

J A M A I C A

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL No. 6/87

BEFORE: The Hon. Mr. Justice Rowe, P.
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice White, J.A.

R. v. STEPHEN BOOTHE & JUNIOR THOMAS

Delroy Chuck for the appellants.

Kent Pantry and Miss Marlene Harrison for the Crown.

9th March, 1987

ROWE, P.:

Lane Supermarket is situate at 26 Constant Spring Road in Saint Andrew. It is a large supermarket and it employs security guards to guard the premises at night. On the 13th December, 1985, at 1.20 a.m. the security guard on duty at the supermarket was a Mr. Christie and he observed during one of his rounds that there were four men on the roof of the supermarket and they were seen by him to be cutting the zinc of the roof. He called, he said, to these men and the reply he received from the roof was the shout, "Shoot de boy." He thereupon did not wait to be shot, but he fired some shots towards the men who were on the roof and they scampered away. He made a report to the police and when the police came they made observations,

and they saw spots of fresh blood in an area which suggested that someone on the roof had been shot.

Mr. Christie, the security guard, observed that the men in fleeing had left a sheet of zinc cut, as also cutting tools, an ordinary saw, a hammer and a hooker, something which I imagine was to be used to pull nails and things of that sort. Those tools were available at trial.

On realising that it was possible that somebody had been shot, the police began to make investigations. In the meantime, however, a report was received from the Medical Associates Hospital and a police officer went to that hospital and there he saw the appellant Thomas. He identified himself to the appellant Thomas and enquired of Thomas how it is that he had been wounded because Thomas was seen to be suffering from a gunshot wound in the left side of his abdomen. Thomas reply to the police officer was, "A de one Stephen mek me get shot, and him left me and gone." The police officer after making further enquiries took the appellant Thomas to the home of the appellant Stephen Boothe on Derrymore Road and according to the evidence given at trial when the police party went to the home of Stephen Boothe they knocked and the door was opened by the appellant Boothe. Thomas said, pointing to Boothe, "See him there officer", and the appellant Boothe is said to have replied, "whey me do?" to which the appellant Thomas replied, "Is yu mek me get shot and yu gone back a yu bed?" The evidence is that to this accusation Boothe remained silent. The police officer arrested Boothe and charged him with shop-breaking with intent. He cautioned Boothe

and Boothe is alleged to have said, referring to the appellant Thomas, "Me tell yu sey to tell them sey that yu get shot at Westminster Road." Thomas repeated his accusation, "A yu mek me get shot."

The evidence for the prosecution further was that when the manager of the Lane Supermarket visited the supermarket on the following day he found that a sheet of zinc was lifted from the roof, and below that lifted sheet the board which covered the ceiling was partly sawn. He noticed that a second sheet of zinc was lifted but the board underneath was intact.

The learned resident magistrate heard the defence. That of the appellant Thomas was that he was on his way home on the night in question, that he was held up while walking along Westminster Road by a young man with a gun, that the man demanded money of him, that he wrestled with the man, and that the man shot him and then ran away. Having been shot, said Mr. Thomas, he went to the home of Mr. Boothe whom he knew before. He could only mumble that he had got shot, and Mr. Boothe took him to the Medical Associates Hospital and he was waiting there when the nurse called the police. Thomas denied that he had told the police anything at all in relation to the appellant Stephen Boothe and especially denied that he had told the police that, "A Stephen mek me get shot and left me and gone." He denied that he had been to the Lane Supermarket on that night, and that he knew anything about the attempted break-in.

The defence of the appellant Boothe was that he was at his house on this particular night, and that the appellant Thomas came there, that Thomas had been known to him for two years, and that because Thomas was bleeding

and told him that he had been shot by thieves. he decided to help Thomas, got a taxi and took Thomas first to the University Hospital, but there being no doctor on duty at that hospital he then took him to the Andrews Memorial Hospital along Hope Road. No doctor was there either, and he took him to the third place, the Medical Associates Hospital where he left him on a stretcher, but before he left he gave the nurse certain details about his name and his address.

The import of this evidence was that it was unnecessary for the appellant Thomas to have told the police anything about the appellant Boothe for the police to have been able to find Boothe because it was easy for them to have ascertained this information from the nurses at the hospital. Thomas denied that he had any connection at all with the incident at Lane Supermarket or that he had made any of the remarks to the police which they gave in evidence.

The learned resident magistrate found the appellants guilty saying that he accepted the evidence for the prosecution and he rejected the evidence for the appellants wherever it was in conflict with the evidence for the prosecution. He said in particular that he accepted and relied on the evidence of Detective acting Corporal Courtney Ferguson as to the statements and the conduct of both accused in the course of his investigations.

Before us, Mr. Chuck argued on behalf of both appellants that the evidence did not disclose the elements of the offence of shopbreaking in that there was no evidence of entry into the building which is a prerequisite of the offence of shopbreaking with intent. Although we did not call upon the Crown to help us in this matter, the evidence

in our view was clear that there was no breaking to the extent that a hole had been created in the fabric of the shop and so that at the highest the offence was an attempt at shopbreaking; Mr. Chuck conceded that the evidence was capable of showing that there was an attempt at shopbreaking. Therefore, in relation to the appellant Thomas he did not go on to advance any other ground in support of his appeal.

In relation to the appellant Boothe he argued grounds 2 and 3. Ground 2 was:

"That the evidence against the appellant Stephen Boothe is flimsy based on unrecorded statement allegedly given to the police officer and that those statements are

(i) unreliable, as they are based on the memory of the police officer as to what he heard and recalled;

(ii) that the statement was obtained without the usual caution;

(iii) It is uncorroborated, which is considered necessary in cases where evidence originates from an accomplice."

And ground 3 was:

"That under all the circumstances of the case the conviction is unsafe and unsatisfactory and would amount to a miscarriage of justice."

In the course of his argument before us Mr. Chuck pointed to the fact that what was allegedly said by the appellant Thomas when Boothe opened the door could not in any event be evidence against Boothe because Boothe might not have heard and might simply have asked "why me do?" by having seen the police officer. He said further that it is possible that even when the police officer alleged that Thomas said it was Boothe who had caused him to get shot, the fact that Boothe did not reply might mean that Boothe had not heard. In his forthright and characteristic style Mr. Chuck did

admit that if Boothe heard both statements and did not reply to the second statement of accusation, which is a matter to which he would have been expected to have made some reaction, it could be used as some evidence against him, although he said, it was flimsy.

In relation to the statement which the police said that the appellant Boothe made after caution, Mr. Chuck argued that this could probably amount at the highest to the inference that Boothe was attempting to pervert the course of justice by attempting to give Thomas an alibi which he did not in truth possess. Again, he was forced to admit and to concede that having regard to the length of time which elapsed between the shooting by the security guard and the time that Boothe was picked up, that having regard to the efforts which Boothe said he made to get medical attention for Thomas and yet Boothe did not report the matter to the police that these circumstances were capable of having the meaning that Boothe was a member of the gang which was attempting to break into Lane Supermarket. On that state of the evidence, he conceded that if the resident magistrate drew those inferences, they could properly be drawn on the facts and, therefore, the conviction for attempt at shopbreaking with intent could not be assailed.

In relation to sentence, Mr. Chuck pointed out the fact that this was the first conviction for the appellant Boothe ^{and} that although Thomas is alleged to have had two previous convictions, the learned resident magistrate was sentencing them at the time for the completed offence of shopbreaking which carries a much higher penalty than the offence of attempt and he, therefore, suggested that in all the circumstances the proper sentence, if a custodial sentence ought to be imposed, would be one of eighteen months at hard labour. With this the Court entirely agrees.

The appeal against conviction is allowed in part. Verdict of guilty of shopbreaking with intent set aside and verdict of attempt at shopbreaking with intent substituted. The appeal against sentence is allowed, not on the basis that if it were shopbreaking and larceny two years would be too high, but because the offence for which they are being convicted is attempt at shopbreaking the sentence ought to be eighteen months at hard labour, and we will allow it to run from the date of conviction.