JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 113 & 114/88

BEFORE: The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Forte, J.A.

R. v. HERBERT SPENCE
VENNIE WILLIAMS

Lowell Marcus for Spencer

Howard Hamilton, Q.C., & Delroy Chuck for Williams

Miss Paula Llewelyn for the Crown

January, 16, 1989

CAREY, J.A.

In the High Court Division of the Gun Court held in Westmoreland on the 17th May, 1988, these applicants were convicted on an indictment which charged them for illegal possession of a firearm and burglary and larceny. They were each sentenced to concurrent terms of five years and eight years imprisonment at hard labour. Their application for leave to appeal having been refused by the single judge, they now apply for a review by the full court.

The short facts are that in the early morning of the 5th November, 1987, Mrs. Neita Morris who resides in a remote area of Westmoreland called Miller District, heard some curious sounds outside her window. At that time, she was awake. There was a demand made by some person outside the door for "Gootu", that being the name of her husband, to open the door. She recognized that voice as being that of the applicant Spencer whom she referred to as "Pappy Dread." The voice was insistent that the persons outside her window were police and suggesting that the occupiers had ganja. Her son who was also in the house, went by the door armed with an agriculture fork. These pseudo

policemen began kicking the door in. The next thing was the sound of a gunshot. Mr. Morris got afraid. Everybody got afraid. The son dashed through a window, her husband ran through the door and finally she endeavoured to make her exit through the same door. But at the back door, she came upon three men, two of whom she knew before and those she identified as being these applicants, the other applicant she knew as "Socka". Neither of these was armed but the third man was armed with a firearm.

The applicant "Socka" who is Williams asked her why she was making up so much noise and threatened to lock up everybody in the house. She observed that she knew him also by his voice. At that time all these men were quite close to her and she testified that she used lamplight and moonlight, and of course, their voices to recognize them. These were persons whom she knew for a considerable number of years. The other witness who gave evidence in regard to identification was her son Hubert, who said that he recognized "Pappy Dread" by his voice.

The defence of both men was an alibi. Spencer's was somewhat intriguing because he said that he was awakened by some disturbance, called his neighbours, and he trailed a man who turned out to be Hubert Morris, who is the son of Mrs. Morris. Mr. Morris is alleged to have said "Ah bwoy, Pappy Dread, man came to rob us last night." A crowd appeared and assaulted Hubert who was taken to the police station.

The learned trial judge had before him these two contradictory tales and he believed the witnesses for the prosecution.

Before us this morning, the main thrust of the argument by both counsel, not unexpectedly, related to the question of identification. Mr. Marcus filed a ground which read thus:

> "That the learned trial judge erred in law when he accepted the evidence of the complainant in relation to lighting, even though the police officer's evidence indicated a situation where the court should have some doubts about the verosity of the complainant's evidence on this point."

We feel that this ground was misconceived because Mrs. Morris had given evidence as to the lighting saying that she had used the light from within the house and also the light from the moon. In an endeavour to contradict that evidence of Mrs. Morris, the investigating officer was asked whether she had not mentioned about moonlight and lamp and he said that she had.

The question was put in this way:

> "Q. Wouldn't it be correct to say that at no time did Mrs. Morris tell you anything about moonshine?
>
> A. No sir.
>
> Q. She never told you about moonlight?
>
> A. No, I am answering your question. It would not be correct.
>
> Q. It would not be correct?
>
> A. No sir.
>
> Q. You used that in the statement?
>
> A. That was not used in the statement, but she told me that."

There was thus no contradiction in her evidence and that really was the end of that ground of appeal, which it is plain was devoid of merit. Another ground argued by Mr. Marcus, was put in this way, that the learned trial judge failed to direct his mind to the question of malice brought out on the evidence which, if considered would have resulted in the acquittal of the defendant. That ground also was without merit because there was no evidence whatsoever dealing with malice. There was some evidence that prior to this incident there had been some fuss between the son of Mrs. Morris, Hubert Morris and one of the applicants "Pappy Dread", but the witness went on to say that matter had been settled and there was no evidence or no suggestion made that by reason of that fracas, that the witness was imbued with any animosity against the applicant.

No other point of substance was put forward by Mr. Marcus.

Mr. Chuck endeavoured to argue that the main prosecution witness Nelta Morris had given evidence that she identified Williams by his voice and

by the moonshine outside and the bedroom lamp was inside burning.. He said further that the learned trial judge relied on that witness' testimony, accepting her as a witness of truth. Then he endeavoured to put before the court some document, a calender which suggested that on that day there was no moon. This was impermissible. Learned counsel had no basis for putting that document in evidence before this court as it could not be regarded as fresh evidence. Indeed it was not evidence.

The evidence before the learned trial judge was that the witness used the voices of these applicants and used lighting which emanated from the lamp which was inside the house and also the light from the moon. We would also point out that there were some lengthy conversations between Mrs. Williams and these applicants who were standing in close proximity to her and she would, having regard to the lighting, be in a good position and would have been afforded a good opportunity to identify the assailants that night.

In our view the evidence was all one way and supported the finding by the learned trial judge that these were the persons who broke into that house that night and stole what was alleged in the indictment, namely, an agricultural fork.

In the result, the application for leave to appeal against conviction must be refused.

There was an argument put forward by Mr. Chuck which was concurred in by Mr. Marcus, that this court ought to interfere with the sentence of eight years on the charge of burglary and larceny, on the footing, that neither of these applicants was armed with a firearm and therefore presumably, in mercy, the court ought to reduce the sentence to one of five years. We are entirely unimpressed by that argument. Persons who play for high stakes must appreciate that they run the great risk of having serious penalties imposed upon them when they involve themselves in such serious offences.

These applicants choose to put themselves in the company of a man armed with a firearm to commit a serious offence.

The offence took place at two o'clock in the morning when all decent and respectable persons should be in their beds sleeping. We can see no reason whatsoever to interfere with the sentences imposed and which we think were appropriate in the circumstances. Accordingly, the applications in their entirety are refused. The court will direct sentence to commence from the date of their convictions.