JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 75 & 78/97

BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

R. v. WESLEY JOHNSON
MICHAEL STEWART

Elham Bogle for appellant Johnson

Jacqueline Samuels-Brown for appellant Stewart

Carington Mahoney and **Laurel Gregg** for the Crown

2, 3, 4, March & 30 July 1999

LANGRIN, J.A.

The appellants were convicted by Panton, J in the High Court Division of the Gun Court held in Mandeville in the parish of Manchester and sentenced to 10 years imprisonment at hard labour on each count of illegal possession of firearm and robbery with aggravation. The sentences to run concurrently.

The facts briefly are as follows - Caroline Warren operated a grocery and bar at Waltham Square, Mandeville. At about 9.00 p.m. on the 12th July, 1993 as she was about to close the shop a yellow car drove up and four men came out of the car and entered the shop. One of the men went over the counter and another held a Mr. King who was in the shop. One man was outside the shop and the fourth remained in the car. The man who came over the counter held up Miss Warren at gun point with a shotgun. The man with the long gun held up Mr. King. The men ordered Miss

Warren, Mr. King and another customer present to lie on the ground. The customers lay on the ground but Miss Warren refused. The man hit her with the gun on her hand saying that she was stubborn. She still refused, she pushed him and the gun fell. The man bent down to pick up a shot which had fallen to the ground. Miss Warren attempted to get a knife from her showcase. The man with the long gun who was holding up Mr. King came around the bar. They took a bag in which she had $900.00 and the man with the long gun rushed out with it to the car. He was followed to the car by the man with the short gun. They all drove off. They had also robbed her of two gold chains and a gold ring which she had given to the man with the shotgun on his demand. She had kept the shot which fell from the gun and when the police came later that night she gave it to them. Miss Warren was unable to identify any of the men who came to her grocery and bar that night.

Det. Harold Cover was on mobile patrol that night when he received a radio transmission. Consequently, he attended at Miss Warren's grocery and bar and saw Miss Warren and Mr. King. A report was made to him of the robbery and a .39 calibre cartridge was handed over to him by Miss Warren.

After leaving the grocery and bar, he saw a yellow 323 Mazda motor car 6774 AH about 5 chains up the road from the shop in the middle of the road with all the doors opened and the headlights on. He got out of the service vehicle in which he was driving turned off the headlights on the abandoned car, closed the door and called by radio for a wrecker. Receiving no assistance, he drove to Marks Wrecker Service at Hatfield and spoke with them. He then returned to where he had left the Mazda car only to find that the car was no longer there.

Enquiries at the Collector of Taxes in Mandeville led him to give certain instructions to District Constable Samuda.

On the 3rd of August, 1993 on receiving certain information from D/C Samuda, he went to May Pen Police Station where Mr. Samuda handed over to him the appellant Michael Stewart and the keys for the yellow 323 Mazda motor car licenced 6774 AH. He told the appellant Stewart that he had "received a report of a robbery in the Manchester area and I had seen the car and on my return the car was gone." He cautioned him and Stewart said:

> "Me ago tell you the truth sah, me naw tell no lie fi nobody and take up fi nobody. Me carry Hoosie and Lassa and a man, me nuh know him name, go a one place in Manchester and them come out and go in a one shop and rob the shop. Me never come out of the car because a me did a drive, and just as we ago go whey, we see one light a come and we run left the car."

The appellant was taken into custody. Next day, the appellant sent for him. He went to the cell block where the appellant told him that he wished to make a statement. He took the appellant to Inspector Pinnock.

On the 5th of August, on receipt of information from District Constable Samuda, the witness went to the May Pen Police Station. There he saw the other appellant Wesley Johnson, o/c called "Hoosie" and one Alfanso Martin o/c "Lassa." He told them of the report he had received of the robbery and cautioned them. The appellant Johnson said:

> "A me one you a go lock up sah? A never me one go up deh."

In cross-examination Corporal Cover said:

> "**Q.** I am suggesting to you Corporal Cover that Mr. Johnson never say anything like that, 'that a no mi one go up deh'
>
> **A.** Yes sir.

> **Q.** Neither did he say to you that, 'how comes you a charge me one'?
>
> **A.** That is what he said to me, it is so long ago, that I don't remember the exact words, but it is words to that."

Det. Inspector Pinnock, took a cautioned statement from the appellant Michael Stewart on the 4th of August, 1993 in the presence of one Mr. Williams, a Justice of the Peace and this statement was tendered in evidence.

A no-case submission was made by counsel on behalf of Johnson, which was unsuccessful.

The appellant Johnson gave sworn evidence denying that he ever said to Mr. Cover "a no mi one, a mi one you a go lock up sah? A never mi one go up deh." Neither did he say how you a charge me one and a no me one go round deh?"

The appellant Michael Stewart, in his defence gave an unsworn statement as follows:

> "M'Lord, four men hold me up and said me must take them to Mandeville, while driving they say I must stop and when I reach Mandeville they said stop and three men came out of the car and go into a shop and one sit into the car and have a gun on me.
>
> HIS LORDSHIP: One stayed in the car and had a gun at you?
>
> ACCUSED: Yes, sir, the next three came back from out of the shop. To how me hear them a talk me say it sound like is some robbery them go to the shop go do."

Re: Wesley Johnson

The substantial ground of appeal pertaining to the above appellant is that the oral statement of the accused was insufficient to make a trial judge feel sure beyond a reasonable doubt that the accused was guilty of the charges of the indictment.

The learned trial judge regarded Detective Harold Cover as a credible witness and accepted the admission made by the accused to the Detective as (he) Johnson being one of the four men who robbed Caroline Warren on 12th July, 1993. There was no evidence of any oppression or beating of the accused at the time the admission was made.

In the circumstances this ground fails.

Re: Michael Stewart

The ground of appeal argued before us relating to Stewart centered on the failure of the learned trial judge in his summation to state the law pertaining to duress and apply it to the case.

Counsel further submitted that the judge failed to recognise and take into account the link between the oral statement given by the accused on arrest on one hand and on the other hand the written cautioned statement which he gave the following day. Counsel argued that this was a material irregularity which prejudiced Stewart's defence.

The trial judge in his summation said inter alia the following:

> "The evidence projected against the accused men is in the form of oral admissions to Detective Corporal Errol Cover, by both men. In addition, there are two documents, one caution statement and the other, a question and answer, recorded, from the accused Stewart.
>
> The accused men, in response to the charge - in so far as the accused Johnson is concerned, he gave evidence and he denied involvement in the robbery. The accused man Stewart made an unsworn statement, in which he said that

he was held up by four men in Clarendon, who ordered him to take them to Mandeville, which he did under compulsion.

Three of the men, he said, went into a shop, one stayed in the car, holding a gun at him, and from the operations that he saw, the three men who went into the shop committed a robbery there.

Corporal Cover said he spoke to Michael Stewart, telling him of this robbery at Miss Warren's bar. When he cautioned him, Michael Stewart, he said, ' Me ago tell you the truth sah, me nah tell no lie fi nobody, me carry Hussie and Lassa and a man whose name I don't know, to Manchester. Them come out and rob the bar; I never come out. Just as we were leaving me see light coming. We left the car and run'.

The following day, Corporal Cover received a message and went to the cell block where Stewart was being kept and after a conversation with Mr. Cover, Stewart proceeded to give a written statement, and the main difference between that statement and the oral statement, given to Corporal Cover, is that the accused man Stewart in the written statement, is saying that he was under duress, that he was not a part of this robbery. He was held up.

On the 15th of August, Corporal Cover saw and spoke to accused man Johnson, who after he had told him about the report of this robbery Miss Warren's bar and cautioned him. Johnson said to him, 'A mi one you a go lock up, sir? a nuh mi one go up there.' And the accused man Rhoden who was acquitted at the end of the case for the prosecution, according to Corporal Cover, told him that day that he wasn't really going to say anything. That in effect is the evidence of Corporal Cover. He said under cross-examination by learned attorney Mr. Godfrey that the accused man Johnson in his statement he didn't write that the accused had said, how you a charge me alone and a nuh mi one go round deh? This learned attorney submits that it shows a difference; and in answer to further questioning by Mr. Godfrey, Corporal Cover said, 'Well, I can't remember the exact words, as it is so long ago.'

After all it is a simple case like this and it has taken four years almost to be tried, which is in itself puzzling. It is really puzzling that the accused has been custody from August 1993 and this case is only being tried in May, 1997. The question is, is there really any big difference in what the Corporal said in examination-in-chief and what is in the statement? I would say no, there is no big difference. Because whichever way it is viewed the evidence is

> indicating that the accused man Johnson was aware of what he was being accused of and his response was to the effect, he was not alone in it - in the involvement.
>
> The question that arises, as I said earlier, whether Corporal Cover can be believed? I am taking into consideration his demeanor, I am satisfied so that I feel sure that Corporal Cover is not making up, not inventing these statements, that he said both accused men made. And I find him to be a honest witness and I mean that, so far as the accused man Rhoden, who was acquitted is concerned. Corporal Cover in effect stated truthfully what Rhoden said, which did not indicate involvement.
>
> Now, in my view Corporal Cover told the Court exactly what he was told by these two accused men. There being no force, no threat, no inducement used to elicit these statements from the accused men, I find that the charges on my construction of the effect of these statements proven.
>
> The accused man Stewart has said he was in effect kidnapped and did not act - on his own disposition. I rejected that I refused to believe that he would have allowed himself to be kidnapped in the circumstances that he stated in his unsworn statement and having experience such treatment and in the circumstances a frightening situation it must have been , he kept it to himself for one month and even so, having kept it to himself when he had first spoken to Corporal Cover, he waited until he had time to think then the following day or two days after he discloses that he was under duress. I reject it.
>
> I find that Mr. Johnson was fully conscious of what he was saying to Corporal Cover and that he was in effect admitting his presence and participation in the events. There is no doubt in my mind that both accused men are guilty as charged".

The trial judge having dealt with credibility of Detective Cover and having rejected the appellant's statements in respect of the circumstances and having said he was involved in the robbery, there was therefore no foundation for the trial judge to proceed in demonstrating the possible effect of the coerced circumstances of which the appellant said he was involved.

Where a judge is sitting as a trier of facts outrightly rejects an accused version as to what transpired, there is no reason for him to proceed to deal with areas pertaining to the law relating to that defence.

This Court can only do justice between the parties if the Court is satisfied that the primary facts have been properly found by the judge on a fair trial. Once the primary facts are fairly found by the trial judge, this Court is in as good a position as the judge to draw inferences or conclusions from those facts. I would like to make it abundantly clear that this Court cannot embark on this task unless the foundation of primary facts is secure.

This ground also fails.

The complaint in relation to sentence is without merit. I find that the summation is fair and reasonable and is void of any material irregularity. Secondly the verdict and sentence should not be interfered with. For these reasons we affirmed the convictions and sentences.

The appeals are therefore dismissed. Convictions ad sentences affirmed. Sentences should commence on 31st August, 1997.