J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL Nos. 160 and 168 of 1972

BEFORE: The Hon. President (Ag.)
The Hon. Mr. Justice Swaby, J.A.
The Hon. Mr. Justice Robinson, J.A.

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R. v. LLOYD BELL and FRANKLYN McLEOD

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Roy Taylor for Noel Edwards, Q.C. for the appellant Bell.

Roy Taylor for the appellant McLeod.

M.A. Reckord for the Crown.

February 5, 6; & March 21, 1975

LUCKHOO, P.(Ag.):

The appellants Lloyd Bell and Franklyn McLeod were convicted in the Home Circuit Court on October 13, 1972, on an indictment charging that they and one Errol Wilson on August 10, 1970 in the parish of Kingston (1) shot at Compton Miller with intent to do him grievous bodily harm; (2) wounded Compton Miller with intent to do him grievous bodily harm; (3) being armed with guns together assaulted Compton Miller with intent to rob him. The appellants were each sentenced to imprisonment for 10 years at hard labour on the first count and to imprisonment for 5 years at hard labour on the second and third counts, the sentences to run concurrently. McLeod who was also charged with shooting at Milton Pusey on August 10, 1970 with intent to do him grievous bodily harm was acquitted on

that count. Errol Wilson had earlier been discharged from the indictment. The appellants applied for leave to appeal against their convictions and sentences and their applications were granted.

The case for the prosecution was to the following effect. At about 6.30 a.m. on August 10, 1970 about six persons were present in a little restaurant on the Spanish Town Road in the parish of Kingston. Amongthem were Compton Miller and Terrence Beckford, truck driver who resided in the parish of Hanover. Miller was seated at a table about 8 feet from the doorway. He was facing the doorway. Another driver was seated at the same table. Miller said that Beckford was somewhere at the doorway when he saw a man armed with a gun come into the restaurant. He heard the man say "Nobody move." The man held the gun pointing in the direction of the tables at which persons were sitting in the restaurant. Miller said that he turned around and looked behind him and saw two men come in. He observed one of those men searching a man who was sitting behind him. As a result he became afraid and attempted to leave the restaurant. On his way out he was held on the piazza by one of the two men he had seen behind him. He attempted to free himself and just as he had succeeded in doing so he heard the sound of gun-fire and observed that the man whom he had seen with a gun (not the one who had held on to him) was holding a gun pointed in the direction of his left thigh. He observed blood on his leg. The men then ran away. He was taken to the Denham Town Police Station and from thence to the Kingston Public Hospital where the injured thigh was X-rayed and treated. (Examination of the wound by Dr. Trotman disclosed that he had a bullet wound in the left thigh). A week later he was told by a friend (not the police) that the man who had shot him had been shot and caught by the police and that he was in the Kingston Public

Hospital. As a result he went with his friend to that hospital where he saw the appellant McLeod in bed in custody of the police and recognised him as the man who had come to the doorway of the restaurant armed with a gun and had later shot him in the thigh. On August 17, 1970, he attended an identification parade at Hunts Bay Police Station but failed to point out the appellant Bell who was the suspect on that parade.

Beckford testified that he with Miller and one "Young boy Willie" were among the six persons in the restaurant on the morning of August 10, 1970. Miller was sitting with another nan at the table while he was sitting at another table near the kitchen. He saw two men come into the restaurant and one of them had a gun. The one with the gun said "Nobody move" pointing his gun in the direction of all those who were in the restaurant. The one with the gun told the other "Go to that man and get a clean search of him." He repeated the order because the other man made no move to do as he was ordered. The other man then went towards Willie but he (Beckford) could not say what happened to them thereafter because he was so frightened. The man with the gun then told him (Beckford) "Get up from there, come outside here, you have nothing." As a result he did as he was told and the man with the gun pointed the gun upwards and there was an explosion. The other men in the restaurant started to scramble for themselves. He saw Miller moving towards the doorway as did the man with the gun. He later told him "Don't move" and he, obeyed. He leaned against the wall of the building. He (Beckford) was afraid and did not observe what became of the other man (the companion of the man with the gun). He heard a gun go off and saw Miller bleeding from the left leg. He did not see anyone near to Miller. On August 17, 1970, he attended an identification parade at Hunts Bay Police Station where he pointed out the appellant Bell as the companion of the man whom he had seen with a gun. The

latter he first pointed out as the appellant McLeod when McLeod was in the dock at the preliminary inquiry in this matter.

Detective Constable Pusey said that he was travelling in a motor car at about 7 a.m. on August 10, 1970 when he heard the sound of an explosion. On looking in the direction from which the sound came he saw four men about 11 yards away from the restaurant running across the Spanish Town Road. He recognised the men as the appellants McLeod and Bell, Errol Wilson and one Notice. He followed them in his car and on negotiating the bend at the corner of Milk and Tulip Lanes the appellant McLeod who was then 15 feet away spun around and pointed a revolver at him. He ducked and McLeod fired the revolver. The shot shattered the windscreen of the car. He continued the chase but the men escaped. Detective Constable Walker came on the scene and he reported the matter to him. Bell and Wilson were apprehended on August 12 and McLeod on August 25. Notice was apprehended on September 3. In the course of their apprehension Wilson and McLeod were shot. McLeod was hospitalised at the Kingston Public Hospital where on September 17, 1970, he was arrested on two warrants which had been issued on August 11, 1970.

Detective Constable Walker testified as to the report made to him by Det. Const. Pusey on August 10, 1970 as well as to record of the report made at the Denham Town Police Station by Miller on August 10, 1970 to the effect that he had been shot in the leg at the restaurant and that four men were involved in that occurrence. There was also an entry in the Denham Town Police Diary that on August 15, 1970, Det. Ashman detained McLeod for shooting with intent pending further inquiries and that he had been shot and taken to the hospital.

In his defence the appellant McLeod testified on oath. His defence was an alibi. At the material times he was at his house at Berrick Road. He denied knowing the appellant Bell. He knew Notice who was his girl friend's brother. Notice was with him on August 25, 1970 when the police came to his home at Berrick Road and searched his room. They put a paper bag over his head placed him in a police vehicle and shot him in his belly. Shortly before he was shot he heard someone say "See a gun here Winston." The bullet entered his spine and he was crippled from the waist down. He was taken to the police station and then to the Kingston Public Hospital. He was arrested at the hospital by Det. Const. Walker on September 17 on two warrants. He saw Miller and Beckford come to the hospital and someone pointed him out to them.

Bell in his defence testified on oath that he lived at 114 Spanish Town Road. His defence was likewise an alibi. He spoke of the occasion on which he was put on an identification parade at Hunts Bay Police Station and alleged that there was opportunity given prospective witnesses of seeing him before the parade was held.

On appeal it was submitted that the verdict of the jury is unreasonable and cannot be supported having regard to the evidence for a number of reasons. Firstly, in regard to both appellants it was contended that there was no evidence sufficiently cogent from which the specific intents charged could be safely and properly drawn. Putting aside the question of the identity of the persons who came upon the six persons in the restaurant the evidence for the prosecution clearly indicated that two or more men, one of them armed with a revolver, and acting together held up at gun-point the six persons. The man with the gun then proceeded to give an order to one of his associates to search one of the six persons - Willie. Beckford was excluded from the search for the reason given by the man with the gun that he had nothing. The clear

inference from this course of conduct is that the man with the gun and his associates were bent on the commission of the offence of robbery with aggravation of those persons in the restaurant who had something on them. Miller was one of thos persons and he was not exempted from search by the man who held the gun. When the gun was pointed at the men in the restaurant the clear intent on the part of the man holding the gun and his associates was to rob those who might have something on them - Miller was in this category. The pointing at Miller (and others) of the gun which turned out to be loaded (it was actually discharged in the air according to Beckford) was an assault upon Miller. There was indeed sufficient evidence which, if believed by the jury, would constitute the offence of an assault upon Miller with intent to rob and once the identity of the appellants as the assailants was proved their conviction on the third count cannot be disturbed. In relation to the intent charged in the first and second counts - intent to do Miller grievous bodily harm - Miller was shot in the thigh. The bullet passed entirely through the thigh and was not recovered. It is clear that the shot was discharged at fairly close range. The circumstances in which the shot was fired indicate that the object in the mind of the gunman was to incapacitate Miller so that he would let go his hold on the gunman's associate from the nature of the weapon used, the position on the body at which the shot was directed and the circumstances in which the shot was fired there was ample evidence on which the jury could find that the gunman intended to cause grievous bodily harm to Miller when he fired the shot.

Finally on this point there is ample evidence that the gunman and his associates were acting with a common design and all well contemplated such a use by the gunman of the gun for the purpose of making good their escape.

It was also submitted that the convictions ought not to stand because the circumstances prior to and at the time of the dock identification of the appellants rendered

such identification unreliable and of insufficient weight for the purpose of a conviction. Mr. Taylor referred us specifically to the nature and circumstances of the identification by Miller and to certain contradictory statements made by Miller when his evidence at the trial is compared with that at the preliminary inquiry for which no or no satisfactory explanation was given and contended that these contradictions were on material aspects of the case in so far as it affected the question of identification by Miller of his assailants, more particularly of the person whom he said fired the gun. As to the way in which the identification by Miller of the appellant McLeod at the hospital came about it is unfortunate that Miller was told that the man who had shot him was at the hospital and that he had been shot by the police. In such circumstances there would be no point in holding an identification parade at a later date when the suspect would be sufficiently recovered to be placed on such a parade. Miller's visit to the hospital took place a week after Miller had been shot and some 5 days after McLeod had been shot. The learned trial judge dealt in great detail with this question and brought forcefully to the attention of the jury the unsatisfactory nature of an identification of this type. He also dealt in great length and thoroughness with the contradictions and discrepancies elicited in the course of the testimony given by Miller. He left to the jury the question of identification of McLeod solely on the evidence given by Miller and Beckford and stressed also the unsatisfactory nature of the dock identification by Beckford. He told them to approach this particular method of identification with great care and caution. He declined to leave the question of the identity of Miller's assailant either in whole or in part on the basis of the evidence given by Det. Const. Pusey as to the events which Pusey said occurred that morning. Whether the trial judge was right in so doing is not in question on this appeal so the matter must be looked at as

the jury were directed by the trial judge, solely on the basis of the testimony given by Miller and Beckford.

There was no suggestion that the police either directly or obliquely engineered the identification of McLeod by Miller at the hospital.

The jury apparently were impressed with Miller's positive assertion that his identification of McLeod proceeded entirely from his own recollection of the facial appearance of his assailant who had the gun despite the fact that he had been told that the police had shot the man who had shot him and that that man had been pointed out to him in the hospital and was then under police guard. Can we conclude that it was unreasonable for the jury to have been so impressed? We have referred to the passage in Ross in the Court of Criminal Appeal, First Edition at p. 88 which has been set out verbatim in R. v. Joseph Lao S.C.C.A. No. 50 of 1973 (unreported) decided by this Court on November 16, 1973, in relation to the features of the case to which Mr. Taylor attracted our attention in support of his submission. Having given our most earnest consideration to the matter we are unable to say in the light of the ample directions given by the learned trial judge on these aspects that the verdicts are palpably wrong and that we ought to interfere with them. In coming to this conclusion we have had regard to the third point raised in the grounds of appeal on behalf of both appellants that the credit of the relevant witnesses was severely impugned and the discrepancies in their evidence irreconcilable and disparate with the report the complainant made at the Denham Town Police Station.

As to sentence it was urged that in all the circumstances of the case the sentences imposed "were excessive, harsh, cruel and inhuman and seemingly unrelated to any principle underlying the imposition of punishment." McLeod admitted five previous convictions, among them one for robbery with aggravation and one of the illegal possession of a firearm.

Bell admitted four previous convictions, among them one for the illegal possession of a firearm and one for assaulting a constable. We are unable to agree that the sentences imposed are unduly severe, inhuman or are based on a wrong principle. However the hearing of these appeals having been considerably delayed for various reasons and we think that it would be just that the sentences be made to run with effect from November 1, 1973.

In the result the appeals are dismissed. The convictions and sentences are affirmed. The sentences in each case to run with effect from November 1, 1973.