

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MR JUSTICE D FRASER JA**

SUPREME COURT CRIMINAL APPEAL NO 45/2016

PONJO LEE v R

Miss Jacqueline Cummings for the applicant

Andre Wedderburn for the Crown

19 January 2021 and 28 January 2022

EDWARDS JA

Introduction

[1] On 21 April 2016, the applicant was convicted, following a trial by Graham-Allen J (the learned judge'), sitting without a jury, in the High Court Division of the Gun Court, for one count of illegal possession of firearm and four counts of shooting with intent. He was sentenced on 11 May 2016 to 10 years' imprisonment for illegal possession of firearm and 15 years' imprisonment on each count of shooting with intent. The sentences were ordered to run concurrently.

[2] The applicant applied to a single judge of this court for leave to appeal his convictions and sentences but this was refused. On 19 January 2021, we heard the applicant's renewed application to the full court for permission to appeal against his convictions and sentences. After hearing that application, and after a candid concession from counsel for the Crown that the convictions were unsafe, we made the following orders:

1. The application for leave to appeal conviction and sentence is granted.
2. The hearing of the application is treated as the hearing of the appeal.
3. The appeal is allowed.
4. The convictions are quashed and sentences are set aside.
5. Judgments and verdicts of acquittal entered.

[3] We promised to put into writing our brief reasons for making those orders. This is in fulfilment of that promise.

Summary of the prosecution's evidence at the trial

[4] The witnesses for the prosecution were all police officers with the Jamaica Constabulary Force. Their evidence, in summary, was that, on 18 February 2014, Detective Corporal Carlos Ellington, who was on duty in plain clothes, was travelling in an unmarked police vehicle along Hagley Park Road when he spotted a heavily tinted Nissan Note registered 5669 GM, travelling in front of him. Whilst driving he heard a radio transmission and radioed police control to report his observations. He followed the Nissan Note onto Olympic Way. On Olympic Way, he saw a marked police car BS009 attempt to block the path of the Nissan Note. The Nissan Note slowed then careened to the right of the service vehicle, climbed the sidewalk and embankment, and sped off. When the Nissan Note climbed the embankment, he heard explosions coming from the direction of where the Nissan Note and the service vehicle were, but the Nissan Note continued to drive. He followed the Nissan Note onto Phillip Avenue where the Nissan Note slowed down and he heard loud explosions. He observed that the occupants of the Nissan Note

were firing gunshots in his direction. He swerved his vehicle to avoid being hit. He knew it was gunfire because he saw fire coming from the muzzle of the firearms. He stopped his vehicle and returned gunfire in the direction of the Nissan Note. He then saw three men alight from the Nissan Note, two firing in his direction whilst running off. He returned the fire in their direction, firing 13 rounds from his M16 assault rifle. After the shooting subsided, he saw the third man, who was the applicant, sitting on the side of the road beside the front right-hand side of the Nissan Note, with blood on his back. He did not see the applicant firing a gun.

[5] The evidence from the police officers, Constable Delroy Francis, Constable Omar Pennant and Constable Adian Dawkins, who were in the marked police vehicle, was that they heard a radio transmission from police control and attempted to block the path of the Nissan Note. The Nissan Note did not stop but instead climbed the sidewalk and went around the police vehicle. The two front windows were down, and two males were seen in the vehicle. At the time the Nissan Note climbed the embankment and was passing the police vehicle, loud explosions were heard. Constable Dawkins said he saw the muzzle of a firearm pointed in his direction from the front passenger seat of the Nissan Note, and several shots were fired in his direction as the Nissan Note climbed the embankment. He took cover on the ground near the middle of the service vehicle and fired five rounds from his Glock pistol in the direction of the Nissan Note, but it continued to drive. The marked service vehicle continued in the same direction as the Nissan Note. After further radio transmissions, the officers eventually drove onto Phillip Avenue where Detective Corporal Ellington was observed, as well as the injured applicant, who was sitting on the ground beside the Nissan Note with the driver's door opened. The applicant was taken to the hospital and later charged.

The defence

[6] At trial, following an unsuccessful no case submission, the applicant gave an unsworn statement from the dock indicating that he was a passenger in a vehicle being driven by his friend when he heard an explosion. The car turned onto Tower Avenue, and

he continued to hear more explosions. His friend eventually stopped the car on Tower Avenue, and he heard several more explosions. He exited the car and stood on the sidewalk, where he saw a lot of police. He was then taken to the hospital by two police officers whom he knew and who both enquired from him whether he had a gun. He told them both that he had had no gun.

Grounds of appeal

[7] Ms Cummings, for the applicant, sought and was granted permission to argue five amended grounds of appeal filed on 19 January 2021, thus abandoning the grounds filed 1 June 2016. The grounds of appeal argued were as follows:

- “(a) The Learned Trial Judge, the Honourable Mrs. Justice Graham-Allen erred on the facts and was wrong in law in arriving at her findings of fact.
- (b) The Learned Trial Judge misdirected herself on the applicable law and was wrong on the facts in rejecting the submission of no case to answer by the defence counsel on behalf of the applicant.
- (c) Failure of the Learned Trial Judge to make any or any sufficient reference to, or comment on, obvious weaknesses contradictions, and inconsistencies in the case of the prosecution.
- (d) The prosecution repeated [sic] attempted to elicit and did elicit prejudicial evidence against the Applicant that denied the Applicant a fair trial.
- (e) The verdict was unreasonable having regard to the evidence.”

Reasons for decision

[8] At the close of arguments, Counsel for the Crown conceded that the learned judge had failed to show how she had resolved the discrepancies between the evidence of the prosecution’s witnesses and the forensic evidence. As a result, Crown Counsel conceded

that there was a risk of a miscarriage of justice as the conviction was not safe. We applauded counsel for the candour with which the concession was made and agreed that the manner in which the learned judge had treated with the evidence created a grave risk of a miscarriage of justice.

[9] Counsel for the applicant, Ms Cummings had maintained that the learned judge could not have come to any proper findings of guilt based on the evidence of the prosecution's four witnesses, as their evidence did not put her in a position to do so. She argued that the learned judge had failed to resolve the discrepancies which arose in the evidence, or if she had done so, failed to disclose how she resolved them. Counsel identified six areas in which she said the failure was significant, as follows:

- (1) Detective Corporal Ellington said that the applicant had been taken from the scene before Constables Pennant, Dawkins and Francis had arrived at Phillip Avenue in the marked service vehicle BS009, yet those officers all claimed to have seen the applicant on the scene at Phillip Avenue when they arrived. Both versions, counsel said, could not be true, and the learned judge failed to indicate whose evidence she accepted as true;
- (2) The ballistic evidence showed that all the spent shells collected by the Independent Commission of Investigations ('INDECOM') investigators came from the police officers' firearms. There was, therefore, no scientific evidence to support the claim that anyone apart from police officers had fired that day, either on Olympic Way or on Phillip Avenue. The learned judge was silent as to how she dealt with this aspect of the Crown's case, which counsel identified as a significant weakness;

- (3) The evidence of the Detective Corporal Ellington was that the left rear window of the Nissan Note had been down when he saw it on Phillip Avenue, but a photograph adduced through the Scene of Crime photographer contradicted that evidence. When shown the photograph, Corporal Ellington agreed that the window was not down;
- (4) Detective Corporal Ellington also claimed that the men had come out of the vehicle on Phillips Avenue and fired at him, whereupon he returned the fire. However, the bullet holes in the Nissan Note matched the number of rounds discharged by Detective Corporal Ellington, which suggested that he was the only one who fired and that he fired into the Nissan Note;
- (5) Constable Dawkins had said the area had been cordoned off before he left Phillip Avenue, and he thereafter went to the Hunts Bay Police Station and made a report to Detective Sergeant Alton Morgan. However, Detective Sergeant Alton Morgan said that when he arrived on the scene, it had not yet been cordoned off; and
- (6) The crime scene photographs all showed that the Nissan Note motor car, registered 5669 GM, was heavily tinted and had all the windows up and all the doors closed, which contradicted the evidence of the police officers on the state of the crime scene.

[10] Counsel argued that the evidence of the witnesses was contradictory, and the discrepancies were not resolved so that this court could not be sure which aspect of the evidence the learned judge had accepted as true. Counsel also submitted that the learned judge did not understand the ballistics evidence or the significance of the scene of crime photographs and how they contradicted the evidence from the crown witnesses. Counsel pointed out that when the personnel from INDECOM had arrived on the scene, they had marked out the location of and collected the spent shells at the scene. All spent shells collected came from police weapons. This, she said, cast doubt on the officers' claim that there had been a 'shoot out'. Counsel also pointed out that the photographs from the crime scene showed that the Nissan Note was heavily tinted with the windows up and that all the witnesses had said the scene was cordoned off and preserved. The witness Phillip Anderson from INDECOM had also indicated that he came and found the Nissan Note just as it appeared in the photographs. The question, counsel said, which the learned judge had failed to ask and have answered, was how then could the witnesses have seen the windows down on Olympic Way and Phillip Avenue and see persons in the Nissan Note pointing guns at them?

[11] In arriving at her verdict, the learned judge found (at page 258 to page 259 of the transcript), as follows:

- "(1) the accused was in the company of two other men who were armed with firearms in the silver Nissan Note;
- (2) that the two men shot at the police officers when they attempted to intercept the Nissan Note, that they had received information from police control;
- (3) the reasonable inference I have drawn in the circumstances is that the accused was the driver of the Nissan Note, who, from his conduct, intentionally aided and abetted the commission of the offences of shooting with intent in Counts 1, 3, 4 and 5; that there is no reasonable excuse for his presence."

[12] In coming to that conclusion, the learned judge said this, at pages 236 to 237:

“The main issues for adjudication by the Court are whether the witnesses for the Crown are to be believed, whether the accused can be treated as being in possession of a firearm and whether the circumstances give rise to a reasonable presumption that the accused was present with the intention to aid and abet the offence of shooting with intent.”

[13] With regard to the discrepancies arising in the evidence, at page 256, the learned judge said this:

“I bear in mind how the Court ought to treat with the evidence of witnesses and discrepancies. I reminded myself that discrepancies cannot necessarily mean that witnesses are not telling the truth.”

[14] Apart from reciting the evidence of each witness and indicating that she had observed their demeanour and found them frank and forthright, the learned judge did no analysis of the evidence that she heard. The applicant was charged with four counts of shooting with intent. Each count on the indictment ought to have been dealt with separately to determine whether the prosecution had successfully proven its case on each, a fact which the learned judge clearly recognised having reminded herself of exactly that, at pages 238 to 239 of the transcript. However, there is no indication that the learned judge considered each count of shooting separately. She appeared to have treated the pointing of the firearm in the direction of Constable Dawkins on Olympic Way as evidence satisfying the charge of shooting with intent at all three officers. We agreed with Miss Cummings that the learned judge failed to address the fact that there was no evidence that Constable Francis or Constable Pennant was shot at on Olympic way. Their evidence was that they had heard explosions after the Nissan Note had climbed the sidewalk and passed the service vehicle.

[15] The evidence of Detective Corporal Ellington, who was travelling behind the Nissan Note, was that it “careened” to the right of the service unit and rode the sidewalk and the embankment. At that time he heard several loud explosions sounding like gunshots. He said it sounded like it was coming from the direction of the Nissan Note and the service Unit. He was two car lengths away from the Nissan Note at the time, and he gave no

evidence of seeing a hand extended from the car with a firearm pointed at the officers trying to intercept the Nissan Note. He said that after he heard the explosions, the Nissan Note sped off in a northerly direction, and he followed it. His evidence, therefore, could not support a finding of shooting with intent at Constables Francis, Pennant or Dawkins. It, however, supported Constables Pennant's and Francis' evidence that the explosions were heard after the Nissan Note had climbed the embankment and was passing the service vehicle.

[16] The evidence given by Constable Francis, in summary, was that, at the material time, he was travelling in the front passenger seat of the marked service vehicle [registered] BS009 being driven by Constable Pennant. He received two transmissions by police radio and instructed Constable Pennant to drive along Olympic Way. He saw the Nissan Note motor vehicle, and Constable Pennant used the service vehicle to block its path. As the Nissan Note slowed, he alighted from the service vehicle. However, the Nissan did not stop but sped off to his left, riding the sidewalk. After the Nissan passed, he heard several explosions coming from it. He saw two males in the front of the Nissan Note, which he observed was heavily tinted. The evidence seems to suggest that he had seen the men through the front windows of the Nissan Note, both of which were down. That is the highest this evidence can be put because the transcript, at page 51, unclearly records a question from prosecuting counsel as to how the witness was able to see, with the answer rolled in. Constable Francis gave no evidence of having seen a gun, or of any gun being pointed at him, or anyone else, or even of having had to take cover.

[17] His evidence of what happened after the Nissan Note sped away was that the service vehicle drove onto Tower Avenue, then after hearing another radio transmission, he instructed Constable Pennant to drive onto Phillip Avenue. There he saw the Nissan Note stationary. The driver's door of the Nissan Note, he said, was open and, he saw a male seated on the sidewalk next to the driver's door. He also saw and spoke to Detective Corporal Ellington, as well as officers from the Hunts Bay Police Station. The applicant

was placed in a service vehicle and taken away, and he, Constable Francis, went to the Hunts Bay Police Station to make a report.

[18] In cross-examination, he said, he did not fire that day and no one from his unit fired on Phillip Avenue. To the court, he said a member of his service vehicle fired on the Nissan Note at the time when it had sped off, riding the sidewalk.

[19] Constable Pennant's evidence was that he was on patrol in the Samocan Community in the Olympic Gardens area when he heard a radio transmission. He replied to the transmission and then proceeded towards Olympic Way. Upon reaching a section along Olympic Way, he saw a vehicle "fitting the description". He turned the service vehicle into the path of the Nissan Note, attempting to block it. The Nissan Note, however, slowed down, then sped off, riding the "walkway" on the left of the service vehicle. During that time, he heard several explosions sounding like gunshots. He took cover by stooping. One foot was outside, and one was inside the service vehicle so that he was crouched partially in the vehicle. He didn't know what direction the shots were coming from because from his position, he could not really "see that". He saw another vehicle come and pass on the right of the service vehicle, then turn following behind the Nissan Note.

[20] He, too gave no evidence of anyone pointing a gun in his direction and firing shots at him. When he arrived on Phillip Avenue, the doors of the Nissan were open, although he did not remember how many, and he saw the applicant seated on the outside of the open driver's door.

[21] Under cross-examination, he could not say how many explosions he had heard. He could not say where exactly Constable Francis was, although he knew he had exited the vehicle. He did not know where Constable Dawkins was when he heard the explosions. He did not know if anyone from his team had fired into the windscreen of the Nissan Note. When he saw the applicant on Phillip Avenue, the applicant was seated on the sidewalk.

[22] Constable Dawkins' evidence was that he had stepped out of the service vehicle on Olympic Way with the intention to stop the Nissan Note vehicle, having heard the radio transmission. When he did so, the Nissan Note was 17 metres away. He attempted to stop it, saw it slow down, saw its front windows down, and at that time, he saw two men. As the vehicle came towards him, he saw a black Vitara vehicle travelling behind it at a distance. As the Nissan Note sped up, the service vehicle tried to block it, but it travelled on the sidewalk. He could see a firearm pointed in his direction, and "from that vehicle they fired several shots" in his direction. He took cover and fired in the direction of the threat. The Nissan Note sped away. He could see that it was a firearm because the person pointed it in his direction, and he saw the muzzle. He said the shots came from the front passenger side. The other officers were "at the service vehicle, out of the service vehicle". He gave no evidence as to how far from him they were at that time.

[23] Constable Dawkins said he discharged four rounds from his Glock pistol in the vicinity of Olympic Way and Tower Avenue at the direction of the threat. He said he fired his first shot after he was fired at. He fired when the vehicle was about to climb the sidewalk. The first shot, he said, was fired when the wheel of the Nissan Note reached on the sidewalk when it reached the rear of the service vehicle. The service vehicle was positioned stationary across the road, blocking both sides. He was not facing the front of the Nissan Note when he fired. He was not facing the back of the Nissan Note when he fired. He did not fire into the windscreen of the Nissan Note. No one else in his team fired at the Nissan Note. He did not notice whether the vehicle was heavily tinted. He did not see any tint at the time.

[24] Constable Dawkins also testified that Constable Francis had exited the vehicle, but he did not know where he was when he heard explosions. He did not know where Constable Pennant was either, and he did not know how many explosions he had heard. He said he took cover beside the service vehicle at the centre of the service vehicle on the ground. The service vehicle had no bullet holes that he could see.

[25] In summing up the case, the learned judge said she accepted the evidence that the other two men had fired on the police officers when they had tried to intercept the Nissan Note, but there was no such evidence. Constable Dawkins said he saw two men at the front of the Nissan Note but did not say two men fired at him. He said he saw a gun pointed in his direction, and the shots came from the front passenger's side, although he also said "they" fired in his direction. Furthermore, only Constable Dawkins gave evidence of being fired at. Constables Francis and Pennant gave no such evidence but spoke only of hearing explosions as the car passed. Constable Pennant did not even know where the explosions were coming from.

[26] It is clear, therefore, that the learned judge needed to have demonstrated on what basis she accepted that the charge of shooting with intent at Constable Francis and Constable Pennant was made out. She did not say what evidence she found proved to arrive at a finding of guilt for those two counts. Having failed to do so, she simply accepted that on the evidence of a gun being pointed in the direction of Constable Dawkins and shots being fired at him, the charge was equally made out with respect to Constables Pennant and Francis, who were in the vicinity.

[27] Constable Dawkins, in his evidence, said he discharged four rounds in the direction of the Nissan Note. Two bullet holes were found in the front windscreen of the Nissan Note, a damaged bullet was found inside the front of the car, and one expended shell was found on Olympic Way, which came from Constable Dawkins' gun. No other expended shell was found from any other firearm, either on Olympic Way or in the Nissan motor car. There were no bullet holes in the service vehicle to substantiate the officer's claims that they took cover near the vehicle when shots were being fired at them. Constable Dawkins said he took cover in the open but received no injuries, and the vehicle in front of which he was taking cover, received no damage, although shots were being fired directly at him. There was, therefore, no supporting witness testimony and no forensic support for Constable Dawkins' claim of being shot at that day.

[28] One of the applicant's complaints was that the learned judge did not understand or appreciate the forensic evidence or its significance. As a result, she interrupted the cross-examination on that key aspect of the case and did not allow the witnesses to answer certain relevant questions with regard to the ballistics evidence. This we found to be a valid complaint.

[29] The ballistics report showed that, of all the officers involved that day, only Detective Corporal Ellington and Constable Dawkins fired their weapons. All the expended shells found in both locations came from either the weapon of Detective Corporal Ellington or that of Constable Dawkins.

[30] Detective Corporal Ellington's account of being shot at was that, whilst pursuing the Nissan Note, it turned onto Phillip Avenue. When it did so, he heard loud explosions coming from the Nissan Note. He said he swerved his vehicle to avoid those explosions in case they were gunshots hitting him or the vehicle. By this evidence, it is clear that he was not saying they were shooting at him but that he heard explosions. On further questioning, he said he had realised that the Nissan Note was slowing down, and the occupants were firing in his direction. When asked what he observed, he said he realised they were firing gunshots because he heard loud explosions and saw fire coming from the muzzle of the firearms. He said he stopped his vehicle and returned the gunfire in their direction. When the shooting subsided, he said, he realised that there was a man on the sidewalk dressed in blue jeans. This was a reference to the applicant. An objection came from counsel for the applicant, however, with regard to the witness' use of the word 'realise', whereupon Detective Constable Ellington was asked the following, at page 10 of the transcript:

"Q: You said that you realized [sic] that they were firing, what did you observe?

A: Muzzle flash fire coming from the muzzle.

Q: And at the time you made those observations, what direction was the muzzle pointed?

A: They were pointed in my direction.”

[31] This was the evidence Detective Constable Ellington gave in examination-in-chief. He did not say from where in the Nissan Note the firearms were pointed or where he saw the muzzle(s) of the firearm(s), nor did he say how many he saw at the time. He stopped his vehicle and returned fire.

[32] Detective Corporal Ellington said he first saw the two men who had fired on him when they opened gunfire on Phillip Avenue. The transcript, at page 12, records as follows:

“Q: Tell us what were your observations when you first saw them firing shots at you?

A: While they were firing shots in a bid to escape...

Q: Explain to us what you observed that they were doing?

A: They were firing and running.

Q: Now, you said they were firing, which direction were they firing?

A: My basic, general direction.”

[33] Later in examination-in-chief, when he was asked what he had observed “with regards to where they came from”, he said the two men he saw firing came from the left front passenger door and the rear left passenger door.

[34] Corporal Ellington was driving a tinted car with the windows up and the air conditioning unit on. He travelled behind the Nissan Note, at two car lengths away, for approximately five minutes before it turned on Phillip Avenue. He made no indication to it or its passengers that he was a police officer. He did nothing to intercept the Nissan Note. He stopped behind it on Phillip Avenue. Despite his claim that the men had fired at his vehicle and in his general direction, there were no bullet holes on the unmarked Vitara he was driving to substantiate that claim. He was not injured. He gave no indication as to whether he was inside or outside the vehicle when he returned fire.

[35] Under cross-examination, Detective Corporal Ellington said that when the vehicle had stopped on Phillip Avenue, from his position, he could see all four doors and the back of the Nissan Note. He said he heard more than five explosions along Phillip Avenue. When asked when he had started firing, he said it was when he stopped his vehicle and realised his life was in danger. He was asked specifically whether he was firing at the Nissan Note or the men and his response was that he fired in the direction of the men who had just come out of the Nissan Note. He was again asked if the men he was firing at were no longer in the car, and his response was that "they came out of the car firing". When he was firing at them, they were no longer in the car. He denied the suggestion that he had fired into the Nissan Note when it had stopped on Phillip Avenue. He denied that it was when he fired into the vehicle that one man ran from it.

[36] Detective Corporal Ellington saw the applicant seated on the sidewalk with blood on his back about 40 to 45 seconds after the shooting had subsided. He said during the shooting, all three doors of the Nissan Note were opened, including the front driver's door, and that the applicant came out. He said he could not say what the applicant did after he came out because he was concentrating on the two shooters. He never pursued the other two men, and it was only after the shooting that he saw the applicant bleeding.

[37] Cross-examined about the state of the windows on the Nissan Note, Detective Corporal Ellington said when the shooting had subsided, the left rear window of the Nissan Note was down. It was the only window he saw down. He was shown a photograph of the car, which he noted was not date or time posted and agreed that looking at it, none of the windows on the Nissan Note appeared to be down.

[38] Detective Corporal Ellington fired 13 rounds from his M 16 assault rifle. All 13, "5.56mm/223 Rem" expended cartridges casings found on Phillip Avenue came from Detective Corporal Ellington's gun, and the sole "9mm luger WCC 11" expended cartridge casing found on Olympic Way came from Constable Dawkins' gun. It is true to say, therefore, that the forensic evidence did not support Detective Corporal Ellington's

account of what took place on Phillip Avenue and at least brought into question the account given by the three constables, especially Constable Dawkins.

[39] Phillip Anderson was the INDECOM investigator who examined both scenes. He gave evidence that he went on Phillip Avenue, saw a grey Nissan Note, saw 13, 5.56mm cartridge casings, and he marked and photographed the scene. He used numerical scene markers to identify the cartridge casings found on the scene. They were packaged after being photographed.

[40] Mr Anderson found and examined 12 bullet holes on the Nissan Note, which he photographed. These were as follows:

- a) six to the rear of the vehicle- three of which were in the rear windshield and two in the rear license plate;
- b) four on the left side of the vehicle- three of which were at the left rear passenger side and the other one on the front passenger side; and
- c) two on the front of the vehicle in the front windshield.

[41] Two bullet fragments were found on the running board on the floor of the front passenger seat. He could not determine the calibre of the fragmented bullet as it was broken into pieces. Mr Anderson's evidence was that, when he arrived on Phillip Avenue, all the windows of the Nissan Note were up. At the time, he did not have the expertise to determine if all the bullet holes had come from outside the vehicle. There were no bullet holes on the right side of the vehicle.

[42] Mr Anderson also examined the scene at Olympic Way. There he identified another 9mm cartridge casing. He took the firearms from the police officers involved in the shooting, which included three Glock pistols, one Browning pistol and two M16 rifles. He went to the Kingston Public Hospital and swabbed the hand of a man, identified to

him as the applicant, for gunshot residue. The hands of all four police officers were also swabbed.

[43] Having recalled the evidence of the prosecution's witnesses, the judge merely stated that she saw their demeanour, and accepted their evidence. In relation to the applicant, after recalling his unsworn statement, she rejected it. The applicant, in his unsworn statement, said he was a passenger in the Nissan Note with one other person, and no one in the Nissan Note had a gun or had shot at the police.

[44] The learned judge did not demonstrate any consideration of the fact that the ballistics report did not support the claim of shooting from persons inside the Nissan Note or how she resolved that issue. Constables Francis and Dawkins had claimed that on Olympic Way, the two front windows of the Nissan Note were down; however, there was a bullet hole in the front passenger window. On Phillip Avenue, the rear left passenger window of the Nissan Note was the only window that was seen down by Corporal Ellington, who said shots were fired from that window. There were four bullet holes in that side, three to the left rear passenger side, yet Detective Corporal Ellington's evidence was that he was only shooting from behind the Nissan Note. This evidence left unresolved questions as to who shot into the front windscreen and the left side of the car, at what time was that left rear window wound up, and by whom.

[45] The Nissan Note was recovered, but not only was no gun recovered, other than the single fragmented bullet referred to by Mr Anderson, no ejected cartridge casings were found in the Nissan Note. Apart from the cartridge casings from the police firearms, no other cartridge casings were found on Phillip Avenue or on Olympic Way. No explanation for this absence was proffered on the prosecution's case. The investigating officer, Detective Sergeant Alton Morgan, was asked in cross-examination whether cartridge casings are what are ejected from the firearm. His response was yes, "if that firearm is a magazine firearm". No evidence was given about what happens when firearms other than magazine firearms are discharged. The learned judge herself prevented any further questioning of Detective Sergeant Morgan regarding whether

efforts to ascertain who the spent shells found on the scene had belonged to before the applicant was charged. The learned judge formed the view that the line of questioning was irrelevant because no gun was recovered. Defence Counsel was told to "move on". By that ruling, the learned judge had deprived herself of the opportunity of hearing any evidence regarding the possible explanation for the absence of spent shells resulting from the alleged shooting by persons in the Nissan Note. Therefore, faced with the evidence that the Nissan Note had been shot up and the applicant injured; the evidence of the recovery of the 14 spent shells from the police firearms, and with no related injuries or damage to the service vehicle or any of the police officers, it was not enough for her to accept the witnesses for the prosecution based on their "demeanour".

[46] Since there was evidence that differing windows of the Nissan Note were down at the various times when the men were firing at Constable Dawkins and Corporal Ellington, whilst the photographic evidence showed that when the shooting had subsided on Phillip Avenue, all the windows were up, it was incumbent on the learned judge to resolve that conflict in the prosecution's evidence and say what significance it had to any finding she had to make. For if the heavily tinted windows of the Nissan Note were up, as the photographs showed, then it was possible that Constables Dawkins and Francis were lying when they said the two front windows were open on Olympic Way, and that they had seen two men in the front of the Nissan Note. Certainly, Constable Dawkins could have been less than truthful when he said he saw a gun through the open window at the left front passenger side. Detective Corporal Ellington, who said the only window he saw down was the left rear passenger window and that he saw firearm muzzles and flashes of light coming from the Nissan Note through that window, could also have been lying. Detective Corporal Ellington said the men exited the vehicle firing in a bid to escape. He fired at the men. He agreed that the Nissan Note's windows were up in the pictures shown to him but provided no explanation as to how the window he saw open came to be closed when the scene was being forensically examined. There was no allegation the men stopped to close the windows before exiting the vehicle firing.

[47] The forensic evidence also did not suggest that the men in the Nissan Note fired from inside the car through the closed windows, doors, the rear and front windshields, the trunk, or the rear of the car near the licence plate. That, in any event, would have been an unlikely scenario. But both Constable Dawkins and Detective Corporal Ellington insisted that they did not fire into or at the Nissan Motor car. However, since there were bullet holes all over the left side and rear of the vehicle, including in the rear licence plate of the vehicle, Detective Corporal Ellington's claim that the men had exited the vehicle firing at him whilst running away, and that he returned the fire at them whilst they were running warranted closer scrutiny from the learned judge. For if he were firing at the men whilst they were running away, how did all those bullet holes appear to the rear and left side of the vehicle? Constable Dawkins fired four rounds but claimed not to have fired at the front or back of the vehicle. Where then did his shots land? Did all the bullet holes to the front, side and back come from Detective Corporal Ellington? If so, then he could not have been firing at the fleeing felons. The learned judge did not ask herself those questions or point to any evidence that answered them. It was clear that Detective Corporal Ellington's claim that explosions came from the car when it slowed down, and that men were firing in his direction from the left rear window would have been at most discredited and at least rendered questionable by the fact that the windows of the Nissan Note were up. The claim that he fired at the men when they were running and shooting in his direction would also have been refuted by the forensic evidence of the number of bullet holes in the Nissan Note. If the officers were shown to have lied on these important issues, how then could they be found to be witnesses of truth?

[48] With regard to the count of shooting with intent at Detective Corporal Ellington, the learned judge found the applicant guilty. The applicant was not one of the men who had allegedly exited the vehicle and had fired shots at Detective Corporal Ellington. The applicant had been shot in the vehicle either before or at the time it stopped on Phillip Avenue. He did not run with the others, and he had no firearm. The learned judge concluded that he was the driver. She did not indicate the basis of that finding, since no one identified the applicant as being the driver of the Nissan Note. Detective Corporal

Ellington claimed that during the shooting he saw the driver's door open and the applicant came out, but he also said he was concentrating on the men who were firing at him from the left side of the car. It was the applicant who conclusively placed himself in the car but said he was a passenger. Even though the learned judge said she had drawn the inference that the applicant was the driver, she did not say from what evidence she had drawn that inference. It is possible that the learned judge accepted Detective Corporal Ellington's evidence that he saw the applicant come from the driver's side of the Nissan Note and concluded that the applicant was the driver based on that evidence, as well as the fact that he was found seated on the right near to the driver's door. However, there is no indication that this was the inference the learned judge drew. Constable Francis sought to say that the driver's door was open after the shooting on Phillip Avenue, and Constable Pennant said the doors were open, but this was proven untrue by the scene of crime photographs which showed all the doors, including the driver's door, closed and the windows up.

[49] The Vitara that Detective Corporal Ellington was driving was unmarked. He, at no time, identified himself as a police officer. On Detective Corporal Ellington's account, the Nissan Note slowed down, and explosions were heard coming from the car. He said the occupants were firing at him. He saw fire coming from the muzzles of firearms. However, his evidence was that only the left rear window was open. Is it then that both shooters were firing through the same window from the front and back of the Nissan note? Most importantly, he stopped behind the Nissan Note whilst the shooting was taking place, but not one bullet hit the Vitara. The learned judge did not consider this aspect of the case.

[50] If the car window was up and the evidence of shooting from the Nissan Note on Phillip Avenue was discredited, the next issue the judge ought to have considered was whether the applicant would have been acting in concert with the shooters who were shooting at the police from outside the car whilst they were running away. The applicant was not one of them. The learned judge would have had to find not only that the applicant was in the company of the persons in possession of the firearms but also that the

circumstances showed that he had had the intention to aid and abet or counsel and procure the shooting at Detective Corporal Ellington, so as to cause him grievous bodily harm or to evade apprehension. The learned judge found that the conduct of the applicant, being that he was the driver of the Nissan Note and that he did not stop the vehicle, led to a reasonable inference that he intentionally aided and abetted the offence of shooting with intent at all four officers. With regard to Detective Corporal Ellington, since the two men he said shot at him, did so as fleeing felons leaving the injured applicant behind, there would be no clear basis on which the learned judge could have found that having stopped the car on Phillip Avenue, the applicant had formed the intent to aid and abet the escape of the two men who shot at Detective Corporal Ellington.

[51] Detective Corporal Ellington gave evidence of two separate occasions in which the men shot at him. It was the duty of the learned judge to properly scrutinize the evidence, deal with any internal conflicts therein and resolve them before accepting the evidence wholesale as true.

[52] The learned judge said she accepted the evidence of the police officers with regard to the way in which they said the incident had occurred. However, since: (a) each of the three officers on Olympic Way observed the incident differently; (b) the forensic evidence and the photographs of the scenes of crime presented by the prosecution did not support what they said had occurred; and (c) the forensic evidence and photographs contradicted Detective Corporal Ellington's account of what took place on Phillip Avenue, it is impossible to say how the learned judge arrived at her verdict and what evidence she accepted in doing so. At pages 245 to 246 of the transcript, for example, the learned judge recited the evidence of Detective Corporal Ellington that he saw the left rear window of the Nissan Note down and the fact that he agreed that in the scene of crime photographs, it was up. However, she said she believed his evidence without determining how it squared with the scene of crime photographs and the evidence of Detective Corporal Morgan and Mr Anderson, that the scene had been cordoned off and secured and was photographed as it was found. Nor did she reject that evidence. However, the

learned judge would have had no basis to reject the evidence of Mr Anderson and Detective Corporal Morgan that the scene was cordoned off and secured as Detective Corporal Ellington was always on the scene and he gave no evidence the Nissan Note or the scene was interfered with before Detective Corporal Morgan and Mr Anderson arrived.

[53] Furthermore, when the applicant's counsel sought to clarify the evidence regarding the ballistics report, she was interrupted by the learned judge. At page 34 of the transcript, counsel asked Detective Corporal Ellington if any of the 13 rounds he fired had hit the Nissan Note. Instead of allowing the witness to answer, the learned judge interrupted to ask if the witness "would be able to tell", suggesting that it would require some forensic evidence and that the witness was not an expert. By the time counsel was able to rephrase the question to ask if he could tell by hearing a noise, the witness seemingly, having been put on his guard, said he could not answer as he was not a ballistics expert. The attorney was then told by the learned judge to move on. The witness ought to have been made to answer the question, as it was one of fact as to whether he knew where his shots had landed or not. It was not a scientific question requiring ballistic expertise. Judges should avoid unnecessary interruptions of cross-examination when proper questions are asked to test the veracity of a witness, as it runs the risk of putting the witness on guard, as happened in this case. In **Jones v National Coal Board** [1957] 2 All ER, at page 160, it was said that:

"It is only by cross-examination that a witness's evidence can be properly tested, and it loses much of its effectiveness in counsel's hands if the witness is given time to think out the answer to awkward questions; the very gist of cross-examination lies in the unbroken sequence of question and answer. Further than this, cross-examining counsel is at a grave disadvantage if he is prevented from following a preconceived line of inquiry which is, in his view, most likely to elicit admissions from the witness or qualifications of the evidence which he has given in chief. Excessive judicial interruption inevitably weakens the effectiveness of cross-examination in relation to both the aspects which we have mentioned, for at one and the same time it gives a witness valuable time for thought before answering a difficult

question, and diverts cross-examining counsel from the course which he had intended to pursue, and to which it is by no means easy, sometimes, to return."

[54] The applicant also complained that the learned judge considered prejudicial evidence, which may have impacted her verdict. There were several sections in the transcript where prosecuting counsel tried to obtain hearsay and prejudicial evidence from the witnesses. This was in relation to ascertaining the script of the radio transmission received by the officers and to elicit evidence about the items found in the Nissan Note, which counsel for the applicant said bore no relevance to the charges before the court, but which may have proven prejudicial to the applicant's case.

[55] The applicant further pointed to the fact that in the middle of his trial, the learned judge was told that he was to be sentenced in the Corporate Area Parish Court in Half-Way-Tree. Although the tribunal of fact should not have been told this, one would expect that a judge of law and fact would be able to warn him or herself against the prejudicial effect of such information. Of significance too, is the fact that the information came from defence counsel, who must have had this in mind when the information was imparted to the court. This particular disclosure, in our view, by itself, did not render the verdict unsafe

[56] Although this was not a major issue in the decision of this court, it is true that hearsay evidence was led and given by Detective Corporal Ellington and Constable Dawkins during a line of questioning which this court and the Privy Council have consistently warned against (see **Delroy Hopson v R** (1994) 45 WIR 307; **Gregory Johnson v R** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 53/1994, judgment delivered 3 June 1996, **Regina v Winston Blackwood** (1992) 29 JLR 85; **Norman Holmes v R** [2010] JMCA Crim 19, and **Glinski v McIver** [1962] AC 726 at pages 780 to 781).

[57] It is a line of questioning designed to get around the hearsay rule and which is frowned upon, not only because it is blatantly hearsay (unless led not for the truth of it

but as evidence going to the state of mind of the defendant or the witness), but because it also has the potential to admit otherwise prejudicial inadmissible evidence against an accused person. Detective Corporal Ellington said that whilst travelling along Hagley Park Road, he heard a transmission from police control. He was asked if he did anything as a result of that transmission, and he said yes. He was asked what he did, and he said he radioed police control and told them of the observation. He was asked about his observations. He began to say “[r]e the transmission of a motor...” and was stopped by an objection from counsel for the applicant who complained that this was “backdoor hearsay”. Prosecuting counsel continued, at page 6:

“Q. What were your observations? You heard the transmission and you told them of your observations, what did you see?

A. I observed a silver Nissan Note, registered 5669 GN.”

[58] By this device, prosecuting counsel was able to ascertain not only the transcript of the transmission but also evidence of the out of court statement by Detective Corporal Ellington to police control. It is clear, therefore, that the transmission was with regard to the Nissan Note and the learned judge made that link. The learned judge herself, at page 258 of the transcript, referred to the information received from police control as the reason for the interception of the Nissan Note. The reference to information from police control is hearsay and ought not to have been allowed, much less, referred to by the learned judge herself.

[59] Although counsel for the Crown did not concede on this point, indicating that he saw nothing prejudicial in the transcript, we took the view that we had no way of knowing what effect the evidence had on the learned judge with respect to her wholesale acceptance of the evidence of the police officers. It is clear that this operated on the learned judge’s mind and was clearly prejudicial to the applicant. At page 172 of the transcript, prosecuting counsel, in addressing the court, said that the learned judge would recall that the officers said they had received a transmission. The learned judge’s response was, “I have not forgotten that, Madam Prosecutor”. The learned judge then

asked, “[s]o are you saying then the Court can draw reasonable inferences”. It is entirely unclear to us what reasonable inference the learned judge could have possibly drawn from this back door hearsay evidence of the transmission received from police control regarding the Nissan Note.

[60] Constable Dawkins was also asked by prosecuting counsel if, when he heard the transmission and went in search, he had the intention to stop a motor vehicle (page 70 of the transcript). He also gave evidence that he saw the things he had heard about on the transmission, on the back seat of the Nissan Note. This was hearsay combined with potentially prejudicial evidence. The learned judge herself was concerned as to the relevance, but the prosecution persisted with this line of questioning before eventually abandoning it. The fact that items were found in the car, in and of itself, is not prejudicial, as it could have been led merely as part of the narrative. However, in the light of the evidence of the officers that they stopped the car as a result of a radio transmission and that things were seen in the car linking that to the transmission, it was clearly prejudicial to the applicant.

Disposition

[61] It was for the above reasons that we made the orders indicated at paragraph [2].