

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 123 & 126/97

**BEFORE: THE HON. MR. JUSTICE FORTE, P
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE PANTON, J.A.**

***REGINA vs.
AUDLEY CAMERON
ORAL THOMPSON***

**Dennis Morrison, Q.C., and Maurice Saunders
for the applicant Thompson**

Miss Paula Llewellyn and Donald Bryan for the Crown

Applicant Cameron unrepresented

October 4 and December 20, 1999

HARRISON, J.A.:

These are applications for leave to appeal from the convictions of illegal possession of firearm - count one, and illegal possession of ammunition - count two, in the High Court Division of the Gun Court on September 23, 1997, when the applicants were sentenced to terms of imprisonment of seven years and five years respectively, to run concurrently. At the hearing on October 4, 1999, in respect of the applicant Thompson, on

count one, we dismissed his application for leave to appeal and confirmed the conviction and sentence; on count two, we treated his application for leave as an appeal, allowed his appeal and quashed the convictions and sentences thereon. In respect of the applicant Cameron, we refused his application for leave to appeal and confirmed his convictions and sentences. We ordered further that the sentences should commence as from December 23, 1997. As promised, we now put our reasons in writing.

The relevant facts are that on November 30, 1996, at about 11:00 a.m. Constables Walker and Robinson and two other police officers were on the Hermitage Road in the August Town area of St. Andrew checking motor vehicles. Constable Walker signalled a white motor car coming from the August Town direction to stop; it did, having passed them. The driver, the applicant Thompson, came out from the right side and came towards the back of the car. There he was searched by Constable Walker who then went to the left side of the car and told the applicant Cameron, who was still sitting in the left front passenger seat of the car, to come out; he did. Constable Walker searched the applicant Cameron and from his right front pants pocket he took a plastic bag containing eight 9mm cartridges. Asked where he got them from, the applicant Cameron said, "Officer, mi find them a mi gate and mi have them fe give mi police friend." Constable Walker then searched the trunk of the car but found nothing. He thereafter searched the front of the car and saw lying in the area of the hand-brake between the two front seats a .38 Smith & Wesson revolver, with five live cartridges. When

asked, both men said that they had no firearm user's licence nor permit. Constable Walker arrested and charged both men for illegal possession of the firearm and ammunition; cautioned, each said, "Officer, mi nuh know nothing bout no gun."

The applicant Thompson, giving evidence, stated that he was an auto mechanic and while driving from August Town on the said date, he took up as a passenger the applicant Cameron, whom he did not know before, and reaching onto the Mona Road he was stopped by policemen who searched him and the car. He said that at the August Town Police Station the police showed him the firearm and ammunition and told him in the applicant Cameron's presence that they had found them in the car. He denied that he placed or saw the said firearm and ammunition in the car before he came out and went to the police, neither did he know that the applicant Cameron had such articles. Furthermore, the car belonged to a customer of the garage where he worked and he had cleaned out the car and saw no firearm in it. He could not explain how the firearm got into the car.

The applicant Cameron also gave evidence of having been a passenger in the car driven by Thompson, who stopped the car at the signal of the police officer. The applicant Thompson, when asked for his papers, came out of the car and spoke to the police officer. He, Cameron, remained in the car counting money, and then came out when a gun was pointed at him and he was told to do so. He was searched and his jewellery taken from him. No ammunition was taken from him, nor was any firearm found in the

said motor car. He first heard of the finding of the firearm after he was taken along with Thompson to the August Town Police Station, and learnt of the finding of ammunition on him, on his appearance before the Court. He denied that he had any ammunition and denied that he had seen any gun in the said motor car.

Mr. Morrison, Q.C., for the applicant Thompson, argued three of the supplementary grounds filed:

- (1) The evidence, as led, was insufficient to establish possession in the applicant Thompson, namely:
 - (a) the firearm found between the two seats, and
 - (b) ammunition found in possession of Cameron.
- (2) The learned trial judge failed to give sufficient consideration to the rule applicable to circumstantial evidence.
- (3) The learned trial judge was not correct in drawing an inference unfavourable to the applicant Thompson from his failure when charged and cautioned at the police station to retort that it was Cameron who had the firearm.

In support of ground 1, Mr. Morrison, argued that the evidence led revealed that when the firearm was found the applicant Thompson had already left the motor car and the applicant Cameron had remained. Therefore, there was no sufficient evidence to find that the applicant Thompson was in possession of the firearm and the ammunition found on the applicant Cameron.

The prosecution witness, Constable Walker, having given evidence that the other police officers were "behind me giving coverage" when he searched the applicant Thompson and that Constable Robinson went to the left side of the car, was cross-examined further by counsel for the applicant Cameron, at page 19 of the notes of evidence:

"Q: And having met Oral Thompson you proceeded to search him?

A: Yes, ma'am.

Q: At that time Robinson was at the left side?

A: Yes.

Q: Where was Acting Corporal Hall?

A: He was to the side.

Q: Which side?

A: The left side.

Q: Along with Robinson. And Wray, where was he?

A: He was further down to the back.

Q: So in fact it was Wray who was covering you?

A: All three officers were giving coverage.

Q: But Robinson and Hall were at the left side of the vehicle, to the front?

A: Yes.

Q: And during that time - so they were both at where the front passenger is to the left side?

A: Yes."

The other prosecution witness, Constable Robinson, gave evidence of seeing the applicant Thompson being searched by Constable Walker at the back of the car. He was cross-examined by counsel for the applicant Thompson. The text reads, on page 30:

"Q: Is it that you were along with Walker concentrating on what was happening in the front of the vehicle?

A: Yes, sir."

He was cross-examined also by counsel for the applicant Cameron, page 36:

"MISS BROWN: You could see how many people were in the vehicle?

CONS. ROBINSON: Yes, ma'am.

Q: Even though the driver had come out, you know that there was another person in the vehicle?

A: Yes, ma'am.

Q: And the four of you were outside, one of you searching Thompson and nobody went around to deal with whoever might have been in the vehicle, is that what you are telling me?

A: We were actually covering Constable Walker.

Q: So Constable Walker was being covered, but there were three of you apart from Constable Walker?

A: Yes, ma'am.

Q: And all of you were covering him and none of you had any concern for the passenger?

A: We were paying attention as well, understand ma'am.

Q: Paying attention?

A: Yes, ma'am.

Q: To what?

A: To the car and the occupants."

and at page 37:

Q: What I am saying to you is that you have told us that at that time Walker was searching Thompson, you were with Walker, yes?

A: I was the nearest person to him.

Q: Nearest person to him. Exactly where were you?

A: He was - actually he searched Thompson at the rear of the vehicle.

Q: Thompson and he are at the rear of the vehicle, you are arms length from Walker in which direction?

A: To the left of the vehicle.

CONS. ROBINSON: To the left also of the vehicle.

MISS BROWN: Didn't you say they were behind him?

A: Yes, ma'am to the left.

Q: Behind, that means Constable Walker, Oral Thompson and yourself are between those two police officers and the vehicle?

A: That is correct.

Q: And any occupants that might be in this vehicle?

A: That is correct.

Q: So how can they be observing or covering or paying any attention to the occupants of the vehicle at the time that Oral Thompson is being searched?

A: It is easy, there was only one vehicle at that time.

Q: So they were covering the occupants of the vehicle in that position?

A: Yes, ma'am."

On this evidence, the learned trial judge could find that the police officers had the occupants of the said motor vehicle under observation in their full view, in such a manner to exclude any activity on the part of the applicant Cameron to suggest that the firearm was elsewhere when the applicant left the vehicle, other than where it was found by Constable Walker.

Possession in the criminal law is custody or control coupled with knowledge of the thing in one's possession. (See *R. v. Wishart Brooks* [1974] A.C. 862; *R. v. Bernal and Moore* [1997] 51 W.I.R. 241). There was, therefore, ample evidence on which the learned trial judge could find, as he did, that both the applicants Thompson and Cameron were in illegal possession of the firearm.

Furthermore, the driver of a motor vehicle in which a firearm is found is presumed to be in possession of that firearm, under the provisions of the

Firearms Act, section 20. An evidential burden is then placed on such a driver to give a reasonable explanation of its possession. Section 20(5)(b) reads:

"(5) In any prosecution for an offence under this section--

...

(b) any person who is proved to have in his possession or under his control any vehicle or other thing in or on which is found any firearm shall, in the absence of a reasonable explanation, be deemed to have in his possession such firearm;"

Miss Llewellyn for the prosecution submitted that because of the evidential burden placed on the applicant it would be wrong to invite the learned trial judge to speculate as to whether or not the applicant Cameron could have placed the firearm where it was found by Constable Walker.

When the law places an evidential burden on an accused person, then, in order to discharge it he needs only to lead the appropriate evidence to establish such a fact on a balance of probabilities. By the operation of the provisions of section 20(5)(b), the presumption arose that the applicant Thompson being the driver of the motor car was in possession of the firearm, in the absence of a reasonable explanation. It was, therefore, incumbent on the said applicant to establish by evidence by what means the said firearm came to be in the motor vehicle. On the contrary, the evidence of the applicant Thompson was a clear denial that he saw when a firearm was found in the said motor car. He said that he did not know that the applicant Cameron had any ammunition on him, nor had he seen or placed any

firearm or ammunition in the car. He was then asked, in examination-in-chief, on page 62:

“Q: Are you in a position to say how - would you be in a position to explain at all how this firearm that Constable Walker said he found in the car, how it got there if it got there at all?

A: No, sir, never see any firearm.”

Having denied that he saw a firearm, in view of the fact that the learned trial judge found as a fact that a firearm was found in the car, the learned trial judge was correct in finding that the applicant had failed to discharge the evidential burden placed upon him under the provisions of section 20(5)(b) of the said Act. For this reason also we found no merit in ground 1.

In support of his arguments on ground 2, Mr. Morrison, submitted that from the nature of the evidence that the applicant Cameron remained in the car after the applicant Thompson had left the car, the evidence against the applicant Thompson was not inconsistent with a rational explanation of the finding of the firearm which would have exculpated him, namely, that the applicant Cameron had placed the firearm there after the applicant Thompson had left the car. Counsel was here adverting to the guiding principle by which the learned trial judge should be guided in considering circumstantial evidence.

The proper consideration of circumstantial evidence is governed by the rule in *Hodge's* case (1838) 2 Law CC 227, namely, that the tribunal or

jury must decide not only whether the facts are consistent with the guilt of the accused but also "whether they are inconsistent with any other rational conclusion, for it is only on the lost hypothesis that they can safely convict the accused." In **Bernal and Moore v. R.** (1996) 50 W.I.R. 296, Forte, J.A. (as he then was) in examining the approach to such evidence said, at page 313:

"...it is settled practice in Jamaica for the directions as given in **Hodge's** case to be given to the jury. This is not so in England, as the **McGreevy** case shows. But even though there is a difference in the manner in which the jury is directed to approach this type of evidence, there is really no difference in the manner in which a conclusion of guilt may be drawn from circumstantial evidence."

This observation followed a reference to the words of Kerr, J.A. in **Edwards v. R.** (1983) S.C.C.A. No 32/83 delivered on the 16th December, 1983 unreported, who said:

"The approach in this country is not the same as in England. Speaking for myself, it would seem that if the circumstantial evidence must point indubitably to the guilt of the accused then impliedly if it points to any other reasonable conclusion it would not meet the test; nor do I think that to tell a jury of laymen that it must be 'inconsistent with any other rational hypothesis' is clarifying or edifying. Be that as it may, the rule in **Hodge's** case is so firmly established here that trial judges are well advised to adhere to the formula, thereby obviating the risk of the directions on this question being made grounds of appeal."

In the instant case, the learned trial judge, sitting without a jury, having examined the evidence, in expressing his findings, said at page 15:

"...this was a classic case of possession, joint possession and the case came about by one accused in the company of the other."

He stated that he accepted the evidence of the police officers as truthful, rejected the defence, and continued, on page 16:

"Now, the place that this firearm was found is a place that is easily seen by the driver of the car for that is where the hand-brake is and the Officer, Constable Walker says there was nothing to hide it, it was in plain view."

The learned trial judge concluded, on page 17:

"I find that both men were concerned with this gun; that Thompson knew that the gun was there, that he had control and possession of it ..."

It is desirable that a trial judge sitting without a jury demonstrates in his findings that he considered the relevant rules in his treatment of the evidence: (*R. v. Cameron* (1989) 26 J.L.R. 453). However, if from his findings, it can be discerned that despite the absence of such an indication in his reasons on the printed record, he must have taken the relevant directions into consideration, an appellate court will invariably hold that the deficiency is not fatal.

The learned trial judge, in the instant case, referred specifically to the evidence of the applicant Thompson that he did not see any firearm in the car before he left the car and that he Thompson had cleaned out the car the very morning and he saw no firearm in it. Having rejected that defence of the applicant Thompson and found as a fact that the firearm was found in the car "in plain view", there was no room for any inference consistent with

innocence. This is so moreso because of the said deeming provisions of possession in the driver, applicant Thompson, arising under section 20(5)(b) of the Act.

In *Bernal & Moore v. R.* (supra), where the complaint was that the learned Resident Magistrate did not take into consideration certain facts and thereby failed to apply properly the rule in *Hodge's* case (supra), Forte, J.A said at page 314:

"In the instant case, there was of course no lay jury, the resident magistrate exercising the functions of judge not only in applying the law, but in finding of the facts upon which to found his verdict. There was no necessity therefore for the specific express directions, and one has only to look at his findings to determine whether, in coming to his conclusions, he demonstrated by what he said that he applied the principles in relation to circumstantial evidence."

We found no merit in ground 2.

Finally, in support of ground 3, Mr. Morrison, argued that the learned trial judge had no legal basis in drawing any inference adverse to the applicant Thompson from his failure to protest when charged that the firearm was placed there by his co-accused the applicant Cameron.

We agree with counsel that an accused person is not required to reveal his defence, when charged with an offence. The learned trial judge said, at page 16:

"Now, why do I say that I don't believe the accused Thompson when he says he knows nothing about the gun? First thing; if or when he was confronted about this gun and Cameron was taken he never said anything to Cameron, say

Cameron, a mus you put this gun in the car man because I never have any gun in the car and you are the only man I pick up there. One would have thought that that was a reasonable reaction, it would be a spontaneous reaction, but he did not do that, because the evidence is that the morning he had cleaned out the car."

Insofar as the learned trial judge considered this non-response of the applicant Thompson to amount to an inference, he could draw to ground possession, he was in error. We did not, however, consider that this particular treatment of the evidence by the learned trial judge was in any way material to diminish or affect the other evidence of possession in the case. We hold that this ground also fails.

The applicant Thompson was convicted on count 2 for possession of ammunition. The finding of the learned trial judge revealed that it was based on the possession in the co-applicant Cameron, "...joint possession...in the company of each other." The learned trial judge said of the applicant Thompson, at page 17:

"...he...knew that his passenger, the other man had these ammunition, rounds of ammunition in his pocket. They were designed to use, to be used in that gun."

We are of the view that in the circumstances of this case this is a finding based on common design that he could not properly have made. Miss Llewellyn for the Crown conceded that she could not support this aspect of the conviction.

For the above reasons, we made the orders earlier referred to.