JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS: 32 and 33/07

BEFORE: THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A. (Ag.)

FITZROY NELSON
LEROY NELSON
v.
REGINA

Mr. Oswest Senior-Smith, for the appellants
Miss Anne-Marie Nembhard, for the Crown

October 17, 19, 2007 and January 23, 2008

COOKE, J.A.:

1. The appellants Fitzroy and Leroy Nelson who are brothers, were on the 13th February, 2007 convicted and sentenced in the St. Ann Circuit Court. The conviction was before Paulette Williams, J. sitting with a jury. They were charged for causing grievous bodily harm. Each was sentenced to five years imprisonment at hard labour.

2. In outline, the case presented by the prosecution was that the virtual complainant, Roxton Johnson, at about 7:30 p.m. on the 15th August, 2004, went into Middle Baxton square. It was a Sunday evening and as is the custom in rural Jamaica, a number of persons were

gathered there. In that square there was one streetlight. On Johnson's arrival in the square he heard an argument going on between his brother and Kenrick. His brother had stones in his hand. Kenrick jumped on the tail gait of a van that was proceeding through the square. Kenrick fell off. It would seem that as Kenrick was being taken up both appellants rushed from the shop owned by Leroy Nelson. They were armed with machetes and rushed towards Johnson who immediately ran away from his perceived attackers. In his flight he encountered "a wall" which was constructed to prevent persons from going over a gully which was on the other side of that structure. The learned trial judge's assessment was that "the wall" was a ledge built to protect persons from the drop on the otherside. When Johnson approached "the wall" he heard warning shouts. He "prep" back and Leroy "chopping" at him. He jumped over "the wall" and landed some twelve feet below. As a result of jumping over the wall, Johnson received serious injuries to his left ankle which necessitated hospitalization and major surgeries. At the time of the trial he was still undergoing treatment.

3. In context of the trial of the appellants, the central issue was that of identification. The defence of Fitzroy Nelson was that of *alibi*. His brother Leroy said he was in the square but denied chasing Johnson with a machete or chopping at him. In this court there were two grounds of appeal relating to the issue of identification. The first was that:

> "The Learned Trial Judge, respectfully, erred fatally in not upholding the submission of No Case to Answer on the basis of the Evidence of identification."

The second which is in fact an alternative challenge was that:

> "The Weaknesses [sic] and infirmities of the evidence of Identification [sic] were, respectfully, not commended by the Learned Trial Judge to the Jury for their deliberations and thus the Applicants were denuded of the Protection of the Law."

4. The Court will now address the first challenge. This involves subjecting the identification evidence of Johnson to close scrutiny. Listed below are the relevant aspects of his evidence.

(i) Both appellants were well known to Johnson for some six years.

(ii) Both appellants rushed from the shop owned by Leroy Johnson.

(iii) At the time when the appellants rushed from the shop Johnson was standing about ten to fifteen feet from the doorway of that shop.

(iv) Johnson saw the faces of the appellants properly. Leroy Nelson was in front armed with a "28 machete" and his brother with "a lass".

(v) Johnson was standing in the immediate vicinity of the streetlight.

(vi) Johnson, because of his perception that the appellants were about to attack him was paying particular attention to them. He said "the way them run out a the shop one have to pay them mind"

(vii) When Johnson started to "run like a thief" the appellants were "like 5 feet from me".

(viii) The appellants came out of the shop "at bird speed". As to the time that elapsed before he ran Johnson said:

> "Me no have no specific timing pon that. Not even a minute. In space a one minute everything deh so happen in 5 seconds or more me nuh know too much maths"

In cross examination when taxed on time before he ran he said:

> "Not even a minute or half a second"

(ix) As he ran he gave "a little prep" Johnson said:

> "I have to look behind, you can't run with two machete man behind you and nah look."

He observed that Leroy Nelson in the chase "run out of him slippers and left it in the middle road."

(x) Johnson "preps" around on two occasions at which times he said he saw the faces of the appellants. He said he was able to see their faces because

> "Is a not dark vicinity which part me a talk part bout yah"

However, Johnson emphasized that his opportunity to recognise the appellants was:

"Because I saw them both in the entrance coming out of the shop with their machetes."

5. Trial judges are obliged to withdraw from the jury any case in which the prosecution relies solely or substantially on identification evidence if the quality of that evidence can be properly impeached on the ground that the basis upon which that evidence is grounded is unreliable. Any decision, whether or not a particular case ought to be withdrawn will obviously turn on a critical examination of all the relevant facets of the circumstances pertaining to the issue of the quality of the identification evidence in that particular case. This case does not fall in the category of those cases which have been compendiously categorized as "fleeting glance" cases. It cannot be said that the opportunity for Johnson to recognise the appellants whom, he knew well for six years, and who lived in the same district as himself was such as to render the quality of the identification so poor as to warrant a withdrawal of the case from the jury. The facets of the circumstances of the identification which have been set out in para. 4 supra when analysed and assessed, are in our view of a requisite quality, for the consideration of the jury without any risk of injustice. **Jones (Larry) v. R.** 47 W.I.R. 1 is an advice from the Judicial Committee of the Privy Council. The accurate headnote states as follows:

> "Where the defence sought the dismissal of a charge on the ground that there was no case to answer as the essential identification evidence of the only witness was not sufficiently reliable to found a conviction, the trial judge was entitled to rule that the case should be left to the jury even though the circumstances relating to the identification were not ideal."

The contents of this headnote are apposite to this case. Accordingly this ground of appeal fails.

6. We will now address the other ground which seeks to criticize the summing up of the learned trial judge's approach as to her assistance to the jury in arriving at their verdict on the critical issue of identification. It was not sought to fault the general directions given by the learned trial judge. In the application of those general directions the learned trial judge directed the jury as follows:

> "Now, as regards to the issues of identification, Mr. Palmer, counsel, asked him more questions to satisfy the requirement of how he was able to see and recognise the persons he said chased him. Was he able to see them? How was the lighting? He told you about the street light right there in the square. He said he saw their faces. He said that things happened quickly. From how he described it, things happened quickly. He told you at one stage, "In the space of a minute or five seconds or more, but things happen very quickly."
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> He said when he started to run they were like five feet away from him. When they came out of the shop he said he saw their faces and their body. He said that he saw them and he had to pay them mind because they had these two

> dangerous weapons in their hands and they came towards him.
>
> He said at one stage when he looked back Leroy was ten feet behind him and Fitzroy was right behind Leroy. He said although it was 7:00 in the night the street light was not very far, it was not dark, dark in the area, and he said no one else attacked him. He saw both of them, he saw their faces. He 'prips' behind him two times and although his back was to Leroy when he chopped at him, people had said, "Look out!" and he looked back and saw Leroy. Those are the circumstances under which he seeks to identify his attackers, he seeks to recognise his attackers as these two men.
>
> Do you believe Mr. Johnson? Is he making a mistake? Is he lying about these things? Approach this evidence of identification carefully, bearing in mind the warning I gave you. Be satisfied, that if you believe Mr. Johnson's version of what took place, and you are satisfied and you are sure that it was him. [sic] If you are not, then you must find them not guilty."

7. The appellants complained that this excerpt of the summing up did not include the answer given by Johnson under cross-examination that the time for recognizing the appellants was "not even a minute or half a second". Therefore it was argued that the learned trial judge omitted to highlight a weakness which detracted from the quality of the identification evidence given by Johnson. We do not agree. It was incumbent on the learned trial judge to remind the jury of the time span during which the tragic drama unfolded. This she did – that "the incident happened quickly". In view of Mr. Johnson's varying estimate of time, it is

our view that the omission complained of was not inimical to the appellants as regards them having a fair trial. It was further submitted that the learned trial judge should have alerted the jury that the experience of Johnson was so frightening that this factor could have had a negative influence on his capacity to properly recognize the appellants. Here again we disagree. Johnson first recognized the appellants as they emerged from the doorway of Fitzroy Nelson's shop. At that juncture he was not subject to any terrifying experience. The caution which a jury should be warned to exercise in respect of identification in terrifying circumstances is best left to those situations where the identifying witness purports to identify an assailant when the attack is not foreshadowed and the identification is in the midst of that attack. This is not so in this case. We consider the summing up of the learned trial judge to have been comprehensive, balanced and entirely fair. This ground of appeal fails.

8. There was another ground which was couched thus:

> "Prejudicial material from complainant [sic] and the Witness [sic] Edna White was not expunged or excluded from the Jury's deliberations."

The submission with respect to this ground was that:

> "The convictions are untenable in light of the evidence of Ms. Edna White, mother of the brother of the Virtual Complainant who, though later aborted, stated that she had seen the Applicants enter her yard with machetes, at minutes to 8:00 p.m. on August 15, 2004. This material would have been unwittingly used by

> the Jury to offer corroboration to the tenuous evidence of identification."

We, without so deciding, are not immediately convinced that the evidence complained of was not relevant to the issue of identification. Be that as it may, this is how the learned trial judge dealt with this aspect of the case.

> "And in this case also, I need to warn you, that one person was called, Miss Edna White, and she started to give evidence, the defence attorney objected to what she was coming to say, and what she was – and I agreed with the objection, and what she was coming to say, she would be very prejudicial in proving the Crown's case. Now, you do not speculate about what Miss White was coming to say. It is actually what you heard from the witnesses from Mr. Roxton Johnson in particular, that you have to consider when you come to make a decision."

It is abundantly clear that the learned trial judge directed the jury to ignore anything which Edna White had said. Therefore the complaint in this ground of appeal is unfounded.

9. Finally we come to the question of sentence. It was urged that the sentences were manifestly excessive. Both appellants it was said had unblemished records. It was suggested that the actions of the appellants were without malice and quite spontaneous. The difficulty with this view is that it begs an explanation as to whether or not both applicants were "spontaneously" armed with machetes? Both applicants were chasing

Johnson with machetes. This would indicate an intention to visit Johnson with violence. It was the evidence of Johnson that Leroy Nelson took aim at his head. But for the agility and desperate manoeuvre of Johnson both appellants may well have faced a much mores serious charge. The maximum penalty on this conviction is life imprisonment. In all the circumstances we do not regard the sentences as manifestly excessive.

10. It is only left to be said that the appeal in respect of both appellants is dismissed. The convictions and sentences are affirmed. The sentences are to commence from the 13th February, 2007.