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JAMAICA

IN THE COURT OF APPEAL.

SUPREME COURT CRIMINAL APPEALS NOS. 9/80 & 10/80.

BEFORE: THE HON. MR. JUSTICE CARBERRY, J.A.
THE HON. MR. JUSTICE ROSS, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A. (AG.)

REGINA

VS.

BARRINGTON SMITH

AND

ROBERT JOBSON

Mr. Ian Ramsay for the applicant Smith

Mr. Pantry for the Crown.

September 22, 23, 24, 25, and 30;
October 28, 1981.

CARBERRY, J.A.:

In this matter we heard arguments on the 22nd, 23rd, 24th and 25th of September, 1981, and on Wednesday, 30th September, 1981, we announced our decision. Both appeals were dismissed, convictions and sentences affirmed, sentences to run from the 10th of April, 1980, being the customary three months after the date of conviction on 10th January, 1980. We promised to put our reasons in writing at a later date and we do so now.

The accused Barrington Smith and Robert Jobson were tried at the Gun Court on the 9th and 10th of January, 1980, on a charge of unlawfully having in their possession a .38 Cobra Colt Revolver. They were convicted on that charge and applied for and received leave to appeal. The facts out of which the charge against them arose are set out shortly below.

On Wednesday, the 18th of April, 1979, a Bedford truck, KK153, owned by one Sherman Coleman and driven by the accused

Barrington Smith with the accused Robert Jobson sitting in front with him and a third man in the body of the truck (whose name is unknown since he was never caught) was stopped along the Spanish Town Highway near the Salt Factory by two policemen in a police radio car. The time was about 3 o'clock in the afternoon and it appears that the interception was the result of a message received over the police radio transmission. The driver of the police car was Constable Desmond Edge (since promoted to Corporal) and he was accompanied by Constable Joshua Grant.

At the trial only Corporal Edge gave evidence for the Crown. It appears from the notes that Constable Grant had been present on previous occasions when the case came up for trial but was absent on this occasion and the Crown elected to close their case without his evidence. Thus the conviction rests on the evidence of one witness only.

Edge's evidence was to the effect that the driver of the truck attempted to evade capture and that when the truck was finally brought to a stop the driver (Smith) and the man in the front (Jobson) and the third unknown person in the rear of the truck all jumped out and fled. The two policemen gave chase: Edge caught the driver (Smith) while Grant caught the accused (Jobson), the other man made a successful escape. Edge testified that having held both accused he took them back to the cab of the truck, locked inside the open door and saw the firearm in question resting on the seat mid-way between where both accused had been sitting. Edge testified that he <u>then</u> asked first Smith and then Jobson how or why the gun was on the seat. Each replied in identical words, "I was just helping out a man". Edge also testified that he found a walkie-talkie in the cab of the truck and that in the back of the truck he found a full truck load of 'vegetable matter' resembling ganja - contained in thirty-seven crocus bags. After showing the two accused the gun Edge states that he arrested and cautioned the men for illegal possession of the firearm. Smith replied that he was just helping out Sherman and Jobson

made no reply at all.

It appears from the rest of the evidence that this version given in-chief telescoped what happened. This may have been due to the fact that Crown counsel was at first hesitant in introducing into the case the fact that the accused had been transporting a truck load of ganja. He seems to have thought this was another offence on which they were not at present charged and which might prejudice their trial for illegal possession of the firearm, but he decided eventually to bring this fact out in part as it related indirectly to the possession of the gun, the Crown's case being in effect that the gun was present in the cab of the truck to enable the driver and his aide to protect the ganja which they were carrying. The defence on its part was anxious to bring out the fact that a truck load of ganja was being carried, this being an integral part of their defence in that it both explained why the two accused had run when their truck was stopped by the police and it also explained why the gun was in the truck at all. The defence offered unchallenged evidence that the firearm was a licensed firearm belonging to the owner of the truck, Mr. Sherman Coleman, and Corporal Edge admitted that on the day in question he had seen Mr. Coleman driving in a car behind the truck. Coleman however was not stopped or taken into custody on that occasion. He just drove past when the truck was held. No doubt the police did not then realize his connection with the gun or the ganja.

I have referred to the telescoping of events. It appears, according to Edge's evidence that after the truck was stopped and the gun and ganja found the accused were taken to the Central Village Police Station.

His evidence omits mention of the truck being unloaded and it omits to mention whether the two accused were challenged with regard to the ganja. These omissions are not his fault. The Crown was concentrating on the firearm case.

Edge's evidence is that they were arrested with respect to both the gun and the ganja and cautioned. It appears therefore on

this version that there were two occasions on which, the accused were questioned and either replied or made no reply:

(a) when the gun was first found after they had been chased and held; and

(b) when they were formally arrested, charged and cautioned, which probably took place at the station.

The defence case, except upon two important points, admitted most of the evidence given for the Crown by Corporal Edge.

Mr. Coleman came to Court and testified on behalf of the defence, that he was the owner of this truck, and also the licensed owner of this gun. That on the day in question he had gone to Colbeck, a small village in the hills of St. Catherine, to purchase this truck load of ganja. He had engaged Smith and Jobson to drive the truck. He had taken his gun with him for protection and his evidence was to the effect that while standing in the back of the truck purchasing the ganja he had taken the gun from out of his waist and put it down on a ledge in the truck and that after he had bought what he considered a sufficient load of ganja (he claimed that this was his first such venture) he had closed up business, told the truck man to drive off and jumped into his car and followed it, having accidentally forgotten to retrieve his gun which he had left in the back of the truck.

The two accused gave evidence that they had been engaged to bring in the ganja and had seen Coleman with a gun in his waist at Colbeck. They had not known that the gun was on the truck. They denied that it was on the seat in the cab and they claimed that while the truck was being unloaded at Central Village Police Station they had heard an unidentified voice declare that a gun had been found in the back of the truck with the ganja. They strenuously denied that the gun was in the cab and that the police had ever questioned them about the gun in the cab at the scene of their capture on the road. They said that they only heard of the gun later when the ganja was being unloaded and they denied the remarks attributed to them about

helping out a friend or Mr. Coleman. Their original apprehension according to the defence related only to the ganja, they were asked on the road if it was ganja and admitted it was.

On the face of it then we have a situation in which the two accused are held while transporting a truck load of ganja; a gun is found on the truck; both the truck and the gun are licensed and both belong to the defence witness Coleman who was driving closely behind the truck. The crucial point at issue is <u>where was the gun found?</u> Was it found on the driving seat in the cab of the truck between both men? - which would lead to an inference that they were in possession of it and that it had been given or lent to them by the licensed owner to protect their precious cargo; or was it found in the back of the truck? - which would support the inference that the owner had inadvertently left it there while he was conducting his risky and illegal purchase of ganja? A subsidiary issue that arose was whether the remarks attributed to the two accused were made in response to questions about the gun, in which case they might constitute admissions as to the possession of the gun; or if made, (which was denied), were they made in response to questions about the ganja which they were admittedly carrying?

Viewing the case as a whole it cannot be denied that the defence was plausible and possibly even "reasonable". It was strenuously urged upon us that had there indeed been a gun on the seat of the truck the accused would not have fled leaving it behind but would at least have taken it with them and tried to throw it away. Unfortunately for the accused these were really arguments to be urged in the Court below. They relate to questions of fact. The Firearms Act and the Gun Court Act have made the determination of questions of fact the prerogative of the High Court judge who sits in that Court without the assistance of a jury.

As to the subsidiary issue of fact that arose with respect to the remarks of the two accused, as is customary at the Gun Court, there is no preliminary examination but the defence is furnished

with a copy of the police statements in lieu of the depositions which they would ordinarily have had.

Very late in this appeal we were asked to look at the police statement of Corporal Edge. That statement sets out his chase and capture of the truck, his taking the two accused back to the cab and finding the gun on the seat, but it does not at that stage set out that he put any question to the accused about the gun or received any reply from them about it. Edge's statement continued simply that he then looked into the back of the truck and saw the crocus bags containing ganja and it says "I pointed out this to both men and told them the same was ganja, they made no statement". Edge's statement then continued that he arrested and charged both men for illegal possession of the firearm, and the ammunition in it, and for possession and trafficking in ganja. The statement then reports: "They were cautioned separately. They made no statement". It will be seen from what had been said above that though in his <u>oral</u> evidence in Court Corporal Edge had said that there were two occasions on which he questioned the accused and elicited responses. His evidence and the statement indicate that there may have been three such occasions:

(a) when he questioned both about the gun when he first found it;

(b) when he questioned them about the ganja; and

(c) when he finally arrested and cautioned them.

In his oral evidence he reported them as making admissions on occasions (a) and (c). His police statement clearly contradicts him as to Smith on occasion (c) and inferentially as to (a) and (b) because the statement has them making no statement whatever on any occasion save as to the ganja. However the statement omits any mention of questioning them about the gun, that is occasion (a), and as to this it may be an omission - not a contradiction.

In the Court below he was cross-examined as to the remarks he attributed to the accused and he admitted that his statement contained no mention about the questions he put and the answers they made about the gun, and he admitted that nowhere in the statement was there any mention made of any remarks having been made by the accused.

We have therefore a contradiction between Edge's statement and his evidence as to occasion (c), with respect to Smith, that is the responses made after the formal arrest and caution and an omission or potential contradiction as to occasion (a) as to which the statement was silent. Unfortunately, in the cross-examination that was conducted in the Court below though it established that these responses did not appear in the statement, the cross-examination was inconclusive and though it did advert to a contradiction re (c) it did not establish any clear contradiction as to occasion (a).

The learned trial judge accepted Edge's evidence and found as a fact that the gun was on the seat of the cab and he rejected the evidence of Mr. Coleman that he had forgotten it in the back of the truck as being wholly untruthful. He therefore convicted the accused.

Before us it has been argued that the conviction should be set aside and that in effect much of Mr. Coleman's evidence is clearly true and was accepted by both sides, and that his evidence that he had forgotten his gun in the back of the truck should have been accepted also.

Section 20 subsection (5)(b) of The Firearms Act imposes on 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 the onus of providing a reasonable explanation failing which he should be deemed to have possession of a firearm. It was conceded in argument by Mr. Ramsay that a "reasonable explanation" must be one which either convinces the trial judge or at least raises a reasonable

doubt in his mind. From the reasons for judgment given it is clear the explanation in this case did not do either of these things. It is possible that a different judge might have reached a different conclusion and might have accepted the explanation or found that it raised a reasonable doubt but that possibility would not per se justify us in upsetting this conviction. The learned trial judge here saw and heard the witnesses. He rejected the explanation and it raised no reasonable doubt in his mind. To upset his conclusion, it must I think be established that he acted on some wrong principle of law, or misapprehended the facts, or for these or other reasons this Court must be convinced that the judge's finding was clearly wrong.

We were pressed with some recent cases in which material differences between a Crown witness' oral evidence and his original statements to the police have been discovered after conviction, when the defence having seen the police statements for the first time, have pointed out that the differences were such as to nullify the oral evidence and lead the Court of Appeal to quash the conviction or order a new trial. See for example The State vs. Lloyd Harris (1974) 22 W.I.R. p. 41; The State v. Nasrat Ali (1978) 26 W.I.R. p. 99 and also see our own local cases such as Glenford Pusey (1970) 12 J.L.R. p. 243 and Lindell Grant and Leslie Hewitt (1971) 12 J.L.R. p. 585. These however are cases involving the duty of prosecuting counsel to bring to the notice of the Court or the defence serious inconsistencies between a Crown witness' oral evidence in Court and his original statement to the police. They are a peculiar variant of cases of applications to call fresh evidence. The discrepancies have been fundamental and most often involved questions of identification and comparison of the witness' original statement to the police with his oral evidence in Court. This however is not such a case nor can these cases be prayed in aid for two simple reasons: (a) that the police statements here were already in the possession of the defence counsel at the time the original trial was being conducted and this is not material

unavailable below; and (b) that the contradiction or inconsistency here was not fundamental. It would be only in the most exceptional circumstances that a counsel's failure to make full use of his material for cross-examination in the Court below could furnish any proper occasion for setting aside a conviction on that score. Here the inconsistencies and contradictions between Corporal Edge's oral evidence and his police statement were in fact canvassed even though this might not have been done as adequately as it might have been done by more experienced counsel. It is true that the judge relied on the implied admission made by the accused when questioned about the gun but he was fully aware that this evidence was being put forward for the first time in Court and was not contained in the original police statement. The trial judge had already found the primary fact, that the gun was on the seat of the cab and relied on the statement only to support that finding.

Further, in view of the express provisions of the Firearms Act, that line of cases which prescribes that if you do not know which of two accused committed an offence but that only one did so then you ought to acquit both (in the absence of evidence showing common design) does not here arise. In any event there was admittedly a common design to transport this ganja and once the fact that the gun was on the seat of the cab was accepted by the Court, there was room for an inference that there was a common design to protect the cargo, and that the firearm was on the seat available to both accused for that purpose and in the possession of both.

The appeal of both appellants was therefore dismissed.