J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 20 of 1974

BEFORE: The Hon. Mr. Justice Edun, J.A.
The Hon. Mr. Justice Graham-Perkins, J.A.
The Hon. Mr. Justice Hercules, J.A.

REGINA V. JOSEPH PAT TENN

H. Munroe, Q.C., and H.G. Edwards, Q.C., for the appellant.

Chester Orr, Q.C., and F. Smith for the Crown.

May 28, 29, June 2, 1975

GRAHAM-PERKINS, J.A.: The applicant was convicted before Wilkie, J., on two counts of an indictment which charged shooting with intent and having in his possession a firearm with intent to endanger life. He was acquitted on a third count which charged wounding with intent. The first count alleged that the applicant shot at Lascelles Kerr with intent to do him grievous bodily harm. The second count alleged that the applicant wounded Cecil Gray with intent to do Lascelles Kerr grievous bodily harm. It is on this second count that the jury returned a verdict in favour of the applicant. The third count alleged that the applicant had in his possession a firearm with intent, by means thereof, to endanger life.

The applicant challenges his conviction on the first and third counts on the ground that the verdict on the first count is inconsistent with the verdict on the second count with the consequence, firstly, that the verdict on the first count cannot be allowed to stand, and secondly, that since the third count was inextricably tied to the first and second counts the conviction on that count would also be incapable of being sustained.

In order to appreciate the applicant's complaint it is necessary to identify and describe the precise factual situation which emerged from the evidence adduced by the Crown, through Lascelles Kerr and Cecil Gray,

in support of the indictment. The applicant operates a bar and restaurant on Lyndhurst Road in Kingston. At about 7.30 p.m. on April 19, 1973, Kerr was in the bar having a drink when Gray entered and ordered a pack of cigarettes. The applicant told Gray that the price of the cigarettes was 30 cents whereupon there followed a dispute between the applicant and Kerr, the latter insisting that the price of cigarettes had not been increased. The applicant produced a newspaper containing a news item in support of his right to charge 30 cents for a pack of cigarettes. This Kerr rejected and thereupon the applicant folded the newspaper and used it to strike Kerr on his face. The applicant moved toward another part of the bar and Kerr threw a bottle at him hitting him on his head. On being hit the applicant said: "A soon come. A soon come." He entered the section of the premises housing the restaurant and returned to the bar almost immediately carrying a gun. He aimed this gun at Kerr and fired a shot. Happily for Kerr the shot did not find its intended mark and he was able to leave the bar. Thereafter Kerr heard two more shots. Gray was not, however, so fortunate as Kerr as the shot intended for Kerr inflicted a somewhat severe wound on Gray. These then were the circumstances that gave rise to the three counts in respect of the first and third of which the jury returned verdicts adverse to the applicant.

During the initial submissions advanced by Mr. Munroe on behalf of the applicant it appeared to us that the verdict on the second count was not in any way inconsistent with that on the first count if it were, on the evidence, open to the jury to take the view that they were unable to say which of the three shots fired by the applicant had caused Gray's injury. Indeed a careful examination of the learned trial judge's summing-up reveals that he, too, must have formed that view, albeit by reason of an understandably imperfect appreciation of the evidence of Gray and Kerr. For example, the learned judge said:

"It is a matter entirely for you Mr. Foreman and

"members of the jury as to whether you accept the evidence of this man Kerr, and Gray because the effect of their evidence is that without any sort of provocation at all, this man, the accused, came up with this gun after they had this altercation about cigarettes, he slammed him in his face with the 'Star' and when he moved away Kerr threw a bottle and struck him and he said he [illegible] and he won't away and returned with a gun and pointed it at Kerr and fired a shot at him - fired shots at him, and in the course of which Gray got injured."

This is one of three references in the judge's summing-up to shots fired at Kerr by the applicant. As Mr. Munroe's submissions developed, however, it became clear, from the evidence, that only one shot was fired at Kerr and that it was that shot, and no other, that found its mark on Gray. Now let it be observed that the first and second counts alleged precisely the same intention, i.e., an intention to inflict grievous bodily harm on Kerr. If, indeed, the jury were unable to say which of several shots fired by the applicant caused the wound to Gray they would, clearly, have been justified in saying: We are satisfied, in respect of the first count, that the accused shot at Kerr with intent to do him grievous bodily harm, but in respect of the second count we are not satisfied that the Crown has established that it was a shot fired at Kerr that wounded Gray.

When once it is resolved that one shot was fired at Kerr and that it was that shot that wounded Gray the question arises: Is a verdict of guilty on the first count which charged that the applicant discharged a bullet from a gun aimed at Kerr with intent to do him grievous bodily harm necessarily inconsistent with a verdict of not guilty on another count which in effect alleged that by the very act with which the first count was concerned a wound was inflicted on Gray with precisely the same intent, i.e., to do Kerr grievous bodily harm? Before answering

this question we advert to the following passage in the judgment of the English Court of Appeal, Criminal Division, in R. v. Durante (1972) 3 All E.R. at p. 966.

> "In R. v. Hunt, Lord Parker, C.J., cited from the unreported case of R. v. Stone which was tried in 1954 and quoted what he described as a useful passage from the judgment of Devlin, J., in regard to the approach that the court should adopt in cases of inconsistent verdicts. This is how it reads:
>
> > 'When an appellant seeks to persuade this court as his ground of appeal that the jury has returned a repugnant or inconsistent verdict, the burden is plainly on him. He must satisfy the court that the two verdicts cannot stand together, meaning thereby that no reasonable jury who had applied their mind properly to the facts in the case could have arrived at the conclusion, and once one assumes that they were an unreasonable jury, or that they could not have reasonably come to the conclusion, then the convictions cannot stand but the burden is on the defence to establish that.'
>
> We do not know whether this Court of Appeal has ever previously formally adopted the view there expressed by Devlin, J., that the burden is on the appellant to show that verdicts on different counts are not merely inconsistent but are so inconsistent as to demand interference by an appellate court. Be that as it may, for our part we are satisfied that it is right and we now formally express our approval and adoption of that proposition."

The foregoing extract from the judgment of Devlin, J., has, on at least one occasion, been cited by this Court and, like the English Court of Appeal, we now adopt it as indicating the correct approach to verdicts alleged to be inconsistent.

On the evidence in this case we have not the least hesitation in holding that the applicant has discharged the burden that undoubtedly lies on him of showing that the verdicts on the first and second counts are, ex necessitate, inconsistent. We think that "no reasonable jury who had applied their minds properly to the facts in the case could have arrived at the conclusion" reached by the jury in this case. Apart from one factor both counts depended on precisely the same factual situation. In respect of each of those counts the Crown was required to establish that the applicant had levelled a firearm at Kerr and had discharged a bullet at him, and that at the moment when the applicant discharged that bullet there was present in his mind an intention to inflict grievous bodily harm on Kerr. In addition to that situation the Crown was required to establish, in relation to the third count, that the bullet discharged by the applicant from the gun aimed at Kerr wounded Gray. There was here no question as to whether or not Gray received a wound, or whether or not that wound was caused by a bullet discharged from a gun fired by the applicant. The evidence on those matters was clear and unchallenged. Indeed, the applicant admitted that Gray was wounded. The only justification, therefore, for a verdict of not guilty on the second count was that the jury were not satisfied that the applicant intended to do grievous bodily harm to Kerr. In that event a verdict adverse to the applicant on the first count predicated on the existence of a particular intent must, inevitably, be in violent conflict with a verdict which, in precisely the same factual situation, denies the existence of that very intent.

Mr. Orr contended that the verdict of not guilty on the second count was, on the evidence, quite erroneous and must have resulted

from certain defects in the summing-up. This, he argued, could not, however, affect the validity of the verdict on the first count. By way of answering that submission we wish to adopt, as particularly apposite, the following passage from the judgment of Edmund Davies, L.J., (as he then was) in R. v. Durante (ibid) at p.966:

> "It may be that the irrationality of the jury is manifested by their acquittal on the second count and that a finding of guilt on the first count was an entirely rational one, being solidly based on the evidence. But we are here in the realm of conjecture. We are satisfied that no reasonable jury who had applied their minds properly to the facts in the case could have arrived at the two different conclusions that this particular jury did. It may be, as we say, that they were guided to some extent and perhaps applied in a different way from that intended by the trial judge his observations in the course of his summing-up that the two charges 'do not necessarily stand or fall together'. However that may be, and whatever the explanation for the jury arriving at such conflicting verdicts we are satisfied that in the result the conviction of this man on the first count cannot be regarded as either safe or satisfactory."

It must follow, too, that the conviction on the third count must go.

Finally, we observe that the defence advanced by the applicant was self-defence and defence of property. The jury, by their verdict on the first count, quite obviously rejected both limbs of the applicant's defence. We find it unnecessary to deal with the criticisms advanced by Mr. Edwards on this aspect of the judge's summing-up as those criticisms are, in our view, entirely devoid of merit.

In the result we treat the application for leave to appeal as the appeal which we allow. The convictions and sentences are set aside.