JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No: 50 of 1999

BEFORE: **THE HON MR. JUSTICE DOWNER, J.A.**
THE HON MR. JUSTICE HARRISON, J.A.
THE HON MR. JUSTICE PANTON, J.A.

REGINA v **WALTER THOMAS**

Ian Ramsay, Q.C., and Oswest Senior-Smith for Appellant

Donald Bryan for Crown

July 24, 25, 26, 27, 2000 and May 28, 2002

HARRISON, J.A:

The applicant was convicted in the High Court Division of the Gun Court on the 9th of March 1999, of the offences of illegal possession of firearm, illegal possession of ammunition, robbery with aggravation and shooting with intent and sentenced to terms of imprisonment of ten years, seven years, fifteen years and fifteen years, respectively, to run concurrently.

The facts are that on 7th September 1996, at about 3:30 a.m. the prosecution witness Steveford Duncan, whilst driving his motor car along the Bog Walk/Linstead main road going towards Ewarton in the parish of St Catherine, developed a puncture. He stopped his motor car near to a street light ten feet away, came out, and was taking the spare wheel from the trunk at the back,

when a red Lada motor car drove up and stopped about two car lengths behind his car. Someone called his name enquiring if he was alright. He answered. He then heard a voice telling him not to move. He looked around and saw two men facing him five feet away, with a gun each pointing at him. He knew one of the men before, that is, the applicant. He had seen him "... around town ... about Linstead, in the general area." One of the men searched him and took from his waist his Taurus revolver with six live cartridges and $5,000.00 from his wallet. He was able to see the face of the applicant for about four minutes. A third man was in the Lada motor car "racing" the engine. The two men returned to the Lada motor car which immediately drove off speedily towards Ewarton. Having changed the tyre, the witness Duncan drove to the Bog Walk Police Station and made a report.

At about 4:30 a.m. the said morning prosecution witnesses Sgt Linval McGann, Det. Cons. Constantine Campbell and Woman Dist Cons. Carla Thomas, were on patrol in the said Linstead area of the parish of St Catherine, in a marked police vehicle. Sgt McGann, the driver was driving along York Street, when they saw a red Lada motor car with three occupants driving in front of them. Sgt. McGann spoke to the other police officers in his vehicle, turned on its flashing lights, and the public address system and told the driver of the Lada motor car to stop. The occupants of the Lada motor car had been looking around at the police car. The Lada motor car sped off, chased by the police car which eventually "banked" the Lada and forced it to stop. All three men came

out of the Lada motor car with guns. They fired at the police who in response fired their guns at the men. All three men were shot by the police. Two fell to the ground. The third man, the applicant, although shot, dropped the Taurus revolver which had been stolen from the prosecution witness Duncan earlier, and escaped into the bushes. Det. Cons. Campbell stated that he was able to see the applicant's face during the period that the exchange of gunfire lasted. The police officers took possession of the Taurus revolver, exhibit 1, and one other .32 revolver and also a 9 mm gun imitation firearm, and sent out messages to hospitals and police stations. Within two hours, having received a message, they went to the Linstead Hospital. They saw the applicant there and pointed him out, in his presence and hearing to Sgt. Williams as one of the men who had shot at them earlier on York Street in Linstead. The applicant said nothing in response. He was arrested by Sgt. Williams who cautioned him. The applicant said nothing. At the Linstead Police Station, the witness Duncan identified and claimed the said Taurus revolver as the one stolen from him by the men at 3:30 a.m. earlier.

The applicant gave evidence in his defence. He said that he is a taxi driver and drove the said red Lada that the police said they stopped at York Street, Linstead. At about 12:00 midnight he had been at a party at Redwood District, St Catherine. He left at about 4:00 a.m. taking up two passengers therefrom. He did not know them by name. One of them he knew for about three years by the name of Indian, and the other he knew for about ten years,

only to pass and say "hello". They offered to pay him but he refused to accept pay, offering to drive them to the area where the police said the shooting took place. He drove for twenty minutes to this area where the two men said they were going. To reach there he did not drive by the Bog Walk/Linstead by-pass road, he drove another way. When he reached the area and stopped, the two men still remained in the back of the car drinking beer. He said that he had earlier seen the police vehicle approach him on York Street going in a direction opposite to him and he slowed down and manoeuvred the Lada to allow it to pass him. He then recognized two of the police officers, Woman Dist. Cons. Thomas and Det. Cons. Campbell, whom he knew and regarded as his friends. When he stopped to let off the men, the police vehicle drove up and he got out and went over to talk to the police, saying to Det. Cons. Campbell, "What is up Cammo?" demonstrating to the Court by raising his hands from his waist in greeting. He said that Det. Cons. Campbell sitting in the front left of the car then shot him, in his leg. He, the applicant, asked, "What is the meaning of it?" and then addressed Woman Dist Cons. Thomas, asking "If she didn't know me, what was happening". He said that she abused him. Sgt. McGann ordered the men to come out of the car. They did and he lined up the three of them against the car. He, the applicant, then ran off. He was shot in the buttocks while running. He continued running for about thirty feet, fell in the bushes unconscious, and awoke in the Linstead Hospital. Sgt. Williams arrested him there. He did not tell Sgt. Williams how he sustained his injuries.

Several grounds of appeal were advanced in argument. Ground one reads:

> "That the count of robbery with aggravation was wrongly joined in the indictment with the count of shooting with intent not being "... part of a series of offences of the same or similar character," rendering the indictment invalid, but if valid, the learned trial judge erred in considering the evidence of shooting with intent to support that of robbery with aggravation."

The joinder of offences in an indictment is governed by the provisions of the Schedule to the Indictments Act. Paragraph 3 reads:

> "Charges for any offences, whether felonies or misdemeanours, may be joined in the same indictment if those charges are founded on the same facts, or form or are a part of a series of offences of the same or a similar character."

The question whether or not certain offences satisfied the classification of "... a series of offences of the same or similar character" was considered by the House of Lords in ***Ludlow v Metropolitan Police Commissioner*** [1971] A.C. 29. In that case the appellant was charged in one indictment with (a) attempted larceny from a public house on the 20th August and (b) robbery with violence at another public house in the same area on the 5th September, 1968, having ordered three drinks, offered to pay for one only, tendered money, then grabbed it back, and punched the bartender. The argument that the counts were improperly joined, in that the offences were not a "series of offences of ... a similar character," was rejected and the appeal dismissed. Their Lordships, endorsing the Court of Appeal in ***R v Kray*** [1969] 3 WLR 831 held that "two

offences could constitute a 'series' within the meaning of the rule." In relation to the phrase "... offences of ... similar character." Lord Pearson said, at page 39:

> "... I think the proper conclusion to be drawn from the judgments as a whole is that both the law and the facts have been and should be taken into account in deciding whether offences are similar or dissimilar in character.
>
> In my opinion, however, it is important to notice that there has to be a series of offences of a similar character. For this purpose there has to be some nexus between the offences. Counsel criticized the wording of passages in judgments appearing to say that there cannot be similarity of character without a nexus. But I think this criticism, if it has any validity, applies only to the wording, and not to the substance, because when regard is had to the requirement of a series of similar offences it is right to look for a nexus. Nexus is a feature of similarity which in all the circumstances of the case enables the offences to be described as a series.
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> In the **Kray** case the Court of Appeal said, at p. 836:
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> ... offences cannot be regarded as of a similar character for the purposes of joinder unless some sufficient nexus exists between them. Such nexus is certainly established if the offences are so connected that evidence of one would be admissible on the trial of the other, but it is clear that the rule is not restricted to such cases." (Emphasis added)

Mr. Ramsay argued that there was no nexus between the offences of robbery with aggravation which was concerned with the property of the complainant and shooting with intent, directed at the person of policemen. They were separate offences different in time and place.

It seems to this Court that in the instant case, both offences of robbery with aggravation and shooting with intent have to be considered in the context of a legal and of a factual similarity in order to resolve the issue of their similarity or otherwise: (***R v Christopher Harward*** (1981) Cr App. R 168).

Both offences contain common features. Each offence involves:

(a) the illegal possession and use of a firearm, and

(b) an assault, clearly an act of violence.

In the latter count both features progressed to the further act of shooting. On that basis there was a sufficient "nexus" to join the said offences in the same indictment. In addition, the Taurus revolver, exhibit 1, allegedly taken from the complainant at the time of the robbery was recovered at the scene of the shooting, allegedly dropped by the applicant, within approximately one hour after the first incident. That was evidence of recent possession of the said firearm linking the possessor, the applicant, with the perpetrator of the earlier robbery, by the presumption of the doctrine that he was in fact either the thief or a receiver of the said firearm, exhibit 1. That evidence of possession would suffice to make the offences "... so connected that evidence of one would be admissible on the trial of the other."

What is "proven recent" is a question of fact in each case. A firearm, unlike money, does not ordinarily change hands readily, from person to person, moreso at 4:00 a.m. Consequently, finding the applicant in possession of the Taurus firearm, exhibit 1, so recently after, within one hour, of its removal from

its owner, the complainant, gives rise to the inference, and confirms the identification that the applicant was one of the robbers, involved with the said complaint.

Accordingly, it is our view that there was sufficient nexus between the offences, in law and in fact, to join the offences in the same indictment. That ground therefore fails.

Ground two reads:

> "Assuming that the indictment was good, the learned trial judge erred in failing to acquit the applicant/appellant on count (3) on the basis of unreconciled weaknesses which he himself found in what amounted to dock identification ..."

Mr. Ramsay, Q.C., argued that the dock identification of the applicant by the complainant, was regarded by the learned trial judge as a weakness in the prosecution's case. The learned trial judge failed to resolve that issue, specifically, but incorrectly relied on the evidence of recent possession of the stolen firearm, exhibit 1, as identification of the applicant as one of the men who committed the robbery offence, or was in common design with them, thereby depriving the applicant of the chance of an acquittal.

The learned trial judge in his assessment of the evidence, and referring to the evidence of the complainant Duncan said, at page 95 of the transcript:

> "Of course the defence is saying that because the defence finds his description of the two assailants were fully inadequate, and I agree, I find them inadequate too. What I won't do is to put myself in the position of the witness, and decide that the

> witness must be able to say something more about the person that he had seen."

and, referring to the complainant, further said, at p. 96:

> "If that witness wanted to give an identification to bolster his courtroom identification it would be quite easy for him to do so.
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> We don't know if he told the police more than he told this court or whether he told the police less or he did not. We assume he did not tell the police less but the description he gave I would agree is inadequate. So that that really is a great weakness in the case in respect to the identification of the accused because the witness allege that this is the man who I have seen several times before in the Linstead area. I don't know his name but I have seen him around on several occasions before. The fact that the accused says that he is a well known man in the Linstead area, the prosecution says most of their identification – I don't think it really takes them any further but there is no dispute that there was adequate time in which to have seen the man and if he had seen him before to be able to recognize him; that there was adequate lighting to have seen his assailants."

Dock identification is not nugatory (***Slinger*** *v* ***R*** (1965) 9 WIR 271), but taken by itself, it is an unreliable means of proper identification of an accused. However, other evidence in the case may assist in giving support to the dock identification, thereby confirming the witness' identity of the accused as the offender. The learned trial judge having warned himself of the weakness of the dock identification, went on to deal with the other aspect of the evidence in the case, relied on by the prosecution. He said, at page 97:

> "... but the prosecution says that here we have a red Lauder (sic) motor car with three men, two armed with guns, one steals a gun which is identified later

> when a red Lauder (sic) motor car is stopped in which the accused man undoubtedly was in, a mere minute after the first incident and the prosecution is asking this court to say that there is only one possible inference that these three men and this red Lauder (sic) motor car must be the same three men in the same red Lauder (sic) motor car and the inference is inescapable because of the presence in it of exhibit 1, a chrome Taurus revolver which contained six live rounds."

and at page 100:

> "... but the prosecution has been consistent ... Two of the men who were in the red Lauder (sic) car were shot near to the red Lauder (sic) car on the right-hand side; that one man who was shot made his escape, dropping the Taurus revolver."

and further at page 102:

> The presence of the Taurus revolver whether taken from any of the dead men or dropped by the accused can only be explained by the fact that it was in the red Lauder (sic) motor car; there can be no other explanation. Whoever had it must have been in the red Lauder (sic) motor car it would be too much of a coincidence that this would not be the same red Lauder (sic) motor car which was a part of the robbery of Mr. Duncan earlier that morning."

The learned trial judge concluded, on page 103:

> "On the totality of the evidence therefore, this court finds beyond all reasonable doubt that on the 7th day of September, 1996, in the parish of St Catherine the accused Walter Thomas being armed and being with others who were armed, and in illegal possession of firearm and ammunition, did rob Steveford Duncan of his firearm containing six live rounds and five thousand dollars ($5,000.00) in cash and later on that same morning did shoot at three police officers, Sergeant McGann, Detective Constable Campbell and Woman District ConstableThomas."

Contrary to the submission of counsel, on the point, the learned trial judge did not fail to face the issue of dock identification. He correctly recognized it taken by itself, as a weak area in the prosecution's case. He did not seek to rely solely on it. He thereafter, to decide on the issue of identification, repeatedly adverted to the evidence in support of the doctrine of recent possession, accepted that the Taurus revolver, exhibit 1, was found in the possession of the applicant recently after it was stolen from the complainant Duncan, and found that he, the applicant, was the person who stole the firearm and subsequently shot at the police. The learned trial judge could properly draw that inference, in the absence of any explanation from the applicant as to how he came into possession of the said firearm, exhibit 1.

This ground also fails.

Grounds three and four read:

> **"3. <u>Transposition of Issues</u>**
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> That alternatively and/or further, the learned trial judge erred in transposing the issue in count (3) from identification to one of circumstantial evidence turning on a plinth of Recent Possession of a stolen gun. That such an approach sidetracked both the vital issue of Identification, as well as the important requirement of considering each count separately where several offences are being tried in one Indictment on the basis of arising from the same facts or a series of offences of the same or similar character.

4. <u>Circumstantial Evidence</u>

> That the learned trial judge fell into error in adopting the prosecution argument that applying the principle of circumstantial evidence, there was only one inescapable inference namely that the applicant/appellant was either the person who robbed the complainant in count (3) of his gun or a person in Common Design with the robbers: That it is submitted that if the applicant/appellant was not proved to be one of the robbers at the scene, it would not follow "inescapably" that he must be in Common Design with the robbers because he was seen in possession of the gun more than one hour later and not one minute later as the learned trial judge appears to have wrongly thought, bearing in mind the case for the defence."

Having referred to the fact of possession of the Taurus revolver, exhibit 1, at the scene of the shooting and the inference that its possessor must have been in the red Lada motor car and present at the robbery of the complainant earlier that morning, the learned trial judge continued at p. 102:

> "The coincidences would be too great to amount to anything other than circumstantial evidence. There are too many pieces of evidence pointing in one direction and one direction only and that direction points to the accused man being part of a party of three men who robbed Mr. Duncan and later shot at the police ..."

The learned trial judge having earlier examined the evidence of the applicant was here referring to the cumulative effect of the evidence led by the prosecution, namely, the fact of possession of the revolver exhibit 1, giving rise to the doctrine of recent possession, linking the offenders at the scene of the shooting with the offenders at the earlier robbery. Both incidents had the

common feature of the presence of the red Lada motor car and exhibit 1. The learned trial judge properly referred to the evidence in the nature of circumstantial evidence "... pointing in one direction and one direction only." The learned trial judge cannot be described as going on to reveal a doubt in his mind by the use of the statement, at page 102:

> " ... whether he actually fired a shot or actually took part in the physical robbery, being part of the group which intended to do this, he would be guilty as any other of them."

The learned trial judge was dealing with the concept of common design as expanded by section 20(5) of the Firearms Act and its effect in law on the evidence of the conduct of the applicant and his level of participation with the other offenders on both scenes, thereby placing guilt in him. There is no basis for the arguments put forward on these grounds. "Nagging doubt" and the complaint of convictions being "unsafe" are alien to this court's considerations. These grounds also fail.

Ground five reads:

> **"5 <u>Evidence</u>**
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> That the learned trial judge completely failed to attach the most serious weight to the evidence that one of three guns that the police alleged were fired at them in relation to count **(4)** was a toy gun, not lethal barrelled and incapable of firing bullets: That it is submitted that the following propositions follow inevitably from the above facts: **(a)** Only two guns could have been fired at the police by the applicant/appellant and the two other men: **(b)** From this it follows; that the evidence that all three men fired is wrong and false: **(c)** That, if (as the evidence

> is) the two men who were fatally shot were firing their guns at the police, then the applicant/appellant could not have been seen firing shots at the police with a toy gun: **(d)** that accordingly, the evidence of the police as to the applicant/appellant's role in the shooting should been have rejected, or at the very least held or placed in the gravest doubt."

The prosecution witnesses Sgt. McGann, Det. Cons. Campbell and District Constable Thomas, all said in evidence that all "three men" fired guns at them. Both Sgt. McGann and Det. Cons Campbell stated specifically that the applicant was running and firing a gun at them, and the gun fell from his hand. Sgt. McGann said that he then took up from the ground, the firearm exhibit 1; Cons. Campbell confirmed this. The evidence revealed that one of the firearms recovered was a toy gun. On this evidence it was inaccurate to state, as the police witnesses did, that the "three" men were firing at them. The learned trial judge recognized the effect of the imitation firearm on the prosecution's case. He said, at page 100:

> "The defence of course will take issue with the fact that I said that the police were consistent that the three men who were in the Lauder (sic) car fired at the police because defence would point out, has pointed out the evidence that one of those guns which the police recovered could not fire shots and that is the imitation 9 mm pistol."

He dealt with it, in this way, on p. 100:

> "Of course, what is perhaps fortunate is that defence has probably never been under fire but he would like this court to think that when persons or persons are firing guns at you one has time to count bullets and to look at guns to see who is firing; how many shots they are firing and where the guns are pointed and in

> exactly what directions the bullets were coming from. I can only regard this as being highly fanciful and in my experience when persons are firing at you he is not going to stop to count the bullets, but the fact is that there is this discrepancy on the prosecution's case. This court is of the view that such discrepancies as have arisen between the three officers who were undoubtedly present at the same time, undoubtedly witnessed the same incident, must be subject to the ravages of time and to one's personal conception of time, distance and other elements of judgment. This court does not find that they affect the credit of the prosecution witnesses to the extent that it destroys the case fabric of the prosecution's case. On the other hand this court does not accept the accused man as a witness of truth."

The learned trial judge having recognized this discrepancy in the prosecution's case, made a specific finding that he accepted the prosecution's case having treated the discrepancy as a minor one. He rejected the applicant's account of the incident, dealing specifically with the different demonstrations given by the applicant, in evidence, as to the movement of his hands when he was shot by the police. The learned trial judge was entitled to do so. Consequently, we find no merit in this ground.

Ground six reads:

> "That the learned trial judge erred in failing to give sufficient weight to the numerous discrepancies and defects which existed on the prosecution case: **(b)** Alternatively the learned trial judge erred grievously in dismissing some of the discrepancies on the basis of his own personal experience: Whereas it is submitted that a tribunal is precluded in law from relying on its personal knowledge or experience rather than on strict analysis of the evidence given."

The learned trial judge was aware of and pointed out the several discrepancies that arose on the prosecution's case. He said, at page 98:

> "What the defence here relies on are the discrepancies in the statements or in the evidence of the witnesses who were called, the three eye witnesses, and bolster it. He states that what is really in the statement of Sergeant Williams because Sergeant Williams did admit that he wrote in the statement that the Taurus revolver, exhibit 1, was taken from where the dead men were and perhaps I ought to mention this first. The witness probably could have been asked why he wrote what he wrote. The defence is asking this court no doubt to infer that he wrote it because that is what he is told ... so whatever he wrote in his statement concerning the gun is at best hearsay, and this court attaches no weight to it but as I said before, among the three eye witnesses there were discrepancies and these are discrepancies which the prosecution must admit were a part of their case.
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> The prosecution called three witnesses, in fact all the witnesses who were in the police car on that early morning. First they called Detective Constable Campbell and then the prosecution decided to put up a witness who was not on the back of the indictment, for cross-examination and this was Woman District Constable Thomas and it is from her evidence that there are the many discrepancies, discrepancies as to how long the chase lasted; discrepancies as to what door the men came out of the car; discrepancies as to the distance the two cars were from each other and so on ... There is seemingly discrepancy or there is discrepancy about how the police got the car to stop and where the car actually did stop at the 'T' junction or near a 'T' junction or whether or not a 'T' junction was there; there is discrepancy as to whether there was a shop on the left-hand side, possibly house, possibly fences; there is a discrepancy as to whether the car could have proceeded and stopped of its own accord or whether it was because the police forced the car to stop. In fact there is a discrepancy as to

> whether the accused men fired while the police were in the car or whether the police actually started to get out of the car; there is discrepancy about how long the entire incident took place or even how long the shooting incident took place; there is discrepancy about – I think I said already, about what side of the car the men came out of; how far they were from the car when they were shot; in what direction they were at but the prosecution has been consistent on the importance and relevant issues and that is that there was a chase; that the police used siren; flashing lights, public address system; that the vehicle, the red Lauder (sic) car came to a stop on the right-hand side of the road and that the police car was to his left; that the three men who were in the Lauder (sic) car came out and that they fired guns at the police; that the police came out of the car and returned fire; that Woman District Constable Thomas came out, fired shots and ran back into the car; that two men were shot near the car. Two of the men who were in the red Lauder (sic) were shot near to the red Lauder (sic) car on the right-hand side; that one man who was shot made his escape, dropping the Taurus revolver."

The learned trial judge then adverted to the discrepancy in respect of the evidence of the prosecution witnesses that all "three men were firing" at them, whereas one of the firearms was an imitation firearm, and continued on page 101:

> "This court is of the view that such discrepancies as have arisen between the three officers who were undoubtedly present at the same time, undoubtedly witnessed the same incident, must be subject to the ravages of time and to one's personal conception of time, distance and other elements of judgment. This court does not find that they affect the credit of the prosecution witnesses to the extent that it destroys the case for the prosecution or that it destroys the fabric of the prosecution's case."

The learned trial judge was here making a specific finding classifying the said discrepancies as minor ones that did not "destroy the fabric of the prosecution's case," and contrasting them with what he found to be the major issues in the case: (***R v Baker et al*** (1972) 12 JLR 902). In so far as the learned trial judge is perceived to be "dismissing some of the discrepancies on the basis of his personal experience," by his comment on page 101; "... in my experience when persons are firing at you he is not going to stop to count the bullets ...", he was in error. However, we regard this comment merely, as a general comment aimed at a common sense approach in his jury capacity. His treatment of the discrepancies in the case was otherwise correct, in that he gave them the accepted proper consideration. We do not agree with the submissions of Mr. Senior-Smith in this regard. We find no merit in this ground.

Ground seven reads:

> That the sentence of 15 years was manifestly excessive in all the circumstances bearing in mind, inter alia;
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> **(a)** The applicant/appellant's prior good character.
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> **(b)** The grave doubt that the applicant/appellant fired lethal or any bullets at the police.
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> **(c)** The undoubted fact that the 2 shooters were killed on the spot by the police who received not even a scratch.
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> **(d)** The fact that the applicant/appellant suffered serious injury from police bullets
>
> **(e)** The fact that the sentence is out of line with the authorities seeking to introduce some uniformity into the sentencing process."

The learned trial judge in imposing sentences considered the seriousness of the offences, and continued at page 106:

> "... I take into consideration the fact that you have no previous convictions. I take into consideration the fact that you have a medical problem, so that the sentence which I impose will not be the sentence that I would normally impose for the offences which are found that you committed."

The learned trial judge thereby took into consideration the relevant factors, namely, inter alia, the appellant's previous good character and his physical illness at the time, prior to imposing the sentence on each count of the indictment. We are of the view that the offences were sufficiently serious for the imposition of the said sentences. We cannot agree that they were in any way manifestly excessive. There is no merit in this ground. In view of the arguments advanced, we treated the application as the hearing of the appeal.

In the circumstances the appeal is dismissed. The sentences shall run as from June 9, 1999.