

S. Reynolds
IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 173 of 1974

BEFORE: The Hon. President (Ag.).

The Hon. Mr. Justice Graham-Perkins, J.A.

The Hon. Mr. Justice Swaby, J.A.

R. v. CLIVE BROWN

Mr. Keith Knight for the Applicant.

Mr. F.A. Smith, Crown Counsel for the Crown.

March 18 and June 6, 1975

SWABY, J.A.:

On September 11, 1974 the applicant Clive Brown was convicted in the St. Catherine Circuit Court, Spanish Town, before Wilkie, J. and a jury, on an indictment containing two counts (i) for robbery with aggravation, contrary to Section 34(1)(a) of the Larceny Law, Cap. 212 and (ii) for being in illegal possession of a firearm, contrary to Section 20(1)(b) and 20(4)(c)(ii) of the Firearm Act, 1967. On the first count he was sentenced to be imprisoned at hard labour for twenty years and in addition ordered to receive ten lashes and on the second count he was sentenced to two years imprisonment at hard labour; the said sentences to run concurrently.

His application for leave to appeal against his convictions and sentences was on February 7, 1975 refused by a single judge, and now by way of appeal from the refusal of his application the matter has come before the full Court.

The prosecution's case was to the following effect. On January 12, 1974 at about 12.30 p.m., while Miss Sadie Thompson, the Postmaster at Hawkers Hall in the parish of St. Catherine, was in the post office, she saw two men outside who looked like rastafarians. One of them came up to the post office and asked for a ten cent stamp. Miss Thompson said that she became a little alarmed and suspicious and did not sell him the stamp. Instead, she left the post office, went outside and looked at him for some minutes. She then became more suspicious and was

going back into the post office when she heard a voice say, "This is a hold-up!" Turning around Miss Thompson saw the same man who had asked for the stamp. He had a plaid bag in his hand and the other man was immediately behind him with a small outlass. She then observed that the applicant had a gun pointed at her and he said to her that she must give him the keys to the money she had in the office. She took the keys for the safe in the post office, threw them down and ran into a shop next door.

Miss Joyce Tulloch, who also works at this post office testified that she was in a kitchen when she saw the two men come up and the applicant asked about the stamp. She saw Miss Thompson go outside and she heard when the applicant asked for the keys of the post office. She said that the applicant had a gun in his hand which she had seen him pull from out of a bag he was carrying. He pointed the gun at Miss Thompson and also came in (the kitchen) and pointed the gun at her. He then took up the keys and went into the post office. Miss Tulloch said she then ran down to Mr. Bell's shop.

Eric Ducombe and Lincoln Marsden two witnesses called by the prosecution said that they had been standing close by the post office when they saw the applicant and another man passing by. The applicant was carrying a bag. An alarm was raised and immediately these two men ran. They were chased by men, Ducombe and Marsden joining in the chase. Both witnesses testified that from the time they joined the chase they never lost sight of the two men. The chase took them at times along the road leading to Aberdeen at other times through bushes along the way. They passed Aberdeen and went unto Sandy Hill where Ducombe caught and held the applicant. These witnesses further testified that during the chase the applicant dropped the bag he was carrying but it was recovered and a gun was found in it. These were handed over to Corporal McLean at the point where the applicant was held. Miss Thompson had in the meanwhile left the next door shop and gone to the police where she made a report. Corporal McLean accompanied by Miss Thompson, left immediately in a police vehicle in pursuit of the robbers, travelling along the road to Aberdeen, the direction in which Miss Thompson informed him she had seen the robbers run. Whilst travelling along, she said

that she had seen the two men cross the road being chased by persons. Corporal McLean and herself joined in the chase but she admitted losing sight of the applicant during the course of the chase, but she eventually went to the place where the applicant was being held and she there identified him to the police. From there she said the accused was taken to the post office (presumably she and the applicant were transported in the same police vehicle to the post office at the same time). When they got there, they entered the post office which was ransacked, letters torn up, the safe open with the key in the keyhole, and money \$132:21 missing from it. Under cross-examination Miss Thompson admitted that later that day she had returned to the police station and that she had gone to the cell in which the applicant then was in order to identify him to Corporal McLean. She, however, denied that on that occasion she had told the corporal that the applicant was not the man. Corporal McLean who gave evidence denied that Miss Thompson and himself had gone to this cell for her to identify the applicant. The learned trial judge dealt adequately with this conflict of evidence in the applicant's favour. The other witness called by the prosecution, Detective Sergeant Wray, Ballistic Expert, gave evidence that the gun in question was a firearm within the meaning of that word in the Firearms Act, 1967, and was capable of discharging a deadly or lethal missile.

The defence was an alibi. The applicant who gave evidence on oath said that on January 12, 1974 at about 12.30 p.m., he left his home at Central Village, St. Catherine, and took a bus in to Cross Roads, Kingston, and from there a transit vehicle to Glengoffe, with a view to visit his girl-friend. From Glengoffe he got a lift to a place called 'Elbow'. He was thereafter walking along Big Road, in Glengoffe when he saw about nine persons coming down the road and one of them said, "Come yah rasta head boy". He replied saying that they should not 'style' him that way. These persons then told him that two men had robbed the post office that day and that Corporal McLean had said that any strange face they saw like a rasta they must take and bring him to the station, and so he went with them to the police station. While at the station he saw Corporal McLean who asked him what he was doing there and he replied. Corporal McLean then opened a cupboard, took out a bag

with a gun in it and asked him if he knew anything about it, and he replied that he knew nothing about it because he was not a gunman. Corporal McLean is alleged to have said then that he was a fresh boy and started to hit him. The applicant also said that he was later put in a cell and whilst in it Miss Thompson came there and Corporal McLean asked her to look at him to see if he was one of the men. She is alleged to have said, "is not this one". Corporal McLean then said to her, "What is it, you afraid for the beard, you afraid for this dirty natty head boy?" Miss Thompson then repeated, "is not this one".

Mr. Keith Knight, Attorney-at-Law, who represented the applicant both at his trial and at the hearing of this appeal from the outset very frankly stated that he had no complaint to make about the learned trial judge's summing-up as he had dealt adequately and fairly with all the relevant discrepancies in the evidence of the various witnesses, most of which were set out as grounds of appeal on the form 6 herein. He submitted, however, that notwithstanding it was the jury's function to decide what evidence should be believed, yet there remained such fundamental conflicts which were unresolved in this case, having regard to the evidence adduced, that the verdict must be regarded as unreasonable, or, further, in the alternative, that the Court should hold that the verdict was unsafe and unsatisfactory and should not be allowed to stand. He therefore prayed that the Court would so hold, allow the appeal and quash the convictions.

Mr. Smith, Crown Counsel, in reply, urged that the jury could, reasonably acting on the evidence of Miss Thompson alone, if they accepted her as a witness of truth, have arrived at the verdict they did, and submitted that the Court who had not had the opportunity of seeing and hearing the witnesses should not substitute its verdict for that of the jury.

The summing-up shows that the learned trial judge in his general directions to the jury had directed them on all the material principles of law applicable to the counts in the indictment. From the outset and indeed throughout his summing-up he charged the jury not to be influenced by any feelings of bias or prejudice for persons who looked like rastafarians whether they were or were not in fact rastafarians.

He said:-

"Now, in considering the evidence your views should not be influenced by any feelings of sympathy for the accused or for the ~~indies~~ who were held up or any feelings of bias or prejudice. I learned counsel for the defence said **rastafarians - Rastafarians are persons who look like rastafarians whether they are or not, have a right to dress any way they want and you cannot judge a person merely by his appearance so you can't prejudge a case and say this must be a bad man because you do not agree with a person looking like a rastafarian and judge the case in that fashion.** You have to judge the case purely on the basis of the evidence you have heard from the witness in the witness box here and that is the only consideration that you must have in arriving at your verdict."

The learned trial judge charged the jury in clear and unmistakable terms that it was for the crown to prove the identity of the person who was alleged to have committed the offences charged to the extent that they, the jury, would feel sure that it was the applicant who had committed them. He stressed that the identification of the accused was the fundamental issue that the jury had to resolve. He dealt with the essentials that had to be established by the evidence for their consideration before the jury could say that the identity of the offender has been established to their satisfaction beyond reasonable doubt. He gave illustrations, then said:-

"Well, the analogy I am trying to draw is that you have to consider in relation to a man who has the appearance of a rasta man you might not very well see, you have to be very careful in considering the evidence whether these witnesses satisfy you that their recognition is on the basis of a man's features, his physical features, his eyes, his nose, and not on the basis of an overall impression as a rasta man where you are not seeing his features but you see a rasta man so any other rasta man that you might see might very well lead you to the conclusion that is the same man you saw. You have to be very careful of that, and I think that is the point the defence is trying to make out; this is the point the defence is putting forward that this man is held because he looked like a rasta man and these people held him because he looked like a rasta man. It is not a situation where the witnesses have distinct recollection of his features that they would remember him, so bear that in mind; that is the whole situation".

The judge then reviewed and commented on those aspects of the evidence of the prosecution witnesses relating to the identity of the applicant, dealing specifically with the discrepancies and inconsistencies therein. He pointed out that the crown was primarily relying on Miss Thompson's evidence in this regard, if the jury accepted her as a witness of truth, having regard to the length of time she alleged she had been looking at him, from 20-30 minutes, before she ran to the shop next door, of seeing him cross the road during the chase and pointing him out at Sandy Hill where he was held by Ducombe. In this regard also he charged that the evidence of Ducombe and Marsden was of great importance because they alleged that they had seen the applicant passing with the bag accompanied by another man, that they ran when the alarm was given and that they had never lost sight of the men in the chase. The trial judge was however caustic in his criticism of Miss Thompson's going to the cell to identify the applicant after she had already claimed to have identified him at Sandy Hill. So also was he of the time it took Ducombe and Marsden to capture the applicant, about 4 hours, having regard to the distance it was alleged that Aberdeen is from Hawkers Hall. Dealing with the first criticism above more fully the trial judge said in part:-

"..... If she had identified him before what is the reason for her having to come back to the station to identify him again and if you accept what she says then you have to reject Corporal McLean's evidence when he said she never came there. And if you find that Corporal McLean is not speaking the truth in relation to that you have to consider whether it is serious or not and in my view it is very serious because it would go to the root of the question of identification and it would support the case put forward by the defence that this man was held merely because he looked like a rasta man and it would in effect if you accept what the accused is saying, show that all these witnesses are not speaking the truth whether out of the zealousness that the post office was robbed by rasta men; that they are good minded citizens they try to assist in apprehending the person - the person responsible; it is a question of whether they went out looking for rasta men and the first one they saw they held."

And dealing with the second criticism he said in part:

"..... Mr. foreman and members of the jury, you will have to consider what took from approximately two o'clock to six o'clock, nearly four hours of chase, why it lasted so long, because what the defence is suggesting is that this man was held some time after this. There might have been a chase, they don't know and nobody was held and in the search continuing they suddenly butt up on a rasta man and they took him into custody. This is what the defence is saying and that is why Miss Thompson was brought to the station to identify him. Of course Mr. Marsden and Mr. Ducombe said they never lost sight of this man at all from they heard the alarm; he passed them; they chased him; they kept him in sight in full view right from Hawkers Hall to Aberdeen and Sandy Hill where they held him. As I say it is a matter for you."

Regarding the identification of the applicant by Miss Tulloch, the trial judge described this as a dock identification, and as being grossly improper, unjust and unfair; and as evidence to which the jury could apply little or no weight, so that they would have to concentrate very heavily on the evidence of Miss Thompson, Mr. Ducombe, Mr. Marsden and Mr. McLean in relation to the identification of this man.

The question of whether the applicant was wearing a beard at the time of the commission of the offence, or whether he could or could not grow a beard was fully gone into by the judge; and he charged them that if they found that he could not grow a beard then that would have been fundamental in showing that the witnesses might have been mistaken when they say he was one of the men who went to the post office; but left it for their decision.

The evidence for the defence was fully put to the jury. Throughout the summing-up, particularly as regards the question of the identification of the applicant the learned trial judge leaned over in favour of the defence set up, overwhelmingly so, but he made it clear that it was for the jury as the judges of the facts, to say what evidence they accepted and what witnesses they believed in arriving at their verdict. By convicting the applicant on both counts the reasonable inference is that they at least accepted Miss Thompson as a witness of truth, notwithstanding the criticism of the

judge regarding her attendance at the prison cell. Are there any circumstances which would warrant this Court interfering with the jury's verdict? The principles by which a Court of Appeal should be guided when dealing with a ground of appeal of this nature are summarised in Ross on the Court of Appeal, First Ed. at p.88 and in Archbold's Criminal Pleading 36th Edition p.341, para.934 cited in the judgment of this Court, in Supreme Court Criminal Appeal No.50 of 1973, R. v. Lao, of November, 16, 1973. The Court in the instant case, is unable to say, having regard to the evidence, that the verdict of the jury was obviously and palpably wrong, and cannot disturb the convictions. His application is therefore refused.

The appeal against sentences was not pursued and is therefore dismissed also.