NM LS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 142/2006

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A. (Ag.)

DEVON CAMPBELL
V.
REGINA

Hugh Wilson and Delano Franklyn, instructed by Wilson Franklyn Barnes for the Applicant.

Ms. Deneve Barnett, on Fiat for the Crown.

30th June, 2008

Oral Judgment

COOKE, J.A.

1. The applicant Mr. Devon Campbell was on the 27th July, 2006, in the High Court Division of the Gun Court, convicted of two counts namely illegal possession of firearm for which he was sentenced to five years and on count two shooting with intent for which he was sentenced to seven years. Sentences were ordered to run concurrently. The single judge refused leave to appeal and the application has now been renewed.

2. The factual account is that on the date alleged in the indictment, the 13th January, 2005, the virtual complainant was at his home in the Eltham Park area in the parish of St. Catherine. Apparently he lives along an alley. At about 1:45 p.m. on that day he received a telephone call which prompted him to go out to

his gate. While he was there, he saw the applicant and another person coming down the lane which led by his house. He was apprehensive and he stopped in his tracks waiting for these men to pass. They passed with the applicant in front. From the evidence it would appear that the virtual complainant was in a heightened state of expectancy as he suspected that something would happen. He stood at his gate. He watched the applicant who having passed his gate, turned back, pointed a gun at him, fired a shot and then ran into his barber shop which was located at his residence.

3. Now the issue in this case turns on the question of identification. The learned trial judge fully recognized this, warned himself and subjected the evidence to the usual type of analysis which is required in a case like this. This can be found on page 47 of the transcript where the learned trial judge went through the various elements pertaining to opportunity for the applicant to have been properly identified.

4. It was bright daylight, there was nothing obscuring the applicant's face and he was known to the witness before for over some four years. After viewing the quality of the identification evidence, the judge was satisfied, so he felt sure and pronounced a verdict of guilty.

5. The applicant in his renewed application advanced three grounds of appeal. The first two grounds can be disposed of in a very summary manner. Ground 1 stated:

> "The learned trial judge erred in law in finding that the appellant was in possession of a firearm which he used to shoot at the complainant to cause him grievous bodily harm, in the absence of any specific description by the complainant of the firearm."

It is true that the virtual complainant did not identify the trigger or any of the other parts of the firearm. This court cannot but be cognizant of the fact that regrettably in our dear country today, everybody knows what a firearm looks like. He gave evidence about being shot at. Further there was evidence of what the investigating officer regarded as bullet holes in the structure of his house and there were war heads which the virtual complainant handed over to the police which were subject to ballistic investigation. Ground 1 can be said to be hopeless.

6. In respect of ground 2 it said:

> "The learned trial judge erred in law by failing to warn himself that mistaken witnesses can be convincing witnesses and that mistakes in recognition cases are made in a case of purported recognition of friends or close relatives."

It has to be recognized that this is not the case of a judge sitting with a jury. It is a case of a judge sitting alone. It is not necessary for the judge to direct himself in the fulsome manner in which he would do with a jury. However, what is imperative is that the judge should demonstrate by his analysis of the evidence that the appropriate and relevant judicial principles are applied to his examination of the evidence.

7. Ground 2 deals with the issue of the judge not demonstrating verbally that he warned himself against mistakes in recognition. However, an examination of the transcript reveals that what he said makes it quite clear that he was well aware and applied the principles pertinent to mistakes in recognition cases. On page 45 of the transcript, counsel for the applicant who appeared in the court below, brought to the attention of the learned trial judge the **Turnbull** case and reminded the judge that an identifying witness can be no less mistaken even if it was a recognition case. Counsel went on to illustrate this from a personal experience where apparently he touched a lady who he thought was a particular lady. It turned out not to be so and he escaped a beating. The learned trial judge at page 50 dealt with this issue recounting the example given by counsel Mr. Kinghorn. He said:

> "Counsel gave an example of touching some female, I don't know for how long he was seeing her, maybe few seconds, but luckily for him he was spared, but he was nearly beaten up. In this case I am prepared to rely on the witness Harris, I find him as a witness of truth."

This paragraph, when read in conjunction with the submissions that were made to the learned trial judge, demonstrates in this court's view that he was well aware of the danger of mistakes in recognition cases.

8. Ground 3 of the appeal pertains to the absence of an identification parade. Now let it be said that there is no dispute in this case that the virtual complainant knew Juggy (the applicant). There is no dispute in this case that

the Juggy whom he said he knew was the Juggy who was in the dock. It is not as in the case, helpfully provided by Counsel, of **Irvin Goldson and Devon McGlashan** Privy Council Appeal No. 64 of 1988, delivered March 23, 2000 where there was some dispute as to the honesty of the witness as to whether he knew the accused.

9. So in this case we are of the view that in the particular circumstances the identification parade would serve no useful purpose, because the significant debate was whether or not the virtual complainant was mistaken when he fingered Juggy. The learned trial judge zeroed in on the critical issue and it is worthwhile to quote from his summing up:

> "I now come to the point where counsel placed heavy submission that the accused was not offorded [sic] the opportunity to be placed on an ID parade. Now, it is true that the first time that the accused and the complainant are coming face to face since that incident in January last year was in these courts and I bear in mind authorities which warn against dock identification. However, I am satisfied that on the circumstances of this case and on the evidence accepted, it is safe to say that it is not because the complainant is seeing the accused in the dock why he picks on him and say he was the man."

This excerpted passage demonstrates that in the particular circumstances of this case, the approach of the learned trial judge cannot be successfully criticized.

10. Accordingly, the application for leave to appeal against conviction is refused. The sentences are to commence on the 27th October, 2006.