JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 155 & 159/88

BEFORE: THE HON. MR. JUSTICE CAMPBELL, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

R. v. ANTHONY PERYER & EVERTON POWELL

Delroy Chuck for Peryer
and amicus curiae for Powell
Miss Cheryll Richards for the Crown

September 29, 1989 and March 5, 1990

DOWNER, J.A.:

This application for leave to appeal was treated as the hearing of the appeal because an important point of law was raised. It concerned the extent of the duty of a trial judge to give reasons for his verdict when conducting a trial in the High Court Division of the Gun Court without a jury.

The facts which persuaded the judge to return a verdict of guilty in respect of both appellants for the offence of illegal possession of firearms, shop breaking and larceny and shooting with intent must be reviewed to determine whether the trial judge specifically took into account the probability that the police officers might have been mistaken in identifying the appellants Peryer and Powell on the night of the incident. The need for the jury to be warned even in instances where police officers were the witnesses in a case of visual identification was emphasised in the recent Privy

Council Appeals 14, 15 and 16 of 1988 and 7 of 1989, Junior Reid et al and Errol Reece et al v. The Queen delivered 27.7.89. In so far as the Privy Council decided on the issue of police officers as identifying witnesses, they held that there was a duty to withdraw from the jury evidence of identification made in circumstances amounting a fleeting glance. No such issue was raised or could be raised in the circumstances of this case. The issue in this case was whether the specific requirement of a warning was satisfied, where the police officers knew the accused previously and the trial judge was judge of fact and law.

What were the findings of fact? The Crown's evidence was related by two police officers - Constables Henry and Wilson. They reported that around two o'clock in the morning of 17th August, 1987, they saw both appellants, whom they had known before, emerging from a Sherwin Williams retail paint shop. The shop was at the corner of Upper York Street and Deanery Road and both officers were on Upper York Street. Both accused dropped the paint they were carrying when they were alerted by the officers, they ran and began to shoot it out with the police. There was evidence that the shop was broken into and entrance gained from an adjoining premises. That evidence came from two employees, Reclifton Campbell and Marcia Allen. Both appellants ran towards the officers initially and then made their escape through a gully. Both accused were subsequently arrested.

It is against this background that we must examine the reasons the judge gave for returning a verdict of guilty. The first point to emphasise is that judges of the superior courts have invariably given reasons for delivering their judgments. With the decline of juries on the civil side, judges, instead of summing up to a jury, began to give reasons for their judgments. So it was also on the criminal

side, when judges were empowered to arrive at verdicts without the assistance of a jury, see Trevor Stone v. The Queen (1980) 1 W.L.R. 880, they gave reasons for their verdicts. See Tumahole Bereng v. The King (1949) A.C. 253 and Thabo Meli & others v. Reginam (1954) 1 All E.R. 373 from Basutoland and Chiu Wang Hong v. Public Prosecutor (1964) 1 W.L.R. 1279 from Malaysia as well as Thambiah v. Reginam (1965) 1 All E.R. 611 from Ceylon. So ingrained is the practice of giving reasons when there is a verdict of guilty, that in A.G. for Northern Ireland Reference (1977) A.C. 105, the trial judge gave reasons for returning a verdict of not guilty. Lord Diplock said at page 134(b):

> "Although he was under no legal obligation to do so, the judge gave a judgment stating his reasons for finding the appellant not guilty and setting out in considerable detail his findings of fact."

This case illustrates the need for reasons from a trial judge, for without reasons, it would have been difficult to have a reference on a point of law and thus the statute permitting a reference, when there is a verdict of not guilty, might have proved unworkable. So the practice of giving reasons when a judge of a Superior Court sits alone in criminal trials has been well established in common law jurisdictions. Also, be it noted, that the right of appeal both from jury and non jury trials is governed by Section 13 of the Judicature (Appellate Jurisdiction) Act. See Section 14 of the Gun Court Act.

With respect to the complaint in this appeal, from the outset Wolfe, J. emphasised that the crucial issue was that of identity. The defence was based on alibis, so that there were explanations as to where the men were, on that morning. Also the defence of mistaken identity was projected

in cross-examination. It is in this regard that the following passage on page 106 of the record in the trial judge's reasoning must be assessed:

> "So there you have good lighting, a distance which I would say enabled them to recognise the men and the fact that the men were known to them before. So what is it then that could have led these police officers just to come out of the blue and to say that these were the men they saw coming from the premises. What is it? Were the police actually witnesses to the break-in or am I being asked to believe that the police went there and got information as to who the breakers were. I am satisfied that the police actually saw the men coming from the premises with paint."

As for the time available for identification, the trial judge recognised its importance as the following passage on pages 105-106 of the record indicates:

> "I am satisfied about that. I am also satisfied from the relative position indicated by the police officers that they would have been in position to recognise who the persons were because the distances were not too far, as I said at the most two chains. At one stage when the men were running from the premises to the gully they would be running diagonally and so to speak in the path of where the officers were because Upper York Street, if you were to follow it straight across to Deanery Avenue, it would take you right into the gully. In addition to that, both officers have said that they knew the accused men before and both accused men agreed that they had known Mr. Henry before."

The trial judge visited the locus and he was then satisfied with the position of the lighting and that from the vantage point on Upper York Street there was no impediment to obstruct the police officers' view of the accused leaving the shop. Bearing in mind that mistaken identity was the live issue in this case, then from all these circumstances, it is proper, on appeal, to draw the conclusion that Wolfe, J.

had alerted himself to special features of identification evidence and the inference must be that he had warned himself of the dangers of mistaken identity. Had it been a case before a jury, however, an express warning would have been necessary. The jury are laymen and have not had the requisite experience of the numerous instances of mistaken identity. Moreover, the verdict of the jury is a general one and the only reasons which can be challenged on appeal is the judge's direction to them. That the Privy Council has recognised that reasons for judgment require a different treatment from directions to a jury is illustrated in the following passage from Thambiah's case at page 664 (D-E):

> "Thus the evidence was wrongly admitted. Had this case been tried by a jury, its effect on their minds and the degree to which, if at all, it might have affected their verdict would be a matter of speculation. Here, however, their lordships have the learned judge's careful reasons to guide them in estimating its effect. It is clear that he did not regard it as being of any importance."

Yet another way of expressing the difference between a trial by judge and jury and judge alone in a criminal trial, is by reliance of the maxim "a judge is presumed to know the law". While it is obligatory for him to give explicit instructions on law to a jury, an appellate court may presume that he has advised himself correctly on the law of identification from his reasons which must be expressed and from his conduct of the trial. On this alternative ground also the appellant has failed to rebut the presumption in favour of the judge.

This approach is supported in the opinion of the Privy Council case of Chiu Nang Hong (supra) and in this regard it is appropriate to examine closely the reasoning of Their Lordships Board. Firstly, while in Jamaica and it

seems Basutoland, trial judges sitting alone deliver oral reasons in criminal trials immediately after the closing speeches of counsel, a different practice obtains in Malaya.

At page 1284, Lord Donovan said:

> "This was not an extempore judgment, but a well-considered judgment given in writing, albeit some six weeks after trial. The conclusion comes after a careful and meticulous examination of the circumstances, in which the desirability of corroboration, in the legal sense of that term, must have been in the mind of this very experienced judge. He nowhere refers to the absence of corroboration: and when at the close of his judgment he announces that the circumstances afford corroboration, their Lordships cannot presume, on virtually no grounds, that he intended to say simply that the circumstances afforded consistency only. The circumstances were, indeed, consistent also with the appellant's story."
> [Emphasis supplied]

It is clear from this passage that the trial judge erred in law by finding that there was corroboration when the circumstances merely indicated consistency in the complainant's story. Furthermore, this misdirection rebutted the presumption that the judge applied the law correctly. No such charge could be laid against the experienced judge who tried the instant case.

Earlier on page 1283, the opinion of the Board sets out the practice in that jurisdiction:

> "He convicted the appellant, sentenced him to 18 months imprisonment, but allowed bail. This was on November 22, 1962. Notice of Appeal being given by the appellant on January 14, 1963, the judge, as he was then obliged to do, put in writing the grounds of his judgment."

Bearing in mind that the charge was rape the crucial passage comes at page 1285:

> "Their Lordships would add that even had this been a case where the judge had in mind the risk of convicting without corroboration, but nevertheless decided to do so because he was convinced of the truth of the complainant's evidence, nevertheless they do not think that the conviction could have been left to stand. For in such a case a judge, sitting alone, should, in their lordship's view, make it clear that he has the risk in question in his mind, but nevertheless is convinced by the evidence, even though uncorroborated, that the case against the accused is established beyond any reasonable doubt. No particular form of words is necessary for this purpose: what is necessary is that the judge's mind upon the matter should be clearly revealed."

It is clear that, although more rigorous standards are to be applied to a reserved judgment, the inference from this passage is that "the judges mind on the matter should be clearly revealed" and this introduces "presumptions" and "inferences", as their Lordships indicated, which can be relied on by the crown from the reasons for judgment, the course of the trial and the conduct of the trial judge.

In Tumahole's case the trial judge erred in his directions on the issue of the effect of the evidence of a second accomplice, as regulated by the relevant Basutoland statute and generally on accomplice evidence. Here is how Lord McDermott treated the error. At page 269 he said:

> "What matters is whether the learned judge was right in treating as corroborative the points thus relied on. As regards the Christmas Day feast, their Lordships cannot accept the view that the attendance of the appellants, or most of them, thereat afforded any corroboration of the kind required. It was, by its nature, an event calculated to attract, and it did attract, others beside the appellants

> "who were there, and the mere fact of attendance is no sufficient link with a crime alleged to have occurred after the festivities were over and at some distance from the hut where they had been held."

In the instant case, the judge expressly stated at page 101 of the record that the Crown relied solely on visual identification as the basis to prove its case. There was no supporting independent evidence to implicate the appellants. But the fact that the judge examined all the features that pertained to the strength and weakness of the identification evidence, took the precaution of visiting the locus, meant that he acknowledge the importance of the issue of mistaken identity projected in cross-examination. All these features, therefore, clearly revealed that the possibility of mistaken identity was clearly in the judge's mind.

This was a recognition case and this feature must also be taken into account. The trial judge was also satisfied that the shop was broken into by the appellants, that they shot at the police, with intent to do them grievous bodily harm, so that the Crown had discharged the onus of proving to the satisfaction of the tribunal that the appellants were guilty as charged.

So considered, this appeal ought to be dismissed, the convictions and sentences affirmed and concurrent sentences of seven years hard labour are to run from July 11, 1988.