JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL Nos. 100 & 102 of 1971

BEFORE: The Hon. Mr. Justice Fox, Presiding.
The Hon. Mr. Justice Edun, J.A.
The Hon. Mr. Justice Graham-Perkins, J.A.

R. v. LYNFORD COKE AND ASTON FARQUHARSON

Appellants appeared in person.

Mr. C. Alexander for the Crown.

13th, 14th, 15th and 22nd November 1972
23rd February 1973

EDUN J.A.:

On November 22, 1972 we delivered judgment in the above appeals. We dismissed the appeals against convictions in respect of both appellants and also as against the sentences imposed upon Aston Farquharson. We allowed the appeal of Lynford Coke against sentence, by varying sentences on Counts 7, 8 so as to allow those sentences of 18 years imprisonment at hard labour to run concurrently (instead of consecutively) with sentences of 15 years at hard labour imposed on Counts 1,2,3,4,5,6 and 9. We promised to put our reasons in writing. We do so now. Both appellants argued their appeals.

The case for the prosecution was that on September 18, 1970 about 4.00 p.m., whilst the tellers of a bank were at their counters attending to customers, four men each carrying a gun entered the bank, robbed Mr. Stasyk, the manager, of a revolver, and robbed four tellers of a total of approximately $15,000. Rev. Sawyers, then a customer in the bank, was robbed of a wallet containing $11.00 Jamaican and $20.00 U.S. About 15 minutes after, Constable Shaw was walking in the Half Way Tree Road on the same side of the bank. When he was about a chain or little more from the bank, he saw a group of 5 to 6 men walking fast towards him. He was in uniform. He recognized two of them, one of whom was the appellant Coke. Coke stepped out from the group and shot him with a shotgun and robbed him of his revolver. The appellants Coke and Farquharson were identified as two of the robbers in the

bank and were seen leaving the bank and being in the group walking on Half Way Tree Road in the direction of Constable Shaw. The four men were jointly charged, thus -

Ct. 1 of robbing manager of the bank of a revolver;
Ct. 2 of robbing teller, Audrey McKenzie of $3,255.16;
Ct. 3 of robbing teller Judith Douglas of $4,670.44;
Ct. 4 of robbing teller Elaine Yee of $2,891.81;
Ct. 5 of robbing teller Maria Lattibeaudiere of $3,566.25;
Ct. 6 of robbing Menzie Sawyers a customer in the bank of $30.00 in Jamaican and U.S. currencies;
Ct. 7 of shooting at Cecil Shaw, with intent to murder him;
Ct. 8 of wounding Cecil Shaw, with intent to murder him; and
Ct. 9 of robbing Cecil Shaw of a revolver.

They were all four convicted. Coke and Farquharson have appealed. Coke was sentenced to imprisonment, on Ct.2, to 15 years at hard labour and to receive 15 lashes; on Cts.1, 3, 4, 5, 6 & 9, 15 years and in addition to receive 1 lash on each Count, sentences to run concurrently with sentence on Count 2; on Count 7, 18 years at hard labour, sentence to begin at expiration of sentence on Count 2; and on Count 8, 18 years at hard labour to run concurrently with sentence on Count 7. Farquharson was sentenced to imprisonment on Count 2 to 15 years and to receive 15 lashes; on Counts 1,3,4,5,6 and 9 to 15 years at hard labour and to receive 1 lash; and on Counts 7 and 8 to 15 years at hard labour; all sentences to run concurrently.

Appellant Coke

Coke argued the following points:

i, there was no evidence to support a conviction on Ct. 1;
ii, Counts 2,3,4 & 5 were wrongly instituted and should have been one count charging the entire taking from the bank; and
iii, the verdict against him was unreasonable and cannot be supported having regard to the evidence.

Point i

Eli Stasyk, manager of the Bank, gave evidence that he kept his revolver in his desk drawer in his office at a place where he could normally see it, sitting there. And he opened his drawer from time to time during the course of the day and during the course of business. He could not say exactly when he saw it last before the robbery, but when he went back into his office after the robbers had gone, he found his desk ransacked, drawers

pulled out and his gun was missing. During the robbery, he was ordered to get up from his desk where he was sitting, and to get out of his office with his hands in the air. The learned trial judge left it as a question of fact for the jury to find whether at the time of the entry of the robbers, Mr. Stasyk had the revolver in his desk drawer and that one of the robbers had robbed him of it. The jury were correctly directed on the law as to a taking in his presence: R. v. Desmond and Hall (1965) A.C. 960. We saw no reason to conclude that the jury's verdict on Count 1 was based on no evidence or that robbing the manager of his gun was an unusual consequence of the joint enterprise.

Point ii

In R. v. Ballysingh (1953) 37 Cr. A.R. 28 it was held that where, in a case of shoplifting, the evidence for the prosecution shows that a number of articles have been taken from different parts of a large store, the proper course is to make each taking the subject matter of a separate count for larceny. In that case, the indictment contained only one count for larceny which charged the appellant for stealing the several articles.

In Jemmison v. Priddle (1972) 56 C.A.R. at 229, it was contended that the information in that case was bad for duplicity in that it related to two red deer and that the killing of each of those deer was a potential offence because it contained within itself an allegation of two separate offences. The appeal was dismissed. It was held that an information or count in an indictment is not bad for duplicity if it relates to one activity even though that activity may involve more than one act. In the judgment of Lord Widgery C.J., R. v. Ballysingh was distinguished and at p.234, he said ".... that it is legitimate to charge in a single information one activity even though that activity may involve more than one act." In R. v. Merriman (HLE) (1972) 3 WLR at p.551, Lord Morris of Borth-y-Gest, referring to Jemmison v. Priddle (supra) said, "I agree respectfully with Lord Widgery C.J., that it will often be legitimate to bring a single charge in respect of what may be called one activity even though that activity may involve more than one act. It must of course depend upon the circumstances."

The appellant Coke made the point that the accused could have been charged in one count for the entire takings from the bank and to make each taking the subject matter of different counts was oppressive and unfair.

No precise formula can be laid down to guide the institution of charges, because:-

(a) R. v. Ballysingh has not been overruled.

(b) Though it may be legitimate to bring a single charge in respect of one activity even though that activity may involve more than one act, it is yet not wrong to make each taking the subject matter of a separate count, in a proper case.

In the instant case, each teller of the bank had a special property in the amount of moneys he or she had for the purposes of his employment. In section 3 (iii) of the Larceny Law, Ch. 212, "owner" has been defined as including any part owner, or person having possession or control of, or a special property in, anything capable of being stolen. In R. v. Harding (1929) 21 Cr. A.R. 166, the appellant was charged with robbing Valetta Mary Matthews of a mackintosh. The appellant and another, entered a house belonging to Bowen. At that time only the servant Matthews was in the house. After hearing a noise, Matthews entered the kitchen, then she was struck across the forehead. Reviving from the blow a few minutes after, she found herself in the hands of both accused. They put her in fear and demanded money and clothes from her. She gave them her employer's mackintosh coat. On appeal, it was contended that Matthews was in no sense in possession of the mackintosh; it was not her property; nor was she a bailee, nor in the position of a person, who had special custody of it. The Court held following decision of Deakin and Smith (1800) 2 East P.C. 653 that it was correct to allege that the prisoners did rob Matthews of the mackintosh. In R. v. Giddins (1842) Car & M. 634, two persons were charged in one count with the robbery of two persons. That was the only charge against them. It was suggested that the robbery of each victim was a distinct felony but Tindal C.J. rejected that submission. Viscount Dilhorne in R. v. Merriman (supra) at p.558, expressed the view that in R. v. Giddins (supra) each robbery might have been separately charged.

(c) Though we hold that the prosecution were not wrong in the circumstances of this case to have charged the appellant Coke and others on the separate counts of 2, 3, 4 and 5, yet there may be cases where the rules of fairness and of convenience and the needs of justice may not warrant such a course.

We hold that the course taken by the prosecution in this case does not result in any oppression or unfairness. At the trial, each of the four accused was represented by learned attorney-at-law and no objection was taken to the indictment. If the prosecution had charged the four accused jointly in one count for robbing the bank of the entire amount of $15,000.00 approx., there could have been no successful objection to the leading of evidence of each taking from the individual tellers so as to establish the common design to rob in each of the accused.

Point iii

The appellant Coke dealt with the evidence exhaustively, but there are only a few points which merit our consideration.

(a) Decoy money. The bank had a system whereby each teller was given a bundle of 100 notes and a card was made up wherein the serial numbers were recorded so that in the event of a robbery the teller should endeavour to hand over to the robbers the "decoy" money. That system might well assist in the detection of any robbers. On September 8, 1969 there was a currency change-over from pounds to dollars and so fifty-cent notes were substituted for five-shilling notes. Supt. Robertson gave evidence that on Sept. 23 he arrested Coke at the Palisadoes airport and found on him, among American and Canadian currencies, 122 Jamaican fifty-cent notes and 2 $5.00 notes; 36 of the fifty-cent notes contained serial numbers between 430701 to 430800. One of the tellers said that on Sept.8, 1969 she was handed 100 Jamaican fifty-cent notes with the above serial numbers and that the Manager initialled the card at the time she was handed the decoy notes. The teller said when the robbery took place on Sept.18, 1970 she handed one of the robbers that set of money. But there was evidence that Mr. Stasyk went to that bank as manager on October 2, 1969 - that is, after the teller was given the notes. The cards recording the handling of the decoy notes in the tellers were tendered in evidence and entries therein referred to by the learned trial judge. Coke's defence was that the police did not find any Jamaican currency on him, and the point was forcefully made at the trial that there was conspiracy and fraud between the police and the bank officials to fabricate evidence for the prosecution. However, there was evidence from other witnesses that the notes numbered 430701-800 were in that teller's

possession on Sept. 8, 1969 - the date of the currency change-over. On this aspect of the case, the learned trial judge told the jury:-

> "If, Mr. Foreman, and members of the jury ... you are satisfied so that you feel sure that the witnesses from the bank spoke the truth when they said that these cards are genuine, ... and that in fact on the 18th September the robbers were handed the decoy notes C 430701-800, then you would go on to consider the other evidence in relation to what has been said by the police officer on the finding of this money, but if you feel sure that these records are, as suggested to you, fraudulent, then of course, you will have to reject probably the whole case out of hand because you will be dealing with fraudulent conspirators. Even if you should feel a tinge of doubt that these records are genuine, I think you would have to say to yourselves: these people are so fraudulent, how could I believe a word that any of them said? How could I, if they go and manufacture records to go and bring here to fool me? You might say they are genuine - a matter for you. I make no further comment on the decoy money records."

(b) Identification. Five witnesses gave evidence for the prosecution that on identification parades they pointed out Coke as being one of the robbers they saw in the bank. Coke argued that when he was arrested, his passport and other things were taken from him. One police officer claimed that he handed the passport to another officer and that officer denied ever receiving that document at all. One witness claimed that Coke was wearing a mask in the bank, another claimed that he had something covering his eyes or mouth. Coke claimed that no proper entries were made in the station diary showing what property was taken from him or with what offence he was charged; that he was taken from his cell to Court when it was very likely that witnesses could have seen him before going on identification parades. He also claimed that the police used his passport to show the witnesses before any identification parades were held. Those witnesses, however, were cross-examined on all aspects of the appellant's views. They denied ever seeing Coke before the parades or at all except at the bank during the robbery. No doubt those matters were fully aired in addresses to the jury.

We have carefully examined the facts and studied the summing-up. From pages 32-35, the learned trial judge took great pains to highlight the views propounded by the defence and gave a fair and impartial review of the evidence. We found no reasons to interfere with the jury's verdict on any bases whatsoever.

Sentence. On counts 7 and 8 concerning the shooting of Cecil Shaw, Coke was sentenced 18 years at hard labour to run consecutively to other sentences of 15 years at hard labour, and lashes. On those same counts, the other accused were convicted and sentenced on all counts to serve concurrent sentences. In the case of Farquharson, he is to serve a maximum sentence of 15 years. There is no complaint made of the summing-up of the learned trial judge on the law as to common design.

The jury in convicting all four prisoners in respect of Counts 7 and 8 must have concluded as directed by the learned trial judge that one of the prime objectives of the robbers was to use whatever force was necessary to permit and ensure their escape and that it was part of the agreed plan to shoot at the police with the intention to kill should it appear to the robbers that any policeman was about to interfere with their process of escape.

In sentencing all four prisoners, the learned trial judge said:-

> "The normal course of business in Jamaica should not be hampered by marauding acts of gangs of desperadoes armed with guns ... In this case there seems to have been careful planning ..."

When dealing, particularly with the two appellants, he said:

> "I have also taken into account the nature of the previous convictions of you Coke, and of you Farquharson, both of whom have previously received long sentences in this court."

We have no doubt that the facts in this case justify long sentences because the Courts will not tolerate the continuance of the acts of violent robberies which threaten the community. When persons set out in a gang armed with murderous weapons we say, without hesitation that long custodial sentences are necessary lest others are encouraged to behave in a similar way. If all the prisoners were sentenced on Counts 7 and 8 to run consecutive to other sentences, it would not be unjust for Coke to be punished in like manner. The disparity of the consecutive sentences imposed upon Coke is in the circumstances of this case, unjustified. There was careful planning in

all of them. Each had a gun and the execution of the common purpose to rob with violence, to secure and escape with their loot, was clockwork. Except for pulling the trigger of the gun by Coke at Cecil Shaw, there was no evidence establishing anyone as being a ringleader as such or any mitigation in either. The eventual escape from immediate apprehension by Cecil Shaw benefited all to make away with their loot. "The general principle is that sentences passed on co-defendants should bear a proper relationship to each other; it is not necessary that identical sentences should be passed on each defendant, but discrimination between defendants should be capable of being justified by reference either to differences in the relative responsibility of the defendants for the commission of the offence, or to the presence of mitigating factors of a personal nature which apply to one defendant and not to another. So far as is possible the Court of Appeal will vary sentences to take account of these principles, either by removing an unjustified disparity or creating a distinction which the circumstances of the case require." See Dobson & East (1970) Criminal Law Review 354-476; See also R. v. Coe (1969) 53 Cr. A.R. 66, where the Court made certain observations on disparity of sentences passed on co-defendants.

For the above reason, we varied the sentences of Coke on Counts 7 and 8 to run concurrently with the other sentences.

Appellant Farquharson

The prosecution's case was that Farquharson was identified in the bank as robbing a teller of $3,255.16 cts. and was pointed out at an identification parade. A police detective found on him 32 Jamaican fifty-cent decoy notes and when he was told of the bank robberies, and cautioned, he said:-

> "I never go there but I know the boys them who go there .. I never go to the bank but the boys them who go is Dungle Lion, Neville Johnson, Senna, Ransimo, Pye and Flash. They leaving the Island this evening at Palisadoes; they give me some of the money which you take from me."

Point (i) Decoy money. Farquharson made the same points as Coke did, and in his case the jury must have been sure of the existence of the decoy money if they believed his statement as true that the police had found some of the money on him.

Point (ii) Identification. His main complaint was that when the bank teller was about to identify him, the Inspector in charge of the parade went in front of him so as to indicate his identity to the witness. The bank teller explained that she had asked the Inspector to stand in front of her when she walked in front of the line as she was afraid the suspect when pointed out would injure her. At the parade Farquharson had counsel of his choice present when the parade was held and neither he nor his counsel made any complaint of improper conduct to the Inspector.

Point (iii) Convictions on counts 7, 8 and 9. Farquharson by means of written submissions of an attorney-at-law, argued that in absence of any preconceived plan between the robbers to shoot Cecil Shaw, there was no evidence from which the inference could be drawn that he was a party either to the shooting of Shaw or the robbery of Shaw's gun. On Count 6 he also argued that if the plan was to rob the bank, the robbing of a customer, was an isolated act and only those of the robbers who participated or acquiesced in it, would be answerable.

Point (iv) Cautioned statement to the police (as mentioned above). We have carefully examined the summing-up of the learned trial judge and we hold that all points of view of the defence were told to the jury, facts were fairly and impartially explained to them and the defence was adequately put.

The law involved in point (iii) is quite clear. Where two or more persons embark on a joint enterprise, each is criminally liable for acts done in pursuance of the joint enterprise, including unusual consequences arising from the execution of the joint enterprise; but if one of them goes beyond what has been tacitly agreed as part of the joint enterprise, the others are not liable for the consequences of the unauthorised acts. It is for the jury in every case to decide whether what was done was part of the joint enterprise, or went beyond it and was in fact an act unauthorised by that joint enterprise. See R. v. Smith (1963) 3 AER 597
R. v. Betty (1963) 3 AER 602
R. v. Anderson and Morris (1966) 2 AER 644
R. v. Lovesey (1969) 2 AER 1077

In the instant case, the four prisoners were identified as robbers in the bank. When one of them was speaking to the Manager to open the vault, another of them said that they did not have time. The first one then said: "Unnoo come and help me; is not me alone plan this thing." Another robber

then came into the staff area and helped to put money in the dust bin. There was then the fourth who stood on top of the counter with a long gun.

About twenty minutes after that robbery, Cecil Shaw who was in uniform was on Half-Way Tree road going towards the same bank saw a group of 5 or 6 men walking fast towards him. He recognised Coke and another of the robbers. Coke stepped out from the group, shot him and robbed him of his revolver. The Manager said he was robbed of the revolver he had in his desk drawer. Sawyers said that shortly after the robbery in the bank, the robbers turned down towards Half-Way Tree Road, then he heard gunshots. Mr. Chung, an employee of the bank said that after the robbers left the bank, he went outside and he too heard gunshots coming from the direction of Half-Way Tree. Although Miss Findlator did not identify any of the robbers, she said she was going to a bank to lodge money, when: "Up came a young man with a long gun and he pointed it at Constable Shaw; she heard gunshot ... After we heard gunshot we saw some other men running on the sidewalk. They had guns in their hands and they were pointing them .." There was also abundant evidence that each robber knew that Coke had a gun.

We have examined the summing-up carefully and find that the learned trial judge had correctly stated the law on this aspect of the case, to the jury. There has been no complaint in that respect. From the evidence, we hold that there was sufficient material upon which the jury could reasonably have come to the conclusion as to -

(a) the identity of the prisoners in the group in which Coke was one of them and who shot Cecil Shaw;

(b) the nature of the tacit agreement as part of the joint enterprise;

(c) whether or not Coke's act in shooting Cecil Shaw was the consequence of an act outside the joint agreement; and

(d) whether or not the robbery of Sawyers was an unusual consequence of the joint enterprise.

The jury have made their decisions and we saw no justification in this or in any other respect to interfere with their verdicts.