

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS. 118 & 120/89

BEFORE: THE HON. MR. JUSTICE ROWE - PRESIDENT
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

REGINA

VS.

FITZROY BLAIR
NIGEL THOMAS

Applicants unrepresented

Lloyd Hibbert, Deputy Director of
Public Prosecutions for Crown

July 30, 1990

ROWE P.:

These applicants were convicted in the High Court Division of the Gun Court on July 25, 1989 and were each sentenced on Count 1 which charged illegal possession of a firearm to five years imprisonment at hard labour, on Count 2 which charged assault, to one year hard labour, and on the third count for robbery with aggravation, to seven years imprisonment at hard labour. Although both men were represented by Counsel at trial, they are unrepresented today. We do not find any merit in the applications for leave to appeal inasmuch as no grounds were filed.

The issue which arose at trial was that of visual identi-

fication. On this issue the learned trial judge directed himself fully and accurately. Having reviewed the evidence he made the following analysis:

"..... Now, the area in which the Defence is most concerned is visual identification - the area of visual identification and whether on this evidence the Court can say that these two or any of these two were properly identified bearing in mind the recent rulings that we have had from other Courts outside of this jurisdiction. The first - the first question to be asked is whether the evidence can be believed and I have no doubt and find as a fact that on the night of the 26th of September, a number of men went to the premises of the Maragh and of Miss Paulette - Miss Juliette Ford - and from those premises they stole a number of articles. So, I find as a fact that the men were armed with guns and machetes. Can it be said that these were some of the men or any of these that are before me today is one of those who went there? We look on the question of identification; how was it done? Were these accused men known before the day of the incident and the answer is, yes. The witnesses know them, Miss Paulette knows Blair. Now, under what circumstances were they seen? Now, this is night and they told us from the very inception that the light from outside Mr. Maragh's house was on; light on the street, the house light, light inside the shop and I find as a fact that the area was well lit. Now, the other area is, under what circumstances did the witnesses purporting to identify the defendants did so? The evidence is that both men had on stockings - stocking foot. At one stage Nigel Thomas - not Nigel, Fitzroy Blair, the evidence said his face was turned sideways but as the evidence revealed he went to various other parts of the house like Miss Juliette's room. Was the witness then able to see and recognise who the persons were that were under those masks? What is the type of stockings that the witnesses said they were wearing; stockings like the stockings that the Crown Counsel was wearing. What sort of

"stocking the Crown Counsel was wearing; see-through stockings. Is it possible to see through see-through stockings? Well the name speaks for itself. I submit that one is able to see through see-through stockings. Given the amount of lighting, the amount of time that was spent there, because it is said that they spend over an hour and these persons were known to them before. Could this Court rely on that evidence; does this evidence make this Court feel sure that when Mr. Wilson says Fitzroy Blair was one of the men there and Nigel Thomas was one of the men, I can feel sure that this is so? This is one of these cases of visual identification and one knows how easily mistakes can be made in cases of visual identification. One knows too that there are lots of people in Jamaica that resemble each other or take a particular likeness to another person. Having regard to the length of time that they are known and having regard to the lighting and in spite of the masks which are made of see-through stocking foot, can it be said that they are not making any mistake? I have advised myself and I have warned myself of the dangers of convicting in cases of this nature where there is visual identification and nevertheless, I find that the evidence here is so strong that there is one and only one conclusion that this Court can come to, that is to say that I am satisfied beyond a reasonable doubt that the accused Fitzroy Blair and Nigel Thomas were the persons who took part in that robbery that night. The verdict, therefore, is guilty as charged, both of them."

We cannot improve upon those directions which the learned trial judge gave to himself and which he patently heeded. Both applicants had been known to the prosecution witnesses for many years. Jack Wilson said he knew Blair for five years and Thomas for twelve years. Juliette Ford said she knew Blair "long years" which she eventually quantified as nine years. Alibi defences raised in unsworn statements were rejected by the trial judge.

We have considered the sentences imposed on Count 3. The applicant Thomas had no previous conviction and the two previous convictions in respect of Blair did not involve the use of weapons. There was nothing to choose between the culpability of these two men, therefore the sentence appropriate in Thomas' case must also be applied to Blair. Robbery with aggravation is indeed a serious offence, and made even moreso when a firearm is used even if no shots are fired. We think, however, that for a first offence a sentence of five years hard labour ought to have been imposed. We will therefore allow the applications for leave to appeal against sentence on Count 3, and vary the sentence of seven years, hard labour to one of five years. All the sentences will commence on October 20, 1939.