JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 86/92

BEFORE: THE HON. MR. JUSTICE CAREY, P. (Ag.)
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A. (Ag.)

REGINA vs. GERVANT RATTRAY

Delroy Chuck for the applicant

Hugh Wildman for the Crown

March 2 and 16, 1993

PATTERSON, J.A. (Ag.):

The applicant was convicted before Langrin, J. on the 2nd September, 1992, in the High Court Division of the Gun Court at Kingston for the offences of illegal possession of firearm and shooting with intent. He was sentenced to imprisonment for five years and seven years on the respective counts, the sentences to run concurrently. His application for leave to appeal against conviction and sentence was heard by us and refused on 2nd March, and we announced then that we would give our reasons in writing at a later date, which we now do.

The applicant, a special constable who was on suspension, attended a house party at 8a Kingslyn Avenue, St. Andrew, on the night of the 14th July, 1992. Two police constables and a district constable, in response to a report they received, proceeded in a marked police vehicle to the premises. Both police constables said that on arrival, they saw the applicant standing in the drive-way of the premises with a firearm in his hand. The premises was well lit. As they alighted from

the police vehicle, they heard an explosion coming from the direction where the applicant stood. Both police constables dived to the ground and from there they saw the applicant pointed the firearm in their direction and fired a shot. The applicant then ran towards the rear of the premises. The district constable and one of the police constables chased the applicant while the other police constable ran along the other side of the house. They confronted the applicant at the rear of the house. He dropped the firearm at his feet, held up his hands and said, "Murder - oonu no kill me." On examination, the firearm, a .357 Magnum "colt" King Cobra revolver, was found to contain two unexpended firearm cartridges and two expended firearm cartridge cases. It was shown to the applicant and when cautioned and asked where he got it, he replied, "Officer, you nuh know how that go? It bigger than me and you." The Ballistic Expert's evidence disclosed that the firearm was in good working order and was recently fired.

It was suggested to the police constables that their vehicle was one of three that came on the scene simultaneously, and that the applicant and a group of persons then moved to the rear of the premises while the police kept asking the men where were the guns. That was denied by the constables. They also denied beating the applicant or seeing any other policemen beating him.

The applicant gave sworn testimony, and he called a number of witnesses. He related quite a different story to that of the prosecution. He said that he had returned to the party shortly before the police arrived, and while in the front, he heard what appeared to be gunshots coming from the rear of the premises. On seeing the police, he panicked and ran to the rear of the premises, went into the adjoining premises, and eventually he came back to the road in front of 8a Kingslyn Avenue. There two uniformed policemen (not the prosecution witnesses) held

him, handcuffed him and then beat him, asking for the gun. His evidence was not quite clear as to what transpired after this, but apparently he was saying that he was taken to the back of the premises and again was beaten by the police who wanted him to pick up the gun. He denied ever having a gun that night or shooting at the policemen.

The applicant called a number of witnesses to support his case that he was held on the road, handcuffed and beaten, and that he did not have a gun. Two of these witnesses testified that they saw cuts on the applicant while he was in custody at the Half Way Tree Lock-up. Another said she saw him handcuffed and being beaten on the road. Yet two others said they saw the police holding the applicant in the premises before escorting him to the road. One of them said the applicant was beaten on the premises as well as on the road, and the other said he saw only one punch on the road.

Before us, Mr. Chuck contended that "the verdict is unreasonable and cannot be supported having regards to the evidence." He argued that there was clear evidence that the applicant had been beaten by the policemen and their credibility had been impeached by their denial of that fact. He argued further that the learned trial judge was wrong in finding that there was a conflict in the defence evidence as to where the applicant was held by the police and that he was unreasonable in finding that "the defence was manufactured because of the failure to put the defence case", having regard to counsel's admission that he was at fault.

In our view, the learned trial judge did not have to battle with any nice point of law. His major task was to decide what evidence was credible and what were the true facts of the case. In a careful summation, he recounted the relevant evidence in the case and pointed out the discrepancies. He identified what he described as the real issue in the case by saying:

> "The real issue in the case is whether the accused was in possession of a firearm which he used to shoot at the constables with intent to do them serious bodily injury. The credibility of the Crown witnesses remains the fundamental point in the case."

He found as a fact that the prosecution witnesses did not beat the applicant, and he alluded to the fact that the applicant's evidence that he was held on the road was contradicted by those of his witnesses who said he was held in the premises, thus supporting the Crown's case. We are of the view that the defence was riddled with contradictions and inconsistencies, and could not have inspired confidence on the main issues in the case. In the result, the learned trial judge was left to consider the prosecution's case, and he accepted the police constables as credible witnesses. There was the further evidence of the Ballistic Expert that the firearm recovered had recently been fired. The facts which he accepted grounded the conviction on both charges.

Mr. Chuck submitted further that the comments and findings of the learned trial judge "strongly suggested that he had shifted the burden of proof and imposed a duty on the defence to respond to each and every allegation of the Crown."

The relevant area of the judge's summation on which Mr. Chuck based his complaint reads as follows:

> "When the Crown witnesses gave evidence it was never put to any of them that the firearm was found elsewhere and planted on the accused. Indeed, when the accused gave evidence and stated that he was held by the police in the road and not around the house I asked counsel why this was not put to the crown witnesses and he said he did not know that that was the case. The Court is left to draw the inference that this aspect of the defence is a recent fabrication. What, therefore, is the reason for this recent concoction? Does the accused man have something to hide in another significant aspect of the case, is it failure of the Defence to contradict a statement stated by the police to have been made by the accused after he was cautioned? Constable Duncan cautioned the accused and asked him where he got

> "the firearm, he said 'Officer, you know dis bigger than me and you.' This bit of evidence remains uncontradicted and points to the knowledge of possession of the firearm by the accused. The burden of proof remains with the Prosecution throughout the case."

Counsel admitted before us, as he did before the learned trial judge, that he did not know that the applicant would have said in evidence that he was held on the road by the policemen - he had not taken a statement from him to that effect - and that was the reason why he had not put that part of the defence to the prosecution witnesses. The learned trial judge was entitled to draw the inference, correctly in our view, that that aspect of the defence was a "recent fabrication". The prosecution's evidence of what the applicant said after arrest and on being cautioned was never challenged in cross-examination nor was it denied by the applicant in his sworn testimony. Consequently, it was open to the court to accept that those words were said.

We are of the view that counsel's complaint that the learned trial judge had shifted the burden of proof or indeed, that he had imposed a duty on the defence, is unfounded. The learned trial judge was very mindful of where the burden of proof rested, and he made specific mention that it "remains with the prosecution throughout the case." He came to his verdict upon a pure question of fact hinged on the credibility of the witnesses in the case. He had the advantage of seeing and hearing the witnesses, and, in our view, no reason was shown why his verdict should be disturbed.