

C.A. Criminal Law - Gun Control Act [Illegal possession of firearm, Robbery with aggravation,] Evidence - visual identification - warning - not fatal - not fatal due to confession of appeal n.t. Sentence and appeal
Applicant has for leave to appeal a reference

Cases referred to

JAMAICA

R v Anthony Mc Intosh S.C. CA 145/89-18/2/91 (unreported) ✓ comp

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 75 - 80 OF 1990

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

REGINA

vs.

WORREL HEADLEY

STEVE SMITH

DELOY ATKINS

Applicants Headley and Smith unrepresented

Appellant Atkins unrepresented

Bryan Sykes for the Crown

May 13 and June 4, 1991

WRIGHT, J.A.:

The above-mentioned three persons, along with one Arnold Johnson, were charged on an indictment containing four counts before Courtney Orr, J. in the Saint James Circuit Court on 24th April, 1990. All four were charged on counts 1, 2, 3 with Illegal Possession of Firearm (Count 1) and Robbery with Aggravation (Counts 2 and 3). Smith alone was charged with Illegal Possession of Firearm on Count 4. With the exception of Atkins, who pleaded not guilty to all charges, they pleaded guilty as charged and were sentenced as follows: On counts 1, 2, 3, Smith, Headley, Johnson each to twelve years imprisonment with hard labour. On count 4 Smith to twelve years imprisonment with hard labour - sentences to run concurrently. The trial of

Atkins lasted five days at the end of which he was convicted on each of the three counts on which he was charged and was sentenced to imprisonment with hard labour for thirteen years on each count.

The applications of Headley and Smith for leave to appeal against sentences were refused and their sentences ordered to commence on 8th August, 1990.

Atkins had been granted leave to appeal by the single judge obviously to have the question of his identification considered by the Court. It is, therefore, necessary to state the facts of the case sufficiently to be able to deal with the point at issue.

The night of May 19, 1989, was a nightmare which Rudolph Scarlett and his family living at Bottom Cambridge, Saint James will certainly want to forget. Having retired at about 9:00 p.m., the family was rudely awakened at about 1:45 a.m. by strange sounds which preceded the entry of three armed men into the bedroom of Mr. Scarlett and his common-law wife, Miss Pamela Morris. The three who pleaded guilty were those three men armed with a gun, a machete and a knife. So self-assured were they that they ordered Miss Morris to turn on the electric lights in the room and she complied. They were ordered to lie down - Mr. Scarlett on the floor and Miss Morris, who had sat up in bed when they made their entry bringing her daughter from her room with a knife at her headback, was pushed back and fell propped up against the bedhead - a fact which was to prove advantageous in a manner they did not intend.

Mr. Scarlett was made to disclose where his wallet was and it was promptly taken with its contents of over \$2,000. In the meantime, he had to seek refuge underneath the bed as one intruder threatened him with a machete.

The daughter had been dumped on the bed beside Miss Morris, who at gun point was forced to disclose the whereabouts of her handbag which was immediately relieved of its contents of money and jewellery. They demanded the remainder of her jewellery and when she showed them the box in which it was, that box was fetched and set in her lap and she was told to identify those which were real gold which she did. Further, she was asked for the big gold chain which she used to wear. It was in a handbag atop the closet and that, too, was taken.

While all this was going on she was aware of a fourth man outside. It was apparent that they had knowledge that Miss Morris had recently returned from the United States of America and much effort was being exerted to obtain United States currency from her. During this time she heard the fourth man say, "Wey oonoc a do in deh so long? If the gal a gi oonoo trouble shoot her in her b... c... and come". They collected all the electronic equipment in sight and items of clothing and haberdashery and then retreated outside for what appeared to be a conference. When they re-appeared the fourth man, armed with a gun, was with them. It was then made plain that raping was next on the agenda. In her effort to thwart their intentions, Miss Morris pleaded the state of her health and had to endure the indignity of a physical examination before her word was accepted. Her examiner then announced, "Well, you daughter then" and having so said he grabbed on to the daughter and started dragging her off the bed. But that was not to be. In the midst of all that danger, Miss Morris held on to her fifteen year old daughter and would not relent although the fourth man, whom she identified as the appellant Atkins, stood by the door with his gun trained on her and threatening to shoot her. Her only weapons were her eyes. She fixed her eyes on his face in an earnest plea to spare her. At last Headley intervened and said, " 'Low her man, just leave her alone". It took some

effort on his part, "Just cool, man, just cool, 'low her man". She was then asked if she knew them and she said no but the fourth man, expressing himself with the aid of expletives, indicated that she might not be a stranger and further threatened to shoot her.

They then demanded the key to Mr. Scarlett's van and he fetched it and handed it to them. As a parting gesture, the first gunman went back to Miss Morris and admonished her thus:

"Hey gal, no tell nobody nothing you know, for yuh sa if yuh ever say nothing to nobody we a come back and bun down yuh house or do yuh something bad, all kill yuh too, yuh, yuh know?"

They went out with their loot of some \$30,000. But Mr. Scarlett anticipated a return because he knew they would have trouble starting the van so he locked the doors. He was correct. They came back kicking at the door and complaining that the "van won't start". Whereupon the occupants began to scream and retreating footsteps were heard. This was after they had spent some thirty minutes in the house with the lights on.

On the question of the identity of Atkins, Miss Morris testified:

"He was the one that came in last. He was the second gunman. I could see his face and his body because he was standing in the doorway and I could see him clearly from the time he entered the room and he held the gun on me because this time I thought it was death. The way in which, the manner in which he came into the room and held the gun on me I was sure that he was going to shoot me and I was looking directly in his face, you know trying to plead with him. So I had a good look at him. So I was looking straight in his face, because, you know, trying to plead with him, because the way how he was behaving like he would shoot me at any moment. So its like about maybe approximately ten minutes, you know, maybe about 15 minutes or more."

The distance between them, she said, was seven to eight feet. Her ability to see was greatly facilitated by the propped-up position into which she had been pushed when they came in and which position was retained throughout the ordeal.

Both Mr. Scarlett and Miss Morris pointed out Atkins on Identification Parades consisting of fourteen men on July 3, 1989, at the Montego Bay Police Station in the presence of his attorney, who represented him at the trial. In identifying him, Mr. Scarlett touched Atkins and said, "This one". Miss Morris, however, said, "This looks like one, he is one".

The three, who pleaded guilty, were each found in possession of goods stolen from the house. Nothing was found with Atkins. Visual identification would, therefore, in his case, be a live issue aided by his plea of an alibi supported by Steve Smith, a co-accused, who testified that Atkins was not one of the intruders at Mr. Scarlett's home on the night of May 19. Atkins' grand-mother, who was also called, did not betray any knowledge of his whereabouts at the time of the robbery. She only spoke of events after his arrest.

The learned trial judge, in assessing the evidence relevant to the identity of Atkins as one of the marauders, examined the opportunity disclosed in the evidence and expressed himself as satisfied that he was guilty on all counts on which he was charged. But he omitted to warn himself and to do so in the manner required in numerous judgments of this Court and of the Privy Council. Fortunately, however, this failure on the part of the learned trial judge is not crucial. The warning is to ensure that the issue of identification is settled only after all the relevant factors have been carefully considered in order to eliminate the danger of mistaken identity. Where, therefore, that danger is removed by the confession of the appellant no problem arises. (See R. v. Anthony McIntosh S.C.C.A 145/89 delivered 18th February, 1991 [unreported]).

The appellant Atkins was the first of the four desperados to be picked up by the police, Acting Corporal Vernon Ellis, on June 8, 1989, who told Atkins that he had received certain information "that he is a prime suspect in an alleged case of robbery and that he can assist the police in their investigation". Straightaway he told the officer that -

"he and some of his don friends
went to a house at Cambridge
and robbed the occupants of
their jewellery and cash."

It was as a result of information which he supplied why the officer was able to pick up the other three, who were charged, the very next day, and recover some of the stolen property. We say nothing, however, to derogate from the duty of trial judges to observe the requirement to warn themselves appropriately. Indeed, where the identification is fortified, as in this case, by a confession it cannot be amiss for the judge to emphasize that fact.

We are satisfied that the conviction of Atkins is justified by the weight of the evidence against him.

SENTENCES:

Much time went into the consideration of the sentences.

Headley was given credit for the fact that he had pleaded guilty and had intervened to forestall the effort to rape Miss Morris' daughter. However, on his debit side appeared four previous convictions, one for illegal possession of firearm (16th July, 1984) and a three-year sentence in the Saint James Circuit Court on 14th July, 1986, the memory of which must still have been fresh in his mind when he joined that gang to rob on the night of May 19, less than three years after that conviction and sentence.

Smith had had the benefit of good parentage but had chosen to involve himself with known criminals, who terrorized

the community. He had earned one previous conviction. While in custody, he gave the officer information which enabled him to go to Smith's home and recover one .38 Smith and Wesson revolver along with fourteen .38 unexpended cartridges. The serial number of the firearm had been erased. When asked whose gun it was Smith replied:

"A fi mi gun, officer, is the same
gun me and mi other don friends
use and rob the woman and man at
Bottom Cambridge."

Atkins had no previous convictions but the trial judge took note of the role he played first in exhorting his co-accused to shoot the woman if she gave any trouble and then the terror to which he subjected Miss Morris during the final stage of their unwelcome visit when he seemed bent on shooting her and may only have been deterred by her pleas and Headley's intervention.

In our opinion, these sentences were well earned and so we refused to interfere with them.