IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT

CICA (Crim) 02 of 2014

BEFORE

The Rt Hon Sir John Chadwick, President
The Hon Elliott Mottley, Justice of Appeal
The Hon Sir George Newman, Justice of Appeal

BETWEEN

H.M THE QUEEN

Respondent

and

RAY KENNEDY SMITH

Applicant

Ms Amelia Fosuhene of Stennings appeared for the Applicant, Ray Kennedy Smith
Ms Candia James, Crown Counsel, appeared for the Crown

Hearing: 30 April 2015
Judgment: 30 April 2015

RULING
Revised from transcript and Approved released 16 July 2015

Sir John Chadwick, President:

1 The judgment which I am about to deliver is the ruling of the Court.

2 On 28 November 2013, following a trial before Justice Quin sitting alone, the applicant, Ray Kennedy Smith, was convicted of possession of an unlicensed firearm contrary to section 15 of the Firearms Law (2008 revision). On 6 February 2014 he was sentenced to a term of imprisonment of ten years: that being the minimum statutory sentence for such an offence in the absence of exceptional circumstances. He seeks leave from this Court to appeal from his conviction and his sentence.

3 The grounds of the applicant's proposed appeal, as set out in a notice filed on 7 February 2014, were (i) that the judge's verdict was against the weight of the evidence and (ii) that the judge failed properly to take account of the DNA evidence. Since that notice was filed the applicant has obtained legal representation. Counsel who now represents him for the purpose of his application for leave to appeal has put before the Court a document headed "Advice on an appeal against conviction and sentence". In a section of that document headed "basis of the appeal against conviction" she has set out the grounds upon which the Court is invited to grant leave to appeal.

4 The circumstances which led to the applicant being charged with the offence of which he was convicted may be stated shortly:

(1) On the evening of 31 July 2011, three officers in the uniform support guard section of the Royal Cayman Islands Police were on patrol in a marked car in the West Bay district. At approximately 9:50 p.m, when travelling along Hell Road in the vicinity of a night club known as Club Inferno, they observed three men standing in the parking lot of that establishment. They thought that those men were acting suspiciously: in that they were fidgeting and looking back and forth at the marked police car.

(2) As the officers drove into the parking lot, one of the men whom they were observing - the applicant, Ray Kennedy Smith, left the group and walked quickly behind the night club building, in the area of the dumpster. After spending a few seconds out of the sight of the officers, behind the building, the applicant rejoined the other two members of the group.

(3) The officers parked the police vehicle and approached the three men on foot. They detected a strong scent of ganja. On carrying out a search, a small portion of ganja was found in the pocket of one of the other two men. They admitted that they had been smoking ganja.

(4) One of the officers, Police Constable Stuart, then went behind the building - in the direction which he had seen the applicant to go - and conducted a search of the immediate area. He found a black ski mask, partially covering a silver and black handgun, and a pair of purple gloves, one of which was turned inside out.

(5) Police Constable Stuart brought his findings to the attention of the other officers. Two of the three men (other than the applicant) denied any knowledge of the gun. The applicant made no comment.

(6) The area was subsequently cordoned and processed by scenes of crime officers. The gun was identified as a 9mm Smith & Wesson semi-automatic pistol, loaded with five rounds of live ammunition. The mask and each glove were placed in separate bags. The firearm and ammunition were also placed in packages which were sealed.

(7) Police Constable Stuart did not have any physical contact with the applicant at any stage. In particular, he was not the officer who had searched the applicant. The applicant had been searched by Police Sergeant Smith.

(8) In due course the ski mask, the purple gloves and the swabs from the firearm and ammunition were sent to specialists - DNA Labs International in the United States - for DNA comparison against swabs taken from each of the three men who had been in the car park. The scientist who conducted that analysis – Miss Oechsle - was able to exclude the other two men as contributors in respect of each of the exhibits tested; but was not able to exclude the applicant as a contributor to the DNA sample taken from the interior of one of the two gloves.

5 In the course of his judgment, Justice Quin referred to the evidence of the forensic scientist, Miss Oechsle; and, in particular, to the evidence which she had given as to her examination of the interior of one of the gloves which had been found with the gun. At paragraph 147 he said this:

> "Miss Oechsle's examination of the interior of exhibit 1 found a partial DNA profile with a match for the defendant, Ray Kennedy Smith. Miss Oechsle said that the chance that an unrelated person chosen at random from the general population matching this DNA profile is approximately one in every 1.4 billion individuals. This is what is known as the random occurrence ratio or match probability which is the statistical frequency with which the matching profile between the crime scene sample and someone unrelated to the defendant would be found in the general population. The probability of one in 1.4 billion is so low that barring the involvement of a close relative, the possibility that someone other than the defendant was a donor to the crime scene sample is effectively eliminated."

He went on, at paragraph 150, to observe:

> "The defendant's DNA on the interior of the glove, exhibit 1, cannot alone establish that he is guilty of the possession of the illegal firearm; however, it is a very significant fact which I must take into consideration when determining whether the defendant is guilty or not guilty of the charge he is facing."

6 It can be seen that paragraph 147 of the judgment contains three sentences; in each of which the judge addresses a different point. The first sentence describes the judge's

assessment of the evidence given by Miss Oechsle. In the second sentence - which begins "this is what is known as the random occurrence ratio or match probability" – the judge explains his understanding of the significance of a random occurrence ratio or match probability derived from the DNA analysis. In the third sentence – which begins "the probability of one in 1.4 billion is so low" – the judge concludes that the possibility that someone other than the defendant was a donor to the crime scene sample was effectively eliminated. That was the judge's own conclusion on the basis of the evidence which he had heard.

7 Counsel for the applicant challenges both the first and the third sentence of paragraph 147. There is no challenge to the second sentence in which the judge sets out his understanding of the significance of random occurrence ratio.

8 There is, as it seems to us, no basis for the challenge as to the judge's understanding and assessment of the evidence that had been given by Miss Oechsle. That evidence was given in her report dated 26 October 2011 and, orally, at the trial. Miss Oechsle was cross-examined by counsel who then appeared for the applicant. The Court has not been provided with a transcript of the oral evidence given by Miss Oechsle at the trial.

9 In her written report Miss Oeschsle listed the material which she received at her laboratory in Florida. That list included the two burgundy gloves which had been found behind the Club Inferno building and a standard DNA sample from the applicant. In relation to the first burgundy glove, Miss Oeschsle concluded that DNA examination of the outside of the glove indicated at least one male contributor; but that the data was inconclusive for inclusionary purposes. Nevertheless she was able to exclude as contributors the other two men who had been present at the parking lot. As to the interior of that glove she said this:

> "interior (DLI sample 11-02793.02): the partial DNA profile obtained from this sample indicates at least one male contributor. Peaks below detection threshold were observed which may indicate additional contributors; however, this data is inconclusive for match purposes. Ray Kennedy Smith cannot be excluded as a contributor to this partial DNA profile. The chance that an unrelated person chosen at random from the general population matches this DNA profile is approximately one in every 1.4 billion individuals."

And, again, she was able to exclude as contributors the other two men who had been present at the parking lot. At the conclusion of her written report she said this:

> "The DNA population statistics are estimates with a confidence level of plus or minus a factor of ten for unrelated individuals. The reported frequency was derived from the Federal Bureau of Investigation (FBI) DNA population data base from three major population groups; Caucasian, African American and Hispanic. The most common frequency was selected for reporting.

She exhibited to her report two tables; each in a similar form. The tables set out, in 16 rows, the various locus/item matches that were analysed. They contain a number of columns. For present purposes is sufficient to refer to the second column of table one (which sets out the results of the analysis on the inside of the burgundy glove) and the fifth column of table two (which sets out the results of the analysis on the sample provided by the applicant). Each of those two columns contains 16 rows. It can be seen that the figures in nine or ten of the corresponding rows match; and that the figures in the remaining six or seven rows are not capable of being matched because the sample provided material which was below detection threshold and did not meet reporting criteria.

10 On the basis of that evidence - which as I have said, was the subject of cross-examination and which was summarised clearly and helpfully by the judge at paragraphs 59 to 66 of his judgment - the judge was, to my mind, correct to make the assessment which he did make in the first sentence of paragraph 147. It said that the judge ought to have taken the view that Miss Oeschsle's evidence was unsatisfactory in that - as her written report makes clear - the random occurrence ratio was defined from a FBI data base. It is said that the report would have been more satisfactory if the random occurrence ratio had been derived from a narrower, or more restricted, data base comprising only males in the Cayman Islands. But there was no evidence as to whether such a data base existed; and, so far as appears from the judgment, no questions were put to Miss Oechsle as to whether - had there been such a data base - it might have materially invalidated her conclusion that the random occurrence ratio was approximately one in every 1.4 billion.

11 As to the third sentence of paragraph 147 of the judgment, it is said that the judge was wrong to fail to consider the possibility that the DNA might be that of a close relative of the applicant. It is pointed out that the judge had said that the probability of one in 1.4 billion was so low that "barring the involvement of a close relative" the possibility that someone other than the defendant as a donor to the crime scene is effectively eliminated; but that he did not consider the possibility that there might have been a

close relative involved. But, as the judge said at paragraph 161 of his judgment, the applicant elected not to give evidence or call any witnesses; and so had not availed himself of the opportunity to present any reasons for his DNA matching the DNA found on the interior of the burgundy glove. Additionally, the applicant had not availed himself of the opportunity to explain his movements. So there was no suggestion at the trial that there could have been any involvement of a close relative.

12 In our judgment the judge was entitled to take the view that that was not a case that he was required to consider. The applicant's case on DNA, as the judge pointed out at paragraph 127 of his judgment, was that there was the possibility of a transfer of DNA. The judge was satisfied on the evidence of the police officers that there was no possibility of transfer of DNA in this case.

13 Counsel for the applicant made it clear that she did not criticise the expert; and that there was no criticism of the judge's summary of the significance of random occurrence ratio. But she submits that the judge went wrong when he referred, at paragraph 161 of his judgment, to: "the defendant having not availed himself of the opportunity to present any reasons for his DNA matching the DNA found on the interior of exhibit 1, the burgundy glove." It is submitted that the judge fell into the trap of thinking that the match pointed necessarily to the applicant having handled the glove; or, perhaps more precisely since the relevant DNA was found inside the glove, of having worn the glove. But when paragraph 161 is read with paragraph 147 of the judgment, it is clear that the judge did understand the effect of the expert evidence was on this point: there was a partial DNA profile with a match for the applicant. In our view the judge is not to be taken to have forgotten, when he reached paragraph 161 of his judgment, that the evidence that was before the Court was as he had stated in paragraph 147. His reference to: "his DNA matching the DNA found on the interior of exhibit 1" is to be taken as a short form of his summary in the first sentence of paragraph 147. There was a match: but it was a match of a partial DNA profile with his DNA. The effect of that match, as Miss Oechsle had carefully explained, was not that the applicant could be shown to be the person who had worn the glove; only that that possibility could not be excluded.

14 The judge was careful to remind himself that the applicant could not be convicted on the basis of that partial profile match; and that he needed to evaluate all the evidence

of which the DNA material was only part. The judge said this, at paragraph 168 of his judgment:

> "There is no question that it is the defendant's DNA which is found on the inside of exhibit 1. The gloves were found on top of the ski mask which was on top of the firearm. The Court finds that the defendant went behind the building as soon as the police entered the car park minutes before the gun was discovered. The Court finds as a fact that the defendant requested to leave the scene when PC Stuart went to search for ganja behind the building. The Court finds that, when the three men were questioned about the ownership of the firearm PC Stuart had discovered, the other two men vigorously denied ownership of the firearm whilst the defendant remained silent and was observed by the police officers to be sweating profusely".

At 169 he went on:

> "I agree with Crown counsel that all the foregoing facts, taken in concert with the defendant's failure to give evidence, lead to the inescapable conclusion that it was the defendant who placed the gun, ski mask and gloves behind the air conditioning unit at the side of the building. When the defendant saw the police coming into the car park he went and hid the items together and in doing so was in possession of the firearm."

And that, he said, satisfied him beyond all reasonable doubt that the defendant was guilty.

15 In our view, that was a conclusion which the judge was entitled to reach on the whole of the evidence that was before him. We reject the submission that the judge fell into the trap of thinking that the DNA evidence was of itself sufficient to convict the applicant. As he pointed out, it was a factor - indeed a significant factor - to be taken into account; but that factor had to be weighed with all the other factors. That is what the judge did.

16 This Court is satisfied that leave to appeal should be refused.

Chadwick, P

Mottley, JA

Newman, JA