JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS. 239/88 & 131/89

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA VS. EARL MOWATT
REGINA VS. CHRISTOPHER BROWN

Cheryll Richards for the Crown

Both applicants unrepresented

February 19, 1990

WRIGHT, J.A.:

In order to facilitate the harmonizing of the sentences on similar charges we decided to deal with these two applications for leave to appeal against conviction and sentence together.

R. v. EARL MOWATT

At about 3:15 a.m. on May 3, 1988, Mr. Hugh Brown of Seaforth, St. Thomas, was awakened from sleep by his mother's cry for help. He took up his firearm and stepped to his room door from where he could see his mother's room door which he observed was ajar. Standing in the doorway with a long gun in his hand and facing into her room was the applicant whom Mr. Brown had known for some eight years during which time they had been next-door neighbours.

Although Mr. Brown could have shot the applicant

at that stage he refrained from so doing lest he should endanger his mother. Instead, he fired one shot upwards in response to which the applicant spun around and in the full glare of a 100-watt bulb, which was alight in the dining room, Mr. Brown confirmed his identification of the applicant. As the applicant retreated in the direction of his room door Mr. Brown withdrew into his room and kept firing. When the applicant reached the room door he dropped the long gun which he was carrying and made good his escape - Mr. Brown still firing - via the kitchen door which was then open but had been locked by Mr. Brown before retiring. The louvre blades of the kitchen window were observed to have been prised apart sufficient to admit an adult.

Mr. Brown locked up the house then went off to the Seaforth Police Station where he lodged a report. He was accompanied back to the house by Detective Corporal Dennis Young, who took charge of the long gun - a Stevens shotgun loaded with a 12-gauge cartridge. Detective Young noticed that there were blood-stains on the passage-floor and at the kitchen doorway - a clear indication that the intruder had been shot. Promptly, thereafter, Detective Young issued warrants for the arrest of the applicant who was known to him. Acting on information received, Detective Young, armed with the warrants, went to the Trinityville Police Station nine days later where he saw the applicant in custody. He had actually been taken into custody in Kingston and brought there. Detective Young cautioned him and told him of the report made by Mr. Brown to which the applicant responded, "Mr. Young, a dem force me fi do it sah. Me alone nah tek it, boss, an mi a go talk how it go, sah". He said he wished to give a statement and was advised that he would be taken to the Seaforth Police Station

where a Justice of the Peace could witness the taking of the statement.

Detective Young noticed an injury to the applicant's left thumb resembling a gunshot wound and when he asked the applicant how he came by that injury he replied:

> "A the night when me go a Hugo yard sah, me hear shot a fire and me run, after that me see seh me get shot pon me big finger."

Asked about a swelling above his left eye and an injury below the said eye, he said:

> "A when me run sah me lick up me face pon the wall."

Taken to the Seaforth Police Station, the applicant gave a statement which was witnessed by Mr. Sydney Facey, a Justice of the Peace for the parish of St. Thomas. In that statement he clearly put himself on the scene of the crime though he assigned the major roles to three of his cronies whom he named. He confirmed the account he had given of the injury to his left thumb. After he was arrested and cautioned he urged Detective Young to find the others he had named and gave information which could assist in finding them.

However, at his trial before Theobalds, J., in the St. Thomas Circuit Court on December 8, 1988, he repudiated the statements attributed to him and by way of defence set up an alibi viz. that he was in Kingston at the material time. He also denied ever having been Mr. Brown's next-door neighbour but said he visited his mother at that home.

On that evidence the learned trial judge correctly identified the live issue as one of visual identification which he proceeded to treat with appropriate caution.

He accepted Mr. Brown's evidence of his prior knowledge of the applicant as well as of his recognition of him in his house at the relevant time. He accepted, too, the oral and written statements attributed to the applicant and in the process rejected the applicant's alibi.

Concerning the Stevens shotgun, the Certificate issued by the Ballistics Expert reveals the following:

> "It was found to be an aged 12-gauge 'Stevens' single barrel shotgun that was in poor working order and was capable of firing firearm ammunition to discharge deadly missile as it was designed. The hammer can be adjusted so that it may strike with sufficient force to fire firearm ammunition. It is capable of discharging deadly missiles from the barrel by striking the hammer to fire the ammunition."

On that evidence the learned trial judge held quite correctly, in our opinion, that the weapon attracted the sanctions of Section 20(1)(b) of the Firearms Act and found the applicant guilty on Count 1 which charged him with Illegal Possession of Firearm. Guilty verdicts were also recorded on Count 2 charging Burglary and Count 4 charging Common Assault of Ruby Brown the mother of Hugh Brown. On Count 3 charging Robbery with Aggravation he quite correctly found the applicant not guilty. There was no justification for including such a count in the indictment. Count 2 should properly have charged Burglary and Larceny. Instead, the Larceny was upgraded to become Robbery with Aggravation. The evidence on which that charge was based was that Mr. Brown discovered, after the applicant had fled, that a US$2 note was missing from his pants pocket in his room. No one saw the taking so no element of robbery was present. Nothing is to be gained by preferring an

indictment which cannot be supported by the evidence at hand.

We see no reason on which the learned trial judge's treatment of the evidence or his conclusion can be faulted. The question of the sentence will be dealt with later.

R. v. CHRISTOPHER BROWN

At about 3:30 a.m. on December 26, 1986, Mr. Donald Wheatley, while in bed, heard a voice outside demanding that he open the door and threatening to shoot his way in by M16 and Uzi. Mr. Wheatley turned on the light and opened the door and in came this applicant, whom he had known for about a year as "Wayne" and "One-O-T". Another intruder stood behind the applicant on the step. In the applicant's hand was a short gun. He queried more than once "Do you know me" to which Mr. Wheatley replied "No". Thereafter he told Mr. Wheatley to lie on the floor face down and when he did so the applicant placed a pillow on Mr. Wheatley's head. The applicant then demanded of him where was the US money that he had and refused to accept Mr. Wheatley's denial that he had any and told him so. The applicant kept moving about the room and the witness seized the opportunity to steal glances at him which he described as "I prips him, I just barely prips him like this". He saw the applicant take down his black pants from behind the door and help himself to $500 from the wallet which was in the pants. The applicant then took a tape recorder, an electric iron, a gold Seiko watch and a head phone. Next he emptied the witness' travelling bag into which he placed the loot and while leaving he cautioned, "Hey, boy don't look on me you know". Finally, he told the witness to kick the door. This was done and he left.

On the question of Mr. Wheatley's denying to the

applicant that he knew him, he explained that he did so to avoid being hurt because the applicant had the gun pointing at him.

He described the applicant thus:

> "I saw his face. He did have in eas'ring and he had two crown in his mouth."

Constable Herbert Henry, to whom Mr. Wheatley made his report at the Elletson Road C.I.B. Office, had warrants issued on 28th December, 1988, for the arrest of Wayne o/c One-O-T, whom he knew before. On January 20, 1989, he executed the warrants on the applicant at the Kingston Public Hospital where he saw him in a bed. After caution the applicant said, "A Buttery force me go pon dem works deh".

At the close of the prosecution case, the applicant elected to say nothing but called his father to set up an alibi viz. that he was at home at the material time.

After a careful examination of the evidence Morris, J. (Ag.), having focussed his attention on visual identification as the live issue in the case on August 16, 1989, rejected the alibi and convicted the applicant on the two counts -

Count 1 - Illegal Possession of Firearm

Count 2 - Robbery with Aggravation.

There is no basis on which the learned trial judge's treatment of the evidence or his conclusion can be disturbed.

SENTENCE

The sentences imposed on Earl Howatt by Theobalds, J. are as follows:

Count 1 - Illegal Possession of Firearm - 10 years imprisonment at hard labour.

Count 2 - Robbery with Aggravation - 3 years imprisonment at hard labour.

Count 4 - Common Assault - 2 years imprisonment at hard labour.

Christopher Brown was sentenced as follows:

Count 1 - Illegal Possession of Firearm - 5 years imprisonment at hard labour.

Count 2 - Robbery with Aggravation - 7 years imprisonment at hard labour.

Our experience in this Court tends to show that on a first conviction for illegal possession of a firearm the sentence ranges between five and seven years imprisonment depending upon the nature of the firearm. In keeping with such a policy a person convicted for the possession of a high-powered automatic weapon would receive a longer sentence than one in possession of a home-made shot-gun which could be discharged only with some ingenuity or one in possession of a defective firearm which required some adjustment to render it functional.

In both the cases under review a householder was attacked in his house but in neither case did the intruder discharge his firearm. The fact that the firearm was recovered in one case but not in the other would not, in our view, constitute of the former, a more serious crime, than the latter. What is being punished is the crime of illegal possession.

It is our view that trial judges should endeavour to impose comparatively similar sentences for similar offences. Where there is an extremely wide departure from this principle of uniformity, the person who receives the higher sentence might be excused if he harbours a sense of grievance engendered by the lack of uniformity and proportionality in the system of sentencing.

We think, therefore, that the sentences passed upon Mowatt in respect of illegal possession of firearm and Burglary are manifestly outside the normal range. The substantive offence was Burglary and Larceny, a serious offence which, if properly proved, should attract a minimum sentence in excess of three years. On the other hand a sentence of ten years imprisonment for illegal possession of a firearm, in the circumstances of this case, was excessive.

We must do our best to harmonize the sentences in these two cases.

The applications for leave to appeal against sentences are allowed in part. The sentence of ten years at hard labour passed on Mowatt is varied to a sentence of five years imprisonment at hard labour. His other sentences remain unaffected. All his sentences will commence on 8th March, 1989.

Brown succeeds to the extent that his sentence of seven years imprisonment at hard labour is varied to a sentence of five years imprisonment at hard labour which together with the other sentence will commence on 16th November, 1989.

The result is that both will serve five years imprisonment for the similar offence of illegal possession of firearm which we think is appropriate in the circumstances of these cases.