JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 187 & 188/2001

BEFORE: **THE HON. MR. JUSTICE DOWNER, J.A.**
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE SMITH, J.A.

STEVEN BRYAN
SEARCHWELL SMITH
v.
REGINA

Keith Bishop for the Appellants

Tanya Lobban Crown Counsel for the Crown

September 30, October 1, 2 and December 20, 2002

SMITH, J.A.:

The appellants Steven Bryan and Searchwell Smith were, on the 23rd day of August, 2001, convicted of the offences of Illegal Possession of Firearm (count 1), Wounding with Intent (count 2) and Discharging a Firearm in a Public Place (count 3) by McIntosh J in the High Court Division of the Gun Court held at Morant Bay in the parish of St. Thomas.

In respect of count 1, each was sentenced to fifteen (15) years imprisonment at hard labour. In respect of count 2, Bryan was sentenced to 15 years imprisonment and Smith to 25 years imprisonment

at hard labour. On count 3, each was sentenced to 12 months at hard labour.

On the 2nd October, 2002 we treated the hearing of their applications for leave to appeal as the hearing of the appeals. We dismissed their appeals against convictions. We allowed in part their appeals against the sentences imposed. The sentence on count 1 was set aside and a sentence of 10 years substituted therefor. The sentence of 25 years against Smith on count 2 was set aside and a sentence of 15 years substituted therefor. We ordered that the sentences should commence on the 23rd November, 2001 and should run concurrently. As promised then we now put our reasons in writing.

The prosecution's case rests mainly on the evidence of the victim Mr. Delroy Downer, from Font Hill in St. Thomas. His evidence, in summary is as follows: During the early morning of the 2nd July, 2000, he was at a dance at Messenger Lawn, Font Hill. He had gone there with his girlfriend Wendy. The appellants, whom he knew very well before, were also there. They were expecting what is popularly known as a "sound clash" that night. At about 2:00 a.m. he was sitting outside the Lawn on the bonnet of a car with his girlfriend Wendy sitting in his lap. He saw the appellants climb to the top of an old abandoned and roofless shop. They sat straddling the wall of this old building. The appellant Smith was looking at

Mr. Downer while the appellant Bryan spoke to Smith. The "sound clash" had begun. "Messenger Sound" put on a record. "Merciless" was the deejay. It was a war tune – "A war them want, a war them want..." The appellant Steven Bryan drew a gun from his waist and fired four shots in the air. That was the gun salute. Wendy became fearful and left. The appellant Bryan passed the gun to the appellant Smith. Mr. Downer got up and walked away quickly. He saw Smith point the gun at him and he heard an explosion. He was shot in the left side. Smith fired another shot which caught the finger of a chicken vendor. The two appellants then jumped off the wall. Mr. Downer was taken to the Princess Margaret Hospital. Whilst there, he was visited by the police to whom he gave a statement. He was later transferred to the Kingston Public Hospital.

Detective Inspector Anthony Brown told the Court that on the 2nd July, 2000, Cpl. Drysdale escorted the appellants Smith and Bryan to the Morant Bay Police Station. Inspector Brown told the appellants that he had received a report that they were involved in the shooting of someone at Messenger Lawn, Font Hill. Each denied that he was involved. The Inspector instructed Constable Thorne to swab the hands of the appellants. This was done with their consent. Inspector Brown subsequently charged them. When cautioned, the appellant Smith said he was in his car when the shooting was taking place.

The appellant Bryan said he was at the section where the music was being played.

Detective Constable Luke Thorne testified that on the 2nd of July 2000 about 10:00 a.m. he was at the Morant Bay C.I.B office. Inspector Brown and the appellants were also there. In their presence Inspector Brown instructed him to swab their hands. Both appellants he said consented to this course of action. For each appellant he used four swabs. He placed each cotton swab into separate plastic bags which he labelled and sealed. On the 14th July he took the swabs in sealed envelopes to the Government Forensic Lab.

Miss Marcia Dunbar, a forensic scientist and analyst attached to the Government Forensic Laboratory, told the court that on the 14th July, 2000 she received from Constable Thorne envelopes containing plastic bags with cotton swabs. The upshot of the scientific tests carried out on these swabs was that traces of gun powder residue were found on the left palm and back of left hand of the appellant Steven Bryan and on the right palm and back of the left hand of the appellant, Searchwell Smith.

The Defence

The appellants who are cousins gave sworn evidence and called two witnesses. Both knew Mr. Downer before. They did not deny that during the early morning of the 2nd July, 2000 they were at a dance at Messenger Lawn in Font Hill District. They testified that they had gone there together with one Miss Kerry-Ann Stewart.

The appellant Bryan told the Court that sometime after 2:00 a.m. he, Searchwell, Kerry–Ann and some girls left the dance, and went on the road. Searchwell and his girlfriend went into a car which was parked in a "ball ground". He and the girls sat on a wall facing the car. The girls with him left, leaving him alone sitting on the wall. He was joined by " a next youth and his girlfriend". While sitting on the wall he heard four (4) shots. The sound of these shots came from behind him, that is "up in the dance". Then he heard another shot. The youth sitting beside him said "is clash time". He said he got up off the wall to go back in the dance but stopped to help a man whom he saw bleeding and whose hands and feet were tied. He swore that he did not see Mr. Downer at the dance anytime that night. He did not have a gun and he did not fire shots in the air that night. In cross-examination he denied handing a firearm to the appellant Smith. He said he heard that Mr. Downer got shot before he, Bryan, left the dance to go home.

The appellant, Searchwell Smith testified that he did not shoot Mr. Downer and that he did not have a firearm that night. In cross-examination he said he knew Mr. Downer from he "had sense", that is, over seventeen (17) years. He was nineteen (19) at the time. He agreed that shots were fired that night.

Miss Kerry-Ann Stewart gave supporting evidence. She swore that she was at the dance with the appellants. About 2:00 a.m. they came out of the dance, went to their car which was parked in a "ball ground" nearby. She and Searchwell went inside the car. The appellant Bryan sat on a wall in their sight. While they were in the car she heard gunshots outside the dance. She was terrified and asked Searchwell to take her home which he did.

We do not find it necessary to recount or summarize the evidence of Mr. Buchanan the chicken vendor who said that he was shot on the finger but did not know who was responsible.

Grounds of Appeal

Counsel for the appellants argued some ten (10) grounds of appeal. Grounds 1,2 and 3 were argued together. In these grounds counsel contended that there was a misjoinder of counts in the indictment in that two indictable offences (counts 1 & 2), triable in the

Gun Court were joined with a summary offence (counts 3), triable in the Resident Magistrates Court. Counsel submitted that there is no provision for joint trial of summary and indictable offences. Counsel further contended that the misjoinder of counts on the indictment rendered the trial a nullity – see ***R v Rudolph Brown*** 12 JLR 139.

Miss Lobban for the Crown submitted that count 3 charges an indictable offence and was properly joined with counts 1 and 2. Both counsel referred to the Firearms Act, the Gun Court Act, the Indictment Act and to decided cases.

Analysis of relevant enactments

Count 3 charges the appellant with the offence of " Discharging a firearm in a public place", contrary to section 23(1) of the Firearm's Act.

Section 23 reads:

> "**23.**- (1) A person shall not discharge any firearm or ammunition on or within forty yards of any public road or in any public place except-
>
> (a) in the lawful protection of his person or property or of the person or property of some other person; or
>
> (b) in the lawful shooting of a trespassing animal; or
>
> (c) under the direction of some civil or military authority authorized to give such direction; or

(d) with the permission of the Minister.

(2) Where any contravention of subsection (1) occurs, any Justice of the Peace or constable may without warrant enter any premises on which he has reasonable cause to believe such contravention was committed and seize any firearms and ammunition there found which he has reasonable cause to believe were used in such contravention or are about to be used in the commission of a contravention of subsection (1) and may retain such firearm or ammunition for so long as may be necessary for the purpose of any investigation in relation thereto, and where such investigation results in legal proceedings against any person for any such offence until such legal proceedings are finally disposed of.

(3) Every person who contravenes subsection (1) shall be guilty of an offence.

(4) Where any person is charged with contravention of subsection (1), the burden of proving that the discharge of the firearm or ammunition in respect of which the contravention is alleged to have occurred was a lawful discharge shall lie upon the person asserting the same."

It is important to note that this section does not state the forum for trial or the penalty on conviction. Of course without more at common law a contravention of this section would be an indictable misdeameanour. However, section 50 of the Firearms Act provides:

"**50.** Any person guilty of an offence under this Act for which no penalty is otherwise provided shall on summary conviction before a Resident Magistrate be liable to a fine not exceeding four hundred dollars or to imprisonment with or

> without hard labour for a term not exceeding twelve months".

Mr. Bishop submitted forcefully that sections 23 and 50 of the Firearms Act when read together create a special statutory summary offence triable by a Resident Magistrate. Therefore the High Court Division of the Gun Court he said had no jurisdiction to entertain such an offence.

Does the High Court Division of the Gun Court have jurisdiction to try a section 23 offence as counsel for the Crown contends? To answer this question we must examine the provisions of the Gun Court Act which established the Gun Court:

Section 3(1) of the Gun Court Act provides:

> "**3.**-(1) There is hereby established a court, to be called the Gun Court, which shall have the jurisdiction and powers conferred upon it by this Act.
>
> (2)...
>
> (3)...

Section 4 reads:

> "**4**- The Court may sit in such number of Divisions as may be convenient and any such Division may comprise –
>
> (a) one Resident Magistrate--hereinafter referred to as a Resident Magistrate's Division;

(b) a Supreme Court Judge sitting without a jury – hereinafter referred to as a High Court Division; (our emphasis)

(c) a Supreme Court Judge exercising the jurisdiction of a Circuit Court – hereinafter referred to as a Circuit Court Division."

Section 5 (where relevant) provides:

"(1)...

(2) A High Court Division of the Court shall have 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 and St. Andrew or any other parish.

(3)...

(4) The provisions of this section shall have effect notwithstanding anything to the contrary contained in the Juveniles Act or any other enactment."

Section 9 (b) provides:

"**9**- Without prejudice to the generality of section 5 –

(a)...

(b) there shall be vested in a High Court Division of the Court all the like powers and authorities as are vested in the Supreme Court and a Judge thereof and, for the purposes of this Act, a Supreme Court Judge exercising jurisdiction in that Division in relation to any offence shall have powers of a Judge and a jury in a Circuit Court;"

Section 2 of the Gun Court Act defines a firearm offence to mean:

> "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;"

The relevant subsection is (b). Under this subsection for an offence to be correctly described as a firearm offence it must:

(i) involve a firearm, and;

(ii) the offender's possession must be illegal, that is, contrary to section 20.

In our view it cannot be gainsaid that the offence charged in count 3 involves a firearm. The learned trial judge found that the offender's possession, the subject of count 1 was contrary to section 20 of the Firearms Act. Therefore the offence charged in count 3 falls exactly within the ambit of section 2(b) of the Gun Court Act. It is no doubt, a firearm offence, and by virtue of s.5(2)(a) of the said Act such an offence is within the jurisdiction of the High Court Division of the Gun Court.

When one examines the provisions of sections 23 and 50 of the Firearms Act and sections 2(b) and 5(2) (a) of the Gun Court Act it seems that the intention of Parliament was to invest the magistrate with jurisdiction to try a section 23 offence when the possession of the offender

is not unlawful, that is not contrary to s.20 of the Firearms Act. However, where the possession of the offender is contrary to section 20 of the Firearm's Act, then the High Court Division of the Gun Court is seized of the matter. In the latter case it may well be argued that the Magistrate's Court and the High Court Division of the Gun Court have concurrent jurisdiction. We make no definitive pronouncement on that. What however, is, to our mind, beyond peradventure is that the High Court Division of the Gun Court has jurisdiction to adjudicate on a section 23 offence where the possession of the offender is contrary to s.20 of the Firearms Act.

It was not argued before us, and in the circumstances could not properly be argued, that the provisions of Rule 3 of the Schedule to the Indictments Act which defines the circumstances in which charges may be joined in one indictment have been breached. We find that count 3 was properly joined with counts 1 and 2.

However, even if count 3 was improperly included on the indictment on the basis that it charged a special statutory summary offence, this misjoinder would not in our view necessarily render the trial a nullity. In ***R v Newland*** [1988] 2 W.L.R. 382, it was held that misjoinder renders an indictment invalid and that any conviction resulting from such an indictment is a nullity. ***Newland*** was followed in ***R v O'Reiley*** 90

Cr.App.R.40. However, in ***R v Smith (B.P)***[1997] 1 Cr. App. R. 390 it was held that ***Newland*** was wrongly decided in so far as it held that misjoinder would invalidate all convictions on the indictment. The decision in ***Smith*** although **obiter** was followed in ***R v. Lockley and Gainsbury*** [1997] Crim. L.R. 455. However, the question might be asked which of the charges are to be disregarded as the misjoined charges? We are of the view that ***Newland*** was correctly decided since Rule 3 delimits the power of the Court to join separate charges laid against a defendant. Further, it would be difficult to decide which of the charges are to be disregarded as the misjoined charges. However, ***Newland*** only applies where the charges joined are all indictable and the joining of the charges is in breach of Rule 3 of the Schedule to the Indictments Act. What is the position where a summary offence is joined in an indictment with indictable offences? Does such a misjoinder render the entire proceedings a nullity?

In ***R v Rudolph Brown*** [1970] 12 J.L.R. 139 a joint trial of indictable and summary offences before a resident magistrate was held to be a nullity. More recently in ***R v Callaghan*** [1992] Crim. L.R 191 the Court of Appeal (England) had to consider this question. The Court held that a summary offence joined on an indictment was essentially a parasitic count. The Court was of the view that the misjoinder of the summary offence did not render the trial a nullity. We are inclined to the view that

the decision in ***Callaghan*** is correct and should be applied in this jurisdiction. These grounds failed.

Ground 4

In this ground counsel for the appellant complains that the learned trial judge erred in not clearly stating that the burden of proof rests on the prosecution. In an effort to substantiate this complaint counsel referred to p.177 of the Record where the judge said:

> "On the other hand their (the accused persons') evidence could support the evidence of the prosecution, but even if this court were to reject the evidence of the accused persons and the witnesses, this court could not on that account find the accused persons guilty.
>
> The Court must look to see whether there is evidence in respect of each accused and in respect of each count on the indictment."

Here the judge was, as Crown Counsel pointed out, dealing with the effect of the accused's statement. There is no merit whatsoever in this complaint. At p. 171 of the record the judge stated:

> "To this indictment they have pleaded not guilty and once they plead not guilty it then becomes the duty of the prosecution to prove the case against both accused to the extent that the court can feel sure of the guilt of either or both accused. There is no duty on either of the accused to prove anything.
>
> ... They are innocent and remain innocent unless the prosecution can discharge the burden

placed upon it of proving their guilt beyond reasonable doubt."

Ground 5

The burden of the complaint in this ground is that there was no evidence from which the learned trial judge could conclude that the appellant Bryan aided and abetted the appellant Smith to shoot the complainant.

Mr. Downer in his evidence told the court that while he was sitting on a car he saw Searchwell Smith and Steven Bryan climb onto an abandoned shop. His evidence continued (pp. 16-17):

"**Q:** How far was this shop from Messenger Lawn?

A: Same place just a foot cross

Q: Yes?

A: While I sit there I saw him climb on a trolley

Q: Traddle?

A: Yes straddle

Q: Yes sir?

A: Immediately, they were corresponding to each other Searchwell Smith and Steven Bryan.

Q: They talking or either writing?

A: Talking to each other.

Q: Couldn't hear what they were saying?

A: No I couldn't hear what they were saying but at that time Searchwell Smith was looking at me while Steven Bryan was talking to him. At that time now it was a sound clash going on, so it was time for the clash to start, where one sound would play record to record. I was still sitting there."

The witness went on to describe the "sound clash" then continued:

"A: Suddenly I saw Searchwell Smith pull a short gun from his waist band. What I say Searchwell Smith or Steven Bryan?

Q: You said Searchwell Smith

A: Sorry its Steven Bryan

Q: So that's a mistake you make?

A: Yes sorry about that. Steven Bryan pull a short gun from his waist and open fire up in the air four times. So it's a gun salute and tune wheel up.

Q: What happened next?

A: So Wendy get frightened now and got out of my lap, although mi did feel scared to.

Q: Yes?

A: So at that time when he open fire, I saw Craig, he give Searchwell the gun.

Through Craig is his pet name, but he is Searchwell Smith.

Q: So what happen now?

A: I see Steven Bryan pass gun to Searchwell Smith. So I get up now. I get off the car and walk with my face facing them side way to the car. A was moving fastly.

Q: You were what?

A: I was walking fastly trying to move away when I saw Searchwell point the gun on me. I was trying to run, but I could not run. The only thing I could do is go down on me, because when I see him point the gun after me so, Searchwell Smith discharge a shot which caught me in my left side. I was still looking at him. I fell down on my side like this (indicates).

Q: You said you were still looking on him?

A: Yes, and he fired a next one.

Q: The same Smith?

A: Yes, same Smith, sir, which caught a chicken vendor on his finger. Then I creep when I fall down on my side I creep to the back of the car still peeping round.

Q: Could you have seen them?

A: Yes, them jump down at that time off the shop. I stood down there and shout, if me dead a Searchwell shot mi and see Steve there also on the building.

Q: You shout that out?

A: Yes I shout that out. If mi dead tell mi mother. Same time the crowd came down now. The owner for the car came too and ask me what happen."

The witness related what happened after the crowd "came down", then he was asked:

"Q: Now sir, when you said Smith fired the shot at you which catch you in your side, where was Bryan at the time?

A: He was there too on the top of the abandoned shop."

We do not accept the contention of counsel for the appellants that the foregoing evidence of Mr. Downer cannot give rise to the inference that the appellant Bryan aided and abetted the appellant Smith in shooting Mr. Downer. Both appellants denied firing a gun that night; they denied being at the spot where Mr. Downer was shot. The learned trial judge rejected their evidence and accepted that of Mr. Downer.

The fact that Bryan handed the gun to Smith, witnessed the commission of the crime, offered no opposition to it or expressed no dissent, affords cogent evidence upon which the judge could reasonably and justifiably find that Bryan willfully encouraged and so aided and abetted the offence. We do not think it necessary to examine the cases relied on by Mr. Bishop. This ground also fails.

Grounds 6, 7 and 8

In these grounds counsel complained that the learned trial judge failed or neglected to consider the appellants' defence of alibi. In our view this criticism is unsustainable. The judge rejected the defence. He carefully examined the identification evidence of Mr. Downer. It is clear that the judge had the **Turnbull** warning in mind. The learned judge in his reasons clearly demonstrated that he was mindful that the appellants were saying that at the material time they were elsewhere and that it was

for the prosecution to prove that they were where Mr. Downer said they were. We regard this approach as perfectly adequate on this point.

Grounds 9 and 10: - Unreasonable Verdict and Sentence

The complaint that the verdicts are unreasonable was not pursued as an independent ground. It is only left for us, therefore, to consider the complaint that the sentences were manifestly excessive. In ***R v Gary Hoyes*** 25J.L.R. 373 this Court said that "an appropriate sentence must relate to the circumstances of the offence, antecedents of the accused and the usual range which relates to a particular offence".

We were of the view that for a first offender , 15 years imprisonment for illegal possession of a firearm is outside of the usual range and therefore manifestly excessive. Insofar as the sentence in respect of the wounding with intent charge is concerned, we did not think that there was any justification for the different treatment of the appellants. The appellants are about same age. The evidence is that one gave the other the gun which was used to inflict the injury. In our view the punishment should be the same in the circumstances. It was for the above reasons that we made the orders referred to at the outset.