

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 105/89

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA

VS.

NIGEL NEIL

Delroy Chuck for Applicant

Miss Paulette Williams for Crown

March 26, 1990

ROWE P.:

Special Constable Victor Bowers attached to the Denham Town Police Station gave evidence before Pitter J. in the High Court Division of the Gun Court to the effect that on February 24, 1989 at 12:45 p.m. he was walking along Simon Taylor Road, Cockburn Pen, Kingston 11, when he saw the applicant, whom he knew before and another man walking ahead by about five yards. The second man touched the applicant, who looked around, drew a semi-automatic pistol from the right side of his pants waist, pointed it at him and fired a shot. Spl. Cons. Bowers said he took cover behind a "column post" and returned fire. The men, he said, ran on onto premises along Simon Taylor Road. He gave chase

and found the applicant in a room bleeding from a wound to his right foot. Upon search, no firearm was found on the applicant. According to the Special Constable the applicant explained that the other man had gone away with the firearm. The applicant was taken to the Hunts Bay Police Station and charged with the offences of illegal possession of firearm and shooting with intent. He was convicted on both counts and sentenced to a term of five years imprisonment on each count.

At trial the applicant denied the allegations. In sworn evidence he said he was walking along Simon Taylor Road looking for one Charles. He spoke to Charles' brother, then Charles called to him and he was waiting for Charles to come to him, when Spl. Cons. Bowers, ran from a house, held him at gun point, pushed him to the ground, searched him and proclaimed that he the applicant "was a wanted man". The applicant said that he protested being called a wanted man and asked to be told why he was being ordered to go to the Police Station, whereupon the Special Constable fired a shot which hit his left foot just below the knee, broke a bone, exited near the ankle and entered the right leg. He denied possession of a firearm and denied shooting at Spl. Con. Bowers.

There was a discrepancy in the Crown's case in that Spl. Cons. Bowers in his statement of how the incident occurred said he found the applicant hiding behind a drum on the premises, whereas in evidence he said he found him in a room. The learned trial judge did not find that this discrepancy was fundamental. He found too that on the demonstration of the applicant, the wounds which he received could not have happened that way; that the applicant was "shifty in the witness box" and that he was satisfied beyond reasonable doubt that the

Special Constable was speaking the truth.

Evidence had been led by the prosecution that on a visit by the Special Constable and a J.D.F. Official on the night of the incident to premises adjoining where the shooting occurred, a 9mm. pistol was found. It was not tendered in evidence.

Mr. Chuck filed and argued a single ground of appeal viz. that the verdict was unreasonable and could not be supported by the evidence. He submitted that the discrepancy as to where the applicant was held impeached the credibility of the Special Constable to the extent that whatever he said afterwards ought not to have been believed. The police statement had been shown to the witness Bowers and a passage was read into the Record to this effect:

"I followed them inside this premises where I saw yellow-man 'shooting' behind a drum and crying."

When the actual statement was examined by this Court, it was found that the witness had said he saw yellow-man "stooping" behind the drum and not "shooting" behind a drum. If the prosecution witness had written a statement that he had seen the applicant shooting at him from behind a drum and that he was held in that position, it would have been a materially different matter if at trial he said the applicant was found hiding in a room. When therefore the Record is correctly read, the apparent contradiction becomes minimal. We are unable to accept Mr. Chuck's submissions as to the overall effect of this discrepancy which was considered expressly and taken into account by the trial judge.

Mr. Chuck conceded that if the bullet hit upon a bone in the left leg, that could cause it to deflect downwards and consequently the trajectory of the bullet was of no evidential

value to determine the angle at which the firearm was held when it was fired.

The overall behaviour of Spl. Cons. Bowers after the arrest of the appellant was criticized on the basis that he did not return to the scene to search for the missing firearm, nor did he produced in evidence the 9mm. pistol which he said was recovered later that night. There was evidence from the Special Constable that upon his enquiry the applicant had told him the other man had carried away the firearm. If this was believed there would be no reason for a further search of the premises. In addition, the firearm found on the adjoining premises could have no relevant connection with the offences charged and would be inadmissible in evidence.

This is one of the cases where the demeanour of the witnesses was of paramount importance. There is no real objective evidence by which this Court can test the credibility of each witness and consequently, we cannot substitute our view of the evidence for the impressions of the trial judge who had the opportunity to see and observe the witnesses and who made findings based upon demeanour.

The application for leave to appeal is refused. Sentences will commence to run from the date of conviction in recognition of the fact that the applicant received severe injuries.