JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 108/87

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

REGINA

VS.

ERROL KELLY

Application for leave to appeal

Mr. Brian Sykes for the Crown

May 1, 1989

CAREY, J.A.:

On the 23rd of June, 1987, in the High Court Division of the Gun Court, the applicant was convicted on an indictment which, as to counts 3 and 4 charged him and another man with illegal possession of firearm and counts 5, 6 and 7 charged him with robbery with aggravation of certain persons who were patrons in a bar at the time of the robbery. He was sentenced to concurrent terms of eight years imprisonment at hard labour. He now applies for leave to appeal his conviction and sentence.

The short facts are that on the early morning of the 30th of November, 1985, there were certain patrons in a bar at Mount Ogle, called "Aunt Pet's Bar", and around that time two men entered and uttered words with which we were familiar in the days of the highwayman, but of course, with a more modern ring, namely, "get flat". Everyone interpreted that to mean that this was a hold up and they should take very great care how they acted. In the result, various patrons were deprived permanently of their property.

This case rested wholly on the visual identification of a lady, with a rather interesting name of Paravella Millanaise. She said that she had an excellent opportunity of observing the features of this applicant whom she did not know before. She testified before the learned trial judge that she had about five minutes to look at his face and some six days later, when she attended an identification she pointed him out. There were some other evidence of visual identification given by another witness called Clement Nelson, but the learned trial judge did not regard his evidence as credible and therefore did not take it into consideration in returning the verdict which he did.

Later that morning, the police picked up this applicant and another man in a derelict motor car and in the motor car they also found a shot gun, which was the subject of count 4 of the indictment preferred against him. The defence of Kelly was that he knew precisely nothing about these events.

As we have indicated, the robbery counts depended wholly upon the visual identification of a solitary witness and the learned trial judge, having clearly in his mind the authority of R. v. Whylie 15 J.L.R. p. 163 considered the question of opportunity; the distance between assailant and victim; the lighting available at the time. The lighting at the time was from electric lights in the bar and witness and applicant were within close proximity of each other. We have already stated the time for the robbery, namely, some five minutes.

Those were cogent factors which the learned trial judge would have been entitled to take into consideration in finding adversely to the applicant. And of course having seen and heard the witnesses testify before him, he was in a position of advantage to make up his mind where the truth lay. Insofar as count 4 is concerned, that was a straightforward question of fact; the police witnesses testified that there was a firearm in the possession of the applicant. Credit was the only matter to consider. The learned trial judge believed the police officer and disbelieved the applicant. We can see no reason whatever to interfere in

the verdict at which he arrived.

Insofar as sentences are concerned, they are well within the range of sentences imposed for offences of this nature. In the result, the application for leave to appeal is refused and the Court directs sentences to commence from the 23rd of September, 1987.