

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 109/2010

**BEFORE: THE HON MR JUSTICE PANTON P
THE HON MRS JUSTICE MCINTOSH JA
THE HON MR JUSTICE BROOKS JA**

MARK SMITH v R

Ernest Smith for the applicant

Miss Sanchia Burrell for the Crown

28 October 2014

ORAL JUDGMENT

BROOKS JA

[1] This is an application by Mr Mark Smith against his conviction and sentence in respect of an indictment, containing two counts, on which he was charged. The first count was the offence of illegal possession of firearm and the second, one of wounding with intent. He was sentenced to 12 years imprisonment in respect of the illegal possession of firearm and 16 years imprisonment in respect of wounding with intent.

[2] The charges arose out of an incident which the Crown alleged occurred on 23 March 2010 at about 10:00 pm when five men entered the garden of the virtual

complainant, Mr Raymond Thomas. The five were all armed with handguns. Mr Thomas knew four of them before, in fact, one of that four had been to speak with him just two hours earlier, indicating that something was going to happen arising out of an allegation that Mr Thomas had interfered with a gun. That person was said to be the applicant, Mr Mark Smith, whom Mr Thomas said that he had known, from the area, for some two years before.

[3] When the five men entered Mr Thomas' garden they put him to sit with his head facing the floor. After some discussion as to what was to be done with him, Mr Smith went and got a cutlass, ostensibly to cut off Mr Thomas' head. When he returned with the cutlass one of the men fired a shot which went through Mr Thomas' dreadlocked hair.

[4] The applicant then fired a shot hitting Mr Thomas on the left leg injuring him. Mr Thomas then ran away and hid, and the men went away. Mr Thomas thereafter went to the police station at the National Stadium and was taken to the University Hospital of the West Indies, where he was treated and released.

[5] On 22 April 2010 Mr Thomas identified the applicant on an identification parade, as one of the men who had attacked him in his garden on 23 March 2010. The applicant was later arrested and charged.

[6] His defence at the trial was one of alibi. He acknowledged, in an unsworn statement, that he knew Mr Thomas from the community but denied that he had had anything to do with Mr Thomas' injury.

[7] Mr Smith applied for leave to appeal against his conviction and sentence. His application was considered by a single judge of this court who refused his application, not having found anything of merit with which to place before this court. Mr Smith renewed his application before us. At the hearing, his counsel Mr Ernest Smith indicated to us that he has carefully perused the record and has found nothing which he can credibly advance, in support of the application, before this court. Learned counsel for the Crown, Miss Burrell, concurred in that position.

[8] The main issue raised at the trial was that of visual identification, and the learned trial judge, Mangatal J, in her treatment of the matter, gave herself full directions in that regard. The learned trial judge carefully perused the evidence and assessed it according to the **Turnbull (R v Turnbull (1976) 63 Cr App R 132; [1976] 3 All ER 549)** directions, which she gave herself. She also considered the matter of alibi which arose on the defence, again giving herself proper directions concerning that matter.

[9] She found Mr Thomas to be an honest and reliable witness and accepted his testimony as to the identification of the person who had shot him. Her conclusion that Mr Smith was guilty of the offences cannot be faulted.

[10] It is to be noted that Mr Smith had a previous conviction for illegal possession of firearm and ammunition. There can, therefore, be no complaint about the sentences imposed.

[11] Having examined the record of appeal ourselves, we agree with learned counsel and the single judge of this court that there is nothing to commend Mr Smith's application for leave to appeal. It is therefore refused. Sentence is deemed to have commenced on 15 October 2010.