicant to the place from which they were eventually recovered. It, therefore, became a question of fact for the jury as to whether or not they accepted the testimony of Juliette Plummer. If the jury accepted her as a witness of truth it was open to them to find that he had been in possession of the exhibits. The verdict substantiates that they so accepted her.

It is a fact that Miss Plummer's evidence placed the applicant in possession of the deceased's gun before Hurricane Gilbert which was in September 1988. However, as to the date when she saw him in possession, it must be borne in mind that the offence was committed in 1988 and the case was tried in 1993. The witness did say that it was a long time and she could not remember when it was she first saw him with the guns. This answer was proffered only when she was being pressed to assist the court by learned counsel for the Crown.

The learned trial judge in his summation at page 150 of the transcript addressed the conflict thus:

"Now, this is a bit of evidence that you would have to examine carefully because Miss Plummer told you that the accused had these guns before Gilbert, that is, before September of 1988. But from the evidence, the Prosecution is asking you to say that Mr. Hunter, had his gun up to the 28th of October, 1988, he fired it October 1988. Commissioner Wray examined it and he found that the shell that was found at the spot showed - that the firing pin on that gun matched the shell that was found on the spot.

As I told you, real evidence sometimes is even stronger than oral evidence and you must examine it. And Miss Plummer's evidence shows that she is saying that the accused had it long time before Gilbert. She can't remember. It was a long time now. But it is a matter for you how you view the evidence, what evidence you will accept and what you will reject."

In this passage the learned trial judge highlighted the conflict in Miss Plummer's evidence. He pointed to the evidence of Assistant Commissioner Wray which showed that the firearm owned by the deceased and which was recovered from premises where the applicant cohabited with Miss Plummer was indeed fired at the scene of the crime. By so doing he was assisting the jury to resolve the conflict in Miss Plummer's evidence if indeed it could have been resolved. It is obvious from the verdict of the jury that they accepted that the gun was fired at the scene of the crime, that Miss Plummer was mistaken as to when she first saw the applicant with the firearm but that she did see him with the

firearm as also the other firearm which discharged the shot which killed Mr. Hunter. This approach by the jury was permissible on the evidence before them. There was no challenge, at the trial, that guns were found on the premises. We, therefore, do not agree with the complaint that the evidence as to possession was unreliable.

The second complaint was that the gun having been found on premises occupied by Miss Plummer and she having been taken into custody by the police she fell into the category of an accomplice vel non or a witness with an interest to serve, consequently the judge ought to have given the jury the accomplice warning.

We do not accept that there was any evidence to suggest that Miss Plummer was an accomplice or that she was a witness with an interest to serve. The circumstances of her being taken into custody were not explored at the trial. It was not whilst she was in custody that she made the revelations to the police. Then it could be said that she did so to secure her release. She was released and subsequent to her release the police returned to her premises and spoke to her. Regrettably, it is not unusual for the police in Jamaica whenever there is a curfew to take persons into custody without being able to justify such action. Against this background the mere taking of a person into custody is no indication that the person is an accomplice or a person with an interest to serve.

The law is settled. If a witness was a participant in the crime charged (an accomplice) or if on the facts it was unclear whether or not he was such a participant (accomplice vel non) the trial judge is bound to give a warning to the jury of the danger of acting upon such evidence without corroboration. Where it is alleged by the defence that the witness has an interest to serve, but it is not suggested that he was in anyway a participant in the crime charged, there is no duty on the trial judge to give an accomplice warning.

This court has in S.C.C.A. 22, 23, 24/80 R. v. Champagnie et al (unreported) September 30, 1983; S.C.C.A. 45/89 R. v. Leroy Barrett (unreported) June 16, 1990 and S.C.C.A. 161/90 R. v. Calvin Hunter (unreported) June 30, 1992, approved the dicta of Ackner, L.J. in R. v. Beck [1982] 1 All E.R. 807 at 813:

"While we in no way wish to detract from the obligation upon a judge to advise a jury to proceed with caution where there is material to suggest that a witness' evidence may be tainted by an improper motive and the strength of that advice must vary according to the facts of the case, we cannot accept that there is any obligation to give the accomplice warning with all that entails, when it is common ground that there is no basis for suggesting that the witness is a participant or in any way involved in the crime the subject matter of the trial."

The complaint concerning the quality of the circumstantial evidence was not substantiated by the applicant. Once the jury accepted the evidence of Miss Plummer as to the possession of exhibits 1 and 2 by the applicant, then based upon the evidence of Assistant Commissioner Daniel Wray, the Government Ballistics Expert, and the evidence of Detective Acting Corporal Laurel Campbell that the firearm bearing serial number FG57670 belonged to the deceased, it became a matter for the jury whether such evidence pointed conclusively to the guilt of the applicant and to no other conclusion. See Hodge's Case (1838) 2 Lewin C.L. 227 which was approved by this court in R. v. Cecil Bailey [1975] 13 J.L.R. 46 at 49, where it was said per Edun, J.A.:

"It cannot be disputed that in Jamaica the rule in Hodge's case has become settled that such a special direction as to the way in which purely circumstantial evidence is to be viewed should be given to the jury."

There was evidence at the close of the case for the prosecution which could properly be left for the consideration of the jury. The oblique suggestion that the judge ought to have withdrawn the case from the jury's consideration is unsupportable. It is appropriate to refer to the dicta in R. v. Galbraith [1981] 73 Cr. App. R. 124:

"Where on one possible view of the facts there is evidence on which the jury could properly conclude that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

This was, indeed, such a case. The evidence was compelling.

The verdict is supported on the evidence.

We are, therefore, of the view that the application must be refused.