CRIMINAL LAW — Murder — (Alibi) — Identification — whether judges adequately and effectively warned jury on dangers of "fleeting-glance". Evidence whether judge admitted evidence which was highly prejudicial and of no probative value (no objection by appellant). Appeal dismissed.

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 11/85

BEFORE: The Hon. Mr. Justice Rowe, - President
The Hon. Mr. Justice White, J.A.
The Hon. Mr. Justice Downer, J.A. (Ag.)

R. v. ALBERT BERRY

Delroy Chuck for Appellant

Garth McBean for Crown

October 21 & November 11, 1987

ROWE: P.

On March 23, 1984, Donovan Gayle was shot in the back and died as a result of a gunshot wound. A post mortem on his body revealed a seven milimetre hole in the back six inches below the left shoulder and two inches beside the spine and a 15 milimetre hole one inch beside and half inch above the jugular. The fifth rib on the left side beside the spine was broken, there was a hole in the left upper part of the lung and the main artery to the brain on the left side was completely severed. At trial in the St. Ann Circuit Court before Morgan J., and a jury, the appellant was convicted of the murder of Donovan Gayle. We treated the hearing of the application for leave to appeal as the hearing of the appeal, dismissed the appeal and now set out our reasons for so doing.

A group of twelve men were walking along the unlighted main road at Maider in St. Ann at 8.00 p.m. on the night of March 23, 1984. Two of these men carried flashlights but at the material time it appears that only one of the flashlights was turned on. That group of twelve came upon a smaller group of men who blocked the road ahead of them. There was a discrepancy in the crown's case as to whether the smaller group consisted of three men or four men. In the forefront of the group of twelve were Fenton Frazer and Guy Brown who carried the

the lighted flashlight. Also in that group of twelve were Henry McCook, Jolly Smith and the deceased. Four prosecution witnesses, Frazer, Brown, McCook and Smith said Guy Brown shone his flashlight on the group of men ahead of them and with the aid of that light they each recognized the appellant who was unmasked, but they were unable to recognized the other men who all wore masks. The appellant was known to each of the witnesses from childhood and they had all attended the same primary school together. The witness Frazer said he saw a long gun in the hand of the appellant, while Jolly Smith said he saw something strapped to the appellant's shoulder. All the eye-witnesses said they became aware of the men ahead when they heard the challenge "A who that?" and they estimated the distance which separated the two groups to be between 1/2 chain and 3/4 chain.

Immediately after Brown shone the flashlight towards the men, the witnesses said they heard a burst of gunfire and they ran in all directions. Jolly Smith was shot and wounded and required hospitalization.

During the course of the cross-examination of the arresting police officer, the names of three men, Charles, Cheesy and Paul, were introduced to the witness and he was asked if he was making efforts to locate them in connection with the murder of Donovan Gayle. In re-examination the witness said that upon caution the appellant said he was in company of those three men who shot Donovan Gayle and injured Jolly Smith. No objection was taken to the admission of this statement. The defence was an alibi.

Mr. Chuck submitted that the learned trial judge failed to adequately and effectively warn the jury of the dangers of identification in the peculiar circumstances of this case, and, in particular, that the trial judge failed to emphasize that this was a classic fleeting-glance case on a dark night when the persons were separated by as much as 3/4 chain. Two prosecution witnesses placed the appellant on the extreme left of the road while two others placed him on the right. This discrepancy, said,

Mr. Chuck, further weakened the identification evidence and should have been separately highlighted by the trial judge to show how mistakes can be made and the inherent dangers of visual identification.

The learned trial judge was very much aware of the necessity to impress upon the jury the importance of identification and in a lengthy passage directed them at pages 140-142 of the record, he said:

> "Now, I have to warn you that caution has to be exercised when you are relying on the correctness of any visual identification because it is always possible for a witness to be mistaken, and even though the witness may be mistaken the witness can also be very convincing. You have to remember, too, that people and persons often look like each other. I am sure it must have happened to some or all of you in your lifetime where you have seen somebody and you say to yourself there is Aunt Jane and when you get close you find that it isn't Aunt Jane at all. You have to examine very closely the circumstances in which the identification by each witness came to be made, and in trying to come to a decision about this you must look at the frankness, the candour of the witness - that is very important - how the witness impressed you. You must look at that. Did he impress you as a witness of truth? Do you think they are mistaken? Do you think they are lying? These are questions that you will all have to consider and come to a determination because, you see, you have to feel sure that there has been no mistaken identification.
>
> Now there are certain things that you have to look for when you come to consider whether or not there is mistaken identification. How long the witness had a particular person under observation, from what distance, by what light, did anything at all hamper the observation, was there any trees, was there anybody in between to prevent him seeing the person fully, was the person known before by the witness, did he see him very often, when was the last time he saw him to refresh his memory on what the person looks like. These are all matters that you have to consider. We will see if we can examine them as we go through the evidence."

Then later at page 151 he said:

> "As far as the flashlights are concerned, three, - Frazer, McCook and Brown - say one flashlight was on. It is Smith who says two flashlights were on. It is for youtto say whether or not in those circumstances at the distances that they have given - half chain Frazer says, half chain McCook says, three quarter chain Smith says - they could properly see from a flashlight which has two cells, which has new batteries and which is working properly and which, each witness says, was shone in the face of the accused man."

The strength of the crown's case lay in the fact that the appellant was well known by four witnesses who were not at all shaken in cross-examination. The weakness on the aspect of identification lay in the fact that these witnesses had but a moment in which to make the identification. We think that the explicit directions at page 151 quoted above sufficiently brought to the minds of the jury the importance of the lighting situation and when this is coupled with the general warning as to the dangers inherent in visual identification, we are of the view that the strictures of Mr. Chuck as to the sufficiency of the directions as to identification are without merit.

Mr. Chuck complained that the trial judge admitted evidence which was highly prejudicial to the accused and which was of no probative value. The passage at page 100 - 101 of the record contain the alleged inadmissible material. Detective Corporal Warmington was there giving evidence and in re-examination he gave evidence as follows:

> "Q. From whom did you receive this information concerning Charles, Cheesy and Paul?
>
> A. The accused man, Albert Berry.
>
> Q. Was this as a result of your investigations?
>
> A. Yes, sir.
>
> Q. Where did you receive this information?
>
> A. I receive it at the Brown's Town Police Station.
>
> Q. Did you caution him before you receive this information?

"A. Yes, sir, I did.

Q. And in respect of this information concerning Charles, Cheesy and Paul what did he tell you?

A. He told me that on the day in question, sir, he was going towards Meider.

HIS LADYSHIP: What did he tell you in respect of these three men?

Q. Just these three men?

A. He said he was in company of the three men who shot Donovan Gayle and injured Jolly Smith.

Q. That he was in company of these three men?

A. Yes, sir.

Q. Who shot Donovan Gayle?

A. And shot and injured Jolly Smith.

Q. You said he made this statement after you cautioned him?

A. After I cautioned him.

One would have expected the prosecution in opening its case to the jury to have intimated that it proposed to adduce in evidence the admission allegedly made by the appellant and to have afforded the defence an early opportunity to object if they were opposing the admissibility of this admission. This trial did not take that course and it was not until the last witness for the prosecution was called and was being re-examined that the admission was elicited. It was then open to the defence to have raised an objection. Counsel for the defence who had introduced the names Charles, Cheesy and Paul kept very silent possibly in the hope that he could persuade the jury that the three murderers were those named men and that the appellant was being framed because he had at some time been in their company, albeit not at the scene of the shooting.

In support of this second ground of appeal, it was submitted that the trial judge erroneously made reference to this admission in her charge to the jury when she said:

> "On the other hand, if you find that there is no basis for you to say that any of these men were there then you may conclude that the witnesses did indeed see this accused and two others. As to whether the two others were Cheesy and Paul, one does not know. It is the accused man, he says, who said these were the three men, but the accused man also said he was not there. How did he know that it was these three men?"

In D.P.P. v. Boardman (1975) A.C. 421, the House of Lords discussed the whole question of the right of a trial judge to exclude relevant evidence if the prejudicial effect outweighed its probative value. Lord Hailsham of St. Marleybone said at page 453:

> "The judge also has a discretion, not as a matter of law but as a matter of good practice to exclude evidence whose prejudicial effect, though the evidence be technically admissible on the decided cases may be so great in the particular circumstances as to outweigh its probative value to the extent that a verdict of guilty might be considered unsafe or unsatisfactory if ensuing."

The admission in the instant case provided powerful corroboration of the evidence of visual identification and its probative value could be of telling effect. There was never any suggestion that the statement made by the appellant after caution was other than voluntary, and it ill behoves the appellant to take no objection to the admission of the statement at trial, and now to rely upon its allegedly prejudicial effect. We hold that the evidence of Det. Sergeant Warmington as to the admission made by the appellant was relevant and probative and was properly admitted.

The prosecution produced a very strong case against the appellant, his defence was rejected, the summing-up was fair and adequate and consequently the challenge to the conviction fails.