JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 56 OF 2006

BEFORE: THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MISS JUSTICE SMITH, J.A. (Ag.)

AUDLEY CAMERON V. REGINA

Robert Fletcher and Brian Barnes for the Appellant.

Miss Kathy-Ann Pyke for the Crown

13th May and 21st November, 2008

G. SMITH, J.A. (Ag.)

1. The appellant Audley Cameron was convicted on the 6th day of April 2006 in the High Court Division of the Gun Court held in Kingston for the offences of illegal possession of firearm and shooting with intent. He was sentenced to 5 years imprisonment and 9 years imprisonment respectively, with sentences to run concurrently.

2. His application for leave to appeal received the attention of a single judge who granted leave "so that the legal basis on which the conviction rests may be subject to scrutiny".

3. On the 13th May 2008 after hearing arguments we treated the application for leave to appeal as the hearing of the appeal and allowed the appeal. We promised then to put our reasons in writing, which we now do.

Prosecution's Case

4. The case for the prosecution was that on the 30th December 2004 at 10:30 a.m. police officers were on patrol in the Barbican area of St. Andrew. While proceeding on foot in a lane at #5 Birdsucker Lane they observed six men in close proximity to a gate of premises in the lane. Three of these men were armed with handguns. On the approach of the police the men started firing shots in their direction, which forced the police to take evasive action. These men ran through the gate into the premises dispersing in different directions. The police chased them but only the appellant was caught as he attempted to run off. He was immediately searched but no firearm was recovered from him. He was arrested and charged for the offences for which he was convicted. When cautioned he said that he did not have any gun but "Andre dem did have the gun".

The Defence

5. The appellant gave sworn testimony that on the 30th December 2004, at about 10:30 a.m. he was held by the police at the entrance to Birdsucker Lane where he had gone to collect supplies for his business. After he was detained, other officers in the police party proceeded further in the lane where a shooting

incident took place. The appellant denied that he was present during that incident, or that he was in the company of men who were armed with handguns and who shot at the police that day.

Grounds of Appeal

6. Leave was granted for the appellant to argue the following supplementary ground of appeal:

> "The learned trial judge erred in law and fact in finding the accused guilty in that sufficient evidence does not exist to find that he was a part of a common design or was present to aid and abet the offences for which he was tried."

This supplemental ground became the focal point of counsel's argument before the court as he abandoned the original grounds which the appellant had previously filed.

7. In support of this ground, Mr. Robert Fletcher submitted that:

> "(i) The learned trial judge erred in law and fact in finding the accused guilty as the evidence presented was insufficient to substantiate the finding that he was a part of a common design or was present to aid and abet the commission of the offences for which he was convicted.
>
> (ii) Any consideration of the facts in the instant case when looked at against the background of the relevant statutory provisions required the learned trial judge to consider such factors as the knowledge of the thing possessed, it's physical custody and control, and any behaviour that would show that the appellant's presence was not accidental.

(iii) The evidence adduced by the Crown against the appellant in the instant case amounted to no more than a mere presence by him at the scene of the incident. There were no acts or statements which showed any intention on his part to aid and abet the commission of the offences for which he was convicted."

He cited the cases of **R. v. Clovis Patterson** S.C.C.A. 81/04 delivered on the 20th April, 2007 and **R. v. Kevin Bascoe** S.C.C.A 8/04 delivered on 23rd January, 2008 in support of his submissions.

8. Miss Pyke on behalf of the Crown graciously conceded that there was no behaviour on the part of the appellant which in any way demonstrated his complicity in the commission of these offences.

9. The facts of the instant case which were accepted by the learned trial judge disclosed that the appellant was present when the police officers were shot at on the day of the incident. However, there was no evidence to show that he was armed with a firearm or that he personally shot at the police. The appellant's culpability for the specified offence of shooting with intent would be directly connected to the principal offenders' possession of the firearms. In order to substantiate the charges against the appellant the Crown would be obliged to satisfy the evidential requirements of Section 20 (5) (a) of the Firearms Act which states:

"(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."

10. The question therefore for the court's determination is whether or not there were circumstances in the instant case which gave rise to a reasonable presumption that the appellant was present to aid and abet the commission of the offence of shooting with intent at the police officers and therefore would cause him to be treated in the absence of a reasonable excuse as being in possession of the firearm.

11. The evidence of Cons. Cleven Ellis was that while walking along Birdsucker Lane he observed a group of four men on the outside of a premises, while two others were seen exiting the gate of the same premises. The appellant was one of the four men on the outside. Three of the men in this group were armed with handguns and on the approach of the police they started to fire shots in the direction of the officers forcing them to take cover. All the men ran through the gate dispersing in different directions. The police gave chase and the appellant

was held as he attempted to run through the gate. He was immediately searched but no firearm was recovered from him.

12. The evidence of Deputy Supt. Beau Rigabie corroborated that of Cons. Ellis on the material particulars. Significantly the evidence presented did not disclose such vital details as the proximity of the appellant to armed men, whether there was any form of communication between the appellant and the armed men, if the appellant was seen doing any unlawful act prior to the commencement of the shooting, if these men were known to each other before, and if the appellant's presence at the scene was not accidental.

13. The learned trial judge in her assessment of the evidence concluded that there was a common design or agreement by the appellant and others to shoot at the police. Upon scrutinizing the evidence presented we were unable to discover a scintilla of evidence to show the basis upon which the learned trial judge arrived at that conclusion. We are of the view that the learned trial judge did not demonstrate in her assessment of the evidence and the application of the law an adequate appreciation of the doctrine of common design. The mere presence of the appellant at the scene of the incident without more was not enough to make him a party to the crime or to establish that there was a common design or agreement between him and the men who were armed with the firearms and who shot at the police.

14. In determining the question as to whether there were circumstances in this case which gave rise to a reasonable presumption that the appellant was present to aid and abet the commission of the offence of shooting with intent it is our view that the learned trial judge did not demonstrate in her analysis of the evidence that she considered the following factors:

(i) whether or not the presence of the appellant was entirely accidental;

(ii) the fact that the appellant was not armed with a firearm;

(iii) the absence of evidence that the appellant was seen doing or saying anything to the possessors of the firearms which might have been construed as communicating with them;

(iv) the absence of any evidence that the appellant was engaged in any illegal act prior to the commencement of the shooting; and

(v) the finding by the court that the firing at the police was done on the spur of the moment.

We think that if the learned trial judge had adequately analysed and considered these factors she ought to have concluded that there were no sufficient circumstances which would give rise to a reasonable presumption that the appellant was present to aid and abet the commission of the offence of shooting with intent.

15. In **R. v. Clovis Patterson** (supra) a decision of this court where the circumstances were similar to the instant case Smith, J.A. opined at page 13 of the judgment as follows:

> "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."

In applying the principle as enunciated by Smith, J.A. to the present case, and bearing in mind the concession made by the Crown that there was no behaviour on the part of the appellant which in any way demonstrated his complicity in the commission of the offences, it is our view that the learned trial judge erred when she found the appellant guilty as charged on the indictment. Once she was of the view that the shooting at the police occurred on the spur of the moment then the prosecution would have been confronted with a difficulty in establishing a charge under section 20 against a person who was in the company of the actual possessor, if subsection (5) (a) was not applicable.

16. We are of the opinion that for the appellant to be convicted of a charge under Section 20 of the Act there ought to be compelling evidence that the principal offender used the firearm to commit the specified offence and that the appellant's presence was not accidental thereby giving rise to the presumption that he was there to aid and abet the commission of the specified offence. In the instant case the Crown's failure to present cogent evidence of this compelling nature was fatal to the successful prosecution of the case against the appellant.

We therefore concluded that the learned trial judge erred in law and in fact when she found the appellant guilty as charged.

Conclusion

17. Accordingly as was previously stated the appeal was allowed and the convictions quashed. The convictions and sentences were set aside and a judgment and verdict of acquittal entered.