C A Criminal Law - Gun Court Offences - Illegal possession of firearm (2) Robbery with aggravation - Evidence - Sentence - Whether inadmissible hearsay evidence admitted - whether identification evidence proved and uncorroborated - whether misdirected self on weight of evidence - whether sentence of 7 (seven) years harsh and excessive

APPLICATION FOR LEAVE TO APPEAL REFUSED

No Cases referred to

✓ Comp Evidence

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 35/92

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

Criminal Practice

REGINA
vs.
TREVOR POWELL

Paul Ashley for the applicant

Michael Palmer for the Crown

July 21, 1992

WRIGHT, J.A.:

In the Gun Court Division of the High Court on the 19th November, 1991, before C. S. Orr, J., this applicant was convicted on an indictment containing two counts of illegal possession of a firearm and robbery with aggravation and was sentenced to seven years hard labour on each count.

In the evening of the 4th July, 1991, at about 6:45 p.m. while Mr. Hemsley Johnson and his wife were sitting in their home viewing television they suddenly saw a man appear in the house. This man's demand was for money, "Give me all the money yuh have." The wife remonstrated with him and he punched her and then he went to her husband and said, "Give me all the money yuh have and turn yuh back." Mr. Johnson complied. He turned his back whereupon his assailant pushed his hand in Mr. Johnson's back pocket and extracted a total of fifteen hundred dollars. He then said he was going to shoot Mr. Johnson whereupon Mr. Johnson asked, "What are you going to shoot me for?" The frightening aspect of it is that it appeared that the assailant intended just that because Mr. Johnson said,

"I heard the gun start and I turn around." Fortunately for Mr. Johnson the gun did not go off but so intent was the assailant on inflicting violence that he struck Mr. Johnson at the side of his head with the gun. Mr. Johnson grabbed at the mask made of knitted material which the assailant was wearing and then he discovered that his assailant was the applicant Trevor Powell who had worked with him up to the Tuesday of the said week. This was now Thursday and the applicant had worked with him four days per week for three or four weeks previously and had only left on the Tuesday when he refused to work as he was told. In an effort to prevent recognition, Mr. Johnson said that the person had "hoarsed up his voice." On that point, the wife disagreed. She recognised the voice as being that of someone, a man who used to work with them. After Mr. Johnson had grabbed the mask the applicant ran out of the house and down the hill. On the same night Mr. Johnson made a report to the police who visited their home.

A warrant was taken out for the arrest of the accused in his name and on the 28th July, in the early morning, the police visited the scene at Fogah Road where they found the accused under a bed, not at his home. He was arrested and charged and his defence was that he was at his mother's home at the time when the offence was supposed to have been committed.

The learned trial judge rejected what in effect was an alibi defence and found the applicant guilty.

Before us today, Mr. Ashley sought to argue four grounds of appeal. The first ground reads:

> "The learned trial judge erred in law by admitting inadmissible hearsay evidence; and having done so, failed to demonstrate in his reasoned judgement that such evidence did not affect his determination."

What that focussed on was the fact that the policeman had the name of the applicant and Mr. Ashley says that no witness was

called who said that he gave the name to the officer.

But that is a matter of inference. The report was made to the police the same night, the witness knew the applicant. What then could he do but identify his assailant? Not much effort was spent on that ground and Mr. Ashley moved on to the second ground.

> "The quality of the identification evidence was poor and uncorroborated and thus insufficient in law to support a conviction of the accused/applicant."

Mr. Ashley regards the evidence as being poor but here is a man who was known to his victim; who had worked regularly with him for some three or four weeks for four days a week and had only left the Tuesday, came back the Thursday as though he was imposing a new pay day on them. The fact of the matter is that although Mr. Johnson did not have a long time to view the face of his assailant after he had pulled off the mask, in those circumstances it would not require a long view to make the evidence of the identification good. We do not agree that the identification evidence was poor and we do not see any merit in that ground.

Ground 3 states:

> "The learned trial judge mis-directed himself as to the weight to be attached to the evidence concerning:
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> (i) the attempt of the robber to disguise his voice during the incident;
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> (ii) the circumstances surrounding the arrest of the accused in a case dependent wholly or substantially on uncorroborated evidence of visual identification."

Mr. Johnson had said that the assailant hoarsed up his voice in an endeavour to disguise his voice, the wife said to the contrary but she did say that the voice was that of a man who had worked with them. The value of her evidence and the weight

of it is that she was saying that the assailant was not a stranger and to that extent supported Mr. Johnson when he identified the applicant as being the intruder. The circumstance of the arrest was that the applicant was found under somebody else's bed in the early morning and this is subsequent conduct which showed "the guilty fleeing". We see no value in that ground either.

Ground 4 criticises the sentence as being unduly harsh and excessive. In the circumstances where aged persons are attacked in their homes and where the assailant demonstrated an intention to destroy them,because he actually endeavoured to use the gun to shoot and only hit Mr. Johnson with the gun when it could not be fired, heavy sentences are justified. This applicant had obviously intended to eliminate the evidence and so ensure that his crime would go unpunished. We think, in those circumstances, seven years is mild and it would appear that the only reason why that sentence was imposed was because of the condition of the gun - it was rusty.

Neither the evidence nor the treatment thereof by the trial judge affords any reason for interference by this Court. Accordingly, we refuse the application for leave to appeal and direct the sentence to commence on February 19, 1992.