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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 205/77

BEFORE: The Hon. Mr. Justice Henry, J.A.
The Hon. Mr. Justice Rowe, J.A. (Ag.)
The Hon. Mr. Justice Willkie, J. A.(Ag.)

REGINA

v.

GLENFORD FERGUSON
MELSHA GRANT
LEONARD CAMPBELL

Applicant Ferguson unrepresented

Mr. Dennis Daley for Applicant Grant

Mr. Richard Small for Applicant Campbell

Mr. A. Soares for the Crown

July 4 - 6 27, 1979

HENRY J.A.

The applicants were tried in the Westmoreland High Court Division of the Gun Court on an indictment containing 8 counts. The first three counts charged all three applicants with illegal possession of firearm, robbery with aggravation of Twidlyn Allen and robbery with aggravation of Winston Brooks. These counts arose out of an incident in which it was alleged that Mr. Allen and Mr. Brooks were set upon by three men, two of them armed with guns, and robbed. This incident is alleged to have taken at about 9:20 p.m. on January 24, 1977 as Mr. Brooks and Mr. Allen arrived at Mr. Brooks' home at Chantilly. Counts 4, 5 and 6 charged all three applicants with robbery with aggravation of Isaac Matalee, robbery with aggravation of Lloyd Hines and illegal possession of a firearm. These

counts arose out of an incident at about 10:00 p.m. on the same date when it is alleged that four men, one armed with a gun and one with a knife entered the shop of one Mr. Matalee at Hertford and robbed the occupants of the shop. Counts 7 and 8 charged the applicant Ferguson only with illegal possession of a firearm and assault with intent to rob. These counts arose out of an incident on January 29, 1977 when it is alleged that one Arnold Cameron was attacked as he arrived home at about 8:45 p.m. He wrestled for some 5 minutes with his attacker and eventually the man made off.

In so far as the first incident is concerned Mr. Allen and Mr. Brooks both identified all three applicants as having been involved and pointed them out at identification parades held on February 13, 15 and 16 1977. In so far as Ferguson is concerned Mr. Allen and Mr. Brooks both said that they had known him before the night of the incident.

In so far as the second incident is concerned Ferguson was pointed out by Mr. Matalee and Mr. Williams at the Bluefields Police Station as having been involved in the incident while Grant and Campbell were pointed out at identification parades held subsequently, but the learned trial judge did not act on Hines' purported identification of Ferguson at the Bluefields Police Station because his attention had been specificially directed to Ferguson by Matalee. At the identification parades Campbell was identified by Messrs Hines and Williams while Grant was identified by Mr. Williams only. This identification of Grant as well as his identification in respect of the first incident were disregarded by the learned trial judge because Inspector Daley had taken an active part in assembling the men for the parade and had then

left the parade area before the witnesses were called to the parade. The learned trial judge was of the view that this was not a fair parade. Both Grant and Campbell are alleged to have given voluntary statements to the police which were admitted in evidence. In the view of the learned trial judge the statement of Grant did not clearly disclose his presence at the second incident but placed him on the scene of the first incident. In the event she convicted him on the first 3 counts, Campbell on the first 6 counts and Ferguson in all 8 counts of the indictment.

In so far as the third incident is concerned Ferguson was pointed out at an identification parade by both Mr. Cameron and Sylda Ruddock a neighbour of the Camerons' who says that she saw the incident. Their applications for leave to appeal having been refused by a single judge the applicants sought the leave of the court. In support of his application Ferguson relied on the following grounds:

> "1. That the learned judge was misled by her own sommnery. (sic)
>
> 2. Misidentity
>
> 3. That the crown was no way supported during to the wait (sic) of the evidence."

We see no merit in these grounds nor can we find any ground on which the application by Ferguson for leave to appeal ought to be granted. There was abundant evidence to establish that the offences charged had been committed. The applicant was identified by more than one witness at identification parades in respect of counts 1 - 3, 7 and 8. In respect of counts 4 - 6 identification was made when the applicant was brought to the Bluefields Police Station. The learned trial judge found

that the confrontation which then took place was not contrived and that two of the witnesses who then pointed out the applicant did so spontaneously. We see no reason to disagree with that conclusion.

Counsel for the applicant Grant argued 3 grounds of appeal before us. The first ground was:

> "That the learned trial judge's admission of the Caution Statement of Melsha Grant as having been voluntarily given was unreasonable, having regard to the evidence adduced on the "voire dire"."

In support of this ground it was pointed out that the statement allegedly given by Grant purported to have been taken between 11:30 p. m. on February 9 and 12:40 a.m. on February 10, and that although the evidence of Inspector Daley as to having reached Whithorn with the applicant at 11:00 p.m. is consistent with this, the same cannot be said of the evidence of Cpl. Taylor which indicates that the time of arrival was after 12 midnight. The applicant himself stated that he had arrived at about 6.00 p.m. and had been subjected to physical intimidation both during the journey from Montego Bay and after his arrival at Whithorn with a view to inducing him to give a statement. The suggestion was that both Police officers had falsified their testimony by advancing the time of their arrival in Whithorn in order to give the impression that there was no time at Whithorn before the statement was taken to carry out the physical intimidation described by the applicant, the witness Taylor in his zeal/overlooking or being unaware of the fact that the statement disclosed the time when it was taken. It was also pointed out that although on the evidence of the Police witnesses the statement was

completed and signed on February 10, the signatures on the earlier pages are dated 9/2/77. It is, we think reasonable to conclude that these pages are so dated because it was thought that if the statement was commenced on one day and concluded on another those portions of the statement which were taken on a particular day should bear that date. The discrepancy between the Police officers as to their time of arrival in Whithorn and the significance of that discrepancy are matters which would be essentially for the learned trial judge to consider in deciding the issue of fact as to whether the applicant had been coerced into signing the statement. The learned trial judge had the advantage of seeing the witnesses while they gave evidence and of assessing their credibility having regard to her observation of them. We do not think we would be justified in interfering with her finding of fact on the basis of which she concluded that the statement was voluntarily given.

The second ground was as follows:

> "a. That the learned trial judge erred in finding in the context of her rejection of the identification of the applicant by the prosecution witnesses, that the caution statement, by placing the applicant at the scene of the robbery, identified him as one of the persons who held up and robbed Twidlyn Allen and
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> b. Further, that the learned trial judge failed to consider
>
> (i) whether the said caution statement by itself constituted sufficient evidence on which she could convict the applicant on counts 1 and 2 of the indictment and if so,
>
> (ii) what weight she should give to such evidence."

In support of the second limb of this ground it was argued that since the statement did not indicate that the applicant was in possession of a firearm, he could only be convicted if the evidence disclosed that he

was in the company of a person who was in possession of a firearm (as distinct from an imitation firearm) in circumstances in which S. 20 (5) (a) of the Firearms Act would apply. That section is as follows:

> "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;"

It was further submitted that the evidence at the highest indicated that the persons in whose company the applicant was at the time were in possession of imitation firearms because there was no evidence from which it could be inferred that the articles described were capable of discharging deadly missiles. This is a submission which has with varying success been addressed to the court over the years. In R. v. Clinton Jarrett et al a bench of five judges declined to lay down any hard and fast rules for determining whether an object was a firearm, refrained from confirming that evidence of injury from a bullet or damage to property or bullet wounds was necessary and concluded that it was for the court to decide on evidence which could include that of a non expert as to the appearance of the object. There was no suggestion to the witnesses in this case as there was in R. v. Eric Brown (1967) 10 J.L.R. 234 that the objects in question might have been toy guns. The applicant in the statement described one of his companions as having "a long gun". The witnesses in evidence stated that one of the men had "a long gun" and the other "a short gun". They also gave evidence describing the objects. On the

totality of the evidence it was we think open to the learned trial judge to find that the objects described were firearms within the meaning of the Firearms Act. But even if it can be said that the evidence could only justify a finding that the object was an imitation firearm R. v. Kenneth Rose et al is authority for the proposition that a person found in the company of another who has in his possession either a firearm or an imitation firearm in the circumstances described in S. 20 (5) (a) of the Firearms Act is in the absence of reasonable excuse treated as being in possession of a firearm. The relevant passage is as follows:

> "Learned counsel for the Dixons had argued that the provisions of s. 20 (5) (a) could not apply to the Dixons as that sub-section they contended, is intended to apply only to cases of firearms as defined in s. 2 of the Act and not to "imitation firearms" as defined in s. 25 of the Act. I do not agree with this submission. The opening words of sub-section 20 (5) (a) make it clear that the rebuttable presumption in that sub-section may arise in any prosecution for an offence under s. 20 namely, of being in illegal possession of a firearm without a firearm user's licence.
>
> In this case the prosecution chose to establish its case by proving the commission of a s. 25 (2) offence against the three appellants. Upon proof establishing such an offence against them the irrebuttable presumption in s. 20 (5) (c) arose against Kenneth Rose who had been in possession of the home-made gun and who was about to use it in a manner prejudicial to public order or public safety. As the Dixons were found in the company of and acting in concert with Kenneth Rose in circumstances which raised a reasonable presumption that such firearm was intended or was about to be used in a manner prejudicial to public order or public safety, then in the absence of a reasonable excuse for their being in Kenneth Rose's company at the time, the Dixons are by virtue of the provisions of s. 20 (5) (a) to be treated

> as being also in illegal possession of the 'firearm' that Kenneth Rose had in his possession and therefore guilty of a contravention of s. 20 (1) (b) of the Act and liable to be punished under s. 20 (4) of the Act accordingly.

We do not consider that there is any merit in ground 2 (a) It is true that the evidence as to identity not having been accepted, it was not possible to identify from the evidence of the Crown's witnesses the part played by the applicant in the incident. If however the learned trial judge accepted in general the evidence of the witnesses as to the incident the applicant could be identified by his statement as having participated in it.

Finally it was argued that the learned trial judge to the prejudice of the applicant erred in allowing inadmissible evidence to be led that the applicant was the person referred to in the statement of Leonard Campbell as "Tallest". This evidence was clearly inadmissible against the applicant. It was however in our view admissible against Leonard Campbell inasmuch as what was admitted was evidence of the person to whom Campbell intended to refer in the statement. If the statement had referred to the applicant by his proper name it would clearly have been admissible against Campbell although not against the applicant. To the extent to which it may have been necessary to elucidate whether and to what extent the applicant Campbell was making an admission in the statement we consider that the evidence was relevant and admissible.

On behalf of the applicant Campbell seven grounds were argued but the first was eventually abandoned and the remaining six are as follows:

" 2. The Learned Trial Judge erred in law in permitting the witness David Campbell to refer to a document in examination-in-chief in order to contradict the previous evidences given by the said witness.

3. The Learned Trial Judge erred in law in permitting the witness David Campbell to refer to a document in order for the witness to give oral testimony where the witness had not expressed a wish to refresh his memory (see Volume 1 page 300 and page 297.)

4. (a) The Learned Trial Judge erred in questioning the witness Inspector Daley at Volume 2 Page 191-194 as to meaning of the reference in the Caution Statement of the accused Grant to the names "Grievance," "Lloydie" and Brother."

(b) In the alternative the Learned Trial Judge erred in not specifically warning herself not to rely on the evidence that was adduced when considering the case against the Applicant Campbell.

5. The Learned Trial Judge at Volume 2 page 126 erred in law when in addressing the applicant Leonard Campbell she stated:

"Why are your friends laughing?" There had been no evidence led to establish any friendship between Campbell and the other accused save the inference which may have been drawn from the evidence of identification. In view of the fact that the identification had all along been streneously challenged by the defence and that each accused denied knowing any of the others this was a live issue in the case. The assertion implicit in the Learned Trial Judge's comment therefore goes to the root issue in the case and suggests a prior determination by the Trial Judge before hearing all of the evidence.

6. The Learned Trial Judge in considering the submissions by the Counsel for the Applicant Campbell that the Caution Statement ought not to be admitted in evidence mis-applied the evidence when at Volume 2 Page 133-134 of the record she stated that the evidence of Mr. Taylor was that he was in

Sav-la-mar on the 9th February, 1977 between the hours of 8:00 a.m. and 12:00 p.m. and the hours of 12:00 p.m. and 7:00 p.m. The Learned Trial Judge stated that the witness was not asked if he was consistently there. In fact the record discloses at Volume 2 Page 87-88 that the witness admitted saying that he was in Sav-la-mar from 8:00 a.m. until noon on the 9th February, 1977 and that he was in Sava-la-mar from 12:00 p.m. until 7:00 p.m. on the said day.

7. The Learned Trial Judge failed to address her mind (in considering the contention of the accused) to the fact that the accused had been in custody without charge for more than two days before signing the alleged confession. There being no explanation from the police for the original detention or for the delay between detention and questioning. The Prosecution had failed to discharge the burden to prove beyond a reasonable doubt that the signature of the accused had not been induced by the threat of further unlawful detention on the promise or hope of release. In the alternative the Learned Trial Judge failed to direct herself on these considerations or to make findings thereon."

The learned trial judge clearly erred in the respects described in grounds 2 and 3. The witness who conducted the identification parade had stated in examination-in-chief that at the parade Hines had not identified the applicant. He was allowed to refer to the identification parade record in order to "correct" this statement although he had not asked to refresh his memory in this regard. This was clearly wrong (Vide R. v. Edward Harvey (1975) 13 J.L.R. 142.) We do not however consider that this was fatal to the conviction. There was other evidence of identification relating to counts 4, 5 and 6 and the learned trial judge does not appear to have relied on the identification by Hines because at p. 286 in recounting the persons by whom Campbell was

identified at the parade she does not mention the name of Hines.

In so far as ground 4 is concerned, the learned trial judge clearly was attempting to elicit from the police officer information as to the identity of the persons to whom the maker of the statement indicated that he intended to refer and as we have previously indicated this would have admissible against the maker of the statement. However in answer to these questions the police officer gave his own interpretation of the references and this was clearly inadmissible against the maker of the statement or anyone else. We do not however consider that the failure of the learned trial judge specifically to state in her summation that she had warned herself not to rely on these answers by the police officer suggested that she may have so relied and invalidated the conviction. In dealing with the case against Campbell the learned trial judge nowhere indicated that she took into consideration the statement made by Grant or the police officer's interpretation of the references in it. This ground of appeal also fails.

As regards ground 5, the use of the expression "your friends" is perhaps unfortunate in view of the allegation by the applicants that no friendship existed between them prior to the alleged incidents. We do not however consider that the learned trial judge intended to refer to anything other than such association as existed between them by virtue of their being co-accused who had by that time been sitting together in the dock for several days. We do not consider that this suggests a prior determination of any issue by her.

In so far as ground 6 is concerned the comment by the learned trial judge in relation to the evidence of Det. Cpl. Taylor amounts to a

misdirection of fact. The effect of Cpl. Taylor's evidence in cross-examination clearly was that between the hours of 8:00 a.m. and 7:00 p.m. on February 9. 1977 he was in Savanna-la-mar. Whatever may have been the explanation for this evidence it was not, as the learned trial judge suggested, that the witness was not asked if he was consistently in Savanna-la-mar. If there was no explanation then this evidence was clearly in conflict with the evidence of Det. Cpl. Taylor to the effect that he took a statement from the applicant Campbell at approximately 11:00 a.m. on February 9, 1977 at Whithorn. The effect of this conflict could well be to discredit Cpl. Taylor in relation to the date of taking of this statement and this might have been of importance if the existence of the statement was in issue. We do not however consider that it could have the effect of discrediting Cpl. Taylor generally. This ground also fails. Counsel for the applicant Grant in the course of his submissions indicated that he was also relying on the submissions of counsel for the applicant Campbell in so far as they suggested that Det. Cpl. Taylor had been discredited. We do not however consider that it was open to him to rely on this particular ground because Grant had himself stated that he had been taken inter alia by Det. Taylor from Montego Bay to Whithorn between 5:00 p.m. and 6:30 p.m. on February 9, 1977. It was not therefore open to him to say that because of the apparent conflict in Taylor's evidence as to his whereabouts on Febraury 9, Taylor could not be believed when he stated that he had taken Grant from Montego Bay to Whithorn and had been present when a statement was taken from Grant that night. In any event it was Det. Insp. Daley and not Det. Taylor who on the evidence took the statement from Grant. Taylor only

witnessed it.

Finally we turn to ground 7. On the evidence the applicant Campbell is a young man. He was detained by the Police and was not permitted to see his parents. No charge was initially preferred against him and after 2 days he is alleged to have volunteered a statement. Counsel for the applicant contends, not without some justification, that this treatment, particularly in the case of a young person, could well have the effect of inducing him to make a statement if only in the hope that it would secure his release. We cannot however uphold his submission that in the absence of an explanation from the police for the original detention or for the delay between detention and questioning "the prosecution had failed to discharge the burden to prove beyond a reasonable doubt that the signature of the accused had not been induced by the threat of further unlawful detention or the promise or hope of release." Nor can we agree with the alternative submission that the learned trial judge having failed to direct herself on these considerations or to make findings there on, her decision ought not to be uphold. The fact is that the applicant in challenging the voluntariness of the statement had made two allegations - firstly that he had been beaten in order to persuade him to give a statement and secondly that the inducement had been held out to him that if he signed the statement it would ensure his release when he appeared before the judge. The learned trial judge specifically rejected these allegations. The detention incommunicado of the applicant was never advanced as the reason or one of the reasons for his signing the statement and even if it was a factor which might have contributed to his willingness to sign in the hope of release before the judge, the learned trial judge having rejected

the evidence of this offer, it was not necessary for her to deal with this predisposing factor. For the same reason it was not necessary for the police to explain the detention (desirable though this may be for other purposes) in order to establish the voluntariness of the statement. This ground also fails.

For the reasons we have given the applications of Ferguson and Grant were refused on July 6, 1979 and the application of Campbell for leave to appeal is now refused.