

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME CRIMINAL APPEAL NOS: 105 & 112 OF 2003**

**BEFORE: THE HON MR JUSTICE HARRISON, P.  
THE HON MR JUSTICE SMITH, J.A.  
THE HON MRS JUSTICE HARRIS, J.A.**

**REGINA V  
DEVON GREEN  
EVAL POWELL**

**Ravil Golding for the appellant Green**

**Appellant Powell unrepresented**

**Mrs. Simone Wolfe-Reece, Crown Counsel for the Crown**

**December 6, 2006 and May 11, 2007**

**HARRIS, J.A:**

On December 6, 2006 we granted the applications by the applicants for leave to appeal. We treated the hearing of the applications as the hearing of the appeals. We allowed Devon Green's appeal, quashed his conviction, set aside the sentence and entered a verdict of acquittal. We reserved our decision with respect to Eval Powell.

On May 14, 2003 Powell and Green were convicted in the Gun Court Division of the Manchester Circuit Court on an indictment containing three counts. The first count charged them for the offence of illegal possession of

firearm. On the second count they were charged with assault. The third count charged them with assault with intent to rob. Each was sentenced to a term of 15 years at hard labour on count one and ten years hard labour on count three. A sentence of ten years hard labour seemed to have been imposed on Powell in respect of count two. No verdict was entered on that count in relation to Green.

On the night of May 18, 2002 men entered Samfo Wholesale and Supermarket at Porus, brandished firearms and demanded money from two employees. The evidence on which the Crown relied was essentially that of these two employees, Miss Beverley Scille and Miss Shernette James.

It was Miss Scille's evidence that about 8:30 on the night of the incident a man entered the business establishment, proceeded to the snack counter, then, left without examining any item or making any purchase. About 15 minutes later he returned, closely followed by another man. They passed her. Both men walked to the snack counter, stood there, fidgeting beneath their shirts.

Shortly after the arrival of these two men, she felt an object on her arm. This object was a silver coloured gun being pointed at her by another man. (This man was not before the court). He announced that it was a hold-up and demanded money from her. He then moved away and went to Miss James, the cashier and ordered her to give him money.

She, Miss Scille, turned and was about to leave when she encountered one of the men who was at the snack counter. He was armed with a black gun. She passed him. He went to a cash register and banged on it continuously in an

effort to open it. She eventually escaped and hid behind a refrigerator at the back of the building.

In June 2002, she attended an identification parade but pointed out the wrong man. On July 23, 2002 she attended another identification parade and pointed out Green as one of the persons she saw at the snack counter.

Miss James' evidence was that about 8:45 on the night of the incident she was at the cash register attending to customers when she felt someone stick her side. This she ignored initially. The prodding continued. She turned to investigate and discovered a man armed with a chrome coloured gun who demanded money from her. She responded by telling him she had none.

Another man entered and said to her "gal you no hear say you fi gi him the money". He thereafter took a black gun from his waist. Both men began banging on her cash register. Shortly after, one of these two men went over to another cash register and began punching the keys but was unsuccessful in opening it.

Following this episode, both men went and stood beside her cash register. A car drove up and stopped. Both men looked outside. The car drove away. The men walked towards the door. She then hid behind a column in front of her cash register. Soon after she heard a loud explosion. She ran to the back of the building where she fainted.

On June 1, 2002 she attended an identification parade where she pointed out Powell as one of the armed men who entered the supermarket on the night of the incident.

The investigating officer Detective Sergeant Michael Norman received a report which caused him to proceed to the scene of the crime. There, he spoke with Miss Scille, Miss James and a Mr. Roy Clarke. His observation revealed, among other things, two cash registers situated near the entrance of the building. He recovered one expended bullet on the floor.

On May 24, 2002 Powell was pointed out to him at a cell block at the Porus Police Station. When cautioned and told of the report, he said:

"Officer, last week Saturday night, me and my cousin was walking up by Toll Gate, a van with some men drive down on us and accuse me as thief, and we run in a bushes and mi hear gun start fire and one a the shot catch me in mi hand".

Upon being cautioned on arrest, he said:

"Mi nuh know bout it, a frame dem frame me".

On July 22, 2002 Green was informed of the offences by the investigating officer, when cautioned he said:

"Officer I was at my home all these time, me nuh know anything bout that".

He then told Green that he had been to his home on several occasions but had been unable to find him. Green said:

"Mi hear bout the incident but is not me is another man who live at Mount Pleasant that resembles me and is also called Shabba".

Corporal Hilroy Nelson who was listed as a witness for the prosecution was not examined in chief but was made available for cross-examination. At about 9:15 on the night of the incident he responded to a message relayed by the Four Paths Police following which he proceeded to Toll Gate in the vicinity of a jerk centre. On arrival there at about 10:15 p.m., he saw Powell suffering from what appeared to be gun shot wounds.

Sergeant Heather Dawn Singh testified to conducting an identification parade at Black River on June 1, 2002. Miss Scille, Miss James, Mr. Roy Clarke and Mr. Pierre Rogers, attorney-at-law for Powell, were present.

Powell, with the assistance of Mr. Rogers, chose eight volunteers to participate in the identification parade. Powell's left arm was in plaster of paris. The other men and himself were dressed in long sleeve shirts. Their arms were removed from the sleeves of the shirts and concealed beneath the shirts.

Miss Scille, Mr. Clarke and Miss James were requested to identify the suspect. Miss Scille and Mr. Clarke failed to point out anyone. Powell was pointed out by Miss James.

Sergeant Miguel Thompson testified that on July 23, 2002 an identification parade was held with respect to Green. He was pointed out by Miss Scille as a man who "committed a crime on May 18, 2002". He stated that Green was also pointed out by Mr. Clarke. (Mr. Clarke was never called as a witness). The proper procedure was followed in the conduct of the identification parade.

In an unsworn statement Green denied knowledge of the incident. He also denied knowing Powell.

An unsworn statement was also made by Powell who said that on the Saturday in question he went to Toll Gate to make a purchase at a jerk centre where he saw a car and a van. A man called Dave alighted from the car and began shooting at him. He, Powell, sought refuge in nearby bushes but Dave continued firing and he received a shot in the left arm. He then went through the bushes to another jerk centre where he requested a woman to summon the police.

He stated that he selected eight men to participate in the identification parade. He was number seven. He was told to change his position but did not do so. Two witnesses failed to point him out. The police and one of the witnesses walked up and down the line of men and the police assisted the witness to point him out. At the time his arm was fractured and he had to cradle it in the other arm as he was without the supporting strap.

Evidence on his behalf was given by Mr. Pierre Rogers who stated that on arrival at the Police Station on the day of the identification parade, he observed that Powell's arm was in a cast and a cast handle which was supported by a sling. This he brought to Sergeant Singh's attention.

A decision was taken to have all persons on the identification parade dressed in long sleeve shirts and use one arm to support the other, in order to obviate the need for the use of sling.

Some of the men had removed their hands from beneath their shirt sleeves and abandoned supporting one hand by the other, during the identification parade. The edges of the plaster of paris on Powell's hand were exposed along the cuff of his shirt sleeve. This irregularity he said he pointed out to Corporal Singh. He also spoke to Powell about it. It was also his evidence that during the identification parade he was sent out to call Miss James.

### Appeal of Green

Five original and four supplemental grounds of appeal were filed.

### Grounds:

- "(a) (1) MISIDENTITY BY THE WITNESS; THE PROSECUTION WITNESSES WRONGFULLY IDENTIFIED ME AS THE PERSON OR PERSONS WHO COMMITTED THE ALLEDGED (sic) CRIME.
- (b) (2) LACK OF EVIDENCE; THE PROSECUTION FAILED TO JUSTIFY THE CASE AGAINST ME IN THAT THE WITNESSES DESCRIPTION OF THE ALLEDGED (sic) ROBBERS DID NOT COLLOBORATE.
- (c) (3) UNFAIR TRIAL; THE PROSECUTION WITNESSES GAVE TO THE COURT CONFLICTING AND CONTRASTING TESTIMONIES, WHICH SHOULD NOT HAVE BEEN ALLOWED IN COURT BY THE LEARNED TRIAL JUDGE.
- (4) MISCARRIAGE OF JUSTICE; THE EVIDENCE UPON WHICH THE LEARNED TRIAL JUDGE RELIED LACK FACTS (sic) AND CREDIBILITY THUS RENDERING THE VERDICT UNSAFE UNDER THE CIRCUMSTANCES.
- (5) IMPROPER POLICE PROCEDURES; THE IDENTIFICATION PARADE WAS NOT CONDUCT (sic) IN A PROFESSIONAL MANNER, MOREOVER I WAS EXPOSED PRIOR TO THE PARADE. THE MAIN EYEWITNESS'S STATEMENT AND DESCRIPTION OF THE ALLEDGE (sic) ROBBERS WERE OMITTED FROM THE RECORD, THUS COMPROMISING MY POSITION".

The following are the supplemental grounds:

“(1) That the main issue at trial was one of identification and that the evidence of the main prosecution witness BEVERLEY SCILLE as it relates to such identification of the Applicant was woefully inadequate in that it was of a fleeting glance nature, it was contradictory, confusing and unreliable.

(2) The Learned Trial Judge erred in law when she allowed evidence to be given by Sgt. Miguel Thompson that someone b (sic) the name of Roy Clarke had pointed out the Applicant on the identification parade when Clarke was not called as a witness at the trial.

(3) That the Learned Trial Judge did not properly consider the defence of the Applicant as she only dealt with his defence of alibi after she had convicted him of the offences charged.

(4) That the sentences imposed on the Applicant were manifestly excessive in all the circumstances.”

Mr. Golding relied essentially on the supplemental grounds. However, grounds a (1) to (4) and supplemental grounds 1 and 2 can be addressed simultaneously. Mr. Golding, in support of these grounds argued that there is no evidence connecting Green to the hold-up. He contended that the Crown relied primarily on the evidence of Miss Scille on the issue of the identification of the person whom she said was Green. It was his further contention that her evidence was inadequate, confusing, contradictory and unreliable and in any event her sighting of the person she asserted was Green would have been a fleeting glance.

The first and fundamental ground of complaint is that the quality of the evidence on which reliance was placed touching the identification of Green was of such unreliable character as to render the verdict unreasonable.



Persons are prone to make mistakes in identification of others. As a consequence, evidence of visual identification needs to be approached with scrupulous care. In light of the inherent danger of miscarriage of justice due to a mistaken witness, strict adherence must be applied to the general principles governing identification contained in *R v Turnbull* (1976) 63 CR. App. Rep. 132.

The only evidence against Green originated from Miss Scille. The Learned Trial Judge may have found her evidence was somewhat confusing. This evidence, the Learned Trial Judge endeavoured to unravel and found that Green had been correctly identified. At page 336 of the transcript the following was her finding:

"Now in relation to Mr. Green I, also, find that the evidence of identification is more than sufficient to establish that he was correctly identified as one of the two men. I am satisfied that there was ample opportunity, lighting conditions, given the close proximity of the accused and in Mr. Green's case I must also consider whether what he was seen to be doing is sufficient to fix him as a party to what took place here".

The supermarket was brightly lit by fluorescent lighting. Miss Scille spoke of three men being there that night. She said she had seen Green earlier that night in a barber shop. At times, in her evidence, she made reference to the men interchangeably, as the first man, second man and third man. It is sometimes unclear who was first, second or third. However, what is clear is that two of the men were armed with guns. The man with the silver gun was

described as being of brown complexion, 5 feet 8 inches tall and slim built. This description she admitted did not fit Green. The man whom she said was Green was unarmed.

Green, she asserted, followed the man with the black gun into the building. They stood at the snack counter about two yards away from her. Initially, she said he was standing directly behind the one with the black gun. A demonstration by her, with the aid of two police officers, as to how they were positioned, showed that the person whom she said was Green was not immediately behind the man with the gun. At that time she was observing them sideways.

The entire incident lasted about five minutes. Miss Scille, on the evidence, may have viewed the face of the man she said was Green for less than a minute. She saw the face of that man on his entry into the supermarket. He, together with the other man, passed her while she stood at the entrance. The two men were under observation by her while they were at the snack counter as she was on the alert for shoplifters. Her focus, however, would have been quickly diverted when the (shine) gun was placed on her arm. At page 18 of the transcript she said:

"... just as he was at the snack counter and I was trying to look at them, I feel the object; I was focusing on it. The one that had the machine in my shoulder".

(Emphasis added)

Green was not known to Miss Scille. The critical question is whether she could have made a positive identification of him. Although the place had been adequately illuminated, there is some doubt whether she had sufficient time to have secured a view of the face of the person she said was Green when the two men entered, so as to be able to identify him, notwithstanding she had seen him in the barber shop earlier that night. At the snack counter, that man was standing about a foot behind the man with the black gun. The faces of the men were viewed sideways while they stood there. It is obvious that she would not have been able to identify him then. But would she have had sufficient time to view his face when he came into the building? We think not. In our view, in light of all the surrounding circumstances, there should have been some doubt in the mind of the Learned Trial Judge as to whether Green had been correctly identified by Miss Scille.

A further complaint of the appellant is that the Learned Trial Judge was in error by permitting evidence to be adduced from Sergeant Thompson that Roy Clarke pointed out Green at the identification parade. Clarke was never called as a witness. It cannot be denied that the Learned Trial Judge had erred in allowing this evidence to be given.

However, even if it could be said that Miss Scille had ample opportunity to have seen Green's face and he had been correctly identified as being present in the supermarket, a further question to be considered is whether it could be said that he was an active participant in the hold-up. It was the

Crown's case that Green had acted in concert with the other men. He denied being at the supermarket. There must be evidence to establish that a common design existed between Green and the other men to be in possession of illegal firearms which were used to assault Miss James. This must be considered within the purview of section 20 (5) (a) of the Firearms Act.

Section 20 (5) (a) of the Firearms Act provides:

"(5) In any prosecution for an offence under this section-

(a) any person who is in the company of someone who uses or attempts to use a firearm to commit -

- (i) any felony; or
- (ii) any offence involving either an assault or the resisting of lawful apprehension of any person,

shall, if the circumstances give rise to a reasonable presumption that he was present to aid or abet the commission of the felony or offence aforesaid, be treated, in the absence of reasonable excuse, as being also in possession of the firearm;"

(Emphasis supplied)

Possession in terms of this provision means custody or control coupled with knowledge (and possession of), in the companion of the person who is found with the firearm. As a consequence, for an accused to be deemed to be in possession, it must be shown that he was in the company of the principal offender who used or attempted to use the firearm to commit a felony, or an assault, or to resist the lawful apprehension of any person. The circumstances

must be such as to give rise to a reasonable presumption that the presence of the accused was to aid and abet any of the foregoing offences and that there was no reasonable excuse for his presence.

Mere presence without felonious participation in an act is insufficient to fix a party with culpability in the felonious design. In *R v Clovis Patterson* S.C.C.A. 81/04 delivered on April 20, 2007 Smith, J.A. in treating with the true meaning of section 20 5 (a) of the Act said:

"Whereas at common law, non-accidental presence is no more than evidence for the jury, by virtue of the subsection, in the absence of a reasonable excuse, it is conclusive of guilt. This in our view is the proper interpretation of the subsection.

Thus under the present legislative regime the mere association with the possessor of a firearm is not sufficient to establish a *prima facie* case against the possessor's companion as it was under the former regime. Before the accused companion may be called on to answer a charge of illegal possession of firearm it must be shown that the principal offender used the firearm to commit a specified offence and that the presence of the accused was non-accidental thereby giving rise to the presumption that he was there to aid and abet the commission of the specified offence."

The Learned Trial Judge in dealing with the issue as to whether Green was a part of the joint enterprise that night, at pages 336 and 337 of the transcript, said:

"Now when these men came in one behind the other, go down to the snack counter and stand together and both are seen fumbling under their shirts and both come up, even with Mr. green (sic) going out at that point, Mr. Green would have already put himself in

the picture and he would already have been a part of what was going on in that supermarket that night.

Now if the prosecution leads evidence to say that this man was with another who is armed with a gun and when they are walking out towards where the witness, Scille, is the gun is out and he sees him and he is in a position where he, too, can see him and this is after they were seen together fumbling under their shirts and he would clearly- this is really the strongest inference to be drawn here that Mr. Green is a party of what is going on but one doesn't know why he chooses to go out at that time but he has already been implicated. He was no shopper or innocent bystander who just happened to be in the supermarket at the time and who happened to have had left. The evidence of the circumstances given by the prosecution clearly fix him as a person who was a part of what was taking place in that supermarket so that he, too, was in illegal possession of firearm and is guilty on count 1 and also guilty on count 3 as the intention of these men, there, must clearly be to rob Miss James as particularized in count 3 of the indictment".

There was no evidence supporting an inference that a common design existed between Green, Powell and the other man. The circumstances of this case are incapable of giving rise to such an inference. There was no proof of any act of Green's complicity with the other men. He did not communicate with Powell nor did he do anything to show that it was in his contemplation to join with the armed men to use firearms to assault the employee of the supermarket with the intention of robbing her. The fact that Powell and himself entered the supermarket simultaneously and were fidgeting beneath their shirts is not sufficient to regard him a part of the joint enterprise to carry out the illegal acts.

Further, a most compelling aspect of the evidence is that Green left the supermarket when Powell began banging on the cash register. Clearly, it could not be said from Green's conduct that they were acting together to assault Miss James by use of illegal firearms and that he is culpable.

Ground 5 seeks to impugn the conduct of the identification parade. There is nothing on the evidence to show any irregularity which could impeach the identification parade. The evidence shows that the identification parade was fairly conducted.

Supplemental Ground 3 is with respect to the failure of the Learned Trial Judge to fully consider the appellant's defence. The appellant stated that he did not know of the incident. His defence was one of alibi. The Learned Trial Judge fell into error as she did not give any consideration whatever to the defence of alibi before pronouncing the guilt of the appellant. She referred to that issue subsequent to the appellant's conviction.

Supplemental Ground 4 is that the sentences imposed on the Applicant were manifestly excessive. It is unnecessary to consider the question of sentencing in light of our conclusions in respect of grounds 1 and 2.

#### The Appeal of Powell

The following grounds of appeal were filed by Powell:

"(1) MISIDENTITY BY THE WITNESS :THE PROSECUTION WITNESSES WRONGFULLY IDENTIFIED ME AS THE PERSON OR PERSONS WHO COMMITTED THE ALLEDGED (sic) CRIME.

(b) (2) LACK OF EVIDENCE; THE PROSECUTION FAILED TO JUSTIFY THE CASE AGAINST ME IN THAT THE

WITNESSES DESCRIPTION OF THE ALLEDGED (sic) ROBBERS DID NOT MATCH.

(c) (3) MISCARRIAGE OF JUSTICE; THE EVIDENCE UPON WHICH THE LEARNED TRIAL JUDGE RELIED LACK FACTS AND CREDIBILITY THUS RENDERING THE VERDICT UNSAFE UNDER THE CIRCUMSTANCES.

(4) IMPROPER POLICE PROCEDURES; THE I.D. PARADE WAS NOT CONDUCTED IN A PROFESSIONAL MANNER, BECAUSE I HAD A BROKEN ARM AT THE TIME AND WAS TOO VISIBLE TO BE PLACED ON A PARADE. ALSO, MY ATTACKER WHO SHOT AND INJURED ME WAS COLLABORATING WITH THE ARRESTING OFFICER. "

Grounds (a)(1), (b)(2), and (c)(3) will be considered simultaneously.

Evidence relating to the identification of Powell was presented by Miss James. Her description of him was that he was of dark complexion with plaited hair, his face was cleanly shaved, he had sideburns leading to a moustache and a beard. He had a black gun in his hand.

In dealing with Miss James' evidence as to Powell's identity the Learned Trial Judge said at pages 312 and 313 of the transcript:

"It is her evidence that Beverley Scille and other co-workers were nearby and could have seen what she described to the court. However, it maybe that Miss James, evidence is to be preferred on that part of the matter, since well – first gunman moved from the cashier, didn't see where the second gunman had turned, but I again turn to her description of the men. The first one who came over to her, according to the description had brown complexion, slim built, with hair plaited, and that man is not in court. That man had the shine gun with plaited hair and face shaved cleanly, is the one that she says is Mr. Powell and both of them had stood together. That was the one banging the cash register and saying, "Gal you nuh hear say you fi gi mi di money". This man was standing about 6 inches from her. She was able to



see his face for two minutes. She said she saw his face for the entire period of two minutes. She was watching him, the light was good inside the supermarket and on the piazza, the light was right over their heads”.

Although the Learned Trial Judge initially stated that Powell was the man with the shine gun, this she corrected at page 315 of the transcript when she said: “Mr. Powell was the one with the short black gun”. Her reference to him as the one who had been interfering with the machines, clearly shows that Powell was the person of whom Miss James spoke.

The Learned Trial Judge also stated that Miss James said that Powell’s face was shaved cleanly. She, however, failed to mention that Miss James had also spoken of this man having moustache and beard. It is somewhat bewildering to conceive that a man whose face is cleanly shaven could have been described as having a moustache and beard. The Learned Trial Judge failed to take into account this material aspect of the evidence and demonstrate how he resolved it. This, in our view, would affect the reliability of the witness as to the identification of the person she asserted was Powell.

It is also of significance that the incident occurred between 8:45 and 9:00 in the night. The entire incident lasted about 5 minutes. At about 9:15 p.m. Corporal Nelson received the report of Powell’s shooting. He arrived at Toll Gate at 10:15 p.m. where he saw Powell with the injured arm. Powell’s defence is one of alibi, as, he said he had gone to the jerk centre to purchase chicken when he was shot.

The Learned Trial Judge, in addressing the question as to whether Powell could have been the person in the supermarket at the time of the hold-up, at page 320 of the transcript said:

"Now, there is evidence also from Detective Corporal Hilroy Nelson, he responded to a message from the Four Paths Police and he went to Toll Gate in the vicinity of a jerk centre, where he saw Mr. Powell. He does not recall speaking to a lady, but he was told by the person who spoke to him there, that the call was made by her because the accused Powell had a gunshot injury to the arm. And, that was what he discovered when he got to the jerk centre, that he saw Powell there and he did have a gunshot injury and Powell did give him a story, telling him who had shot him. And, in re-examination he said it was about 10:15 that he had seen Mr. Powell at the jerk centre.

Now, at another stage a submission was made to refute that the logistics and the physical location of Mr. Powell at the time when Corporal Nelson saw him would somehow limit the person who was in the supermarket that night. I do find that at the time that is what transpired".

Bearing in mind the time at which the hold-up is said to have occurred and the time at which Corporal Nelson received the report, the critical question is whether Powell could have been in Porus at the material time as the Learned Trial Judge found.

It is without doubt that evidence ought to have been adduced to establish the distance between Toll Gate and Porus. This would go towards proving whether Powell could have been transported to Toll Gate between 8:50 or 9:00 p.m. and 9:15 p.m. and would have been the person in the supermarket at the

material time. The absence of such evidence should have raised a reasonable doubt as to whether Powell was in the supermarket that night.

Ground 4 -

"(4) IMPROPER POLICE PROCEDURES; THE I.D. PARADE WAS NOT CONDUCTED IN A PROFESSIONAL MANNER, BECAUSE I HAD A BROKEN ARM AT THE TIME AND WAS TOO VISIBLE TO BE PLACED ON A PARADE. ALSO, MY ATTACKER WHO SHOT AND INJURED ME WAS COLLABORATING WITH THE ARRESTING OFFICER."

It is a further complaint of Powell that the integrity of the identification parade was impugned as the police assisted the witness to point him out. It is of significance that Mr. Rogers, his attorney-at-law, was present when the identification parade was conducted, yet, in his testimony the attorney-at-law made no mention of this purported irregularity occurring. He, the attorney-at-law, brought to the attention of the officer in-charge of the conduct of the parade, Sergeant Singh that the injured arm of Powell was exposed. This breach was remedied by the left arms of the men being placed beneath their shirts during parade.

Mr. Rogers declared that he was sent out to call the witnesses during the identification parade. Sergeant Singh said that she detailed a police officer to bring the witnesses into the room. This was never challenged. The Learned Trial Judge rejected Mr. Rogers' evidence that the edges of the cast on Powell's arm was exposed. She was correct in so doing. This ground is without merit.

However, in all the circumstances, we are of the view that the appeal of Powell also ought to be allowed. His conviction is quashed, sentences are set aside and a judgment and verdict of acquittal is entered.