JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 95/71

BEFORE: The Hon. Mr. Justice Fox, J.A., (Presiding).
The Hon. Mr. Justice Graham-Perkins, J.A.
The Hon. Mr. Justice Hercules, J.A.

REGINA v. DENNIS CAMPBELL

Roy Taylor for appellant.

Courtney Orr for Crown.

8th, 9th February; 15th March 1972

FOX, J.A.:

This is an application for leave to appeal from convictions in the Home Circuit Court before Astwood, J. (Ag.) and a jury on three counts of an indictment charging, in Count 1 shooting with intent, in Count 2 wounding with intent, and in Count 3 illegal possession of ammunition, namely, one cartridge. The application was dismissed and the convictions and sentences affirmed. These are the reasons for our decision.

The evidence in support of the Crown's case showed that the complainant was standing at his gate on a street in Kingston reading a newspaper at about 3.30 p.m. on 12th April, 1971. He heard guns firing, looked up the street and saw a number of young men, including the applicant, firing guns. The applicant came over a wall and fired three shots at the complainant, one of which caught him in his leg inflicting a wound. The complainant made a report at the C.I.D. Central Police Station, Kingston to police officer Davidson who thereupon went in search of the applicant. The complainant went to the hospital, received treatment and was sent home. That same day Davidson found the applicant at 15 Highholborn Street, told him of the report he had received, searched him and found the cartridge which was the subject of the third count for illegal possession of ammunition. Davidson took the applicant to the central police station. On his way from the hospital, the complainant returned to the station where he saw the applicant and pointed him

out to the police as the person who had shot him. At the trial, the applicant was unrepresented. His defence was an alibi.

Four grounds of appeal were argued before us. In the first ground, complaint was made that in the absence of medical evidence, it had not been established that the wound received by the complainant was caused by a bullet. The jury had not been directed to this effect and the omission was fatal. There is no merit in this complaint. The evidence of the complainant that he had been shot at and had forthwith received a wound in his leg was sufficient to show that the injury was the result of a blow from a missile discharged by a firearm. Medical testimony could have added to, but its absence cannot detract from the weight of this evidence if believed.

The second ground of appeal complained of failure "to direct the jury on the question of the identification of the appellant having regard to the fact that (his) defence was an alibi." In his submissions on this ground Mr. Taylor did not attack the judge's directions on the defence of alibi. Indeed he could not, for the reason that these directions are entirely adequate. The complaint, in effect, as we understood it, is that the issue of identification should have been discussed with greater clarity. We have carefully examined the summing-up and are satisfied that the jury could not have failed to understand that they had to be convinced that the applicant was the person who had shot at the complainant before they could convict him.

The third ground alleged that the judge had erred "in allowing evidence to be given which tended to prove that the appellant was a person with criminal affiliations and was therefore of bad character." This ground is based upon the circumstance that when the complainant pointed out the applicant at the police station, the applicant accused the complainant of being a member of the "Spanglers". The complainant denied the accusation, and added that he knew that the applicant was a member of the "Skull". There was nothing in the record to explain the circumstances under which this evidence was elicited or to suggest that a member of either the 'Spanglers' or the 'Skull' was necessarily or even probably a person with criminal affiliations. We were not satisfied that the evidence was inadmissible. Neither was it shown that the evidence was prejudicial and likely to have influenced the jury in arriving at their verdict. The onus was upon the applicant to establish these particulars of his complaint.

In the fourth ground it was contended that there had been an improper joinder of count 3 with the other two counts.

Unquestionably, the joinder of separate offences in one indictment is contrary to law unless it is authorized by rule 3 of the schedule to the Indictments Law, Cap. 158, which is in these terms -

> "3. Joining of charges in one indictment. - Charges for any offences, whether felonies or misdemeanours, may be joined in the same indictment if those charges are founded on the same facts or form or are a part of a series of offences of the same or a similar character."

In effect, this rule requires offences to exhibit a certain similarity of feature to justify them being tried together. A sufficient nexus between the offences must be shown to exist. One obvious example is the rule itself, where, if charges are founded on the same facts, they may be tried together. Again, "such nexus is certainly established if the offences are so connected that evidence of one would be admissible on the trial of the other" R. v. Kray [1969] 3 All E.R. 942 at 944. The evidence is inadmissible if its only relevance is that it tends to prove a disposition towards wrong doing in general, or a disposition to commit the particular crime which is charged. As Lord Goddard, C.J. puts it in R. v. Sims [1946] 1 All E.R. 697, at p.700 "Evidence is not to be excluded because it tends to show the accused to be of a bad disposition but only if it shows nothing more." In so far as it is concerned with the admissibility of the evidence that the applicant was found in illegal possession of a cartridge shortly after the shooting, the question here therefore is whether that possession was relevant to an issue before the jury. This does not mean all those issues which arose from the applicant's plea of not guilty, and which the prosecution was required to resolve in its favour in order to prove its case, but only such particular issues as were raised up by the defence and to which the prejudicial evidence was relevant. (vide Lord Sumner in Thompson v. The King [1918] A.C. 221 at p. 232). The only issue which satisfies this criteria is as to the applicant's identity. His defence was an alibi. This was also the defence in Thompson v. The King. In that case it was held that evidence of powder puffs found upon the appellant when he was arrested on March 19th and of indecent photographs found subsequently in a locked drawer in his rooms confirmed the testimony of the witnesses for the prosecution that he was the person who had committed offences

with them on March 16th. The evidence was relevant to the issue of his identity and was therefore admissible. R. v. Twiss [1918] 2 K.B. 853 and R. v. Gillingham [1939] 4 All E.R. 123 further illustrate the nature of the connection which must be shown to exist between possession of incriminating material and the crime charged to warrant reception of evidence of that possession. To use the words of Charles, J. in Gillingham at p. 123, the articles found in the possession of the accused were "things which a man who was guilty of an offence like this might well have about him, and might well use as an adjunct to assist him in the commission of the crime." By parity of reasoning, we consider that the cartridge found with the applicant when he was apprehended and searched was also admissible in relation to the first two counts.

This is not the only ground upon which we think that there was no misjoinder. There are other grounds upon which a sufficient nexus between offences may be held to exist. Thus in R. v. Clayton-Wright [1948] 2 All E.R. 763 when the accused was convicted on four counts, namely, arson of a vessel, arson of the same vessel with intent to prejudice the insurers; attempting to obtain money by false pretences from those insurers in respect of a policy on the vessel; and attempting to obtain money by false pretences from insurers by falsely pretending that a mink coat had been stolen from his motor car, Lord Goddard, C.J. rejected the contention that the fourth count was improperly joined. He did so not only on the ground that the evidence with regard to the mink coat could be given in evidence on the other charges, but more so because "the charge with regard to the mink coat was a similar charge of swindling underwriters, and, therefore, one gets what I may call the nexus of insurance, the nexus of fraudulent acts to the prejudice of the underwriters ....." (at p.765).

The truth of the matter is that in ascertaining the scope of rule 3 in the schedule to the Indictments Law, a judge is not restricted within the severe boundaries of nice legalities. In R. v. Sims at p.699, Lord Goddard, C.J. pointed out that the mere fact that evidence is admissible on one count and inadmissible on another is not by itself ground for separate trials. This is so, explained that wise and learned judge "because often the matter can be made clear in the summing-up without prejudice to the accused."

This practical approach was echoed by Widgery, L.J. in R. v. Kray when at p.944 he said this:

> "It is not desirable, in the view of this court, that rule 3 should be given an unduly restricted meaning, since any risk of injustice can be avoided by the exercise of the judge's discretion to sever the indictment. All that is necessary to satisfy the rule is that the offences should exhibit such similar features as to establish a prima facie case that they can properly and conveniently be tried together."

In Ludlow v. Metropolitan Police Commissioner /1970/ 1 All E.R. 567 at p.574, Lord Pearson thought that the last sentence in this passage, although not a construction of the rule, was "helpful practical advice for those applying the rule." In our view, the specific feature which links the offences in the instant case, and enables them to be regarded as "a series of offences of the same or a similar character" lies in the circumstance that a firearm to shoot with an ammunition to be used in shooting are necessary and integral parts of the act of shooting at a person. Prima facie therefore, it was entirely proper and convenient in the particular circumstances to try the charge of illegal possession of ammunition, with the charges of shooting at and wounding the complainant.

The only question which remains to be answered is whether the judge should not have ordered separate trials on the ground that the evidence of the illegal possession of the cartridge was so highly prejudicial as to outweigh altogether the probative value of the evidence. This was the ground upon which the Court of Appeal quashed the conviction in R. v. Fitzpatrick 47 Cr. App. R. p. 16. In inviting us to take a similar course, Mr. Taylor pointed out that in that case the Recorder had not, except perhaps inferentially, dealt with that aspect of the matter, and that as a consequence the Court of Appeal had felt that it was in a position to exercise its own discretion. Mr. Taylor submitted that the position was even more serious in the instant case, because the applicant was unrepresented at the trial, and the record did not disclose that the judge had exercised, inferentially or otherwise, and for the particular reason of unfair prejudice stated above, the discretion which he had under section 7 (3) of the Indictments Law to order separate trials.

The answer to this question depends upon whether there has been any miscarriage of justice. In R. v. Muir /1938/ 2 All E.R. 516, the appellant was convicted upon an indictment which charged four offences, two of rape on a young girl on two different occasions, a third with stealing 12/-6 from the girl's father, and a fourth of indecent assault on a totally different person, a married woman. He appealed on the ground that the two charges of rape and the one of indecent assault should not have been tried together. In delivering the judgment of the court, Humphreys, J. said:

> "The only question which arises on this appeal is whether this court ought to take any action as the result of the two charges of rape, and indecent assault having been tried together, which, in the opinion of the court, would very much better have been separately tried. There cannot be any doubt that, when a man is charged with rape, it is prejudicial to him to have before the jury a charge of indecent assault on another person at a different time. The second charge was different in character, and quite unconnected with the charge of rape, and could not have been given in evidence on a charge of rape. On the whole, we are satisfied that no miscarriage of justice has occurred, and have come to the conclusion that we cannot interfere with the conviction."

Quoting this passage with approval, this Court came to a similar conclusion in R. v. Gillespie and Jones (unreported) Supreme Court Criminal Appeals 119 and 120 of 1967 of 31st May, 1968. In that case offences based upon a shooting incident on 3rd July, 1966 had been tried together with offences based upon another such incident on 15th August, 1966. The Court examined the relevant portions of the summing-up and was apparently satisfied with the effectiveness of the directions to the jury that they ought not to say that because an accused was guilty on one particular charge he was necessarily guilty on the other. In the instant case, although the language used is somewhat imprecise, a direction to a similar effect occurs at page 4 of the record where the jury were told to relate the evidence to the counts separately.

In Ludlow v. Metropolitan Police Commissioner, the House of Lords considered whether a miscarriage of justice had occurred as a result of a refusal to order separate trials. Lord Pearson gave it as his opinion that since the passing of the Indictments Act 1915, the theory, - that a joinder

of counts relating to different transactions is in itself so prejudicial to the accused that such a joinder should never be made, - had ceased to be valid. At p.575 Lord Pearson continued:

> "No doubt the juries of that time were much more literate and intelligent than the juries of the late eighteenth and early nineteenth centuries, and could be relied on in any ordinary case not to infer that, because the accused is proved to have committed one of the offences charged against him, therefore he must have committed the others as well. I think the experience of judges in modern times is that the verdicts of juries show them to have been careful and conscientious in considering each count separately. Also in most cases it would be oppressive to the accused, as well as expensive and inconvenient for the prosecution, to have two or more trials when one would suffice. At any rate in my opinion the manifest intention of the Act is that charges which either are founded on the same facts or relate to a series of offences of the same or a similar character properly can and normally should be joined in one indictment, and a joint trial of the charges will normally follow, although the judge has a discretionary power to direct separate trials under s.5(3). If the theory were still correct, it would be the duty of the judge in the proper exercise of his discretion under s.5(3) to direct separate trials in every case where the accused was charged with a series of offences of the same or a similar character, and the manifest intention appearing from s.4 and r.3 would be defeated. The judge has no duty to direct separate trials under s.5(3) unless in his opinion there is some special feature of the case which would make a joint trial of the several counts prejudicial or embarrassing to the accused and separate trials are required in the interests of justice."

In this passage, the thinking of Lord Goddard, C.J. in R. v. Sims at p.699 ibid is again reflected.

There is nothing in the record to indicate that the judge had directed his mind to the question of exercising his discretion under section 7 (3) of the Indictments Law to order separate trials because the "accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment." This is an unsatisfactory situation. It is even more to be deplored when an accused is unrepresented at a trial and does not himself apply for a separate trial. In a situation where there is the slightest possibility of prejudice to the accused the judge should invite counsel for the Crown to state the ground

upon which the charges are joined. In this way, the considerations which allowed the exercise of the discretion will become apparent in the record. Having said this we must also say that we are satisfied that the evidence of the illegal possession of the cartridge was not so highly prejudicial to a fair consideration of the offences in counts 1 and 2 as to outweigh the probative value of that evidence. The applicant did not say anything in relation to the charge on count 3. The Crown's evidence in support of that charge was left unchallenged. In view of this circumstance, the jury could have had no difficulty in coming to a conclusion on count 3. They retired for only 8 minutes. It is reasonable to think that their verdict on all counts was determined by their favourable conclusions as to the truthfulness of the complainant and the other witnesses for the Crown. They could not have failed to understand that they were to consider each count separately, and that their verdictson counts 1 and 2 were to be based entirely on the evidence as it related to each of these counts. We were satisfied that no miscarriage of justice had occurred as a result of the joinder of the offences in one indictment. Accordingly we considered that the offences had been properly joined.