JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 192/04

BEFORE: THE HON MR JUSTICE HARRISON, JA
THE HON MR JUSTICE MORRISON, JA
THE HON MRS JUSTICE M^{C}INTOSH, JA (Ag)

OMAR PEART v R

Oswest-Senior Smith for the appellant

Miss Claudette Thompson for the Crown

20 July, 30 July and 20 December 2010

HARRISON JA

[1] The appellant was convicted in the High Court Division of the Gun Court held at King Street, Kingston on an indictment charging him for illegal possession of firearm and robbery with aggravation. On count one, which charged him with illegal possession of firearm, he was sentenced to seven years imprisonment at hard labour and on count two, which charged him with the offence of robbery with aggravation, he was sentenced to 12 years imprisonment at hard labour. The sentences were ordered to run concurrently. On 30 July 2010 the appeal was allowed, the convictions quashed and a verdict and judgment of acquittal entered. We promised then to put our reasons in

writing, so this is a fulfillment of that promise.

[2] The single judge granted leave to appeal as there was a "confrontation identification of the applicant".

[3] The case for the prosecution in a nutshell is as follows. The complainant was robbed of her gold chain on 1 November 2003, at about 7:45 am. She testified that the appellant held her up at gun point along Spanish Town Road whilst she was walking with a friend and was heading to Tools Hardware where she worked. Her handbag was also taken from her but it was left behind after the man fled with her chain. She said that the incident had lasted for about five minutes and that during that period of time she was able to see the assailant's face. She retrieved her handbag with cash intact and went to Hunts Bay Police Station where she made a report. Prior to the incident, the person who held the gun at her was not someone that she had known.

[4] On 2 November 2003, at about 11:45 am she received certain information whilst she was at her work-place, which caused her to go to the Hunts Bay Police Station. After speaking to the investigating officer at the door of the CIB office she pointed out the appellant to the police as the man who had robbed her.

[5] Constable Gary Richards, the investigating officer, was stationed at Hunts Bay Police Station at the time of the incident. The complainant, he said, had attended the station on 1 November 2003, and made a report to him. He commenced investigations and on 2 November 2003 at about 11:30 am he went to 118 Hagley Park Road based

on certain information he had received. The appellant was held and taken to the station. He said that while he was at the station, the complainant came there and pointed out the appellant as the man who had robbed her. He was arrested and charged with the offences of illegal possession of a firearm and robbery with aggravation. When he was cautioned he said, "Officer, is a man send mi".

[6] Constable Richards disagreed under cross-examination that he had taken the appellant to Tools Hardware after he was held. He also denied that he had called the complainant and her friend to the police car and had asked the complainant if the appellant was the man who had robbed her. He agreed with counsel that it was he who had placed the appellant in the CIB room. He also agreed that on 2 November 2003, when the complainant came to the station, he had spoken to her inside the CIB room when he knew that the appellant was in that room. He said he had taken no steps to prevent the complainant from entering the CIB room at the time that the appellant was in there.

[7] A no case submission was made at the close of the case for the prosecution. The gist of the submission was that there was a confrontation between the appellant and the complainant and that since the appellant was not known to her prior to the incident, an identification parade ought to have been held. The learned trial judge rejected this submission and called upon the appellant to answer to the charges.

[8] The appellant made an unsworn statement from the dock and asserted that he did not use any firearm and did not rob the complainant. He also denied that he used

the words attributed to him by Constable Richards when he was cautioned after arrest.

[9] The sole ground of appeal urged on behalf of the appellant was formulated in this way:

> "The convictions herein are respectively, impugnable, as the means of identification which was sine qua non to the Prosecution's Case was contrived and not impartially and/or objectively garnered as it emanated from an impermissible confrontation between the Witness/Virtual Complainant and the suspect/Appellant."

[10] Mr Senior-Smith for the appellant argued that when one examines the evidence adduced by the prosecution, the convictions are impugnable as the means of identification which were absolutely essential to the prosecution's case were deliberately created rather than arising spontaneously and impartially. He submitted that in the circumstances, the confrontation was impermissible between the complainant and the appellant. He therefore submitted that the learned trial judge had fallen into error in not acceding to the no case submission.

[11] Miss Thompson, for the Crown, agreed that the facts of the case did point to a confrontation having taken place. However, she argued that the learned trial judge found that the words spoken by the appellant after he was arrested and charged were sufficient to put him on the scene and as the person who had carried out the robbery. She submitted that the learned judge found that the words used by the appellant did not cure the confrontation but they took the case to another level which made her feel sure that he was the person who had committed the offences. She further submitted

that when one examines the transcript, it is clear that the learned trial judge did not place reliance on the confrontation in order to convict the appellant.

[12] The cases dealing with confrontation are well known but it is worthwhile examining them in this judgment. The case of **R v Dickman** (1910) 5 Cr App R 135 is a convenient starting point. In that case, the allegation was that a witness who had gone to see whether he could identify the appellant was first invited by someone, possibly on behalf of the police, to look through a window and on doing so, did see, sitting alone, the appellant. The Lord Chief Justice expressed himself in firm language at page 142:

> "We need hardly say that we deprecate in the strongest manner any attempt to point out before hand to a person coming for the purpose of seeing if he could identify another, the person to be identified, and we hope that instances of this being done are rare - I desire to say that if we thought in any case that justice depended upon the independent identification of the person charged, and that the identification appeared to have been induced by some suggestion or other means, we should not hesitate to quash any conviction which followed. The police ought not either directly or indirectly, to do anything which might prevent the identification from being absolutely independent and they should be most scrupulous in seeing that it is so."

[13] In **R v Gilbert** (1964) 7 WIR 53 the facts were that after the appellant was taken into custody, he was left alone in a room at a police station in such a position that he could be seen by the prosecutor as he was entering the room. The prosecutor thereupon identified the accused as the man who had stolen his money. The judgment of the court was delivered by Lewis JA (as he then was) who said at page 56:

> "The court feels strongly that this method of identification is a most improper one. This case does not stand alone in that respect. In several cases within the last few months the court has observed that there is a tendency for the police to confront a suspected person with the person who is required to identify him in circumstances in which it is possible for the identifying witness to say that he merely came upon him.
>
> Where it appears, as it must have appeared clearly in this case, that the evidence against the suspected person is going to depend to a great extent upon identification, there is a distinct duty upon the police to take every care to see that the witness who is going to identify that person is not brought into proximity with him before the identification parade is held."

The appeal was dismissed however, because the case for the Crown had also depended upon the doctrine of recent possession. The court therefore concluded that there was sufficient evidence on that score to allow the conviction to be sustained.

[14] In **R v Hassock** (1977) 15 JLR 135, three lay witnesses, to whom the appellant was previously unknown, were allowed to see him at the police station with a view to identifying him. No identification parade was held and the court held inter alia:

> "(i) that where an accused person is unknown to the witness before an alleged incident and his guilt rests solely on visual identification by those witnesses an identification parade should be held;
>
> (ii) that the practice of confrontation with a view to identification in those circumstances is to be condemned;
>
> (iii) ..."

Melville JA (Ag) who delivered the judgment of the court said (at page 137):

> "The conclusion cannot be avoided that the police here had embarked on a deliberate course of confronting the applicant with the various witnesses. Not once, not twice, but at least on a third occasion this course was pursued. Mere words seem inadequate to condemn behaviour of this kind."

And at page 138 he continued:

> "Indeed it seems that this pernicious practice has intensified whereby confrontation has now become the order of the day rather than the rare exception that it ought to be in clear defiance of the warnings of Lewis, JA. It is hoped that the result of this appeal has given a clear indication of the course that this court will pursue in the future under similar circumstances. Confrontation should be confined to rare and exceptional circumstances such as those in **R v Dennis** (1970) 12 JLR 249, where the court would perhaps not be inclined to frown too unkindly on the procedure adopted there. Although it is always difficult to formulate universal rules in these circumstances, where the facts may vary infinitely, a prudent rule of thumb would seem to be: where the suspect was well known to the witness before, there may be confrontation. That is, the witness may be asked to confirm that the suspect is the proper person to be held. If the witness did not know the suspect before, then the safe course to adopt would be to hold an identification parade, with the proper safeguards, unless of course there are exceptional circumstances."

[15] A few years later, this court in **R v Errol Haughton and Henry Ricketts** (1982) 19 JLR 116 once again re-emphasized the importance of an independent identification. Carey JA stated at page 121:

> "In the result, we would state the law in this way. Where a criminal case rests on the visual identification of an accused by witnesses, their evidence should be viewed with caution and this is especially

> so, where there is no evidence of prior knowledge of the accused before the incident. Where an identification parade is held as is the case where there is no prior knowledge of the accused, the conduct of the police should be scrutinized to ensure that the witness has independently identified the accused on the parade. Where no identification parade is held because in the circumstances that came about, none was possible, again the evidence should be viewed with caution to ensure that the confrontation is not a deliberate attempt by the police to facilitate easy identification by a witness. It will always be a question of fact for the jury or the judge where he sits alone to consider carefully all the circumstances of identification to see that there was no unfairness and that the identification was obtained without prompting. In a word, the identification must be independent."

[16] The dicta of Melville JA at page 138 in the **Hassock** case were approved by their Lordships' Board in the Privy Council in **Williams (Noel) v R** (1997) 51 WIR 202.The headnote of that case reads:

> "Where a witness to an incident knows well the person suspected of involvement in the incident, the suspect may properly be confronted by the witness so that the latter may confirm that the suspect is the proper person to be held in connection with the incident. Where the witness does not know the suspect well, an identification parade is the proper means of identifying the suspect and confrontation should be confined to rare and exceptional circumstances."

[17] In **R v Brown (Gavaska), Brown (Kevin) and Matthews (Troy)** (2001) 62 WIR 234 this court reiterated the purpose of a confrontation. The headnote states inter alia:

> "In an identification case in Jamaica, where the suspect is well known to the identifying witness, confrontation for the purpose of identification is permissible, except where the

> suspect asks for an identification parade. In order to ensure fairness, any such confrontation should be conducted as follows: (i) before the confrontation takes place, the identification officer must tell the witness that the person he saw may, or may not, be the person he is about to confront and that if he cannot make a positive identification he should say so; (ii) before the confrontation takes place, the suspect or his attorney at law must be provided with details of the first description of the suspect given by any witness who is to attend the confrontation; (iii) the confrontation should take place in the presence of the suspect's attorney at law, unless this would cause unreasonable delay; and (iv) the suspect should be confronted independently by each witness, who should be asked 'Is this the person?'. A failure to comply with head (i) above, however, is not necessarily fatal to a subsequent conviction.
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> **R v Hassock**, 15 Jamaica LR 135, **Watt v R** (1993) 42 WIR 273, **R v Popat** (1998) 2 Cr App Rep 208, and **Goldson and McGlashan v R** (2000) 56 WIR 444 applied."

[18] More recently, Lord Carswell delivering the judgment of the Privy Council in **Edwards (Garnett) v R** [2006] UKPC 23, (2006) 69 WIR 360, condemned the approach to identification by means of confrontation. His Lordship said, "Confrontations between an identifying witness and a suspect are in general undesirable and should be avoided, lest they undermine the value of the identification evidence."

[19] The circumstances of the identification in the instant case can be summarized as follows:

(a) The alleged robber was someone unknown to the complainant.

(b) On 2 November 2003, the complainant received certain information and went to the CIB office at Hunts Bay Police Station.

(c) Constable Richards stood at the door of the CIB office as the complainant spoke to him.

(d) After she spoke to Constable Richards she went inside and walked towards the appellant who was standing at the back of the office.

(e) She then pointed out the appellant to Constable Richards.

(f) She agreed that she had entered the CIB office for the main purpose of identifying the person who had robbed her.

(g) Constable Richards agreed under cross-examination that he was the person who had placed the appellant in the CIB room.

(h) At the time that Constable Richards spoke to the complainant at the door, he knew that the appellant was in the office.

(i) Constable Richards said he had taken no steps to prevent the complainant entering the CIB office where the appellant was standing.

[20] In summing up the case, the learned judge realized that identification was the main issue for consideration. She emphasized the need for caution and at pages 75 - 76 of the transcript stated:

> "The question is, who was that robber? I remind myself that this is a trial where the case against Mr. Peart depends to a large extent on the correctness of his identification which the defence is saying is mistaken. I warn myself of the need for special caution before convicting Mr. Peart in reliance on evidence of identification and I know that it is necessary to be cautious because it is possible for a honest witness to make a mistaken identification."

Later at pages 76-77 the learned judge continued:

> "I accept that in the circumstances as testified to, there was opportunity for Miss Parsons to see the robber. She says that she identified the robber as being Mr. Peart at the police station. I accept her evidence in that regard and I say this, the circumstances of this identification at the police station are not to be encouraged. An identification parade is

> the preferred method of identification in such a situation. The evidence that others were in the CIB Room does not make the circumstances of identification more palatable, therefore, I use a special caution in assessing the evidence of identification. I find that the identification in the police station CIB Room was obtained without prompting and was independent. I accept further that the identification does not stand alone. I believe the officer that the accused when cautioned by him said that a man had sent him. I take that to be an acknowledgement of having done the act but that he was sent so to do." (emphasis supplied)

[21] Miss Thompson had argued that when one examines the transcript, it is clear that the learned trial judge did not place reliance on the confrontation in order to convict the appellant. However, we do not agree with this submission. The learned judge had clearly accepted that the identification was good but it ought not to be encouraged. She stated that this identification was "obtained without prompting and was independent" and had warned herself along the lines of **R v Turnbull** [1977] QB 224. It is our view that this identification amounted to a blatant confrontation and ought not to be encouraged.

[22] We therefore agree with Mr Senior-Smith that the means of identification which were absolutely essential to the prosecution's case were deliberately created rather than arising spontaneously and impartially. We wish to emphasize that where a witness is expected to give evidence identifying an accused person whom he does not know or never set eyes on before the occasion of the offence, the accused should be placed on a parade with other persons of similar height, appearance and status as far as is feasible, to demonstrate that the witness' recollection has been properly tested.

[23] Standing on its own, it is our view that this method of identification would have been fatal to the prosecution's case. So, was there something more that would have justified the conviction? The learned trial judge was of the view that the identification by the complainant did not "stand alone". She stated that she had believed Constable Richards when he said that the appellant had said after he was cautioned, "Officer is a man send mi". The learned judge took this statement to mean that it was "an acknowledgement of having done the act but that he was sent so to do". It is our view however, that this statement is at best ambiguous and at worst unable to stand on its own as an admission of guilt. The learned judge had treated the statement as support for a "tainted" identification but, in our view, this was unacceptable and highly prejudicial to the defence. It was for these reasons why we held that the appeal ought to be allowed, the convictions quashed and a verdict and judgment of acquittal entered.