

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 122/89

BEFORE: THE HON. MR. JUSTICE ROWE - PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

REGINA

VS.

LLOYD BLOOMFIELD

Delroy Chuck and Miss Helen Birch for Applicant

Miss Paula Llewellyn for Crown

JANUARY 14, 15 AND MARCH 22, 1991

ROWE P.:

Patty Palace is the name of certain business premises situate in the heart of Cross Roads, immediately opposite the Cross Roads Post Office. There, on the night of June 15, 1988, the applicant was shot and wounded. He was charged along with another man Whitcliffe Johnson on an indictment charging illegal possession of a firearm, school-house breaking and larceny and shooting with intent. Bloomfield pleaded guilty to the offence of school-house breaking and larceny from which charge there is no appeal. He was convicted before Pitter J. on the other two counts and received sentences of seven years hard labour for illegal possession of the fire-arm and ten years imprisonment for shooting with intent.

THE PROSECUTION'S CASE

Two sets of Apple 2-E computers including the printers, valued at \$35,000.00 were stolen from the Computer Room of the St. Hugh's High School between the 14th and 15th June 1988. Thieves gained entry by dislodging burglar bars at the windows. Special Constable Lavern McKoy attached to Harman Barracks, was sitting in his car which was parked on Retirement Road and he was drinking a beer. It was 1:15 a.m. Other cars parked in that vicinity were taxis. Special Constable McKoy observed a man, later identified as the applicant, go from car to car and speak to the drivers. One taxi-man pointed in McKoy's direction and Bloomfield approached him and said:

"What happen man? The man a roots man?"

McKoy answered:

"Yes."

Bloomfield said:

"Here yah. I have some looting fe move
and I have a twenty dollar fe give
the man."

To McKoy's query as to what kind of loot, Bloomfield said it was some computer machines which he had taken from over St. Hugh's High School. McKoy invited Bloomfield into his car and then drove to St. Hugh's High School. There McKoy observed a man leaning against the wall of a building holding a snub-nosed .38 revolver in his hand. Bloomfield opened a gate, went under the cellar of a building and took out seven pieces of computer equipment. McKoy opened the trunk of his car and Bloomfield placed the computer parts therein. Then both Bloomfield and the gunman who appeared to McKoy to have been keeping watch, entered McKoy's car, and sat in the rear seat. Bloomfield directed McKoy to drive to Patty Palace. At a bus stop on Caledonia Crescent, Bloomfield ordered McKoy to stop. Both Bloomfield and the gunman alighted from the car, and Bloomfield directed McKoy

to drive around to the Post Office.

After these two men alighted McKoy said he spoke to the driver of a minibus, remained in place for two minutes to enable the minibus to reach Cross Roads Police Station, then drove into Cross Roads Square, passed Bloomfield, drove down to Carib Theatre, stalled the car, reversed from that point towards the Post Office, stalled the car again and finally at the beckoning of Bloomfield drove the car to Patty Palace. All the unusual manoeuvres on the road, were done, McKoy said, to attract the attention of the police.

A third man now entered the scene. McKoy said that as he drove to the gate a man was standing inside the gate and he opened it permitting the car to enter. Whitcliffe Johnson was identified as this third man. McKoy said all three men were now standing at the gate viz., Bloomfield, Johnson and the gunman.

McKoy drove into Patty Palace and opened the trunk of his car. The three men began unloading the computer equipment. McKoy observed that before this was completed the men began whispering to themselves. The gunman detached himself from the group and approached him. In McKoy's words:

"Then I saw the man with the gun come around the front of the car. I realized that he had the gun pointed in my direction. He then fired a shot in my direction. I jumped through the front door."

By this McKoy meant that he dived from right to left and exited through the passenger's door. He lay on the ground under the car. From that position he fired his service revolver in the direction from which the gunman was firing at him. McKoy said he emptied his revolver and then ran. When he reached the main gate of the premises he saw two policemen running towards him, to whom he made a report. With them he returned into Patty Palace and saw the applicant

lying on the ground, about six feet away from the car, bleeding from wounds to his head, arm and lower abdomen. Bloomfield was sent to the hospital in a passing police car. McKoy said too that when he lay under the car he could not see anything because it was dark.

McKoy said he received no injury but the gunshots burst the left door of the car. About three shots were fired at him before he dived through the left door. The premises had no light but light from adjoining premises reflected therein. Areas of Patty Place were dark and following the shooting he used a flash-light to search the premises. In the process he found the portions of the computers which had been removed from the car. McKoy denied that he had assisted to load the computers into the trunk of his car; that he had demanded one of the computer monitors mistaking it for a television set and that upon the refusal of the applicant to acquiesce in this demand that he shot the applicant at point blank range. McKoy denied defence suggestions that there was no third person armed with a gun with the applicant and Bloomfield that night.

Special Constable Brown was at the Cross Roads Police Station at about 1:50 a.m. on the 15th of June 1988 when gunshots from the Post Office direction attracted his attention. Special Constable Brown and another policeman ran to investigate. On reaching the Post Office he saw McKoy running out of Patty Palace premises with a .38 revolver in his hand. He stopped and spoke to McKoy. Together they re-entered Patty Palace. A motor car with headlights burning was parked in the premises. The doors were open. About 1/2 chain from the car the applicant was seen lying on his face, and bleeding from his left hand and in the region of his testicles. Special Constable Brown knew the applicant who addressed him thus:

"Mr. Brown, come carry mi
go hospital, nuh meck mi
dead."

At this point Special Constable McKoy made a report to Special Constable Brown in the presence of the applicant in terms similar to the evidence given by Special Constable McKoy. The only response of the applicant was a repetition of his request to be taken to the hospital.

Special Constable Brown further testified that he examined McKoy's motor car and observed two holes "in the region of the door post on the driver's side" which resembled bullet holes. He saw freshly chipped duco and from experience was confident that the holes were not made by other objects. Special Constable Brown at one time said the bullet holes were pointed out to him (p. 93 Record) and later that he became aware of these bullet holes through his examination of the car having regard to the report from Special Constable McKoy.

In cross-examination Special Constable Brown was challenged as to the veracity of the evidence in respect of the bullet holes. First the Special Constable said he had recorded this fact in his Statement but when faced with his written Statement, admitted that this fact was not recorded due to inadvertence. Special Constable Brown said he searched the premises for spent shells but did not find any.

On the question of the state of the light on the Patty Palace premises, Special Constable Brown said that "if somebody was on the premises of Patty Palace you would have been able to see that person because it was well lit" (p. 103). Light was on the building and light was on the street (p. 119). And because the place was well lit he did not have need for recourse to a flash-light and neither Special Constable McKoy nor any of the police officers used a flash-light that night (p. 117).

Detective Sergeant Barnaby investigated the school-house breaking and larceny charge, and was at the Cross Roads Police Station at about 2:30 p.m. on June 15, 1988 when Special Constable McKoy "attended the Station with a Triumph motor car and on examining the car I saw two holes which appeared to be gunshots holes", on the right door near the hinge and on the centre pole on which the door locks. Detective Sergeant Barnaby did not include this observation in his written Statement, a copy of which was served on the applicant.

Upon arrest the applicant is alleged to have made no Statement.

THE DEFENCE

Bloomfield, the applicant gave sworn evidence. He admitted breaking into the Computer Room at St. Hugh's High School and stealing computers which he said he hid in some bushes by an abandoned house on Leinster Road. He went in search of transport and at Retirement Road he saw and spoke to Special Constable McKoy who was then half-sitting, half-lying on the back of his car, and McKoy agreed to take him to Duff's College for the sum of \$20.00 which he paid. McKoy stopped his car beside the place where the stolen computers were hidden and McKoy assisted him to load them into the trunk of his car. Together they drove to Patty Palace. McKoy reversed into the premises, the gate of which was open, parked, went to the rear of the car, opened the trunk, and asked the applicant for what sum did he expect to sell the machines. The applicant expressed ignorance, whereupon Special Constable McKoy describing the pre-paid fee as "idiot money" determined to retain one piece of the computer system. Firstly, the applicant promised to compensate McKoy on the following day and upon the refusal of that offer, he attempted to physically wrest away the printer from Special Constable McKoy. Of course at the time the applicant did not know the status of the driver but rather believed him to be a robot taxi-man. It was then, said the applicant, that

Special Constable McKoy drew his revolver and shot him twice. A crowd gathered and later Special Constable Brown came on the scene with Special Constable McKoy. The applicant told of a circuitous route by which he was taken to the hospital and how he received further injuries at the hands of police officers on that journey. Bloomfield denied that any third man with a gun was present that night. He denied that Special Constable McKoy had gone with him to St. Hugh's High School, or that he, and an armed man entered Special Constable McKoy's car or that he alighted from the car other than at Patty Palace on the return journey. Bloomfield denied that there was any shoot-out between McKoy and an unknown armed man.

JUDGE'S FINDINGS

Pitter J. recounted the evidence at great length and made certain findings of fact. As to his approach to the credibility of Special Constable McKoy he said at p. 181 of the Record:

" was there a third man or shall I say another man at St. Hugh's when Constable McKoy went with his car? One has to view Constable McKoy's evidence very carefully because insofar as this other gunman is concerned his evidence must be credit-worthy. Now, we were told that the computers were valued at some Thirty-five Thousand Dollars (\$35,000.00) and that the accused man himself had to go and seek transportation to remove the goods. He was asked how come he left the goods there without protection, he said he had hidden them some distance from the school itself. The inference is that where they were placed it was not likely that any body would find them. Now against that concept he is saying, 'I went to the School and I saw this third man'. I accept the evidence from Constable McKoy that there was a third man there, this man was a lookout man. that he was the lookout man, he was armed. I accept the evidence of Constable McKoy, that

"this man travelling in the back of the car had gone to Patty Palace at the direction of the accused, Bloomfield.

I find as a fact that Constable McKoy's car was shot. I find that this was shot up that very night at Patty Palace. I so find that the accused, Johnson, he was present, that he assisted in the unloading of the computers. I also find as a fact that he spoke with this third man and the accused, Bloomfield, and in fact that there was a shootout and the gunman shot at Constable McKoy and he returned the fire thereby hitting the accused, Bloomfield. Having said so - I accept the case for the Crown, I reject that for the Defence."

Earlier on in his summation Pitter J. had disposed of the debated issue concerning the quality of the light on the premises by saying:

"Now, one thing is clear is that the place was well lit." (p. 176 Record).

The single ground of appeal filed is that the conviction is unreasonable and cannot be supported having regard to the evidence. The supporting particular was that:

"The evidence of Constable McKoy that there was a third man, a gunman, lacks credibility."

Prima facie Special Constable McKoy was acting as an accomplice to assist the thief, Bloomfield, to transport stolen goods for a reward. McKoy had seen taxi-men refuse to comply with requests from Bloomfield and having regard to the nature of the proposition made to him, he could reject it out of hand as did the taxi-men, decide to co-operate for financial gain to himself or decide to appear to co-operate with a view to entrapping the applicant. Once he decided to co-operate with the thief, it became a matter of the utmost importance for the trial judge to determine

in which of the two capacities adumbrated above he was acting. It does not appear from his summation that this issue ever crossed the mind of the trial judge. Had he faced the question of accomplice vel non, Pitter J. would have been obliged to dissect the evidence of Special Constable McKoy to see on which side of the accomplice line he fell, and to seek for corroboration if he fell on the wrong side of the line.

Mr. Chuck submitted that the evidence of McKoy as to the presence of a gunman was so incredible that it ought to have been rejected out of hand. On his version of the events, McKoy would have been unpleasantly surprised to see an armed man guarding the stolen goods; he would have been in great personal danger to have this armed man seated immediately behind him and he would have been relieved when both the gunman and Bloomfield alighted from the car and walked out of his sight. To have driven through Cross Roads to Carib Theatre, and then to reverse to Patty Palace, rather than to drive to the Police Station, a stone-throw away should, in Mr. Chuck's view, be regarded as a tall-tale.

In support of the events at Patty Palace as outlined by Special Constable McKoy, it was essential that the place be darkened so that he need not account for the precise manner in which the applicant was shot. The finding of Pitter J. based on evidence from the prosecution, other than Special Constable McKoy, and from the defence, was that the premises were well lit. In the face of that finding, it behoved the trial judge to test the credibility of McKoy who claimed that he had to use a flash-light to search the premises. This piece of evidence was denied by the other Crown witness.

There was a gap in the evidence for the prosecution in relation to the damage done to Special Constable McKoy's motor car. A gunman, was credited with firing three shots

at Special Constable McKoy at point blank range. Special Constable McKoy was not injured. Damage to his motor car would in those circumstances have been inevitable. Neither the Special Constable who testified that he observed bullet holes on the night, nor Detective Sergeant Barnaby who inspected the motor car on the afternoon of the following day, included this fact in their Statements. Pitter J. did not consider this lacuna of importance, as he made no specific finding as to how he resolved that issue which was much pressed upon him during the trial.

It seems to us that there were contested issues of fact as to the resolution of which Pitter J. ought to have offered even a modicum of reasoning. The failure of the trial judge to determine whether in the circumstances Special Constable McKoy was an accomplice vel non, renders his findings of fact unreasonable and consequently produced an unreasonable verdict.

The application for leave to appeal is treated as the hearing of the appeal which is allowed. The conviction is quashed and the sentence set aside and verdicts of acquittal entered on Counts 1 and 3.