

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 165, 166 & 170/77

BEFORE: THE HON. MR. JUSTICE HENRY, J.A. - PRESIDING  
THE HON. MR. JUSTICE KERR, J.A.  
THE HON. MR. JUSTICE CARBERRY, J.A.

REGINA

vs.

BRUCE REID  
WAYNE REID  
WAYNEWORTH HARVEY

Miss M. Stewart for the Applicants Bruce Reid  
and Wayneworth Harvey

Mr. B. Macaulay. Q.C., amicus curiae

Mr. Smellie for Crown.

October 5; December 13, 1978

KERR, J.A.

These applications for leave to appeal were heard on the 5th October, 1978, when the application of Wayne Reid was refused and judgment reserved on the applications of Bruce Reid and Wayneworth Harvey.

The applicants were tried and convicted on July 8, 1977, in the High Court Division of the Gun Court by the Chief Justice sitting without a jury. They were jointly charged on an indictment with -

- Illegal Possession of Firearm. - Count 1.
- Illegal Possession of ammunition. - Count 2.
- Shop breaking with intent. - Count 3.
- Shooting at Derrick Hart with intent to cause greivous bodily harm. - Count 4.

The learned Chief Justice convicted Wayne Reid on all four Counts - and both Bruce Reid and Wayneworth Harvey on Counts 1 and 3 and acquitted them on Counts 2 and 4.

The case for the prosecution briefly was that Constable Derrick Hart on April 10, 1977, while at the Cross Roads Police Station at about 10.15 p.m., received certain information and as a result went to the Grocery and Bar Shop Premises of Daniel Lee at No. 15 Retirement Road, Cross Roads. He saw light inside the shop and heard sounds from the roof. He went to the back of the shop and looking up he saw a man on the roof. He called out "Police what are you doing up there". The man then drew a gun from his waist and fired at Hart. Hart who had dodged behind a tree returned the fire. The man jumped to the ground and Hart's second shot felled him. This was Wayne Reid and from his hand the Constable took a .32 automatic pistol which then had in 5 live rounds. He took him to the Police Car which was parked in front of the shop and hand-cuffed him to the back seat. In response to his calls by radio other policemen came in about 10 minutes. It was then that Bruce Reid was seen coming from the shop and was held. Hart then observed a hole in the roof and heard movements in the shop. Although a side door was opened the main door giving access to the shop proper was intact so Hart climbed on the roof. There on the roof and crouching by a column near to the hole was the accused Wayneworth Harvey. Daniel Lee, the owner on the Saturday April 9, had locked up his shop about 6 p.m., and left with his keys. On his return on Monday April 11, about 8 a.m.,

Bruce Reid on Count 2 is not made out. I don't regard it as joint possession. I regard the possession of the firearm as a possession by association",

and later:-

"As regards the accused Harvey, I believe the officer and I have no doubt about his evidence. I disbelieve Mr. Harvey that he was passing coming from show, I disbelieve Mr. Harvey that he was passing coming from show, all of them said they were coming from show. I disbelieve them, and he was passing innocently and held at the gate, innocently as he ushered out the other two accused. I believe he was found on top of the roof as the police officer said and the inference is that he was involved in the breaking and entering of the shop. He was acting in concert, there was a common design in which he was involved in breaking and entering the shop. I find him guilty of shop-breaking on Count 3, and for the same reason that I have found the accused Bruce Reid guilty of illegal possession of firearm, I find the accused Harvey guilty, that is to say that he was in company with Wayne Reid in terms of the section and that he is therefore guilty by virtue of that section of illegal possession. He is also found not guilty for illegal possession of ammunition for the reasons I stated in relation to Bruce Reid and not guilty of shooting with intent for the same reason".

As regards Count 4, he gave both Bruce Reid and Wayneworth Harvey, the benefit of the doubt on the issue of common design.

The Attorney for the applicants Bruce Reid and Wayneworth Harvey was granted leave to argue the following additional ground of appeal in lieu of the original grounds in which she found no merit.

Additional Ground:-

"The learned Trial Chief Justice at page 101 of the record having given the benefit of the doubt to Bruce Reid, that he may not have known of the fact that Wayne Reid was in possession of a firearm and yet convicted him and convicted Wainworth Harvey for the same reasons, implicitly misdirected himself in law in that:-

- (a) The Standard of Proof under Section 20 (5) of the Firearms Act is not as high as that which rests on the prosecutions, but that the standard is based only on a balance of probabilities.
- (b) Having given the two applicants Bruce Reid and Wainworth Harvey the benefit of the doubt, that benefit constituted a case where guilty possession has not been proved and innocent

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possession was in doubt. In such circumstances there was reasonable excuse within Section 20 (5) of the Firearms Act".

Her submissions were founded on the following statements made by the trial judge as evidenced in two passages in the Record:-

(i) Page 93:

"In view of the provisions of the Act, if three men go to break a shop and one is armed with a gun and is found afterwards to be armed with a gun and the others in association with him, this is sufficient, the law doesn't require any knowledge on his part", and

(ii) Page 101

"I give him the benefit of the doubt as to whether or not he knew before hand that Wayne Reid had the firearm or whether it was common design in the breaking of the shop that the firearm should be used to shoot at people. It would be a different thing if each had a firearm, then it could be said there was a common design to go armed but I gave him the benefit of the doubt about that and he was the one that was on the roof; the other one was down there, as I said it is a benefit of doubt that I am giving, it is a slight benefit that he is given and he is acquitted on the charge of shooting".

She submitted that although by the provisions of Section 20 (5)(a) of the Firearms Act there is a presumption in favour of the prosecution that presumption is rebuttable and if the defence satisfies the Court by offering a reasonable excuse the onus shifts to the prosecution and that burden is proof beyond a reasonable doubt. That if the applicants Bruce Reid and Wayneworth Harvey did not know that Wayne Reid was in possession of a firearm that would be a reasonable excuse rebutting the statutory presumptions and that implicit in the trial judge's findings was a finding that these two applicants had no knowledge of the possession by Wayne Reid of the firearm.

ABS

Mr. Macaulay as amicus curiae sought from the Court a certain interpretation of the provisions of Section 20 (5)(a) relevant to the instant case.

Section 20 (5):-

"In any prosecution for an offence under this section -

- (a) if any person has in his possession, contrary to this section, any firearm in circumstances which raise a reasonable presumption that such firearm was intended or was about to be used in a manner prejudicial to public order, or public safety, any other person who is found in the company of that person in those circumstances shall, in the absence of reasonable excuse, be treated as being also in possession of such firearm;
- (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;
- (c) any person who is proved to have used or attempted to use or to have been in possession of a firearm, or an imitation firearm, as defined in section 25 of this Act in any of the circumstances which constitute an offence under that section shall be deemed to be in possession of a firearm in contravention of this section".

He submitted for the Court's consideration that "being in the company of" necessarily involves presence on the scene at the material time but having regard to the exclusive nature of possession the doctrine of common design would not apply in the absence of joint possession and therefore the provisions of the Section extended the doctrine of common design. If that is so then for the applicants who were "companions" of the possessor to be "treated" as the actual possessor the prosecution is required to prove against them the same essential elements as against the actual possessor namely (1) knowledge of the thing possessed (2) physical custody or control -

R. v. Wishart Brooks (1974) 1 W.L.R. p. 899 at p. 902 - 3.

ASb

Further that "reasonable excuse" need not necessarily come from the defence; it may exist in the prosecution's case and as the plea of innocent possession was open to the actual possessor the finding of the learned Chief Justice clearly indicated that the prosecution had not proved knowledge in the applicants.

Mr. Macaulay suggested that as a cross check on his proposition that the provisions merely extend the doctrine of common design, the Court should consider the hypothetical case of the holder of a firearm licence giving the firearm to his companion in whose possession it was found under the circumstances defined in the subsection. In such a case he contended the licensee though in company of the unlicensed possessor would be protected by the licence which he holds.

Even without praying in aid the provisions of the Act, the licensee in Mr. Macaulay's illustration would have aided and abetted the illegal possession in his companion - R. v. McCarthy (1964) 1 A.E.R. p. 95 - In this case the appellant was charged with unlawful possession of explosives. In delivering the judgment Fenton Atkinson J., at page 97 said:-

"In the view of this court, a man may properly be convicted of aiding and abetting this offence if it is found: - (a) that he knew that the principal offender had explosives in his possession or under his control; (b) that he knew facts giving rise to a reasonable suspicion that the principal offender did not have such explosives in his possession or under his control for a lawful object; (c) that he was present actively encouraging or in some way helping the principal offender in the commission of this offence".  
See also - Wessel v. Carter Patterson and Pickfords Carriers Ltd., (1947) 2 A.E.R. p. 280.

To give a useful interpretation of the provisions of the subsection, a careful analysis seems necessary. It is clear from

the tenor and substance of the subsection that the legislature intended to lighten the burden of the prosecution by creating certain presumptions. What then are the primary facts that must be established to raise the presumptions in Section 20 (5)(a)? They are:-

- (1) Possession of the principal offender of a firearm contrary to the provisions of Section 20.
- (2) Circumstances which raise a reasonable presumption that such a firearm was intended or about to be used in a manner etc.
- (3) That the accused was found in the company of the principal offender in those circumstances.

In our view when these evidential requirements are met then the companion in the absence of reasonable excuse would be liable to be treated as being also in possession of such firearm. "Treat" is a word of varied meanings. In the context in which it is used and to give effect to the intendment of the subsection the most appropriate meaning seems:- "to consider or regard in a particular aspect and deal with accordingly" - (Shorter Oxford English Dictionary). Accordingly, on proof by the prosecution of the primary facts, then the "treatment" becomes applicable not only in relation to culpability but also to consequences unless there is in existence a reasonable excuse.

In short the statute creates a rebuttable presumption against the companion of a person proved to be in possession of a firearm in contravention of Section 20 (5)(a) in such circumstances as to give rise to the presumption defined by the Act. In so interpreting these provisions we note that in the other subsections in granting somewhat similar inculpatory presumptions the word

"deem" is used. We are of the view that "treat" seems the more appropriate in paragraph (a) which deals with two categories of persons and in which it is intended that proof of culpability and attendant consequences in the one are to be applied to the other.

The presumption clearly cannot be applied when there is a reasonable excuse. With respect to the first statement of the Chief Justice at page 93 - that statement must be interpreted in the context in which it was made and at the particular stage of the trial. It was made after the close of the case for the prosecution and in dealing with the submissions of "no case to answer" by the Attorney for the defence, who submitted inter alia, that no evidence had been led by the prosecution of knowledge by the companions that the actual possessor had a firearm. In our view the prosecution having adduced evidence to prove all the elements of possession in the actual possessor and the attendant "circumstances", and of the fact that the two accused were in the company of the possessor, the presumption came into being and dispensed with the burden of further proving either custody or knowledge in the companion. This is so because the subsection is evidential and does not create an offence. See R.M. C.A. No. 101/74 - R. v. Clinton Jarrett delivered December 8, 1975.

Accordingly, we interpret the Chief Justice's statement dealing as he was with the submission of "no case to answer" to mean that in effect he was saying that in the light of the presumptions created by the provisions in favour of the prosecution there was no burden on the prosecution to adduce evidence in proof of actual knowledge in the companions of the possession of a firearm by the

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actual possessor and therefore, he ruled, there was a case to answer. With that ruling, we unhesitatingly agree.

But the presumption as indicated above being evidential in nature, in the absence of express words or inescapable implication would ordinarily be rebuttable and the inclusion of the words "in the absence of reasonable excuse" puts the matter beyond debate. So that although the presumption relieves the prosecution from tendering evidence to prove knowledge this would not preclude the accused in rebuttal from offering a reasonable excuse and it would be in accord with jurisprudential principles that ignorance of the existence of the firearm at the material time would be a reasonable excuse. To hold that ignorance of such a primary fact is no excuse would render a person liable to conviction for this serious offence which he could not by taking thought have avoided committing.

An excuse in the nature of things is exculpatory and personal to the person seeking to be excused. It is in the nature of things to expect that the excuse will come from such a person. It is not inconceivable that in rare cases, an excuse may come from a source other than the accused. In any event, in order that the presumption may not run against an accused a reasonable excuse must be shown to exist. The existence of the excuse, however, must be found in the evidence. If it exists its genuineness or reasonableness would clearly be a matter for the jury.

Whether or not there is reasonable excuse can only arise for consideration after evidence in proof of the essentials enumerated above has been tendered by the prosecution.

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In the instant case on the Crown's case, there is clearly an absence of reasonable excuse. Nor can it be said to exist in the defence which was by its nature and conduct an alibi. Apart from denying that they were ever involved in the shop-breaking, (or the shooting at Constable Hart) neither Bruce Reid nor Wayneworth Harvey ever set up, expressly ignorance of the fact that Wayne Reid had a gun on him that night. Wayne's brother Bruce, who was admittedly with Wayne that night, denied any involvement at all. Harvey, the third accused, who both the Reids claimed to have sheltered with that night (and he admits it) also denied any involvement.

Therefore, the crucial question is whether or not the second statement by the Chief Justice in his summary amounted to a positive finding or an acknowledgement of the existence of a reasonable excuse. Such a finding would not be supported by the evidence. In the context in which the statement was made the learned Trial Judge was concerned with the charge of shooting with intent and whether or not there was common design. On the evidence adduced it was open to him to find not only that there was a common design to commit shop-breaking but that Wayne Reid was the watcher without, armed and strategically placed to overcome resistance, cover retreat or resist apprehension. That this further inference or judgment of fact could be drawn, the learned Chief Justice was not unaware as he said just before the passage under review:-

"Of course it could be said that there was a common design not only to break the shop but go there armed and to use the firearm which I have found was in Wayne Reid's possession for the purpose of the breaking of the shop".

Although this was properly a matter for the jury or tribunal of fact, he noted the concession made by Counsel for the Crown that Bruce Reid should not be held responsible for the shooting committed by Wayne Reid and thereafter expressed his doubts as quoted.

In the context of the passage and in the absence from the evidence of any reasonable excuse relating to the possession of the firearm by Wayne Reid and to the attendant circumstances, such a statement cannot reasonably be interpreted to mean that there was "reasonable excuse".

For these reasons, the applications of Bruce Reid and Wayneworth Harvey are treated as appeals and the appeals are dismissed.

he observed that in the roof a hole had been made sufficiently large to admit a grown man and giving access to the grocery section of the shop. However no goods were missed. The defence by each accused was an alibi. Bruce Reid gave an unsworn statement to the effect that he and his brother Wayne Reid were walking along Retirement Road, and Wayneworth Harvey was walking in front of them. He heard explosions (presumably gun shots) and in fear he and his brother ran following Harvey into a nearby yard in which Harvey said he lived. About ten minutes after they all three were on their way out the yard and at the gate were met by policemen, who questioned and searched them and took them along the street. No firearm was found on them. It was then that Wayne Reid who had been separated from them was shot. He knew nothing about the breaking of Daniel Lee's shop. Unsworn statements to the same tune were given by both Wayne Reid and Wayneworth Harvey. The evidence for the prosecution summarised above was accepted by the learned Trial Judge. In his summation the learned Trial Judge in interpreting Section 20 (5)(a) of the Firearms Act and applying his interpretation to the facts said:-

"Now, it is quite clear, in view of what the Firearms Act says that having found that Wayne Reid was in possession of a firearm that inevitably the accused Bruce Reid would be also in possession by virtue of subsection 5. I have no doubt at all that the accused Bruce Reid was found in the company of, as contemplated by the subsection, in the company of Wayne Reid and that Wayne Reid was armed with the firearm or had it in his possession intending that it should be used in a manner prejudicial to public order and of course breaking into people's shops is a breach of public order. And based on that section, I find that the accused Bruce Reid was equally in possession of the firearm which was actually found on the accused Wayne Reid and makes him guilty of the offence on Count 1. But of course the statute says nothing about ammunition and so the charge against him, that is, against

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