JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 63/85

BEFORE: The Hon. Mr. Justice Rowe, President
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Downer, J.A. (Ag.)

REGINA v. KIPLING PATTERSON

K. Pantry, Deputy Director of Public Prosecutions and Miss Donaree Banton for the Crown.

P.J. Patterson, Q.C., and W. Scott for applicant.

13th January, 1986

ROWE, P.:

This is a case in which the applicant Kipling Patterson was convicted in the Gun Court Division of the Circuit Court in Mandeville on the 24th May, 1985, on three counts of an indictment the first of which charged that he, along with one Godfrey Powell, on the 6th December, 1984, in the parish of Manchester unlawfully had in his possession a firearm not under and in accordance with the terms and conditions of the Firearm User's Licence.

The second count charged him with robbery with aggravation, the particulars being that he, along with Godfrey Powell on the 6th December, in that same year, in Manchester, with others, armed with a gun robbed

Nezeta White of $1,100.00, a travelling bag, a quantity of ladies' and men's clothes, a gold watch, and $30 in U.S. currency. The third count also charged him with illegal possession of firearm, a fourth count charged him with robbery with aggravation, the particulars of which were that he robbed one Sydney Forbes of a wrist watch. He was convicted on counts one, two and four of the indictment.

The evidence led by the Crown was that on the night of 6th December, 1984, Nezeta White was at home at a place called Mount Pleasant in Manchester; she was sitting up waiting for her husband to come home. They lived in a house which appears to have about seven or eight rooms. A part of that house was occupied by her daughter and a Mr. Powell, while another part was occupied by her husband and herself. While she sat up waiting for her husband to come home, and it appears just after he had come home, a number of men came to the house. Mrs. White's account of the incident is that she heard a banging on one door, and then a banging on another door. Two men came through one door and three came through the other. Two men came through her room and of these, one had a firearm. She identified two people, one of them being the appellant, Kipling Patterson. Mrs. White gave an account of being tied up, of money being taken from her dresser and a quantity of goods from other parts of the house.

The issue in the case was not whether or not a robbery had taken place, but whether or not the appellant was one of the persons who went to that particular house. The evidence of identification as given by Mrs. White and Mr. Forbes, was that they had known the appellant from the time when he was a very small child. He had lived in the

district in which they lived, he had been fed by them, he had been befriended by them but for a time he had been away from the district. He was, they said, the tallest man in the area. On the night of the robbery he had, according to these witnesses, a bit of cloth, like a handkerchief, tied around his mouth, but they could otherwise see the rest of his face and he was, according to Nezeta White, with her in the room for over an hour-and-a-half in which time she had the most ample opportunity to observe his features, to recognize him and to know who he was.

Mr. Forbes, whose room was also ransacked and from whom a number of articles were stolen, gave evidence of identification of Kipling Patterson, all to the effect that he was absolutely sure who this man was because of his long association with him, because of the physical features of the man and of the opportunity which he had to observe him on this night.

Somehow, the trial took a number of turns. At one time, it was discovered that only Patterson was charged in relation to three counts of the indictment, to which I have made no reference, when in fact it was intended that at least three persons ought to have been charged. Be that as it may, the issue at the end of the Crown's case was whether or not Mr. Forbes and Mrs. White could be believed in respect of one aspect of the case. Mrs. White had maintained that she had only seen one person with a firearm, while, Mr. Forbes, was maintaining that he had seen three persons with firearms.

The learned trial judge acceded to the submissions of counsel for the Crown that it was quite possible in the dynamic situation which arose on that evening that Mrs. White could have see one set of things, and Mr. Forbes a more detailed set of things, and he being so satisfied called upon the accused for his defence.

The accused gave evidence and he called a number of witnesses from Westmoreland and from Clarendon. The effect of the evidence was that he was in Westmoreland on the particular day and at the particular time of the robbery; that it would have needed a travel time of at least two hours for him to move from Bluefields in Westmoreland to Mount Pleasant in Manchester and that at all material times he was under observation by one or more persons in Westmoreland. At the end of the day the learned trial judge found the applicant, as I have said, guilty on counts one, two and four and not guilty on count three. He found him not guilty on the other counts of the indictment, for reasons which I need not enter into at this time. The applicant was sentenced to serve some 10 years imprisonment at hard labour.

On appeal Mr. Patterson has argued some five grounds. He took the ingenious point in relation to count four that because the indictment was drafted in such a way that count three was a charge of being in possession of firearm, and count four a charge of robbery with aggravation, the inference should be, that count three referred to a separate possession of a firearm in Mr. Forbes' section of the house, and that count four, depended upon the robbery when the applicant was so armed. If then, said Mr. Patterson, the applicant was not armed with a firearm as charged in count three, how then, could the judge have jurisdiction to try him in relation to count four, as count four would not then be a Gun Court offence.

The simple answer is, that the entire robbery constituted a single occurrence. It was one event and the fact that armed men robbed more than one person in more than one location in the one house would not in any way require that there ought to be several counts of possession of firearm,

that is to say, a separate count charging possession in each room in which a robbery took place. We think that the principle in the case of D.P.P. v. Merriman, [1972] 56 Cr. App. R. 766, applies. It was one occurrence and the charge of being in possession of a firearm on count one sufficiently covered all the incidents of robbery which happened in that house and especially those referred to in counts two and four of the indictment. Consequently, we find no merit in ground one of these grounds of appeal.

Ground two alleged that the learned trial judge failed to adequately direct and warn himself on the law and the evidence in relation to identification and as a consequence of this he erred in holding that there was sufficient evidence to establish the identity of the applicant as a party to the robbery. Now, it was clear from the evidence, and Mr. Patterson did not submit to the contrary, that these witnesses knew the applicant prior to this occasion, and it appears that the applicant also knew them as he said, he once lived in that area with his father, although, he said, for sometime now he had departed to live elsewhere in the parish of Manchester and later on in Westmoreland. We do not think that there was any foundation for the complaint that the judge failed to adequately direct himself as to identification because on the evidence the witnesses had over an hour-and-a-half within which to observe this person and although he had, according to them, a bit of cloth across his mouth, there was no suggestion that this bit of cloth so obscured his face that he could not be identified.

The point which Mr. Patterson used to support his complaint as to insufficiency of evidence as to identification was that there was another gentleman in the house, a Mr. White, the husband of Mrs. White, who was unable to identify anybody because he said, "the man had cloth or mask over his face". We do not think that this is of any consequence because on the evidence, Mr. White was kicked, thrown on the bed, and his face was turned, as described by Mrs. White, towards the wall, away from the happenings in the house. His failure to identify or to recognize the person did not reflect adversely, we think, upon the opportunity of the other persons so to identify and establish the true identity of the applicant. We think, therefore, that that ground also fails.

Ground three complained that the verdict failed to take into sufficient account or properly to appreciate the sworn evidence given by the accused and his several witnesses on his behalf. The learned trial judge spent a very long time recounting faithfully all the evidence given by the accused and the witnesses who were called to support his alibi defence. It is regretable that the learned trial judge did not give any reason for rejecting the evidence of these witnesses. Where the judge is sitting as a judge and jury it is to be expected that if he is going to reject evidence that he ought, in order to assist the persons who are before him and those who have to review the case at a later stage, to give his reasons for rejecting the evidence which he has heard. We think, however, that there was sufficient positive evidence coming from the prosecution witnesses which the learned trial judge said he believed and which he could only have believed if he had rejected the

evidence given by the defence, to warrant the convictions. In these Gun Court cases the judge need not set out in extenso the law which is applicable, and provided he shows that he fully grasps the important facts in the case, this court will be slow to arrive at a different conclusion on the facts. This ground also fails.

The fourth ground complained that at the end of the evidence for the Crown the learned trial judge failed to take into account unresolved discrepancies in the Crown's case, and these were discrepancies which he himself found and expressed. The discrepancy arose in relation to whether or not there were three guns or only one gun. The learned trial judge after hearing the submissions of counsel for the Crown was quite satisfied that Mrs. White could quite truthfully have seen only one firearm whereas Mr. Forbes could equally quite truthfully have seen three firearms and he, therefore, did not think there was any discrepancy in the Crown's case going to the root of the Crown's case. We do not see how that determination by him can be said to be an omission. Again, we find that there is no merit in ground four.

Ground five complained that the sentence of 10 years hard labour was harsh and excessive. Mr. Patterson said that this case should be looked at against the background of the judge's positive finding that the marauders were armed on the occasion of the robbery with imitation firearms, and although admitting that imitation firearms can cause great fear in the hearts of persons who are being robbed, nevertheless, he submitted, imitation firearms have less capacity to do intrinsic harm than real firearms, and therefore, persons who are convicted of being in possession of imitation firearms should receive smaller sentences than persons who in

fact have lethal barrelled weapons.

We think that there is some merit in this particular argument and we think also that as this particular applicant did not have any previous conviction, which the judge thought he ought to take into consideration for purposes of sentence, that the sentence of 10 years was on the excessive side, and that a proper sentence, in this particular case, having regard to the trend which we have observed of sentences being passed in similar cases should be one of 7 years imprisonment at hard labour.

The application for leave to appeal against conviction is, therefore, refused. The application for leave to appeal against sentenced is allowed and the sentence is reduced from one of 10 years hard labour to one of 7 years hard labour. We think that the date from which the particular sentence should run, having regard to the fact that we have granted leave to appeal against sentence, should be from the date on which he was sentenced, i.e. on the 24th May, 1985.