

C.A. CRIMINAL LAW - Gun Court - Illegal possession of firearm -
Robbery with Aggravation - Visual identification
Confused and mistaken running up by judge - warned
of danger of visual identification.
Application for leave to appeal ^{JAMAICA} refused

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 230/87

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (Ag.)

REGINA

v

AINSWORTH CHARLTON

Application for leave to appeal

Miss V. Grant for the Crown

December 13, 1988

WRIGHT, J.A.:

This application for leave to appeal against conviction and sentence was first on the list of cases set down for hearing for the week commencing December 12, 1988. However, when the case was called on there was no representative for the applicant and just as the Court was about to dismiss the application for want of prosecution, Mr. K.D. Knight who with Mr. D. Saddler had represented the applicant at the trial entered and announced that he appeared for the applicant but that he was applying for the case to be taken out of the list. Asked for his reason, he stated that he had been engaged in other activities and had neither read the transcript nor prepared his presentation. He was told that his application could not be granted but that the case would be heard the next day.

On the next day the Court continued with the list of cases including one argued by Mr. Howard Hamilton, Q.C. Just as Mr. Hamilton was about to leave the Court at the conclusion of his case he advised the Court that he had just been handed a note requesting him to apologize

EVIDENCE
✓ comp
Application by Counsel
for argument refused

for Mr. Knight's illness but that he was not requested to make any application. The Court considered this situation unacceptable and, inasmuch as the application was wholly unmeritorious, proceeded to dismiss the application.

The applicant had been convicted on December 18, 1987 at a sitting of the Gun Court on an indictment containing two counts viz. Illegal Possession of Firearm and Robbery with Aggravation and sentenced to imprisonment at hard labour for three years and five years, respectively.

As it transpired the applicant, whose mother is a corporal of police, is an adjoining neighbour of the victim, Miss Donnett Daley of a St. Catherine address. Miss Daley, a higgler, was returning home at some time after 10.00 p.m. on October 10, 1987 when on nearing her verandah, she heard footsteps behind her and when she looked she saw three men. She did not recognise any of them. Her efforts to get inside her house and so shut them out, was frustrated when two of them grabbed her, one of whom said, "You are the higgler woman, is yuh i come for" and at the same time one of them fired a shot from a gun in his hand. The other was armed with a knife. The bullet left its mark in the ceiling of the house.

They entered the house and ordered her to hand over all the money she had. In the process they robbed her of goods and money to the value of \$13,000.00. In the meantime they wreaked their savagery on such occupants of the house as they encountered. The victim's mother was kicked to the floor and Vivienne Brown, a helper, was kicked in the face by one of the two who entered the house. But the door had been left open and by the light from the living room and the moonlight Vivienne Brown recognised the third person standing on the verandah. He was the applicant who lived next door and had quite often eaten in their house as if he were a member of the family. He did not enter the house. Miss Brown eventually made her escape through a back door. Having accomplished their mission the intruders fled the scene leaving Miss Daley bound and in one last defiant show of force fired a shot as they fled.

A report was made to Corporal Kenneth Pottinger at the Riversdale Police Station and he went in search of the applicant whom he knew as "Hopie". On October 13, he accosted the applicant at Troja, informed him of the report and accompanied him to his home where he carried out a search. Among articles taken from the house was a container with skin cream which Miss Daley identified as being among items stolen from her house on the night of October 10. She identified it by a damage caused by a shoe heel because of which she could not sell it and had begun using it. The applicant claimed it.

While the applicant was in custody, his mother along with other police officers visited the station and the mother was allowed to speak with him in the cell. After that the applicant indicated to Constable Leroy Taylor, the investigating officer, that he wanted to tell him where "the things dem deh" and to take him there. Cautioned by Constable Taylor, he further said -

"Is mi and a bwoy name Delroy and another man from Bellrock out Three Miles in Kingston go up a Donnett yard. Delroy have di gun; him borrow it from a bwoy name Cougar from Tower Hill and dem only give mi five hundred dollars and mi tek it buy one red travel fox shoes. Di shoes up a mi yard and the things are at Delroy house now and mi can carry yuh go there go show yuh them."

However, the trip to Delroy's house ended instead at the applicant's mother's house. Questioned about the deception he replied -

"Mi jus carry yuh come a mi mother yard, mi na'ah badder carry yuh a Bellrock go show yuh nowhere."

The reason for the volte-face was not given but it may be of some significance that after he had made the disclosure and his mother was made aware of it she had been permitted to speak to him before she left the station.

The defence advanced by the now famous unsworn statement was that at the material time he was at work at 118 Hagley Park Road and he called one witness in support of his defence.

In a very careful and painstaking summation covering 26 pages, Smith J. considered all the relevant aspects of the case warning himself in so doing of the dangers of visual identification. He drew attention to the fact that the involvement of the applicant was confirmed by -

- (a) Visual identification by Vivienne Brown;
- (b) The container with the skin cream;
- (c) The admission by the applicant.

None of these had been displaced or rendered unreliable and the verdict based upon such evidence remains in the end unassailable. We are in complete agreement with the verdict. As for the sentences they are so lenient as not to attract any complaint.

For these reasons, we dismissed the application and directed that the sentences should run from the date of conviction.