

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 130/88

BEFORE: The Hon. Mr. Justice Rowe, President
The Hon. Mr. Justice Downer, J.A.
The Hon. Mr. Justice Gordon, J.A. (Ag.)

R. v. VINCENT ELLIS

J. Hines for appellant

Lloyd Hibbert for Crown

July 3 & December 20, 1989

DOWNER, J.A.

At the conclusion of the hearing of this appeal we set aside the verdict of guilty, with five years imprisonment at hard labour, imposed on the appellant by Orr, J., exercising jurisdiction in the High Court Division of the Gun Court. In the interest of justice, a new trial was also ordered.

The appellant was charged on an indictment containing two counts, one for illegal possession of firearm and the other for illegal possession of ammunition, contrary to section 20 (1) (b) of the Firearms Act. On appeal, the sole issue debated was whether the learned trial judge exercised his discretion correctly in proceeding to trial in the absence of counsel assigned for the defence. To appreciate the circumstances in which the judge exercised his discretion, it is pertinent to set out an extract from the transcript of the trial. It is as follows:

"Ms. Harrison: Before Your Lordship is Vincent Ellis. He is represented by Mr. Barry Johnson who was assigned on the 14th of October, last year. Mr. Johnson has not appeared since this morning.

His Lordship: When last, the records show he was present?

A: He was last present on the 9th of March, this year.

His Lordship: Was that a date fixed for trial?

A: No, M'Lord, there was one subsequent trial date and two subsequent mention dates before this date and it does not appear that he attended on any of those occasions. I have three crown witnesses in the matter, M'Lord two of whom are present and one who is vital to the Crown's case
.....

His Lordship: What was that?

A: Two out of three witnesses are here and the third witness without whom I would not close my case, is not here today.

His Lordship: Where is he?

A: I gather he was informed to be here. He was here on the last occasion and he was informed to come today. He is one of the officers who does foot patrolling and these officers here are not able to contact him. Efforts have been made to contact him, M'Lord, but without success.

His Lordship: Have you seen your lawyer, Ellis?

Mr. Ellis: No, sir.

His Lordship: When last you see him?

A: I don't remember the last time.

His Lordship: When was that?

A: I don't remember when was the last time I see him, M'Lord.

His Lordship: Well, it is now five minutes to twelve, I am going on with the case; you understand me?

Mr. Ellis: Yes, sir.

"Registrar: Vincent Ellis, please stand. Vincent Ellis, you are hereby charged on an indictment containing two Counts. The first Count charges you with Illegal Possession of Firearm, contrary to Section 20 (1) (b) of the Firearm's Act. Particulars of Offence are that you Vincent Ellis on the 21st day of June, 1967 in the parish of Kingston unlawfully had in your possession a firearm not under and in accordance with the terms and conditions of a Firearm User's Licence. How do you plead, guilty or not guilty?

Mr. Ellis: Not guilty.

Registrar: The Second Count charges you with illegal possession of Ammunition contrary to Section 20 (1) (b) of the Firearm's Act. Particulars of Offence are that you, Vincent Ellis on the 21st day of June, 1967 in the parish of Kingston unlawfully had in your possession Ammunition, not under and in accordance with the terms and conditions of a Firearm User's Licence. How do you plead, guilty or not guilty?

Mr. Ellis: Not guilty."

It is to be noted that although Mr. Barry Johnson was assigned, the records indicated that he was not present in Court, on the two occasions when the case was mentioned. Counsel for the Crown expressly stated she could not close her case until an officer on foot patrol was present. It turned out that that officer was Corporal Taylor. In any case he was not present and the Crown had to seek an adjournment to the following day. There is no indication from the record that any enquiry was made in court to persuade counsel to take on an assignment for that or the following day, nor was there any evidence that any enquiry was made as to the availability of counsel assigned. We are all aware of the need for trial judges to keep a firm control of cases listed for hearing, but this must balance against such privileges as are accorded to an accused by the common law, the Poor Prisoners' Defence Act and the Constitution. If due weight is given to these considerations the trial judge's discretion will not be disturbed

on appeal. It is now appropriate to examine the legal provisions pertaining to the assignment of counsel.

Section 3 of the Poor Prisoners' Defence Act, in so far as is material, reads as follows:

"3 (1) Where it appears to a certifying authority that the means of a person charged with or as the case may be convicted of a scheduled offence are insufficient to enable that person to obtain legal aid, the certifying authority shall grant in respect of that person a legal aid certificate which shall entitle him to free legal aid in the preparation and conduct of his defence in the appropriate proceedings or in such of the appropriate proceedings as may be specified in the legal aid certificate and to have counsel or solicitor assigned to him for that purpose in the prescribed manner.

(2) For the purpose of determining whether a legal aid certificate ought to be granted a certifying authority

(a) shall -

(i) upon application made by or on behalf of the person charged; or

(ii) where the person charged appears to be a person of unsound mind,

make such enquiries as he considers necessary into the means of the person charged; and

(b) may direct any probation officer to enquire into and report to him on the means of the person charged.

Since in Section 2, the definition section of the Act "certifying authority" means either a Resident Magistrate or a Supreme Court Judge, then the presumption must be that in this case, the legal aid certificate was properly granted to the appellant. Further paragraph 12 of the First Schedule to the Act makes -

"Any offence the trial of which is to be held in the Gun Court established under the Gun Court Act."

a scheduled offence pursuant to section 3 (supra) of the Act.

The law is that an accused has an entitlement to have counsel assigned to him in the court and he should not be deprived of that protection until proper efforts are made and recorded that no counsel would have been available during the trial judge's period of assignment at the Gun Court. That a trial can proceed without counsel if the appropriate enquiry is made is supported by Robinson v. The Queen Privy Council Appeal No. 3 of 1984.

In the instant case the learned trial judge merely enquired of the accused as to the last time he had seen his counsel and did not consider an adjournment for even a day nor did he direct an enquiry as to whether any counsel within the precincts of the court would have been willing to take on the assignment.

It was against this background that we decided to allow the appeal and ordered a new trial in the interests of justice. Further, we would request of trial judges to bear in mind the necessity to institute an enquiry and the appropriateness of an adjournment as well as to record such actions before embarking on a trial without the assistance of counsel.