NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 229/2002

BEFORE: **THE HON. MR. JUSTICE WALKER, J.A.**
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE COOKE,J. A.

R. v. NICHOLAS BENNETT

Jacqueline Samuels-Brown for the Applicant
Anthony Armstrong for the Crown

October 12, 13, 19 and December 20, 2004

WALKER J.A:

On October 19, 2004, we gave a judgment whereby the Court refused this application for leave to appeal and ordered that the applicant's sentences should commence on February 11, 2003. We promised then to put the reasons for our decision in writing at a later date and we now do so.

On November 8, 2002 in the High Court Division of the Gun Court sitting in Kingston the applicant was convicted on three counts of an indictment which charged him with Illegal Possession of Firearm (Count 1), Robbery with aggravation (Count 2) and Shooting with intent (Count 3). Following upon those convictions the applicant was sentenced to seven years imprisonment at hard labour on Count 1 and nine years

imprisonment at hard labour on each of counts 2 and 3, the sentences to run concurrently with each other.

The prosecution's case disclosed a daring daylight robbery committed some time after 3:00 p.m. on January 15, 2002. It was perpetrated by the applicant and two other men at a location described as the old Port Henderson beach in St. Catherine. While on the beach the complainant, Mr. Milton Robotham was robbed of cash totalling $200,000 by the applicant's two companions, one of whom was armed with a 9mm firearm. After committing the robbery the two men made their escape to a get-away car the driver of which was the applicant. As the vehicle sped away, Mr. Robotham gave chase in his motor car. During the course of that chase gun-shots coming from the applicant's car were fired at Mr. Robotham's car. Some of those bullets, Mr. Robotham said, actually struck the bonnet of his car. This was confirmed by a prosecution witness who gave evidence of observing after the event what he described as a "bullet wound" to the bonnet of Mr. Robotham's car. But to return to the chase following the robbery, that chase eventually ended somewhere along the South-Boro main road when Mr. Robotham drove his car deliberately into the right front fender of the applicant's car, in the process blocking the applicant's exit from the car. The applicant's two companions, one with gun in hand, exited the car on the left side of the vehicle and made good their escape. The applicant was immediately

in question, and that sometime afterwards – a short time after 3:00 p.m. that day - he heard gunshots being fired.

Mrs. Samuels-Brown for the applicant filed several grounds in support of this application for leave to appeal. However, for purposes of this judgment we find it necessary to refer in detail only to the ground numbered 5, the other grounds not having been, to use Mrs Samuels Brown's language, "belaboured" by her . It is sufficient for us to say that having, ourselves, examined the remaining grounds we found no merit in any of them. Ground 5 contained the main thrust of the applicant's challenge to the propriety of his convictions. Ground 5 reads as follows:

> "The learned trial judge misdirected herself in relation to the burden of proof applicable where the accused raises a legal defence to the offence charged and as a result there has been a miscarriage of justice."

We need, therefore, to examine the trial judge's summation in-so-far as it relates to her directions on the burden of proof. The specific direction of which the applicant complains reads as follows:

> "The ultimate or persuasive burden is on the prosecution to display the defence in such a manner as to be in the mind of the Court no reasonable doubt on the question of whether the accused can be absolved on the grounds of alleged compulsion."

We would pause here to note that that passage contains two errors which, in our opinion, are obvious errors made by the Court Reporter in recording what the trial judge said. The first error is in the word "display"

which should properly read "displace" and, secondly, the phrase "be in the mind of the Court" should properly read " leave in the mind of the Court". Otherwise, the passage would make no sense at all. So corrected the passage would now read:

> "The ultimate or persuasive burden is on the prosecution to displace the defence in such a manner as to leave in the mind of the Court no reasonable doubt on the question of whether the accused can be absolved on the ground. of alleged compulsion."

We do appreciate that although Mrs Samuels-Brown fully accepted the view of the Court that the trial judge's summation had been faultily reproduced in this way, counsel maintains her criticism of the particular direction given in that passage. That criticism is that therein the trial judge wrongly reversed the onus which lay on the prosecution to prove the guilt of the accused.

In our opinion the summation of a trial judge must be read and considered as a whole. Accordingly, it is only right and proper that we should in the present case, examine the summing-up of the trial judge in its entirety i.e. those parts of it which touch and concern the judge's directions on the subject matter of the burden of proof.

At the very outset of the summation the trial judge said:

> "The burden of proof rests on the prosecution. It never shifts and the prosecution must, by evidence adduced, satisfy the court so that the court can feel sure of the accused's guilt before

> the court may return a verdict adverse to him on each charge."

Later in the summing-up she said:

> "The defence is that the accused must have been coerced in participating in these acts. In other words, the defence is he was acting under duress. And it is for the prosecution to prove that these acts were done by the conscious will of the accused. Where the acts were committed by the accused under physical compulsion, that is, under threat, fear of death or serious bodily injury and not of his own free will -- sorry, let me start again, where the acts were committed by the accused under physical compulsion, that is, under present fear of death or serious bodily harm and not of his own free will, he has committed no crime. Where the defence is relying on it, the accused, either by cross-examination of the prosecution witnesses, or by evidence called on his own behalf, or by a combination of both, must place before the court such material as make the issue fit and proper to be left to the Court. The evidential burden is, therefore, on the accused. It is for the prosecution to negative duress. If the Court says that the accused's account of duress might be true or is true, then he should be acquitted."

So far, so good one might say. However, it was immediately following the latter direction that the trial judge delivered herself of the passage that is now impugned, the details of which were given earlier in this judgment.

Towards the end of her summation the trial judge returned once more to focus on the burden of proof saying this:

> "Having heard the defence's entire address, I find that the evidence of Miss Wright does not

> assist the defence. I reject the evidence of Leslie Brown, who said the men took the accused's taxi on the 15th of January, 2002. I reject the accused man's statement that he was under threats of death to participate in these acts."

Finally the trial judge ended her summing-up with these words:

> "I'm satisfied and feel sure of the prosecution's evidence that the prosecution has negatived the defence of distress (sic). I'm satisfied and feel sure that the accused was acting on (sic) his own free will and was a willing participant in the execution of these offences. He was in this venture with the other two and as such I find him guilty of the charge on all counts of the indictment."

Again, in this passage we see yet another example of an error in recording the actual language of the judge. For it is clear that the word "distress" was wrongly recorded and should properly read "duress."

Now having examined with the greatest care these excerpts of the trial judge's summing-up we entertain no doubt that she fully appreciated where the burden of proof lay, and that she came to her judgment on the basis of an application of the correct principles of law. Her directions were in the main correct. They were plain and unambiguous except for the impugned passage where, in our view, in an attempt to re-state the correct principle of law in a different way – perhaps to avoid the criticism of being monotonous – she unfortunately expressed herself in language that was awkward and infelicitous.

In this passage we understand the trial judge to be saying no more than this – that the final burden is on the prosecution to negative the defence of duress in such a manner to such an extent as to leave the Court in no reasonable doubt but that that defence must fail. Otherwise, the accused would be entitled to be absolved of any guilt on the basis of duress. So read, the passage appears to us to be unobjectionable.

But, in any event, we are satisfied that the language of the trial judge carried with it no risk of confusion (as it might have done had a jury been involved), nor did it in fact lead to a miscarriage of justice as was contended for by counsel for the applicant. We think that the present case is to be distinguished from the case of ***R v Gordon Wright*** [1985] 22JLR 235 upon which Mrs. Samuels -Brown placed such great reliance. It is distinguishable on at least two bases. Firstly, Gordon Wright was a case of a judge sitting with a jury. Secondly, in that case the position was correctly stated in the appellant's ground of appeal which averred:

> "Nowhere did the learned trial judge direct the jury that if they had doubt about what the applicant said they should return a verdict of not guilty for the reason that the Crown had not proved a case about which they could feel sure."

In the present case the position is quite different. This is a case of a judge sitting as both judge and jury. Further, it is abundantly clear that here the trial judge did give to herself the particular direction of which the trial judge in ***Gordon Wright*** was found to have been derelict.

In the present case a verdict adverse to the applicant was inevitable once the trial judge rejected the unsworn statement of the applicant and the evidence of his witnesses. This is so because in rejecting all of that she rejected the defence theme of a third man which had been so strenuously urged by the defence, but equally strenuously denied by the prosecution witnesses. Indeed, when it was put to him, the prosecution witness and complainant, Mr. Robotham, in denying the suggestion of a third man making up the number of the applicant's companions described such a third man as the one that was "invisible". Of course, we need hardly observe that the presence of a third man was crucial to the viability and success of the applicant's defence of duress. For had there been no third man to stand guard over the applicant and to intimidate him there would have been nothing to prevent the applicant from extricating himself from his professed predicament. He could quite simply have driven away in his car during the time that his two passengers had gone off to rob Mr. Robotham. His captors would then have had absolutely no control over him at that time.

Despite the valiant efforts of Mrs. Samuels-Brown this was really a hopeless application for leave to appeal and we refused it as such.