JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS: 106, 108, 114 and 123/ 2004

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

DAVE HARRIS
MACHEL ROBINSON
JERMAINE CLARKE
DEVON ROSE
v
REGINA

L. Jack Hines for Dave Harris.
Hugh Wilson for Machel Robinson.
Delano Harrison Q.C., for Jermaine Clarke.
Applicant Devon Rose unrepresented.
Donald Bryan, Deputy Director of Public Prosecutions and Miss Melissa Simms Crown Counsel (Ag.) for the Crown.

December 12, 2007; July 31 and November 21, 2008

HARRISON, J.A:

1. On the 7th May 2004, Devon Rose, Machel Robinson, Dave Harris and Jermaine Clarke were convicted in the High Court Division of the Gun Court held at St. Ann's Bay, of two counts of illegal possession of firearm; one count of wounding with intent; one count of robbery with aggravation and one count of shooting with intent. Rose was sentenced to a term of thirty years imprisonment on each count. Robinson, Harris and

Clarke were sentenced respectively to fifteen (15) years imprisonment on each count. The sentences were ordered to run concurrently.

2. All four convicted persons applied for leave to appeal against their convictions and sentences and on February 9, 2007 the single judge granted Robinson, Harris and Clarke leave to appeal. Devon Rose was refused leave to appeal and has renewed his application to the Court.

The Case for the Prosecution

3. Evidence for the prosecution was given by eight witnesses. On August 3, 2002, about 7:45 p.m., Vencot Hamilton, had parked his taxicab by the clock in Ocho Rios awaiting passengers. This was his starting point in the route he plied between Ocho Rios and Saint Ann's Bay. While he was there, four men and a lady boarded his taxi - three of the men and the lady were seated in the rear; the other man occupied the passenger seat in the front.

4. Hamilton drove off and headed towards St. Ann's Bay. Whilst he was on his way he heard a phone ring. One of the men who was seated in the rear said: "I am on my way coming". That man then turned to him and said: "Driver, can you leave us at the hospital?" On arrival in Saint Ann's Bay, he stopped and let off the woman at the fire brigade station. He resumed his journey and on reaching near to Marcus Garvey School he felt a gun in the back of his neck. He was ordered by the man with the gun to "pull over". The front-seat passenger then told the man with the gun to shoot him. He heard an explosion. He flung open his door; jumped out of the taxicab and began running in order to get away. He heard another shot and shortly after he was rescued by the driver

of a "red van". He was taken to the Saint Ann's Bay Police Station and then to the Saint Ann's Bay Hospital where he was admitted for four days. He had been shot through the neck. He did not know what had become of his vehicle but on some later occasion, he identified his vehicle to Detective Corporal Coleman at the Ocho Rios Police Station.

5. At about 8:45 pm on August, 3 the police were engaged in carrying out random spot checks in Ebenezer district. A white Toyota Caldina motor car approached the police service vehicles and Constable Johnson, a member of the party signalled the driver to stop. He stopped in front of one of the service vehicles but within seconds he started to reverse "rapidly". The car eventually crashed into an embankment on the left side of the road.

6. Constable Henry alighted from one of the police service vehicles and immediately thereafter, gunshot explosions came from the Caldina motorcar. He threw himself to the ground; pulled his service revolver and fired in the direction of the motorcar. Three men alighted from the motorcar with guns in their hands and began running. They fired shots in the direction of the police party and disappeared in the bushes.

7. After the shooting ceased Constable Henry and other police officers went up to where the Caldina motorcar was parked. A man was seen lying on the floor between the front and back seats. He was suffering from what appeared to be gunshot wounds to his head and stomach. The man then said to Constable Henry, "Officer, duh nuh kill me, see the gun yah underneath me." Assistant Superintendent Sutherland picked up a silver colour Smith and Wesson firearm from the floor of the motorcar and took a live .38

cartridge and a spent .38 shell from the firearm. Devon Rose was pointed out in Court as the injured man in the motor car.

8. On August 4, 2002 at about 6:30 am, Detective Cpl. Downer who was attached to the Flying Squad in St. Ann's Bay, went to Ebenezer District. Two men were handed over to him by citizens. These men were identified in Court as the appellants, Dave Harris and Jermaine Clarke. Harris was suffering from what appeared to be a gunshot wound to his left shoulder and Clarke, also had what appeared to be a gunshot wound to his right leg. Both men were handed over later that day to the investigating officer, Detective Sergeant Coleman. They were thereafter taken to the hospital.

9. On August 7, 2002 at about 10:00 am, Special Constable Dobson was on mobile patrol duty along with Cpl. S.D Brown. They received certain information and proceeded to Ebenezer District where a group of people signalled them to stop. On alighting from the motor vehicle a man was seen lying on the ground in a "bushy" area. The man's clothing was blood-stained and he had wounds on his body. He gave his name to the police as Machel Robinson. He told Constable Dobson that he was robbed, kidnapped by his robbers the previous Saturday and was taken to Ebenezer district where he was shot and thrown into a gully. He was taken to St. Ann's Bay Police Station and handed over also to Detective Sgt. Coleman.

10. Det. Sgt. Coleman interrogated the Appellants Robinson and Clarke in relation to the offences committed on the night of August 3, 2002. Robinson was cautioned and he was asked 29 questions. The questions and answers were duly recorded in the presence of Attorney-at-Law, Bill Salmon, Det. Sgt. Simpson and Det. Sgt. Coleman.

The answers revealed inter alia, that:

(a) The appellant Dave Harris is Robinson's cousin;

(b) He knows the appellant Jermaine Clarke who is otherwise called "Bragga";

(c) He had met Clarke through Harris;

(d) He did not know Rose;

(e) He did not run away when he jumped from the car because he was looking at the man who was shot and had panicked.

(f) Harris was sitting in the front passenger seat, Clarke was in the middle of the rear seat and Rose whom he did not know was seated behind the driver of the car;

(g) No one else had entered the car up to when they had been stopped by the police;

(h) He was unable to say what Rose had done with the firearm after he shot the taxi man;

(i) He did not know where they were going after the taxi man was shot although he had asked Harris;

(j) He did not see anyone shoot at the police and;

(k) The only person who had a gun in the car was Rose.

11. Robinson also gave a cautioned statement which was recorded and witnessed by the same persons referred to above. It contained inter alia, the following facts:

(i) At about 10:30 pm, when he went to the taxi stand to take the taxi, he saw his cousin Dave who invited him out on another "sporting".

(ii) He asked him where he was going and he told him that when he get into the car he would explain to him where he was going to "sport".

(iii) When he got into the car he saw "Bragga" a friend of Dave Harris.

(iv) On reaching near to the hospital a brown one (Devon Rose), a friend of Dave, "pop" out a gun and shot the taxi man.

(v) After the taxi man was shot, he, Robinson jumped out of the car;

(vi) He asked Rose why he had shot the taxi man and he replied: "shut up and come back into the car you no see sey mi a murderer."

(vii) Dave Harris came out of the car and told him to return to the car because everything was alright;

(viii) The brown man told "Bragga" that he could not drive so he was told to "take the steering and drive;

(ix) "Bragga" took over the car and began to drive;

(x) The police ordered the driver to stop; "Bragga" complied and then began to reverse the car;

(xi) The car crashed in an embankment and the police started to shoot. He alighted from the car and made good his escape.

12. On September 20, 2002 the Appellant Clarke, was asked 42 questions in the presence of Attorney-at-Law, Bill Salmon, Det. Sgt. Coleman and Det. Cpl. Minott. All questions and answers, were duly recorded, and were tendered in evidence as Exhibit 7. The answers in relation to the questions asked of Clarke revealed inter alia, the following:

(a) He knows Dave Harris and where he lives;

(b) He also knows Devon Rose and where he lives;

(c) He does not know Robinson;

(d) He knew Harris and Rose, but they were not friends;

(e) He did not take the taxi along with the others;

(f) He was seated in the front passenger seat;

(g) He realized for the first time that Rose, Harris and Robinson were in the car when it got to Marcus Garvey School in St. Ann's Bay;

(h) After the taxi man opened the car door and ran away, he was ordered by Rose to drive the car;
(i) He said that Rose knew that he could drive because when he lived in Edgehill Rose had seen him drive a motor vehicle.

(j) No one spoke to him after he started to drive the car;

(k) All four of them went to Ebenezer district;

(l) He did not refuse to drive the car because Rose had a gun;

(m) He had reversed the car when he was stopped by the police but it was Rose who had told him to reverse;

(n) He knew that Rose who was sitting behind had the gun because he had placed it at his neck and told him to reverse;

(o) He does not know if any other person had a gun apart from Rose;

(p) He did not shoot at the police and he does not know if anyone had fired at them.

The Defence

13. Devon Rose indicated at the close of the case for the prosecution that he had nothing to say to the Court. As we have said before, Rose's application for leave to appeal was refused but he has renewed his application to the Court for leave to appeal against his conviction.

14. Machel Robinson made an unsworn statement from the dock. He said that on August 23, 2002 he took a taxi along Main Street in Ocho Rios in order to get home. He got into the taxi and saw other passengers in it. He sat in the back seat. The taxi man had also picked up a lady who came towards the car. The car then drove off and headed towards St. Ann's Bay. The lady was dropped of by the fire station. He paid his fare and told the taxi man to drop him off at the corner because he did not want the

police to give him a ticket. The taxi man told him to relax. A man who was seated behind the taxi man pulled a gun and shot him. He said he was "in a panic" and tried to jump from the car but the man who fired the gun told him to come back into the car. He said he did not want to die so he returned and remained in the car. The car drove off and he told himself that he was "in the wrong place at the wrong time". He saw a police car and the police started to shoot at the taxi. He feared for his life so he jumped out of the car and fell over a precipice. He remained there for about three days shouting for help. He eventually found his way out of the bushes and sought help. The police arrived and he was taken to the station.

15. Dave Harris also made an unsworn statement from the dock: He said that on August 3rd, he took a taxi from Ocho Rios to St. Ann's Bay. When he got near to the hospital in St. Ann's Bay he heard someone ask the taxi man to "leave him at the hospital...". He then heard a man who was seated behind the driver said: "shoot the driver". The driver got out of the car and the man with the gun told a next person in the car to drive it. He had alighted from the car but was ordered by the man with the gun to get back in the car. He did so and the car drove off. On going around a corner they met up on some police "in the road". A police vehicle had stopped in the road and the man who had the gun told the driver to reverse. He said that the police started to shoot up the car and he got shot in his right shoulder. He came out of the car and held up his hands. The police told him to run for his life and they started to shoot at him. A shot caught him in the left foot but he continued running and went into some nearby bushes. He came out of the bushes the next morning. The police was summoned and he was

taken into custody. He denied that he had a gun and said that he did not shoot at anyone.

16. Jermaine Clarke made an unsworn statement from the dock: He said that he had given the police a statement (Exhibit 7) and that was all, that he wished to say.

The Grounds of Appeal

Jermaine Clarke

17. Leave was granted to Mr. Delano Harrison Q.C to argue two supplementary grounds of appeal on behalf of Clarke. They are:

> 1. "That, in light of the fact that the Appellant, Jermaine Clarke, was charged jointly with three others with the commission of five offences, directly involving firearm use, the learned trial judge insuperably misdirected himself, in his summation, by his application to the facts of the case of the purely common-law principles of common design, with no reference soever to (the effect of) Section 20(5) (a) of the Firearms Act, as amended".
>
> 2. ...the verdict is unreasonable or cannot be supported having regard to the evidence."

Dave Harris

18. Leave was also granted to Mr. Jack Hines, Counsel appearing on behalf of Dave Harris to argue a supplementary ground of appeal filed on his behalf. The ground reads as follows:

> "The learned trial Judge erred in that he failed to advert to or to treat with the statutory requirement of section 20(5) of the Firearm Act in determining the guilt or innocence of the appellant; in particular

whether the facts in his defence of duress constituted in law a reasonable excuse".

Machel Robinson

19. On behalf of the appellant Robinson, Mr. Hugh Wilson was granted leave to argue three supplementary grounds of appeal. They state as follows:

1. **Joint possession**

The learned trial judge failed to properly or at all to:

(a) direct himself on the concept of joint possession.

(b)to warn himself that the applicant, Machel Robinson's mere presence in the motor car was insufficient in law to found joint possession.

(c) warn himself that the applicant, Mache! Robinson, would not be deemed to be in joint possession of a firearm if he did not know of its existence or play an active involvement in the use thereof or had equal access to the firearm.

2. **Duress**

(a)The learned trial judge's direction on the common law defence of duress as it relates to the appellant, Machel Robinson, was inadequate. The learned trial judge should have considered whether the reasonable likelihood of death or serious physical injury impelled appellant to remain in the motor car and whether a sober person of reasonable firmness sharing the characteristics of the appellant would have behaved or responded in a similar manner.

3. **Section 20 (5) (a) of The Firearms Act**

(b) The learned trial judge erred in law in failing to take into consideration section 20 (5) (a) of The Firearms Act and in particular whether "reasonable excuse" within the provision of the said Act afforded

the appellant, Machel Robinson a defence in the context of duress.

Devon Rose

20. The grounds of appeal in respect of Rose are as follows:

1. **Unfair Trial**

   That the evidence upon which learned trial judge relied for the purpose to convict lack facts and credibility thus rendering the verdict unsafe in the circumstances.

2. **Lack of Evidence**

   That the prosecution failed to substantiate the charges against me, yet I was convicted on all charges, mostly on heresays and not facts.

3..**Misidentity by the Witness**

   That the prosecution witness wrongfully identified me as the person or among any persons who committed the alleged crime.

4. **Miscarriage of Justice**

   I had nothing to do with any crime as presented by the prosecution. I was just an innocent passenger travelling in a registered taxi when same was intercepted and fired on by the police. I was injured during the shooting and was charged as a criminal rather than being treated as a victim of police shooting.

21. In our view, the appeal may best be dealt with, by grouping the areas of common complaint under the following heads: common design, the application of section 20(5)(a) of the Firearms Act ("the Act") and the defence of duress.

The Submissions

22. The major argument presented by Mr. Harrison Q.C on behalf of Jermaine Clarke is that the prosecution case against him in relation to all five counts on the indictment was plainly founded upon the operation of section 20(5)(a) of the Firearms Act, as amended. Thus, the prosecution was relying on the evidence that the Appellant was in the company of another — before and after that other used the firearm to commit the felony of wounding with intent.

23. He submitted that, "the mere association" with the possessor of a firearm is not sufficient to establish a prima facie case against the possessor's companion. He argued that before the accused companion may be called on to answer a charge of illegal possession of firearm it must be shown that the principal offender used the firearm to commit a specified offence and that the presence of the accused was non-accidental thereby giving rise to the presumption that he was there to aid and abet the commission of the specified offence. He further submitted that the learned trial judge had posited the prosecution case solely on the basis of the common law principle of common design and accordingly had expressly treated with the appellant's 'excuse' (in the questions and answers document) strictly as his defence.

24. Counsel submitted that when Clarke was interrogated by the police, he had "excused" his entire presence in the car in the company of the co-accused on the basis that (a) he had boarded the car wholly on his own; (b) sitting in the front passenger-seat as he was, he was not aware of the existence of any firearm in the rear of the car; (c) when he heard the explosion (from behind) which represented the shooting of the

taxicab-driver, impliedly, he had done nor said nothing to aid or abet that shooting; (d) after the driver had fled the cab, he was then forced at gunpoint to drive from the scene and, later, to attempt to evade police action; (e) he did not shoot at the police and could not say if anyone else did. Thus, at no point from the time of his entry into the taxicab until he himself fled the scene, was he in the company of the man in the rear with the firearm, and neither was he present, aiding or abetting, or to aid or abet, the offences committed.

25. He further submitted that where, in such circumstances, the "accused companion" proffers an "excuse" which may be "reasonable" and which forms an essential part of the prosecution case against "the accused companion", it is incumbent on the trial judge first to determine the issue of reasonableness vel non, before calling on that accused. Such an "excuse" he said, would, in the normal scheme of things, constitute the exculpatory part(s) of a "mixed statement" tendered in evidence by the prosecution (see **Hamand** (1986) 82 Cr App R 65).

26. Accordingly, he submitted that the learned judge had erred in law in his application of purely common law principles and in the circumstances the Court ought properly to interfere with the verdict.

27. Mr. Hines for the appellant Dave Harris, contended on his behalf that section 20(5) of the Firearm's Act is the relevant statutory provision which will ultimately determine the guilt or innocence of this appellant and in particular whether the facts in his defence of duress constituted in law a reasonable excuse. He submitted that the appellant Harris had given evidence clearly demonstrating duress in that he was saying

that one man in the taxi had a gun and that he was forced by him to return to the car and to continue the journey. He argued that Harris had nothing to do with the shooting of the driver of the taxi, the robbery of the car or the shooting at the police because there was only one man who had a gun and he Harris, was not a party to his intention. Mr. Hines further submitted that even if it is accepted that Robinson had said, "Leave us at this bus stop" it only proves at its highest that they knew where each other lived. It did not prove he said, that his excuse was unreasonable and that he or the other two knew that one of the four men had a gun and intended to use it to commit the offences for which they were charged.

28. Mr. Wilson, for the appellant Robinson, submitted that from the very inception, Robinson had raised the defence of duress as a live issue. He said this was clear from the document containing the answers to the questions put to him as well as the account he gave in his cautioned statement. He submitted that the learned trial judge ought to have warned himself of the objective test applicable to the defence of duress in respect of the appellant. He referred to ***R v Graham*** [1982] 1 All ER 801 and ***Regina v Hudson*** [1971] 2 QB 202. He argued that by failing to apply the essential ingredients of the defence of duress, the learned trial judge erroneously concluded that the appellant was voluntarily in the company of the other appellants and acting in concert with them. He finally submitted that the appellant's statements clearly disclosed that he was not there voluntarily pursuant to a joint criminal enterprise to commit robbery. This was a case he said, of "innocent association".

29. No submissions were filed or argued on behalf of the applicant Rose.

30. Mr. Bryan, for the Crown, submitted however, that the evidence clearly indicated that the three appellants were in the company of Rose. He argued: (i) that the virtual complainant testified that the four men had approached his car together; (ii) Robinson had occupied the front passenger seat and said to Rose: "shoot the boy" and; (iii) The men were known to each other. Mr. Bryan submitted that it was therefore open to the learned judge to have drawn the inference that their presence in the car was not accidental or coincidental but was deliberate thereby bringing them within section 20(5)(a) of the Firearm's Act. He further submitted that the judge having heard the unsworn statements of the applicants and considered the questions and answers would have concluded that the excuses which they had proffered were unreasonable in all the circumstances. He finally submitted that the appellants had failed to discharge the evidential burden placed on their shoulders.

31. In relation to the issue of duress, Mr. Bryan submitted that the learned judge had adequately addressed his mind to this defence. He referred to and relied on the case of ***R v Wesley Johnson and Anor***. SCCA 75 &78/97 delivered July 30, 1999.

The Grounds in Relation to Common Design, The Provisions of Section 20(5) (a) of The Firearms Act and The Defence of Duress Issues.

32. We turn first to the statutory provisions. Section 20(5) (a) of the Firearm's Act 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; 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."

33. It is trite law that where an accused person is tried for illegal possession of firearm and the prosecution relies on section 20(5)(a) of the Firearm's Act it must be established by evidence (i) that the accused was in company of the principal offender; (ii) that the principal offender used the firearm to commit a specified offence in (a)(i) or (ii) of subsection 5; (iii) that there must be circumstances which give rise to the reasonable presumption that he was present to aid and abet the commission of such offence specified in (a) (i) or (ii) and; (iv) that there was an absence of reasonable excuse. See ***R v Clovis Patterson*** SCCA No. 81 of 2004 delivered April 20, 2007.

34. In the instant matter, the appellants were tried on an indictment containing five counts. The first three counts are in relation to the incident concerning the complainant Vencot Hamilton on the 30th day of August 2002. Count 1 charges the appellants jointly with illegal possession of firearm. Counts 2 and 3 also charge them jointly with the offences of wounding Mr. Hamilton with intent and robbery with aggravation of his taxi motor car. Counts 4 and 5 charge them jointly with illegal possession of firearm and shooting with intent.

35. The evidence clearly revealed that Devon Rose had possession of a firearm which he used to shoot Mr. Hamilton thereby inflicting injuries to him. He was also robbed of his motor car. The critical question therefore is whether the circumstances of the shooting and robbery give rise to a reasonable presumption that the appellants were present to aid and abet the offences (counts 1 and 2). Of course there is also the evidence of the police that they were fired upon by person or persons from within the Caldina motorcar and that three men were seen leaving the motor car and running away with guns in their hands (counts 4 and 5).

36. The authorities show that at common law, where presence may be entirely accidental, it is not evidence of aiding and abetting. Where also the possessor of the firearm commits a specified offence on the spur of the moment the doctrine of common design or joint enterprise in the commission of the offence is not readily applicable.

37. The learned judge described the case against the four accused men as being one of joint enterprise and directed himself on the elements of a joint enterprise and participation in it. Counsel for the appellants criticised the content of the directions and complained that the judge made no reference whatsoever to the effect of section 20(5) (a) of the Firearms Act and the facts of the case. The learned judge's directions were also criticised for his failure to relate the defence of duress to the provisions of section 20(5) (a).

38. The material passages in relation to the directions on common design/joint enterprise are to be found at pages 196 – 197 and 201 of the transcript. At pages 196 – 197 the judge said:

> "Now, when one looks at the indictment, on the charges of the indictment, there is no issue that, if as the Crown alleges, the four persons were acting jointly on a common enterprise together and if any of them shot the taxi driver and robbed him of his motor car, then the first three counts of the indictment would be satisfied. Then too, if they were later in a motor vehicle in which, knowingly, one person had a firearm, and that firearm was used to shoot at ... the police, then the second, the fourth and the fifth counts of the indictment would have been satisfied. But of course, that is just the tip of the iceberg because, through cross-examination and later on through statements made by the accused persons, they were spuriously —— at least three of them have certainly indicated that they did not participate as a group in a joint venture with any other persons. And that they were merely there under duress, in that, they were going home in a particular taxi, one person had a firearm and that one person used that firearm, did everything and compelled them to remain in that vehicle. So, their presence was because of their fear of the firearm in this person's hand. A person who, on all indications, was a cold-blooded, vicious murderer, and I use the word 'murder' advisedly wise. There is the word used by one of the accused, in fact, that accused said that the man who had the firearm said he was a murderer".

And at page 198 he continues:

> "The several issues raised in this case, I had indicated, thirdly, that the prosecution is depending on what is called common design or joint enterprise and I indicated basically that the law is that where two or more persons together do a common act or engage in a common crime, then each is as guilty as the other when the crime is committed".

39. Robinson and Clarke have said however, that they were acting under duress and that they were told by the man with the gun not to panic and to remain in the car. Harris

said the man behind the driver shot the driver and that man ordered him to get back into the car which drove off after he obeyed the order.

40. At page 201 the Judge said:

> "... And, of course, this Court is aware that the defence of duress having been raised, they have no duty to prove anything, it is the prosecution who must satisfy the tribunal of fact that they were not acting under duress. It is the prosecution that must satisfy the tribunal of fact that there is evidence against each accused, which makes the Court sure of their guilt beyond a reasonable doubt".

41. At page 198 the learned judge added a passage concerning circumstantial evidence. He said:

> "The Crown also depends on circumstantial evidence and that merely is where there are (sic) evidence of circumstances, of several circumstances, which points in one —- which, when taken together – might not be meaningful by themselves when taken separately – but when taken together, that points directly in one direction and that can be compelling evidence of circumstances which lead to one inference which is inescapable".

42. Finally the learned judge said at pages 219 -221:

> "So that when one looks at a totality of the evidence, one finds that these men were together there for a common purpose a common goal. This Court does not find any scintilla of evidence which could indicate that any of them was acting under duress. This Court finds proof beyond all reasonable doubt, that on the 3rd day of August, in the year 2002, these four accused men, being together and being armed with illegal firearms, did rob Vencott Hamilton of his Toyota Caldina motor vehicle, did shoot Vencott Hamilton and wound him with intent to cause him grievous bodily harm and later on when they were accosted by the police,

> they shot at the police, being then also armed with illegal firearms. The shooting of Vencott Hamilton set the stage for what must have been an intended rampage, that in itself, by itself, certainly does not suggest that any of these persons were persons of any civility, any milk of human kindness. The evidence which is contradicted is that the gun was placed at the neck of the complainant and that when the gun was placed at the neck of the complainant, that is the driver of the motor car, and he was told by the person with the gun that he must pull over and don't give him any trouble and none of us, and this again is significant in that said motor car, said shooting, the so and so expletives which much ado about nothing was made about the fact that the indecent language used by the complainant on that occasion was not and is not in his statement to the police and the complainant indicated he didn't know he could say it to the police since he knew it was coming to court, but whether or not it was said or not, his evidence that somebody else in the vehicle, apart from the man who had the gun on him, said shoot the boy and another indication that the men were in the vehicle were certainly not, were certainly not under duress, and in fact cements the prosecution's case, in that the men were acting jointly, that is by common design. So as far as the counts in this indictment are concerned, the Court finds all four guilty as charged".

43. We hold the view that the learned judge was correct in finding that all four accused persons were acting together. The evidence of the prosecution which the learned judge accepted is that the accused men had approached the taxicab together before entering it. The appellant Robinson had occupied the front passenger seat and had said to Rose: "shoot the boy". The men were known to one another. Robinson had said in his caution statement that his cousin Dave (Harris) had invited him to go "sporting" and that when he get into the car he would explain to him where he was going. One of the men had told the driver to "leave us" at the hospital. No one spoke

to Clarke after he was told to drive the motor car but he drove from St. Ann's Bay to Ebenezer district. There was also evidence which the learned judge accepted that the three men who alighted from the motor car after it was intercepted by the police, had firearms in their hands and had discharged them at the police who in return retaliated. This evidence highlighted above, in our view, clearly indicates that they were all part of the common design to shoot and to rob.

44. It was also open to the learned judge on these facts, to have drawn the inference that their presence in the car was not accidental or coincidental but was deliberate thereby bringing them within section 20(5)(a) of the Firearms Act. The learned judge having heard their unsworn statements from the dock and having considered the questions and answers no doubt concluded that the excuses which they proffered were unreasonable in all the circumstances. Devon Rose was indeed the principal offender whilst the others were in his company and were present aiding and abetting in the commission of the offences with which they were charged in counts 1-5 of the indictment.

45. We are also of the view that the learned trial judge had adequately addressed his mind to the defence of duress which in our view he correctly rejected.

46. Ground 1 in respect of Clarke; ground 1 in respect of Harris and grounds 1, 2, and 3 in respect of Robinson all fail. Grounds 1-4 in respect of Rose also fail.

Ground 2 of the Appellant Clarke – Unreasonable Verdict

47. We are firmly of the view that the learned judge's decision in finding the appellant Clarke guilty on all counts in the indictment cannot be faulted. Counsel has failed to show that the verdict is so against the weight of the evidence as to be unreasonable and unsupportable. This court has said repeatedly that it will only set aside a verdict on this ground where the verdict was "obviously and palpably wrong" see ***R v Joseph Lao*** (1973) 12 JLR 1238. This ground also fails.

Conclusion

48. For the reasons given, the appellants in our view have no proper basis for complaint in respect of the convictions and sentences. The appeals are dismissed and the sentences are to commence as of the 7th day of August 2004.