JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 181/2006

BEFORE: THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.

KENNETH CHRISTIE V REGINA

Delano Harrison Q.C., instructed by K. Churchill Neita for the Applicant.

Mrs. Caroline Hay and Loxly Ricketts for the Crown

June 18 and 19, 2009

Oral Judgment

COOKE, J.A.

1. The applicant, on the 9th October 2006 in the Western Regional Gun Court, was found guilty on an indictment which charged him respectively for illegal possession of a firearm, robbery with aggravation and indecent assault. The sentences imposed were 15 years at hard labour on the first two counts and 3 years at hard labour on the count in respect of indecent assault. The sentences on counts 1 and 2 were to run concurrently but consecutively with the sentence on count 3, which would mean that looking at the sentences in a global manner, the total sentence to be served would be one of 18 years imprisonment.

2. The court will not indulge in an expansive discourse in respect of the factual situation; suffice it to say, that on the 4th August 2006 at about 10:00 p.m., the virtual complainant Cression Clarke was wending her way home in Sandy Bay, Hanover. She was utilizing a pathway when her consciousness was awakened to the presence of shadows. She was then aware of two men brushing against her, one of whom, the applicant in this case, had a firearm. She was robbed of her cellular telephone and during the confrontation she was indecently assaulted. She went home, and reported to her brother, who it was that she was convinced was the robber, whom she knew as Rangie. The inescapable inference is that her brother phoned Rangie no doubt complaining to him and telling him to bring back his sister's cell phone, which he duly did on the following morning. The defence was that the applicant wasn't there, but that the previous night he had been held up by two robbers who gave him the cell phone to return to the virtual complainant. As Counsel who represented Mr. Christie has said, there are undoubtedly aspects of a comic nature which attaches itself to this case.

3. This matter came before a single judge who refused leave to appeal. Learned Queens Counsel, Mr. Delano Harrison who has been briefed in this matter, quite readily and inevitably recognized that there was no material sufficient to mount any attack on the propriety of the

conviction. However, before us he mounted an attack on the sentences which he said were manifestly excessive and, to this the court will advert its attention in a moment. However, before that, the court would like to comment on an aspect of the summing up which is not in harmony with the accepted principles. At page 52 of his judgment, the learned judge used the following words:

> "Now, voice recognition is not an exact science and voice recognition by itself would not suffice as an identification in a court of law."

That is not, in our view, accurate.In respect of voice identification, the prosecution would be obliged firstly, to tender evidence which shows that the identifying witness has had adequate opportunity to become familiar with the voice, and secondly that at the time of recognition there was sufficient conversation which permitted the identifying witness to properly identify the voice. Of course the caution that **Turnbull** mandates, is to be equally adopted in respect of the approach to voice identification. In this case, that did not arise; the applicant was a regular visitor to the home of the virtual complainant and spoke at length on a number of occasions. On the night in question, there was an extended conversation involving him since he is described as the talkative one of the two.

4. The court now turns the attention to the question of sentence. Learned Queen's Counsel was particularly helpful in reminding the court of its own pronouncements in **Cecil Gibson v R** 13 JLR 307 and **Badrow v. R**

25 JLR 324. The most important aspect of **Gibson** (supra) is a reminder to sentencing judges that, the person who has been convicted, "is not an abstraction" and that it is important to assess that individual who has been convicted and not to employ, in counsel's words "a cavalier approach."

5. In **Badrow** (supra) the head note is to this effect:-

> "The paramount purpose of sentencing in criminal cases is for the general protection of the public. There must be some reasonable relationship between the sentence imposed and society's abhorrence of the crime."

However even in regard to serious offences, (and I pause here for emphasis) there are degrees of seriousness, and the trial judge must, in imposing sentences, discriminate according to the comparative data presented by the offences in this society. This court would add the comparative seriousness of the offence within the range of the gravity of this particular finding of the offence. So, being mindful of the guidance provided by these two cases, we are of the view that in this particular case, the gun was not used to inflict personal injury.

6. Counsel has described it as 'play-play' which is really metaphorically distinguishing really serious robberies from this robbery. We think that that submission is of merit. He further asked us to look at the individual, and although there was not a social enquiry report which he said ought to have been sought in this particular case, it was obvious that the applicant

in this case was "fool-fool". He was illiterate and has none of the sophistication of maturity about him. We also feel that there is merit in this submission and we approach it first of all to look at what global sentence would be appropriate in these circumstances bearing in mind the factors enunciated in **Gibson** (supra) and **Badrow** (supra).

7. We believe and have come to the conclusion that a global sentence of 10 years would be the proper sentence. Therefore the conclusion is as follows - the application for leave to appeal against conviction which was not pursued is refused. The application for leave to appeal against sentence is granted and the application for leave to appeal against sentence is regarded and treated as the hearing of the appeal, and the appeal against sentences is allowed. The sentence of 15 years on counts 1 and 2 respectively is set aside; the sentence on count 3 is affirmed; the pronouncement by the sentencing judge that the sentence on count 3 is to run consecutively with the sentences on counts 1 and 2 is set aside. So, the sentences on counts 1 and 2 will be 7 years for count 1, and 10 years for count 2 respectively. All three sentences are to run concurrently, and are to commence on the date of sentence, 9th October, 2006.