[2010]JMCA Crim 45

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 44/2007

BEFORE: THE HON. MR JUSTICE HARRISON JA
THE HON. MISS JUSTICE PHILLIPS JA
THE HON. MR JUSTICE BROOKS JA (Ag)

CHRISTOPHER MCKENZIE v R

Everton Bird for the applicant

Miss Claudette Thompson for the Crown

12 May & 30 July 2010

HARRISON J.A

[1] The applicant was convicted on 27 February 2007, by Paulette Williams, J. sitting in the High Court Division of the Gun Court, held at St. Ann's Bay in the parish of St. Ann, on charges of illegal possession of firearm (count 1), robbery with aggravation (count 2), wounding with intent (count 3) and shooting with intent (count 4). He was sentenced to 10 years imprisonment at hard labour on count 1 and 15 years imprisonment at hard labour respectively on counts 2 to 4. The sentences were ordered to run concurrently. The single judge refused his application seeking leave to appeal so he has renewed this application to the court.

The Prosecution's Case

[2] Bertram Clarke is a farmer living in the parish of St. Ann and on Friday 30 June 2006, at about 5:45 am, he was in Cave Valley, St. Ann awaiting his nephew's taxi. The taxi arrived and, as he was about to board it, three men came towards the vehicle. He was then standing at the trunk of the motor vehicle. One of the three men brandished a gun and ordered the passengers to come out of the vehicle. The other two men were standing near to the taxi when the man took out the gun. Mr Clarke said he held on to the man with the gun from behind and a struggle ensued between them. They fell to the ground and when Mr Clarke was in the process of getting up, he was shot in his left hip. Everyone then ran off leaving Mr Clarke alone. He was thereafter assisted and taken to hospital where he was admitted.

[3] In respect of the opportunity which availed Bertram Clarke to identify the applicant he said that he was able to see the men that morning. There was a street light in the vicinity where the incident had occurred and according to him it was "broad daylight" at that time of the morning. He had identified the applicant in the dock as one of the two men who were standing nearby when he and the man with the gun were struggling. He said he had kept an eye on the applicant during the struggle because he did not know if any of the two other men had a gun. He also said that he was able to see the applicant's face because nothing was covering it and he had an unobstructed view of him from a distance of 10-12 ft away. He had attended an identification parade where

he said he pointed out the applicant but the Crown did not lead any evidence to support firstly that an identification parade was held and secondly that he had pointed out the applicant at that parade.

[4] Angel Clarke, a nephew of Bertram Clarke and who was the driver of the taxi also gave evidence on behalf of the prosecution. He had seen the "gunman" rob one of his passengers of her cell phone. This man had also taken $5,000.00 from his pocket and had demanded money and a cell phone from his uncle. He had witnessed the struggle between the "gunman" and his uncle and had heard an explosion. At about the time of the explosion he observed that the applicant was seated around the steering wheel of his car so he ran up to it, switched off the engine and removed the key from the ignition. Angel Clarke then ran to his friend's house, got assistance and returned to the scene. He noticed that his uncle was bleeding from the left hip. His uncle was taken to Spaldings Hospital and then to Mandeville where he was admitted and treated at Mandeville hospital for about five days.

[5] Constable Winston Whitely was also a witness for the prosecution. On 30 June 2006, at about 6:15 am, he had driven his motorcar along a dirt road not too far from Cave Valley Police Station. He parked the vehicle, came out, and started to place some yam sticks in the trunk of his car. Two men approached him and the man who was in front pointed a gun at him. The other man was walking about one yard behind the man with the gun. Under cross-examination, he said that the men were in a crouching position as they walked towards him.

Constable Whitely reached for his waist and immediately he heard several gunshot explosions and saw flashes of light coming from the direction of the man who had the gun. The constable took cover, jumped into a gully, and made his escape. He went to Cave Valley Police Station and made a report to Sergeant Russell. Both officers returned to the scene of the shooting. Constable Whitely's car was still parked where he had left it and he observed that the back windscreen was shattered. There was also a bullet hole in the front windscreen.

[6] Sergeant Russell and Constable Whitely went in search of the two men. They were joined by other police personnel including Constable Karet Simmons of Brown's Town Police Station. They headed towards Trout Hall in Clarendon and on their way, they received information about a white Toyota Corolla station wagon. On reaching James Hill a vehicle fitting the description of the Corolla was seen parked along the roadway. The police stopped behind it and alighted. The occupants of the Corolla vehicle were ordered out of the vehicle and the driver and three occupants alighted from the car. Constable Whitely, immediately identified one of the passengers as the person who had fired at him earlier in the morning. A man was taken from the trunk of the station wagon and Constable Whitely identified that man as the man who was along with the gunman who had fired at him. Constable Simmons then searched the man who Constable Whitley had identified as the man who had fired at him and a firearm was removed from the man's waist. The firearm bore the serial number 832771. Both men were taken to Cave Valley Police Station where Constable Simmons

arrested and charged them with the offence of illegal possession of a .38 Smith and Wesson firearm. The firearm was taken to the ballistic expert for examination and a certificate was issued in respect of it (Exhibit 2).

[7] Later that day, the applicant and the other man were pointed out by Constable Whitely to Detective Constable Joseph Rose at Cave Valley Police Station. Constable Rose commenced investigations into cases of shooting with intent and illegal possession of a firearm. The applicant was cautioned and he denied the charges. Angel Clarke had also attended the Police Station and made a report to Constable Rose in respect of the incident which had taken place at Cave Valley earlier that day. The applicant was further charged for the offences of robbery with aggravation, illegal possession of firearm and wounding with intent. He was cautioned but he made no response.

[8] On 3 July 2006, Sergeant Headley Coleman went to the lock-up at St. Ann's Bay Police Station where he saw and spoke to the applicant. The applicant told the sergeant that he wanted to tell him what had happened "in the shooting". He was cautioned and Sergeant Coleman asked him if he had an attorney at law. He told him no. The sergeant told him that an attorney or Justice of the Peace had to be present at the time when the statement is recorded. Two Justices of the Peace attended the station and the words of the caution were recorded on a sheet of paper by Sergeant Coleman. The applicant then dictated a story which was written down by Sergeant Coleman. When the applicant completed the statement he was invited to sign it which he

did. It was witnessed by the Justices of the Peace and Constable Rose. Sergeant Coleman also signed the certificate at the end of the statement. The statement was tendered and admitted in evidence as Exhibit 3 without any objection on the part of the defence.

[9] In that statement the applicant stated as follows:

> "On Thursday 29th of June, 2006, I went to do some work to pound some coffee, then me see a man by the name of 'Bad Boy' -- a so dem call him. Him say me must leave me work and follow him somewhere in Cave Valley. Him never did tell me what him going to do. Me see a car a come down the road. Him stop it. It never stop suddenly. It stop at three man feet and 'Bad Boy' run back down the road. A girl ina the taxi, and the driver, and a next man, and the three men. When he stop the taxi said time 'Bad Boy' run round the taxi front and me see him pop out a gun and him say "No one should move" and I did not know say him have a gun.
>
> The man way him shoot him and him did a wrestle fi the gun and him squeeze the trigger and me say, why did you shoot the man. Said time eye water drop out a me eye and him start run down the driver down the road. Anyway him no catch the driver and him run way from the spot and him stray go through a bush and him meet upon a next road and him see a man a come off of a hill and him pop out him gun again and start fire shot. When him done fire the shots him run gone through a next common. I don't know anything more. Me a hard working farmer. Me plant most 'ketch crop' and I don't know anything more."

The Defence

[10] The applicant made an unsworn statement from the dock. He said he was from Bucknor, Clarendon and that on 30 June 2006 he went to his farm at Cave Valley. He left the farm and according to him, he went to Cave Valley town. He boarded a vehicle that was in the park and sat in the trunk. The vehicle then drove off but stopped at Bog Hole in order to pick up a man. Whilst he was in the car, a police jeep came up to where the vehicle had stopped. He was ordered out of the vehicle, placed in the jeep and taken to the police station. He was questioned by the police but he told them that he did not know about any robbery. He said he was handcuffed and beaten on his knee by the police and was taken to St. Ann's Bay Hospital where he was admitted. He said he was taken to the lock-up at St. Ann's Bay and was in custody for two months before he was placed on an identification parade. He said he was not pointed out on this parade. He was placed on a second parade but he was also not pointed out. He denied knowledge of the crimes with which he was charged and said that he was caught up "in this thing at the wrong time".

The Grounds of Appeal

[11] The applicant has challenged his conviction on the following grounds:

> **Ground 1** – The learned trial judge erred on the facts and was wrong in law in finding that the evidence adduced by the prosecution pertaining to the identification of the assailants in the alleged incident, was adequate or sufficient.
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> **Ground 2** - The learned trial judge erred on the facts and was wrong in law in finding that the Applicant was in

> common design or on a joint enterprise with the brown complexioned gunman who allegedly brandished an illegal gun and committed the offences of robbery with aggravation, shooting with intent and wounding with intent at Cave Valley in the Parish of St. Ann on June 30th 2006.
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> **Ground 3** – The trial was unfair.

[12] Mr Everton Bird, for the applicant, in his attempt to advance what he regarded as the merits of the application, was highly critical of the learned trial judge's handling of the identification evidence, the existence of discrepancies and inconsistencies in the evidence presented by the prosecution and the issue of joint enterprise. What is abundantly clear to us is that there is no dispute that there was an incident where both Bertram Clarke and Angel Clarke were held up by a group of men and that one was armed with a weapon. There is also no dispute that shortly after that incident had occurred at Cave Valley, Constable Whitely was confronted by two men, one armed with a gun and he was shot at.

We now turn to the arguments in respect of the grounds of appeal.

Ground 1

> **The learned trial judge erred on the facts and was wrong in law in finding that the evidence adduced by the prosecution pertaining to the identification of the assailants in the alleged incident, was adequate or sufficient.**

[13] The complaint in this ground is that the evidence pertaining to identification was wholly inadequate. Mr Bird submitted that because the

prosecution did not have any evidence of a "successful pointing out" of the applicant at an identification parade, the Crown had resorted to dock identification. He submitted that this was unfortunate and that the learned judge had apparently sought to resolve the issue by discarding the evidence of both Bertram Clarke and the applicant's unsworn statement and placed complete reliance on the testimony of Angel Clarke. He referred to the cases of **Popat v Regina** [1998] 2 Cr. App R 208 and **R v Graham** [1994] Crim. L.R 242 for support.

[14] In our view, the learned trial judge had carefully examined the evidence of the witnesses. In relation to the witness Bertram Clarke she stated at pages 139 and 140 of the transcript as follows:

> "Mr. Bertram Clarke gave evidence of there being an identification parade on which he said he pointed out the accused man.
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> Here again the Crown did not lead any evidence to support the fact of this identification being held or rather the fact of the accused man being pointed out on any identification parade and therefore it would not be sufficient for me to pronouns (sic) on the fairness or otherwise of any parade that was held, which certainly might bring the identification made by Mr. Clarke of the accused into that realm of dock identification which I recognized to be undesirable and unreliable and properly could be disregarded but even if I disregard the evidence of Mr. Bertram Clarke, as it concerns the identification, I am now left with the evidence of Mr. Angel Clarke who I found to be a better witness than his uncle in that respect, and I am now left with the evidence of Constable Whitely although, as I said, there are weaknesses in both their

identification, so I have to consider whether there is anything he did to support the correctness of these because I am aware of the need for caution when dealing with identification evidence; aware of the need to approach such evidence carefully, bearing in mind that warning that mistakes have been known to be made when it comes to identification. Is there anything therefore to support the correctness of their identification?"

[15] With respect to Angel Clarke the learned judge said at page 137:

> "Mr. Clarke gave evidence as to the time in which he had to observe the assailant but his identification of Mr. McKenzie as an assailant is but to the fact that he says sometime after on that morning he heard something, he heard that the police had caught some men and he, at that time saw two men and he identified the two men, Mr. Mckenzie and that other man.
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> It is clear that in these circumstances it would` have been preferred that there was an identification parade but in these circumstances where shortly after the offence is committed, someone is held and brought back to the station, I have heard no evidence that this was contributed to by the police to cause an identification to be held and therefore in the circumstances I find that this identification is sufficient."

[16] With regards to Constable Whitely, the learned judge stated at page 138:

> "Mr. Whitely said that the accused and the other man were dressed in the same manner he had observed earlier and he identified them as the persons who had attacked him earlier that day. It is clear that the circumstances under which Mr. Whitely purported to identify his assailant was for a brief moment. Indeed, it would fall into that category

> known as fleeting glance made under difficult circumstances, but his identification is also further buttress (sic) that it was within sometime shortly thereafter he saw and was able to identify his assailants."

[17] What is clear to us is that if the case against the applicant depended wholly on the correctness of the witnesses' identification of the applicant, the comments made by the learned judge as reported at paragraphs 14, 15 and 16 (supra) would certainly be cause for concern. However, the learned trial judge found that the applicant's cautioned statement had supported the correctness of the identification. She stated at pages 140 – 142 of the transcript:

> "The accused man upon (sic) arrested admitted he was held in custody from the 30th of June to the 3rd of July. On the 3rd of July he indicated to Detective Sergeant Coleman that he wish (sic) to tell the officer what he knows of the incident. He thereafter gave a caution statement which was witnessed by two Justices of the Peace and, indeed, there was no challenge to this caution statement. There was challenge that the proper procedure was not followed and there was no challenge to the fact that the accused man voluntarily and of his own free will gave a statement to the police within days after the incident took place. This caution statement puts him clearly on the scene of the robbery that took place that morning, clearly in the company of this gunman who, in his caution statement, he said he knew, having (sic) called off his farm by this man, puts himself in the man's presence, puts himself with the man when the robbery took place, and puts himself further with the man when they had run off and approached another man who the accused said is his companion, returned and fired shots (sic).

> So Mr. McKenzie throughout his caution statement puts himself on the scene, puts himself in the company of this gunman. He came here today and gave an unsworn statement and sought to distance himself from anything that took place that day at all. In his caution (sic) statement he had no choice but to admit that he was held in the car with the gunman because that evidence is truly overwhelming but he says he was merely taking a taxi with others when the police came and took him out of that car.
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> So within days of the incident he gave a statement that has not been challenged, admits his presence at the time, admits his knowledge of the person who had the gun, though he seeks to distance himself from any incident. He makes no effort to comment on this statement either in his unsworn statement here today."

[18] In our judgment, the failure on the part of the Crown to adduce evidence of the holding of the identification parade was not fatal to the conviction. Most importantly, there was no challenge to the admission of the cautioned statement into evidence. Indeed, the applicant had placed himself at the scene of both incidents on the morning of 30 June 2006. There was therefore other evidence which the learned judge found supported the correctness of the identification - see **R v Earl Reid** SCCA No. 111/2005 delivered 31 July 2008. Smith J.A, who had delivered the judgment of the court in the **Reid** case, stated inter alia (at page 14):

> "If the case against the appellant depended wholly on the correctness of Mr. Rankine's identification of him, such omissions would certainly be cause for concern. However the

> Crown also relied on the confessions of the appellant. In this regard the learned judge told the jury:
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> 'So the prosecution is saying to you that on these two limbs, one, the identification, if you are not satisfied with the identification of the police (sic) the prosecution is saying, then look at the confession. If you are satisfied with both the confession and the identification, then the evidence, is overwhelming. That is what the prosecution is saying to you, that both together... is overwhelming.
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> On the other hand, the accused says he never made those statements to the police and that witness could not have seen him on the 26th since he had gone to Trelawny from the 22nd.'
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> In the circumstances of this case, in our judgment, the failure of the judge to specifically highlight the discrepancy and inconsistencies referred to by counsel for the appellant is not fatal."

[19] Credibility was an important issue for consideration by the learned trial judge in this case. She clearly had the opportunity to decide who she should accept or reject. In the circumstances, we see no reason to disturb the exercise of her discretion. Ground 1 therefore fails.

Ground 2

> **The learned trial judge erred on the facts and was wrong in law in finding that the Applicant was in common design or on a joint enterprise with the brown complexioned gunman who allegedly brandished an illegal gun and committed the offences of robbery with aggravation, shooting with intent and wounding with intent at Cave Valley in the Parish of St. Ann on June 30th 2006.**

[20] In **Regina v Anderson; Regina v Morris** [1966] 2 QB 110 the Court of Criminal Appeal held:

> "…where two persons embarked on a joint enterprise, each was liable for the acts done in pursuance of that joint enterprise including liability for unusual consequences if they arose from the agreed joint enterprise, but that, if one of the adventurers went beyond what had been tacitly agreed as part of the common enterprise, his co-adventurer was not liable for the consequences of the unauthorised act, and it was for the jury in every case to decide whether what was done was part of the joint enterprise or went beyond it and was an act unauthorised by that joint enterprise."

[21] Mr Bird submitted that the mere fact that Angel Clarke had said that the applicant went and sat around the steering wheel of the car, this evidence was insufficient to prove that the applicant was part of a common enterprise to rob. The evidence, he said, also revealed that Angel Clarke had testified that during the incident the two men, who were some distance away from the man with the gun, were not seen doing anything at the time of the robbery. He therefore submitted that there was no evidence which the learned judge could have

accepted as probative of participation on the part of the applicant which amounted to a joint enterprise.

[22] Miss Thompson for the Crown, submitted however, that the evidence presented by the prosecution showed that three men had arrived together on the scene; two of them (one of them being the applicant) stood 10-12ft away from where the brown man with the gun was carrying out the robberies. The evidence, she said, also revealed that at the time of the robberies, the applicant had entered the car and attempted to drive it off whilst Bertram Clarke and the brown man with the gun were struggling. The applicant was seen again with the brown man when that man opened fire at Constable Whitely. Both men were in a crouching position as they approached the constable. Later that morning the applicant was found by the police in the car with the said brown man. Counsel therefore submitted that there was sufficient evidence adduced by the Crown which clearly established that the applicant was not only present but had actively participated in the commission of the offences and as such joint enterprise had been established. Counsel referred us to and relied on the case of **R v Clifton Thompson** (1975) 13 JLR 118.

[23] The learned judge in dealing with the joint criminal enterprise between the applicant and the man with the gun in the instant case said at page 134 of the transcript:

> "From the evidence led it is also clear that the Crown is seeking to rely on Section 25(c) (sic) of the Firearms

> Act. Subsection 20, (sic) subsection 5, where they are alleging that the accused man, while not having the firearm in his possession, is deemed to be in possession because he was in the company of one who used that firearm, and indeed, a firearm has been admitted into evidence and there is no challenge that this firearm was the firearm used to commit these various offences on that day in question. The Crown therefore have to satisfy this court as to the presence of Mr. McKenzie on the scene and his presence had to be such that in the circumstances it should have been given rise to a reasonable presumption that he presently aided and abetted the commission of the offences, in other words, that there was a joint criminal enterprise between Mr. McKenzie and the other man..."

[24] It is trite law that the mere presence of an accused person without active participation cannot amount to aiding and abetting so as to bring the person within the concept of common design. We are of the view however, that the evidence on which the prosecution relied, clearly established that the applicant's presence on the occasions that he was seen in the company of the man who had the gun was clearly not accidental. Indeed, he did absolutely nothing to detach or disassociate himself from the criminal enterprise after the two events had taken place on the morning of 30 June 2006. He was later found in the company of the brown man (the man with the gun) in the taxi at James Hill, Clarendon soon after the second incident. We are of the view that the submissions of counsel for the Crown are correct.

[25] The learned trial judge had also correctly taken section 20(5) of the Firearms Act into consideration in determining the guilt of the applicant. The law is quite settled that where the specified offence is committed by the actual possessor of the firearm, that is the principal offender, the principle of joint enterprise or common design is readily applicable, because 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 - see **R v Clovis Patterson** SCCA No. 81/04 delivered 20 April 2007. In other words, once it is established that there are circumstances which give rise to a reasonable presumption that the applicant 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. He would also be equally guilty of other offences that the firearm was used to commit. It is therefore our view that ground 2 also fails.

Ground 3

The trial was unfair.

[26] We are satisfied that having regard to the scope of the prosecution's case, there was no unfairness or prejudice to the applicant and accordingly, having regard to the conclusions which we have reached with respect to the two previous grounds, we see no merit in this ground. Ground 3 also fails.

Conclusion

[27] The application seeking leave to appeal is therefore refused. Sentence is to commence on 1 June 2007.