

C.A. CRIMINAL LAW - Appeal from Gun Court - (i) illegal possession of firearm
(ii) shooting with intent - incident occurring at night - whether
Discrepancy in evidence as to lighting and identification of appellant - whether
judged to give proper consideration to issue of identification - whether judge
might have had regard to statement made by co-accused not on trial
in identifying appellant. Verdict unreasonable as not supported
by evidence - [Appeal JAMAICA allowed - convictions and
sentence set aside]

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 134/84

No case referred to

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

R. v. LEPHANSO THOMPSON

Mrs. Donna Scott-Bhoorasingh for appellant.

Mr. Kent Pantry and Miss Donaree Banton for Crown.

January 15 & 26, 1987

ROWE, P.:

We treated the hearing of the application for leave to appeal as the hearing of the appeal, allowed the appeal from the conviction of Gordon J. sitting in the Gun Court Division of the Manchester Circuit Court, by which he found the appellant guilty of illegal possession of firearm and shooting with intent, set aside the convictions and sentence and directed that judgments and verdicts of acquittal be entered. Herein are our reasons for allowing the appeal.

Thompson was charged jointly with another man named Griffiths and both were convicted on the basis of evidence from two civilian witnesses and a number of police officers. Mr. Young operated a shop at Warwick in Manchester. He and a fifteen year old lad slept in a room at the back of the shop. On the night of

February 15, 1984, Mr. Young locked up his shop and retired to bed. The shop is serviced with electricity and, said Mr. Young, when he went to bed at 11 p.m. he turned off the lights, leaving only the one at the back door burning. He said emphatically that he left no light at the side or at the front of the shop. During the night, male persons attempted to break into the shop by forcing the door. Reid first, and with the assistance of Mr. Young, both secured the door against the attack which was then switched to a window. The occupants threw bottles at the window and then they heard three explosions of gunfire from the direction of the window. A missile, which was not produced at trial, entered the room, bored a hole in each of two metal buckets and dented a refrigerator. The shop-keeper ran for assistance. When he left the room through the window which was being assailed, he did not see anyone, and outside that window was dark.

James Reid could see that the attack was being made by men but he could not identify them. He said that light was to the front of the shop and it shone inside. Reid also said that after the men left he saw no light outside as the men had turned off the back light. On re-examination Reid said two lights were left burning that night, one to the front of the shop, and the other at the back. Inspector Henry, who was on patrol with another sub-officer, said he saw the appellant come to the front of the shop where there was electric light and that he was able to recognize the appellant who had been known to him for many years. The recognition was made when the appellant was about 1½ chains from the Inspector.

It was submitted on behalf of the appellant that the learned trial judge failed to consider the discrepancies in the evidence as to lighting and thereby failed to give proper consideration to the issue of identification.

The incident occurred at night and, therefore, the central issue was whether there was sufficient light by which the police inspector could make the observation which he said he did make. Mr. Young, volunteered the information that when he retired to bed on that night he did not leave a light burning at the front of the shop. In order to meet this potentially decisive evidence, the learned judge resorted to what he called the common practice in Jamaica for shop-keepers to leave a security light at the front of their shops. This we think was an unsatisfactory manner to resolve the discrepancy, especially as Mr. Young left the shop shortly after the men had gone away, albeit through the side window, and he gave no hint of seeing light then to the front of the shop.

There was, we think, some confusion in the evidence of Inspector Henry as to his prior knowledge of the appellant. His evidence-in-chief conveyed the impression that he had recent knowledge of the appellant who had been interviewed by him for entry into the Constabulary Force. It turned out, however, that that interview was some nine years before. Over a nine year period the Inspector said he had seen the appellant on an average of once per year which in our view weakened his evidence that he was thoroughly acquainted with the appellant. There being the probability that the lighting

condition was not satisfactorily proved and the weakness in the evidence of Inspector Henry, we were of the view that the verdict was unreasonable.

Another issue, which although it did not form a ground of appeal, concerned the use which the learned trial judge made of a statement given by the man Griffiths who was jointly charged with the appellant. In this statement Griffiths named the appellant and another man Trowers as the persons who were engaged in this escapade with him. Trowers was not on trial yet the learned trial judge found:

"Trowers is the man, on the evidence who Inspector Henry chased in the darkness Trowers is the man on his evidence, who would have put the gun in his waist, or the instrument that could be a gun, in his waist."

These passages suggest that the learned trial judge could unconsciously have had some regard for what Griffiths said in his caution statement which sought to implicate Thompson especially as the trial judge did not expressly say that he was not so influenced. This lingering doubt supported the conclusion at which we arrived on the identification ground, that the verdict was unreasonable as not supported by the evidence.