J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 34/76

BEFORE: The Hon. President
The Hon. Mr. Justice Henry J.A.
The Hon. Mr. Justice Rowe, J.A. (Ag.)

R. v. DONALD DEER

Mr. B. McCaulay, Q.C. and Mrs. B. McCaulay for applicant

Mr. Henderson Downer for the Crown

May 19, 20, July 11, 1977

HENRY J.A.

The applicant Donald Deer was convicted on April 6, 1976 in the Home Circuit Court on two counts of an indictment which charged him with robbery with aggravation. He was sentenced to imprisonment with hard labour for fifteen years on each count and in addition he was ordered to receive eight strokes on each count, the sentences to run concurrently. Having been refused leave to appeal by a single judge he applied to the court for leave to appeal against his conviction and sentence. On May 20, 1977, having refused his application we promised to put our reasons in writing. We now do so.

The evidence of the prosecution witnesses discloses that on April 25, 1974, at about 10.30 to 11.00 a.m. two men entered the business premises of West Indies Paper Products Ltd. Having disarmed the security guard who was on duty in the receptionist's office they entered an inner office where money intended for the employees of the company was being counted and then absconded with that money totalling some $15,000. One of the men had a gun from the outset, the other armed himself with the gun taken from the security guard. At an identification parade held two weeks later five persons, four of whom gave evidence at the trial, identified the applicant as being one of the two men

involved in the robbery. Two of these persons had been in the receptionist's office at the time of the incident, the other two had been in the inner office. The applicant was not known to any of these persons before the alleged robbery. The entire incident, executed with what the learned trial judge described as "command precision" was over in a matter of minutes but the men did not wear masks. According to Detective Sergeant Simpson when he told the applicant that he had received information that the applicant robbed $15,000 from West Indies Paper, the applicant's reply was "Is Edward carry me there, sir".

Two grounds of appeal were argued before us. The first ground is as follows:-

> "The learned trial Judge's directions were totally inadequate in that (a) he failed to give the jury any warning on the need for caution in a case of visual identification,
> (b) he totally failed to explain to the jury the perils or dangers of visual identification and
> (c) he failed to evaluate to the jury the evidence which may weaken or cast doubt on the visual identification rather,
> (d) he advanced every point in favour of the prosecution when dealing with the evidence of identication and none in favour of the appellant".

We do not consider that on the evidence in this case it was incumbent on the learned trial judge to give a specific warning either on the need for caution in a case of visual identification or on the dangers of visual identification. Although identification was an issue in the case, the conviction of the applicant was not entirely dependent on visual identification. If the jury accepted the evidence of Detective Sergeant Simpson it was open to them to find that the words "Is Edwards carry me there" amounted to an admission by the applicant of participation in the robbery at the instigation of Edwards. The applicant was identified by five persons at an identification parade in respect of which no impropriety is alleged. The nature and scope of the directions which are appropriate in a particular case must very largely be left to the discretion of the trial judge exercised having regard to all the circumstances of that case. The type of direction which would be necessary, for

example, in a case where the identifying witness or witnesses did not know the accused beforehand, saw him for a brief moment in near darkness and identified him several weeks later at a police station when the police brought him in on another charge would be very different from the direction in a case where the accused and the witnesses were well known to each other for years and there was ample time and opportunity at the time of the alleged offence for the witnesses to observe the accused in broad daylight.

Thus in Dennis Gayle v. R. S.C.C.A. 17/72 the witnesses as to identification did not know the accused before the date of the alleged offence. They next saw him at a police station being escorted by one of the investigating officers. They gave different accounts as to the circumstances in which they came to be at the police station at the time and whether it was at the invitation of the police. The learned trial judge "dealt at great length in a general way with the question of identity when it arises in any case" but the summing up was unrelated to any of the issues which arose on the evidence and was held to be "entirely deficient". The important question for the jury's consideration was the circumstances under which the witnesses came to identify the accused, and this was the matter to which their attention should have been particularly directed. We mention this case to illustrate that a summing-up may be deficient even though it includes general directions on the question of identity and a general warning as to the dangers of visual identification.

A trial judge is in the best position to assess the atmosphere of the trial, the way in which the case is conducted and the quality of the jury and these factors may well affect the way in which he sums up to the jury. Each case must be dealt with in the light of its particular circumstances but where identification is a live issue, the judge in summing-up should clearly identify to the jury and deal specifically with all matters relating to identification and if there are any weaknesses in the evidence bring them to

the attention of the jury.

In this case there did not seem to be any significant weaknesses in the evidence of identification. The identifications were based on having seen the applicant at two different places. Two of the witnesses based their identification on having seen him when he was in the receptionist's office and the other two on having seen him when he was in the inner office. Yet all four witnesses, and indeed the fifth person also, had not the slightest difficulty in pointing him out at an identification parade held under circumstances that appear to have been flawless.

Generally, a summing-up which clearly identifies to the jury the issues for their determination and fairly deals with the evidence in relation to those issues is all that is required. The learned trial judge early in his summing-up told the jury "The real point here now in this case is, what is the evidence that the prosecution has put before you touching the identity of the accused as one of the men? It seems really that the whole case boils down to that point, the question of identification. Are you satisfied from the evidence that has been put before you by the prosecution that the accused did take part in the robbery? If you are satisfied to the extent that you feel sure, bearing in mind what the witnesses told you the accused is supposed to have done and what words he used, then your duty would be to convict him. If, on the other hand, you believe the accused that he didn't take any part in this robbery, knows nothing about it, or you have a reasonable doubt whether he took part in it or not, your duty would be to acquit him". He then went on to deal with the burden of proof during the course of which he told them "To put it another way, his guilt must be demonstrated beyond any reasonable doubt. As I have already told you, the issue here is as to his identification". We do not consider that the jury could have been in any doubt as to the principal issue for their consideration. When therefore the learned trial judge subsequently reminded them of the salient features of the evidence for the prose-

cution and for the defence they could have been in no doubt that they had to consider this evidence in relation to that principal issue. Complaint was made to the effect that in reviewing the evidence the learned trial judge was more favourable to the prosecution and in particular that he emphasized the striking features of the applicant to suggest that he was a person who would be easily remembered without at the same time advancing points in favour of the defence - for example that the witnesses were lying face down for most of the time during the commission of the robbery. We do not consider this complaint to be justified having regard to the summing-up as a whole. Indeed we consider that the learned trial judge in dealing with the alleged response of the applicant "Is Edwards carry me there" was unduly favourable to the applicant in the interpretation which he suggested to the jury could be placed on those words. He suggested that while this might amount to an admission to being on the premises on the day of the robbery it could not be regarded as an admission to taking part in the robbery. According to Detective Simpson these words were in response to the Detective's statement to the applicant "I am a Detective Sergeant and I received information that you robbed $15,000 from West Indies Paper". As we have already indicated, in our view if the jury accepted this evidence they could well have concluded that the words in that context amounted to an admission by the applicant to participation in the robbery. In so far as the comments by the learned trial judge as to striking features of the applicant, we would first of all observe that if the applicant does indeed have striking features the learned trial judge would be perfectly justified in pointing this out to the jury. He did so twice during his summing-up. The first occasion was when he mentioned the fact (elicited in cross-examination) that one Shirley Chisholm had stayed for about 10 seconds before pointing out the applicant at the identification parade and the evidence of Mr. Green as to his reason for picking out the applicant at

the parade "Looks, just looks, his looks". The second occasion was when he reminded the jury that in cross-examination the witness Antoinette Lyn had admitted seeing the applicant for a matter of seconds. It is true that on neither occasion did he immediately proceed to mention evidence which might have been favourable to the applicant, but viewing the summing-up as a whole we cannot say that it was prejudicial or unfair. In our view the first ground of appeal fails.

The second ground argued was as follows:-

> "The learned trial Judge failed to deal adequately with the evidence for the defence in so far as the appellant's credibility and character were concerned, in that he totally failed to remind the jury of the evidence of the appellant's only witness, Mrs. Adina Deer, which it appears he himself accepted when addressing the appellant after conviction and before sentence".

It is true that the learned trial judge did not specifically deal with the evidence of Mrs. Deer independently of that of the applicant, but the nature of her evidence is such that we do not think that this omission could have affected the jury's verdict. This ground of appeal also fails.