J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS

Nos. 67 and 66 of 1973

BEFORE: The Hon. Mr. Justice Luckhoo, P. (Ag.)
The Hon. Mr. Justice Swaby, J.A.
The Hon. Mr. Justice Zacca, J.A. (Ag.)

R. v. STANFORD JOHNSON & GEORGE BROWN

F.M. Phipps, Q.C. for the applicants.

B. Macaulay, Q.C. and T.G. Usher for the Crown.

Heard: July 26, September 23,
& December 20, 1974

LUCKHOO, P.(Ag.):

The applicants Stanford Johnson and George Brown were convicted in the Westmoreland Circuit Court on May 30, 1973 on an indictment which charged in the first count that Stanford Johnson on May 1, 1972 shot at Conroy Ford and Simeon Johnson with intent to do them grievous bodily harm, contrary to s. 16 of the Offences against the Persons Law, Cap. 268; in the second count that George Brown on the said day shot at Conroy Ford and Simeon Johnson with intent to do them grievous bodily harm contrary to s. 16 of the Offences against the Persons Law, Cap. 268; and in the third count that George Brown on the said day was in possession of one .38 calibre revolver except under and in accordance with the terms and conditions of a firearm user's licence, contrary to s. 20(1)(b) and s. 20(4)(c)(ii) of the Firearms Act, 1967 (No.1).

They have applied for leave to appeal against their respective convictions on a number of grounds.

The case for the prosecution was to the following effect. At about 1.30 p.m. on May 1, 1972 police constable Ford having informed himself of cars reported missing or stolen went to the piazza of one William Lindsay's shop in the parish of Westmoreland. He was in plain clothes. While there he noticed a Cortina motor car being driven in the direction of Sheffield with four men aboard. The applicant Brown was the driver and the applicant Johnson was sitting beside him. The two other men were seated in the back of the car. Ford went after the car. He found it parked under the piazza of one Mary Lee Fung's business place. He then went for district constable Johnson who resided nearby. Ford and district constable Johnson both of whom were armed went towards where the Cortina was parked. As they got near to the Cortina someone from inside the car was heard to say "Babylon. Drop them to r-, c-." They observed the two applicants running from Mary Lee Fung's shop towards the car the right front door of which was open. The applicant Johnson was the first to enter the car and he sat on the left front seat. The applicant Brown followed him and sat in the driver's seat. The car started to reverse. Ford called out "Police. Stop." The applicant Johnson put his head out of the left front window, pointed a firearm at Ford and district constable Johnson who were about a quarter of a chain away - that is about 16½ feet away - and fired two shots at them. The car continued to reverse and when it had reversed a distance of about three-quarters of a chain it crashed into a bank and caught fire. All four occupants jumped out and ran. Ford and district constable Johnson gave chase. As they did so the applicant Brown spun around. He was holding a gun. He pointed the gun at the two constables who were about a quarter of a chain away and fired two shots at them. The constables returned Brown's fire. Brown was hit and a revolver dropped from his hand. The applicant Johnson went to Brown's aid. Both of the applicants made good their escape. The revolver which fell from Brown's hand was picked up and was found to contain three live cartridges and two spent ones. Later both of the applicants were apprehended. After he was cautioned the applicant

Brown said "I am only the driver." Charges in connection with the incident were laid against four men including the two applicants. The other two men were later discharged when the prosecuting officer offered no evidence against them at the preliminary enquiry into those charges.

The applicant Johnson in his defence made a statement from the dock. He said that he had nothing to say as the constables had told lies against him. The applicant Brown in his defence said that on May 1, 1972, he was in Montego Bay doing some welding when a man named Danny came with a car. Danny persuaded him to come with him to Negril. On reaching Negril Danny told him to drive him to Sheffield. He did so and he later parked at a shop. He was sitting behind the ~~steering~~ wheel. The rain was falling and he heard the sound of explosions. His left hand was resting on the steering wheel. He heard another explosion and felt a burning sensation in that hand. He saw blood dripping from the hand. He heard another explosion and a crowd of persons came down upon him. He was taken to a lock-up and later to hospital where a special constable told him that they had found a gun in the car.

Mr. Phipps for the applicants has first submitted that the first and second counts of the indictment as laid are bad for duplicity in that each of those counts charged more than one offence. Mr. Phipps contended that when each applicant allegedly shot at each constable separate and distinct offences were committed with respect to each constable and that even if it were accepted that the two shots which were fired by each applicant were fired at the two constables that transaction would be two separate and distinct acts and not one activity achieved in one of two different respects. A number of authorities were reviewed by Mr. Phipps in this connection. We have considered them but it is not necessary for us to refer to all of them. In R. v. Clendon (1730) 92 E.R. 517 the earliest authority in point of time it was held that a person could not be prosecuted upon an indictment for assaulting two persons. The decision in that case was held to be wrong in R. v. Benfield and Saunders, (1760) 97 E.R. at p.666 a case

of libel on two persons. See also Anon. (1773) 98 E.R. 646. In R. v. Pelham (1846) 8 Q.B. at p. 963 Lord Denman, C.J. stated that R. v. Clendon was not good law. In R. v. Giddins (1842) 1 Car. & M. 634 upon an indictment charging four persons in one count with assaulting two men and taking away their money all of the prisoners were found guilty. Finally, in Jemmison v. Priddle (1972) 1 All E.R. 539 an information charging the unlawful taking and killing of two red deer without licence was held by the English Divisional Court not to be bad for duplicity because it is legitimate to charge in a single charge one activity even though that activity may involve more than one act. In that case the Lord Chief Justice, with whose judgment the other members of the Divisional Court agreed, considered that the defendant had been charged with the activity of shooting red deer without a licence "and that although as a nice debating point it might well be contended that each shot was a separate act, indeed each killing was a separate offence, I find that all these matters, occurring as they must have done within a very few seconds of time and all in the same geographical location, are fairly to be described as components of a single activity, and that made it proper for the prosecution in this instance to join them in a single charge." We respectfully agree with the Lord Chief Justice's conclusions so clearly stated. We think the case of Jemmison v. Priddle on that point to be applicable to the question raised in the instant appeal as to the validity of the first two counts of the indictment and hold that those counts are not bad for duplicity.

A further ground taken in the grounds of appeal filed on behalf of the applicants was that there was a miscarriage of justice in that the trial judge allowed the case to be tried without the applicants being legally represented. It would appear that on the opening day of the Westmoreland Circuit Mr. Clare an attorney-at-law announced that he and Mr. Ian Ramsay were appearing for the applicants. When the case was called on for hearing the trial judge was informed by counsel for the Crown that Mr. Clare and Mr. Ramsay would no longer be appearing and this was stated to the applicants by the trial judge. It would also appear that the applicants did not seek further legal assistance

and the hearing was commenced. As Mr. Phipps pointed out the indictment did not charge any of the scheduled offences in respect of which legal aid must be granted. No application seemed to have been made by the applicants for an adjournment to secure the services of counsel. This ground of appeal is in our view without merit.

Lastly, it was submitted on behalf of both applicants that their convictions should be quashed for the reason that the learned trial judge erred when he refused Brown's application to call Donald Clarke and Wedderburn to testify in his defence. Clarke and Wedderburn had been charged along with the applicants in the Resident Magistrate's Court in connection with this incident and had been there discharged upon the prosecution not offering any evidence against them. After Johnson had made his defence from the dock in answer to the trial he said that he wished to call no witness. Brown made his defence - in essence that he was an innocent driver of the car - and in answer to the trial judge he said that he would like to call the two men who were in the car with them "to talk what they know". The trial judge considered that it would only be fair that Brown be given an opportunity to have those men testify in his defence. As it was then near to the usual time for the afternoon's adjournment to be taken the further hearing of the case was adjourned to the following morning. On the hearing being resumed next morning counsel for the Crown informed the trial judge that the two men had been contacted (presumably by the police) and told to come that morning but that they had not arrived. The names of the two men were called but the men did not appear. Brown then applied for a further adjournment for the witnesses to be called but the trial judge refused the application because the applicants had been in custody for a period of over one year. The question is whether in these circumstances it can be said that the applicant Brown was afforded facilities to obtain the attendance of witnesses he proposed to call in his defence comformably with s. 20(6)(b) and (d) of the Constitution of Jamaica and indeed comformably with the right of every accused person ever since he was permitted to have witnesses testify in his defence? In our view it was imperative to ensure that the applicant Brown, who was unrepresented and in custody, had every opportunity of calling witnesses in his defence

and for that purpose the trial judge ought to have given instructions for the required witnesses to be subpoenaed to attend. While appreciating the desirability of a speedy determination of the trial of an accused person especially when such person has been held in custody in relation to the offence charged for a considerable period of time it is to be borne in mind that that must always be subject to the right of the accused to be afforded the fullest opportunity of having his defence in its entirety presented to the court. In this case the applicant Brown was not effectively afforded such an opportunity. His convictions therefore cannot stand. Accordingly we grant him leave to appeal. We treat the hearing of his application as the hearing of the appeal. His convictions on the second and third counts are quashed and the sentences set aside. Mr. Phipps has urged that because of the passage of time - the offences were alleged to have been committed on May 1, 1972 and the year 1974 is drawing to a close - it would not be in the interests of justice that there should be a retrial on those counts of the indictment. We do not agree. For obvious reasons we refrain from expressing our view of the facts of the case and would only say that we order that the applicant Brown be retried at the next sitting of the Westmoreland Circuit Court.

In so far as the applicant Johnson is concerned the failure to afford Brown adequate facilities to obtain the attendance of Clarke and Wedderburn cannot be held to have occasioned any miscarriage of justice to him (Johnson). His application for leave to appeal is refused. In the circumstances of this case we order that his sentence should run with effect from July 26, 1974.