JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 35&37/99

BEFORE: **THE HON. MR. JUSTICE FORTE, PRESIDENT**
THE HON. MR. JUSTICE LANGRIN, J.A.
THE HON. MR. JUSTICE SMITH, J.A.

R V LLOYD SCOTT
TYRONE BENNETT

Ernest Smith for Scott
Ian Wilkinson for Bennett
Mrs. Nadine Guy Crown Counsel for the Crown

29th, 30th April and 20th December , 2002

SMITH, J.A.

On the 22nd February, 1999, the applicants were convicted by Beckford J, in the High Court Division of the Gun Court in Trelawny of the offences of illegal possession of firearm (count 1) and robbery with aggravation (count 2). Each was sentenced to 15 years imprisonment hard labour (count 1) and 10 years imprisonment hard labour (count 2). Before us were their applications for leave to appeal . At the end of the hearing we dismissed their applications and affirmed their convictions and sentences. We ordered that the sentences commence to run as of the 22nd May, 1999.

We promised to put our reasons for that decision in writing. This we now do.

The Crown's case

Four persons testified on behalf of the prosecution. The virtual complainant, Mr. Lester Smikle was on the 5th September, 1998, about 7:30 p.m. at the "Down South Restaurant and Bar" on the Salt Marsh Road in the parish of Trelawny. He was in the company of a ' lady friend'. He sat at a counter in the bar and ordered fish. This counter was 'L' shaped. There were bright lights in the bar. While he was eating, two men entered the bar. One sat at the counter and one at the entrance door. The one at the counter ordered two beers. The latter was about 5-6ft from Mr. Smikle. The one at the door was about 4ft from the one at the 'L' shaped counter. The latter sat at one part of the 'L' shaped counter and Mr. Smikle sat at the other. According to Mr. Smikle, this man sat "across the counter from him", and he "saw his face all the while". Mr. Smikle identified the applicant Tyrone Bennett as the man who sat "across the counter" from him.

Mr. Smikle finished eating his meals, pushed away the chair on which he was sitting and was about to get up when he heard a loud shout. His back was at this time turned to the man he identified as the applicant Bennett. His evidence is that he turned around and saw the applicant Bennett with a gun held in both hands pointing at him. It was a

small gun – a revolver. He was ordered to turn around and "to hold my head down". He was further ordered to "hold his hand in the air". The applicant Bennett went up to him, placed the gun at the back of Mr. Smikle's head and proceeded to search him. Mr. Smikle had a .38 revolver in his right trouser pocket. According to him he "squeezed himself against the counter... to conceal the gun". The applicant Bennett frisked him, then rifled his left pocket and removed therefrom $1,800.00 and a key ring. He was then ordered to "go down so boy". Mr. Smikle moved towards the kitchen. His female companion was ordered "follow him gal". At this stage the man at the door went up to him and also searched him. This man also rifled his pockets and removed the .38 revolver from Mr. Smikle's pocket. Mr. Smikle said he was able to see his face for "some seconds" or for less than a minute while he was searching him. This man had a gun at his ear whilst he searched him. Mr. Smikle and his lady friend were told to lie on their bellies. Mr. Smikle did . His female friend refused. According to Mr. Smikle they "kicked her down, kicked her and told her to lie down".

The Mr. Smikle identified the applicant Scott as the man who was sitting at the door and who removed the gun from his trouser pocket. As he lay on his belly he was hit several times in the head and back by his assailants who kept asking for money. The beating stopped, he remained on his belly for a few minutes. He heard the sound of a moving car, he

looked up and they were gone. He got up; the proprietor emerged from his hiding place. He reported the incident to the police.

On the 23rd September, 1998, Mr. Smikle attended an identification parade at the Falmouth Police Station. On this parade he identified the applicant Lloyd Scott as the one who took his gun on the 5th September, 1998.

On the 7th October, 1998 he attended another identification parade at the Falmouth Police Station and identified the applicant Tyrone Bennett as the one who "held the gun at me in the first instance ".

During cross-examination by Mr. Albert Morgan, counsel for the applicant Scott, Mr. Smikle told the court that he wore glasses but only for reading. He said that although he was told to "hold his head down" he "looked straight at him" (Scott) when he was searching him. The search lasted for a few seconds. He was frightened, he admitted, but later said he was scared but not frightened. He admitted a discrepancy in his description of the type of shirt being worn by the person whom he said was Scott. At the trial he described the shirt as "floral", however, in his statement to the police he had described it as "stripe". At the parade he said he walked up and down the line about three times. He wanted to make sure, he said. He insisted that he saw the face of the applicant Scott and that he was not mistaken.

In answer to Mr. Douglas, counsel for Bennett, Mr. Smikle said the entire incident, that is, from the two men entered the bar to the time they left, was about ten (10) minutes. He said from the time they held him up to the time they left was about three (3) minutes.

Constable Kevin Smith told the Court he arrested and charged the applicant Scott who, after he was cautioned, said "me glad with the set up". Constable Smith testified that on 1st October, 1998 he was at the Falmouth Police Station when a man whom he identified as the applicant Bennett came there. Bennett was attired in military uniform. He said he was a member of the Jamaica Defence Force. He asked about the applicant Lloyd Scott - who was in custody at the station. He was detained and after investigations he was held as a suspect. After the identification parade he was charged with illegal possession of a firearm and robbery of Mr. Smikle. When cautioned he said nothing.

Sgt. John Daniels testified that on the 23rd September, 1998 he conducted an identification parade on which the applicant Lloyd Scott was the suspect. Before the parade he told the suspect of his rights. His attorney Mr. Albert Morgan was present on the parade. He told the Court that Mr. Smikle identified the applicant Scott as one of the men who robbed him on the night of the 5th September, 1998. No complaint was made concerning the conduct of the parade.

Sgt. Dennis Jones told the Court that on the 7th October, 1998, he held a parade on which the applicant Tyrone Bennett was the suspect. He had on the 5th October told the applicant of his rights. The applicant requested the presence of a Justice of the Peace. A Justice of the Peace was present on the parade. Mr. Smikle identified the applicant as one of the men who robbed him on the night of the 5th September, 1998.

The Defence

Both applicants gave unsworn statements. Scott stated that on the 5th September,1998 he agreed with one Watson Smith to operate the latter's Lada motor car as a taxi between Daniel Town and Falmouth. He said he was told to return the car by 8:00 p.m. that evening because it was needed to run an errand. He told the Court that he returned the car to Smith at Daniel Town around 8:05 p.m. From Daniel Town he went to the home of his girl friend Keisha Thompson. Together they left her home and went to his home in Daniel Town. They stayed at his home until 7:00 a.m. the following day, when his girlfriend left.

On the 11th September he was arrested and taken to the Falmouth C.I.B office. On the 15th September he said he was taken from his cell to the Deputy Superintendent's office. The following day he was again taken from his cell this time to the front of the station. He saw three men talking and pointing at him. The import of his evidence in this regard is that he was exposed to the view of persons at the station.

His witness and girl friend, Miss Keisha Thompson gave evidence supporting him in every detail.

The applicant Bennett in his unsworn statement said he was a mechanic and that he lived in Manchester. He stated that on the 5th September, 1998, he was not in Trelawny at all , he was in Manchester, where he spent the night with his girlfriend. He said he was in Trelawny on the 30th September, 1998 when he met the applicant Scott's mother who told him that her son was in trouble. He went with her to the Falmouth Police Station to visit Scott. He was dressed in military uniform. He said he told the police that he was a member of the J.D.F. "But", said he, "they found out I was not a member and detained me". He said that they took photographs of him and later charged him jointly with Scott for robbery with aggravation and illegal possession of firearm.

Grounds of Appeal

Mr. Ernest A. Smith sought and obtained leave to argue two supplemental grounds of appeal.

Ground 1 – deals with the identification evidence.

Counsel for the applicant submitted that the learned trial judge erred in holding that "the few moments" during which Mr. Smikle said he saw the applicant Scott amounted to more than "a fleeting glance". Further, counsel submitted that the identification was made under difficult circumstances. The fact that at the identification parade the

witness took 3-5 minutes before identifying the applicant, counsel submitted, indicated that the witness was not sure.

In evidence –in- chief Mr. Smikle said that as he was going toward the kitchen the person he identified as the applicant (Scott) came up to him and started to search him. His evidence is:

> "He went through all my pockets and while doing so he kept on looking straight at me.
>
> **Q:** So what part of him were you able to see?
>
> **A:** All of him facewards".

At p. 17 line 7 his evidence continued:

> **"Q:** Okay, just hold it. For about how long you saw his face at that stage?
>
> **A:** Some seconds, while he was searching me. It could have been a minute or less than a minute...
>
> **Q:** How close was he to you as he searched you?
>
> **A:** He is right in front of me because his hands were moving all around me. The front of him was touching onto my body, searching me all around.
>
> **Q:** And as he held the gun at your right ear, were you able to see him then?
>
> **A:** He said to hold my head down so I had to. He said "Hold you head down boy". So when I looked at him I was holding my head down because the other one had the gun at the back of my head.
>
> **Her Ladyship:** I am sorry what is your answer?

Q: I will get that clarified. I had asked you if you were able to see him as he was pointing the gun at your right ear?

A: Yes I glanced at him sometimes.

Her Ladyship: You what?

Witness: I looked at him sometimes but he kept saying I am to hold my head down."

Later on in his evidence the following exchanges took place:

"**Q:** Okay. Now sir at the time when the accused Lloyd Scott was searching you, you see, at that stage were you still inside the bar area, sir?

A: Yes, ma'am.

Q: And how were you able to see him at that stage?

A: When he search me?

Q: Yes.

A: He came right up to me facing me kept on looking straight at me with a staring look and going through my pocket at the same time.

Q: As he came up to you sir, were you able to see him as he came up to you?

A: Yes.

Q: What part of him were you able to see as he came up to you?

A: I look at him I observe him.

Q: The front of him or the back of him as he came up to you what part of him did you see?

A: His face.

Q: And you saw his face for about how long as he was coming up to you?

A: I had been looking at him in front of me all the time he was searching me.

Q: Not at that stage yet, as he came up to you?

A: Yes, just a few seconds he took to come up to me. He was about five feet away from me at the time".

In cross-examination he was asked:

"Q: And, the period of search lasted for?

A: A few seconds, some seconds".

The judge in her evaluation of Mr. Smikle's identification evidence held that this was not a fleeting glance. She was mindful of the special need for caution in this case where the issue turns on evidence of visual identification. She bore in mind the fact that Mr. Smikle said he was scared when the gun was at his head. We agree with the learned trial judge that this is not a case which involves the "ghastly risk" of a fleeting encounter. The learned judge found that Mr. Smikle was not only a credible but also a reliable witness. She found that although he was frightened he was able to observe his assailants so as to be able to subsequently identify them. We find no reason to differ from the learned trial judge. This ground fails.

Ground 2

Counsel for the applicant Scott complained "that the learned trial judge misdirected herself by finding that a licensed firearm holder enjoys a special ability to identify his assailant in circumstances which would otherwise be a fleeting glance".

The impugned direction appears at p.116 of the record:

> "I hold that this is not a fleeting glance, but this is enough to give a man who is a licensed firearm holder enough time".

The learned judge had earlier given herself the full **Turnbull** warning. At p.112 she said:

> "I warn myself of the dangers inherent in a case where there is one witness and there is no corroboration of that witness as to identification evidence. I am aware that an honest witness can make a mistaken identification."

After carefully examining the circumstances of the identification the learned judge said:

> "This witness is a man who is travelling with a firearm. There is no evidence to show that he is faint-hearted and although he said he was frightened he maintained he was able to recognise the accused persons. So I have to take all that into account. There are persons who one will determine are overpowered because of the way they gave their evidence. You look at them - which is what I am entitled to do- look at them and see the manner in which they gave their evidence, the way they answered questions, and I look at that and I determine from that whether this person is somebody who I can believe".

The learned judge went on to state that she believed the witness when he said he was not overcome by the circumstances. The judge added:

> "The circumstances were such that a faint hearted person would probably be overpowered... He said he was not overpowered and he said when the accused Scott came up to him, he was facing him, he was staring at him".

It was in that context that the judge used the impugned words. Clearly what the judge was saying was that the witness who was a licensed firearm holder was not a faint-hearted person and had enough time to observe his assailant. The judge was certainly mindful that the **Turnbull** guidelines apply equally to a licensed firearm holder who is an identifying witness. She further revealed her thought process when she said:

> "The accused was only five feet from him at one point; the accused came right up to him. He was in touching-distance. He was right there when he was staring at him for the few seconds. He says about 3 to 4 seconds it took the accused to search and find the firearm and then to hold him".

Although all witnesses are subject to the same rules, the tribunal of fact is entitled to take into account the fact that a particular witness is less likely to have his observations and recollections affected by the excitement of the situation. This ground also fails.

Tyrone Bennett

Eleven grounds were filed on behalf of the applicant Bennett. Three original and eight supplementary grounds. The three (1,2 and 3) original grounds and grounds 8,9and 10 were abandoned by Mr. Wilkinson, counsel for the applicant. Leave was granted to argue grounds 4,5,6,7 and 11 of the supplementary grounds.

Ground 4:

The learned trial judge erred in concluding that the implement, instrument or thing allegedly held by the applicant, Tyrone Bennett was a firearm within the meaning of the Firearms Act. The burden of Mr. Wilkinson's argument is that the evidence fell woefully short of being sufficient for the learned judge to conclude as she did, that she was satisfied that the "gun" allegedly carried by the applicant was a firearm within the meaning of the Firearms Act.

In this case no firearm was recovered. There is no evidence of the discharge of a firearm. Thus the prosecution could not prove that the instrument allegedly seen in the hand of the applicant was a "firearm" within the meaning of section 2 of the Firearms Act. However, this is not the end of the matter. The applicants were charged with illegal possession of a firearm contrary to section 20 (1) (b) of the Firearms Act and with robbery with aggravation.

Section 20 (5)(a) & (c) provides:

"(5) In any prosecution for an offence under this section –

(a) any person who is in the company of someone who uses or attempts to use a firearm to commit –
(i) any felony; or
(ii) any offence involving either an assault or the resisting of lawful apprehension of any person,

shall, if the circumstances give rise to a reasonable presumption that he was present to aid or abet the commission of the felony or offence aforesaid, be treated in the absence of reasonable excuse, as being also in possession of the firearm;

(b) ...
(c) any person who is proved to have used or attempted to use or to have been in possession of a firearm, as defined in section 25 of this Act in any of the circumstances which constitute an offence under that section shall be deemed to be in possession of a firearm in contravention of this section."

Section 25(1) states:

"**25.-**(1) Every person who makes or attempts to make any use whatever of a firearm or imitation firearm with intent to commit or to aid the commission of a felony or to resist or prevent the lawful apprehension or detention of himself or some other person, shall be guilty of an offence against this subsection".

Section 25 (5) defines "imitation firearm". It states:

" 'imitation firearm' means anything which has the appearance of being a firearm within the meaning of this section.

> And 'firearm' means any lethal barrelled weapon of any description from which any shot, bullet or other missiles can be discharged...".

When sections 20(5) (c) and 25(1) and (5) are read together the import is that any person who uses or attempts to use anything which has the appearance of being a firearm with intent to commit a felony, for example robbery, is deemed to be in possession of a firearm in contravention of s.20(1)(b).

The question therefore in the instant case is whether there was sufficient evidence to satisfy the judge that the "thing" which the applicant is alleged to have used in the robbery of Mr. Smikle had the appearance of being a firearm. What was the evidence before the court? The learned judge summarised the relevant evidence as follows:

> "He (Smikle) said he looked around and observed the accused who he identified as the accused Bennett at the door, he said the accused had a gun pointed at him with his two hands holding it, his hand was covering most of the gun, so he could not describe it but he knows it is a revolver, because he is a licensed firearm holder and he owned a .38 Smith and Wesson, so he knew that what was pointed at him was a revolver, although the hand of the accused was covering most of the gun.
>
> He said he saw the full body of the accused when he was pointing the gun at him, he saw him from waist up. He said that at that point the accused was about five feet from him. The accused said 'Turn around', he held the gun to his head and told him to hold his head down."

Mr. Wilkinson referred to the relevant legislative provisions and submitted that the prosecution is required to lead evidence describing the instrument alleged to be a gun. It is his contention that in light of Mr. Smikle's inability to describe the instrument it was incumbent on the prosecution to elicit from him the basis for his conclusion that the instrument he allegedly saw was a firearm. The evidence he submitted fell woefully short of being sufficient to satisfy the trial judge that the 'gun' allegedly carried by the applicant was a firearm within the meaning of the Firearms Act. He relied on the decision of this court in ***R v Purrier and Bailey*** 14 J.L.R. 97.

Mrs. Guy, for the Crown, submitted that the facts in the ***Purrier*** case can be distinguished from the facts in the instant case. Unlike the instant case, in the ***Purrier*** case the complainant only assumed that what her assailant had in his hand was a gun. She further submitted that the evidence in the instant case was more than ample. She relied on a dictum of Carey J.A. in ***R v Christopher Miller*** SCCA No. 169/87 delivered March 21, 1988. We agree with the submissions of Crown Counsel. In ***Purrier***, Watkins J.A. (Ag) (as he then was) in giving the judgment of the Court said at p.101g:

> "Apart from saying that the applicant Bailey had a gun which he placed at her ear, the complainant Tate, the only eyewitness for the Crown gave no description whatever of the instrument or weapon which she was supposed to have seen. Significantly Tate at no time

> expressly stated that she saw a gun and equally significantly she gave no testimony of having observed any of the outstanding characteristics of the traditional firearm such as the mouth, the barrel, the chamber or trigger, nor did she even say that the instrument was concealed, if indeed it were concealed, that any or all of these parts were concealed from view".(emphasis supplied).

In the instant case the witness said that the applicant "had the gun pointed at him with his two hands holding it, his hand was covering most of the gun so he could not describe it". This evidence is significantly different from the evidence in ***Purrier.*** Mr. Smikle also testified that although the applicant's hands were covering most of the gun he knew it was a revolver because he is the licensed holder of a .38 Smith and Wesson revolver. What Mr. Smikle was saying was that the gun the applicant had resembled the one he owned.

In ***R v Christopher Miller*** (supra) the Court per Carey J.A. said (p.2):

> " The learned trial judge did find it was a firearm and it was described in these terms: 'The mouth was brown coloured resembling small arms that policemen carry'. The point maintained is that that is not enough. In our view, that is ample evidence. It is not necessary to give detailed descriptions of the firearms because it must depend on the intelligence and the power of observation of the witness. It must be extremely difficult now-a-days to find a person who does not know a gun when he sees a gun. In so far as we are concerned the evidence that was put forward by this applicant was more than ample".

We share the views expressed by Carey J.A. and are inclined to think that they apply to the instant case. We are clearly of the view that the evidence of Mr. Smikle, if believed, is sufficient to satisfy the learned trial judge that the instrument in the applicant's hands 'had the appearance of being a firearm' within the meaning of the Firearms Act.

Another aspect of this issue is the evidence of Mr. Smikle that the applicant Scott dispossessed him of his firearm. In ***R v Glenroy Wilson et al*** SCCA 156-162/87 (delivered 25th March, 1988) a policeman was unlawfully dispossessed of his firearm by ***Wilson*** while six others actively assisted him in his unlawful effort. The Court held that ***Wilson*** was in unlawful possession of the firearm and the others were equally in unlawful possession on the basis of the common design.

In the instant case the Crown's case is that the two applicants were acting in concert. It was therefore open to the learned judge to find that when the applicant Scott dispossessed Mr. Smikle of his .38 revolver both applicants were in unlawful possession of Mr. Smikle's firearm in contravention of s.20(1)(b) of the Firearms Act.

We find no fault with the judge's conclusion that the applicant Bennett was in unlawful possession of a firearm.

Grounds 5 and 6

These grounds touch and concern the identification evidence. We have carefully considered the written and oral submissions of counsel for

Bennett in this regard and do not agree with him that the circumstances under which Mr. Smikle observed his assailants render the identifying evidence poor or unsatisfactory. We agree with the learned trial judge that this was not "a fleeting glance" case. The observations were not made in difficult conditions. Dealing with the identification of Bennett the judge said (p.117):

> "The witness said he sat across from Bennett. He said there was nothing blocking his view. Yes, he said there was a glass case with fish in it, but the glass-case - and he demonstrates where the glass-case was, it was in the corner. He said he was looking straight across at the accused Bennett; that there was nothing blocking his view... He saw him for six minutes. Counsel quite correctly put it to him that well, you are talking to your girlfriend and you are eating your fish; he said 'yes I agree and I look at the fish, sometimes I look at my girl'...
>
> He said yes he was talking to the female companion; he looked across, but he said the man was always in his vision, so that whether or not he was looking at him for six minutes, this is the man. They are the only persons in the bar; this is incontrovertible evidence".

The learned judge went on to say that she accepted the evidence of Mr. Smikle. Then further on in her summing up she said (p.118):

> "It is clear that this is not somebody who is known to the witness before but the witness had enough opportunity to view him. The lighting was such that he could view him, the length of time was there the opportunity to see him... and there was nothing blocking his vision; and he saw him clearly..."

The learned judge demonstrated that she was mindful of the special need for caution when the issue turns on evidence of visual identification. These grounds are without merit.

Ground 7

In this ground counsel complained that the trial judge refused to admit evidence from Constable Kevin Smith that the firearm stolen from Mr. Smikle was the subject of a charge of illegal possession against other persons. This ground in our view is misconceived. Accordingly nothing more will be said of it.

Ground 11 - verdict unreasonable

In this regard Mr. Wilkinson submitted that taking into consideration all the factors which he had already canvassed he was asking the Court to hold that the verdict was unreasonable. We thought it wc enough to say that for the reasons already given, we found no merit in this ground also.

Accordingly, we refused their applications and made the orders referred to at the outset.