JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 8 OF 2004

BEFORE: THE HON. MR. JUSTICE HARRISON, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A. (Ag.)

REGINA
v
KEVIN BASCOE

Miss Deborah Martin for the Appellant
Chester Crooks and Miss Natalie Ebanks for the Crown

July 4, 2007 and January 23, 2008

DUKHARAN, J.A. (Ag.):

The appellant Kevin Bascoe was convicted on January 5, 2004 in the High Court Division of the Gun Court in Kingston, for the offences of Illegal Possession of Firearm and Shooting with Intent. He was sentenced to ten (10) years and fifteen (15) years imprisonment respectively, with the sentences to run concurrently.

After hearing arguments, we allowed the appeal and promised to give our reasons in writing. This we now do.

The Prosecution's Case

The evidence for the prosecution was that on March 24, 2003 at about 9:30 a.m., Detective Inspector Millicent Sproul-Thomas and two

other officers received information which took them to the Windsor Road area of Spanish Town in St. Catherine. On arrival, a group of about four men were observed sitting under a tree in an open lot. Detective Inspector Thomas testified that as they approached the men, they got up. She shouted "police" and the men ran in different directions with two of the men firing shots at them, while running away. The appellant was not one of the men firing at the police. Shortly after, with the assistance of other police officers, they went to a one bedroom board house in the vicinity of the open lot. The appellant was seen lying in a bed. He was identified by Inspector Thomas to be among the group of men who shot at the police. He was taken to the Spanish Town Police Station where Inspector Thomas and the other two officers made a report to Detective Sergeant Wayne Jacobs, who arrested and charged him for illegal possession of firearm and three counts of shooting with intent. When cautioned, the appellant said; "Officer, mi never fire any shot".

The Defence

The appellant gave sworn testimony and denied that he was one of the men who were sitting under the tree, or who ran on the approach of the police. He said he was riding his bicycle along with a friend, when he heard several shots being fired. He ran into a house. After the firing of the

shots had subsided, he said the police came and ordered everyone out of the house. He was taken into custody and subsequently charged.

The appellant called a witness, Miss Angela Williams. She said on March 24, 2004 she was at her home at 26 Windsor Road, Spanish Town, in St. Catherine, when she heard the firing of gun shots somewhere outside. She saw the appellant run through a shop and into her house. She said she never knew the appellant before and while the shots were being fired he was in her premises. She denied that he was taken off a bed by the police.

Grounds of Appeal

Counsel for the appellant sought and obtained permission to argue the following supplemental grounds of appeal:

(1) The learned trial judge erred in finding the appellant guilty of the offences for which he was tried as there was no evidence that he acted in concert with the men who it was alleged fired at the police.

(2) The learned trial judge erred in accepting the witness for the Crown as credible without demonstrating that she had directed her mind to and resolved the inconsistencies between the evidence that they gave in Court and what was contained in their statements.

(3) The learned trial judge erred in law in accepting as true the hearsay evidence of Miss Angela Williams admitted through Inspector Sproul-Thomas, having rejected Miss Angela Williams as a witness of truth for the defence.

(4) The learned trial judge's assessment of the issues of identification was deficient.

(5) The learned trial judge's finding that the witness, Godfrey Daley, came only to assist his friend was unreasonable having regard to the fact that he was present at the scene when the accused was arrested, was in fact taken into custody by the police and specifically said in re-examination that he was telling the truth.

(6) The learned trial judge erred in assessing and advising herself of the evidence of good character in the case.

(7) The sentences imposed were manifestly excessive.

Ground 1

Miss Martin, for the appellant, submitted that the learned trial judge found that the appellant had prior knowledge that the men were in possession of illegal firearms. She also found that the appellant was part *and* parcel of a plan to possess the firearms and to fire at the police. Miss Martin further submitted that, the learned judge did not give sufficient weight to the evidence of the police officers, concerning the facts, that the men had run in different directions when the firing took place and that they were not seen doing anything illegal when they first approached them. The fact that the appellant was in the company of persons, without more evidence, was not sufficient for a finding that he was there to assist, or aid in the commission of a

crime. In sum, Counsel for the appellant submitted that there was no evidence of a common design in which the appellant was involved to shoot at the police. She referred to the case of **Regina *vs* *Clovis Patterson*** SCCA 81/04 delivered 20th of April, 2007.

Mr. Crooks for the Crown submitted that the Crown's case would rise or fall on the issue of common design. He conceded that this was a hurdle that the Crown was not able to surmount.

The provisions of Section 20(5) (a) of the Firearms Act as amended reads:

> "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;
>
> (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 question for determination is whether "the circumstances gave rise to a reasonable presumption that the appellant was present to aid or

abet," the offences of shooting at the police with intent. The evidence of Inspector Thomas was that the men were not doing anything illegal prior to firing at the police. Sergeant Ottie Williams supports Inspector Thomas that the appellant was not one of the men who had a firearm. The firing at the police was done on the spur of the moment.

(From a decision this Court) Smith J.A. said in ***R v Clovis Patterson*** (supra) at page 13:

> "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."

It is quite clear therefore, that there must exist circumstances which give rise to the reasonable presumption that the appellant was present to aid and abet the commission of a specified offence in section a (i) or (ii) of the Act.

We are of the view that, the learned trial judge did not demonstrate in her assessment of the evidence that there was illegal activity taking place on the approach of the police. As the felony in this case was

committed on the spur of the moment, the learned trial judge did not indicate whether or not the appellant in running away could have been disassociating himself from the men who were shooting at the police.

We are of the view that, the learned trial judge was wrong when she came to the view that the appellant was part and parcel of a common design to shoot at the police. We are also of the view that, the evidence the prosecution relied on was nothing more than mere presence of the appellant in the company of men who fired at the police.

The appellant therefore succeeds on this ground. It is therefore unnecessary for this Court to make any pronouncement on the merits of the other grounds.

As stated previously, the appeal was allowed and the conviction was quashed. The convictions and sentences were set aside and a judgment and verdict of acquittal entered.