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JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CRIMINAL APPEAL No.113 of 1975

BEFORE: The Hon. Mr. Justice Hercules, J.A.(Presiding).
The Hon. Mr. Justice Swaby, J.A.
The Hon. Mr. Justice Watkins, J.A.(Ag.).

Regina v. Hubert Kelly)
Samuel Wisdom)
Thomas Edwards)
Kenneth Blissett) Appellants
Berkman Johnson)
Denver Shaw)
Caleb Duncan)

Mr. Ian Ramsay and Mr. A. Campbell for appellants.

Mr. J.S. Kerr Q.C. Director of Public Prosecutions and Mr. A. Soares for the Crown.

May 10,11,13,14; June 18, 1976

WATKINS, J.A.(Ag.):

This is an appeal from convictions and sentences imposed at the Brown's Town Resident Magistrate's Court on April 30, 1975 by His Honour Mr. C.S. Orr, resident magistrate, St. Ann. It is necessary to refer to the indictment and to the convictions and sentences recorded thereon in some detail. The indictment contained eleven counts which charged the appellants or some of them with crimes alleged to have been committed on January 2, 1974. On count one which charged all the appellants with unlawful and riotous assembly all were convicted. On count two which charged Hubert Kelly alone with occasioning actual bodily harm to one Ivan Lowers, Kelly was convicted. Charged alone also on count three with breaking and entering the dwelling house of Tex Mitchell, Hubert Kelly was also convicted. On count four which charged Hubert Kelly and Thomas Edwards with wounding Tex Mitchell, these appellants were both convicted. On count five which charged Hubert Kelly, Kenneth Blissett, Berkman Johnson and Samuel Wisdom with wounding Alverna Wray, all were convicted. On count six which charged Samuel Wisdom alone with assaulting Alverna Wray, Wisdom was convicted. On count seven which charged Hubert Kelly and Kenneth Blissett with wounding Cleveland Williams, both appellants were convicted. Charged on count eight with malicious damage to the property of David Whorms both appellants Hubert Kelly and

Samuel Wisdom were convicted. On count nine which charged Berkman Johnson, Caleb Duncan and Denver Shaw with malicious damage to the property of Olive Campbell, Johnson alone was convicted. On count ten which charged Hubert Kelly, Samuel Wisdom, Thomas Edwards and Kenneth Blissett with malicious damage to the property of Vernon Faulkner, only Kelly and Blissett were convicted, whilst on the eleventh and final count which charged all seven appellants with wounding Edward Hobson only Johnson and Blissett were convicted. All appellants were sentenced to serve consecutive sentences of twelve months hard labour on each count save that on count six the sentence imposed on Blissett was six months hard labour to run consecutively to his sentence on count one.

After hearing arguments ranging over four days the court took time for consideration.

The circumstances in which these charges arose were as follows: On the night of January 2, 1974 a group of men, including the appellants, the Crown alleged, and variously numbered between 60 and 200, went on a rampage in Bamboo, St. Ann, and its outlying areas. Travelling in two vans and armed with guns, machetes, knives, sticks and other weapons they began the rampage at a place called Lillyfield, and working their way through Homestead Property, Thatchfield, and some places nearby to Bamboo, they terminated their activities at a place called Higgins Land. The various counts of the indictment catalogue the personal injuries and property damage left behind. At Lillyfield David Whorms, Olive Campbell and Vernon Faulkner suffered property damage whilst Conroy Gabbidon and Edward Hobson sustained physical injuries. Homestead Property was the scene of the infliction of physical injury upon Alverna Wray and Cleveland Williams, whilst at Bamboo, Ivan Lowers and Tex Mitchell underwent physical harm and property damage. The unlawful and riotous assembly charged in count one embraced all the scenes of these criminal activities. Of the appellants only Johnson, Duncan and Shaw faced an identification parade but were not identified either by Alverna Wray, Tex Mitchell or Olive Campbell, witnesses at the trial. Johnson and Duncan were however identified in the dock by Edward Hobson,

the virtual complainant in the last count. Johnson, Duncan and Shaw were arrested on the day after the date of the offences, namely January 3, 1974, by Det. Sgt. Warren, whilst Kelly was not arrested until July 1974, some six months after the date charged in the indictment. The Crown called no evidence in relation to the futile identification parade and after verdict the learned resident magistrate refused an application by the Defence for an adjournment to call character evidence and proceeded, after hearing evidence of antecedents and of the state of crime in the parish, to impose the sentences already referred to.

The major arguments agitated before us, not surprisingly, centred around three issues, namely: (i) whether in relation to the first count of riot the evidence adduced supported the existence of the common purpose found by the learned resident magistrate, (ii) identification, and (iii) the validity of the sentences imposed, having regard to the refusal of the application for adjournment, and also that the sentences were manifestly excessive. These issues must now be examined.

Common Purpose. The learned resident magistrate in his statement of findings of fact stated that he found the common purpose in the charge of riot to be "to apprehend certain persons by force, to wound certain persons, to enter certain premises by force, to ..... damage certain property." In his supplementary grounds of appeal which by leave of the Court Counsel was permitted to argue, he urged that rather than supporting the finding of the resident magistrate the evidence adduced by the Crown suggested "spontaneous happenings and escalations occurring as one incident led haphazardly to another and eventually to an ending so startling that it can only be explained in terms of a mindless series of events" a reference doubtlessly to the fact that at the end of the rampage one participant therein instructed another to take the injured to the hospital. Before us Counsel expanded this argument to embrace the contention (i) that the finding of the court below amounted merely to a finding of the method by which the common purpose, if any, was achieved and (ii) that from the evidence it could have been inferred that there were several different purposes by which different participants were actuated, a circumstance necessitating not one but several counts of riot. What then was the evidence adduced by the Crown? It was in evidence that in response to

various witnesses, victims of the outrages of that night, who enquired what were the reasons for the assault upon them, the appellants Kelly and Wisdom demanded the return of a quantity of ganja which they apparently thought had been purloined by their victims or some of them. At Homestead Property, for example, Kelly is said to have told the witness Wray "to carry mi ganja come" and Wisdom is said also to have told Wray that "we must know something about their things". At Lillyfield the witness Conroy Gabbidon was told "give mi mi ganja". In so far then as a motive, in the sense of an emotion prompting an act, for these criminal acts was concerned, it was abundantly open on the evidence for the learned resident magistrate to have inferred that the wrongdoers were urged or motivated by a desire to recover the ganja thought by them to have been stolen, or at least to find out who were the persons responsible for the disappearance of their ganja. How they purposed to satisfy this urge, the evidence would necessarily also have to disclose. As already indicated, a considerable body of men assembled themselves together under cover of night, and conveying themselves in two vans driven, as the evidence discloses, by the appellants Kelly and Wisdom, they betook themselves from district to district armed with weapons capable of inflicting severe injuries to body and equally severe property damage. At Lillyfield the complainant Hobson and a witness named Gabbidon were beaten. The property of witnesses David Whorms, Vernon Faulkner and Olive Campbell suffered destruction. At Homestead the complainants Wray and Williams were beaten. So too at Bamboo were Ivan Lowers and Tex Mitchell whose house was broken into. At Thatchfield, according to the evidence, one van separated itself from the other and proceeded to Bamboo where Lowers, Mitchell and a third person were taken captives and beaten. That vehicle rejoined the waiting vehicle later on at Thatchfield and the ringleaders openly exchanged information with each other as to the tally of captives taken, whereupon both vehicles resumed the pursuit of other predatory acts. In summary then there was evidence of a concensus to meet at a pre-arranged place at a pre-arranged time. There was evidence also of a concensus about the means of transport, to be armed in certain ways, and to assemble in certain numbers. These arrangements were curiously consistent with the challenges of the

enterprise in hand. On such evidence which was never really challenged by the defence whose uniform defence was an alibi, it was abundantly open to the learned resident magistrate to find that the common purpose of the participants in the riot was as already described and we can see no reason to differ from him. Most certainly one could hardly apply the description "haphazard" or "mindless" to an enterprise which from beginning to end manifests, if nothing else, a well conceived and equally well executed plan of violence and destruction. Counsel's argument on this ground necessarily fails.

Identification. It has already been noticed that it was Det. Sgt. Warren by whom on January 3, 1974 the appellants Johnson, Duncan and Shaw had been arrested. Warren had further testified that prior to the arrest of these three men he had interviewed, in addition to persons who had not been called to give evidence in the case, the three witnesses Olive Campbell, Vernon Faulkner and Conroy Gabbidon. Asked whether he could furnish the names of the other persons from whom he had received information, the Sergeant of Police claimed privilege and stated that to answer the question would involve the disclosure of confidential information. Counsel for the defence did not pursue the matter.

Apart from the first count of riot on which these three appellants as well as the others had been charged, Johnson was also charged and convicted on count five (wounding Alverna Wray), on count nine (malicious damage to property of Olive Campbell) and both Johnson and Duncan on count eleven (wounding Edward Hobson), the events of the two latter counts having taken place at Lillyfield where Olive Campbell, Vernon Faulkner and Conroy Gabbidon lived and where on the night of January 2, they had each of them either suffered personal injury or damage to property. Wray had not identified Johnson, Duncan or Shaw at the identification parade, neither did Tex Mitchell nor Cleveland Williams, and both Olive Campbell and Edward Hobson were not asked to attend the parade. During the course of the trial, however, Edward Hobson made a dock identification of Johnson and Duncan and Olive Campbell identified in the dock Hubert Kelly and other unnamed appellants. Out of these circumstances the appellants' next ground of appeal emerged. Somewhat composite in nature it contended (i) that for want of identification the convictions of Shaw and

Duncan were unsustainable (ii) that the dock identification of Johnson was unsatisfactory and that his convictions ought therefore to be quashed and (iii) that the claim of privilege having been wrongly upheld, the Court thereby deprived itself of information which might have so impeached the credibility of the evidence on the important issue of identification as to render the case against the other appellants incapable of proof beyond reasonable doubt.

Shaw. The identification of this appellant rested entirely upon the testimony of the witness Wray. He had in examination-in-chief testified that he had seen Shaw (and Duncan) before the date charged in Brown's Town and was certain that he had seen Shaw (and Duncan) in one of the vans on the night of January 2, yet under cross-examination he admitted that he had not known Shaw (or Duncan) before that night. Wray failed to identify either Shaw or Duncan at the identification parade and it was not elicited from him what was the reason, if any, for this failure on his part. In his findings of fact the learned resident magistrate whilst accepting Wray's testimony as to his knowing the appellants and seeing them on January 2, makes no reference whatever to Wray's failure at the identification parade to identify either Shaw or Duncan and it is only reasonable to infer that this important fact had escaped his attention. We do not feel that in these circumstances the identity of the appellant Shaw has been established with the certainty required in law and so his conviction on count one must be quashed.

Duncan. The identification of the appellant rested not only upon the rather fragile testimony of the witness Wray but also upon that of the witness Hobson who testified that although he had not known him before the night of January 2, yet he was in no uncertainty that he had by the aid of the light in his house seen Duncan enter therein and had been chopped by him. This was evidence as to identification which it was open to the court to accept and did accept, the court having advised itself of the inherent dangers of dock identification, and we see no reason why the finding of the court should be disturbed.

Johnson. The identification of this appellant did not rest solely upon the testimony of Mr. Wray who failed to identify him at the identification parade, nor upon the dock identification of the witness

Edward Hobson but upon the evidence of David Whorms who testified that he saw him coming from Olive Campbell's room with burnt clothing, upon the evidence of the witness Conroy Gabbidon who knew him before January 2, 1974 and had seen him that night at Higgins Land in one of the vans and had been driven together with other victims by Johnson, on the instructions of Wisdom, to the Alexandria Hospital; upon the evidence of Cleveland Williams who said that he saw him on Homestead Property on the relevant night, and upon the evidence of Ivan Lowers who testified that he knew Johnson before the date charged and had seen him on the night of January 2 at Bamboo in one of the vans. There was therefore abundant evidence of the presence of the appellant Johnson at various times and stages of the activities of the night in issue and so the contention as to the identification of this appellant must fail.

Identification of the other appellants and the claim of privilege.

The rule concerning the non-disclosure of the name of an informant was stated by Lord Esher M.R. in Marks v. Beyfus (1890) 25 Q.B.D. 494. He said (25 Q.B.D. at p. 498):

> "In the case of A.G. v. Briant (1846) 15 M & W 169 Pollock, C.B. discussing the case of R. v. Hardy says that on all hands it was agreed in that case that the informer, in the case of a public prosecution, should not be disclosed;"

and later on in his judgment, Pollock C.B. says:

> "The rule clearly established and acted on is this, that in a public prosecution a witness cannot be asked such questions as will disclose the informer, if he is a third person ..... and we think the principle of the rule applies to the case where a witness is asked if he is the informer. I do not say that it is a rule which can never be departed from; if upon the trial of a prisoner the judge should be of opinion that the disclosure of the name of the informant is necessary or right in order to show the prisoner's innocence, then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail."

(See also R. v. Dawkins (1961) 3 WIR 489). As already noticed Sgt. Warren's claim of privilege met no objection from the Defence and indeed the matter received no further attention at all in the court below.

Before us repeated invitations from the Bench to illustrate in what way the interest of his clients or any of them might have been prejudiced by the non-disclosure received no satisfactory or convincing reply from Counsel and we were satisfied that this particular contention did not really rise above the level of a "fishing" expedition. Proof of the crimes charged in the indictment required the adducing of evidence of the identity of the participants in the activities of the night of January 2 and of the involvement therein whether as principals or as aiders and abettors of each and every participant charged.

The findings of fact of the learned resident magistrate confirm that he had adverted his mind to these evidential requirements. He said:

> "Court finds that these accused men and others executed their common purpose by assaulting Ivan Lowers thereby occasioning actual bodily harm (count 2), wounding Tex Mitchell (count 4) Alverna Wray (counts 5 and 6) Cleveland Williams (count 7) and Edward Hobson (count 11). Court finds that the common purpose was further executed by apprehending Ivan Lowers, Tex Mitchell, Cleveland Williams (count 7) and other persons, and by the damage to the property of Vernon Faulkner (count 10) David Whorms (count 8) and Clive Campbell (count 9) and by entering the house of Tex Mitchell (count 3). The Court is satisfied that the accused had an intention to help one another by force, if necessary, against any one who may oppose them in the execution of their common purpose. Court finds that all the persons concerned in committing the various offences charged, and in the execution of their common purpose, were armed with weapons, that some had machetes, some had bits of iron pipes and some had guns and that at least one member of the party (Blissett) had a knife."

The various counts are interpolated and do not in fact appear in the record of the findings of fact of the court below. We have closely examined all the evidence in this case with the assistance of Counsel on both sides and we have no hesitation in saying that such evidence overwhelmingly supports these findings and accordingly we see no reason why the convictions, other than that in the case of the appellant Shaw with which we have already dealt should in any way be disturbed.

Sentence. The complaint of Counsel for the appellants in respect of

sentence rested on two grounds. First, he said that the sentences were manifestly excessive. Next, he said that they were void, or at least voidable, by reason of the fact that in breach of the common law principle of natural justice, audi alteram partem, and of section 20 (6)(d) of the Constitution the learned resident magistrate had proceeded to impose sentence without hearing character evidence which the Defence desired but was not allowed to adduce. The second complaint will be dealt with first. The reasons advanced for the refusal of the application for the adjournment to allow the character evidence to be given appear from the record to be (i) that several adjournments had already been sought and obtained by the defence (ii) that the defence should have come prepared for the eventuality of a guilty verdict (iii) that the court at Brown's Town where the trial was taking place sat but once per week and there were many part-heard cases outstanding and (iv) that he, the judge, was shortly to leave the island on vacation. The constitutional provision is in explicit terms. It says that:-

> "Every person who is charged with a criminal offence ..... shall be afforded facilities to ..... obtain the attendance of witnesses, subject to the payment of their reasonable expenses, and carry out the examination of such witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution."

This section which is designed to afford the protection of law to a person charged with a criminal offence crystallises the common law on the subject (See Nasralla v. D.P.P. (1967) 2 All E.R. 161 at p.165 lines A-C) and so it is to the authorities at common law to which one must refer for the scope, content and qualifications of the rule in the particular context of an application for an adjournment in order to adduce character evidence after verdict. Four questions seem to arise. The first is: Does the rule apply in a post verdict situation as here? The learned Director contended that it did not inasmuch as the protection of law is afforded to a person "charged with a criminal offence" whereas in the instant case the appellants were no longer "charged" but "convicted" persons. This indeed was the argument urged unsuccessfully by the defendant in Evans v. Macklen (1976) G.L.R. pp. 120-121, a case subsequently brought to our

notice by the Director himself. The defendant was convicted by justices of unlawfully using a motor vehicle with a defective tyre. Not having attended the trial the justices who wished to disqualify her issued a warrant for her arrest in order to secure her attendance before them for sentencing. She forcibly resisted her arrest by a constable who did not have the warrant in his possession at the time of the arrest. Charged with assaulting the constable in the execution of his duty the defendant was convicted. She appealed by way of case stated to the Divisional Court of Queens Bench on the ground that since the constable did not have the warrant in his possession at the time of the arrest he was not acting in the execution of his duty and so the arrest was unlawful. In dismissing the appeal the Divisional Court held that by section 102 of the Magistrates' Court Act 1952 a constable need not have a warrant in his possession when arresting a person "charged with a criminal offence" and although the defendant contended that she was not a person "charged with an offence" since she had already been convicted of driving with a defective tyre and the warrant had been issued only in relation to the penalty to be imposed, the purpose of the words "charged with an offence" was to distinguish between civil and criminal cases and the words could be construed as referring to someone who had been "charged with an offence" in the sense that an information had been laid. We respectfully adopt the reasoning of the Divisional Court and hold that the protection of law afforded pursuant to section 20 (6)(d) of the Constitution extends as well to proceedings after verdict as before. The second question is: What considerations arise, after verdict, for the determination of the Court? This question was fully and ably answered by Hilbery, J. in R. v. Ball (1951) 35 C.A.R. pp. 165-166. He said:

> "In deciding the appropriate sentence a Court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be

> negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the Court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the Court has the right and the duty to decide whether to be lenient or severe. It is for these reasons, and with these purposes in view, that before passing sentence the Court hears evidence of the antecedents and character of every convicted person."

The right afforded by section 20 (6)(d) of the Constitution to a person "charged with a criminal offence" "to obtain the attendance of witnesses .... to testify on his behalf" is, as a means of affording this particular protection of law, calculated to ensure, where an accused party so wishes it, that evidence of his character is taken into account as a matter of duty by the court when considering sentence, other than a mandatory sentence. The third question is: What is the duty of a court when faced with an application for an adjournment in order to afford opportunity for the adducing of character evidence after verdict? Both at common law and by section 169 of the Judicature (Resident Magistrates) Act the power to grant adjournments is discretionary but the discretion is one to be exercised on legal principles and an appellate court will interfere with the exercise of such a discretion if it can be shown that a refusal of such an application led to a miscarriage of justice. (See De Freitas v.R (1960) 2 WIR 523; R. v. Walker (1969) 15 WIR 355; Allette v. Chief of Police (1967) 10 WIR 243; Maxwell v. Keun et al (1927) All E.R. Rep. 335 and Dick v. Pillar (1943) 1 All E.R. 627). The fourth and final question is: Did the refusal of the application for adjournment in the instant case occasion a miscarriage of justice? Indubitably the order of the learned resident magistrate refusing the application was untenable in law. The grant of other adjournments during the course of the trial proper and before verdict had no bearing upon the new situations and different

considerations arising thereafter, nor ought the crowded state of the court list or the personal affairs of the judge to be put in the same scales with those interests for which the protection afforded by section 20 (6)(d) of the Constitution exists. Whilst also the perspicacity of Counsel might have led him to come to court prepared for the consequences of a possible guilty verdict, failure to do so could hardly per se warrant the refusal of his application for adjournment. This was not a case of an application for a further adjournment after verdict as distinct from a first application for an adjournment. The refusal therefore was a wrongful exercise of judicial discretion and Counsel for the appellants contended that in the circumstances the sentences were void, or at least, voidable and that, leaving out of consideration the question of guilt of his clients, the matter ought to be returned to the court below to redress the wrong. It has not been contended that, if the self-same sentences had been imposed after due consideration of all evidence of character adduced, such sentences would be in excess of jurisdiction. If this is not so, the contention of voidness seems unsupportable. We have enquired and are reliably informed in any event that the learned resident magistrate is indeed off the island and will not be returning shortly and it would be wrong to prolong the incarceration of the appellants to abide that event. This Court has the power under section 28 of the Judicature (Appellate Jurisdiction) Act to order the production of character evidence and indeed as part of his case on appeal Counsel had sought to move the Court to hear fresh evidence which, as his application reveals, included evidence of character, but the application was not in proper form and was refused. We have, however, considered the testimonials which constituted the evidence of character and have come to the conclusion that no consideration arising out of them would justify any mitigation of the sentences imposed for such crimes, and so, in our view, no miscarriage of justice has in fact been occasioned by the refusal of the adjournment. It follows also that we do not consider that the sentences are in any way excessive having regard to the violence displayed and the terror excited thereby in the community that night.

The order of the court therefore is that the appeal of Denver Shaw is allowed, his conviction quashed and the sentence set aside, and that the appeals of each of the other appellants are dismissed, and their convictions and sentences affirmed.