IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 138/72

BEFORE: The Hon. Mr. Justice Fox (Presiding)
The Hon. Mr. Justice Smith
The Hon. Mr. Justice Robinson

TREVOR WILLIAMS v. THE QUEEN

Appearances: Mr. R. Small for Applicant
Mr. G. Andrade for Crown.

Friday, April 6, 1973

FOX, J.A.:

This is an application for leave to appeal against convictions and sentences in the Home Circuit Court before Rowe, J. and a jury on the 21st July, 1972.

The applicant was tried on an indictment containing ten counts relating to five separate incidents. In the first incident three policemen who were on patrol in the Wareika Hills at about 11.30 a.m. on 21st August, 1970, testified that as they approached a hut in single file the applicant who was in the yard pointed a gun at the leading constable and pulled the trigger several times. The gun failed to discharge. The second constable fired his gun at the applicant who then dropped his gun and ran. Upon recovery by the policemen the applicant's gun was found to be loaded with three cartridges. On this evidence the applicant was charged on three counts: with attempting to shoot at with intent and illegal possession of a firearm and of ammunition.

The second incident occurred at about 10.00 a.m. on the 11th October, 1970. It was described by a single witness, a constable, who said that as he was walking along the Windward Road the applicant fired two shots at him in quick succession with a weapon resembling a revolver. The constable jumped over a wall. He was not hurt. On this evidence the applicant was charged on a fourth count

with shooting at with intent.

The third incident took place at about 8.00 a.m. on 28th October, 1970. It was supported by the evidence of a civilian living at Wareika Road, Kingston, who described the manner in which the applicant broke the zinc fence of his yard and fired two shots from a gun at him. On this evidence the applicant was charged on a fifth count for shooting at with intent.

The sixth and seventh counts charging shooting at with intent related to the fourth incident. It occurred at about 10.00 a.m. on 29th October, and was related by two constables who were on radio-car patrol on Commission Road at that time. Both constables were in uniform. The applicant was walking on the road. The constables noticed a bulge in his back pocket. They stopped the patrol car beside the applicant and called to him. The applicant did not stop. The car was again driven up to the applicant. As one constable was coming from the car the applicant fired a revolver at him. The constable ducked into the car. The applicant then fired several other shots, some of which struck the car.

The fifth incident occurred at about 3.00 p.m. on the 2nd November, 1970, during the course of a police raid at 9, Robert Avenue in the McGregor Gully area of Kingston. A corporal of police tes - tified that as he approached the back of a house on the premises he saw the applicant sitting at the root of a breadfruit tree. The applicant pulled a gun from his waist and pointed it at the corporal. The corporal shot him. The applicant fell. The gun together with five live rounds were recovered by the police. In these circumstances the applicant was charged on the eighth, ninth and tenth counts with common assault and illegal possession of a firearm and of ammunition.

In the first ground of appeal the applicant complained that the learned trial judge had wrongly exercised his discretion in refusing an application to sever the counts on the indictment. In his submiesions Mr. Small whose advocacy we have found both delightful and distinguished, invited the court to conclude that by

reason of a special circumstance existing in the evidence the learned trial judge was in error in refusing to sever the charges in counts six and seven from the charges in the remaining counts of the indictment. The special circumstance identified by Mr. Small was the allegation of a wanton shooting at uniformed policemen by the applicant. This conduct, submitted counsel, was of such a reprehensible nature as was likely to arouse in the minds of the jury hostile feelings against the applicant. This prejudice would be too great for any direction by the trial judge to overcome. This be it observed is the sort of objection identified in Ludlow v. Metropolitan Police Commissioner, (1970) 1 A.E.R. p. 567 at p. 576, as being sufficient to require separate trials in the interests of justice.

The test as to whether there has been a wrongful exercise of discretion by a trial judge is whether there has been any miscarriage of justice. When this matter comes to be considered the inevitable prejudice which is created when an accused has to face several charges based upon separate incidents, as in the instant case, must be recognized, but as was pointed out by Lord Pearson in Ludlow at page 575, the existence of such inevitable prejudice is no longer a ground for saying that a joinder should never be made. If the theory were still correct that any joinder of counts relating to distinct alleged offences was necessarily so prejudicial to the accused that such joinder ought not to be permitted then, as Lord Pearson pointed out, "it would be the duty of the judge in the proper exercise of his discretion under section 5 (3) (section 7 (3) of our Indictments Law, Cap. 158) to direct separate trials in every case where the accused was charged with a series of offences of the same or similar character, and the manifest intention appearing from S. 4 and R. 3 (rule 3 of the Schedule to Cap. 158) would be defeated. The judge has no duty to direct separate trials under section 5(3) unless in his opinion there is some special feature of the case which would make a joint trial of the several counts prejudicial

or embarrassing to the accused and separate trials are required in the interests of justice." (p. 575, 6).

We cannot agree that the wanton conduct by the applicant in shooting at uniformed policemen in the manner alleged is a special feature in this case. To the contrary, it is the common feature running throughout all five incidents, and, far from indicating the necessity for severance, made it desirable in the public interest that the charges - all the charges - should be examined together at one trial. For these reasons we are of the view that the complaint on ground 1 is without merit.

In ground 2 Mr. Small complained that the learned trial judge had given inadequate directions to the jury in relation to the opinion evidence of a ballistic expert that a bullet extracted from the police patrol car when it was fired on during the incident relating to counts 6 and 7 had been fired from the gun which was recovered from the applicant when he was shot and arrested on the 2nd November, 1970. The expert had compared that bullet with one fired from the gun recovered from the applicant. In his evidence he said that his examinations revealed such similar markings on each bullet as enabled him to come to his opinion. He admitted that for the purpose of his examination he had made use of a comparison microscope. He also agreed that photographs of the bullets could have been made and produced to the jury for inspection. No such photographs were produced.

Mr. Small submitted that in the absence of some photographic evidence the defence was denied the opportunity of testing in any real and significant way the opinion of the expert, and that, in those particular circumstances, the learned trial judge should have told the jury that the opinion evidence should be disregarded. We cannot agree. The learned trial judge told the jury that in the absence of any photographs they were to that extent "in no position to check upon what it is that" the expert has said. He went on to tell them that nevertheless it was open to them "if you so choose" to accept the opinion of the expert. We consider these directions not open to

question. In the final analysis the value of all opinion evidence depends upon the confidence in his opinion which is engendered in the jury by the demeanour of the expert as he gives his evidence. This position was satisfactorily explained to the jury.

In ground 3, the complaint was made that the defence had not been properly put to the jury. The defence on all the counts was that the applicant was not there and that the Crown evidence which made him the central actor in all these incidents was untrue. The applicant did not say where he was on the relevant dates. Consequently, from a strict evidential point of view, there was no material upon which the defence of an alibi could be advanced. Nevertheless, perhaps because it could be said that alibi by implication (if this phrase is permissible) did arise, the defence of alibi was left to the jury.

Bound up with this defence was an allegation that the police had concocted the events in the first four incidents for the purpose of covering up the illegality of having shot the applicant in the fifth incident without any just cause or excuse. In relation to the fifth incident the applicant denied that he had a gun or that he pointed a gun at the police; the allegation that he had a gun in the fifth incident was a concoction; it had been put in his hand for the purpose of the charges in counts 8, 9 and 10.

We have considered the complaint that the judge did not leave this allegation of concoction to the jury in a composite way - in a way which related certain features of the evidence as a whole to the allegation of concoction. With the help of Mr. Small and Mr. Andrade for the Crown, whose assistance too has been invaluable, we have examined with care those portions of the summing-up which are relevant to this complaint. We do not go into details. It is sufficient to say that as a result of this examination we are satisfied that all features of the defence were sufficiently and properly left to the jury.

The fourth ground of appeal is one of misdirection on the burden of proof. At page 36 of the summing-up, in dealing with the

question of possession of the firearm in count 9, this sentence appears: "I told you it is not for the Crown to prove possession." Mr. Small submitted that by this sentence the Crown had been relieved of the burden of proving that the applicant was in possession of the gun taken from him when he was shot. It was submitted that this error had implications in all the other possession counts on the indictment. Throughout the summing-up, except in this one place, the learned trial judge gave impeccable directions in relation to possession and to the burden of proof, which was upon the Crown in this respect. He also made it quite clear, on more than one occasion, that such burden as rested upon the applicant in relation to the possession counts, was to show that he had a licence but that this burden upon the applicant would arise if, and only if, the jury concluded beyond all reasonable doubt that the Crown had discharged its burden to prove dominion and control in the applicant. The sentence in the summing-up must have been the result of a mistake either by the judge or by the recorder. In any event, the mistake is of no significance, firstly, because it places no burden upon the applicant and, secondly and more important, there was not the slightest chance of the jury being misled. This ground, too, fails.

The applicant was sentenced to receive various sentences on the counts on which he was found guilty. In the result he was sentenced to imprisonment with hard labour for ten years. It was submitted that the sentence was wrong in principle in that it failed to give sufficient significance to the circumstance that the applicant was a young person and a first offender, and to make use of the reformative facilities open to the judge. In support of this submission it was pointed out that the offences were concentrated in a short space of time - three months - and in addition the probation report showed that the applicant was possessed of a capacity to respond to reformative procedures. In our view, the submission really amounts to a contention that the sentence was manifestly excessive in all the circumstances. We cannot agree with this.

For these reasons the applications are refused. The sentences are to commence as from 1st November, 1972.