JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 141/2005

BEFORE: THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MISS JUSTICE SMITH, J.A. (Ag.)

CHARLES LAWRENCE
v.
REGINA

Mr. Leroy Equiano for the Appellant
Miss Paula Llewellyn, Q.C., Director of Public Prosecutions and Mrs. Karen Seymour-Johnson, Crown Counsel for the Crown

June 23, 25, 2008 and April 3, 2009

SMITH, J.A.

1. The appellant Charles Lawrence was indicted and tried jointly with Shanor Bertram in the High Court Division of the Gun Court for the offences of illegal possession of firearm, wounding with intent and robbery with aggravation. He was convicted and sentenced to nine (9) years imprisonment on each count with sentences to run concurrently. On the 25th June 2008, we dismissed his appeal against conviction and sentence in respect of Counts One and Two and allowed the appeal in respect of Count Three. As promised, we now put our reasons in writing.

2. The Prosecution's Case

Evidence for the Crown was given by the complainant Mr. Forrest, an eyewitness Mr Christopher Burt and three police officers. Mr. Forrest who is a taxi driver and informal dealer in foreign currency gave evidence that on the 27th June 2005, he was shot four times in the right arm, three times on the left hand and once behind the right ear. These injuries, he said, had negatively affected his memory. He said that on that day, he had been at the Times Square Plaza on the Norman Manley Boulevard in Negril in the parish of Westmoreland seeking passengers. Sitting close by was another man whom he referred to as "Prento's brother". While they were there, a white Toyota Corolla car drove up and a man got out of the car. This man went over to "Prento's brother" and asked him to exchange some American dollars for Jamaican dollars. "Prento's brother" sent the man to Mr. Forrest who did the transaction. Mr. Forrest identified this man as Shanor Bertram, the appellant's co-accused. After receiving the money, Bertram went into the back seat of the car. The car then drove forward a few chains into the driveway at Times Square Plaza and then reversed. Bertram got out again and accosted Mr. Forrest pointing a gun in his face. Mr. Forrest tried to push the gun away from his face and a struggle ensued at the end of which Mr. Forrest was shot.

3. Christopher Burt gave evidence that he was sitting in his Hiace motor bus which was parked near the gate of Times Square Plaza and Mr. Forrest was sitting on a fence about two yards behind the bus. A white Toyota motor car drove up with four men in it. Mr. Burt said that he could see the number of men because the driver's window was down. Three of the men got out and went behind his bus. He heard explosions and pushed his head outside the window to look around the back where he saw Mr. Forrest lying on the ground. One of the men was standing over Mr. Forrest pointing a gun at him. A second man was standing behind the man with the gun. Then the man with the gun shot Mr. Forrest. Both men ran towards the white Toyota motor car and got in after which the car drove off.

4. Mr. Burt alighted from his bus and was on his way to assist Mr. Forrest when he saw a man running from where Mr. Forrest's car was parked. The man ran past him, got into his (Mr. Burt's) bus and turned the key in the ignition in an attempt to drive away the bus. Mr. Burt followed and tried to prevent the man from starting the bus. Upon realising that he would not succeed in driving away the bus, the man then jumped out of the bus and ran away. Mr. Burt raised an alarm and started to chase him. The man was eventually caught by an angry mob and subsequently arrested and charged. Mr. Burt identified this man as

Shanor Bertram. Significantly, Mr. Burt did not recall seeing the accused Shanor Bertram in possession of a gun.

5. None of these witnesses identified the appellant as one of the men at the scene of the shooting. However, as we shall shortly see, it appears that at some point on the day in question, the appellant had driven the white Toyota Corolla motor car that was at the scene of the shooting.

6. Constable Rose of the Green Island Police Station in Lucea, Hanover gave evidence that on the day in question, the appellant was one of two men who had come to the station shortly after the incident to report an accident that had happened on the Norman Manley Boulevard in close proximity to Times Square Plaza. Constable Rose said that the appellant told him that he had been driving a white Toyota Corolla motor car. The appellant also told him that he and another man were at a location in Negril where American dollars are bought and sold and while there he heard gunshots. After the shots were fired, two men came up to him with guns and commanded him to drive the white Toyota Corolla. This he did and while driving on the Norman Manley Boulevard towards Green Island, he collided with the other driver. Constable Rose said he then called Detective Corporal Richards who was stationed at the Negril Police Station.

7. Detective Corporal Richards gave evidence that he went to the scene of the shooting where he saw Mr. Forrest lying on his back in a motor vehicle and bleeding from both hands and the chest. As a result of the information he received at the scene, he began a search for a white Toyota Corolla motor car. This search led him to the Green Island Police Station where Constable Rose, who had called him earlier handed him the keys to a white Toyota Corolla motor car registered 8967BL. After inspecting the car, Detective Richards went to the guard room where he saw the appellant who said to him:

> "Mr. Ritchie, you a good man, mek mi tell you the truth. A mi cousin Brooks carry mi go down a Negril and left me where dem shoot the man and tell mi fi drive... the car wid him friend dem, mi drive left one a di man down deh and when mi reach a Orange Bay, the other two man come out of the car."

It may therefore be said that the keys that Constable Rose had handed over to Corporal Richards were the keys that he had received from the appellant. Corporal Richards said he then took the appellant to the Negril Police Station where the appellant pointed out Shanor Bertram as being the person who had driven the white Toyota Corolla motor car to Negril.

8. Corporal Montaque of the Lucea Police Station in Hanover gave evidence that he owned a white Toyota Corolla motor car and that on the 20th of June, he had given the car to Shanor Bertram in order for him

to effect repairs to it. He said that on the 25th of June, he saw Bertram who told him that he had not carried out all the repairs on the car so the car could not be returned to him. Corporal Montague said that the next time he saw his Toyota Corolla car registered 8967BL was on the 27th of June when he went to the Negril Police Station as a result of a call he received from Corporal Richards. From the evidence of these three police officers, it can be concluded that Shanor Bertram was in possession of a white Toyota motor car that he drove to Negril. This car was later driven from the scene of the shooting by the appellant and was later handed over to the investigating officer as the car that had transported Mr. Forrest's attackers to and from the scene of the shooting.

The Defence

9. The appellant gave an unsworn statement from the dock in which he said:

> "I was at my business place when Brooks come to me and said 'Banto a want you to go with me to Negril at the Time Square.' We stop, he told me to wait for him. While I was waiting I heard explosions. Everybody run and I run. I run into two young guy, they put a gun at me and tell me to drive. They had guns in their hands I see one of my customers. I shout out for somebody to assist me. I did not want to get into any argument with them because they had guns in their hands. I see one of my cousin,

> he wash most of the time, so I drive up and go to him, touch the right side of the car."

10. The appellant filed the following grounds of appeal:

> "(a) The Learned Trial Judge erred in law, when he called on the accused to answer to the charges. The evidence adduced did not support participation on the part of the Appellant.
>
> (b) The Learned Trial Judge failed in his summation to demonstrate the basis on which he concluded that the Appellant was part and parcel of any agreement to rob the complainant."

When these grounds are examined closely, it becomes clear that the main thrust of the appeal was that there was not enough evidence from which participation in the incident could be imputed to the appellant and as a necessary consequence, the judge had failed to and could not demonstrate any basis for his conclusion. It is therefore convenient to deal with the two grounds together.

11. Counsel for the appellant argued that none of the Crown's witnesses identified the appellant as a participant in the shooting incident. The participation of the appellant had to be inferred from the circumstances viz, the appellant being in possession of the car a short while after the incident and the statements that the police officers alleged had been made by the appellant. Furthermore, the appellant had given a reasonable explanation of how he came to be in

possession of the car and how he could possibly have been at the scene of the incident. This seems to give rise to the implication that since the explanations were reasonable, they should have operated to create reasonable doubt so as to prevent the judge from being sure that the appellant was guilty. However, while it is true that a reasonable explanation may result in creating doubt, such a possibility is subject to the condition that the explanation must first be accepted as being true. In this case, the explanation given was by way of the statement that the appellant made to Constable Rose and the appellant's unsworn statement from the dock. The unsworn statement not being evidence, it was left to the learned trial judge to determine what weight he would give to it. This he did by rejecting it. Where the explanation in the statement to Constable Rose was concerned, the learned trial judge considered rightly the fact that there was an inconsistency between this statement and the unsworn statement. At page 168 of his summation, he said:

> "Mr. Rose told the attorney Mr. McLeod that he knew Lawrence for some time; he had seen him washing cars in Green Island. When he was asked- this is important - if he had deliberately hit the Nissan with his car, Mr Rose in fact thought about it and said, 'No sir, he did not say so.' Because what Mr. Lawrence is projecting, is that he did this because he had been ordered to at gun point and he had to carry out the instructions to the ultimate."

In addition, the judge considered that even though the eyewitness Mr. Burt had been observing the men when they ran back to the car, he had not mentioned seeing anything that suggested that the men had commandeered anyone into driving. Having considered that this inconsistency went to the heart of the appellant's case that any involvement was by duress and there being no reasonable explanation for the inconsistency, the judge was entitled to reject the explanation given by the appellant, which he did. The result of rejecting this explanation was that in the absence of any further evidence to reasonably explain his presence at the scene as being accidental, the Judge was left with the Prosecution's evidence.

12. The question which must now be answered is whether on the Prosecution's case, there was sufficient evidence from which it could reasonably be inferred that not only was the appellant at the scene of the accident but that he was a participant in the shooting or to use the learned trial judge's words, 'part and parcel' of any agreement to commit the offence. This necessitated that the learned trial judge first satisfy himself that the events that the eyewitnesses had alleged had in fact taken place. Counsel for the appellant argued that the evidence of the complainant, Mr. Forrest conflicted in a material particular with the evidence of the eyewitness, Mr. Burt with the result that the

evidence was unreliable. With respect to Mr. Forrest's evidence, the learned trial judge said:

> "The man with the gun is not somebody he knew, he had never seen him before but he insisted that the man with the gun is the same person who came and asked him to change the money. I shall come in a little while to the testimony of a Mr. Burt, who drove a Toyota Hiace bus out at the location, no doubt waiting for passengers as well, but certainly parked at the location.
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> Mr. Burt's testimony is that the man, when he saw this accused Bertram, and Burt has good reason to say that because Shanor Bertram was pursued by him in circumstances, and held, but Bertram did not have a gun. Mr. Forrest seems to have had a little difficulty here, more than a little difficulty, but eventually he said that Bertram was the man who had come to him."

Later he said:

> "Mr. Forrest could not remember how long he remained in hospital, might have been ten days. So it was suggested to him that he told this to the police. He said he didn't remember telling the police that. So the fact that he did not remember, could this account for the limitation of his memory recalling several instances? Because he said that –to use his words, he does not remember where he put down things after this incident."

It is worth noting that the fact that the witness Mr. Burt did not see Shanor Bertram holding a gun does not automatically give rise to the conclusion that Bertram did not shoot Mr. Forrest because from Mr. Burt's evidence, he did not see the person who fired the first shot. It is therefore possible

that Bertram could have fired the first shot and handed over the gun to the man Mr. Burt saw standing over Mr. Forrest with the gun. Thus, what may have been regarded as a discrepancy may at best only have been an apparent discrepancy. Be that as it may however, the above passage clearly demonstrates the learned trial judge's opinion that there were discrepancies between the evidence of the main witness and the eyewitness and his approach to dealing with this issue. It may be said that implicit in this section of the summing up was an acceptance by the learned trial judge that the permanent effects of being shot was a good explanation of why Mr. Forrest was unable to remember all the details. Having considered this as being a good explanation, the learned trial judge then considered the evidence of Mr. Burt, the eyewitness, before coming to the conclusion that the discrepancies were not of a material nature so as to leave reasonable doubt as to whether or not the shooting incident had occurred. He said:

> "There can be no doubt that from Burt's testimony that Mr. Forrest received injury from a firearm at that location and came from somebody who must have come out of the car."

In view of the fact that Mr. Forrest had given evidence that he had been shot in the head behind the ear and this had affected his memory, we do not see any reason to disagree with the learned trial judge's conclusion that the apparent discrepancy was explainable. In any

event, even if the evidence of Mr. Forrest had been rejected, the learned trial judge was still left with the evidence of Mr. Burt in respect of whom there was no basis upon which the credibility or reliability of this account could be impugned.

13. Having satisfied himself that the shooting incident had occurred, the learned trial judge then went on to consider the evidence as to whether the appellant was at the scene and a participant in the crime. The evidence given by Detective Corporal Richards, if accepted, was damning since unlike what the appellant had asserted in his unsworn statement and his statement to Constable Rose, at the very least the appellant admitted that he had not been at the scene of the incident by chance and that he had not been commandeered to drive the motor car from the scene. This evidence was bolstered by the fact that the appellant was found driving the car and that he was able to point out Shanor Bertram as the man who had driven the car to Negril. This was cogent evidence from which the inference could be drawn that the appellant had, at the very least, assisted Mr. Forrest's attackers in their escape.

14. However, this inference did not automatically lead to the conclusion or inference that the appellant was part of the agreement to commit the offences he was charged with. For, having found that the appellant was part of an agreement with respect to some activity that

should have taken place at Times Square Plaza that day, it could be argued, as it was by Counsel for the appellant, that the wounding of Mr. Forrest was outside what Mr. Lawrence had agreed to do. Counsel for the appellant argued that the learned trial judge had only recited the evidence and had failed to demonstrate the basis for his conclusion that the appellant agreed to the wounding of Mr. Forrest. In dealing with this aspect the learned trial judge at page 194 of the summation said:

> "Now, it can be that sometimes a person goes beyond what is agreed upon. Now, is this injury something that was outside of the agreement in which Mr. Bertram was involved, to rob? When persons use instruments of this sort, the use of a firearm has with it a certain calculated risk in a hold up; but this was a deliberate shooting. Did it go beyond what was agreed tacitly, to rob or attempt to rob? I say, no, it was an agreement that on the basis of the use of force and that having a firearm- ..."

The learned trial judge then went on to consider s20 (5) of the Firearms Act.

15. In our view the learned trial judge erred in concluding that there was an agreement to rob, for as he had reminded himself earlier in his summation, Mr. Burt had said that he had not seen anybody take any money from Mr. Forrest. In addition, Mr. Forrest did not give any evidence that he had been robbed. There was therefore no evidence that money had been taken nor was there sufficient circumstantial evidence from which it could be inferred beyond reasonable doubt that

there was an intention to rob. However, this being an offence that was committed with the use of a gun, we agree with the learned trial judge's approach in considering section 20(5) of the Firearms Act which reads:

> "In any prosecution for an offence under this section-
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> (a) any person who is in the company of someone who uses or attempts to use a firearm to commit —
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> (i) any felony; or
>
> (ii) any offence involving either an assault or the resisting of lawful apprehension of any person,
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> shall, if the circumstances give rise to a reasonable presumption that he was present to aid or abet the commission of the felony or offence aforesaid, be treated, in the absence of reasonable excuse, as being also in possession of the firearm."

In ***R v Clovis Patterson*** S.C.C.A. No. 81/04 (delivered on April 20, 2007) this Court held that under section 20(5), before an accused companion may be called on to answer a charge of illegal possession of firearm, it must be shown that the principal offender used the firearm to commit a specified offence and that the presence of the accused was non-accidental thereby giving rise to the presumption that the accused was there to aid and abet the commission of the specified offence. And in such circumstances, in the absence of reasonable excuse, the companion should be treated as also in possession of the firearm. So then the result of applying this section is that the appellant's non-accidental presence at the scene in the company of the principal offenders gave rise to the

presumption that he was present to aid and abet the commission of the offence and in the absence of reasonable excuse, the judge was entitled to treat him as being in possession of the illegal firearm and to find him guilty as charged inspite of the prosecution's inability to adduce evidence of common design and joint enterprise.

16. Therefore, even if the learned trial judge had failed to adequately demonstrate the process by which he arrived at his decision, we are of the view that there was sufficient evidence from which he could have concluded that the appellant was guilty of illegal possession of firearm and wounding with intent. Accordingly, as stated at the outset the convictions and sentences in respect of Counts One and Two were affirmed. However, for the reasons given above with respect to insufficient evidence, the conviction relating to the charge of robbery with aggravation, that is Count Three, was quashed and the sentence thereon set aside. The sentences on Counts One and Two should commence as of the 10th January 2006.