

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NO 39/2012**

**BEFORE: THE HON MR JUSTICE MORRISON P  
THE HON MR JUSTICE BROOKS JA  
THE HON MRS JUSTICE SINCLAIR-HAYNES JA**

**MICHAEO TAYLOR v R**

**Mrs Caroline Hay and Neco Pagan for the applicant**

**Miss Paula Llewellyn QC, Director of Public Prosecutions and Mrs Lerona Montague-Williams for the Crown**

**14, 15 March and 15 April 2016**

**BROOKS JA**

[1] On 14 and 15 March 2016, we heard Mr Michaelo Taylor's application for leave to appeal against his conviction and sentences for the offences of illegal possession of firearm and wounding with intent. At the conclusion of the submissions, we refused the application and ruled that his sentences should be deemed to have commenced on 30 March 2012. That was the date on which he was sentenced by P Williams J, sitting alone as a judge of the High Court Division of the Gun Court, which was held in the parish of Saint Elizabeth. These are our reasons for that decision.

[2] On 19 April 2008, Mr Taylor had an altercation with Mr Kirk Gayle. When it had ended, Mr Gayle was suffering from gunshot wounds to his left upper arm and chest. The incident was investigated by the police and Mr Taylor was subsequently arrested and charged for the offences mentioned above. No firearm was recovered.

[3] At Mr Taylor's trial, Mr Gayle testified that Mr Taylor had shot him twice resulting in the injuries. In his defence, Mr Taylor testified, in effect, that it was Mr Gayle who had shot himself during a struggle between them.

[4] The learned trial judge, relying heavily on the medical evidence as to Mr Gayle's injuries, accepted his version of the events. On 27 January 2012, she convicted Mr Taylor for having wounded Mr Gayle, and for the offence of illegal possession of the firearm that caused the injury. She sentenced Mr Taylor, on 30 March 2012, to five years imprisonment for the offence of illegal possession of firearm and 10 years for the offence of wounding with intent.

[5] Mr Taylor sought leave to appeal against the conviction and sentences but his application was refused by a single judge of this court. He renewed the application before the court. He contended in his application that the learned trial judge did not pay sufficient attention to the evidence, and in particular, the discrepancies and inconsistencies in the prosecution's case. The result, he contended, was that the conviction was unsafe and a miscarriage of justice. He specifically complained that the learned trial judge placed too great an emphasis on the medical evidence in arriving at her decision.

## **The prosecution's case**

[6] On the prosecution's case, the incident between Mr Gayle and Mr Taylor occurred at premises where members of Mr Gayle's family lived, at Red Hills in the parish of Saint Elizabeth, albeit in different houses. Mr Taylor, who was also called "Scarry", in recognition of a burn mark on his face, lived with one of Mr Gayle's sisters at the premises. She had had children for Mr Taylor. Mr Gayle did not live at those premises, but the men were well known to each other. It was common ground that they had once even had a working relationship with each other, but they differed as to the type of enterprise that was involved. It was also common ground that their previous relations had soured, although they differed as to the reason for that development. It was Mr Gayle's position, and Mr Taylor was aware of it, that he no longer wanted Mr Taylor to be living at those premises.

[7] Mr Gayle testified that on the morning on which he was shot, he had driven his bus to Red Hills to collect something at his mother's house. While at the premises he saw Mr Taylor. He said that Mr Taylor ran toward him and threw a stone at him, hitting him. He said that he ran toward his bus to escape from Mr Taylor but Mr Taylor took a shortcut and came toward him, brandishing a firearm as he approached.

[8] According to Mr Gayle, Mr Taylor fired shots at him, two of which hit him, one on the upper left arm and another on the left side of his chest. He said that he went into his vehicle and drove to a doctor's office. From there he was taken by the police to the

Black River Public Hospital and then to the Mandeville Public Hospital where he was treated.

[9] One of Mr Gayle's sisters, Miss Faithie Baker, also gave evidence for the prosecution. She is not the sister with whom Mr Taylor lived. Miss Baker said that she was present and saw when Mr Gayle and a young friend arrived at the premises. She saw Mr Taylor throw a stone at Mr Gayle. She saw him take up another stone but Mr Gayle then "rush off to [Mr Taylor], there [sic] was a hand-length and they run around the front of [her] sister's house", and out of her sight. She next heard an explosion, after which she saw the back of Mr Gayle's bus "going down the lane". She did not know what had caused the explosion.

[10] On 2 November 2009, Mr Taylor was arrested and charged for the offences, mentioned above, when warrants on information were executed on him by Detective Constable Blossom Rhoden.

### **Mr Taylor's case**

[11] Mr Taylor gave sworn evidence. He testified to the breakdown of the relations between himself and Mr Gayle. He said that not long before the incident at the premises, Mr Gayle had accosted him along the roadway, telling him that he should leave the family premises. He testified that, at that time, Mr Gayle hit him with a machete and drove his bus over some crates of bottles that he, Mr Taylor, had had at the side of the road.

[12] After that incident at the side of the road, he said, he went to stay in Westmoreland. One morning, however, he went to Red Hills to get his clothes. He said that while he was there, he saw Mr Gayle and a little boy. At that time, he said, Mr Gayle insisted that he was to leave the premises.

[13] He said that he thought Mr Gayle was going to attack him so he picked up a stone, threw it at Mr Gayle and ran. He said that Mr Gayle then ran towards him. Mr Gayle, at that time, had his hand under his tee shirt in the vicinity of the front or the side of the shirt. Mr Taylor said that he became afraid, because during the time of their previous relationship, he had seen Mr Gayle with a firearm. As a result of his being scared, he grabbed on to Mr Gayle, pinning, at least, the hand that was under the shirt, and they started to wrestle. During the wrestling, he said that he heard an explosion and felt Mr Gayle get weak as if he was going to faint. Mr Taylor said that he then ran away and left Mr Gayle there.

[14] He said that he went back to Westmoreland. It was sometime thereafter that he heard that the police were looking for him. He made arrangements, and in October 2009, he surrendered to the police.

### **The decision in the court below**

[15] The learned trial judge correctly identified that the main issue for resolution was one of credibility between Messrs Gayle and Taylor. She outlined the conflicting accounts, and then contrasted them with the testimony of Dr Blackwood, who had examined Mr Gayle when he was taken to the Mandeville Public Hospital.

[16] The doctor's evidence was that Mr Gayle had suffered from a single gunshot wound that went through the outer portion of the upper left arm, the muscular part of the arm, and into the chest, where it was lodged. The doctor said that it would be unlikely that the bullet could have come from a firearm that was in the region of the waist and pointed upward. She said that the trajectory of the bullet was from Mr Gayle's "left side...and not from the right" (page 185 of the transcript).

[17] Having conducted that analysis, the learned trial judge rejected Mr Taylor's version of the events and accepted Mr Gayle's. She concisely stated the crux of her decision, which is recorded at page 229 of the transcript:

"Given the description both men gave as to how Mr. Gayle came by his injury, I consider carefully against the background of what Dr. Blackwood [said], and find I could not believe Mr. Taylor's account of how that injury could have arisen. I understand the matter does not end there. I can't find Mr. Taylor guilty because I don't believe him, so I go back and consider carefully Mr. Gayle, the manner in which he gave his evidence, how he responded when he was being cross-examined, and how he accounted for his injuries, and in all the circumstances, I find that I believe him when he says that he was shot while trying to escape from the accused man who was armed with a firearm."

### **The appeal**

[18] Mr Taylor's original ground of appeal was restricted to the sentences that had been imposed. That ground stated:

"The Sentences of five & ten yrs HL in prison respectively is excessive, having regards to the circumstances surrounding the case, as it relates to self defence."

[19] Mrs Hay, on his behalf and with the permission of the court, argued three supplemental grounds of appeal. They were in respect of the conviction and are as follows:

- “1. That the learned Trial Judge failed to carefully treat with and reconcile serious inconsistencies and discrepancies on the Crown’s case. The failure to carefully identify, analyse and reconcile the serious inconsistencies and discrepancies led to material non-direction and misdirection on issues of credibility. The convictions are thus unsafe and by that miscarriage of justice they ought to be quashed and the sentences set aside.
2. The learned Trial Judge fell into serious error when she omitted, mistook or misquoted portions of the evidence on the crucial question of how the incident took place. The error was further compounded by the learned Trial Judge’s reliance on medical evidence to determine how the virtual complainant received his injury. The convictions are thus unsafe and by that miscarriage of justice they ought to be quashed and the sentences set aside.
3. The verdict is unreasonable according to the evidence.”

Grounds one and two were argued separately but each incorporated elements of the thrust of ground three, which was not specifically argued. Mrs Hay candidly did not seek to contend that the sentences were manifestly excessive. Grounds one and two will be separately addressed below.

**Ground one – the issue of contradictions in the prosecution’s case**

[20] In the first ground, Mrs Hay contended that the learned trial judge had failed to properly analyse the contradictions in the prosecution’s case. Learned counsel pointed

to certain inconsistencies and discrepancies in the prosecution's case. The ones identified were:

- a. whether Mr Taylor ran toward Mr Gayle with a stone or was walking, picked up a stone and threw it at him;
- b. whether, after the stone was flung, Mr Gayle ran away immediately, or rushed up to within a "hand-length" of Mr Taylor before they both ran off;
- c. whether Mr Gayle's sister told Mr Taylor not to shoot her brother;
- d. the number of shots Mr Gayle heard Mr Taylor fire;
- e. the distance between Mr Gayle and Mr Taylor at the time that the first shot was fired;
- f. whether Mr Gayle was alone or with two men at the previous encounter along the roadway between Mr Gayle and Mr Taylor;
- g. whether a fight between Mr Gayle and Mr Taylor was on the Thursday before the incident at the premises or a month before the incident; and
- h. Mr Gayle's reason for failing to attend court on previous occasions before the trial started.



[21] The majority of those, Mrs Hay submitted, were “highly material” to the facts in issue. Learned counsel submitted that, as the prosecution’s case depended heavily on the credibility of Mr Gayle, those inconsistencies and discrepancies required very careful reconciliation and clear treatment by the court. That treatment, she submitted, was not rendered.

[22] Learned counsel accepted that a trial judge, sitting alone, was not obliged to identify all discrepancies and inconsistencies on the prosecution’s case, but had a duty to identify the material ones and to reconcile them if they affected the witness’ credit. This was especially so in a case - such as the present one, she said, where the decision turned on the credit of a sole witness as to a material fact.

[23] Items a, b and c, of the list of contradictions identified by learned counsel, represent a contrast between the respective testimonies of Mr Gayle and his sister. The learned trial judge addressed the third of these items. This is recorded at page 224 of the transcript. She said

**“...The sister who I already said seems to have been a very reluctant witness, says that she it was, who had to warn her brother to look out when Mr. Taylor was throwing a stone at him. So, if Mr. Gayle had been looking at Mr. Taylor as if he was going to rush him [as Mr Taylor had testified], why is it that the sister had to call out as it were, warning Mr. Gayle about the stone? Be that as it may, the fact is that Mr. Gayle said that his sister [had] been running behind them calling to Mr. Taylor not to shoot Mr. Gayle, but the sister does not agree or did not give any evidence about this. But her evidence must be viewed in light of this discrepancy as well.”** (Emphasis supplied)

That recounting of the evidence shows, however that Mr Gayle and his sister viewed the commencement of the incident from different vantage points. The extract also shows that the learned trial judge was wary of placing much reliance on the evidence of Mr Gayle's sister, whom, the learned trial judge found, "was reluctant to come forward to take sides as it were" (page 220).

[24] The learned trial judge did not specifically address any of the other discrepancies or inconsistencies identified by Mrs Hay. A close examination shows that the majority were not really material differences in the prosecution's case.

[25] Items f and g of the list of differences do not concern the incident in which Mr Gayle was injured. It is not clear, however, whether there was a difference in Mr Gayle's testimony concerning that previous incident.

[26] Mr Gayle first denied that anyone was with him in his bus at the time of the altercation at the side of the road with Mr Taylor. It was suggested to him that he had three additional men in the bus at the time, but he denied that suggestion. He later accepted that he knew someone named "Scotty" and that Scotty would sometimes come for a joyride in the bus, but he denied that Scotty was ever present when he was transporting schoolchildren, as was the case on the day when the incident occurred.

[27] He also accepted that he had a friend named Andrew. It was suggested to him that at the time of that incident at the side of the road, Andrew "boxed" Mr Taylor. Mr Gayle's response was that, "that is a lie, because Andrew didn't come offa di bus up to the time, that surely is a lie" (page 29 of the transcript).

[28] It is not entirely clear what Mr Gayle meant by that statement, and it was not explored by defence counsel. His statement at that point, did not, however, represent such a difference from his previous testimony, that it would require the learned trial judge to specifically address and reconcile. This is especially so, as the incident at the side of the road did not directly concern the incident in which Mr Gayle was injured. It was also immaterial when it was that they had their altercation by the side of the road. In that context it is to be recalled that over three years had elapsed between the shooting incident and the trial.

[29] Similarly, item h did not concern the incident in which Mr Gayle suffered his injury. He was cross-examined as to his failure to attend court, and accepted that he had previously avoided coming to court. In re-examination he said that it was because he was busy in his business transactions and lost money when he attended court.

[30] The alleged inconsistency, pointed to by Mrs Hay, is that the investigating officer testified that she had had difficulty getting Mr Gayle to come to court. She said that he gave her various explanations for his failure to attend, but that none of them involved work commitments.

[31] The learned Director of Public Prosecutions, Miss Llewellyn QC, was, therefore, correct in her submission, before us, that not only was this not a discrepancy, but that it was a difference that the learned trial judge could properly have ignored, as being immaterial to the issue of which version of the shooting was correct.

[32] Items d and e did, however, directly concern Mr Gayle's suffering his injury. They do not, however, amount to clear differences in the evidence. Mr Gayle's testimony was consistent throughout that Mr Taylor fired three shots. He consistently said that the first shot missed him, the second shot hit his arm and the third shot hit his chest. It is true that it was suggested to him in cross-examination that he had told the police that Mr Taylor had fired four shots, and that it was the first two that went astray, while the third hit his arm and the fourth his chest. He denied those suggestions, however, and the matter was not pursued. There was, therefore, no evidence of an inconsistency in his account in that regard.

[33] In respect of the distance from which Mr Taylor fired the first shot, there was also no discrepancy. Learned counsel submitted that the evidence suggested that at one stage Mr Gayle had testified that Mr Taylor was a distance, which was estimated at 22 feet, away when Mr Gayle got shot. That was recorded at page 43 of the transcript. At a later point in the cross-examination he said that when Mr Taylor shot him, Mr Taylor was either behind him or close beside him. His testimony on this aspect is recorded at page 47 of the transcript:

"Q. Can you tell the court in what position 'Scarry' was, when, according to you, he shot you like that?

A. Either him deh behind mi or close beside mi, mi run and him a run, both of wi a run, mi a run from him and him a run mi down."

On that page, he is also recorded as being pressed on the point:

"Q. Where you saying 'Scarry' was when you got the shot under your left arm?

A. As mi tell you either beside mi running or behind mi running, either mi is running and him is running too.

Q. So, he beside you or behind you?

A. Behind me.

Q. He was behind you?

A. Behind me."

There was a suggestion that he had used the term "close" in his statement to the police, in describing the distance, but that was not placed in evidence and, was, in any event an equivocal statement. There was no inconsistency in that regard for the learned trial judge to address. Based on that analysis it was held that this ground failed.

### **Ground two – the issue of the medical evidence**

[34] In this ground Mrs Hay argued that Mr Taylor's evidence suggested, or at worst, did not exclude, the possibility that Mr Gayle, had at least one hand free during the struggle that Mr Taylor described. In that struggle, the submission ran, with the dynamics of a struggle, the shot could have been fired by a weapon that Mr Gayle held or of which he had control.

[35] Learned counsel submitted that the learned trial judge misunderstood or misquoted the evidence in two crucial ways. Mrs Hay first said that the learned trial judge was wrong in stating that Mr Taylor's evidence was that he held both Mr Gayle's hands "down against his body, and it was in that position...while they were wrestling,

he heard this explosion” (page 226). Secondly, she said, the learned trial judge was wrong in saying that Mr Taylor’s “account is that the gun under the shirt at all times...and under those circumstance [sic] a shot was fired” (pages 228-229). Mrs Hay submitted that the learned trial judge was, therefore, wrong in rejecting Mr Taylor’s testimony for the reason that she did.

[36] Learned counsel’s submissions are defective for two reasons. The first is that the learned trial judge not only had before her, what is reflected in the written words of the transcript but she also had Mr Taylor’s demonstration of what had occurred. This is recorded at pages 160-162 of the transcript:

“Q. All right, hold on a second. I am going to ask you to show us how you grab him, just use that gentleman there, don’t hurt him, to show us how you grabbed Kirk.

...

A. Like mi hold him like this and a ‘wrestle’ him, di two a we a ‘wrestle’ (indicating)

HER LADYSHIP: So you actually coming right round his body?

THE WITNESS: Yes, ma’am, him two hand because him have him hand under him shirt.

...

Q. Now, you said you hug him, hold on to the two hands?

A. Yes, miss.

Q. And what were you trying to achieve by that?

A. Like mi don't know what him have under him shirt, so me would a like hold him fi him no hurt me, for him hurt me already.

Q. So you holding him for him not to hurt you?

A. Yes, miss.

Q. So you pin him hand against him body?

A. Miss, mi hold him hand above up here, him have him hand here and mi hold it, you understand? (indicating)

Q. So one hand, this hand was where, right there.

A. (Witness indicates)

Q. Which hand he have under the shirt?

THE WITNESS: Miss, me couldn't rectify [sic] the one under him shirt because him come 'round di shop pan me.

Q. So where was his other hand?

A. One hand out and one hand...

Q. One hand out where?

A. One hand is out free and one hand is under him shirt.

...

Q. And then you hug him?

A. Yes, miss.

..."

[37] Three things are apparent from that extract. The first is that Mr Taylor does not testify about ever seeing a gun in that incident. Nowhere else, in his testimony, does he say that he saw a gun. The second thing is that, as Miss Llewellyn pointed out in her submissions, Mr Taylor testified, and gave a demonstration, that at some point, when he hugged Mr Gayle, he had both Mr Gayle's arms pinned against his body. It is also apparent, even when there is mention of a free hand, that the hand, which may be assumed to be the one controlling the firearm, was not the free hand, but the one pinned by Mr Taylor.

[38] The learned Director pointed out that the learned trial judge had the benefit of seeing and hearing the witnesses and was eminently positioned to make a finding as to fact on that issue. Her submission is very apt in the light of the evidence which is quoted above.

[39] There is another fundamental difficulty with Mrs Hay's submission in this regard. It is that, from the evidence of the trajectory of the bullet, it would have been physically impossible for Mr Gayle to have shot himself on the outer aspect of his left arm while the hand with the firearm was being "pinned" by Mr Taylor. Mrs Hay's submission that anything is possible in the dynamics of a struggle cannot be accepted in the context of that evidence.

[40] Mrs Hay also pointed out the difference between the medical evidence and Mr Gayle's evidence as to how many bullets hit him. Learned counsel submitted that this difference required the court to reject Mr Gayle's testimony. She relied on an extract



from the judgment of Lord Ackner in **Junior Reid and others v R** (1989) 26 JLR 336 at page 347C, where his Lordship said:

“Having regard to the impossibility of reconciling [the prosecution’s eye-witness] with the medical evidence...the judge should have withdrawn the case from the jury at the conclusion of the prosecution’s case and directed an acquittal...”

[41] That decision does not assist Mr Taylor, given the facts of this case. In **Junior Reid and others v R**, the eye-witness stated that the assailant fired three shots at the female victim from the victim’s left, and at close range. The medical evidence was that the victim died of two gunshot wounds from bullets which travelled from the victim’s right and went toward her left.

[42] In the present case, the medical evidence clearly contradicted Mr Taylor’s testimony and, along the lines of Lord Ackner’s guidance, required the learned trial judge to reject that testimony. The medical evidence does not clearly contradict Mr Gayle’s testimony. It is true that the learned trial judge did not address the point as to whether it was one bullet or two, which struck Mr Gayle, but the reasoning of Lord Ackner would not apply to that difference. The trial judge was entitled to find that the bullet that injured Mr Gayle was fired from a gun which was to his left. Mr Taylor and Mr Gayle were the only parties said to be present at that time. It was inescapable for the learned trial judge to find that Mr Taylor had fired that shot. The omission to mention the difference between the doctor’s evidence and Mr Gayle’s, is not fatal to the conviction.

### **Conclusion and disposal**

[43] As in the case of **Junior Reid and others v R**, this was a case where the medical evidence was very strong and convincingly clear. This allowed the learned trial judge to reject Mr Taylor's evidence and to find that the objective evidence of the trajectory of the bullet supported Mr Gayle's testimony. The contradictions in the evidence on the prosecution's case were not material or significant enough to detract from Mr Gayle's testimony as to how he was shot.

[44] It is for those reasons that we refused Mr Taylor's application and made the orders mentioned above.