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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 81/04

BEFORE: THE HON. MR. JUSTICE HARRISON, P.
THE HON. MR. JUSTICE SMITH J.A.
THE HON. MRS. JUSTICE McCALLA J.A.

R v CLOVIS PATTERSON

Delano Harrison ,Q.C. for the appellant
Tara Reid and Maxine Jackson, for the Crown.

April 25, and December 20, 2006 and April 20, 2007

SMITH, J.A.:

On the 10th March, 2004, Clovis Patterson, the appellant, was convicted in the High Court Division of the Gun Court of illegal possession of firearm and shooting with intent. He was sentenced by Straw J, to 13 years imprisonment on each count. The learned judge ordered that the sentences should run concurrently.

On the 25th October, 2005, he was granted leave to appeal by the single judge. On 25th April, 2006, we dismissed the appeal against conviction and promised to put our reasons in writing. This we now do.

The Prosecution's Case

Evidence for the prosecution was given by three police officers. Det. Constable Christopher Thompson testified that on the 26th March, 2003, at about 9:30 p.m. consequent on a report, he, Constable Peart

and District Constable Byfield proceeded in an unmarked service vehicle to Sligoville. The car was driven by Constable Peart. Det. Constable Thompson sat in the front passenger seat and Constable Byfield was in the back. On reaching a marl pit, Constable Thompson said that he saw the appellant and two other men walking together on the road. The appellant fitted the description he had earlier been given. The police vehicle passed these men, went around a corner, turned around and drove towards the men. The men were then to the right of the policemen. Constable Peart stopped the vehicle on the right side of the road about 12 feet from the three men. Constable Thompson stated that the appellant stooped as if he was adjusting his shoelace. The other two men turned their backs to the road. The light of the vehicle was on, he said, and a light from the verandah of the nearby house also assisted him in seeing the men. Constable Thompson alighted from the vehicle and shouted "Police, put your hands in the air". The men were about 12 feet from where he was. The two men with their backs to the road, spun around each with a gun in hand. He heard two explosions; he flung himself to the ground and fired at the men. The men ran in the direction of Bog Walk and were pursued by the police. Three more gunshot explosions were heard coming from the direction in which the men ran. Assistance from the Linstead Police Station was sought. The men escaped in the bushes. The police began to search in the bushes for the

men. While searching Constable Thompson heard a sound and on investigation he saw the appellant lying on his back. Constable Thompson asked him his name. The appellant replied "Barrington Brown". The appellant, when asked, said he did not know the other two men. Constable Thompson observed that the appellant was bleeding from wounds to his buttocks and heel. He was taken to the Linstead Hospital and a report made to Detective Sgt. Wayne Jacobs.

Constable Stephen Peart also testified. He was the driver of the service vehicle. His evidence in the main, supports the evidence of Constable Thompson. He told the Court that when the men fired at them he took cover and returned the fire. Detective Sgt. Jacobs was attached to the Spanish Town Police Station. He told the Court that on the 20th March, 2003, at about 11:00 p.m. he received a report by telephone from Det. Thompson. He went to the Linstead Police Station and from there to the Casualty Department of the Spanish Town Hospital. He saw the appellant there; his buttocks and right ankle were bandaged. Detective Jacobs identified himself to the appellant, cautioned him and asked him "what was wrong with him." The appellant replied that he was shot by some men. When asked if he knew the men who shot him, he said no. He gave his name as "Barrington Brown" and said he was also called "Hall". He gave his address as Two Rivers in Lawrence Tavern, St. Andrew. When asked how he got to the hospital he said he was taken

there by men who said they were police. He said that he was shot on the Sligoville Road and that he was not alone at the time. Detective Sgt. Jacobs told him of the allegations made against him. When cautioned the appellant said "Officer me don't have any gun, sir a me friends them fire shot". Sgt. Jacobs then asked him who were the friends who fired the shots, his terse response was "After me nuh informer." The appellant was arrested and charged with illegal possession of firearm and shooting with intent. After he was cautioned he said " Officer me nuh have no gun. A mi friends them have." No-case submissions were made by Counsel for the appellant and were overruled by the learned trial judge.

The Defence

The appellant gave the following unsworn statements: "Coming from Bog Walk, Sligoville main road a vehicle pass me go up into a corner and turn come towards me and stop and said, "If I don't know that me fi dead long time, and fire one shot in my left buttock and one in my right ankle. After that I was standing in front of the vehicle then the officers them they took me on a dead end road and they asked me if I know a man by the name of Barry. They carry me to Linstead after and it is me draw out the shot out of my ankle and give him. The man by the name of Barry come up to the hospital and him and the officer were talking. They transfer me to Spanish Town Hospital. That is it".

Grounds of Appeal

Counsel for the appellant sought and obtained permission to argue the following supplemental grounds of appeal:

(1) The learned trial judge erred in law in her failure to uphold the submission that there was no case for the appellant to answer as the prosecution had adduced no evidence of his having acted in concert with others in commission of the offences with which he was charged.

(2) The verdict is unreasonable or cannot be supported having regard to the evidence.

(3) The sentences were manifestly excessive.

Ground 1 – No Case Submission

Mr. Delano Harrison Q.C. submitted that there was no sufficient evidence of a common design, in which the appellant was involved, to shoot at or in the direction of the policemen, in that the evidence discloses no more than the appellant's mere presence at the material time. He relied on ***R v Eric Madurie et al*** [1988] 25 JLR 213 and ***Eric Samuda and Another v The Queen*** [1980]17JLR 157.

Miss Reid for the Crown submitted that the evidence disclosed more than mere presence on the part of the appellant. She referred to the conduct of the appellant just before, during and after the shooting

incident and submitted that the learned trial judge correctly held that there was sufficient evidence to warrant her calling on the appellant to answer the charges. Counsel for the Crown relied on ***R v Dennie Chaplin et al*** SCCA Nos. 3 & 5 of 1989 delivered July 16, 1990 and ***R v Anderson*** and ***R. v Morris*** [1966] 2 Q.B.110.

We are of the view that the submissions of Counsel for the Crown are correct. The evidence on which the prosecution relied clearly established more than mere presence. The appellant's presence was not accidental. According to the evidence he and the other two men were walking "very close together almost brushing on each other." He was seen bending as if to tie his shoelace while the others turned their backs. After the police shouted "Police" and the other two men fired at them, he, the appellant, ran with them into the bushes. When he was questioned by the police as to how he came by the injuries he gave conflicting answers. When he was confronted with the allegations of shooting at the police his answer was "officer me don't have any gun sir, a mi friends them fire shot," and he refused to give the names of "his friends". This case can be distinguished from those cited by the learned Queen's Counsel for the appellant. In ***R v Samuda et al*** (supra) S & M were seen putting clothes in a bag. On reaching about 15ft from the men the Constable shouted "Police." The men looked in his direction and dropped the bag and M was seen to reach for his waist. Several

explosions were heard. The Constable took evasive action and returned the fire. M ran away. S received gun shot wounds in both legs. No gun was recovered. It was not established that any of the clothing in the bag was stolen. S & M were convicted of illegal possession of a firearm and shooting with intent. On appeal it was held that the evidence failed to disclose that S was acting in common design with M. It is necessary to examine the decision of the court. Most of the judgment of the Court dealt with the issue of "firearm". Very little was said about "common design." It seems that the Court did not consider the provisions of the then section 20(5)(a) of the Firearms Act which were enacted in 1974. Those provisions (which have now been modified – see Act 1 of 1983) read:

> "(5) In any prosecution for an offence under the section –
>
> (a) if any person has in his possession contrary to this section, any firearm in circumstances which raise reasonable presumption that such firearm was intended or was about to be used in a manner prejudicial to public order, or public safety, **any other person who is found in the company of that person in those circumstances shall, in the absence of reasonable excuse, be treated as being also in possession of such firearm;..."**

The above statutory provision clearly placed an evidential burden on a person who in certain circumstances, was found in the company of a person who had in his possession a firearm contrary to section 20(1)(b) of

the Firearms Act, to give a reasonable excuse for his presence. In ***Samuda*** (supra) the Court, apparently did not take this enactment into consideration. If that was the case then the decision of the Court was arrived at **per incuriam** and accordingly, is not helpful.

In any event as stated, before, the ***Samuda*** case can be distinguished on the facts. In this regard the statement of the appellant in the instant case is of great importance. When confronted with the allegations he is alleged to have said "Officer me don't have any gun, a mi friends them fire shot." When he was asked the names of his "friends" he said "After me nuh informer." When cautioned after being charged he said" Officer mi nuh have no gun. A me friends them have."

In ***R v Eric Madurie et al*** (supra), the other case relied on by the appellant, the allegations, as stated in the headnote, were that the applicants were part of a large body of men armed with guns who rampaged, attacking and menacing people. The incident occurred in daylight and the applicants were well known in the area. The applicants put forward alibis. The applicant (DM) was present, but did nothing hostile or violent and had nothing in the nature of a weapon. They were convicted on the 21st August, 1987 of illegal possession of firearms and two counts of wounding with intent. On appeal it was held that:

> "(i) it is trite law that presence without active participation cannot amount to aiding and abetting so as to bring the party within the common design.

> (ii) There was no evidence to constitute the applicant (DM) as participating in any joint enterprise with the other applicants in their criminal activities."

Here, too, no mention is made of provisions of section 20(5)(a) as modified. Thus, in my view, this decision was reached **per incuriam** and is also not helpful in this regard. Further, as in the first case, the facts in this case can be distinguished from the facts of the instant case. However, the upshot is that much reliance cannot be placed on the cases cited by the appellant.

The relevant statutory provisions must now be considered. The modified section 20(5)(a) of the Firearms Act reads:

> " In any prosecution for an offence under this section –
>
> (a) any person who is in the company of someone who uses or attempts to use a firearm to commit -
>
> (i) any felony; or
>
> (ii) any offence involving either an assault or the resisting of lawful apprehension of any person,
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> shall, if the circumstances give rise to a reasonable presumption that he was present to aid or abet the commission of the felony or offence aforesaid, be treated, in the absence of reasonable excuse, as being also in possession of the firearm."

A careful analysis of the sub-section is necessary. The enactment of this subsection in 1983 was intended to modify the harsh effect of the 1974 amendment to the Firearms Act, which first introduced such provisions.

The 1974 amendment introduced what was often referred to as guilt by association. This was an extreme measure aimed at stemming the rapid increase in gun related offences. However, its strict application was likely to create injustice. This necessitated the enactment of the 1983 amendment. The latter, like its predecessor, was intended to lighten the burden of the prosecution by abrogating the strict common law principle of possession where the companion of a person in unlawful possession of a firearm is also charged with such possession. The intention of the legislature generally is to obviate the need to prove against the companion of the actual possessor the elements of (1) knowledge of the thing possessed and (2) physical custody or control. The subsection sets out the requirements to be met before a person who was not found to be in actual possession of a firearm, may be treated as also in possession contrary to section 20 of the Firearms Act.

The requirements are:

(1) He must be in the company of the principal offender.

(2) The principal offender must have used the firearm to commit an offence specified in (a)(i) or (ii) of subsection 5.

(3) The existence of circumstances which give rise to the reasonable presumption that he was present to aid and abet the commission of such offence specified in a (i) or (ii).

(4) The absence of reasonable excuse.

Count 1 which charged the appellant with illegal possession of firearm is an offence under section 20 of the Firearms Act. The appellant, on the Crown's case, was in the company of two persons who shot at the police with intent to do them grievous bodily harm (count 2). The offence in count 2 is a felony. Further, it involves an assault. Thus, subsection(5) (a)(i) and/or (ii) above is satisfied. On the Crown's case there was no reasonable excuse for the appellant's presence. The critical question therefore is whether "the circumstances give rise to a reasonable presumption that the appellant was present to aid or abet" the offence of shooting at with intent.

This is a rebuttable presumption of law and is an inference or conclusion which the law requires to be drawn from certain primary facts. The presumption which the law requires "the circumstances" to give rise to, is that the appellant was present to aid and abet the commission of the specified offence. At common law where presence may be entirely accidental, it is not evidence of aiding and abetting. However where presence is prima facie not accidental it is evidence, but not more than evidence for the tribunal of fact – see ***The Queen v Coney and Others*** [1882] 8Q.B.D 534 at 540; ***Wilson v Jeffrey*** [1951]1 All E.R. 464 and ***R v Clarkson and Others*** 55 Cr. App. R. 445. Where the specified offence committed by the actual possessor, that is the principal offender, is one to which the principle of joint enterprise or common design is readily

applicable, for example robbery, then the voluntary presence of an accused as a companion of the principal will normally be sufficient to raise a **prima facie** case against him on a charge of the specified offence. In such a situation on a charge under section 20 of the Act, the prosecution need not prove, prima facie, that the accused knew that the actual possessor had a firearm. By operation of subsection (5)(a) he shall be treated as being in possession in the absence of reasonable excuse. In other words, once it is established that there are circumstances which give rise to a reasonable presumption that he was there to aid and abet the commission of the specified offence, then he shall be treated, in the absence of reasonable excuse, as jointly in possession of the firearm with the actual possessor. It is therefore a question of fact in each case.

The facts in ***R v Conrad Reynolds*** SCCA No. 30/91 delivered March 23, 1992 provide a good example of this. Stated briefly, the facts are that looters of a shop were accosted by the police. A number of them fired at the police. The police returned the fire. The looters ran in different directions. Four were mortally wounded. A firearm was found in the shop. C.R. was seen hiding under the shop counter. It was not established that he was in actual possession of a firearm. C.R. was convicted of illegal possession of firearm among other offences.

His conviction was upheld on appeal. The clear inference is that he was present to aid and abet the commission of the offence of shop

breaking and larceny. Accordingly, he was treated as being in possession of firearm contrary to section 20(1)(b) by virtue of section 20(5)(a) of the Firearms Act.

However, where the specified offence committed by the possessor of the firearm was committed on the spur of the moment and the doctrine of common design or joint enterprise in the commission of the offence is not readily applicable, it is normally difficult for the prosecution to prove a charge under section 20 against a person in the company of the actual possessor at the time. The facts of the instant case provide an example of this scenario. The specified offence is the shooting at the police officers – it is directly connected to the principal offender's possession of firearm. The facts in ***Samuda*** (supra) provide another example. It will be recalled that in that case after the constable shouted "Police" M, the principal offender, fired several shots at him. The police returned the fire. M ran away. S was injured. No gun was recovered. The Court of Appeal held that in respect of S the evidence failed to disclose a common design. S's appeal was accordingly allowed. It is clear to us that had the Court invoked the then applicable subsection (5) (a) of the 1974 enactment its decision in respect of S would have been different. This view is fortified by the decision of the Court in ***R v Bruce Reid et al*** [1978]16 J.L.R. 262. In that case Kerr J.A. in considering the then section 20(5) (a) said at pp. 266-7:

> "It is clear from the tenor and substance of the subsection that the legislature intended to lighten the burden of the prosecution by creating certain presumptions. What then are the primary facts that must be established to raise the presumption in section 20(5)(a)? They are:
>
> (1) Possession of the principal offender of a firearm, contrary to the provisions of Section 20.
>
> (2) Circumstances which raise a reasonable presumption that such a firearm was intended or about to be used in a manner etc.
>
> (3) That the accused was found in the company of the principal offender in those circumstances."

The learned Judge of Appeal went on to say "In our view when these evidential requirements are met then the companion, in the absence of reasonable excuse, would be liable to be treated as being also in possession of such firearm." Thus under the regime of the 1974 amendment, normally, a person who is found in the company of another who was in possession of a firearm contrary to section 20 would, in the absence of a reasonable excuse, himself be guilty of illegal possession.

We must return to the 1983 enactment and its application to the facts of this case. Does the evidence disclose circumstances capable of giving rise to the reasonable presumption that the appellant was present to aid and abet the offence of shooting at the police?

Is the non-accidental presence of the appellant sufficient to raise a presumption pursuant to section 20 (5)(a)?

Now it would seem logical that the evidence which raises the presumption that an accused was present to aid and abet the offence of shooting at, must also raise the presumption that he was aiding and abetting the offence of illegal possession of firearm. In such a situation without praying in aid the provisions of subsection (5)(a) anyone who aids and abets the person who commits the offence of shooting at, would himself be guilty of aiding and abetting and the illegal possession of the firearm. If the intention of the legislature was to lighten the burden of the prosecution, then to give effect to section 20 (5)(a) where a person is voluntarily in the company of another who uses a firearm to commit an offence specified in the subsection, in absence of reasonable excuse that person shall be treated as being also in possession of the firearm contrary to section 20(1)(b). Whereas at common law, non-accidental presence is no more than evidence for the jury, by virtue of the subsection , in the absence of a reasonable excuse, it is conclusive of guilt. This in our view is the proper interpretation of the subsection.

Thus under the present legislative regime the mere association with the possessor of a firearm is not sufficient to establish a **prima facie** case against the possessor's companion as it was under the former regime. Before the accused companion may be called on to answer a charge of

illegal possession of firearm it must be shown that the principal offender used the firearm to commit a specified offence and that the presence of the accused was non-accidental thereby giving rise to the presumption that he was there to aid and abet the commission of the specified offence. And in such circumstances, in the absence of reasonable excuse, the companion should be treated as also in possession of the firearm.

Applying the above to the instant case we are clearly of the view that the learned trial judge was correct in holding that there was a case to answer. The evidence of the prosecution is that the appellant and the principal offenders were walking together, they stopped together and he stooped as if to adjust his shoelace while the others turned their backs when the police vehicle stopped some 12 feet from them. The appellant's conduct was probably to distract the police. He ran with the principal offenders after they fired at the police. When he was caught he said the men were his friends but refused to give their names. On these facts the reasonable presumption is that he was present to aid and abet the offence of shooting at the police with intent to resist their lawful arrest and in the absence of a reasonable excuse the judge, by the operation of subsection 5(a), was obliged to treat him as being in possession of the firearm. Indeed, as we have said before, at common law he would in

the circumstances of the case be guilty of aiding and abetting possession. Ground 1 therefore fails.

Ground 2- Verdict unreasonable

Counsel for the appellant did not pursue this ground. The appellant's response, he pointed out did not meet the specific allegations of the prosecution. He conceded that the judge's verdict could not be challenged in the circumstances.

We unhesitatingly agree with learned Queen's Counsel.

Ground 3- Sentence

The appellant was sentenced to 13 years imprisonment in respect of both counts. We were of the view that the felony of shooting at the police with intent (count 2) should be visited with a more severe penalty than the mere possession of the firearm (count 1). We saw no reason to interfere with the sentence on count 2. Accordingly, we set aside the sentence of 13 years on count 1 and substituted therefor a term of 10 years imprisonment.