

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NOS. 110 & 125/2006**

**BEFORE:           THE HON. MR. JUSTICE COOKE, J.A.  
                          THE HON. MR. JUSTICE HARRISON, J.A.  
                          THE HON. MRS. JUSTICE HARRIS, J.A**

**MALCOLM HIGGINSON  
KEVIN MANHERTZ v. REGINA**

**Cecil J. Mitchell, for the Applicant Higginson**

**Mrs. Valerie Neita-Robinson for the Applicant Manhertz,**

**Mrs. Tracey-Ann Johnson, Crown Counsel for the Crown.**

**November 30, 2009**

**ORAL JUDGMENT**

**COOKE, J.A.**

1. On the 30<sup>th</sup> June 2006, the two applicants Malcolm Higginson and Kevin Manhertz were convicted in the High Court Division of the Gun Court in Kingston. The indictment on which these two applicants were charged contained five counts. The applicant Higginson was convicted on all five counts and Manhertz was convicted on three counts, namely, counts 3, 4, and 5.

2. The circumstances of this case can be shortly stated as follows: On 30<sup>th</sup> June 2003, Miss Paulette Harrilal was at her family business enterprise. She was in the office when she saw a vehicle enter through the front gate, some 20 feet away. From this vehicle emerged two men. One, Mr. Higginson, came to the sliding window of her office which she opened, and engaged her in an enquiry about the price for a prospective purchase of cement.

3. While this conversation was going on, she activated a buzzer to let in an employee and bursting through with the employee was the other man who had entered through the gate in the car. She was held up by this other man, who had a firearm, and he took from her some \$30,000.00 in cash. The two men reentered the motor car and drove off. At this point, Ms. Paulette Harrilal contacted the police, giving them the licence number of the motor vehicle, as well as a description that it was a white Toyota Vista. The police were now alerted and set off on their quarry, which was this motor vehicle. Somewhere in the vicinity of four o'clock, the vehicle was spotted and suffice it to say, there was a shoot out.

4. The Court will now deal with Mr. Higginson. The case against him does not rest solely or substantially on visual identification. Nonetheless, the judge was very careful in utilizing what may compendiously be described as the **Turnbull** directions. Ms Harrilal had, in the judge's view, adequate opportunity for making the primary identification, that is, the circumstances at the window

were adequate, and further, at an identification parade on the 16<sup>th</sup> July, she pointed out Mr. Higginson. There can be no complaint that the integrity of the identification parade can be smirched. Therefore, in respect of Mr. Higginson, when it came to primary identification and the identification parade, there was strong evidence. But, it did not stop there, for, when the police engaged the occupants of the car in a shoot out, seated in the back of the very car that had just participated in the robbery, was Mr. Higginson.

5. It is not, surprising therefore, that counsel could not find any matter of remotest substance to advance on behalf of Mr. Higginson. On count 1, he was sentenced to 10 years imprisonment for illegal possession of firearm; on count 2, 12 years imprisonment in respect of robbery with aggravation; on count 3 for shooting with intent, 15 years imprisonment; on count 4, 10 years imprisonment for illegal possession of firearm and on count 5, 2 years imprisonment for illegal possession of ammunition. His sentences were to run concurrently. It should be noted that Mr. Higginson seems to be a recidivist, in that, he had previously been convicted and sentenced for firearm offences.

6. Now to Mr. Manhertz. The evidence which the learned trial judge accepted was that there was a common design. Mr. Manhertz was the driver of the motor vehicle, and from the circumstances, the judge concluded that they were all in it together to shoot at the police. Mr. Manhertz himself was shot and here again, experienced counsel could find nothing to urge on the Court. Mr.

Manhertz was sentenced to 12 years imprisonment on count 3, 10 years imprisonment on count 4 and on count 5, 2 years imprisonment. In the final analysis, this renewed application (renewed in that a single judge had refused the application) is again refused, and the sentences are to commence on the 30<sup>th</sup> September 2006.