JAMAICA

IN THE COURT OF APPEAL

R.M. CRIMINAL APPEAL NO: 93/82

BEFORE: The Hon. Mr. Justice Kerr, J A.
The Hon. Mr. Justice Rowe, J A.
The Hon. Mr. Justice Campbell, J.A. (Ag.)

R. v. DOUGLAS ROBINSON ET AL

Messrs Dennis Morrison & Alton Rose for Appellant

Messrs F.A. Smith & W. Alder for the Crown

November 29, December 1, 2, 1982 & April 13, 1983

ROWE J A.

The name Douglas Robinson headed the list of names of 26 persons who were all convicted in the Resident Magistrate's Court, St. Andrew on April 13, 1981 for the offence of Riot and Assault, the particulars being, that they:

> "Douglas Robinson, Vincent Reid, Colistus Brown Bruce Farquharson, George McCurdy, Monica Clayton, Errol Gardner, George Callard, Pearl Plummer, Sebert Graham, Ivilyn Shaw, Ivy Pinnock, Cynthia Barnett, Pauline Tenn, Monica Samuels, Leonard Brown, Gilbert Graham, Cyril Johnson, Winnifred Tucker, Clarence Brown, Nigel Stewart, Vincent White, Glen Jones, Joslyn Carty, Linval Ferguson and Mavis Bonner, on the 22nd day of June, 1979 in the parish of Saint Andrew, riotously assembled together and assaulted Joseph Tillie."

and were each fined the sum of two hundred dollars with an alternative of two months imprisonment at hard labour. Their appeals were heard and dismissed on December 11, 1982 but because the offence of rioting is infrequently prosecuted in Jamaica we decided to put out reasons in writing and this we now do.

In or about June 1979 Bata Shoe Co., Ltd., with offices on Spanish Town Road, was experiencing severe production problems arising out of a shortage of raw materials which necessitated the laying off of some of its production employees who were represented by the B.I.T.U. A meeting on June 22, 1979 between the management, the Union and Worker-delegates discussed the impending lay-offs and the next agreed step was for the preparation of a

list of the persons to be affected. An issue then smouldering concerned a retroactive pay award made by the Industrial Disputes Tribunal a week and a half previously and in answer to a question from Union Delegate as to the projected date of payment of the back-pay, he was informed by the Company that within a week thence the Union would be informed in writing.

Mr. Tilley, a Dutch National, the Managing Director of the Company, was engaged in his office just after 12.30 p.m. He was disturbed by what he described as a tremendous noise of shouting from the main office towards his office and he observed a column "as if a mole was moving on," approaching his office. Factory workers were streaming into his office. These workers were shouting and demanding their pay and saying lots of other things. Mr. Tilley attempted to explain that he had discussed the same matters with the Union earlier that day and had promised a reply within a week but the persons in the office would have none of it. They shouted the more: "that they had nothing to do with Union and they wanted to settle the matter themselves now." The tempo increased and they shouted: "Kill the white bastard," "Go back to South Africa". They were in no mood to be appeased either by Mr. Tilley or by Mr. Neville Smart, the Industrial Relations Manager, who intervened on the Company's behalf with reasoned arguments and explanations. Mr. Smart identified the appellant Vincent Reid as the one who raised the shout, "Kill the white bastard" and he also identified the appellant Linval Ferguson as the man who gave the eye-signal that led to the switching off of the electric lights in the room. Then followed a flurry of movements from the group immediately in front of Mr. Tilley's desk. Mr. Tilley received two to three blows in his face which stunned him and caused a bruised and bloody nose, a graze to his left cheek and a red mark on his forehead. After about 20 seconds the lights were turned on and the people in the room laughed at Tilley's condition and taunted him saying, "you white bastard, we want our money, when you going to pay us, we have waited long enough, we need it now."

For a second time the lights were turned off and Mr. Tilley prudently got up from his desk. He observed the appellant Collistus Brown making boxing motions towards where he had been sitting at the desk and he noticed a scuffle as if another of the employees was attempting to restrain him. Although the room was plunged into darkness a third time nothing remarkable occurred in that period. The demands from the crowd became specific. The appellants Collistus Brown and Vincent White pointed their fingers in the Managing Director's face and led the demand for Mr. Tilley to sign a paper then and there agreeing to pay retroactive wages as well increased wages on a named day and date. Mr. Tilley's evidence, which the learned Resident Magistrate accepted as true and reliable, was that at this point in time he began fearing for his life and that of Mr. Smart. Everybody, he said, was shouting what he should do. The violence which had caused him the "coco in his head, abrasion on his nose and slightly swollen left eye," which had shattered the glass plate on the conference table, the threats, the shouted demands, all combined to induce Mr. Tilley to sign a document dictated by the employees promising to meet the workers demands but Mr. Tilley added the words "if bank agrees".

None of the appellants admitted assaulting Mr. Tilley. Basic to their defence was the argument that the company's failure to meet the long outstanding Industrial Tribunal's Award merited independent action by workers and that their demand for information as to when they would be paid was reasonable in the circumstances and consonant with the company's open-door policy in Indistrial relations. Because it was said that the group which invaded Mr. Tilley's office numbered as many as 40 people and only 26 were charged, the question of the identity of each person charged was a very material consideration for the learned resident magistrate. On the question of law, the contention was that the majority of the persons charged were curious but innocent bystanders who could not be convicted as the prosecution could not prove in them any concerted plan of action.

The learned resident magistrate carefully reviewed the evidence and found that the prosecutions' witnesses were credit worthy. He accepted

as true that there was a meeting of workers subsequent to the meeting between the management, the Union and the worker delegates and that a decision was taken at the Workers' meeting to go to Tilley's office. One of the critical findings of fact was that the twenty-six appellants were members of the crowd which by agreement marched upon Tilley's office, that they were in an angry mood evidenced by their noise and shouting as described by the witnesses for the Crown. He found that the appellants had set out to achieve a common objective and had a willingness to assist each other as they packed themselves into Tilley's office. The learned resident magistrate expressly found that:-

> "The various acts of each member of crowd were all part and parcel of a planned concerted course of action to achieve a common purpose of forcing Tilley to state date of payment of amount due under award despite decision taken at 10:00 a.m. meeting. All present gave support to all that took place culminating in assault on Tilley so as to get him to sign document and all - done in furtherance of common objective."

He accepted the prosecution's evidence that the behaviour of the crowd and the assault upon Tilley, caused him to be alarmed and terrified and that he was reduced to the status of a virtual prisoner until he wrote and signed the document dictated by the mob.

It was argued on behalf of 14 of the appellants that the learned resident magistrate erred in law in that he did not give sufficient consideration to the question of the identification of those appellants particularly in light of the defence and to the real possibility of mistaken identification in the circumstances prevailing at the time of the offence charged. We did not find any merit in this ground of appeal as in our opinion there was credible evidence accepted by the learned resident magistrate to satisfy the onus on Crown to prove that these 14 appellants were in the crowd.

BRUCE FARQUHARSON: Mr. Smart and Mr. Smith both said they saw him in Mr. Tilley's office. Mr. Tilley did not recall seeing Farquharson in the office. In his defence Farquharson said he was returning from lunch and he saw people going in and out of the main office. He went on to the corridors and to the door of Tilley's office and observed that it was full of people. Mr. Smith, the Company Cashing Manager, said that he had seen Farquharson with other workers before the crowd entered Mr. Tilley's office.

MONICA CLAYTON: Her defence was that she was not present during the incident and went to the main office in time to see Mr. Tilley leaving in the company of a policeman. But Mr. Smart said he saw her in Tilley's office and Mr. Smith said that in the period when the lights in Tilley's office were being turned on and off, he saw Monica Clayton at the doorway while others were in the office.

GEORGE CALLARD: Messrs. Tilley, Smart and Smith swore that they saw Callard in Tilley's office, whereas Callard said he only went as far as the main passage to Tilley's office out of curiosity.

ICYLIN SHAW: She admitted that she went to the office of Tilley's Secretary but could not get into Tilley's office as it was full of people. This visit was out of curiosity. Both Smart and Smith said she was in Tilley's office.

CLARENCE BROWN: This appellant said he was working when he found that all the other workers had gone to the main office to inquire about their pay, so he went along. As he arrived he saw them coming out of the office and he was told that the matter had been settled already. He did not see Mr. Tilley at all that day. For the prosecution there was evidence of Messrs. Smart and Smith who said they saw Brown in Tilley's office.

JOSCELYN CARTY: He denied going to the main office which housed Tilley's office at the material times but both Smart and Smith identified him as one who was in Tilley's office.

LINVAL FERGUSON: He testified that he spent the lunch period reading his Bible then fell asleep and only awoke after work had resumed for the afternoon. He said, further, that he heard for the first time that workers had gone to Tilley's office when he was on his way home in the afternoon. On the prosecution's case, all three witnesses, Tilley, Smart and Smith, identified Ferguson as one who was present in Tilley's office during the incident.

MAVIS BONNER: In her evidence she said she had not left the factory for the entire Friday and denied that she had gone to Tilley's office. Not only did Messrs. Tilley, Smart and Smith swear that she was in the office, Mr. Tilley went further and said she was seen holding on to Collister Brown when that appellant was making boxing motions towards his empty chair.

PAULINE TENN: Winston Smith saw and spoke to her at the doorway of Tilley's office; Smart saw her inside the office, whereas Tilley could not be sure if he saw her at all. Her explanation of her presence in the main office complex was that she had gone there to speak to Winston Smith.

GILBERT GRAHAM: All three prosecution witnesses identified Graham as being in Tilley's room. He on the other hand said he saw a group of workers by the main office and went to investigate what it was all about.

IVY PINNOCK: She was identified by all 3 prosecutions witnesses as one of the crowd inside Tilley's office but her defence was a denial that she ever went to that office at any time that day and she further said that at the material time she was at her place in the factory at work.

CYNTHIA BURNETT: Tilley was not sure if she was present in his office. Smart positively identified her as being so present. Smith saw her at the door to Tilley's office. Burnett said that after the lunch break when she went to the factory she saw no one. She saw a lot of people outside going towards Tilley's office and so she went to investigate. She saw and spoke to Winston Smith and immediately returned to the factory.

CYRIL JOHNSON: He was the Union Delegate and he was identified by all three prosecution witnesses and by one of the appellants Winnifred Tucker. Johnson said he received information while at lunch. He then spoke to Sebert Graham and proceeded to the main office to investigate. As there was a crowd of people blocking the door to Tilley's office he did not gain entrance and he returned to the factory. Winnifred Tucker one of the Union Delegates admitted in evidence that Johnson was present in the room when Tilley signed the document for the payment of the retroactive wages.

SEBERT GRAHAM: He admitted his presence in Tilley's office and corroborated the Crown's testimony in relation to Cyril Johnson, whom Graham said accompanied him to Tilley's office. Graham said that when he got to the office the document had already been prepared by Tilley and he had no knowledge of, or part in, whatever had earlier transpired in that office.

As the evidence in relation to the 14 appellants outlined above shows, there was ample material from which the learned resident magistrate could say that if the witnesses, especially Smart, the Personnel and Industrial Relations Manager and Smith the Cashing Manager, were witnesses of truth, then the real question was how much weight should be placed upon their evidence and not so much that they could have been mistaken when they said these appellants were present in Tilley's office at the material time. Mr. Morrison sought to persuade the Court to hold that at the end of the Crown's case there was insufficinet evidence to prove that there had been a worker's meeting at which the decision was taken to march on Tilley's office. However, on a perusal of the evidence of Smart, Smith and Tilley, he conceded that there was factual evidence from which a reasonable inference that such a meeting had been held could be drawn. We agree that the finding of the learned resident magistrate that there was a worker's meeting at which certain decisions were made cannot be successfully challenged.

We were asked to consider the decision in Field and Others vs. The Receiver of Metropolitan Police (1907) 2 K.B. 853 as laying down the

essential elements of the offence of Riot. In that case a number of young persons between the ages of 14 years and 18 years were congregated in front of a 9" thick wall of great length which enclosed a yard. They were shouting and using rough language. Some of the youths stood with their backs to the wall while others ran against them and still others ran at the wall with outstretched hands. After about fifteen minutes of this activity, about 12 feet of the wall fell. As soon as the wall fell the caretaker came out into the street and the youths ran in various directions.

The owners of the wall sought compensation for the damage under the Riot (Damages) Act of 1886, and lost, as there was no evidence of any intention on the part of the youths to help one another by force if necessary against any person who might oppose their common purpose of destroying the wall or of any force or violence (other than the actual force or violence used in the actual demolishing of the wall) displayed in such a manner as to alarm any person of reasonable firmness and courage. In the course of his judgment Phillimore J., said at page 860:

> "From these passages we deduce that there are five necessary elements to a riot:
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> (1) Number of persons, three at least;
>
> (2) common purpose;
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> (3) execution or inception of the common purpose;
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> (4) an intent to help one another by force if necessary against any person who may oppose them in the execution of their common purpose;
>
> (5) force or violence not merely used in demolishing, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage."

All five constituent elements referred to by Phillimore J., were present in the instant case. The only one which warranted debate before us was as to the question of the common purpose. As we indicated earlier there was sufficient evidence as to this element.

The final ground of appeal was that the learned trial judge failed to appreciate the legal principle that mere presence is insufficient evidence to convict any one of the offence of Riot. Direct action was attributed by the Crown to four of the appellants. Collistus Brown made boxing motions in the dark at the place where Mr. Tilley had been sitting; Vincent White shouted and pointed his finger in Tilley's face; Cebert Graham demanded the signature to the documents; Vincent Reid shouted at, abused and called upon the crowd to "kill the white bastard," Mavis Bonner was seen to be holding Collistus Brown as if to restrain him; and Linval Ferguson "winked" as the signal for turning off the lights. The actions of Graham and Bonner could, it was argued, be said to be equivocal. Apart from laughing at Mr. Tilley's discomfiture and shouting, there was no evidence of direct action by the other appellants. In support of this ground of appeal, the defence relied upon a decision of Chief Baron Kelly at the Kent Summer Assizes of 1869 reported as R. v. Atkinson and Others (1869) 11 C.C.C. 330. The Chief Baron made certain interesting rulings.

There was a serious riot on election day for three parliamentary boroughs being contested by the Liberal and Conservative candidates. About 9 a.m. on election day it became known that the Conservative candidate had a lead of 90 votes and 2 bands of music which had been playing about the neighbourhood all that morning united together and at the head of a large banner-waving mob they marched through the town. In their progress the mob threw volleys of stones large enough to kill persons and brickbats at the houses of known conservative supporters and broke the windows. The polling booth in one of the boroughs Northfleet, was set upon and completely destroyed by the mob. Further the mob packed the approaches of the polling booth to another borough so closely that no one could vote against the Liberals. Bevan, one of the persons accused of Riot, had taken a prominent part in the election campaign as a supporter of the Liberal candidate. He was the employer of hundreds of men at a lime factory at Northfleet; many of the rioters were in his employment who had the day off from the factory; and he was present at the poll booths at Northfleet when the mob packed the approaches thereto and prevented Conservatives from voting;

that he made no effort to induce his employees to leave and only laughed when his assistance was solicited. The ruling of the Chief Baron was that Bevan could not be convicted because even if he had the power to influence the rioters to desist from committing the outrages, he was in no way responsible for the men and his failure to stop them did not render him criminally liable.

On the evidence, Bevan did not organise the mob; he did not incite them to riot and he took no part in their activities. That he was a beneficiary of their display was insufficient to impute to him criminal liability. His situation is quite different from that of every one of the appellants.

At the close of the case for the prosecution in which evidence had been tendered that five of the defendants had committed acts of violence, in that they had thrown stones or helped to hustle voters or obstructed the police, the Chief Baron ruled that they had a case to answer but that in respect of the other 8 defendants there was no evidence of riot against them and they were acquitted.

But surely if the persons were in the mob and they were shouting and inciting others to throw stones, the mere fact that they did not physically throw, ought not to be the determining factor. The ruling is explicable only on the assumption that some persons could have joined the throng without knowledge of its purpose, took no active part and like Bevan were silent watchers.

And even the five who were called upon for their defence were found not guilty. The Chief Baron directed the jury, in our view quite correctly in law when he said, "But in order to find any of the defendant guilty, the jury must be satisfied that they had taken part in an assembly for an unlawful purpose, and had helped or encouraged or incited the others in the prosecution of that purpose."

In the instant case the evidence for the prosecution did not show a situation of "mere presence" by those persons who marched shouting angrily into Mr. Tilley's office. It was not a condition of "mere presence"

for the persons who filled that room to shout their demands for a settlement then. It was not a condition of "mere presence" when after an eye-signal the lights were switched off and an assault was made upon Mr. Tilley in that when the lights came on again those present laughed at the injured man and repeated their demand for his signature to their letter. Those who were present shouting their assent to the threat to "Kill the white bastard" cannot be said not to have helped, incited or encouraged the others in the prosecution of their common purpose.

We note with interest the election day events in Northfleet in 1869 and the eventual verdict of the jury. It all goes to show that the Jamaican experience in such matters is not unique. R. v. Atkinson supra is distinguishable from the instant case on the facts but we say with respect that the final direction of the Chief Baron at page 333 quoted above accords with the law as applied by the learned resident magistrate in this case and we find no merit in this ground of appeal.

All the appellants were fined the sum of $200.00 or 2 months hard labour. Because we were informed that they had all been dismissed prior to the hearing of the appeals we make no comment upon the adequacy of the penalty for this very serious offence.