

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 68/90

COR: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

REGINA VS. DERRICK BROWN

Gayle Nelson for the appellant

Bryan Clarke for the Crown

30th, 31st March & 23rd June, 1992

DOWNER, J.A.

The appellant Derrick Brown was found guilty of the offences of illegal possession of firearm and wounding with intent by Wolfe, J., presiding in the High Court Division of the gun Court. He was charged jointly with Anthony Angel and Donovan Smith and the finding of the court was that the firearm assigned to the appellant was used to shoot at and wound the victim, Detective Corporal Zimroy Green. The circumstances of the shooting coupled with the fact that the appellant was a member of the Special Constabulary Force have raised an important issue of law which was argued with great force by Mr. Gayle Nelson.

The Facts

Detective Corporal Green recalled that about 1:30 a.m. on Friday 5th July, 1987 on reaching the corner of Lacy and Portland Roads, he noted that there was a crowd at a street dance. About a chain away, he saw four men of whom he knew two previously. These two were Angel, who was tried and convicted, and the other was Arthur, who played the crucial part in the incident. As he proceeded, Corporal Green recounted that the four men who were under a street light were following him. He became suspicious and concealed his service revolver under his shirt when one of the men

called out to him saying "hey big man, don't move." The officer heard an explosion and realised that he was shot. He fell to the ground and observed the four men who had followed him and, that Arthur was pointing a gun at him. They were then just on the opposite side of the road away from him.

It was in those circumstances that he attempted to draw his service revolver when Arthur fired more shots at him which caused him to feel burning sensations in his left hip and abdomen. At that point the men ran away together, and he crawled away until he saw a police vehicle which rescued him.

That the wounds inflicted on him were serious was attested to by Dr. Dundas an Orthopaedic Surgeon. Detective Corporal Green was a patient firstly at Kingston Public and thereafter at St. Joseph's Hospital. The extent of his injuries can be gauged from the fact that he was kept in hospital from 1st to 24th October, and that a bullet was recovered from his spinal canal.

This bullet was an important link connecting the appellant with the crime. On comparison with a bullet test-fired from the gun which was entrusted to the appellant for the performance of his duties as a special constable on assignment to the Family Court, this bullet proved to have been fired from the said gun. It is therefore appropriate to turn to the caution statement of the appellant and his unsworn statement for his account as to how Arthur came to misuse the gun to shoot and wound Detective Corporal Green.

He reported from the dock that, he had been drinking rum-punch and as a consequence felt it was unsafe for him to keep his firearm, so he handed it over to Arthur who would return it when the appellant reached his home. He therefore was surprised when Arthur misused the firearm to shoot Corporal Green. His further account was that, he was "so frightened" that he ran towards his home. He said that when he got home, Arthur returned the gun.

On his own account, he did not report the incident to the nearest police station at that time, nor the following morning. His caution statement was even more damaging. He said that he delivered up his service revolver because Arthur asked him for it. Further, he recounted that Arthur had said to him "see the bwoy deh way shoot me." Then again he replaced six rounds of ammunition which Arthur had fired, with six rounds in his possession. The clear finding was that he was attempting to conceal the illegal use of the firearm on the previous night. The inference that the learned judge drew from his conduct was that, the appellant did nothing at the time of the shooting or subsequently to dissociate himself from the criminal acts of Arthur and the other men. Further, having accepted the victim's account of the incident, the learned judge found that the three men indicted were acting in concert, and that Arthur was also a party to the concerted action.

**The construction of the proviso in
Section 52 (e) of the Firearms Act**

It is in the light of the above facts that the grounds of appeal argued are to be considered and it is appropriate to deal with the first ground at some length as it was emphasised in counsel's submission:

"1. That so far as the Applicant was concerned the offence charged in the First Count of the Indictment was not a firearm offence because the Firearms Act does not apply to a Member of the Island Special Constabulary Force in respect of a firearm in his possession in his capacity as such member and therefore the offence was not one 'involving a firearm and in which the offender's possession of the firearm is contrary to S. 20 of the Firearms Act.' "

It is clear that the solution to this problem must be resolved by interpreting the proviso in section 52 (e) of the Firearms Act to determine if it exempted the appellant as Mr. Gayle Nelson contended.

The relevant part reads thus:

"52. This Act shall not apply:

(e) to any ... special constable ... in respect of any firearm or ammunition in his possession in his capacity as a special constable."

The submission made on behalf of the appellant was that, he was in possession of the firearm in his capacity as a special constable on that fateful morning.

It is true that he was assigned the firearm in his capacity as a special constable. The firearm was to enable him to carry out his lawful duties as a special constable. In such circumstances, the proviso in section 52 (e) would apply. But the proviso does not cover instances where the special constable delivered up his firearm to his co-conspirator who then used the firearm to commit criminal acts. When the appellant was not acting as a constable, the Firearms Act applied to him and he was "A person" subject to a charge of illegal possession contrary to section 20 of the Firearms Act. This section comes into play because of section 2 of the Gun Court Act which states:

"2. 'firearm offence' means—

- (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 appellant's possession of the firearm contrary to section 20 of the Firearms Act is to be considered when he delivered up the firearm to Arthur. Then he was an aider and abettor to the illegal possession of the firearm and liable to be tried, indicted and punished as a principal offender: see section 41 of the Criminal Justice Administration Act. Section 52 (a) throws light on the status of the firearm, because the proviso did not cover it since Arthur was not authorised by the Government of Jamaica to be in

possession of it. For emphasis it is pertinent to set out this section of the proviso which reads as follows:

"52. This Act shall not apply—

- (a) to any firearm or ammunition the property of the Government of Jamaica except, at the time when such firearm or ammunition is in the possession of some person other than a person authorized by or on behalf of the Government of Jamaica to be in possession of such firearm or ammunition; ..."

It is instructive to contrast sub-sections 52 (a) and 52 (d) with 52 (e) of the Firearms Act. Section 52 (a) emphasises the exemption of firearms from the Act as property of the Government of Jamaica when in the possession of authorised persons. Then section 52 (d) reads:

- "(d) to any person authorized by the Government of Jamaica to be in possession of a firearm or ammunition, in respect of any firearm or ammunition the property of the Government of Jamaica in his possession pursuant to that authority;..."

This proviso limits the exemption to a specific authority.

Turning again to the crucial section 52 (e) where the person in authority is named and his functions are detailed elsewhere:

52. This Act shall not apply:

- (e) to any ... special constable ... in respect of any firearm or ammunition in his possession in his capacity as a special constable."

This proviso relates to the appellant in his capacity as a special constable. It does not cover him when he is "A person" acting in concert to breach section 20 and section 25 of the Firearms Act.

To examine the position of a special constable "in his capacity as such special constable" pursuant to section 52 (e) of the Firearms Act, it is necessary to examine section 22 (3) of the Constables (Special) Act. That section in so far as material

reads thus:

"22.—(1) Every Special Constable enrolled under this Part shall while on duty in the capacity of a Special Constable have, exercise and enjoy all the powers, authorities, privileges and immunities and shall perform all the duties and have all the responsibilities of a constable of the Jamaica Constabulary Force constituted under the Constabulary Force Act; ..."
(Emphasis supplied)

So to determine "the capacity of a constable as such" it is pertinent to turn to the well known summary of the duties of a constable which are set out in section 13 of the Constabulary Force Act. It reads:

"13. The duties of the Police under this Act shall be to keep watch by day and by night, to preserve the Peace, to detect crime, apprehend or summon before a Justice, persons found committing any offence or whom they may reasonably suspect of having committed any offence, or who may be charged with having committed any offence, to serve and to execute all summonses, warrants, subpoenas, notices, and criminal process issued from any Court of Criminal Justice or by any Justice in a criminal matter and to do and perform all the duties appertaining to the office of a Constable, but it shall not be lawful to employ any member of the Force in the service of any civil process, or in the levying of rents, rates or taxes for or on behalf of any private person or incorporated company."

On a plain reading of these statutory provisions, it is clear that capacity is related to the duties of a special constable. Be it noted that section 13 stipulates some duties which are not part of the lawful duties of a constable. He could only perform them in a private capacity. So it is patent that the position of a special constable "in his capacity as such" cannot extend to a situation where he aids and abets the unauthorised and unlawful possession of the firearm entrusted to him for his lawful duties. Nor does the proviso protect him when he acts in concert with others

to use that firearm to commit a felony. He participated in a crime instead of apprehending persons found committing an offence. It should be noted that the phrase "in his capacity as such" is well known in other statutory contexts as well as by the common law, and the courts have interpreted the phrase to give immunities or privileges to officials as judges and members of parliament for the performance of their lawful duties.

It is section 5 (2) (a) of the Gun Court Act which confers jurisdiction on the Gun Court as follows:

"5. (2) A High Court Division of the Court shall have jurisdiction to hear and determine—

- (a) any firearm offences, other than a capital offence; ..."

It is now necessary to determine what constitutes "firearm offence" by referring to section 20 (1) (b) and (5) (a) and (c) of the Firearms Act in so far as is material:

"20.—(1) A person shall not—

- (a) save as authorized by a licence which continues in force by virtue of any enactment, be in possession of a prohibited weapon; or
- (b) subject to subsection (2), be in possession of any other firearm or ammunition except under and in accordance with the terms and conditions of a Firearms User's Licence."

Then section 20 (5) as amended deals with **aiding and abetting** thus:

"(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; ..."

The explanation from the dock, that he was drunk when he handed the firearm to Arthur or the evidence in the caution statement that he had delivered it up in response to a specific request, cannot be regarded as a reasonable excuse as required by this sub-section. Then there is a specific reference in section 20 (5) (c) to section 25 which must be noted. It reads:

"20.—(5) In any prosecution for an offence under this section—

...

(c) any person who is proved to have used or attempted to use or to have been in possession of a firearm, or an imitation firearm, as defined in section 25 of this Act in any of the circumstances which constitute an offence under that section shall be deemed to be in possession of a firearm in contravention of this section."

The appellant needed no licence when he was issued with a firearm, the property of the Government of Jamaica: see section 52 (e) of the Firearms Act. When however, he aided and abetted Arthur by delivering the firearm to him, he was jointly with Arthur in unlawful possession and also acting in concert with him when the firearm was used to shoot and wound the complainant. The exemption of section 52 (e) no longer applied and the appellant as much as those in concert with him was in breach of section 20 of the Firearms Act. Since the appellant was within the ambit of section 20 and section 25, it is necessary to refer to section 25 (1) of the Firearms Act which reads:

"25.—(1) Every person who makes or attempts to make any use whatever of a firearm or imitation firearm with intent to commit or to aid the commission of a felony or to resist or prevent the lawful apprehension

"or detention of himself or some other person, shall be guilty of an offence against this subsection."

The felony in this instance was wounding with intent which was charged in count 2 of the indictment. This analysis which is based on the construction of the Firearms Act, the Gun Court Act and the Constabulary Force Act, makes it clear that the Gun Court had jurisdiction over the appellant. It is now pertinent to turn to the authorities which support this construction.

An examination of the authorities

Take Heritage v. Claxton (1941) Vol. 65 S.J. 323. This was a decision of the Divisional Court. As the judgment of Viscount Caldecote, C.J. is accurate and to the point, it is quoted in full. Tucker, J., agreed with him and was equally pertinent.

"VISCOUNT CALDECOTE, C.J., said that the justice's finding that there was no evidence that the respondent had the articles in his possession in his capacity as a member of the Home Guard, made it clear that the exemption conferred by s. 5 did not apply to him. In other words, if a member of the Home Guard in his capacity as such had in his possession a firearm without a licence he committed no offence thereby, but there was no evidence in the present case that the respondent had the pistol and ammunition in his possession in that capacity. It was easy to suppose a case in which it was possible for a member of the Home Guard to have in his possession at all times a firearm in his capacity as a member of the Home Guard; but that gave no justification for the decision of the justices in this case."

This judgment must be read in the light of the stated case which in part reads: "He was a member of the Home Guard, but when he had the pistol and ammunition in his possession he was not performing any duties in his capacity as such." The next important case also

from the Divisional Court was Tarttelin v. Bowen (1947)

2 All E.R. 837. The following extract from the judgment of Lord Goddard, C.J., approves of the earlier case and emphasises that "in his capacity as such" refers to performance of the lawful duties of the officer. At p. 837 Lord Goddard said:

"The justices have said they were of opinion 'that the exemption under s. 5 permitted the possession of the firearm and ammunition by the respondent as a member of his Majesty's forces without a certificate whether or not held in such a capacity.' That seems entirely to overlook the words 'in their capacity as such.' In the opinion of the court, the justices were clearly wrong. If their attention had been called to Heritage v. Claxton their decision would, no doubt, have been different. It is just as much an offence for a member of the armed forces to be in possession of a firearm without a certificate as it is for any other subject of the Crown, unless it has been issued to him or acquired by him in his capacity as a member of the armed forces, in other words, unless he is carrying his arms in the way in which an armed soldier ordinarily does carry them. The exemption does not apply to private purchases which a member of the armed forces makes, for whatever purpose he makes them. The case must go back to the justices with an intimation that the offence was proved."

Again the crucial issue to determine whether the possession was within the exemption, was decided on the particular facts of the case. If he was carrying the arms in the way in which an armed soldier ordinarily does, he would have been exempt. Then there is R. v. Osmond Williams (1977) 15 J.L.R. p. 227 or (1977) 25 W.I.R. 466 which was the authority relied on by the appellant. In unanimous reasons on this aspect of the case, (Robinson, P., Watkins, J.A. & Rowe, J.A.(Ag.) (as he was then)) found that the police officer on the facts of that case, was in possession of the service revolver in his capacity as a police officer. At p. 230 of

the judgment, the court specifically approved of Tarttelin v. Bowen and further said on the same page:

"In each case it is a question of fact as to whether the firearm is in the possession of a constable in his capacity as such. In the instant case the witnesses for the Crown admitted that a constable going on leave could be permitted to retain the firearm issued to him and the applicant said he had such permission. That being the state of the evidence, it appears that the constable was in possession of the .38 Smith and Wesson revolver in his capacity as such and as a consequence exempt from the provisions of the Firearms Act. As the applicant's possession of the firearm was not in contravention of s. 20 of the Firearms Act an offence committed by him with that firearm would not be a 'firearm offence,' as defined by s. 20 of the Gun Court Act."

The facts of the instant case are markedly different from R. v. Osmond Williams (supra) where this Court found that Osmond Williams retained his firearm in his capacity as a constable while on leave. Further, he was in such a capacity when he visited his girlfriend and the charge for murder was preferred. That "in each case it is a question of fact as to whether the firearm is in his possession as a constable in his capacity as such," is illustrated by R. v. Trevor Stone (1977) 25 W.L.R.458. There Stone, a police officer was suspended from duty and the firearm issued to him was not returned to the St. Ann's Bay Police Station. He was tried and convicted in the Gun Court for illegal possession of firearm and robbery with aggravation, and this Court (Zacca, Henry & Rowe, JJ.A.) upheld the conviction. On further appeal, it was upheld in the Privy Council on a constitutional point: see (1980) 1 W.L.R. 861.

For a similar approach in the House of Lords as regards the words "in his capacity as such," Lord Templeman in In re McC. (1985) A.C. 528 at p. 559 approved the following passage of Buckley, L.J. in Sirros v. Moore (1975) Q.B. 118, 139 - 140. It

shows that the language of the legislature may also be used in the context of the common law to denote that "in his capacity as such" denotes performance of lawful duties of a judge. The passage reads:

" The High Court constitutes the sole arbiter (though subject to correction on appeal) as to what matters fall within its own jurisdiction. In my judgment, it should now be taken as settled both on authority and on principle that a judge of the High Court is absolutely immune from personal civil liability in respect of any judicial act which he does in his capacity as a judge of that court. He enjoys no such immunity, however, in respect of any act not done in his capacity as a judge." "

The conclusion must be that to subsume the facts of any case under the rubric "in his capacity as such" is an important issue of law. That was demonstrated in Attorney General of Ceylon v. Livera (1963) A.C. 103 where at p. 126 Lord Radcliffe shows the approach to be adopted in construing the words "in his capacity as such member." His Lordship said:

"... Where the facts show clearly, as they do here, that a Member of Parliament has come into or been brought into a matter of government action that affects his constituency, that his intervention is attributable to his membership and that it is the recognised and prevailing practice that the government department concerned should consult the local M.P. and invite his views, their Lordships think that the action that he takes in approaching the Minister or his department is taken by him 'in his capacity as such member' within the meaning of section 14 (a) of the Bribery Act."

In the light of these authorities, it is clear that the appellant was not in possession of the firearm in his capacity as a special constable while on duty when he delivered his firearm to Arthur and they acting in concert with others misused the firearm to commit a felony. Since the charges were based on

common design, the possession and acts of the co-partner were also attributable to the appellant. So he did not come within the proviso and the initial ground of appeal fails.

The other grounds of appeal

The second ground of appeal has no merit. The identity of the appellant was not in issue as the learned trial judge specifically relied on the caution statement and the unsworn statement, in which the appellant admitted his presence. Nor was it proved that the learned judge misinterpreted the purpose of counsel's cross-examination as was contended. Ground 3 was equally pointless as once the learned judge rightly accepted the caution statement, the criticism of the identification parade as regards the appellant became unfounded. That ground was withdrawn and as ground 4 deals with the same topic, it should also have been withdrawn. Grounds 5 and 6 challenge the learned judge's reception of the evidence of a co-accused Donovan Smith and the finding of fact that the appellant handed over his service revolver to Arthur for an unlawful purpose. The evidence makes it clear that these grounds were also without merit.

Conclusion

The appellant was in breach of section 20 and section 25 of the Firearms Act, so Wolfe, J., rightly exercised the jurisdiction to try him in the Gun Court for "a firearm offence" as defined previously.

This Court treats this application as the hearing of the appeal and has no hesitation in confirming the conviction and dismissing the appeal. The sentence of 10 years imprisonment at hard labour on count 1 and 15 years imprisonment at hard labour on count 2 is therefore affirmed. The sentences are to run from 1st August, 1990.