

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 65/2010

**BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE BROOKS JA
THE HON MS JUSTICE LAWRENCE-BESWICK JA (Ag)**

KEMAR PALMER v R

Applicant not appearing or represented

**Miss Claudette Thompson and Mrs Suzette Sahai Whittingham-Maxwell for
the Crown**

1 and 3 July 2013

BROOKS JA

[1] On 1 March 2008, at about 8:30 pm, three men invaded a house situated in Havendale in the parish of Saint Andrew. Initially, only one of the men brandished a firearm, while the others were wielding knives. Later, one of the knife-wielders put away his knife and produced a firearm in its place. The men accosted the occupants of the house and robbed them of various items, including jewellery, cellular telephones and cash. One of the men also raped one of the female residents.

[2] The arrival of a car at the gate of the premises interrupted their illegal activity. One of the miscreants said "Police", and all three men hurriedly exited the house, ran to the rear of the premises and escaped by scaling the back fence, by which means they had originally gained entry.

[3] The residents made a report to the police and the following day, one of them, Mr Germaine McGeachy, whilst searching the area where the men had made their escape from the premises, found a driver's licence. The licence bore, among other things, the photograph, name and address of the person said to be the holder of the licence.

[4] Mr McGeachy handed over the driver's licence to the police, and in due time, the police apprehended the person depicted on the licence. He is Mr Kemar Palmer, the applicant herein. The police conducted an identification parade on 14 April 2008. Mr Palmer was the suspect on that parade. Mr McGeachy attended the parade, and pointed Mr Palmer out as one of the men who had invaded his house on 1 March 2008.

[5] Based on that identification, the police arrested and charged Mr Palmer. He was tried in the High Court Division of the Gun Court on an indictment containing three counts, namely, illegal possession of firearm, rape and robbery with aggravation.

[6] During the trial, learned counsel for Mr Palmer, at the close of the prosecution's case, submitted that the learned judge should not call upon Mr Palmer to answer the Crown's case. On counsel's submission, Mr McGeachy had identified Mr Palmer because of his exposure to the driver's licence rather than as a result of any observation made

at the time of the commission of the offences. The learned trial judge, Martin Gayle J, rejected the submission and called upon Mr Palmer to answer.

[7] Mr Palmer gave a terse unsworn statement asserting that he was not guilty of the charges. He called no witnesses and his counsel made no further submission on his behalf.

[8] On 21 April 2009, the trial judge convicted Mr Palmer on all three counts on the indictment. That same day, he sentenced Mr Palmer to serve 10 years imprisonment at hard labour in respect of the count of illegal possession of firearm, 20 years imprisonment for the offence of rape and 15 years imprisonment in respect of the count of robbery with aggravation. Martin Gayle J ordered the sentences to be served concurrently.

[9] A single judge of this court refused Mr Palmer's application for permission to appeal against his conviction and sentence. Mr Palmer has, nonetheless, requested that his application be placed before the court. Before us, Mrs Whittingham-Maxwell, for the Crown, submitted that there was no basis for disturbing the verdict of the learned trial judge.

[10] We have carefully considered the matter, and we respectfully agree with Mrs Whittingham-Maxwell's submission. The critical issues in this case were the reliability of the identification evidence and the propriety of the warnings that the learned trial judge gave himself in considering that evidence.

[11] Mr McGeachy is the only one of the victims of the offences, who gave evidence as to the identity of the perpetrator said to be Mr Palmer. At the time of the invasion, Mr McGeachy was sitting on the back porch of the house. He, along with his girlfriend, was the first to be accosted by the men. At that time, he said, only one of the men was masked. Mr McGeachy identified Mr Palmer as one of the unmasked men. He said that that unmasked man came within a distance of 10 feet (based on the learned trial judge's estimate – page 108 of the transcript) of Mr McGeachy. Mr McGeachy testified that he was able to observe that man's face for some 15 seconds. Visibility was aided by fluorescent lighting on the back porch.

[12] The evidence was that, on entering the house, that unmasked man, said to be Mr Palmer, put a shirt over his face to conceal his identity. It is not surprising, therefore, that the other occupant of the house, who attended at the identification parade, failed to point out Mr Palmer.

[13] In our view, Mr McGeachy's evidence of the circumstances of his sighting of the man, said to be Mr Palmer, was sufficient to satisfy the learned trial judge that Mr McGeachy would have been able to recognise that man if he saw him again. That evidence concerned the distance at which Mr McGeachy made the observation, the duration of the observation and the lighting conditions existing at the time. Undoubtedly, Mr McGeachy's evidence, that when he saw the driver's licence he saw "the picture of...one of the robbers" (page 25 of the transcript), would have assisted

the learned trial judge in his acceptance of the adequacy of the quality of the identification evidence.

[14] The learned trial judge also considered the evidence of the female witness, who was the victim of the rape, that in his haste to leave the house, a driver's licence fell from her attacker. She said that the attacker "picked it up and ran out" (page 41 of the transcript). The learned trial judge found this evidence to be truthful. He pointed to it in connection with Mr McGeachy's evidence of the discovery of the licence at the fence of the premises, and likewise found that evidence to be credible.

Conclusion

[15] The learned trial judge carefully assessed the evidence in respect of the issue of identification, as he did in respect of all the relevant issues. He identified the elements of each offence contained in the indictment, gave himself an adequate warning about the dangers of convicting on evidence of visual identification, and found that the circumstances of the observation were sufficient for Mr McGeachy to have made a reliable identification of this assailant.

[16] In the circumstances, we find that there is no basis for disturbing this conviction. The sentences imposed by the learned trial judge were within the normal range of sentences for these offences and there is, likewise, no basis for interfering with them.

[17] Permission to appeal against conviction and sentence is, therefore, refused. The sentences are to be reckoned as having commenced on 21 July 2009.