IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Criminal Appeal No. 19 of 2008
(Ind 16/08)
C#0308/08

Between:

HER MAJESTY THE QUEEN

Respondent

- and -

DAVID ASHTON WHORMS

Appellant

Before: **The Rt. Hon. Sir John Chadwick, President**
The Hon. Mr. Justice E. Mottley, JA
The Hon. Dr. A. Conteh

Appearances: Ms Petit, Crown Counsel, for the Respondent
Appellant in person

Date heard: 19th August, 2010
Judgment delivered: 25th August, 2010

JUDGMENT

Sir John Chadwick P

1. David Ashton Whorms appeals to this Court from his conviction on 24 July 2008 on a charge of possession of an unlicensed firearm contrary to sections 15(1) and (5) of the Firearms Law (2006 Revision). He also seeks leave to appeal from the sentence of 10 years passed upon him following that conviction.

2. The offence alleged was committed on 1 January 2008. The matter came before Justice Williams and a jury on 21 July 2008. Mr Whorms pleaded not guilty. As I have said, he was convicted. Section 39(2)(b) of the Firearms Law required that,

on conviction on a not guilty plea, the judge was required to impose a sentence of imprisonment for at least 10 years unless she was of the opinion that there were exceptional circumstances relating to the offence or to the offender which justified her not doing so. The judge found no exceptional circumstances.

3. The circumstances in which Mr. Whorms was arrested and charged may be stated shortly. At or about 11p.m. on the night of 1 January 2008 he was driving a left-hand drive car along Water Cay Crescent, Cayman Kai, Grand Cayman. There were two passengers with him in the car: Cary Esteban (otherwise known as "Slim") who was seated beside him in the front passenger seat and Donald Nixon (otherwise known as "Tired") who was seated in the back. The car was stopped by the police. The three occupants were ordered out of the car and were searched. Nothing relevant to the case was found upon them.

4. One of the police officers, Constable Gregg Blades, then went to search the car; leaving his colleague, Constable Gabe Rabess, to watch the three men. Constable Blades found a .38 calibre Smith & Weston revolver on the floor of the car in front of the passenger seat. He saw that there were three shells in the chambers of the revolver. He told Constable Rabess of what he had found. Constable Rabess went over to the vehicle, saw the firearm and made it safe. He informed the three occupants of the car that they were under arrest for possession of an unlicensed firearm.

5. Subsequently, DNA tests were carried out on the firearm. Mr. Whorms' DNA (and no other DNA) was found. The fact the fact that his DNA was present on the firearm was the subject of an admission at trial.

6. In the course of her summing up to the jury, the judge said this:

> "In this case (and it is not something that happens very often, the comment I make), you have the Defence and the Crown agreeing in many areas. They agree in one of the most important areas, to my mind, of this case and that is that DNA found on this gun belonged to Mr. Whorms. You have

> to decide and to agree and recognise that it is you who have to decide how that DNA got on that gun because the Crown is using that as a basis for saying the gun was in the possession of the accused man."

7. The judge directed the jury that possession could be found to exist "where a person has knowledge of an object, plus the ability to control the object even if he has no physical contact with it at the time". She reminded them that it was no part of the Crown's case that Mr. Whorms was caught with the gun in his hand. As she put it:

> "They are saying from the circumstances that they have presented to you, if you believe them, it is open to you to infer that Mr. Whorms had that gun in his possession. So this is a case where there is no direct evidence of Mr. Whorms handling that gun.
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> They are relying upon evidence of various circumstances relating to this crime and the Defendant, and they say that when you put them together they must lead to the sure conclusion that Mr. Whorms was in possession of that gun. So the circumstantial evidence can be regarded as powerful evidence, but it is important that you examine it with care and consider whether the evidence upon which a prosecution relies is reliable and whether it does, in fact, prove guilt."

8. The judge reminded the jury of the evidence given by the two police officers. In particular, she reminded them that Constable Blades had said that he conducted the body search of the three occupants and the search of the vehicle. She reminded them that Constable Blades was adamant that he did not handle the gun at all. She reminded them, also, that after the weapon was found – and before Constable Rabess had gone over to the car – the three occupants had been ordered to lie on the ground. She reminded them that both Constable Blades and Constable Rabess had denied that Constable Rabess had assisted Mr Whorms to get up from the ground; and denied that he taken Mr. Whorms to the car by holding him under the arm. The evidence of the two officers was that Constable Rabess had put on latex gloves before he went over to the car and handled the firearm. She went on to say this:

> "At the end of the day the significance of whether or not Mr. Rabess touched Mr. Whorms before handling that gun became clearer when you saw the defence that was being suggested because the Defence is saying they have accepted that the DNA on the gun was Mr. Whorms; but they are saying it did not get there by Mr Whorms' handling the gun and they are saying you are to consider if it could have got there in any other way. I think Mr. Dixey [the attorney for Mr. Whorms at the trial] rightly admitted that he is not saying definitely that he had to have gotten that this way or that but they are raising it for you other considerations as to how they say it could have got there because they may maintain it did not get there by Mr. Whorms' touching that gun."

9. Mr Whorms had given evidence at the trial. He denied having had possession of the firearm. The judge reminded the jury of his evidence that, after the gun was found and the three occupants had been told to lie on the ground, he saw Constable Rabess put on a pair of latex gloves. The officer asked him whether he knew anything about the firearm in the car. He told Constable Rabess that he did not know what he was talking about. She reminded the jury that:

> "He [Mr Whorms] tells us that Mr. Rabess came over picked him up under his left arm and walked him to the car to the passenger side and showed him the gun on the floor of the car in plain view."

10. Mr Whorms had called as an expert witness Dr. Ruth Ballard, Professor of Biological Sciences at California State University, Sacramento. Dr Ballard had particular expertise in the area of forensic serology and DNA. She gave her opinion, by way of a report dated 10 July 2008. She made it clear that she was not presenting results from her own laboratory: rather, she was reviewing the results produced by the Crown's expert (Mr. Noppinger) and giving opinion based on the work that he had done in his laboratory with the benefit of "my general experience and understanding as a professional in these fields". Dr Ballard was asked whether or not it was possible for DNA to be transferred without direct contact. Her answer was that indirect transfer of DNA was possible; but the most likely

result of an indirect transfer would be a mixture of DNA from both sources not a single DNA profile from only one source.

11. In reminding the jury of Dr Ballard's evidence, the judge said this:

> "She was asked specifically if someone touched someone and then touched a gun it is likely you would see mixed DNA or single type DNA profile. She was asked that specifically, and she said it would depend on whether the person who touched the person was sweating heavily had not washed his hands, touched the person with his dominant hand, how long the contact was, and other variables would affect that; and she went on to comment that she could not comment because she was being asked to comment on probability of an event occurring and she could not comment on that. All she could say is that given a hypothetical situation, those are variables which would affect the outcome that you would get. So she was challenged as to her take of what those studies said, but she maintained that on the preponderance of evidence this secondary transfer could take place, but she still said,
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> > 'whether or not it happened is under the control of many variables and if you can control in the lab you can begin to consider what the variables are'".

12. The judge concluded her direction in respect of Dr. Ballard's evidence with this observation:

> "She could not comment directly on the issue, the factual situation, because there was no factual situation presented to her. The hypothetical situation she commented on, and maintains and explained to us, the secondary transfer of DNA is possible, variables involved in it happening, and therefore, it is ultimately your task, based on all of the evidence including Dr. Ballard's, to decide whether or not, in the circumstances that have been presented to you, you are satisfied so that you feel sure that the DNA found on the gun belonging to Mr. Whorms got there by him handling the gun on all the evidence that you have heard. Or do you have a doubt because of the scenario that the Defence presented to you, the hypothesis, their theories of what could have happened?"

13. The appellant gave notice of appeal against conviction, and sought leave to appeal against sentence, by notice dated 29 July 2008. The grounds set out in the notice were these:

> "1. That the DNA expert testified that the DNA found on the firearm was secondary DNA not primary as would have been the case of personal handling and possession.
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> 2. That the trial Judge failed to properly explain what secondary DNA transferral means i.e. not personal possession but transferred by some other means of contact. Example of other means of contact or transferral – the officer who arrested and held the accused while the other officer was searching the vehicle is the said officer who took possession of the gun with his own hands after having held the accused for several minutes while the other officer was searching the car.
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> 3. Both officers contradicted each other as at the actus of arrest – where Gabe Rabess, the officer who held the accused while Greg Blades searched the car said he could not remember holding the accused while Blades searched the car but could remember all other details as related to the arrest procedures. Greg Blades' evidence is that Gabe Rabess did not touch the accused or rather – that he did not see Gabe Rabess touch the accused.
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> 4. In relation to Blades, not seeing Rabess touch the accused, although that is highly unlikely given the fact that he is an officer trained in observation and taking mental details at the scene, nevertheless it would have to have been Rabess who was holding the accused while Blades searched the car – no getting around that fact, Blades searched the car, so Rabess held the accused – not Blades.
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> 5. The picture shown to the jury was not a picture of the public beach but a picture of a secluded area of beach which was not the true scene where the accuseds all said they were – so that the jury was misled by the Crown when shown that picture and referred to it as an area of criminal activity.
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> 6. The other accused who was found with (GSR on him and a .38 spent shell at his residence) was acquitted at long-form PI and so despite these two pieces of evidence against him he was acquitted while the accused David Whorms is convicted on one piece of evidence only – DNA which the

> expert clearly explained was only secondary transferral put on the gun by other means – in all likelihood by the officer who held the accused and handled him for a few minutes and then also picked up the gun with his hands.
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> 7. So that in the absence of proper explanation or direction to the jury in respect to secondary transferral the jury brought an adverse verdict based on the lack of understanding – i.e. what secondary transferral means."

14. Although Mr Whorms had been represented by an advocate (Mr. Dixey) at the trial, he was, for some time thereafter, unrepresented. He then retained Mr Keith Collins It seems to have taken the best part of a year before Mr Collins obtained transcripts of the trial proceedings. The appeal was listed before this Court for hearing on 28 August 2009. On 24 August 2009 (by letter) and on 28 August 2009 (orally, in the presence of Mr Whorms) application was made by Mr Collins, for an adjournment. The matter was stood over to November 2009. When it came before the Court in November 2009 the appellant was still unrepresented; although it can now be seen that a skeleton argument had been prepared on his behalf by counsel in Jamaica, Mr Frank Phipps QC. The matter was again adjourned, at Mr Whorm's request, to March 2010. On 19 February 2010, Mr Collins wrote to the Court to explain that he did not appear for Mr Whorms; he had been approached by him after the trial to instruct Mr Phipps QC. Mr. Collins had, it seems, applied for legal aid on behalf of Mr. Whorms; but this application was refused. Mr. Collins recorded in his letter that Mr Whorms was not in funds to instruct either Mr. Phipps or himself. But he forwarded the skeleton argument which had been prepared by Mr. Phipps.

15. That skeleton argument (originally prepared in November 2009) was signed and dated by Mr. Whorms on 18 February 2010. The appellant appeared before the Court on 1 March 2010, without a representative. The appeal was adjourned to the current session to enable the appellant to obtain the papers (including the transcript) from Mr. Collins. Given that that was the third occasion on which the

hearing of the appeal had been adjourned, the Court directed that the appeal was to proceed in the August session whether or not the appellant was then represented.

16. It is in those circumstances that the matter has come before the Court in the current session with an unrepresented appellant. That cannot be thought satisfactory: given that this is a serious offence carrying a term of imprisonment of 10 years. But, nevertheless, we decided that the hearing of the appeal must proceed. We had regard to the following matters: (i) that the appellant had been represented at the trial; (ii) that he had had the assistance of leading counsel in preparing a skeleton argument for the appeal; (iii) that the hearing of the appeal had been adjourned on three previous occasions (on the last of which the Court had indicated that it would proceed in the current session with or without representation); and (iv) that there was no indication or expectation that a further adjournment would lead to the appellant obtaining representation.

17. It is appropriate, in those circumstances to set out, at some length, the submissions made in the written skeleton argument prepared by Mr Phipps QC and dated 18 February 2010:

> "**The Submissions**
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> 1. The prosecution's case alleged possession of a firearm, which is custody and control of a firearm as outlined by the trial Judge . . .
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> 2. The case for the prosecution is based on circumstantial evidence as directed by the learned trial Judge . . .
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> 3. The fact that the Defendant was in control of the car in which there were other persons when the firearm was found in the car, was not sufficient evidence to prove that the Defendant was in possession of the firearm.
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> 4. Proof of admission that the Defendant's DNA was on the firearm would not be conclusive evidence that the Defendant had touched or handled the firearm.
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> 5. The totality of the evidence did not point exclusively to guilt where (i) both experts for the prosecution and the defence agreed that DNA may be transferred from source to another place by touch and (ii) secondary transfer of DNA

was possible when Constable Blades had searched the Defendant and afterwards searched the car where the firearm was found. These circumstances required appropriate and clear directions by the learned trial Judge for the jury to found possession of the firearm on the day alleged in the Indictment.

6. The directions by the trial Judge were insufficient to assist the jury on their duty to apply the facts in the case to the law of possession.

Particulars of Misdirection

1. There was misdirection where the learned trial Judge had failed to instruct the jury in clear terms that a finding by them that the Defendant had at some time touched or handled the firearm, this could not be proof beyond reasonable doubt that the Defendant had possession of that firearm on January 1 2008 as charged in the Indictment.

2. The final directions to the jury conveyed the impression that handling the firearm would be a basis for conviction on the Indictment, especially when the jury had been told that "the admission is conclusive evidence in these proceedings and no evidence had to be led of it".

3. There was a fatal error by the failure of the learned trial Judge to direct the jury, adequately, on other conclusions available on the evidence which were inconsistent with guilt (see *Hunter and Moody v. The Queen* PC Appeal 64 of 2002).

The appellant informed the Court on 18 February 2010 that he was relying on those submissions.

18. He confirmed that in a document which he put before the Court at the hearing of the appeal. That document contained the following further submissions:

"2. The evidence was stronger against the front seat passenger than the evidence against me. Namely (1) the firearm was located where he sat; (2) a .38 spent shell was recovered by police at his residence; (3) a finding of GSR was found on his shirt.

3. The evidence that the GSR results were unavailable to the Magistrate at the PI.

> 4. I was deprived of the results for the examination testing of that 0.38 spent shell found at the residence of the front seat passenger.
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> 5. There were insufficient regard to the fact that the DNA found on most areas of the gun was in fact partial DNA and that there was no DNA on the rounds inside the gun.
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> 6. I was committed to stand trial for a Smith & Weston .38 revolver #AWW2831 and neither the Indictment nor the evidence states any mention of that firearm with that serial #.
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> 7. The prosecution should have pursued the results for analysis on the 0.38 spent shell found at the front seat passenger's home.
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> 8. The prosecution failed to disclose to the Court that they did not dispose to the discharge of the front seat passenger with those two pieces of evidence namely (1) the firearm found under his seat; (2) the spent shell found at his house was the same calibre as the gun.
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> 9. The picture shown to the jury in the prosecution's closing submissions was not that of a picture of the public beach, but a picture of a secluded area of beach which was not the true scene of which I the Defendant said we were at so with that the jury was misled by the prosecution when shown that picture."

19. As I have said, the appellant, both in the written document which he put before the Court at the appeal hearing and, specifically, in the submissions which he made at the appeal hearing, adopted the grounds set out in the skeleton argument which had been prepared for him by Mr Phipps QC. Further, the appellant himself made the point that there was evidence pointing to the front seat passenger, Mr. Esteban, as the person in possession of the firearm. In that context the appellant referred to three matters: (i) the weapon was located in the well of the passenger front seat of the car, where Mr Esteban had been sitting; (ii) a spent .38 calibre shell was recovered by the police from Mr. Esteban's residence; (iii) gun shot residue (GSR) was found on Mr. Esteban's T-shirt.

20. It is necessary, therefore, to examine carefully how the judge dealt with these matters in order to address the contention – advanced in Mr. Phipps' skeleton

argument – that there was a misdirection in failing to draw the attention of the jury to the possibility of other conclusions available on the evidence which were inconsistent with the appellant being the person in possession of the firearm found in the car.

21. The judge referred, in the course of her summing up, to the evidence of the investigating officer, Detective Constable Rodriguez. She said this:

> ". . . He, being the Detective Constable on duty that night, took over the investigation. He told you the steps he took in the investigation. It is through him that we learnt about the gunshot residue collection kit and the fact that the three occupants of this car were tested for gunshot residue, their hands, and their clothes collected and tested. It is through him we learned that the homes of the accused and the other occupants of the car were searched by the police. It is through him that we learned that a rusty, spent shell – is I think how he described it – was found in the home of Mr. Esteban, and we learned that the clothing and swabs of the hands for gunshot residue were tested. We learned that a report was prepared as to the result of that test. It is an exhibit for you, and it outlines the various article of clothing that each of the men were wearing. What is significant, or what has been called to your attention, is that the report states that it was indeterminate if either Mr. Nixon, Mr. Esteban or Mr. Whorms had discharged a firearm, handled a discharged firearm, or was in close proximity of a discharged firearm. That was indeterminate. It was, however, borne out in the report that the grey T-sheet, item 8, may have been in contact with a discharged firearm, or close proximity to one, and we see that the grey T-sheet was that of Mr. Esteban.
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> The officer agrees that the Mr. Esteban is not before you. You can see that for yourselves. The officer explained that Mr. Whorms was committed by the Summary Court, the Court at the lower level who conducted the preliminary enquiry in this matter. Mr. Whorms was committed from that Court to come and answer the charges here before you. You have heard Miss Pettit, in her address to you, comment on that aspect of the matter, and it is a matter that cannot be disputed, that yes, these things are found in Mr. Esteban's house, yes, the residue was found on his shirt. But under re-examination the officer made it clear to us that he, himself, as the officer was not responsible for who came before the Court.

> What was also borne out was that the decision by the Magistrate to "commit" – which was the term used – Mr. Whorms to trial here was made on the 5th March, and the result of the GSR test (the report containing that result) is dated the 20th March, which means it was received after the committal, so it is to say from that, that at the time of the preliminary enquiry, the Magistrate would not have had the results of that report. We cannot speculate as to what her decision may have been if she had that report, but on the evidence that was presented to her at the time, the decision was taken that it was Mr. Whorms who had to come forward to answer the charge. So Mr. Whorms is here for you to determine whether or not he is guilty of the offence of which he has been charged."

22. Later in her summing up, in the course of reminding the jury as to the evidence that had been given by Mr Whorms in his defence, she said this:

> "He agrees with the prosecutor that he had made up his mind as to who he thought could have been responsible for that gun. Crown Counsel asked him if he was upset with who he thought had placed the gun in his car and he said yes he was, indeed he was. As he put it, he was upset with Mr. Esteban because he thought it was Mr. Esteban who had put the gun in the car and had put him in the position where he had now been remanded for 8 months. That is why he said he was upset with Mr. Esteban that night.
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> The Crown asked him if he was not upset at the fact that Mr. Esteban was discharged and left him to face the charges, and he told us that he did not blame Mr. Esteban, he blamed the law. That was how he responded because, as he recognised, it was not Mr. Esteban who decided whether or not he faced us, it was the processes of the law."

23. The evidence against the appellant – and on which he was convicted – can be summarised as follows:

(i) he was the driver of the car on the night in question;

(ii) the firearm was found in the front right hand passenger well of the vehicle;

(iii) the appellant's DNA was found on the firearm.

An issue to which much attention was given at the trial was whether the presence of the appellant's DNA on the firearm could be explained by secondary transfer: that is to say, could the presence of the appellant's DNA on the firearm be explained on the hypothesis that he had not himself handled the weapon.

24. In that context, the case advanced on Mr Whorms' behalf at trial was that secondary transfer was possible: and that, in this case, secondary transfer could have occurred if the weapon had been handled by a police officer after that police officer had been in physical contact with the appellant. The jury, in the light of the directions which the judge had given to them, were plainly entitled to reject that hypothesis. Even if they accepted the possibility of secondary transfer, they were entitled to take the view, on the evidence of the two police officers present at the scene – Constable Blades and Constable Rabess – that there had been no opportunity for secondary transfer on the facts in this case. If they did reject that hypothesis – as their verdict suggests they must have done – they were entitled to conclude that the appellant had handled the weapon.

25. But the fact that the appellant had handled the weapon did not lead, necessarily, to the conclusion that he was in possession of the weapon on the night in question. The DNA evidence did not rule out the possibility that others (whose DNA was not found on the weapon) might also have handled it. In our view the jury needed to be directed – in clear terms – that, before they could be sure that the weapon was in the possession of Mr Whorms on the night of 1 January 2008, they must be satisfied that it was not, in fact, in the possession of Mr. Esteban. There was evidence - of which the judge reminded the jury - that pointed to Mr. Esteban having some involvement with firearms of this calibre. In particular, there was evidence of the spent .38 calibre shell case found at his residence and of the gunshot residue on his T-shirt. Mr. Esteban was not on trial for possession of this weapon; and there was no evidence before the jury which linked him to this weapon. But, as the judge explained, at the time of the decision not to commit Mr. Esteban for trial, the evidence of gunshot residue on his T-shirt was not before the Summary Court.

26. In our view the judge needed to direct the jury that they could not conclude from the fact that Mr. Esteban was not on trial for possession of the firearm, that there was no real possibility that he was, in fact, in possession of the firearm on the night of 1 January 2008. They had to put out of their mind the fact that Mr. Esteban was not on trial for the offence with which Mr Whorms was charged; and they had to ask themselves whether, on the facts which had been put in evidence before them, they were satisfied that there was no real possibility that Mr Esteban was the person in possession of the weapon on the night in question. Unless they were satisfied of that, they could not be sure that it was Mr Whorms who was in possession of the weapon at the time; and if they could not be sure of that, they could not convict him.

27. In those circumstances, we are unable to avoid the conclusion that there was a mis-direction in this case. That misdirection was, in our view, sufficiently material to render the verdict of the jury unsafe.

28. We must allow this appeal. In those circumstances it is unnecessary to address the question whether, if the conviction had been upheld, leave to appeal against sentence should have been granted. But we should, perhaps, make it clear that we can see no basis on which the judge's conclusion that there were no exceptional circumstances in this case which would have warranted a departure from the sentence prescribed by section 39(2)(b) of the Firearms Law.

Chadwick P

Mottley JA

Conteh JA