

**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MISS JUSTICE EDWARDS JA  
THE HON MR JUSTICE D FRASER JA  
THE HON MISS JUSTICE SIMMONS JA**

**SUPREME COURT CRIMINAL APPEAL NO 54/2015**

**DELROY WILSON V R**

**Atiba A Dyer for the applicant**

**Ms Paula Llewellyn KC, Director of Public Prosecutions and Ms Shanique Farquharson for the Crown**

**29 September 2023**

**Criminal law – Firearms Act section 20(5) – necessity for existence of relevant common design to ground reliance on section 20(5) – what constitutes withdrawal from common design – the effect of withdrawal**

**ORAL JUDGMENT**

**D FRASER JA**

**Introduction**

[1] Mr Delroy Wilson ('the applicant') was charged on an indictment for the offences of illegal possession of firearm contrary to section 20(1)(b) of the Firearms Act (count one) and shooting with intent contrary to section 20 of the Offences Against the Person Act (count two). On 19 May 2015 he was convicted on both counts, following a bench trial in the High Court Division of the Gun Court held at King Street. On 3 July 2015 he was sentenced to serve terms of imprisonment of eight and 15 years' respectively on each count, with the sentences being ordered to run concurrently.

[2] He filed an application for leave to appeal against both conviction and sentence, dated 9 July 2015, which was refused by a single judge on 12 May 2022. As is his right, the applicant has renewed his application before us.

### **The case for the Crown**

[3] The case for the Crown was that, at about 6:00 pm on 3 December 2014, Detective Constable Davis ('DCD') was at the number 61 bus lane in North Parade in the parish of Kingston. He and others were standing under a tree as there was a slight drizzle of rain. DCD said that, while standing there he observed three men, all within an arm's length of each other. The applicant, who was one of the three, was dressed in a white merino. Another man was dressed in a blue T-shirt and the third man was dressed in a black T-shirt.

[4] DCD observed these three men approach a woman whereupon the man in the blue T-shirt said, "See the gal deh weh lef mi pickney", and then he slapped the woman in her face and grabbed a gold looking chain from around her neck. All three men then ran off together in the direction of Orange Street. DCD chased after the men. He observed at 18 feet away, that the man in the blue T-shirt had a black hand gun and that the man in the black T-shirt, who was behind the applicant as they ran, also had a firearm. Both armed men had the weapons in their right hands. DCD did not see the applicant with any weapon. The men ran onto Heywood Street where, at the intersection with Princess Street, DCD saw the men run up to a parked white Toyota Caldina station wagon. DCD had not lost sight of the three men in the two and a half to three minutes' duration of the chase.

[5] The applicant went into the left front passenger seat and the man in the blue T-shirt went into the right rear passenger seat of the station wagon. DCD who was now about 12 feet away from the car, saw the man in the black T-shirt at the left rear door attempting to enter the vehicle. DCD pulled his service pistol and shouted "police" loudly. The man in the black T-shirt looked in DCD's direction, stooped and then escaped by running up Heywood street with his firearm still in hand.

[6] DCD noticed that the station wagon was about to drive off. He commanded the driver to stop and he obeyed. The man in the blue T-shirt held onto a school boy who was also in the back seat of the vehicle and used him as a shield. DCD said he approached the vehicle "in a tactical manner" and commanded the man in the blue T-shirt to drop the gun and exit the vehicle. He indicated that at this point both the driver and the applicant had their hands up in the air.

[7] DCD said the man in the blue T-shirt took off his shirt and came out of the vehicle, pointed the gun in his direction and then he heard a loud explosion. DCD stated that he dropped to the ground and fired two rounds from his service pistol at this man who was running further up Heywood Street and who eventually made his escape. DCD noticed that the applicant was at this point trying to leave the vehicle. He held onto the applicant took him into custody and carried him to the Central Police Station where he reported the matter to the investigating officer.

### **The case for the defence**

[8] The applicant gave sworn evidence. He stated that on 3 December 2014, while dressed in a white merino and black pants, he went and bought snacks for his child at a wholesale on Orange Street. Then, he went and sat in the front seat of a taxi in which there was also the driver and a school boy at the back of the vehicle. He further stated that the taxi began to move off slowly and a guy he did not know before, dressed in a blue T-shirt, stopped the taxi and entered the left rear section.

[9] He then saw a policeman who went to the man in the blue shirt and said, "police, step out of the taxi". The applicant said he heard shuffling coming from the back of the vehicle, the man took off his shirt and ran out of the car and then he heard two shots being fired. The applicant indicated that he was in a panicked state so he stayed in the car until the policeman came around and told him to come out of the car. He complied. The policeman asked him if the man was his friend, to which he replied "No" and that he did not know the man. He said he did not see the other man with a gun in the taxi, and that the only person that fired shots was the policeman.

## **The findings of the learned trial judge**

[10] This being the state of the evidence, the learned judge correctly considered that the issues before the court were identification, common design or joint enterprise, and credibility.

[11] The learned trial judge accepted DCD as a truthful and reliable witness. She found that based on the evidence he had sufficient time, opportunity and lighting, to reliably identify the applicant as the man in the white merino who was in the company of the principal offender (the man in the blue T-shirt) during the robbery; who had run alongside him in a bid to escape; and who had entered the car with him in furtherance of the attempt to escape. On this basis the learned judge found that the applicant was one of the three men who robbed the lady at North Parade and ran off together.

[12] The learned judge also accepted as an inescapable conclusion, that when the men were running, the applicant must have seen that the man in the blue T-shirt (who was running in front of him) had a gun, and that it must have been in the applicant's contemplation that the man may use it to avoid apprehension. She, therefore, found that the joint enterprise included "escaping lawful apprehension" whilst the men were running away. She further found that, because the applicant was still in the company of the man in the blue T-shirt with the gun in the taxi, and the applicant's presence in the taxi was not accidental, this was also within the scope of the joint plan that firearms might be used to prevent lawful apprehension.

[13] Though not explicitly stated, it is clear that the learned judge used the deeming provision in section 20(5) of the Firearms Act, to find that the applicant was in illegal possession of a firearm. This on the basis that the applicant was in the company of the man armed with a firearm who had the intention to use it to resist lawful apprehension, and the applicant had not rebutted the presumption that he was there to aid and abet the gunman in his intention. This in a context where it was not found that the applicant had any reasonable excuse for being in the gunman's company.

[14] Regarding the second count the learned judge found that the applicant “was present to aid and abet and provide support to the man in the blue t-shirt in the commission of the offence of shooting with intent” and was therefore also guilty of that offence.

### **The grounds of appeal**

[15] The applicant filed four grounds before he had the benefit of counsel. Based on how the appeal is to be disposed of, it is only necessary to outline the fourth ground:

“Miscarriage of Justice...the court wrongfully convicted me for a crime I knew nothing about and could not have committed.”

### **The submissions of counsel**

[16] After some consideration, counsel on both sides of this matter were *ad idem*. Their joint position was outlined by the Director of Public Prosecutions, learned King’s Counsel. It was accepted that neither the conviction on count one nor the conviction on count two could stand. This was because a) there was no evidence that any firearm was used in the robbery and b) the actions of the applicant in the taxi, prior to the man in the blue shirt exiting the vehicle and shooting at DCD, brought an end to the applicant’s participation in any joint enterprise to escape lawful apprehension, that may have existed between them.

### **Analysis**

[17] Section 20(5)(a) of the Firearms Act that was in force at the time this incident occurred provides:

“20. - (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; ....”

[18] Based on that provision, as the applicant was not himself in possession of a firearm he could only be liable for illegal possession of the firearm that the man in the blue shirt had, if that man used a firearm to commit a felony or to assault anyone or to resist lawful apprehension, in circumstances raising a reasonable presumption that the applicant was present to aid or abet the commission of the felony, assault or resisting of lawful apprehension, in the absence of reasonable excuse.

[19] There is no mention of any firearm on the Crown’s case until the men were escaping after the robbery. It cannot therefore be maintained that the firearms that either the man in the blue T-shirt or the man in the black T-shirt were seen in possession of while they were running away, were used in the commission of the felony of robbery. Indeed, there being no charge for robbery with aggravation on the indictment it is clear that, quite rightly, the prosecution did not seek to ground the indictment against the applicant in that way.

[20] The indictment was predicated on the contention that the applicant was party to a common design to rob and, thereafter, to resist lawful apprehension after the commission of the robbery by the use of a firearm, which extended to the shooting at the police by the man in the blue T-shirt, to further that objective. The facts, however, do not support that conclusion. Any common design that may have existed clearly ended in respect of the applicant by virtue of his actions in the taxi after the police officer gave the orders to the taxi driver. On the Crown’s case, the applicant, by putting his hands in the air, showed a willingness to surrender to DCD. The result of this was a withdrawal from any common enterprise that may have existed, to use a firearm to resist lawful apprehension.

[21] The case of **R v Clyde Sutcliffe and Randolph Barrett** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 148 and 149/1978, judgment delivered 10 April 1981, provides support for the view that, in such a case, an accused will not be responsible for any further criminal act of his co-adventurer. See also **Romario Gordon v R** [2022] JMCA Crim 27.

[22] The legal umbilical cord between the offences of shooting with intent and illegal possession of firearm having been severed, there is no aiding and abetting of any criminal act by the applicant that could vest illegal possession of the firearm used by the man in the blue T- shirt, also in the applicant, by virtue of section 20(5) of the Firearms Act. The applicant not being liable for the shooting count, therefore cannot be liable for the count of illegal possession of firearm.

[23] In the premises, the court is at one with counsel, that the application of the applicant must succeed in full.

### **Order**

- i) The application for leave to appeal conviction and sentence is granted.
- ii) The hearing of the application is treated as the hearing of the appeal.
- iii) The appeal against conviction and sentence in respect of each count is allowed.
- iv) The convictions are quashed, the sentences set aside and a judgment and verdict of acquittal entered in respect of each count.