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Judgment Book

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS: 102 & 103/91

COR: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

R. v. CONROD COLE
NIGEL COOTE

Arthur Kitchin for Applicants

Miss Paulette Williams for Crown

7th December, 1992

FORTE, J.A.

On the 26th of July 1991, both applicants Conrod Cole and Nigel Coote, were convicted in the Gun Court sitting in the St. James Circuit Court on two counts of an indictment charging each of them with illegal possession of firearm and robbery with aggravation. On count I Conrod Cole was sentenced to 15 years hard labour as also on count 2, the sentences were ordered to be concurrent and to run consecutive to sentence now being served, and it is to be followed by five years police supervision. Nigel Coote was sentenced on each count to 9 years hard labour to run concurrently.

The facts upon which this conviction arose occurred on the 6th of June, 1990 when the complainant a Mr. Wallace Scott, a shopkeeper was in his shop at about 9.30 p.m. The applicant Cole entered the shop and purchased certain items then went to the doorway and spoke to the applicant Coote who was then standing under a streetlight which was in front of the shop. Cole asked Coote if he wanted a piece of cake, but having replied in the negative to the question, the applicant Coote requested that Cole buy cigarettes for him. Cole returned to the counter bought the

cigarettes from Mr. Scott and then left the shop. Immediately after, both applicants "rushed into the shop". At this time the applicant Coote was armed with a gun. He proceeded behind the counter and held the gun at the ear of Mr. Scott demanding money. He then took Mr. Scott into a storeroom while the applicant Cole remained in the shop but on the customer's side of the counter. Subjecting to the demand of Coote, the complainant gave him money which he had in a box. The applicant Coote then left him in the storeroom and made his departure. A few seconds after Mr. Scott followed, exiting the storeroom only to see the two applicants running on the street and away from the shop. Mr. Scott then locked the shop and proceeded to the Cambridge Police Station where he arrived at about 10.30 p.m. There, as he entered the guardroom, he saw the applicant Cole who throughout his evidence he had referred to as "the brown one", sitting in the guardroom. Immediately, and as the learned trial judge described it spontaneously and without any prompting, he pointed to him and said in his presence and hearing "that brown one is one of the two gunmen who came round my shop and held me up." The applicant Cole said nothing.

Mr. Scott remained at the station and about an half-an-hour later Inspector Roach arrived at the station in the company of the other applicant whom the witness referred to as the "black one." Coote came out of the car and as he was about to enter the guard-room he said, addressing Mr. Scott "Boss man is me come to the shop and hold you up?" In answer Mr. Scott replied "Is you have the gun." Earlier, the two applicants had been seen walking on the road by Inspector Roach and Sgt. Daley who were patrolling in search of two suspects arising out of a report they had received about the same incident. They stopped the car, and Sgt. Daley hurried out and held the applicant Cole, but neither police officer was quick enough to hold the applicant Coote who ran into the

bushes and escaped. They then took Cole to the station and Inspector Roach went back in search of Coote whom he found on the road in what was described as a sweaty and dirty condition with burrs on his clothes. Having taken him into custody, he took him to the station where the conversation with Mr. Scott, earlier alluded to, took place. Both applicants denied any involvement in this robbery. Both alleged that they were never together that night and did not know each other. Each alleged that they were innocent users of the road who were picked up by the officers. Coote asserted that he was never with Cole, and never ran away. Cole also said he was alone when he was picked up.

The case therefore depended on whether the identification of both applicants by Mr. Scott was accurate. The evidence revealed that the men were in the shop for a period of 30-45 minutes. There was light in the shop as also light from the streetlight which was 25 feet from the doorway of the shop. The shop was not very large, the doorway being about 6 feet from the counter. Both men came very close to the witness: Cole, certainly: when he bought the items from Mr. Scott, and Coote when he held the gun at Mr. Scott and took him into the storeroom.

The learned trial judge expressly reviewed the evidence of the opportunity for identification and analysed the evidence against the care which he acknowledged was necessary in cases of visual identification. The question however remain whether the circumstances of the subsequent identification by Mr. Scott at the police station was credible. In normal circumstances, identification by confrontation should be avoided and if the identification is prompted either by any actual conduct of anyone or the physical circumstances at the time it should be of little weight: where however it is made in circumstances where it was spontaneous and

without any prompting it is certainly evidence worthy of weight and consideration. The identification of Cole done in these circumstances, albeit that he was in the guardroom at the police station was in our view evidence upon which the learned trial judge could have acted. There was nothing to suggest that the witness knew that any of the men had been held and were at the police station. In those circumstances the learned trial judge was correct in acting upon the evidence having found the witness to be truthful and having found that the witness was obviously not mistaken. In so far as Coote is concerned it was he who attracted the attention of the witness to himself and the witness thereafter immediately identified him. In all the circumstances given the fact that the learned trial judge saw and heard the witnesses and had a better opportunity of assessing their testimony, particularly that of Scott, we can find no reason to disturb the finding of guilt. I should add that Mr. Kitchin who appears for both applicants quite correctly in our view conceded that there was no merit in the applications against the convictions. The application for leave to appeal against conviction is therefore refused.

Mr. Kitchin however, pursued his application in relation to sentences passed on both applicants. The applicant Cole was sentenced to 15 years imprisonment on each count. It was revealed and agreed by the applicant that he had four previous convictions. Significantly, one of those convictions is for illegal possession of firearm and another for robbery with aggravation. Having listened to Mr. Kitchin and having given serious consideration to the points that he made in advancing the application, we are nevertheless not convinced that there is anything here which should allow us to disturb the sentence passed on Cole by the learned trial judge. In relation to Coote, he was sentenced to 9 years imprisonment on each count. Mr. Kitchin in advancing his

application referred to the fact that the applicant was 26 years of age at the time of the offence and that it was his first conviction. We however note that the learned trial judge took all of that into account. It is significant that although the evidence revealed that Coote was the one who was armed with the firearm and who was the major actor in the commission of this offence, he was sentenced to nine years while Cole was sentenced to 15 years. In those circumstances we are assured that the learned trial judge exercised as much lenience as he could in the circumstances and we find nothing wrong with the differences in sentences between both men, given Cole's previous conviction. We are therefore of the mind that the sentence against Coote should also not be disturbed. In the event the applications for leave to appeal are refused. However, in relation to Coote, sentence is ordered to commence on the 26th of October 1991.