

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 117/06

**BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE MORRISON, J.A.
THE HON. MISS JUSTICE PHILLIPS, J.A.**

ANTHONY McKENZIE v. REGINA

Dr. Randolph Williams for the appellant

**Miss Paula Llewellyn, Q.C., Director of Public Prosecutions
and Greg Walcolm, Assistant Crown Counsel (Ag.) for the Crown**

December 2 and 4, 2009

PANTON, P.

1. The appellant was convicted on the 19th July, 2006 in the Western Regional Gun Court held in Montego Bay, St. James, by Anderson, J. on an indictment which charged him with illegal possession of firearm, robbery with aggravation (2 counts), shooting with intent and wounding with intent. He was sentenced to concurrent terms of imprisonment as follows:

Count 1	Illegal possession of firearm – 5 years
Counts 2 & 3	Robbery with aggravation – 7 years on each count
Count 4	Shooting with intent – 10 years
Count 5	Wounding with intent – 10 years

2. A single judge of this court granted leave to appeal, and four grounds of appeal were filed and argued. Grounds 1, 2 and 4 are to the effect that the

verdict on counts 2, 3 and 5 is unreasonable and cannot be supported having regard to the evidence, whereas ground 3 contends that the learned trial judge erred in not upholding a no case submission in respect of count 4. Significantly, no ground was advanced as regards the validity of the conviction on count 1, hence the conviction and sentence thereon are affirmed.

3. The prosecution has conceded that the evidence on counts 3 and 5 was insufficient for a proper conviction of the appellant on either count, and has made a partial concession in respect of count 4. The real dispute between the prosecution and the defence is in respect of count 2.

4. The particulars of count 2 read thus:

“Anthony McKenzie, on the 30th day of March, 2004 in the parish of Hanover, being armed with a firearm robbed Avaleta Cummings of a Nissan Sunny motor car.”

The evidence presented by the prosecution on this count came from Mr Keith Parkes and Miss Avaleta Cummings. The former said that at about 8.30 p.m. he alighted from a taxi, and was about to pull his gate open when the appellant came from the nearby bush, pointed a gun at him and said, “Don’t move”. He observed about five more persons coming towards him, whereupon he fled. While running, he heard the sound of gunshot, and someone saying that he had been shot. Mr Parkes ran unto a lane called Kingdom Hall and took refuge in a mango tree. Thereafter, he saw the men run pass in the lane up to the

Kingdom Hall church. From his vantage point, he saw the group of men "around the lady harassing her". They took her bag and her car, he said, and escaped. After this episode, he heard a businessman and his family "bawling for help," just a little "bottom side" where he was. The appellant is well known to Mr. Parkes as they both live in the same rural district, Mr Parkes for twenty to twenty-two years and the appellant for over ten years.

5. The prosecution also led evidence not only of the witness Parkes' ability to see the appellant, but also of his ability to see the events that he had described. At page 21 of the record, he said that he saw the appellant's face and body. At page 13 lines 12 and 13, he said he was able to see the individuals including the appellant who had emerged from the bush at his gate by virtue of the light that he had around his house. Due to his experience of an earlier robbery, Mr Parkes had taken the precaution of putting lights at the four corners of his house (page 13 lines 19 and 20), and these lights "focus outside" (page 18 line 21). So far as seeing the robbery of Miss Cummings' car is concerned, he was able to see from the vantage point of the tree as a result of the lights that were on the church and at the church gate (page 25 (last line) to page 26 lines 1 – 3).

6. Miss Cummings, a guidance counsellor, said that she was driving her Nissan Sunny motorcar slowly on her way from Kingdom Hall (presumably, the church for Jehovah's Witnesses) when she was robbed of it. The incident

occurred at about the distance of a two minute walk from Kingdom Hall. She was unable to identify the robber, but her evidence is recorded thus:

“...the person came to the door and said I should give **them** everything I have, “Give me what you have, give me what you have”. My window was partially down, so what protruded through the window seem to be a gun...” (p.59 lines 6-11)

Miss Cummings was obviously uneasy while giving evidence as the learned judge at one stage told her to “try and relax”, it being her first visit to Her Majesty’s Court. She said that she eased the car door open and jumped while saying, “see it there, see it there”. She said she jumped up “a banking like a gully and started running”. The learned judge posed this question to the witness:

“You said you eased the car door open and you jumped out and say, see it here, see it here, tek it. What were you giving **them**?”

Miss Cummings answered:

“My handbag and some grocery that I had bought, everything. I didn’t come out the car with anything.”

7. The learned judge accepted Mr Parkes as a credible witness. Accordingly, he not only found that the appellant was the individual who had held Mr Parkes at gunpoint, but also that Mr Parkes had seen the robbery of the car and he concluded that the appellant was one of the group of men who had robbed Miss Cummings of her car.

8. Dr. Randolph Williams for the appellant submitted that the evidence of the witnesses is irreconcilable, particularly because the witness Parkes refers to Miss Cummings being surrounded by the group of men harassing and robbing her of her car, whereas Miss Cummings' testimony was that she jumped out of the car and ran. We do not find any merit in this submission given the fact that Mr Parkes identified the appellant as having a gun in his hand and being joined by five other persons. Thereafter, within minutes, the group of men was seen by Mr Parkes making off with Miss Cummings' car. The conclusion that the appellant was with these men was inevitable. When the lighting is considered along with the fact that the appellant was well-known to Mr Parkes, we are satisfied that there was sufficient evidence to ground the conviction on count 2.

9. The particulars of count 4 read:

"Anthony McKenzie, on the 30th day of March, 2004, in the parish of Hanover, shot at Keith Parkes with the intent to cause him grievous bodily harm".

Mr Greg Walcolm, while conceding that there was no evidence to substantiate the particulars of this count, suggested that the court could amend the indictment to charge an assault instead. He did not cite any authority in this regard. We doubt whether he would have been able to supply same, considering that neither the Criminal Justice (Administration) Act nor the Offences Against the Person Act (under which count 4 falls) makes any provision in this regard. In any event, the circumstances of the case do not make it possible for such a charge to be substantiated. Mr Parkes heard the sound of a gun but would not

have known whether it was the appellant who had discharged the firearm he had; and even if it were the appellant, there was no evidence as to the direction in which the fire was aimed. In the circumstances, the application to amend cannot be entertained.

10. The appeal is therefore allowed in part, in that the convictions on counts 3, 4 and 5 are quashed and the sentences set aside. However, the convictions and sentences on counts 1 and 2 are affirmed and the sentences are to commence from July 19, 2006. The appellant will therefore serve a total of seven years from that date.