JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CRIMINAL APPEAL No. 23 of 1974

BEFORE: The Hon. Mr. Justice Swaby, J.A.(Presiding).
The Hon. Mr. Justice Robinson, J.A.
The Hon. Mr. Justice Zacca, J.A.(ag.).

REGINA v. DEXTER HUNT

Mr. Horace Edwards, Q.C. and with him
Mr. George Soutar for the Appellant.

Miss Joyce Bennett for the Crown.

July 17 and 31, 1974
March 21, 1975

SWABY, J.A.:

The appellant was, on February 8, 1974, convicted by His Honour Mr. J.R. Astwood, a resident magistrate for St. Andrew, for housebreaking and larceny of a Smith and Wesson Revolver No. 226337 valued $200 the property of Gordon Brandon. Yvonne Northover, his common law wife who had been jointly charged, was acquitted. The appeal herein was heard on July 17, 1974 and, at the close of the hearing, we reserved our decision. On July 31, 1974 we allowed the appeal, and quashed the conviction, stating that we would later put our reasons in writing. We now do so.

At the trial, the evidence led by the prosecution, briefly, was that Mr. Gordon Brandon, residing at No. 1 Argyle Road, St. Andrew, locked up his dwellinghouse on Saturday September 1, 1974 at about 3 p.m. and left home leaving his revolver in a dresser in his bedroom. He returned home at about 7.30 a.m. the next day, entered his house by the front door which he found locked as he had left it the afternoon before. On going to a back door of the house he found it open, and the lock broken. He reported the matter to the police at Half Way Tree on the same day and they went and examined the house for possible finger-prints.

Constable Cameron, of the Hunt's Bay Police Station, gave evidence that on January 25, 1974 at about 8.30 a.m. he was one of a police raiding party of some four or five constables in Arnett Gardens, St. Andrew. He said that he entered the premises of the appellant by

the front door which was open. There he saw the appellant and Northover seated on a couch, and, as he entered, he saw the appellant pass a revolver to Northover who lifted a cushion of the couch and pushed the revolver under it. Constable Cameron said that he told them to get up. The appellant obeyed, but as Northover refused to do so, he held her by the hand and pulled her up. He then raised up the cushion, took up the revolver, and after examining it, asked them if they had a licence for it. Both said: "No". He cautioned them and Northover said that the revolver belonged to the appellant, but the appellant said nothing. Another constable, Clauchar, not called as a witness at this trial, held the appellant, but he, Cameron, arrested both of them for being illegally in possession of the revolver and five rounds of ammunition found inside the chamber of the revolver. The appellant and Northover were, on March 11, 1974, acquitted of these breaches of the Firearms Act. The relevance of this fact will later appear in this judgment.

The appellant and Northover were, on January 29, 1974, arrested by Corporal Forbes for housebreaking and larceny of the revolver. Upon being cautioned neither made a statement. Corporal Forbes also alleged that on February 8, 1974, Brandon was shown the revolver in the presence of the appellant. Brandon claimed it as his property and the appellant asked Brandon: "Tell me something sah, how long ago you lose it?" Later that day Brandon identified the revolver in court, and the appellant was convicted and sentenced to a term of twelve months imprisonment with hard labour.

The appellant, who was unrepresented at his trial on the charge of housebreaking and larceny, gave sworn testimony, during which he said, inter alia, that he knew nothing about the revolver exhibited in court, which he had seen for the first time when the police showed it to Brandon at the Half Way Tree Court-house on February 8, 1974. He denied that he had it at his home on January 25, and that he had handed it to Northover to put under the cushion of the couch. He admitted, however, that when the police were in his house on that date they stated that they had found the revolver under the cushion, but he denied that he was in the room when they claimed to have found it. Northover, who was also unrepresented at this trial, gave sworn evidence that she was outside in the yard

"wetting some baby's clothes" when the police arrived and entered the house. She followed them into the house and sat on the couch, but she did not see the police find a gun, or holding a gun. She also admitted, under cross-examination, that she had heard the police say that they had found a gun. She denied having taken the gun from the appellant and put it under the cushion of the couch.

Upon the appeal coming on for hearing we had first to deal with an application by notice of motion filed on May 1, 1974

(a) to call fresh evidence at the hearing of the appeal under the provisions of s.26 of the Judicature (Appellate Jurisdiction) Law, 1962, and,

(b) for leave to argue supplementary grounds of appeal filed with the notice of motion, notwithstanding that the time for filing grounds had expired.

The application was supported by an affidavit made by the appellant's counsel, filed with the notice of motion. In this affidavit Mr. Edwards deponed, inter alia, that the appellant and Northover had been tried on February 21, 28 and March 11, 1974 by Mr. Ian Forte, another resident magistrate for the parish of St. Andrew, and had been acquitted on the charges of the illegal possession of a firearm and ammunition; that Constable Cameron who had been the sole witness as to the finding of the revolver in the housebreaking charge had given evidence in the trial of the illegal possession of the firearm/ammunition charges, as also Constable Clauchar who had been present at the appellant's house on the morning of January 25, but that owing to discrepancies in the evidence of the two constables in the latter trials, Mr. Forte had, without calling upon the appellant or Northover for their defence, discharged them. A certified copy of the notes of evidence taken at the latter trials was exhibited with a view to grounding the application for an order that Constable Clauchar should attend before the Court to be examined. At these trials both accused had been represented by Mr. George Soutar, who appeared along with Mr. Edwards at the hearing of this appeal.

The supplementary grounds of appeal which the appellant's counsel sought leave to argue were:

"(1) The prosecution relied on the doctrine of recent possession to prove that the appellant committed housebreaking and larceny of a revolver. It is submitted that the evidence on which the Crown purported to prove possession, such possession was not recent enough to attract the doctrine.

(2) The verdicts in the case of housebreaking and larceny and the cases of illegal possession of a firearm and ammunition are inconsistent."

We do not think it necessary, in the circumstances, to make an order that Constable Clauchar attend the Court to be examined. Leave was, however, granted to argue the supplementary grounds of appeal.

Learned Counsel for the appellant dealt at length with supplementary ground (1) above, citing several authorities relating to the doctrine of recent possession, and urged the Court to hold that the doctrine of recent possession should not apply to a person in whose possession a stolen firearm was found five months after the theft. We feel it unnecessary to dwell at any length on this ground as, in our view, it is devoid of any merit, and in any event involves a misconception. The authorities relied on by Mr. Edwards do no more than provide examples of the circumstances in which the tribunal of fact felt free to infer from the evidence that possession in a given case was 'recent'. The point we make is that whether in any given case possession may be held to be 'recent' is essentially a question of fact, and not a question of law. It is an issue of fact to be determined by a jury, or a resident magistrate sitting without a jury, having regard to the particular circumstances of each case.

Dealing with the second ground of appeal argued, learned counsel for the appellant cited the case of Warner v Reginam (1966) 50 Cr. App. Rep. 291, as being relevant to the main issue in this appeal. In that case the appellant was tried at the same sessions, first on an indictment for taking and driving away a motor vehicle without the owner's consent, on which he was convicted, and shortly afterwards, on another indictment, for driving the same vehicle when disqualified, on which he was acquitted. In each trial, apart from formal evidence to prove disqualification on the second trial, the evidence for the prosecution was the same and rested

on the identification by a police officer of the appellant as the driver. The accused was unrepresented at each trial and had unsuccessfully applied for an adjournment in order to get legal assistance. The Court of Criminal Appeal held that in view of the inconsistency of the verdicts, the conviction must be quashed. Veale J, said:

> "I emphasise that the evidence for the prosecution was the same in each case. It may very well be that two apparently inconsistent verdicts can, in some cases, be explained by the fact that the evidence at two trials is not the same, but here the sole issue in each case was one of identity and the evidence for the prosecution was substantially that of Constable Kennedy alone."

Where the determination of two or more charges depends on the resolution of the same issue, or issues, of fact then an acquittal on the one followed by a conviction on the other, must involve such an inconsistency as to vitiate the conviction. The sole issue in each trial was whether the appellant was, on January 25, in possession of the revolver and the ammunition found in the chamber thereof. The resident magistrate held, in the first trial, on the evidence before him, that the appellant was so in possession, and that that possession was sufficiently "recent" after the larceny as, in the absence of a credible explanation, to compel the inference that the appellant was guilty of housebreaking and larceny. The resident magistrate, at the second trial which was concluded a month later, found the appellant not guilty of being in illegal possession of the same revolver and ammunition arising out of the same incident on the same evidence regarding his possession thereof.

There were, therefore, two manifestly inconsistent judgments or verdicts on the same issue of fact, namely, the question of the appellant's possession of the revolver. The judgment in the first trial cannot, in the circumstances, be allowed to stand. We accordingly allowed the appeal and quashed the conviction.