JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 147/06

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MISS JUSTICE SMITH, J.A. (Ag.)

REGINA

V.

NICHOLAS POWER

Mr. Leroy Equiano for the Applicant.

Mrs. Diahann Gordon-Harrison, and Miss Natalie Ebanks, for the Crown.

April 21, and 24, 2008

COOKE, J.A.

1. The applicant was on the 17th August, 2006 convicted in the High Court Division of the Gun Court in Kingston on two counts. The first was for illegal possession of firearm and the second for assault. He was on the 18th August, 2006 sentenced respectively to 12 years and 3 years imprisonment at hard labour. The sentences were to run concurrently. His application for leave to appeal against his convictions and sentences, having been refused by a single judge, has now been renewed before us.

2. An outline of the case presented by the prosecution is as follows. At about 8:20 p.m. on the 5th September, 2005, Constable Paulton Montaque and Special Sergeant Grant were passengers on a Jamaican Urban Transit bus, which plied the route between Downtown Kingston to Spanish Town. When this bus reached the vicinity of Tank Weld Company it stopped, as a passenger wished to disembark. The applicant was outside to the rear of the bus. He could be seen as there was a transparent glass window to the back of the bus. The applicant was armed with a 9mm firearm. He was speaking to the conductor telling him that it was a robbery and the money should be thrown out. While this was going on, the back door of the bus "flew open" and the applicant stepped onto a step leading into the bus. Montaque and Grant drew their service firearms and fired at the applicant who fell backwards. There followed two explosions from outside of the bus. Subsequently, "gun shot holes" were observed on the bus and a female passenger received gunshot injuries. On the 8th September, 2005 Montaque went to the Kingston Public Hospital to visit a male friend on ward Three East. At about 8:30 p.m., while on that ward he saw and recognised the applicant who was a patient suffering from gunshot injuries. He immediately contacted Detective Sergeant Fairweather, the investigating officer in this matter. The latter soon arrived and Montaque made a formal identification of the applicant to him.

3. The applicant made an unsworn statement. He said he worked at Tank Weld. On a night, at about quarter to ten, of an unspecified date he left work after doing overtime. He took a bus which was going to Six Miles. He came out of this bus and while walking along Spanish Town Road he was attacked and shot by a gunman. It was about a week after, that he found himself in the Kingston Public Hospital.

4. The applicant was given leave to argue two supplementary grounds of appeal which his counsel stated embraced those already filed. The first was that:

> "The Learned Trial Judge erred in not allowing the no case submission. This was a case where identification was in issue and where there should have been an identification parade."

Both Montaque and Grant were called as witnesses for the prosecution. The latter did not attend an identification parade. Accordingly, when he pointed out the applicant at the trial as the gunman at the time of the incident, this was a dock identification. The first ground as framed would suggest that where one of two witnesses makes a dock identification, in a case where visual identification is a critical issue, then it is inevitable that a no case submission should succeed. This view is untenable. It would mean that, the evidence given by Montaque would have been of no moment. In exchanges between the Bench and the Bar, counsel for the applicant expressed the view that in respect of the evidence given by Montaque, if it stood alone, that was sufficiently cogent to ground the

conviction. It is opportune to restate the law pertaining to dock identification as was clearly enunciated in **Pop v. The Queen** [2003] U.K P.C 40 at para. 9.

> "The fact that no identification parade had been held and that Adolphus identified the appellant when he was in the dock did not make his evidence on the point inadmissible. It did mean, however, that in his directions to the jury the judge should have made it plain that the normal and proper practice was to hold an identification parade. He should have gone on to warn the jury of the dangers of identification without a parade and should have explained to them the potential advantage of an inconclusive parade to a defendant such as the appellant. For these reasons, he should have explained, this kind of evidence was undesirable in principle and the jury would require to approach it with great care: R v Graham [1994] Crim LR 212 and Williams (Noel) v The Queen [1997] 1 WLR 548."

The "dangers of identification" of which **Pop** speaks would include:

(i) When the witness makes a dock identification there is the considerable risk that his evidence will be influenced by seeing the accused in the dock.

(ii) Dock identification lacks the safeguards that are offered by an identification parade.

(iii) It increases the risk of a wrong identification. (See para.. 47 of Holland 2005 SC (PC) 1, 17.)

It is to be noted that there is no complaint about the treatment by the learned trial judge of the evidence of Grant. En passant at the conclusion of the cross-examination of Grant, at the trial, counsel for the applicant (not Mr. Equiano) had this to say at page 42.

> "And may I commend you on the evidence that you gave. You gave very good evidence— in — chief. Thank you, sir."

It should be added that in the no case submission the applicant's counsel submitted that although he commended Grant as a "forthright witness" the absence of an identification parade resulted in his evidence being "totally flawed". This first ground of appeal fails.

5. The second ground of appeal was:

> "The Learned Trial Judge in his summation failed to demonstrate that he recognized and appreciate [sic] the weaknesses in the identification evidence."

This ground was posited on the basis that there were two contradictory aspects of evidence as between Montaque and Grant. This pertained to the firearm which the applicant brandished. Both witnesses said it was a 9mm calibre pistol. However, while Montaque said it was black in colour, Grant described it as chrome. The submission was that this discrepancy demonstrated that there was an inadequacy of lighting to properly see the gunmen. The learned trial judge regarded the difference as to the colour of the firearm as a discrepancy. Although, he did not specifically say how he treated that discrepancy within the totality of the evidence adduced by the prosecution, it can be inferred that he did not regard it as significant. On pages 62 – 63 of the transcript he said in his summation:

> "... apart from the discrepancy in the main evidence of Sergeant [sic] Montaque – Sergeant Grant as to identification (of the firearm), but it is he himself (Montaque) who happened to go to the Kingston Public Hospital and finds the accused man there, and immediately he acts upon it..."

This can only be construed to mean that the learned trial judge who saw and heard Montaque give evidence was so impressed with the quality of his evidence as regards the visual identification of the applicant, that he would not consider the discrepancy as serious. The other contradiction, which somewhat, concerns the first is that while Montaque said the bus was well lit, Grant's evidence was to the contrary. However, Grant on page 31 of the transcript said that "there was light to the back compartment of the bus as well". This was the area where the criminal drama was enacted. The learned trial judge was in error when in his summation at page 59 he said "Both men (Montaque and Grant) agreed that the bus was well lit and the lighting is such that they could see clearly." The inaccuracy pertains to the first part of that sentence. This error, when considered within the totality of the evidence cannot be said to be fatal. This ground fails.

6. Evidence was given in this case by the investigating officer that an identification parade was not held for Grant to attend because while the applicant was in the hospital he had been exposed. In **Leslie Pipersburgh and Patrick Robateau v The Queen** [Privy Council Appeal No. 96 of 2006, delivered on the 21st February, 2008], their Lordships' Board at para. 6 addressed a similar type of situation. This was what was said:

> "At the trial, prosecuting counsel, Ms Moyston, adduced a total of five dock identifications of the appellants, as being involved in the murders at Bowen

> & Bowen's premises, from three witnesses – Karl Ventura (identifying Mr Robateau), John Ventura (identifying both appellants) and Virgilio Requena (also identifying both appellants). In the Court of Appeal the Director of Public Prosecutions accepted that the witnesses had not known the appellants' names. Moreover, the police did not hold an identification parade for either of the appellants. This was on the advice of the Crown Counsel then acting – apparently on the basis that an identification parade would have been inappropriate because the appellants' pictures had been published in the press and so there was a risk that witnesses would identify the appellants from the pictures. However well-intentioned that advice may have been, the decision not to hold an identity parade meant that the first time the three witnesses were asked if they could identify the men involved in the raid was more than eighteen months after the incident, when they were in the witness box and the appellants were sitting in the dock. In their Lordships' view, in a serious case such as the present, where the identification of the perpetrators is plainly going to be a critical issue at any trial, the balance of advantage will almost always lie with holding an identification parade."

We think it is useful for persons concerned to be aware of this passage.

7. The application for leave to appeal is granted. The hearing of the application was treated as the hearing of the appeal. For the reasons given above the appeal is dismissed. The convictions and sentences are affirmed. These sentences are to commence on the 18th November, 2006.