[2022] JMCA Crim 27

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MRS JUSTICE V HARRIS JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 22/2014

ROMARIO GORDON v R

Sanjay Smith for the applicant

Miss Natallie Malcolm, Mrs Christina Porter and Marvin Richards for the Crown

14 March and 13 May 2022

V HARRIS JA

[1] The applicant was tried on an indictment that contained six counts before a judge ('the learned trial judge'), sitting without a jury, in the High Court division of the Gun Court. On 20 January 2014, he was convicted on five of those counts, namely for, illegal possession of firearm (count one), illegal possession of ammunition (count two), robbery with aggravation (counts four and five) and shooting with intent (count six). On 10 March 2014, he was sentenced to seven years' imprisonment on each of counts one and two, 10 years' imprisonment on each of counts four and five, and 15 years' imprisonment on count six. The sentences were ordered to run concurrently.

[2] On 17 March 2014, the applicant filed a Criminal Form B1 seeking leave to appeal his convictions and sentences. A single judge of this court considered and refused his application. As is his right, the applicant has renewed his application for leave to appeal his conviction and sentence in relation to shooting with intent (count six) before us.

Background facts

[3] The case for the prosecution was that on 25 May 2013, at about 3:45 am, the complainants, Mr David Porter and Mr Norman Fray, were in Cross Roads, in the parish of Saint Andrew, standing in front of Mr Fray's stall. As they were speaking, a white Nissan motor vehicle, bearing a red registration plate which included the numbers '32' ('the car'), drove towards them. When the car was about 8½ feet away from the complainants, the applicant alighted from the front passenger seat and pulled out a firearm, which was described by Mr Porter as a silver or chrome "spinner barrel gun" (an expression which we understand to be a colloquial term for a revolver) and by Mr Fray as a gun smoke chrome .38 revolver. The applicant pointed the firearm at the complainants and said, "Police, don't move … hands up". He then searched the complainants and asked them to produce a form of identification. When they did, he snatched their wallets. Then, while still pointing the firearm at them, the applicant searched the stall and removed a container with money and cigarettes. As another motor vehicle approached, the driver of the car said to the applicant, "watch out fi diss". The applicant then walked backwards to the car with the firearm pointing at the complainants and entered the front passenger seat. The car sped off in the direction of New Kingston.

[4] At approximately 3:50 am, just five minutes later, two police officers, Corporal Eddie Wright and Constable Lucien Bloomfield ('the police officers'), while on patrol in a marked service vehicle, noticed the car because it had pulled out of a line of traffic on Balmoral Avenue and disobeyed the red traffic light. The car quickly drove onto Maxfield Avenue, heading in the direction of Half Way Tree. The police officers pursued the car with the beacon and emergency lights of the service vehicle turned on. Despite the police officers' efforts, the driver refused to comply with their commands to stop. The car eventually crashed into a median on Constant Spring Road, which caused one of its tyres to explode. Shortly after, the driver stopped the car in a lane off Seaward Drive after hitting a parked motor vehicle. The driver came out of the car, firearm in hand, and began shooting in the direction of the police officers. He then ran off and escaped into the lane.

[5] The police officers approached the car and saw the applicant exit from its front passenger side. He was searched, but nothing incriminating was found on his person. However, upon searching the car, a chrome .38 revolver loaded with three live rounds was found under the front passenger seat (where the applicant had been seated). They showed the firearm to him, and he said, "No sah, ah nuh fi mi dat". They cautioned the applicant, arrested him and took him to the Half Way Tree police station. Significantly, the car bore a red licence plate with registration number PE 3273.

[6] Approximately two hours after the robbery, the complainants were at the Half Way Tree Police Station making a report about the robbery when they saw the police officers arrive with the applicant. He was wearing the same clothes (pink shirt, pink belt and jeans) and mohawk hairstyle he had sported when he robbed them. The complainants identified the applicant as the person who had robbed them, and he was subsequently charged.

[7] At the trial, the applicant remained silent and elected not to call any witnesses in his defence. It was, however, revealed during the cross-examination of Constable Bloomfield that when the applicant was arrested, he told him under caution that he was taking a taxi from Half Way Tree (which we understand to essentially be an absolute denial on the applicant's part that he was engaged in any joint enterprise with the driver, whether to rob Messrs Porter and Fray or shoot at the police; and that he was simply a passenger in a taxi; hence his presence was merely accidental).

The application for leave to appeal

[8] Counsel for the applicant, Mr Sanjay Smith, sought and was granted permission to abandon the original grounds of appeal. The renewed application for leave to appeal, before this court, proposed two supplemental grounds, namely:

> "1. The Learned Trial Judge erred by finding that [the] Applicant had a case to answer for Shooting with intent and by extension, convicting the Applicant on the charge of Shooting with intent.

2. The sentence is manifestly excessive."

Discussion

Ground one

[9] The applicant has sought to impugn the learned trial judge's finding that he was guilty of the offence of shooting with intent, on the basis that he was not seen with a firearm and did not shoot at the police officers.

[10] Counsel, Mr Smith, submitted on the applicant's behalf that there was no action or positive act on his part to support the Crown's contention that he aided and abetted the driver to commit the offence of shooting with intent. It was further argued that merely being present at the scene was not sufficient. Mr Smith asserted that the applicant was a passenger in the car that was operating as a taxi, and he knew nothing about the firearm found under his seat. Counsel submitted that even on the prosecution's case, the commission of the robberies was the extent of the applicant's involvement. Taking into account the applicant's conduct, he posited that it did not give rise to a reasonable presumption that the applicant was a part of a common design to commit the offence of shooting with intent. For those reasons, he urged us to find that the learned trial judge erred in law and, in fact, by finding the applicant guilty of that offence. Reliance was placed on the cases of **R v Coney** (1882) 8 QBD 534, **R v Powell and another** [1999] AC 1, **Audley Cameron v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 56/2006, judgment delivered 21 November 2008 and **Kevin Bascoe v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 8/2004, judgment delivered 23 January 2008, in support of those arguments.

[11] On the other hand, Crown Counsel, Mrs Christina Porter, contended that there was sufficient evidence of joint possession for the learned trial judge to call upon the applicant at the end of the prosecution's case to answer to the charge of shooting with intent. She cited the evidence that the applicant and the driver were together before the shooting and had robbed the complainants at Cross Roads to make the point that the applicant's presence in the car when the police officers were shot at was not merely accidental.

Additionally, it was posited that the shooting at the police officers represented a continuing transaction and was all part and parcel of the common design because the driver and the applicant were both trying to evade the police officers. The learned trial judge, it was submitted, properly considered the applicable statutory provision, that being, section 20(5)(a) of the Firearms Act ('the Act') and relevant cases. Accordingly, having applied the relevant principles, the learned trial judge was entitled to reasonably infer that the applicant was deliberately present and aided and abetted the driver in the commission of the offence of shooting with intent, pursuant to a joint enterprise. The cases of **R v Clovis Patterson** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 81/2004, judgment delivered 20 April 2007, **Dave Harris and others v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 106, 108, 114 & 123/2004, judgment delivered 21 November 2008, **Audley Cameron v R** and **R v Galbraith** [1981] 2 All ER 1060 were cited in support of these submissions.

[12] The relevant provision for the offence of shooting with intent can be found in section 20 of the Offences Against the Person Act. Section 20(1) provides that anyone who unlawfully and maliciously shoots at another with the intent "to maim, disfigure or disable any person or to do some other grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of a felony".

[13] It is agreed that the applicant was not the person who did the physical act of shooting at the police officers on the prosecution's case. He admitted to his presence at the material time and place of the commission of the offence but has denied any participation, active or otherwise. Therefore, at first blush, we considered that the main issue for this court's consideration is whether the circumstances of this case gave rise to a reasonable presumption that the applicant was present to aid and abet the commission of the offence of shooting with intent and that the statutory provision, relied on by the learned trial judge as well as Crown Counsel, that is section 20(5)(a) of the Act, was

relevant. However, as will be seen later in the judgment, our task was not quite that straightforward.

[14] Section 20(5)(a) of the Act 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; …."

[15] In **R v Clovis Patterson**, a decision from this court (and relied on by the learned trial judge and Crown Counsel), Smith JA discussed the operation of that section. He said at pages 11 and 12 of the judgment:

> "Where the specified offence committed by the actual possessor, that is the principal offender, is one to which the principle of joint enterprise or common design is readily applicable, for example robbery, then the voluntary presence of an accused as a companion of the principal will normally be sufficient to raise a prima facie case against him on a charge of the specified offence. In such a situation on a charge under section 20 of the Act, the prosecution need not prove, prima facie, that the accused knew that the actual possessor had a firearm. By operation of subsection (5) (a) he shall be treated as being in possession in the absence of reasonable excuse. In other words, once it is established that there are circumstances which give rise to a reasonable presumption that he was there to aid and abet the commission of the specified offence, then he shall be treated, in the absence of reasonable excuse, as jointly in possession of the firearm with the actual possessor. It is therefore a question of fact in each case."

[16] That excerpt from the judgment effectively confirms that section 20(5)(a) of the Act operates as a deeming provision for the offence of illegal possession of firearm. It is preceded by section 20(1)(b), which states that no person should be in possession of a firearm or ammunition not under and in accordance with the terms and conditions of a Firearm User's Licence. Therefore, applying the statutory provision to the facts of the present case, once the applicant is found to be present to aid and abet the principal offender (the driver) who is in unlawful possession of a firearm and the principal offender uses or attempts to use that firearm in the commission of a felony (which in this case would be the offence of shooting with intent), he is deemed to also be in unlawful or illegal possession of that firearm. Correspondingly, for the applicant to be convicted under section 20(5)(a) (that is, to be deemed to be in possession of the firearm that the driver used to shoot at the police officers), another count for illegal possession of firearm ought to have been included on the indictment. However, there was no such count from the outset, and neither was there an amendment of the indictment to conform with section 20(5)(a) of the Act.

[17] The court brought this observation to the attention of counsel for the applicant and the Crown. Mr Smith submitted that this would further bolster his submission that the learned trial judge erred when she called upon the applicant to answer the charge of shooting with intent and later convicted him of that offence by relying on section 20(5)(a). Crown Counsel submitted that, given the factual context of the case, there was no substantial miscarriage of justice.

[18] We are of the view that, as a result of this omission in the indictment, the learned trial judge fell into error when she relied on section 20(5)(a) of the Act to find that the applicant had a case to answer for shooting with intent (when that provision only allows for a defendant to answer a charge of illegal possession of firearm). That error was further compounded when she found that since the applicant had failed to give a reasonable explanation for being in the presence of the driver (the evidential burden requirement of section 20(5)(a)), he was guilty of the offence of shooting with intent (see pages 243,

lines 5 – 10; pages 258, lines 7 – 25; pages 259 – 263, line 1 of the transcript). Accordingly, since the applicant's culpability for the offence of shooting with intent would be directly linked to the driver's possession of his firearm and not only to the actual shooting at the police, the finding of the learned trial judge, in our judgment, has resulted in a miscarriage of justice.

[19] We find instructive the dicta of Smith JA at page 15 in **Clovis Patterson** on the proper interpretation of section 20(5)(a):

> "Now it would seem logical that the evidence which raises the presumption that an accused was present to aid and abet the offence of shooting at, must also raise the presumption that he was aiding and abetting the offfence of illegal possession of firearm. In such a situation without praying in aid the provisions of section (5)(a) anyone who aids and abets the person who commits the offence of shooting at, would himself be guilty of aiding and abetting and the illegal possession of the firearm. **If the intention of the legislature was to lighten the burden of the prosecution, then to give effect to section 20 (5) (a) where a person is voluntarily in the company of another who uses a firearm to commit an offence specified in the subsection, <u>in absence of reasonable excuse that person shall be treated as also being in possession of the firearm contrary to section 20(1)(b)</u>. Whereas at common law, non-accidental presence is no more than evidence for the jury, by virtue of the subsection, in the absence of a reasonable excuse, it is conclusive of guilt. This in our view is the proper interpretation of the subsection**." (Emphasis added)

[20] Additionally, an essential question that also would have required exploration by the learned trial judge (since the trial proceeded on the bases that the indictment was in proper form and section 20(5)(a) of the Act was applicable) is whether or not the evidence disclosed circumstances that are capable of giving rise to the reasonable presumption that the applicant was present to aid and abet the driver to commit the offence of shooting at the police with intent to cause them grievous bodily harm (as stated in the indictment). This assessment would be necessary before the applicant could be deemed to be in joint possession of the firearm used by the driver to commit the specified offence.

[21] In the present case, it is beyond debate that there was overwhelming evidence that the applicant and driver were both engaged in a joint enterprise to rob Messrs Porter and Fray at gunpoint (and the learned trial judge was correct in so finding). However, upon close scrutiny, we find that there is a dearth of evidence (such as any behaviour, statements or acts) that would tend to show that the applicant aided and abetted the driver to shoot at the police and shared his intention to do so. We say so for the following reasons.

[22] We agree with the Crown that the applicant's presence in the car was not accidental, and it is pellucid to us that he and the driver were both trying to evade lawful apprehension by the police following the robbery. However, we observe that the applicant was seated in the car's front passenger seat and was not saddled with the vehicle's manoeuvring. He was also armed with a firearm. Yet, during the pursuit of the car by the police, he did not use his firearm to point or shoot at the police. He had ample time and opportunity to do so, were this his intention or part of any agreed plan between him and the driver. Neither was there any direct or inferential evidence that he shared the intention of the driver to shoot at the police. The undisputed evidence was that the driver shot at the police after hurriedly leaving the car following the crash and just before he escaped into the lane. In other words, the evidence is supportive of the conclusion that the driver committed the offence of shooting with intent on the spur of the moment to facilitate his own escape. It is also worth mentioning that when the driver was shooting at the police, the applicant remained in the car and did not attempt to escape or join him in the shooting. His firearm was subsequently found secreted beneath the seat he was sitting on in the car. It seems to us that this evidence contradicts any notion that the applicant was engaged in a joint enterprise with the driver to shoot at the police or that he aided and abetted him in the commission of the offence. Regrettably, the learned trial judge failed to demonstrate that she considered these factors in her analysis of the evidence.

[23] In disposing of this appeal, we find as apt, and will adopt, the following pronouncement of Smith JA at page 13 in **Clovis Patterson**:

> "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." (Emphasis added)

Conclusion

[24] For the preceding reasons, we are of the view that the conviction for shooting with intent is unsustainable and must be quashed. Given our decision, there is no need to address supplemental ground two that raises the issue of the sentence imposed for the offence of shooting with intent being manifestly excessive.

Order

1. The application for leave to appeal conviction and sentence for the offence of shooting with intent is granted.

2. The hearing of the application is treated as the hearing of the appeal.

3. The appeal against conviction and sentence for the offence of shooting with intent is allowed.

4. The conviction for shooting with intent is quashed and the sentence imposed for that offence is set aside.

5. Judgment and verdict of acquittal entered for the offence of shooting with intent.