JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 59/2007

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MRS. JUSTICE HARRIS, J.A.
THE HON. MISS JUSTICE PHILLIPS, J.A.

KIRK LINTON v REGINA

Dr. Randolph Williams for the Appellant

Mrs. Caroline Hay, Senior Deputy Director of Public Prosecutions (Ag.) and Ms. Keisha Prince, Crown Counsel (Ag.) for the Crown.

October 13 and October 30, 2009

HARRIS, J.A.

1. On December 6, 2006, the appellant was convicted in the High Court Division of the Gun Court for the parish of St. Elizabeth, on an indictment containing 7 counts. On counts 1 and 5 he was charged with illegal possession of firearm. On counts 2 and 3, he was charged with robbery with aggravation; on count 4, robbery with violence; on count 6, shooting with intent; and count 7, illegal possession of ammunition. He was sentenced to 7 years imprisonment on counts 1 and 5; 10 years on counts 2, 3, and 4; 15 years on count 6 and 5 years on count 7. It was ordered that the sentences should run concurrently. It was further

ordered that the appellant would be ineligible for parole or remission of his sentence.

2. His application for leave to appeal against conviction was refused by a single judge, and this he now renews before us. He was granted leave to appeal against sentence.

3. On May 17, 2005, Mr. Milton Logan, a salesman for Desnoes & Geddes, accompanied by 2 sidemen, was on his route over which he travelled habitually for 4 years, selling liquor to bar owners and wholesalers. At about 1:00 in the afternoon, he arrived at Bromington Hall in St. Elizabeth and stopped at a bar owned and operated by Miss Doreen McLaughlin. He was in the process of taking an order from Miss McLaughlin when he heard a voice which said, "Don't move". This he ignored initially. He, once again having been told not to move, looked up and saw 3 men pointing guns at him. They entered the bar while a fourth stood guard at the door. The appellant was one of these men.

4. They ordered Mr. Logan, Miss McLaughlin and Mr. Logan's sidemen to lie face down on the floor and not to look at them. They then bound their hands and feet with duct tape. Mr. Logan's face was also bound. He was kicked in the face by the men.

5. Miss Carneta Smith, Miss McLaughlin's sister, entered the bar during the hold-up. She was accosted by one of the men who told her not to look at him. She was also ordered to lie face down and her hands and feet were bound.

6. Mr. Logan was robbed of $25,000.00. Miss McLaughlin was robbed of $45,000.00, a ring and a chain, while a chain, a chapperita and a Motorola cellular telephone was taken from Miss Smith. Immediately after the robbery, the men sped away in a car in which they had arrived, taking with them Mr. Logan's truck, driven by the appellant, laden with merchandise.

7. The police were alerted and this led Constable Desmond Taylor and Constable Gregory Gordon to proceed to the Junction area where the truck was seen and followed by them into Junction where it collided with 3 cars. The appellant, armed with a gun, alighted from the truck and ran. He was chased by the policemen. During the pursuit, he turned and fired at them. Thereafter, he ran into premises which houses a hardware establishment. He then dropped the firearm which was picked up by Constable Taylor. He was apprehended by Constable Gordon. He was searched and $6,700.00, the jewellery stolen from Misses McLaughlin and Smith, as well as Miss Smith's cellular telephone were found on him.

8. The appellant gave an unsworn statement in which he said that he went to Junction to visit his nephew. On his way back, a car with 5 persons on board drove up. Four men alighted from the car and told him not to move. He placed his hands in the air. He was then attacked, abused and beaten by the men.

9. A Mr. Cole brought a man to his cell and asked the man if he, the appellant was the boy who robbed him. The man shook his head and left. The appellant went on to say that he first heard of the charges when he attended the Resident Magistrate's Court. He attended that court, and the Circuit Court on 6 occasions, but no witnesses turned up.

10. He further asserted that he was taken from Nain to Santa Cruz Police Station for an identification parade. He was told that an identification parade would take place in Black River. The parade was scheduled to be done on 3 occasions but no witnesses attended.

11. The learned trial judge rejected his statement, and rightly so.

12. Dr. Williams submitted that he had read the transcript and although the appellant challenged the identification evidence, in light of the overwhelming evidence of recent possession, he could not reasonably present any useful argument against conviction.

13. The critical issue in this case is credibility. This the learned trial judge clearly acknowledged. He recognized that the doctrine of recent possession was crucial in respect of counts 1 – 4; there being no evidence of visual identification. This relates to proof with regard to items taken from Mr. Logan, Miss McLaughlin and Miss Smith.

14. The learned trial judge accepted all the witnesses as credible. Having analysed the evidence with scrupulous care, he correctly directed himself on all counts on which the appellant was charged. We agree with Dr. Williams that there is nothing which could be urged to warrant the conviction being disturbed.

15. We now turn to the question of sentence. Dr. Williams argued that the learned trial judge, in imposing a sentence of 15 years on count 6 added other penalties, rendering the sentence contrary to the Correctional Institution (Adult Correctional Centre) Rules 1991 and the Parole Act, and as a consequence, is manifestly excessive.

In passing sentence on count 6 the learned trial judge said:

> "I am going to state specifically no parole, you have to serve the full 15 years. This business about after you serve two-third's or whatever it is, you are free to come out, it's not for people that go shooting at police officers in an area where people are."

He went on to state:

> "so, you are to serve all full 15 years in respect of count 6."

16. The management and control of the length of any sentence, exceeding one month, imposed by a court, resides with the Commissioner of Corrections, such powers being vested in him by the Correctional Institution (Adult Correctional Centre) Rules 1991. Rule 178 reads:

> "178 (1) A remission, not exceeding one-quarter, or in the case of a first sentence of imprisonment, not exceeding one-third, of the sentence may be earned, by reason of good conduct, in respect of any sentence for a period exceeding one month.
>
> (2) Where an inmate commits an adult correctional centre offence or contravenes the provisions of these Rules, then, subject to paragraph (3), the Commissioner or other correctional officer not below the rank of Superintendent, or the Board of Justices in exercise of powers pursuant to the Act and these Rules, may, in addition to or in lieu of any other punishment which may be imposed on the inmate, order the forfeiture of the whole or a part of any period of remission earned by him.
>
> (3) An order for the forfeiture of remission may be made by a Superintendent in respect only of a period not exceeding thirty days on any one occasion."

17. The learned trial judge, in ordering that the appellant was not eligible for remission of his sentence was clearly usurping the powers of the

Commissioner. He was not empowered to have made such an order. The order, without doubt, offends against Rule 178 of the Correctional Institution (Adult Correctional Centre Rules), and is therefore null and void.

18. Further, the right to grant or reject a convict's application for parole rests with the Parole Board. Section 7 (7) of the Act reads:

> "(7) The Board shall grant parole to an applicant if the Board is satisfied that —
>
> (a) he has derived maximum benefit from imprisonment and he is, at the time of his application for parole, fit to be released from the adult correctional centre on parole;
>
> (b) the reform and rehabilitation of the applicant will be aided by parole; and
>
> (c) the grant of parole to the applicant will not, in the opinion of the Board, constitute a danger to society."

19. In light of the provisions of the foregoing section, it is clear that the learned trial judge had exceeded his jurisdiction. He has without doubt deprived the appellant of a right conferred on him by the statute. Such a right enures to the appellant's benefit, as he is entitled to seek to have his sentence reviewed by the Parole Board at the appropriate time, if or when the circumstances so warrant.

20. Miss Prince, while conceding that the Parole Board has the right to consider an application for parole, argued that the "comments" of the learned trial judge would not preclude the appellant from seeking to be paroled at the appropriate time. The Board, she argued, may take into consideration the trial judge's "comments" but is under no obligation to act on them.

21. With this submission we are constrained to disagree. The learned trial judge made an order, not merely "comments". The order forms an integral part of the appellant's record of conviction. Until set aside, the order remains valid and subsisting. In the event that the appellant seeks to be released on parole, the order will undoubtedly be a part of the documents placed before the Parole Board.

22. There is no guarantee that the penalty imposed by the order would not create some amount of prejudice against the appellant. Although a nullity, it could no doubt generate a negative impact and could adversely influence the Parole Board's decision. It would therefore not be unreasonable to infer that it could militate against any favourable consideration being given to the appellant by the Board.

23. The learned trial judge's order restricting the appellant's right to remission of his sentence, or his entitlement to make an application to be

released on parole, renders the sentence manifestly excessive and is hereby set aside.

24. However, the offence for which the appellant has been convicted is indeed very serious. The nature of the offence makes it one which attracts a high sentence. A sentence ranging between 12 and 15 years is normally imposed for such an offence. In view of all the circumstances leading up to the appellant shooting at the police and the prevalence of the offence in the society, we are of the view that a sentence of 15 years, which falls within the usual tariff, cannot be said to be manifestly excessive.

25. Application for leave to appeal against conviction is refused. The appeal against sentence is allowed. The sentence of 15 years, without a right to parole, or remission imposed on count 6 is set aside. A sentence of 15 years imprisonment at hard labour is substituted therefor. All other sentences remain. Sentences to commence on March 6, 2007, and to run concurrently.