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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 47/97

BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.

REGINA vs. MARCELLOUS ROBINSON

Mrs. Marvalyn Taylor-Wright for appellant

Hugh Wildman, Deputy Director of Public Prosecutions, and
Miss D. Eaton for Crown

May 20, 21 and July 7, 1998

PATTERSON, J.A.:

On the 3rd April, 1997, in a High Court Division of the Gun Court, the appellant was convicted on all four counts of an indictment; the first count charged illegal possession of firearm, the second and third counts arson, and the fourth wounding with intent. On the first count, he was sentenced to seven years imprisonment at hard labour, on each of the second and third counts to twelve years imprisonment at hard labour, and on the fourth count fifteen years imprisonment at hard labour. The sentence on count four was ordered to run consecutively to that on count one. In effect, the applicant was sentenced to serve twenty-two years imprisonment at hard labour for

the offences. He appeals against the convictions and sentences by leave of the single judge.

The case for the Crown depended to a large extent on the evidence of Henry Reid, an eyewitness to the events, and the person who was wounded. At about 11:00 a.m. on the 27th January, 1997, he, along with his three brothers, Dennis, Junior and Donald, and his sister Rhoena, were in the yard at their home at Tawes Pen in St. Catherine. The appellant, whom he knew as "Papa D", his younger brother Nina, and another man called "Monkey Man", came in the yard, each armed with an open knife. The appellant and Nina held on to Donald saying they were taking him "go down soh fi rape." It seems that they were accusing Donald of having committed the offence of rape, and that they were taking him to the police station. The witness said he held on to Donald's pants and the appellant and Nina then let go of Donald and left the yard. About five minutes later, the appellant, Nina, "Monkey Man" and a number of other men, including one Cudjoe, returned. Nina and Cudjoe each had a gun in hand, and the appellant, who was beside them, had a "pick axe stick, cutlass and bottle" in his hands. The appellant was telling the others to "kill the bwoy". It seems that Donald made good his escape. The appellant and others in the crowd then used "bottle bombs" to set fire to a shop operated by Donald and a dwelling house in the yard. When asked what he called bottle bombs, the witness answered, "Gas inside the bottle with a wick light on top." The shop, made of board, burnt flat and

a room in the house was also burnt. The witness and others tried to put out the fire with buckets of water. Nina, with the gun in hand, ran at the witness who hid himself in a garden. But Cudjoe saw him and pointed him out to Nina. Both Nina and Cudjoe then fired shots at the witness, hitting him twice in the right leg. The witness jumped a fence and hid himself in a toilet next door where he remained until the police arrived. He later made a report to the police.

The witness said he knew the appellant for over ten years prior to that day, and also many of the other men that came along with the appellant. The witness had ample opportunity to recognise the assailants, and in particular the appellant. The incident took place in broad daylight with nothing to impede the witness from seeing and recognising the appellant. The appellant's first visit lasted for about five minutes, and the second for about two hours.

The investigating officer was Detective Sergeant Robert Thomas. He said he received a report at about 2:00 p.m. on the 27th January, 1997, which led him to Tawes Pen where he saw the remains of the burnt shop and burnt room on the dwelling house. He next went to the Spanish Town hospital, where Henry Reid, the witness, made a report to him. He obtained warrants for the arrest of "Papa D", "Nina", "Cudjoe" and "Monkey Man". On the 29th January, 1997, he saw the appellant at the Spanish Town Police Station; he read the warrants to him and arrested him for the offences of shooting

with intent, arson and illegal possession of firearm. He said he cautioned him separately on all three charges. Now, this bit of evidence that follows is quite important, and this is how it is recorded:

> "Q: Did you tell him what the report was that you got against him?
>
> A: Yes.
>
> Q: What did you tell him?
>
> A: I told him that Complainant Henry reported that he and his brother, Nina...
>
> Q: He who?
>
> A: That he, the Accused along with his brother, Nina and friends, Cudjoe, Monkey Man and others came to his home at Tawes Pen, held on to his brother and was taking him from the yard when the complainant intervened by holding his brother in the back of his pants and pulled him back in the yard. The Accused Man and his friends left saying that they were going to return to kill them and burn down the premises. That is what I told him that the complainant told me.
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> Q: Having cautioned him - you said that you cautioned him?
>
> A: Yes.
>
> Q: When cautioned did the Accused Man say anything?
>
> A: He said that, 'Officer, I fling bottles but I never shoot anybody'."

The appellant elected to make an unsworn statement in his defence. This is what he said:

> "My name is Marcellous Robinson. I sell at the Vanworth Market for over ten years. I live at Tawes Pen, Spanish Town, St. Catherine. I have never yet been involved in any sort of cases like this before. I do not know anything about what they are saying about me, Miss."

He did not call any witness and that was the close of his case.

The first ground of appeal which the appellant urged was this:

> "That the learned trial judge fell in error when she failed to expressly warn herself in accordance with the guidelines relevant to the law of visual identification in circumstances where no exceptional circumstances vitiated the need for such warning."

This ground was conveniently argued with the second ground which questioned the interpretation placed by the learned judge on the statement which was accepted as having been made by the appellant on caution, and which has been quoted above. Counsel submitted that visual identification remained an issue throughout the case, and accordingly, the guidelines laid down in ***R. v. Turnbull & ors.*** [1976] 3 All E.R. 549 ought to have been followed by the learned trial judge. We were referred to a number of cases which counsel submitted supported her contention. Those were cases tried by a single judge sitting without a jury in which the convictions had been quashed because of the judge's failure to demonstrate that the ***Turnbull*** guidelines had been followed. We do not find it necessary to refer to those cases in any detail. Suffice it to say that in those cases, visual identification was a live issue, and that the principle adumbrated was correctly expressed

by Rowe, P., in the judgment of the court in ***R. v. Locksley Carrol*** (unreported) S.C.C.A. 39/89, delivered 25th June, 1990. This is what he said:

> "...judges sitting alone in the High Court Division of the Gun Court, when faced with an issue of visual identification must expressly warn themselves in the fullest form of the dangers of acting upon uncorroborated evidence of visual identification. In this respect we hold that there should be no difference in trial by judge and jury and trial by judge alone." [Emphasis added]

The question arises as to whether visual identification was a live issue in the instant case. It is trite law that the burden of proving the guilt of a defendant is on the prosecution. The prosecution must prove every fact and circumstance constituting the offence charged in the indictment and, in every case, proof of the identity of the defendant is absolutely necessary. However, it does not follow that every fact and circumstance proved is necessarily a live issue. As a general rule, where there is no challenge or contradiction to a proven fact, either by cross-examination of the prosecution witnesses or by witnesses called by the defendant, then there is no issue raised on that proven fact. In ***Walker v. R.*** [1974] 1 W.L.R. 1090 at 1096A, their Lordships' Board made it quite clear that, with one partial exception (the issue of provocation), the judge should only leave an issue to a jury which upon the evidence in the case is an issue fit to be left to them. We hold that the principle equally applies when a judge, sitting without a jury in the Circuit Court Division of the Gun Court, is expressing the reasons for his

decision. Likewise, it is not in every case that a ***Turnbull*** direction is necessary. In ***Karl Shand v. R.*** (unreported) Privy Council Appeal No. 8 of 1994 delivered on the 27th November, 1995, this point was borne out by their Lordships' Board. This is what was said:

> "In cases where the defence challenges the credibility of the identifying witnesses as the principal or sole means of defence, there may be exceptional cases where a ***Turnbull*** direction is unnecessary or where it is sufficient to give it more briefly than in a case where the accuracy of identification is challenged. In ***Regina v. Bentley,*** reported in [1991] Crim. L.R. 620 (case no. 742/Z4/90 of 14th January 1991), Lord Lane C.J., having said that although in a fleeting glance identification a full ***Turnbull*** direction would be required, in a case where there was purported recognition of a familiar face which had taken place over a considerable period of time in perfectly good conditions of lighting and so on, continued:
>
> > 'If the judge were to give that full ***Turnbull*** direction in the latter type case, the jury would rightly wonder whether he, the judge, has taken leave of his senses because most of the ***Turnbull*** direction would in those circumstances be quite unnecessary'."

A suggestion made to a witness in cross-examination and denied by that witness, cannot raise an issue in the case. In ***R. v. William Baldwin*** [1925] 18 Cr. App. R. 175, Lord Hewart, C.J., made general observations on the form of interrogation of witnesses. This is what he said (at pages 178-179):

> "There is a further matter involved here which goes far beyond the present case, and, it may be, beyond criminal cases. One so often hears questions put to witnesses by counsel which are really of the nature of an invitation to an argument. You have, for instance, such questions as this: 'I suggest to you that...' or 'Is your evidence to be taken as suggesting that...?' If the witness were a prudent person he would say, with the highest degree of politeness: 'What you suggest is no business of mine. I am not here to make any suggestions at all. I am here only to answer relevant questions. What the conclusions to be drawn from my answers are is not for me, and as for suggestions, I venture to leave those to others.' An answer of that kind, no doubt, requires a good deal of sense and self-restraint and experience, and the mischief of it is, if made, it might very well prejudice the witness with the jury, because the jury, not being aware of the consequences to which such questions might lead, might easily come to the conclusion (and it might be true) that the witness had something to conceal. It is right to remember in all such cases that the witness in the box is an amateur and the counsel who is asking questions is, as a rule, a professional conductor of argument, and it is not right that the wits of the one should be pitted against the wits of the other in the field of suggestion and controversy. What is wanted from the witness is answers to questions of fact."

We have mentioned these observations as they are apposite to the instant case. The prosecution led evidence of the identity of the appellant through the eyewitness Henry Reid. This was not a case of identification of a stranger. As we have mentioned before, this was a case where the witness spoke of seeing and talking to someone that he had known for over ten years - they both were friends and lived at Tawes Pen - the incident took place in

broad daylight and lasted over a considerable length of time. The quality of the identification evidence led in examination-in-chief was extremely strong. In cross-examination, counsel asked the witness and he answered questions as to where in the yard he saw the appellant. The cross-examination was quite short and innocuous. This is how it ended:

> "Q: I am going to suggest to you that it was not Papa D that you saw at your house that morning. I am suggesting that it was not him that you saw.
>
> A: You are suggesting?
>
> HER LADYSHIP: Just say, yes or no, don't worry with the speech.
>
> A: It is him I saw.
>
> Q: I am suggesting that you are not truthful to the Court about what happened that day?
>
> A: I have been truthful."

It is suggestions such as those made in cross-examination that Lord Hewart, C.J., deprecated. In our view, at the end of the cross-examination of this witness, the recognition evidence remained strong and was not in issue.

The prosecution buttressed the recognition evidence with the statement of the appellant, made after he was arrested and cautioned. Before us, counsel realised that if the construction placed by the learned judge on those words was correct, then the submissions made in respect of the first ground of appeal could not be sustained. We have already quoted the

statement and the context in which it was made. This was how the learned judge dealt with that important bit of evidence:

> "The officer said he said, 'Officer me fling bottle but mi never shoot nobody.' The fact that he had said that, that was put to the officer that it was not said. I accept what the officer said and I accept the officer as a witness of truth. That puts the accused on the spot there, acting in concert with the others."

Counsel for the appellant readily conceded that "if the judge's interpretation of the caution statement is correct, then it places the appellant on the scene." But counsel submitted that there are other interpretations that could be placed on those words which could result in a verdict favourable to the appellant. These are the submissions of counsel:

> "The Officer was not asked to explain what he understood the appellant to mean by the words of the caution statement. It is submitted that it is not clear whether the appellant referred to:
>
> a) An inclination/disposition on his part to fling bottles, but never to shoot anyone, or to his being present on the scene, but only involved himself by throwing bottles.
>
> b) If he was alluding to being present on the scene - which of the two occasions on which the eye-witness said he was seen was being referred to. If he flung bottles on the first occasion, it would bear no relation to the incident of the second occasion described by the eyewitness.
>
> c) Even if the Learned Judge's interpretation is correct, a failure to adhere to the guidelines is fatal to the conviction. The only evidence which would have come from the caution statement is that the

> appellant was present throwing bottles, BUT the issue as to his being present and committing the offences for which he was charged would have remained in the circumstances of the case, where the appellant was alleged to have been one of a large crowd."

A tribunal of fact may draw reasonable inferences from proven facts to complete the elements of guilt or to establish innocence. Where the evidence is capable of two interpretations, then it is for that tribunal to decide which interpretation is applicable in the circumstances. In the instant case, once the learned judge accepted the evidence of the officer as to what was said by the appellant, then having regard to what transpired before, the only reasonable interpretation as to what the appellant meant is that he was present at the relevant time. It supports the evidence of the witness Reid that the appellant was present participating in the unlawful events of the day. The learned judge considered the unsworn statement of the appellant and rejected what he said. Nevertheless, the learned judge said:

> "But having rejected what he said I go back and I look again at what the witnesses for the prosecution have said."

The learned trial judge considered the credibility of the witnesses for the prosecution and concluded that they were witnesses of truth. We find no merit in both grounds of appeal.

The next ground argued by counsel for the appellant involved a point of law. This is how it is stated:

> "Section 4 of the Malicious Injuries to Property Act is not a scheduled offence under the Gun Court Act. See section 5 of the Gun Court Act.
>
> The learned trial judge exceeded her jurisdiction when she embarked on a trial of the appellant for these offences."

The offences referred to by counsel are contained in the second and third counts of the indictment. Each count charged the appellant with "Arson contrary to section 4 of the Malicious Injuries to Property Act." The particulars in count 2 relate to the setting of fire to the house, and in count 3, to the shop. We will now examine the relevant enactments.

The Gun Court was established in 1974 by the Gun Court Act ("the Act"), and its jurisdiction and powers are those conferred upon it by the said Act. The court sits in a number of divisions, one such being the High Court Division which comprises a Supreme Court Judge sitting without a jury. A High Court Division of the Court has jurisdiction to hear and determine:

> (a) "any firearm offence, other than murder or treason;
>
> (b) any other offence specified in the Schedule, whether committed in Kingston or St. Andrew or any other parish." [Section 5(2)]

A "firearm offence" is defined as meaning:

> (a) "any offence contrary to section 20 of the Firearms Act;
>
> (b) any other offence whatsoever involving a firearm and in which the offender's possession of the firearm is contrary to section 20 of the Firearms Act." [Section 2]

The Schedule to the Act sets out the other offences specially assigned to the court. The relevant offences under the Malicious Injuries to Property Act are specified in section 3 of the Schedule:

> "3. Any offence--
>
> (a) contrary to section 10 or 11 of the Malicious Injuries to Property Act; or
>
> (b) contrary to section 12 of the last-mentioned Act, by means of gunpowder or other explosive substance or an incendiary missile of a kind (if any) to which the definition of 'firearm' in section 2 of this Act does not extend; or
>
> (c) (without prejudice to the generality of any provision made by virtue of anything hereinbefore contained) punishable in accordance with section 45 of that Act with reference to any offence described in paragraph (a) or (b) of this item."

Section 20 of the Firearms Act prohibits the possession of a prohibited weapon save as authorised by a licence, and the possession of a firearm or ammunition except under and in accordance with the terms and conditions of a Firearm User's Licence. A "prohibited weapon" is defined in section 2 of the Firearms Act to mean:

> (a) "any artillery or automatic firearm; or
>
> (b) any grenade, bomb or other like missile."

A "firearm" is defined as follows:

> " 'firearm' means any lethal barrelled weapon from which any shot, bullet or other missile can be discharged, or any restricted weapon or, unless the context otherwise requires, any

> prohibited weapon, and includes any component part of any such weapon and any accessory to any such weapon designed or adapted to diminish the noise or flash caused by firing the weapon, but does not include any air rifle, air gun, or air pistol of a type prescribed by the Minister and of a calibre so prescribed."

The evidence adduced by the prosecution in support of counts 2 and 3 of the indictment, which charged arson contrary to section 4 of the Malicious Injuries to Property Act, established that the appellant used a bottle with a wick and some substance in it (which the witness said was gasolene) to set fire to the shop and the house. The firearm which Nina and Cudjoe were alleged to have had played no part in the committal of the offences charged in counts 2 and 3. Those offences, in our view, do not fall within the classification of "firearm offence", nor are they offences specified in the Schedule to the Gun Court Act.

Counsel for the Crown contended that section 20(5)(a) of the Firearms Act is relevant; it provides as follows:

> "(5) 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,"

> 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;..."

In our view, it is by virtue of those provisions that the convictions of the offences contained in counts 1 and 4 of the indictment are sustainable. The evidence clearly established that the appellant was in the company of Nina and Cudjoe who were armed with firearms which they used to commit the felony of wounding with intent on Mr. Reid. The jurisdiction of the court to hear and determine those charges was, therefore, established. In contrast, it was the bottle with its contents that the appellant used to set fire to the house and shop. We hold that such evidence was not sufficient to bring the offences charged in counts 2 and 3 of the indictment within the jurisdiction of the Gun Court. Accordingly, in respect of those counts, the learned trial judge acted without jurisdiction and the convictions must be quashed.

The only matter that remains to be considered is the question of sentence. Counsel contended that "the sentence of the appellant to 22 years imprisonment was manifestly excessive in all the circumstances of the case." The appellant was 23 years old at the time of sentencing. His role in the commission of the offences charged in counts 1 and 4 was purely that of an aider and abettor. He did not of himself carry a gun nor did he personally fire the shots that wounded Mr. Reid. Hitherto, he had no convictions

recorded against him. He had been gainfully engaged as a higgler in the Falmouth Market for the past ten years prior to his arrest.

This court will exercise its power to interfere with sentences if, in our judgment, the sentence passed is manifestly excessive in view of the circumstances of the case or the sentence is wrong in principle. In the instant case, we have concluded that the convictions recorded on counts 2 and 3 of the indictment must be quashed. The sentences will, therefore, be set aside. There remain the sentences of seven years on count 1 and fifteen years on count 2. The circumstances of the case have been fully aired, and we need not repeat them. We are satisfied that the sentence of fifteen years imposed on count 4 is manifestly excessive in the circumstances of this case, and we are of the view that a different sentence ought to have been passed.

In conclusion, in respect to counts 2 and 3 of the indictment, the appeal against conviction is allowed, the convictions quashed and sentences set aside and a verdict of acquittal entered. In respect to count 1 of the indictment, the appeal against conviction and sentence is dismissed. In respect to count 4 of the indictment, the appeal against conviction is also dismissed, but the appeal against sentence is allowed, the sentence of fifteen years imprisonment at hard labour is quashed and in substitution therefor, we pass a sentence of seven years imprisonment at hard labour. The sentences shall run concurrently, and shall commence to run from the 3rd July, 1997.