

Notes

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 111/2008

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

LEONARD NELSON v. REGINA

Oswest Senior-Smith, for the Appellant.

Miss Meridian Kohler, Assistant Director of Public Prosecutions for the Crown.

January 12, 2010

Oral Judgment

COOKE, J.A.

1. The factual circumstances in this case are within a narrow compass. Because of the decision which we have taken as to the resolution of this appeal, it is a counsel of some wisdom that we do not treat the facts in any extensive or exhaustive fashion. Suffice it to say that on the 27th August 2005, the virtual complainant took his friend to the Norman Manley Airport, where the friend was to receive his daughters on an incoming flight. Apparently the flight was delayed for a considerable period of time and perhaps the anxiety propelled both men to

do an unlawful act, which was to enter a restricted area peering to see if the daughters had arrived.

2. While in this restricted area, both men were properly accosted by two officers of the government security forces. I cannot recall with certainty the status of one, but the appellant was a Special Corporal in the Island Special Constabulary Force. The virtual complainant, while in the custody of the appellant, received a blow from the appellant's baton, the consequence of which is that he no longer has a right eye.

3. In 2007, acting on the advice of the Director of Public Prosecutions, the appellant was charged and in a trial spanning the end of September to the beginning of October 2008, he was convicted of causing grievous bodily harm with intent to cause grievous bodily harm. The indictment had included an alternative count of inflicting serious bodily harm, but the jury after directions which are not the subject of any complaint, returned a verdict to the more serious charge, and he was sentenced to a term of imprisonment of four years at hard labour.

4. The sole complaint before this court is that:

"The learned trial judge respectfully failed to appreciate, assess, analyse and comment to the jury the fact that the appellant was acting in the performance of his duties as a Special Constable, pursuant to the provisions of the Constabulary Forces Act and in accordance with his functions under The Airports (Regulations of the Prescribed Airports) Regulations 1981 and the Airports Authority Act. As a

result the appellant was deprived of the opportunity of a comprehensive and wholesome deliberation by the jury, and thereby lost the protection of the law and was denied a fair chance of acquittal."

5. We are in no doubt that the ground is with merit. In fact, Miss Kohler, the Assistant Director of Public Prosecution found herself unable to rebut this ground. Inevitably, this ground succeeds.

6. We note from the summing up that Crown Counsel at the conclusion of the summing-up by Gayle, J. adverted to the question of whether the fact that the officer was acting in the execution of his duty should not have been dealt with but the judge was not roused by the reminder by Crown Counsel.

7. In the course of this hearing, the bench and the bar engaged in what we would call a comprehensive review of this issue. The first question was whether or not to use Mr. Oswest Senior Smith's terminology, "there was a certain substratum of evidence for the issue to be dealt with". The answer to that is yes. We proceeded to discern what was the proper approach and the authority of **R. v Lance Webley and Desmond Brown** (1988) 25 JLR 425, was usefully and helpfully brought to the attention of the court by counsel for the appellant. As part of the headnote, the following passage was cited and which this court accepted that:

"it was a serious non-direction to have failed to direct the jury on the law applicable to the applicants as police officers endeavouring to apprehend actual or suspected offenders, namely that such officers were statutorily authorized and therefore justified in taking reasonable steps to do so, and it

was for the jury to say whether what was done was in reasonable execution of their duties.”

We note this passage and we hope that trial judges in the courts below will not ignore it.

8. The only question that remains is how the case should be disposed of. At this stage, it can be said that the appeal is allowed, the conviction quashed and the sentence set aside. However, we have determined that in the interests of justice a new trial should take place. We do not perceive that the passage of time will in any way cause prejudice to the conduct of the appellant’s defence at the forthcoming trial. It cannot be said that the nature of the evidence was such that it could be classified as being weak. The offence, in our view is a serious one and it will be fitting that the appellant should be given a fair trial in due course.