

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO.: 2/89

BEFORE: THE HON. MR. JUSTICE CAMPBELL, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

R. v. PETER JOHNSON
DONOVAN BROWN

Ms. Carol Malcolm for Crown

No appearance on behalf of Applicants

June 4 & July 16, 1990

CAMPBELL J.A.

The applicants together with one Donovan Tomlinson were tried by Theobalds J., in the Gun Court Division of the Saint Thomas Circuit Court held at Morant Bay, Saint Thomas on December 15, 1988 for the offences of illegal possession of firearm, robbery with aggravation, wounding with intent and rape. The applicants were found guilty and convicted and each sentenced to varying terms of imprisonment totalling twenty years at hard labour. Tomlinson was found not guilty basically because the identification evidence was found by the learned trial judge to be unsatisfactory.

The incident from which the charges arose occurred on May 7, 1988 at about 2.30 a.m., at Nutt's River Road, Saint Thomas. The householder Adrienne Scott said she had retired to bed when she heard shouts of "open up, open up, Police." She realised that it was not the police so she raised an alarm shouting "thief" and calling out for help. She was going towards the children's room when she was shot in her right breast by a

bullet fired from a gun which smashed through her window. She observed a man at the window with a gun by the aid of partial moonlight. This man moved to, and kicked open the back door which leads out from the children's room. He entered the house and ordered her and her children to lie face downwards on the bed in her room which adjoins the children's room. They did so.

While so lying, she heard the front door smashed and two other men each armed with a gun entered. The man who came through the back door demanded money and she reached towards a drawer from which she took \$500.00 and gave to him. She said one of the two men who came through the front door (later identified to be Tomlinson) grabbed her in her back and ordered her to go to the living room and turn on the electric light. She did so, and this man raped her from behind in the living room. It is as well to pause here to highlight a material conflict between her evidence and that of Mitzie Douglas her daughter who gave evidence in which she says she also was raped. Mitzie Douglas' evidence, contrary to what her mother says, is that it was not one of the men who came through the front door (Tomlinson) but rather the one who came through the back door (Brown) who took her mother to the living room. Brown did not however stay in the living room with her mother but returned to the bedroom and took her that is to say Mitzie Douglas to the kitchen and there raped her from behind. He then took her into the children's room and lay on her on the bed face to face and raped her for about five minutes. Thereafter he carried her back into the room of her mother where all the others were. She saw her mother on the bed when she returned.

Returning to the evidence of Adrienne Scott, she said after Tomlinson raped her, he again grabbed her in the back and took her back to her bedroom. This man and the other who came

through the front door asked her for jewellery. She told them that she had none. Johnson who was the other of the two men who came through the front door grabbed her and told her to "turn around". She was then lying on the bed with Richard, Orville and Keshia. Johnson told her to take off her panty which she did, he came on her, face to face, and raped her. He then left her and went towards the living room where he started dismantling things from the whatnot. Then Brown took her to the children's room and raped her from behind.

As regards the ability of Adrienne Scott and Douglas to see the persons who committed the offences, in particular the rape, whereas Adrienne Scott said she observed them initially through partial moonlight even before the living room light was turned on, Douglas admitted that she could not see them before the light was turned on as the house was in darkness. There is a conflict between Adrienne Scott and Douglas as to the number of lights which were turned on in the house. Adrienne Scott said only the living room light had been turned on. Thus she observed Tomlinson who raped her in the living room by that light and Johnson who raped her in her bedroom by the aid of the same light which filtered therein. She observed Brown who raped her in the children's room by the aid of an eave light some nine feet away which shed light in the room. Douglas however said she observed Brown who raped her in the children's room by the aid of a light therein which was switched on but she is unable to say with certainty that it was Brown who turned it on or whether it was before or after the rape that it was turned on. But certainly it was not on when Brown came through the back door. No lights were then on.

Under cross-examination Adrienne Scott admitted that the person who raped her the second time whom in court she says is Johnson, had on welder's goggles and that on an identification

parade held on May 20, 1988 barely 13 days after the incident she saw Johnson on the parade but did not identify him as one of the persons who came to her home that morning. She admitted she had not known any of the intruders before. She also failed to identify Brown on an identification parade held on 6th June, 1988 though she admitted seeing him on the parade. Douglas admitted that she asked through the Inspector for all the persons on the parade to say "soldier" after walking up and down the line without identifying anyone. It was only after all had repeated the word "soldier" that she pointed out Brown. She however gave no evidence that she had heard him use the word "soldier" that morning or that there was any peculiarity in his pronunciation of words which was significant. The identification of him by Douglas becomes even more unreliable when one considers that she bases her ability to observe him on the 7th May because of electric light having been turned on which is diametrically opposed to what her mother said namely that only the eave light was on.

The evidence of Derrick Scott need not be rehearsed because from his position, hiding under the bed in the room of Adrienne Scott it was physically impossible for him lying as he was on his belly under the bed, to lift up his eyes to see the face of a person "very near" estimated to be about 8' to 10' from him even with the best of illumination. Thus his purported observation of Peter Johnson is manifestly unreliable. His purported observation of Donovan Brown when the latter was coming through the back door 20 feet away is not only manifestly unreliable but patently untruthful because at that time there was no light turned on in the back room even if any had indeed at any time been turned on at all. Douglas herself said that at the time of entry she could not make out the intruders as there was no light in the house.

Richard Spencer who purported to identify Peter Johnson on the identification parade held on 20th May, 1968 is manifestly unreliable because he said Johnson was one of two men whom he saw come through the backdoor. This is not the evidence of either Adrienne Scott nor of Douglas. Secondly, he was the person who took his sister to their bedroom. This also is not the evidence of Douglas. Thirdly, his mother went to the children's room to get money. This is also not the evidence of Adrienne Scott. It was Johnson he said who told him to lie down on his face. This is contrary to the evidence of Adrienne Scott. He saw his face then for about 3 minutes by the aid of light from the children's room. He admits that Johnson had on welding goggles but says he had put them upon his forehead at the time. He contradicted Douglas by saying when Johnson took Douglas in the children's room the light was turned off even though Douglas does not say the light having been turned on was ever turned off. More importantly Douglas did not say it was Johnson who took her to the children's room. Richard could not therefore have seen Johnson as he said he did.

The learned trial judge adverted to the principle of mistaken identification and of the dangers. He properly rejected the voice identification of Adrienne Scott and Douglas relative to Brown and Tomlinson, especially as there was no evidence that these men had each used the word "soldier" on that morning. He however found Johnson guilty based on the identification of him by Derrick Scott and Richard Spencer at the identification parades. He justified this because the conduct of the identification parade was not challenged except belatedly when he the trial judge asked the applicants questions in relation thereto. But the learned trial judge fell into

error in concluding that because both applicants were subsequently identified by Derrick Scott, and Johnson was also further identified by Richard on identification parades, that necessarily established that the applicants had been satisfactorily and adequately observed in the early morning of May 7, 1938. Had he critically considered the evidence of these witnesses he would inevitably have concluded that their evidence was patently unreliable. Consider Derrick Scott; from the position in which he was, lying on his stomach under the bed, no doubt far from the edge so that he would not be seen, and in fact he was not seen by the intruders during their stay in the house, the distance that Johnson was from him, namely that he was very near, a distance which he estimates as 8 to 10 feet away, it would be impossible for him to see the face of Johnson having regard to the restricted angle of elevation at which he could observe things while lying under the bed. The prosecution did not adduce evidence that the bed stood any great height from floor level so to facilitate observing from under the bed. One must necessarily assume that the bed must have been sufficiently low to provide cover, otherwise the witness would have been seen hiding thereunder. He did not say he came towards the edge of the bed to observe, and this ought not to be presumed in favour of the prosecution when it is more reasonable to infer that he would have kept away from the edge to avoid being observed. Had the learned trial judge considered these critical weaknesses, he in my view would have concluded that they seriously militated against any adequate observation. These coupled with the admitted evidence that the person whom both Derrick Scott and Richard Spencer say is Johnson had on welder's goggles which covered his eyes, and the inability of Adrienne Scott to identify Johnson on the identification parade

albeit being face to face with him when being raped should have conclusively established the unsatisfactory nature of the evidence of visual observation on the morning of the incident. This manifest weakness in the evidence is not strengthened by the identification of this applicant on the identification parade even though on the face of it nothing appears irregular.

In regard to Brown the evidence of the same Derrick Scott is that he saw him coming through the back door. He observed Brown for about three minutes. He observed him because light was in the children's room when Brown was coming through. Brown was about twenty feet from him. He Scott was under the bed when he observed Brown. But here again apart from the inherent improbability of his being able to see faces while lying under the bed there is the further inherent contradiction between his evidence and that of Douglas who said that at the time when the men came in, she could not observe any of them as there was no light in the house. Both Adrienne Scott and Richard Spencer confirm this. This being the case, Derrick Scott could not have seen Brown when the latter was allegedly coming through the back door. Thus his subsequent identification on the identification parade is suspect. Richard Spencer's evidence is manifestly unreliable. He admits that he was told to lie on his face in his mother's room. He is however saying that he observed Johnson as being the person who took Douglas into the children's room because Johnson turned to him and told him to lie down on his face. This provided the opportunity which he had for observing Johnson's face five feet away for around three minutes which time he thereafter conceded was about one minute. He said the children's room light was turned on and he saw Johnson's face by the aid of this light which presumably lit up his mother's room.

The manifest incurable flaws in his evidence are that firstly, Douglas in her evidence identifies Brown and not Johnson as the person who took her to the children's room. Secondly, Douglas stated quite clearly that when the men came into the house she could not then describe any of them because no light was then on in the house. She first observed Brown by the light from the living room when she and Brown passed the living room to the kitchen. This was after Brown had taken her mother to the living room and had immediately returned to her mother's bedroom from which he took her to the kitchen. Even if Douglas' evidence is accepted that the light in the children's room was turned on sometime after, presumably by Brown, it is clear that at the time when she was being taken from her mother's bedroom this light had not yet been turned on, hence Richard would have had no light to assist him in observing Johnson or anyone for that matter.

We think the visual identification evidence was wholly unsatisfactory and the learned trial judge fell into error by relying wholly on the identification parade. It is for the above reasons that we on June 4, 1990 treated the applications as the hearing of the appeals and allowed the appeals. We then quashed the convictions on all counts, set aside the sentences and ordered verdicts of acquittal to be entered. We promised then to put our reasons in writing which we have now done.