

CA-Criminal Law - Gun Court - Illegal possession of firearm
(Robbery with Aggravation, Assault at Common Law) Evidence
Circumstantial Evidence - Sentence.
Annulment for leave to dismiss
JAMAICA

No case referred to

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evidence

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 191/87

BEFORE: THE HON. MR. JUSTICE CAREY, P. (Ag.)
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA vs. BERNARD GUTZMER

Application for leave to appeal

Kent Pantry & Brian Sykes for Crown

20th September, 1988

CAREY, P. (Ag.):

In the High Court Division of the Gun Court on the 15th of October, 1987, this applicant, Bernard Gutzmer, was tried on an indictment which contained three counts, namely, Illegal Possession of a firearm, Robbery with Aggravation and Assault at Common Law. He was convicted on the first count only and sentenced to a term of seven (7) years imprisonment at hard labour. The other two counts were dismissed for reasons which we have found, with all respect to the learned trial judge, difficult to understand. This applicant is extremely fortunate.

The circumstances which gave rise to the indictment can be shortly stated. At about 9:30 p.m., on a day in October 1986, the victim, one Yvette Jackson, was walking along a country lane, a place called Mount Zion in Red Hills in the parish of St. Andrew, when she was accosted by a man who came from behind and held her in the nape of her neck. He also presented a firearm by her ears and threatened her with death if she raised an alarm. He required money of her, and in the event did relieve her of Thirteen Dollars (\$13.00) and three cigarettes which she had on her person.

She said that she was able to identify and recognise this person because it was moonlight, and of course, the person was in close proximity to her at the time of the robbery. She stated that she ran off and within some fifteen or twenty minutes, having raised the alarm, she returned to the spot where the incident took place, with a District Constable and some other people, to find this applicant emerging from some bushes. He attempted to make his escape but was caught.

The police were summoned upon the scene and a police officer recovered from him a homemade firearm with which Miss Jackson had indicated, her assailant was armed. Also found on his person were Thirteen Dollars (\$13.00) and three cigarettes which Miss Jackson said he had also extracted from her. She had also stated that the person who had robbed her had a bag and she gave the description of that bag. When the police later returned to the spot where the incident took place, that bag was also recovered. It must be stated that neither the bag nor the cigarettes were tendered in evidence, and also that the cigarettes were not mentioned in the evidence given by the police officer who recovered the cigarettes.

Miss Jackson had also described the attire of her assailant, namely, that he was wearing a pair of black pants and a red shirt, and when this applicant was held, that was the colour of his attire.

The applicant gave an unsworn statement in which he put himself on the scene but said that he had just come off a bus. And it was suggested that there was some motive on the part of the police officer in charging him for these offences. Curiously, he called in support of his case, a witness who admitted "backing up" the applicant in the bushes. We should also add that the applicant called a Mr. Winston Chambers who is employed at the National Meteorological Services. He testified that on the material date, there was no moon.

The learned trial judge in a rather lengthy and convoluted summation discredited Miss Jackson's evidence as to whether there was a moon or not. He found that there was no moon. That led him to hold that he could accept nothing of her evidence. And although there was other circumstantial

evidence, e.g., the finding of the money on the applicant; the finding of the bag on the scene; the finding of a man dressed as she had described him; the finding of the cigarettes on him, all within such a short time of the incident, were all dismissed as of no significance.

We would have thought that the circumstantial evidence pointed in one direction and one direction only, and would strengthen the credit of Miss Jackson that she was in fact robbed by that man. The identity of the assailant did not depend wholly on her visual evidence of identification. Howsoever that may be, the evidence of the possession of the firearm was enough to convict him on count one. And as to that, the evidence was overwhelming.

As we have said, this was a fortunate applicant and there really is no merit in this application which we, accordingly, refuse. The Court will direct that the sentence begin to run from the date of his conviction.