JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 88/2006

BEFORE: **THE HON. MR. JUSTICE SMITH, J.A.**
THE HON. MRS. JUSTICE HARRIS, J.A.
THE HON. MISS JUSTICE SMITH, J.A. (Ag.)

ANDREW CREARY
V
REGINA

Mr. Carlton Williams for the Applicant

Mrs. Icolyn Reid for the Crown

8th , 9th, 12th October and 20th December 2007

G. SMITH, J.A. (Ag.):

1. The Applicant, Mr. Andrew Creary, on June 1, 2006 was convicted for the offences of illegal possession of firearm and robbery with aggravation. He was sentenced to terms of imprisonment of 4 years and 7 years respectively. Both these sentences were to run concurrently.

2. On October 12, 2007 his application for leave to appeal was treated as the hearing of the appeal. We dismissed the appeal and affirmed the convictions and sentences. The latter are to commence

from September 1, 2006. We promised then to put our reasons in writing and we do so now.

3. The evidence of the complainant, Mr. Milton Robotham, is that on the night of January 15, 2005, his family and himself were at their home in St. Andrew. He was in his TV room, on a couch, watching a game of cricket from Australia, while his wife and children were in bed. He dozed off and was later awakened by three men, including the applicant demanding "money, and the chest and the gun" from him. He observed that two of these men were masked, while the third man who was the applicant was unmasked and he was armed with a firearm.

4. Mr. Robotham was taken from the TV room to a bedroom where further demands were made for money. He was then bound up and placed on the floor in a passage beside a clothes closet in the house. A quantity of jewellery, cash and electronics valued at approximately $624,000.00 were robbed from the premises. A report was made to the Constant Spring Police Station.

5. On March 1, 2005 at about 1:00 p.m. the complainant went to the Olympic Gardens area to see someone. While there, he was seated in his parked motor vehicle when he saw the applicant coming out of a yard nearby. The applicant went across the road from where

the complainant was seated and sat down on a piece of stump or a bench. Mr. Robotham viewed him and confirmed in his mind that the applicant was one of the men who robbed him on the night of January 15, 2005. Nevertheless he drove to where the applicant was and engaged him in a conversation "to focus" on him. Having satisfied himself further that the applicant was indeed one of his assailants, he went to the Olympic Gardens Police Station and made a report. The applicant was subsequently identified by the complainant and was taken into custody by the police, arrested and charged for the offences.

6. At his trial, the applicant gave an unsworn statement in which he raised the defence of alibi. He called one witness in support of his defence. The witness testified that they were at work that night at a construction site in Chancery Hall, St. Andrew, where they were both employed as watchmen.

7. The applicant filed a number of grounds of appeal and supplemental grounds including the following:

> (1) The evidence as it relates to identification is so poor and unreliable that no reasonable tribunal properly directed could convict thereon, as is clearly demonstrated from the following undisputed facts:
>
> > (a) the sole witness as to identification described the applicant

> as being 5' 3" – 5' 4" tall the day after the incident and 6 weeks later described him as 4' 8" – 4' 9" tall.

(2) That having regard to the nature of the identification of the applicant, the learned trial judge in assessing the quality of the evidence as to identification, misdirected himself by failing to take into consideration specific weaknesses appearing in the evidence as to identification regarding:

> (a) the glaring discrepancy on the issue as to whether the other four alleged witnesses to the robbery or any of them attended identity parades concerning the applicant;
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> (b) the issue as to whether the other four alleged witnesses to the robbery or any of them were able to identify the applicant;
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> (c) *inter alia*, his finding that, the question of whether his wife and sons were able to identify the assailants and in particular this man was irrelevant for his consideration.

(3) Where the quality of the identification is as poor as it was in this case, in the absence of other evidence which supports the correctness of the identification, the trial judge has a duty to uphold a submission of no case to answer.

(4) That the sentence of 7 years imprisonment at hard labour was manifestly excessive.

8. Grounds 1, 2 and 3 relate to the issue of identification and will be considered together. The essence of the Applicant's submissions was summarized as follows:

> Firstly, that the height of the assailant was the main characteristic of the description which was given to the police immediately after the incident. There was absolutely no mention of any distinctive facial features. Therefore, the material discrepancy which arose as to height, when 6 weeks later another description was given must be fatal to any identification.
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> Secondly, that the judge in dealing with the issue of identification having warned himself of the special need for caution before convicting the accused in reliance upon the correctness of the identification did not demonstrate that he carefully analysed the evidence and applied the principles of law as was required.
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> Thirdly, that it was the duty of the trial judge to have carefully considered all the circumstances relating to the identification particularly where there was no corroboration.

9. Where visual identification is the main issue to be considered in a case, then the correctness of that identification is of paramount importance. There is always a very real possibility that a witness may be mistaken and that such a mistaken witness may also be very convincing. It is therefore advisable that in dealing with cases which relate to visual identification a trial judge should be guided by the guidelines that were enunciated in the case of ***R. v. Turnbull*** [1976] 3

All E.R. 549. In the celebrated judgment of the Court of Appeal delivered by Lord Widgery C.J. at page 551 he had this to say:

> "First, whenever the case against the accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.
>
> Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all

> cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.
>
> All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger."

10. In the instant case the reliability of the sole eyewitness, Mr. Robotham, had been challenged especially in respect of his evidence relating to the height of the applicant. There was an inconsistency between the height given by the witness on the day after the incident when he described his assailant as 5' 3"-5' 4" tall and that given six weeks later, after the applicant was pointed out by the witness in the Olympic Gardens area, when he was described as 4' 8"-4' 9" tall. Mr. Williams submitted that this was a material inconsistency which would render the identification unreliable and therefore could not support the conviction.

11. On an examination of the transcript the following dialogue emerged from Mr. Robotham's evidence at page 31:

"Q. ... the fourth man you described him to the police as being 5' 3 to 4 inches tall, am I not correct?

A. Whatever you see in the statement, that is what I gave.

Q. ... the man who you pointed out to the police, you say is about 4' 8 to 9 inches tall ...

A. You have a tape, sir? Measure that man for me ..."

Q. Forget about his measurement. You saw the man that morning and described that man to the police as 4 foot 8 to 9. In other words a short man?

A. Then nuh a short man".

What is evident and instructive from that dialogue in our view, is the witness' perception of height. It is obvious from his answers that whether the assailant was 5' 3" to 5' 4" or 4' 8"to 4' 9" he perceived him to be a short man. The second description was given after the applicant was pointed out to the police. The crucial question is whether or not the initial description of the height of the applicant, when considered cumulatively with the other evidence of identification given by Mr. Robotham, can be said to mean that the quality of the identification was poor. At page 15 of the transcript he said:

"A. ... when they went into the room, the light was on, so I was able to see everybody clearly and it never turn off from thereon.

Q. What kind of light?

A. Fluorescent light bulbs not the tube.

Q. ... what part of the accused man's body were you able to see that night ...

A. ... his hairstyle, the features of his face and he has a slight bowleg.

Then, further on that same page when he was asked:

"Q. ... how long did you see his face for?

...

A. Within a minute.

Q. ... were you able to see him again?

A. He keep (sic) patrolling the room.

Q. As he patrolled the room, were you able to see his face.

A. Yes.

Q. And give us an idea how long you were able to observe his face for.

A. More than half-hour. "

We think that the inconsistent statements as to the height of the applicant did not obliterate the cogency of the identification evidence.

12. The learned trial judge dealt with the question of the identification in this way, at page 63 of the transcript, he stated:

"While he was on the floor he said he could see his face for some half an hour but I do not put

> much weight on the vision from the floor because he would be seeing him at an angle. He had to turn sideway (sic) and I would say here and now if that was the only time he had the opportunity of seeing his face, I would say that was weak but I rest my findings on the identity on the time when they took him into the room and turned on the light and he said it was about a minute."

Then on page 64 he said:

> "I come to the height. When a person gives an estimate of height, it is a guesstimate, because we are not sure ... I don't know how much difference there is in the height. I agree that the witness, by the dimension he gave in height, he gave different figures but he said he rests his identity on the facial features."

Essentially the trial judge's analysis of the evidence, his application of the guidelines relating to the issue of visual identification were adequate and cannot be faulted. He pointed out what he considered to be the areas of weakness and we formed the view that he was extremely generous to the applicant when he said that he would not put much weight on the view from the floor because he would be seeing him at an angle.

We are of the view that the evidence of identification was neither poor nor unreliable. The evidence of visual identification as it came from the complainant was extremely convincing and compelling and therefore capable of sustaining the conviction of the applicant.

13. Ground 2 was argued mainly on the following bases:

> (a) Whether or not the other four occupants of Mr. Robotham's house attended identification parades;
>
> (b) Whether or not they were able to identify this applicant; and
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> (c) The judge's finding that "the question of whether his wife and sons were able to identify the assailants and in particular this man is irrelevant for my consideration".

When analyzed, this ground, in our view, has no merit. None of the other occupants of the house was called at the trial to testify. The sole witness as to fact was Mr. Milton Robotham. He was for the greater part of this incident, tied up and placed in a passage beside a closet and was unable to say what took place elsewhere in his house that night. He was unaware of where in the house his wife and sons were during the course of the robbery or what or whom they saw. At pages 63 to 64 of the transcript the trial judge addressed this aspect of the evidence as follows:

> "I would say they are irrelevant because this man, according to Mr. Robotham, was the one who kept vigil over him the entire period and it was the other man who was going downstairs with the wife coming back upstairs, going in the room of the son and so on. ... So I don't know the circumstances which existed when they were in the company of the other men, I don't know what opportunity they had to see this man, I don't know but I am satisfied to the extent that I feel sure that Mr. Robotham is not making a mistake ... "

The learned trial judge was correct in finding that the question as to the ability of Mr. Robotham's wife and children to identify the assailants was irrelevant. He cannot be asked to speculate why there is an absence of evidence in support of the correctness of the identification of the applicant by Mr. Milton Robotham.

14. The law does not require corroboration in respect of identification evidence before there can be a conviction. However, when the evidence of identification is from a sole witness the necessity for caution is to be emphasized. In the case of ***Garnett Edwards v. R.*** (2006) 69 WIR 360 it was stated at page 372 that:

> "... a prosecution based solely on identification by a single witness requires particular care from the trial judge."

On an examination of the trial judge's summation, it was demonstrated that he gave careful consideration to the identification evidence after expressly warning himself of the dangers of convicting the applicant on the evidence of a single witness who was uncorroborated. Having so done, we can find absolutely no reason to disturb the conviction on that ground.

15. Further on the question of whether or not the other four occupants of Mr. Robotham's house attended identification parades, we wish to say that there is nothing to suggest that any useful

purpose would have been achieved by that exercise. The evidence was that this applicant was the person who was "patrolling" the area where Mr. Robotham was tied up and placed on the floor. There was not one iota of evidence to suggest that this applicant was seen by any of the other occupants during the robbery.

16. The final ground of appeal was that the sentence of 7 years imprisonment at hard labour was manifestly excessive.

This is a case where a man's house was invaded by intruders in the night and the occupants robbed. He was tied up, placed in a passage beside a closet, held at gunpoint and his family traumatized. We do not think that by any stretch of the imagination, it could be said that a sentence of 7 years imprisonment was manifestly excessive in those circumstances. Indeed, counsel for the applicant did not vigorously pursue this ground and, we would say, with good reason.

17. It is for the above reasons that we came to our conclusion which has already been stated.