JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 51 of 1974

BEFORE: The Hon. Mr. Justice Edun, J.A.(Presiding).
The Hon. Mr. Justice Graham-Perkins, J.A.
The Hon. Mr. Justice Robinson, J.A.

R. v. Andrew Yee Barnes
Albert Jack and others

Mr. F.M.G. Phipps Q.C. for Andrew Yee Barnes.

Mr. Hugh Small for Albert Jack.

Mr. Chester Orr Q.C., with Mr. N.L.V. Sang for the Crown.

20th and 21st January, 1975
16th May, 1975

EDUN, J.A.:

The applicants Robinson, Sterling, Jack and Barnes were each convicted on five counts of robbery with aggravation and were each sentenced to 18 years imprisonment at hard labour on each of those counts; sentences to run concurrently. Sterling alone was convicted on another count of unlawful wounding and sentenced to 3 years imprisonment at hard labour; sentences also to run concurrently. They have all applied for leave to appeal against their convictions and sentences. Before us, learned attorney for Jack abandoned his applications for leave to appeal against convictions but pursued his applications for leave to appeal against sentences only.

The case for the Crown was that Robinson, Sterling, Christie and Jack, on October 31, 1972 entered a bank at Manor Park Plaza, robbed two special constables, each of a gun, and three cashiers of the bank of monies totalling about $15,500. Christie was found not guilty and discharged. There was abundant evidence of identification of those convicted and there were no complaints as to the summing-up of their cases to the jury. We have examined the facts and circumstances and we see no merits in their applications for leave to appeal against convictions and so we refuse such applications. So far as sentences are concerned we would consider them later in our judgment when we deal with Jack's applications for leave to appeal against sentences.

Barnes's applications for leave to appeal against convictions merit entirely different considerations. The case against him was that he drove the car with the robbers to the vicinity of the robbed bank, awaited the commission of the robbery and then drove away the car in which the robbers succeeded in escaping from the bank with the stolen guns and monies. Barnes was apprehended the same day soon after the robbery and he gave a statement to Detective Sergeant Hohn. That statement was put in evidence as part of the case for the prosecution against Barnes. In it Barnes said that about 7.30 that morning, after he dropped some relatives of his, in his car, he returned home and saw Robinson at the piazza of his father's shop. He was leaving with his father when Robinson asked his father to allow Barnes to drop him in town. Barnes did so and later he took Robinson by Meadowbrook High School where he saw Sterling and his two friends. Robinson met them; they were in a blue Cortina car and on Robinson's request, Barnes carried them in his car towards Manor Park. But before he reached there, they came out and they walked towards the Plaza at Manor Park.

Continuing in his statement, Barnes said he came out of his car "barefeet to check on the engine". He went to Mr. Yap's shop in front of the Plaza to place a bet on a horse. After that, he drove his car in the Plaza and was reading an English race-form. "So while I was reading I saw a blue seam policeman run out of the Plaza so I start the car, now, ready to go away. A white station waggon was in front of me. I stopped behind him as I did not reach the main road. After that I see these same four boys come back in the car with a brown paper bag. One of them show me a gun handle and say "Drive," and I drive straight down. Them say I must turn off Constant Spring Road and I turn off. Them say drive back to Meadowbrook School and find one of my nearest friend that I have there. I went to No.12 Randwick Drive and Doggie /Robinson/ come out and open the gate and the other three men that was in my car say I must reverse in and say we must tell the maid say the whole a we go sell ganja. I know the maid so I called her and she opened the door and I tell her say the whole a we go sell ganja and we going share up the money there. And them carry me round by the back a the room where them say I must help them share the money. I help them share it. Lee /Sterling/ and fih him two friends

get fih them share and Doggie left his share in the house. Him say me must tell the girl say ah me left this money there and him will come back fih it ..... On the way to St. Cecilia I see me father and him stop me and say police looking for me. I come up Constant Spring and is right deh so I end up."

Mrs. Eloise Campbell said that after she was robbed of money she saw the robbers run to a car which was at the exit of the Plaza. One of them had a paper bag with him with the money and one still had a gun in his hand. They went into the car which was in the driveway at the exit of the Plaza; it moved off immediately the men went in.

Christopher McCallum said that after the robbery he ran inside up to the entrance door of the bank and he looked at the men as they ran. They ran straight to the exit of the Plaza to a car. They entered and the car moved off.

Apart from Sgt. Hohn giving evidence about the statement he took from Barnes, the Sergeant said that before he had known anything about the robbery he saw Barnes drive a car with the robbers in it down the street. Later when Barnes came to Constant Spring Police Station he was driving the same car but that time with no other persons in it.

Fay Stephenson said she worked at the premises of Leslie Lyew and about 10.45 that morning Barnes came to the house alone and told her he was going round the back of the house to a washroom. She saw his car in the car port. She was accustomed to seeing him at the house. She went to look after her lunch and she heard a news flash. After she was finished preparing her lunch, Barnes called her and said he was going up the road and he would soon be back. He went through the gate walking and while he was away she heard talking in the washroom. Barnes returned about fifteen minutes later. Three persons from the washroom came out and went to him when he was alone in the car. The car drove off with them. Barnes returned about 11.45 a.m.

She was later in the washroom ironing when she saw Robinson and Barnes counting money. Barnes asked her for a paper bag. She gave him one. She saw him put some of the money in the bag and he told her he left a parcel in Lyew's bedroom under the bed. Barnes and Robinson drove off. Then she made a telephone call to Lyew from the neighbour.

She returned to Lyew's premises, looked under the bed and there she saw the paper bag, opened it and later Detective Grant came and took possession of it. Money in the bag was identified as part of the money robbed from the bank and in court Fay Stephenson was able to identify the paper bag which she gave Barnes.

Barnes made an unsworn statement in his defence; he said:

> "I live at 58 Mannings Hill Road. I am a grocery helper. I didn't rob any bank. I didn't rob any gun from the police. When I got the message I went straight to the Constant Spring Police Station and I told them what I know about it.

On the basis of that statement, the learned Chief Justice summed-up the case against Barnes to the jury that he Barnes admitted that the statement he made to the police was made freely and voluntarily and adopted by him.

In the appeal, learned attorney for Barnes submitted that on the totality of the facts there was no evidence that Barnes was a party to the common design to rob the bank, nor was he a party, aiding and abetting any robbery. He urged that after the robbery was committed Barnes may well have known of the robbery and may be guilty of receiving stolen goods or of being an accessory after the fact to the robbery. However, Barnes was not charged with those offences; in his statement from the dock Barnes admitted making the statement to the police, freely and voluntarily and in effect his defence was a denial of the robbery and that any association with the other co-accused was innocent. He further submitted that the prosecution made Barnes's statement to the police part of their case and had it not been for that statement there would have been no evidence showing any association of Barnes with the other co-accused before the robbery. The exculpatory part of that statement - that is, an innocent association with the co-accused before the robbery - cannot be ignored or brushed aside.

So far as the summing-up was concerned, learned attorney for Barnes submitted that the learned Chief Justice did not leave Barnes's defence to the jury. Instead, he urged, that the jury were told that if they accepted that Barnes acted under duress or was in reasonable doubt that he so acted, they were to acquit him. That direction, he claimed,

was inadequate because the jury may well have accepted that Barnes acted under duress when he drove the robbers away from the scene of the crime, yet Barnes's subsequent conduct as proved in evidence could not make him a party to the robbery. In those circumstances he urged that Barnes's convictions of robbery with aggravation could not stand.

On the other hand, learned attorney for the Crown submitted that the prosecution sought to prove Barnes's participation in the crime from evidence of his statement and of his subsequent conduct after the robbery. Apart from his denial, it was recognised that Barnes's defence was that his presence at or near the scene of the crime and his association with the co-accused, before the robbery was committed, was innocent. Learned attorney claimed that there was no misdirection in the summing-up as the learned Chief Justice made it clear to the jury that the only way they could find Barnes guilty of the offences as charged was, if and only if they felt sure that Barnes was a party to the robbery. He discussed the evidence and referred us to certain passages in the summing-up. Even assuming, in the alternative, that a point in favour of Barnes was made out, a reasonable jury properly directed would arrive at the same conclusion of Barnes's guilt. To this latter submission, learned attorney for Barnes replied that the proviso cannot be applied where a cardinal defence has not been put to the jury.

Needless to say, we have again examined the transcript of the summing-up and the facts and circumstance, more especially adverting to the points in submissions, relating to Barnes and we proceed now to state our views.

Accessory after the fact

Barnes was not charged either with receiving or with being an accessory after the fact to the felony and, in our view, there was no necessity for the learned Chief Justice to explain or direct the jury on the law relating to those offences with which Barnes might have been charged. The questions which were made clear to the jury were:-

1 their correct approach to the evidence for and against Barnes, concerning the charges of robbery,

2 whether there was sufficient evidence of those charges against Barnes,

3 what Barnes's defence or defences were, and

4 that there should be no conviction of Barnes on the charges of robbery unless they felt sure of his guilt.

We see it no part of the duty of the learned Chief Justice to tell the jury that Barnes might well be guilty of receiving stolen goods or of being an accessory after the fact, if all of Barnes's defences could fairly and adequately be dealt with, without irrelevant considerations (having regard to the charges) being referred to.

Duress or compulsion. Innocent association with the robbers.

It cannot be disputed that Barnes did say in his statement to the police: ".... One of them show me a gun handle and say 'Drive' and I drive straight down .... Them say drive back to Meadowbrook ...."

Without the statement, it cannot be disputed that -

1 after the robbers had left the bank with the loot,
2 immediately after, they were seen running to and entering in
3 (according to the evidence of Eloise Campbell and Christopher McCallum) a waiting car,
4 Barnes was the driver of that car, and
5 the robbers succeeding in making good their escape with the loot,

there was prima facie evidence against Barnes for robbing the bank. In putting Barnes's statement to the police as part of the case for the prosecution, the conduct of the case was eminently fair and at the same time Barnes's own words were being relied upon as placing him at the scene of the crime. In leading the evidence of Fay Stephenson the prosecution sought to establish that Barnes could not possibly have acted under duress or compulsion if the jury believed that Barnes drove his car with the robbers inside, assisted them to escape, and took part in a sharing of the loot, with willingness and deliberation.

Let us for argument sake, assume as learned attorney for Barnes contended, that the learned Chief Justice only dealt with Barnes's defence as acting under duress or compulsion and that he had not referred to Barnes's defence that his movements with the robbers before the robbery, constituted an innocent association. If the jury rejected Barnes's conduct after the robbery as being without duress or compulsion, they were left, legitimately to consider reasonable inferences from proved facts.

For example, the facts that:-

1 the three of the four persons Barnes took to the vicinity of the robbed bank were in fact three persons who robbed the bank,

2 so soon as Barnes "saw a blue seam policeman run out of the Plaza, he started the car ready, now, ready to go away", and

3 very soon after Barnes was witnessing a sharing of the loot,

were most remarkable coincidences from which as reasonable persons they would find themselves compelled to infer that Barnes's movements with the robbers before the robbery were part of a plan on behalf of all of them to rob the bank. That inference, if drawn by the jury and which they were entitled reasonably to draw from the state of the evidence, would destroy the exculpatory parts of Barnes's statement.

Cave J., in R. v. Coney (1882) 8 Q.B.D. 534 said:

> "Now it is a general rule in case of principals in the second degree that there must be participation in the act, and that, although a man is present whilst a felony is being committed, if he takes no part in it, and does not act in concert with those who commit it, he will not be a principal in the second degree merely because he does not endeavour to prevent the felony, or apprehend the felon .....
>
> Where presence may entirely be accidental, it is not even evidence of aiding and abetting. Where presence is prima facie not accidental it is evidence, but no more than evidence for the jury."

The above statement is still good law. If the evidence against Barnes was conduct free from duress or compulsion, then it was a question of fact for the jury whether Barnes's presence at the scene of the crime accompanied by his acts of aiding and abetting constituted an innocent association with the robbers or guilty participation in the crime as charged.

After discussing the evidence of Fay Stephenson, the learned Chief Justice told the jury at p.172, thus:-

> "Now, the circumstances she described as to what was done by the accused, Andrew Yee Barnes, on that occasion, assuming that you believe it was he, does that strike you, members of the jury, as evidence of conduct of a person who was acting because of fear - not of his own free will?

> If it is consistent with the statement he gave, that those were the circumstances under which he was involved with this money, then, of course, as I say, you must acquit him and if you are not sure about it you must acquit him as well."

However, it was contended that this was not a case where Barnes was compelled at gun point before the robbery to drive the robbers to the bank, await commission of the robbery and then drive the robbers away. In Barnes's statement, he was saying that he drove the robbers to the vicinity of the bank, not knowing of their plan to rob the bank. As we have stated, learned attorney for Barnes contended that that part of Barnes's defence was not put to the jury.

In the summing-up of the case concerning Barnes, the learned Chief Justice said at p.179, thus:

> "If, members of the jury, from the totality of the evidence you find that there was a plan made by five men to rob the bank and a part of the plan was that four were to go into the bank armed to get the money, to subdue the special constables who it was known was there on guard and to take away the guns and to deprive them of them permanently, and part of the plan was that one was to sit in the car ready to drive away as soon as the loot was obtained, and it in fact took place, and they were driven away from the scene by that man in the car, then if the plan is as I have described it and that is what you find and you feel sure about it, the man in the car is guilty of the offences committed by the others in the bank even though he didn't go in there. That is the law so it depends on what you find. Can you infer that from all the evidence that you have heard? Is it a reasonable inference? And, of course, if at the end of the day the circumstances are equally capable of an innocent interpretation on the evidence as of a guilty interpretation, then so far as the accused Barnes is concerned, you must give him the benefit of the doubt and deal with it on the view that he is not guilty. But if from the totality of the evidence the only reasonable inference was that there was a plan which was made beforehand to rob this bank by all five men, including the accused, Barnes, and that he was there and that his role was to drive the get-away car having taken them to the scene, waited for them to come out of the bank to drive them away and he drove away and he afterwards participated in the sharing of the money, then it is ample evidence on which you can find him guilty of the offences

committed in the bank. That is the basis on which the prosecution press the case against the accused. If that is what you find and you feel sure about it, you may convict the accused of all the charges of robbery on the indictment against him. If for any reason you do not feel sure you must acquit him." (underlining mine)

From the above extract, it is clear to us that the learned Chief Justice was not confining the defence or defences of Barnes as only depending upon duress or compulsion or the denial of the robbery. In particular, he dealt adequately and fairly with Barnes's complicity with the plan to rob the bank; and also dealt with Barnes's exculpatory statement that is, of his being in innocent association with the robbers beforehand; he not knowing that they had planned to rob the bank.

For the reasons we have given, we are of the view that the criticisms of learned attorney for Barnes are unfounded. We hold that the directions of the learned Chief Justice are unassailable. We find no necessity of considering the application of the proviso. Barnes's application for leave to appeal is refused.

Sentences

Learned attorney for Hubert Jack submitted that the sentence of 18 years imprisonment at hard labour was manifestly excessive. He urged that Jack was young, had no previous convictions and his antecedents established hopes for his rehabilitation. At the date of Jack's conviction, the maximum period of imprisonment for such crimes was 21 years. He urged that the learned Chief Justice had allowed the atmosphere created by the addresses of other attorneys (who were urging in mitigation that it was a good thing to rob a bank) to cloud his judgment. Furthermore, he continued that the learned Chief Justice did not look at the antecedents of each prisoner but inflicted the same measure of punishment simply because each took part in a joint enterprise. So too, it could not be said that Jack was a ringleader or that he shared in any proceeds of the crime.

The facts and circumstances of the case have revealed careful, deliberate and organised planning. Lethal weapons were used in the ventures. A policeman was in fact wounded and it made no difference to the criminals that policemen were on duty to guard not only the property

of the bank but to ensure the safety of innocent members of the public going about their ordinary business unmolested. We are of the view that the learned Chief Justice was correct in his approach to sentences in this case to pay particular emphasis on deterrence. "Where there is a particular emphasis on deterrence, the sentencer is justified in ignoring mitigating factors related to the personal circumstances of the offender, and may thus pass the same sentence on co-defendants who are equally responsible for the offence, even though one has a good character and the other a substantial criminal record." See Thomas, Principles of Sentencing, p.44. The learned Chief Justice could well have inflicted the maximum period of imprisonment in a case like this.

For the reasons given, applications for leave to appeal against sentences of Jack and the others are refused.