

IN THE COURT OF APPEALSUPREME COURT CRIMINAL APPEAL NOS. 181 & 182/78

BEFORE: THE HON. MR. JUSTICE ZACCA, J.A. - PRESIDING
THE HON. MR. JUSTICE CARBERRY, J.A.
THE HON. MR. JUSTICE KERR, J.A.

R. v. NOEL WALKER & PETER THOMAS

Mr. Codling & Miss Audrey Tucker for Noel Walker.

Mr. Roy Taylor for Peter Thomas.

Mr. H. Cooke for the Crown.

July 27, 1979.

KERR, J.A.

This is in the case of Noel Walker an appeal and, in the case of Peter Thomas an application for leave to appeal from convictions in the High Court Division of the Gun Court for the offences of illegal possession of a firearm and possession of ammunition in the case of Thomas and assault with intent to rob in the case of Walker. Because the application of Thomas contains grounds of appeal which involve questions of law we are treating the application also as an appeal.

Fitzalbert Brooks said that on May the 30, 1977, about 10:50 a.m., he drove his bread van and parked it in front of a shop on May Pen in Clarendon. While he was around the steering wheel a brown young man came up and to his query what he wanted he said, "I want money" and he identified the man at the trial as Walker and also at an identification parade held on June 4, 1977. He said that while the accused Walker was by the van he followed the direction of Walker's glance and he saw what appeared to be the muzzle of a gun pointed at him and on seeing that he rushed from the van, ran past Walker and

into the shop. In looking back he saw Samuel Cameron his assistant who had been in the act of making deliveries from the van standing beside the van. There was a gun man holding him up. He flung a bottle at the man; the man ran away. Both Brooks and Cameron were unable to give sufficient identification of that man and so, in relation to the count in the indictments - count three - with this aspect of the matter charging Thomas and Walker jointly, the learned trial judge held that there was not sufficient evidence of identity in regard to Thomas and acquitted him on that count.

Shortly after the incident by the van Basil Williams, a soldier, while walking along Denbeigh Crescent saw a crowd and got certain information and he went along a track where he saw two men; one turned and fired a shot at him. He was unable to say if any of the accused were the men. He lost sight of them but he continued in the same direction and he got in touch with the police. When the police came he went in a van with them and in that van was Constable Noel, one of the witnesses in the case and Detective Corporal Parnell. Now they went in the direction of the two men and Parnell and Noel both agreed that the two men were the accused and they stopped the van right beside them and ordered them to "hands up". While this was going on the fair man who was Walker put up his hands while the other took the revolver from his waist and flicked it through a fence nearby. The Constable Noel went up and picked up the revolver and opened it in the presence of the accused and in it was ammunition.

Walker in his statement from the dock said that he was walking along the Boulevard and he met a man presumably Thomas, and while he was speaking to him some men jumped out of a van and said,

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'put up your hands in the air'. He put up his hands in the air and the men, who were the police searched them and detained them. When he was taken to the station he was beaten and put to sit on a bench. After that they brought a gun and said, "Boy you know what is this", and he said, 'is a gun' and a policeman said he was going to charge both himself and the other man, who was ~~Walker~~^{Thomas} for it. He called as his witness his father concerning the identification parade which was held and at which Brooks identified him.

The appellant Peter Thomas said that on that day he went to May Pen and while he was there he asked Walker where he could get a bus to take him back to Old Harbour and while he was talking the police came along, ordered them to put up their hands, put them in a van and asked them to lie on their face. There was no traffic jam; he had not pulled any revolver from his waist. Then at the C.I.D. room he was beaten by Parnell. He held up no one.

He was cross-examined and he said that the first time he saw exhibit one - the revolver - was in court. He never kicked the gun over the fence and it was not sealed in his presence in the station. He never saw any gun at the police station; he didn't remember if anything at all was said at the police station about the gun; that citizens never beat him up in the van.

Now before us leave was sought and granted to argue a number of grounds of appeal. Of them the following were worthy of consideration: In regard to Noel Walker, ground 1: - the finding of the learned trial judge of guilty for assault with intent to rob; count 3 of the indictment, is null and void because on the finding of not guilty of illegal possession of firearm the Court had no jurisdiction

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in relation to count three of the indictment.

The indictment contained five counts charging both appellants jointly. The first count, illegal possession of firearm; second count, illegal possession of ammunition; the third count, assault with intent to rob Fitzalbert Brooks; the fourth count, assault with intent to rob Samuel Cameron; and the fifth count, shooting with intent at Bovel Williams. Thomas was convicted on counts one and two and Walker on count three.

Now it has been laid down in cases decided by this Court that the High Court Division of the Gun Court is empowered and limited by the Act of its creation to try certain offences - the offences set out in Section 5(2) of the Gun Court Act and among them are firearm offences. The firearm offence is an offence, the commission of which involved the use or possession of a firearm - Section 2 of the Gun Court Act. The learned trial judge found as a fact that Walker was acting in concert with a man unidentified who had a firearm and therefore, this was a firearm offence within the meaning of the Act. Accordingly we hold there is no merit in this ground.

The other ground of appeal may in effect be summarised as dealing with whether or not there was sufficient evidence to establish common design between Noel Walker and the gun man in relation to count three, and in consideration of the evidence in that regard submissions were made by Mr. Codling as to the reasonableness of the inference of common design ^{as} ~~as~~ in examination-in-chief the evidence was open to the interpretation that Walker was no more than an irksome beggar, and that there was no evidential connection to link him with a man who appeared on the other side of the van with a gun. We were at one stage attracted by this argument but our attention was subsequently drawn to certain

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evidence in cross-examination which made it quite clear that the accused Walker was no beggar. At page 21 it was put expressly to the witness Fitzalbert Brooks:-

"Q: Do you think this brown man was begging you money?

A: Begging me money?

Q: Yes?

A: He was approaching me demanding money, not begging me money."

and again page 24:

"Q: Now apart from asking you for the money did this man do anything else?

A: He stood up before the door like this and after I see him standing up I say to him, 'What happen man?' Him say, 'What happen, money'. 'How you mean money?' Him say, 'Give me the money that I have'.

Q: You have told the court that he stood at the door but you say you were coming out and you pushed him aside, did he resist you?

A: I chucked him. I couldn't say he resist because I never gave him any time to resist."

We find that having regard to the conduct of the appellant Walker as described by the witness and the almost simultaneous appearance of the of the van, gun man on the other side / it was open to the trial judge to find that they were acting in concert and in our view that ground of appeal fails.

The only other ground which merited careful consideration was ground 3, in that the verdict of the learned trial judge was unsatisfactory in that it was based on the evidence of an identification parade which admittedly was conducted contrary to the regulations. In that regard learned counsel submitted that where the witness was put while the parade was being formed may have given him an opportunity to see the prisoner before he went on parade. The cross-examination on that aspect as well as to any impropriety at the parade fell short of a positive suggestion and we are of the view that although the

investigating officer was at the witness' parade there is no evidence that he in any way interfered with the conduct of the parade.

Accordingly, we are of the view that the identification at the parade was fair and that the judge was justified in accepting it as such.

Now for the appellant Thomas, the following grounds are worthy of note:

- "Ground 1: The Indictment upon which the Appellant was tried and convicted was bad in law for the reason that:-
- (a) it purports to have been laid in two different courts simultaneously, viz, the Supreme Court of Judicature of Jamaica and the Gun Court;
 - (b) the offences which counts III and IV thereof purported to charge were not triable in the Gun Court, though they were triable in the Supreme Court.

ALTERNATIVELY

- 1(a) The conviction of the Appellant was bad in law in view of the fact that the trial was a nullity, there being no jurisdiction in the court of trial to try the offences laid in counts III and IV of the indictment."

We are of the view that the commencement of the indictment is descriptive of two courts; that it is neither practical nor possible for a man to be tried in two courts at the same time. It is obvious that there is a patent ambiguity in that regard but it has been conceded and we think there is no doubt that the appellants were tried in the High Court Division of the Gun Court and that the procedure and the practice were appropriate to that court. The question of this false description on the indictment was never raised at the trial and if it were the defect could be cured by a simple amendment. Accordingly, it could not be said with any degree of reason and commonsense that it caused any injustice to the appellant.

As regard ground 1(b): The appellant was never convicted on those counts and we cannot see by what reason Counsel could urge anything in relation to those counts as a ground of appeal here. In the course of argument when it was brought to Counsel's attention that the convictions on counts one and two were based on the evidence in relation to what took place at Penguin Crossing when the appellant was accosted by the two police officers, Noel and Parnell, he quite properly did not pursue his argument. For these reasons we find no merit in ground 1.

"Ground 2: The verdict was unreasonable, unsafe, and/or unsatisfactory having regard to the fact that the several witnesses for the prosecution -

- (a) were in irreconcilable conflict with each other on material aspects of the evidence respecting the issue 'possession vel non,'
- (b) gave otherwise manifestly unreliable evidence."

The argument rested on two bases: (i) The apparent inconsistencies in the evidence of the witness Noel and also the discrepancy between Noel's evidence and Parnell's, and (ii) What appeared to be a major discrepancy between the evidence of Bovel Williams, the soldier and the two police officers. As regard the inconsistencies and discrepancies of the two police witnesses we are of the view that those are merely of the peripheral and do not in any way affect their evidence in the material and important particulars. More anxious consideration was given to what could be called the absence of any evidence relating to the finding of a gun in the testimony of Bovel Williams. It is clear from the evidence that Bovel Williams was present when the gun was found and when it was opened and shown

to the appellant. The question posed by Mr. Taylor is, "How is that in his evidence he has made no mention of any gun being found at

Penguin Crossing?" In that regard he drew attention to the cross-examination of Bovel Williams and particularly to the cross-examination which put to him the sequence of events to which he gave an affirmative answer. The review of the sequence was put to him in this way:-

Q: Well, what are you saying Mr. Williams, is that these men were standing in Chapelton road, the Police simply came up, held them up at gun point and put them in police vehicle without saying anything at all, put them in the vehicle?

A: When the police reached them they told them to put up their hand, searched them and go away with them to the station.

In the evidence it had transpired that Williams came out of the van after the two police officers - but it is clear from the evidence of Parnell that he was there when the firearm was opened and shown to the appellant. The judge dealt with this aspect of the case in what may be regarded as a very clear and reasonable manner. He said, "I have given due consideration to Burrell Williams' evidence and his clear omission to mention any firearm having been recovered on the scene. The defence have put forward that there was no firearm, but the Court regards this as an omission on Williams' part rather than as was suggested 'a denial by him that there was one'. It was indeed a delicate situation for the Crown could not lead him to it nor could the defence seek in cross-examination to have this omission clarified positively as this may have served to jog the witness' memory."

The learned trial judge saw and heard this witness and he apparently was of the view that he was no eager volunteer. Both sides for reasons which he expressed in his summation were reluctant to categorically ask him the question, "Was there a gun present at the

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scene?"

Accordingly, the appeals are dismissed and the convictions affirmed.

ZACCA, J.A. (Presiding) - Re: Noel Walker's appeal against Sentence.

The court has given consideration to the submissions made by Counsel. We are satisfied that a custodial sentence is a proper one. However, in view of the fact that we have no evidence of his antecedents, there is no record of any previous convictions and we are told by Mr. Codling, as far as he is aware, the appellant has no previous convictions as such and in view of the fact that the robbery was not perfected we feel that the least custodial sentence that we can impose on the appellant is one of five years' hard labour. Accordingly, we allow the appeal against sentence and a sentence of five years' hard labour is substituted.

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