

NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 101/2006

**BEFORE: THE HON. MR. JUSTICE SMITH, J.A.
 THE HON. MR. JUSTICE HARRISON, J.A.
 THE HON. MISS JUSTICE G. SMITH, J.A. (Ag.)**

**KEVIN LEIGHTON
 v
 REGINA**

Appellant is unrepresented.

Miss Paula Llewellyn, Q.C., Director of Public Prosecutions and Mrs. Karen Seymour-Johnson, Crown Counsel for the Crown.

ORAL JUDGMENT

June 24, 2008

HARRISON, J. A.

1. The appellant was convicted in the Regional Gun Court in Montego Bay on an indictment which contained two (2) counts. The first count charged him with the offence of illegal possession of a firearm and the second charged him with the offence of robbery with aggravation. The learned trial judge sentenced him to ten (10) years imprisonment at hard labour on count 1 and twelve (12) years imprisonment at hard labour on count 2. The learned judge also ordered that the sentences should run concurrently.

2. The single judge who dealt with this matter refused the appellant leave to appeal so he has now renewed his application to the court. A most interesting case. The Crown relied on the main witness Mr. Casimir who seems to be of Haitian nationality and who the learned judge said did not speak too fluently in English. However he came across quite properly with the use of the language. He gave evidence that on the 1st of February, 2006 he was at his home washing his wife's car when a person approached him and said "freeze". He was ordered to put his hands on the car but he was still observing this person. He asked him for the keys for the car. Mr. Casimir told him that it was inside the house and the accused man said, "go fi di car key". As he walked off Mr. Casimir said the accused man put the gun to the back of his neck and marched him off inside the house. When he got inside, the applicant asked him "wey yu have in yah". He told him he has nothing. He then asked him "wey di car key?". He showed him where it was and the accused man told him to lay down. He went on the floor with his face down but he was still able to look around and he saw this man moving things; taking up his b-free cellular phone from the dresser. This was a one (1) bedroom apartment. He took up his Citizens Gold Watch, his Seiko Watch, his remote control off the dresser and from his left front pants pocket he took out a Thousand Dollars (\$1,000.00) , One Thousand Dollars (\$1,000.00) from his right front and Eight Thousand Dollars (\$8000.00) out of his wallet which was in his left back pocket. He also took up a Nokia phone and a flip phone. After taking these things the applicant put them in his pocket. He stepped over him, slammed the house door and went towards the car.

3. The applicant went into the car and Mr. Casimir got up, looked through his window and said this cannot go like this. He moved towards the car and grabbed him up whilst he was in it. At this stage he pulled the applicant out of the car and he held on to the left side of the waist where the gun was and a struggle ensued between both men. The applicant bit him on the right hand and while they were struggling he also bit him over on the shoulder. During the struggle the applicant man got frightened and then he heard a shot went off. By this time Mr. Casimir had the gun in his hand; he held it and shouted out for thief. The applicant ran off and citizens, who came down quickly, ran after the applicant. According to Mr. Casimir, he saw Mr. Robinson who happened to be a police officer who lived next door. The citizens held and brought back the applicant to where he was by the car. He saw Mr. Robinson and he gave him the firearm and said to him "Mr. Robinson, " a dis ya man ya try fi rob mi". The man was handed over to the police and Constable Francis arrested and charged him at Mount Salem Police Station.

4. Constable Robinson also gave evidence about being in his house and hearing this explosion. He went over to Mr. Casimir's home and saw Mr. Casimir, they called him Haitian, holding this firearm by the muzzle and he took it from him. Constable Robinson was given some information about the man who had robbed Mr. Casimir. He gave chase and caught up with the man in some grass. He was in a crouching position and Mr. Robinson shouted to him "Police", don't move. The man fell flat in the grass and he went up to him and held him. He asked him why he was running and the applicant said "ah some people a run mi down sah, a sey mi rob man". By this time

two (2) other men came up and Constable Robinson asked them to hold the applicant. He observed that his jeans pants was torn and there were teeth marks in one of his shoulders. They took him back to Mr. Casimir's house. When he approached the crowd, they took hold of the man and gave him some good blows. It seems that the applicant made an admission but the learned judge decided that he would have that portion of the evidence expunged from the record. He said he would not take that into consideration. Constable Robinson said the applicant was placed in a car, taken from the scene and he handed him over to Constable Francis along with the firearm. That is the case presented by the prosecution.

5. The applicant said he had spent some years in prison for something he did not do and what these people are saying is a lie. The reason why he went to Cornwall Court he said, is because a friend told him that work was being given away over there. On his way to Cornwall Court he saw some people bawling thief, thief and he ran away from them. They ran him down and started beating him and asked him "where the two man wey run pass him a while ago". He said he was brought back to Cornwall Court to a next group of people and that was when Constable Robinson held him and started to beat him. He said the people told Constable Robinson to let him go and let dem kill him and he allowed the people them to beat him then Constable Robinson put him in the complainant's car and told him to drive. He obeyed the instructions and he started to drive. He was told to press the gas and turn away from the other car and whilst on the road a jeep of policemen came up, stopped and he was handed over to the Police. From there he was taken to the Salem Police Station. Whilst he was there Mr. Casimir

came to the station with his wife and made the complaint that he had robbed him and that he bit the complainant. He said he knows nothing about all of this and he was then arrested and charged.

6. The learned trial judge in dealing with the issues came to the conclusion that identification was a very live issue in the case and that he is aware of his responsibilities that he has, to warn himself that honest witnesses do make mistakes. He said he also looked at the discrepancies and the inconsistencies in the evidence. On the issue of confrontation, he realized that situations like these are most undesirable and should be avoided lest they undermine the value of the identification evidence. He pointed out that Mr. Casimir had identified the suspect on the scene so he has to examine the circumstances of that identification. He said he looked at the opportunity Mr. Casimir had to identify the applicant and the first opportunity was when he came up to him and he heard someone shouted "freeze". He looked at him for about five (5) minutes, there was nothing there blocking his view and on the second occasion, whilst he was inside, he glanced on him while he was on the floor. He saw him taking away his things and that he could have seen him for another couple minutes while they were inside the house. He also said that while the man was in the car, he was able to take a good side view of him and he went and grabbed him, held him from behind and there and then he saw a mark in the head of the applicant. He said the applicant bit him and he also bit him, so he was able to see bite marks on the complainant. Whilst there in court, he was able to point out the marks at the back of the man's head. He said on the matter of confrontation, Constable Robinson said he caught the man and brought him back to

where they were. He reminded himself of the confrontation. What the learned judge is saying is that when Constable Robinson brought back the applicant, he said, this is the man. He asked the question, did Constable Robinson instruct Mr. Casimir to be there? He said no.

7. The learned judge rejected the unsworn statement of the applicant man. He said when one looked at the demeanor of the witnesses and in particular Mr. Casimir, he found him to be a simple, honest man and that he believed him and accepted his evidence as true. He said he accepted the evidence of Constable Robinson and he found that the identification was good. He also found that there was nothing to interfere with Mr. Casimir seeing the accused man for those five (5) minutes. The distance was good, the light was good and it was in broad day light. He also found that the mark in the back of his head was identified by Mr. Casimir in court. All these things he said pointed in one direction and one direction only and that was towards the applicant. He reminded himself of the dangers of visual identification, that mistakes are likely to be made by honest witnesses as outlined in the **Turnbull** case.

8. In our view, the learned trial judge clearly enunciated the law correctly, made proper finding of facts and we are satisfied that the applicant was properly convicted. The credibility of a witness falls within the domain of the trial judge and this court rarely interferes with those findings. We accept what Counsel for the prosecution has said that there is nothing in the transcript that could be of any assistance to the applicant. We do agree that the evidence is overwhelming. This is a man who was caught in the

act, brought back to the scene. We have no reason to differ from the findings of the learned trial judge. The application for leave to appeal is therefore refused and the sentences should commence as of the 21st of September, 2006.