JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS: 93 & 94/89

BEFORE: The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Wright, J.A.
The Hon. Mr. Justice Gordon, J.A. (Ag.)

R. v. TALLIS THOMPSON
ALDRED THOMPSON

Maurice Frankson for Appellants

Robert Brown for Crown

1st & 16th October, 1990

GORDON, J.A. (AG.)

The appellants were convicted by Pitter J in the Gun Court Division of the Circuit Court for the parish of Hanover on 31st May, 1989 of charges of illegal possession of firearm (count I) assault with intent to rob (count II) and shooting with intent (count III). On counts I and III each was sentenced to imprisonment at hard labour for five years; on count II the sentence imposed was two years imprisonment at hard labour. On 1st October, 1990 we dismissed the appeals of the appellants and now put in writing our promised reasons.

The Crown's case rested on the evidence of Mr. Selvin Perkins who described himself as a farmer residing at Success in Hanover. He said that on the night of the 15th October, 1988 he was in his hut; he described it as his "Camp" at his farm. Another person whose name he gave as "Breadfruit Man" was with him. About 3.00 a.m. on the 16th he became aware of movements in the vicinity of his hut. He remained in bed and

feigned sleep only to be jolted by the pressure of something cold against his neck. He realised it was a gun. He got up when ordered so to do and was searched but nothing was found on him. The intruder then struck him on his head with the gun injuring him. Blood flowed from the injury. He was pushed outside the hut and the gunman and another man who was outside proceeded to beat him at his "Camp door". This took place in what he described as "just deadly darkness". He was ordered to lie down and he complied. The men then stepped in his hut turned on flashlights and began to examine the weed (ganja) he had hanging from the roof. They appeared ecstatic, extolling the virtues of the quality of weed as they moved their flashlights about. "Yes a good weed dem ya man, a ready something dem."

In the light of the flashlight he was able to see the features of, and identify the man with the gun. He knew him as Tallis Thompson; he called him Challis. He had known him some 3 - 5 years living in the district. He knew he was a member of the Jamaica Defence Force. While he was on the ground listening to the men talking he saw two flashlights approaching, he held on to Tallis Thompson whom he now knew was not a policeman and they wrestled. He was overpowered by the four men and surrendered. One of the company said "shoot him, a bad boy" and Thompson pointed the gun at him and fired a shot. He was not hit but he saw the flame of the explosion and heard the sound accompanying it. He was ordered into the hut and compelled by the men to assist in taking from the roof the weed suspended therefrom. He assisted in making five bundles of weed and was compelled to carry one while each of the four men took one bundle down from the hill to the lowlands. Throughout the exercise in the hut four flashlights were in use and by these lights he recognised another of the men as Aldred Thompson of the same district, a person he had known for

over three years. The witness said he was in the company of the men for over one hour and when they reached the lowlands he was ordered by Tallis Thompson to "find you way back home."

Mr. Perkins reported the incident to the police and that same day Tallis Thompson was taken into custody by the police. Some five days later the witness went to the Ramble Police Station saw the appellant Aldred Thompson on the premises and identified him to the police. He denied suggestions that his identification of Aldred Thompson was urged on by one Agatha Clarke who carried an old family feud against the Thompsons.

The defence of each appellant was an alibi. Tallis Thompson made a statement from the dock and called as his witness, his girlfriend. Aldred Thompson gave evidence and called as his supporting witness his sister.

Seven grounds of appeal were filed by the appellants and argued by Mr. Frankson. They however are conveniently encapsuled in ground seven which he described as the "umbrella" ground. It reads:

> "That having regard to the totality of the evidence the verdict is unreasonable and cannot be supported."

His first submission was that the learned trial judge erred when he allowed the case to go beyond the prosecution evidence because despite the fact that learned counsel for the appellants did not so submit there was no case for the appellants to answer. It is sufficient to dispose of this submission by observing that the appellants at the trial were represented by very experienced counsel at the criminal bar, and there was no basis for that submission.

Mr. Frankson submitted that the Crown had failed to prove identification and in approaching the issue the judge should have considered the opportunity the witness had to observe the appellants and should have directed his mind to mistaken identification.

The learned trial judge had the advantage of seeing and observing the witness. Mr. Perkins, it appears from the evidence, was not lacking in basic sound commonsense and intelligence; this is apparent from his expressions.

On identification he said of Tallis Thompson at page 6:

> "The way how dem have de flashlight cross one another, the reflection and so forth, I could easily well discern the person by face."

At page 9 referring to Aldred Thompson:

> "..... dem carry me back to the camp now, and so forth, I discern that man there, the next one who I pretty well know before."

Generally at page 13:

> "When we go back to the camp and de weed a pack up and so forth the four men have dem flashlight on and de light dem up and down, and in de camp now, if de light nuh even shine yay so, the reflection from two or three of it reflect in a dis area where I could a discern a person face direct."

In cross-examination this transpired:

> "Q. When you say discern, let me ask you something about this discern. When you say discern whey you mean, mek out?
>
> A. Yes. I can give you little more clearer, sir. Let us say that door where the trial judge is, sir, is open, and the light here turn on, the lights down inside a de room, but the reflection or the glare from the light outside, you know. .....
>
> Q. What you mean by discern? What you mean by discern?

"A. Well, discern, like how me look on that thing there and so forth, and me see say it is a brief case and it is a hat on it and so forth.

The learned trial judge's summation on the issue of identification was challenged in grounds 2 and 3 viz:

"(2) That the Learned Trial Judge erred in law and failed to apply the correct principles as to the issue of identification and this especially so when the evidence of identification was uncorroborated.

(3) That the Learn Trial Judge misdirected himself on the law relating to identification evidence and as such applied incorrect principlies which operated to the prejudice of the Appellants."

Mr. Frankson highlighted page 87 of the transcript:

"The four flashlights were in action, that this took place from the time they were there until the time the men departed. That is when they left the camp as he calls it and went down the valley where the men left him; an hour or a little over an hour had elapsed.
Now, under those circumstances, and given that length of time, is it reasonable to accept that the accused didn't believe Mr. Perkins would have been able to see and recognize who his assailants were? He said he did. He said he called the accused Tallis, Challis. That is of no moment here, because one knows expressions one uses, particularly when names are given. He said he calls him Challis, which is very close to Tallis.
In his cross-examination he said it wasn't just a mere glimpse he got of the men, he could see them and he could see who they were. He had known these two accused men from 1985 to 1986."

This was but part of a detailed review of the evidence in the case by the learned trial judge. He dealt carefully with all the issues that arose and particularly with that of identification. In R.v. George Cameron S.C.C.A. 77/88 delivered on 30th November, 1989 (unreported) in delivering the judgment of the court Wright J.A. said:

> "What is of critical importance here is not so much the judge's knowledge of the law but his application. Even if there is a presumption in his favour regarding the former there is none as to the latter. He must demonstrate in language that does not require to be construed that in coming to the conclusion adverse to the accused person he had acted with the requisite caution in mind."

At page 91 of the transcript the judge said:

> "..... I bear in mind that this happened in the night. I also bear in mind that both accused men, and I accept as a fact that both accused men were known to Mr. Perkins for a period of some three years. Mr. Perkins' evidence is not corroborated, there is no other evidence, no other witness has come forward to corroborate what Mr. Perkins has said. So one has to look very carefully at Mr. Perkins evidence, and in looking at his evidence, I warn myself of the dangers of convicting on the uncorroborated evidence of complaints In these circumstances here this cannot be regarded as a case of a fleeting glance or a case where the accused had not been known before. I find that Mr. Perkins is a witness of truth. I believe him, I accept his evidence. I find as a fact that there was sufficient light from these flash-lights moving up and down, that he was with these men for some hour to a little bit over an hour, and that the men were the accused Tallis and Aldred. They both went to his hut, that they held him up, they beat him up, and that Tallis was armed with a gun and fired a shot at him."

The learned trial judge here demonstrated a knowledge of the law and an application of the principles laid down in Privy Council appeals Nos: 2 of 1987 and 32/1986 Winston Barnes et al v. The Queen delivered on 13th March, 1989 and Nos. 14, 15 and 16 of 1988 and 7 of 1989 Junior Reid et al v. The Queen delivered on 27th July, 1989.

For these reasons we dismissed the appeals confirmed the convictions and sentences and ordered that the sentence should commence on 3rd August, 1989.