J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL 44/69.

BEFORE: The Hon. Mr. Justice Shelley - Presiding.
The Hon. Mr. Justice Luckhoo - J.A.
The Hon. Mr. Justice Fox - J.A.

R. v VERNON MASON

D. C. W. Spaulding for the Appellant
Mr. K. Patterson for the Crown.

28th, 29th, 30th September, 1970.

Fox, J.A:

This is an application for leave to appeal against conviction and sentence. The applicant was convicted in the Home Circuit Court on 25th March, 1969 on the three counts of an indictment which charged him with the offences of shooting with intent to murder, wounding with intent to do grievous bodily harm, and illegal possession of a firearm.

The evidence led by the prosecution described the circumstances in which Corporal Hyman Walters was shot and wounded in the right forearm at about 1.00 a.m. on the night of 7th September, 1968, whilst on patrol duty with two other policemen, Corporal McKenzie and Corporal Rutty, in Ghost Town in the corporate area. All three policemen gave evidence at the preliminary enquiry before the committing magistrate and at the trial. If they were believed, there was an abundance of material from which the jury would have had no difficulty in concluding that Corporal Walters was injured by a bullet fired from a pistol in the hands of the applicant on an occasion when he and three other men were accosted by the policemen. Corporal McKenzie used his service revolver, and returning the fire of the applicant, wounded him. The pistol fell from his hands. It was siezed by the police and was subsequently tendered in evidence at the preliminary enquiry and at the trial; as was also the bullet which was extracted from the arm of Corporal Walters when he was operated upon later that day at the

Kingston Public Hospital.

The ground of the application in relation to conviction was based upon allegations in an affidavit of the applicant that two witnesses were called at the trial in support of the Crown's case whose depositions had not been taken before the committing magistrate, and whose names had not appeared at the back of the indictment; and that the applicant had not been served with notice of intention to call such additional witnesses, and had not been provided with a copy of the evidence it was proposed they should give.

As a consequence of the investigation of these allegations which was ordered by this Court, affidavits were filed by the Deputy Registrar of the Supreme Court and a Grade II Executive Officer in the Criminal Section of the registry of the Court. It is unnecessary to relate the details of these affidavits or to repeat the submissions which were made by counsel on this aspect of the application. It is sufficient to state that on the material before the Court, the application must be considered on the basis that the allegations of the applicant in his affidavit are correct.

It was contended on behalf of the applicant that the failure to give notice of the intention to call additional witnesses and to supply the prisoner with a copy of the evidence it was proposed that they should give, rendered that evidence inadmissible in law. This contention misconceives the principles which apply in connection with the reception at a trial of fresh evidence secured after an accused has been committed. No statute requires that as a condition to the reception of such fresh evidence the accused person must be served with a notice to that effect, and supplied with copies of the evidence. This course is a matter of practice. (Vide Lord Goddard in R. v Chairman, County of London Quarter Sessions. Exparte Downes (1953) 2 All E.R. 750 at 752). If the fresh evidence is relevant, if it satisfies the well established tests for admission, the judge has no power to reject it on the ground that the correct practice was not followed. The Queen v Connor and Another, 1 Cox, 233. In this

case the additional evidence was that of the doctor who examined Corporal Walters when he was received at the hospital, and of the ballistic expert who had examined the pistol which the applicant had fired, the bullet extracted from the arm of Corporal Walters, the service revolver of Corporal McKenzie, and the two empty cartridges. The doctor testified as to the nature of the wound received by Corporal Walters, the removal of the bullet from his arm, and the handing over of it to the police. The evidence corroborated essential features of the evidence of the three policemen who witnessed the shooting. The ballistic expert gave evidence of the tests which he conducted, which confirmed that the bullet had been fired from the pistol, and negatived the possibility of it having been fired by the service revolver. This evidence was clearly relevant. The essential test for its reception at the trial was therefore satisfied, and the trial judge was bound to receive it when it was tendered by the prosecution. The only power which a trial judge has when the correct practice of giving a notice to the prisoner and supplying him with copies of the fresh evidence is not followed, is,

(a) to adjourn the trial if the justice of the case indicates this; Reg. v Flannagan and Higgins, 15 Cox, 403; and

(b) subject the departure from the correct practice to disapproval by way of strong observations from the Bench. Reg. v Greenslade 11 Cox 412.

The learned trial judge did neither of these two things. In this situation, counsel for the applicant submitted further that the applicant had been unfairly prejudiced at the trial for the following reasons:-

1. He was unrepresented.
2. The additional evidence established substantial matters of fact which confirmed the evidence of the three policemen who had witnessed the shooting, and the applicant was not advised by the learned trial

judge of his right to apply for an adjournment so as to have time to rebut this fresh evidence; and

3. No strong adverse comment had been made by the learned trial judge with respect to the irregularity, and the jury had been thereby deprived of a significant safeguard when they came to consider the value of that evidence.

The failure of a trial judge to grant a postponement where none has been applied for and where there is nothing to show that the justice of the case requires this, and the omission of the judge to comment on the failure of the prosecution to follow the correct practice, are not, in themselves, irregularities, and provide no ground whatsoever for quashing the conviction. The submission of counsel that the absence of a strong adverse comment in this case deprived the jury of a significant safeguard when they came to consider the value of the evidence, is misconceived. The observations which the learned trial judge is entitled to make are for the purpose of checking lax practices when these are the incipient, and eradicating them if they are established. These observations have nothing whatsoever to do with the question of the truthfulness of the evidence or its value. These must be ascertained by the jury in the terms of the usual directions which are given to them to this effect when they come to consider the evidence in the case.

A trial judge must assist an accused who is unrepresented at a trial. Crown counsel must ensure that in all respects he functions essentially as a minister of justice. In Jamaica, legal aid is provided for accused persons in specified offences only. This accused was charged with offences for which there was no provision for legal aid. He was entitled to legal aid.

This was an empty right. There are no economic or no social means whereby he could have been provided with that aid as a matter of course. The trial judge was in a difficult position in discharging his obligation to advise the prisoner. He had no instructions in relation to the defence. It is a not unusual experience of judges

that on occasions intervention for the purpose of assisting a prisoner, perhaps to develop a point which appears to be in favour, as a result of the questions which he asked, has produced the contrary effect. The trial judge is then left open to the charge that he has not assisted the prisoner but has merely driven home nails which the prosecution had left unhammered. This case provides an illustration of this danger. The accused was represented at the preliminary enquiry by Mr. Spaulding. The depositions reveal that the bullet recovered as a result of the operation to Corporal Walters' arm had been handed to the ballistic expert. At ths close of the enquiry the Clerk of the Courts intimated that it was proposed to call the doctor and the ballistic expert, but they were not available at that time. This situation, we think, was sufficient to alert counsel to the distinct probability of these witnesses being called at the trial. It is also reasonable to conclude that the applicant had not been left unwarned of this eventuality. He is not without some education. At the age of seven years he attended the Jones Town Primary School reaching Form 4B, and then attended the Kingston Senior School reaching Form 1B, and then went to Calabar High School reaching Form 4B. He left school at the age of sixteen years. The applicant is clearly above the average literacy which prevails amongst the bulk of the population of the country. At the trial he asked no questions of the witnesses. Now, in this situation, if the trial judge had explained to him, in the face of the jury, what was likely to be the significance of this failure, and if the applicant had presisted in refraining from asking questions, the effect of the efforts of the judge to assist the applicant could very well result in emphasizing the significance of his failure to cross-examine, and instead of helping him could have had a contrary effect. The advantage of the judge in seeing and hearing the witnesses is the controlling factor. He is in a much better position than we are in this Court to discern from the demeanour of the prisoner and the conduct of the proceedings whether his failure to cross-examine is

the result of resignation or ignorance, or some other cause. This Court should therefore exercise caution in reviewing the conduct of a trial judge in relation to the discharge of his obligations to assist an unrepresented accused. It is said in this case that the trial judge should have advised the accused of his right to apply for a postponement. On the printed record there is nothing to show that that was something which the trial judge should have done. In relation to the conviction, we consider that there has been no miscarriage of justice. The conviction is upheld.

The applicant received sentences of imprisonment with hard labour for ten years on the first two counts, to run together; and for five years with hard labour on the charge of illegal possession of a firearm, to run consecutively to the sentences on the first two counts. These are severe sentences. We have been asked to say that they are manifestly excessive in the circumstances, and to reduce them. This is a society in which the supreme authority has clearly indicated that severity of sentences is the approved policy in dealing with crimes of violence. This policy is discernible from those statutes which provide for mandatory minimum sentences. This Court cannot ignore the policy of the government as described in its legislation. Severity of sentence is the means whereby the community is to be protected. Persons who use firearms in the circumstances in which this applicant used a firearm - he was found guilty of shooting with intent to murder - are to be kept away from the general public for as long as possible.

This Court is not oblivious to the more liberal principles which relate to crime as a whole. The essential questions are: 'Do the facilities exist in this country, and is there the climate for the carrying out of these liberal principles?' The questions answer themselves. In the circumstance of this particular case, at this particular time, we cannot say that the sentences are manifestly excessive. Consequently, the sentences shall remain. The application is refused.

PRESIDENT: Sentences to run from the 25th of July, 1969.