JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 145/89

BEFORE: THE HON. MR. JUSTICE ROWE - PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

R. V. ANTHONY McINTOSH

Robin Smith and Leonard Green for Applicant

Miss Paulette Williams for the Crown

January 21 and February 18, 1991

ROWE P.:

Two marauders entered a tavern-cum-restaurant at Whithorn, Westmoreland, at about closing time, i.e. just after 11 p.m. on the 24th June 1988. One man identified as the applicant McIntosh was armed with a short revolver and the other one Melford Gopaulsingh was armed with a dagger. At gunpoint they robbed the proprietress of money from the shop's till, of the jewellery which she was wearing, of all the jewellery which she kept in her bedroom, of a large assortment of electronic equipment including television set, tape-recorder, Gemini Mixer, video machine, video cassettes, an electric iron, a quantity of clothing, toilet articles, two suitcases, liquor, and a brief case. These the thieves loaded into the owner's motor car which, too, they stole, and drove away. Both men remained with the woman for more than two hours and at times were each in the closest physical contact with her. Electric lights were ablaze all over the house. The woman had ample, prolonged and unimpeded opportunity to observe the thieves, both of whom she identified at an identification parade held at the Negril Police Station on July 21, 1988.

Police Officers raided Room 505 of the Upper Deck Hotel during the night of July 1, 1988. They found the applicant dressed only in underpants and Gopaulsingh similarly dressed in that room. McIntosh was wearing three gold chains around his neck and two rings on fingers of his left hand. Inspector Levi Stanley told the two men that he was investigating the robbery committed at Whithorn on June 24. After caution the applicant, said the detective, answered to a question as to where he got the jewellery saying:

> "Take them sir, do anything you want do. Mi hearsay me nuh fi say nothing."

In that room the police found a Sony tape-recorder which was then playing, a black attache case, video cassettes, a brown suitcase initialled A.C.T. containing video cassettes and men's clothes. From under Gopaulsingh's mattress the police discovered a large quantity of jewellery and about 50 x $100 bills. Gopaulsingh directed the police to a person who had purchased the video and mixer and to a woman who had a suitcase of clothing. All these articles were identified and claimed by the proprietress of the Whithorn buisness-place as her property.

Mr. Smith, in support of the grounds of appeal that the verdicts could not be supported by the evidence, submitted that on the crucial issue of visual identification the learned trial judge failed to direct himself adequately on the reason for caution when considering such evidence. Langrin J. in his summation at p. 126 of the Record said:

> "Now, this witness had never seen these men before and as this case depends substantially on the issue of identification I have cautioned myself on the dangers of a mistaken identification. An identification parade was held subsequently and both these accused men

> " were pointed out. If that was all the evidence in this case I would certainly feel sure that it was both these men who had gone to Mrs. .... premises on this night of 24th June, 1988."

He found support in the recent possession of the stolen property by both men who were charged before him.

This Court has in a plethora of judgments advanced the rule that a trial judge ought not to adopt any technique of shortening the directions to himself on this issue of visual identification. The issue is commonplace; it arises in the criminal courts every day. Each trial judge owes a duty to himself to get this simple, but important aspect of his trial technique word perfect. In this case nothing turns upon the trial judge's failure to expand the directions to himself so as to place the matter beyond doubt that he is aware of the reasons why visual identification evidence has been placed on the list classified "highly suspect" as there was the most cogent corroborative evidence in the virtual admission of the applicant to the police officer and his recent possession of a quantity of easily identifiable stolen goods.

It was submitted on behalf of the applicant that the identification parade was unfairly conducted as the same police officer who escorted the applicant on the parade also escorted the identifying witness from the waiting room to the parade. This practice is not specifically prohibited by the Identification Parade Rules, is not per se prejudicial to the suspect and not having been explored at trial to suggest impropriety, is not a meritorious ground of appeal. However, it is our view that if police personnel are available in sufficient numbers, then no one officer should be given areas of responsibility for both suspect and witnesses at the holding of these parades.

We find no merit in the submissions advanced against the convictions recorded against the applicant and his applications for leave to appeal against convictions for illegal possesion of a firearm and robbery with aggravation are refused.

Mr. Smith urged us to re-consider the sentence of sixteen years imprisonment at hard labour which was imposed on Count 2. He argued that the trial judge might have been unconsciously affected by the inflammatory nature of the evidence as to the applicant's antecedents given by the police. McIntosh had admitted five previous convictions including convictions on June 30, 1977 in the Westmoreland Circuit Court when sentences of twelve years imprisonment and imprisonment for life were imposed. The applicant was released on parole on April 4, 1986. As part of this antecedent history the police officer said:

> "..... Shortly upon his being paroled there was a rapid increase of criminal activities in this parish in particular Savanna-la-Mar. Mcintosh has now become a menace to society and many many persons expressed relief upon his arrest. Society is better off without him."

Mr. Green who appeared for the defence, expressed surprise at the tenor of the police officer's comments which he labelled as "prejudicial without any basis". The trial judge made no comment then nor when he came to pass sentence. This Court expressed the view in R. v. Ross [1967] 11 W.I.R. 226 that:

> "..... it was the bounden duty of all police officers to exercise the most scrupulous care in presenting to any court, the record of an accused person. Police reports are not based strictly in law upon evidence which can be tested fully by judges or counsel, ..."

The sentence in R. v. Ross (supra) was reduced and a similar situation had occurred in R. v. Barnett and McCartney [1946] 5 J.L.R. 29 where the detective's evidence as to McCartney's antecedents was that McCartney had used his intelligence to fleece others. Hearne C.J. said:

> "..... If this officer was referring to alleged instances of 'fleecing' with which the appellant had not been charged and convicted, he should not have given the evidence he did, but that the appellant does use his intelligence to fleece others is clearly deducible from his convictions of larceny as a bailee, fraudulent conversion, conspiracy to defraud, forgery and uttering.
>
> We find, however, that in passing sentence on McCartney, the Judge assumed he was a professional receiver and there is no warrant for this as far as we can see ...."

The Court went on to reduce McCartney's sentence.

It will be observed that the Court in R. v. Ross (supra) quoted with approval the practice in England which obtained in relation to the giving of evidence of previous convictions and the prisoner's general character as then appeared in the 36th Edition of Archbold, Criminal Pleading Evidence and Practice at para. 613 at page 187. The relevant Practice Directions extant in England are to be found at para. 472-476 of the 42nd Edition of Archbold's. It is stated at para. 4-474 that:

> "Counsel for the prosecution should see that a police witness giving evidence after conviction is kept in hand and is not allowed to make allegations which are incapable of proof and which he has reason to think will be denied by the defendant."

In our experience the police witness invariably supplies to the Court a copy of the antecedent evidence which he proposes to give in evidence. Where the trial judge observes that this statement contains material which goes outside the first-hand knowledge of the witness except material which is in favour of the accused, the trial judge should direct the police witness to omit those parts of the script which are hearsay and prejudicial to the accused. Co-operation between prosecuting counsel and the trial judge should ensure that the trial judge proceeds to sentence on admissible evidence only.

The comments of the police witness which tended to connect the release of the applicant on parole with the increase of crime in the Westmoreland area without a shred of evidence as to his participation in those activities, were most unfortunate. His further comments as to the sentiments of the inhabitants of Savanna-la-Mar concerning the apprehension of the applicant were quite reprehensive and ought not to have been tolerated or permitted by the trial judge. However, this applicant who had in 1977 been sentenced to life imprisonment for illegal possession of a firearm and to twelve years imprisonment at hard labour for robbery with aggravation and who was still on parole, could not expect anything but condign punishment for his dastardly acts committed on the night of June 24, 1988. Gopaulsingh received one half the sentence imposed on the applicant but in his favour was the fact that he had no previous conviction and further he co-operated fully with the police during their investigations. As the single judge said in refusing leave to appeal, "the sentences are not a day too long".

There was absolutely no merit in the applications for leave to appeal and we order that the sentences commence on 21st January, 1991.

of the Rules, would go to the weight of the evidence and not to the validity of the parade. What must be the important consideration for the jury is whether in all the circumstances the identification parade was fair, and gave the witness the opportunity to independently and fairly and without any assistance identify his assailant.

In the course of his submissions Mr. Williams intimated that he was not alleging that the parade was unfair but restricted his complaints to the manner in which the learned trial judge directed the jury in respect of the breach of the Rules.

In dealing with this aspect of the case the learned trial judge directed the jury as follows:

> "Now Madam Foreman and members of the jury, there are rules as to the conduct of an identification parade. You must have a lawyer or lawyers and the only time you can have a Justice of the Peace is when the lawyer cannot come and all sort of things."

He then continued to instruct the jury on all the matters that should be adhered to in making sure that the parade is fair, and then he concludes:

> "So your sole objective is to decide whether in all the circumstances the parade was fair.
> A Justice of the Peace was there, for the parish of St. Andrew, and Sgt. Gauld told you that the Justice of the Peace was there to see that the parade was fair: you examine all the circumstances of the parade and if you find that anything unfair about it .... you have to reject it for it would not be a good parade."

Then later in his summation the learned trial judge again said:

> "Madam Foreman and members of the jury, you will have to examine all that Sgt. Gauld told you and you will have to make up your minds whether it was a fair parade. If you think that the parade was unfair, you can't rely on it, the identification wouldn't be any good."