JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 23/93

COR: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.

R. V. ARTHUR MARTIN

Paul Ashley for Appellant

Hugh Wildman for Crown

13th December, 1993 & 7th March 1994

GORDON, J.A.

When this appeal, by leave granted, came on for hearing we called on counsel for the Crown, without recourse to counsel for the appellant, for assistance. Mr. Wildman submitted that the learned trial judge had properly assessed the evidence and arrived at a just conclusion. If however, the court was of a contrary view then the evidence was such that he invited the court to apply the proviso. Notwithstanding these submissions we allowed the appeal, quashed the conviction set aside the sentence and entered a verdict of acquittal. The reasons for this decision are hereunder stated.

Mr. William Rose operated a business at Parry Town in St. Ann. The business consisted of a shop and a bar, behind were his living quarters. On the night of the 21st May, 1992 at about 7.30 Mr. Rose was held up and robbed at gun point by two men. While one man stood on the piazza with his head covered and his face partially hidden by a towel, the other identified as the applicant at gun point robbed him and directed him to the living quarters and searched and demanded more money. He said he had the appellant under scrutiny sometimes at arms length

for the entire ten minutes of the ordeal.

On 31st May 1992 Mr. Rose was in his shop with one Mr. Murphy. He saw a motor cycle pass along the road "with two individuals on it." The vehicle stopped about a chain away at a shop. The rider of the "bike," a person he knew went into the shop, the pillion passenger came off the "bike" and stood with his back to the complainant. Complainant said, he went on to the piazza of his shop and watched the pillion passenger whom he recognized as the appellant. Mr. Rose said the appellant, as he stood by the shop faced away from him, he only saw his back and he "wanted him to turn around his face." Mr. Rose turned to speak to someone and on completing his conversation he realized the appellant was no where to be seen. In cross-examination he said he spoke to Mr. Murphy telling him the pillion passenger was one of the men who robbed him. Mr. Murphy told him the man's name was "Honey" a person he, Mr. Murphy, knew. Mr. Murphy further said he believed he had recently been released from prison.

On 7th June, 1992 Mr. Murphy visited a patient in the St. Ann's Bay Hospital. He saw the appellant there and on leaving offered him a lift to his home in his, Mr. Murphy's van. This offer the appellant gladly accepted and he entered the van with several others. Mr. Murphy did not go to the appellant's house at Harrison Town, he went to Mr. Rose's shop in Parry Town. There the appellant was ushered into the presence of the complainant Mr. Rose. The details of how the appellant came into Mr. Rose's shop are not clear but there was a confrontation. Mr. Rose was asked if he knew the appellant. There is no doubt on the evidence that the complainant's affirmative response was not immediate or spontaneous. He proceeded to question the appellant. He asked him "If he was a

'twin'?" He asked him which hand he used. The appellant said the left, thereupon Mr. Rose said the appellant was the man who held him up at gun point and robbed him. The appellant denied the accusation. The crowd threatened to beat the appellant and Mr. Rose telephoned for the police who came and took the appellant into custody.

In defence the appellant said he knew nothing of the crime, he did not rob Mr. Rose. When he was taken to the complainant's shop, he walked into his presence of his own volition. He was questioned by the complainant, he answered. The crowd urged Mr. Rose to say if he was the person who robbed him. When Mr. Rose eventually identified him the crowd beat him and the police was summoned to take him into custody.

At the commencement of his statement the appellant declared he was a businessman, married with a wife and five children. In the course of his delivery he said: "My Lord from I know myself I never been rob nobody." He ended his statement thus: "Sir, you know from the day I born I never rob no one. I don't guilty of this charge, you know. Almighty God know."

Identification was the sole issue in the Crown's case and the learned trial judge in considering this said at pages 100-101:

> "Mr. Rose says he recognised the person on the motorcycle, he saw his face, but it is worthy of note that he was standing out there hoping for this man to turn around. He said two things: he recognised his features; he recognised his face. Well, my impression is that Mr. Rose, when he said he recognised his features was not quite sure on the 31st who the person was. But, then, he described this person to Mr. Murphy and Mr. Murphy went and brought the accused to him on the 7th of June. So what I have to be satisfied on: When Mr. Murphy and these persons brought the accused man to his premises on the 7th of June, was this when he said that this was the man who robbed him? Was it merely because Mr. Murphy had told him he knows this person and he

> "had been to prison before or was it that he was sure that this was the man who he saw on the night of the 21st of May.
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> Now, this is something that Mr. Murphy volunteered in cross-examination: that Mr. Rose asked the accused, 'What hand do you use?' and the accused said left hand. And Mr. Rose told us in court that he had observed him that he was left-handed. He had observed this man and the accused was left-handed, and when he went to search he shifted the gun or the firearm from his left hand to his right hand. So I am satisfied so I feel sure that on the 7th of June Mr. Rose identified this accused man not from what Mr. Murphy had told him or anything he heard, but he was satisfied that this was the actual man he saw in his shop, and when he asked this further question about the left-handedness he was merely making doubly sure. It is equivalent to a witness going before a parade and asking the officer to let the person do a certain thing like laugh or stand up or walk."

We agree that the complainant could not have recognized the features of the appellant when he saw him on the 31st May, 1992 on the back of the passing motor cycle. That was indeed a fleeting glance. Mr. Murphy knew him for fifteen years and he accepted the description given by the complainant and acted on it. A question that remains unanswered is to what extent was the complainant's identification cemented or his doubts dispelled, on 7th June 1992, when he questioned the appellant, by the statement made by the witness Murphy on May 31, 1992 that he believed the appellant had just been released from prison? The learned trial judge can disabuse his mind of any prejudice the latter statement might invoke. No attempt was made by the Crown to dispel the possibility of prejudice in the mind of the complainant occasioned by this statement and apart from mentioning it as he did the learned trial judge did not deal with it in his reasons.

It is clear on the evidence that the complainant's identification of the appellant was not spontaneous. There was a confrontation followed by interrogation in the presence of a hostile crowd numbering 10-15. The applicant said the complainant remarked "can man resemble man so?" when he said he was not a twin. The complainant made a decision in these circumstances and he maintained that decision in the testimony he gave. In the passage of the summation given above the learned trial judge dealt with the uncertainty of the complainant's identification of the appellant on the motor cycle. He also adverted to the confrontation and drew an analogy with what sometimes happens on an identification parade. On an identification parade however there are usually 9 persons similar in appearance and the complainant has an opportunity to compare them and select the one who from his recollection is the culprit. The learned trial judge found that "the citizens acted under a misguided sense of justice," but he was satisfied that the identification was genuine. He had warned himself of the inherent dangers in visual identification evidence and he adverted to the factors in favour of identification and the weaknesses in the case but he did not deal with the question raised above.

In his defence the appellant denied the allegations made against him and he placed his character in the scale of justice. His declaration of his non-involvement in crime was not rebutted by the Crown so the learned trial judge was required to consider it in determining the issues to be resolved. Evidence of good character cannot avail where the evidence points conclusively to guilt. Good character is considered when the credibility of the witness(es) is being assessed. It is fair to say that at no time did there appear to have been a consideration of this aspect of the defence in the learned trial judge's assessment of the evidence.

In Archbold 1992 Edition Vol. I at paragraph 4-418 the learned author states:

> "There has been a spate of recent authorities on the appropriate direction where the defendant is of good character, some of which are inconsistent as to the extent of the direction, but, with the possible exception of R. v. Kabariti [1991] 92 Cr. App. 362, C.A. (and even there it was held that the Berrada direction (post) should be given in almost all cases and in any event in any case of seriousness), all of which appear to agree that a direction is necessary on the relevance of good character to the jury's assessment of the defendant's credibility. It seems clear that R. v. Smith [1971] Crim. L.R. 531, C.A. (where the trial judge omitted to refer to the defendant's good character and the Court of Appeal held that he had no duty to refer to it), no longer represents the law."

In **R. v. Berrada** [1989] 91 Cr. App. R. 131A Waterhouse J said:

> "In the judgment of this Court, the appellant was entitled to have put to the jury from the judge herself a correct direction about the relevance of his previous good character to his credibility. That is a conventional direction and it is regrettable that it did not appear in the summing-up in this case. It would have been proper also (but was not obligatory) for the judge to refer to the fact that the previous good character of the appellant might be thought by them to be one relevant factor when they were considering whether he was the kind of man who was likely to have behaved in the way that the prosecution alleged."

The appellant gave a statement from the dock and his credibility fell to be considered by the learned trial judge. Having stressed his good character it behoved the trial judge to deal with it in his reasons. Merely to state "I do not accept what the accused man told me "in our view does not satisfy the requirement that the evidence of good character, such as there was, was given the consideration it deserved.

In **R. v. Turnbull** [1976] 3 All E.R. 549 it was established that evidence of visual identification falls into a category which requires a careful and cautious approach to its assessment hence special directions are required. This was enforced in subsequent decisions of the privy Council beginning with **Junior Reid v. R** [1990] A C 363; [1989] 3 W L R 771 and followed here in this jurisdiction in a line of cases which were reviewed in R M C A 9/93 **R. v. Fitzroy Craigie et al** delivered 29th July, 1993 (unreported). We are loath to find that the category of evidence which requires special treatment is closed and we are in agreement that evidence of good character, when introduced, must be addressed.

The learned trial judge failed to express that he had given due consideration to the character evidence and the language he used does not admit of a construction that he had the correct principles in mind and applied them in arriving at a conclusion adverse to the applicant. We may and do presume that he knows the law, we cannot presume its proper application. That must be clearly demonstrated. By way of a postscript to the judicial assessment of the case we find our conclusion supported by the fact that the appellant does not have any criminal record. Indeed, it was erroneous to have acted on identification evidence suffering from the taint that the appellant was believed to have been recently released from prison since it was not expressly and unequivocally excluded from the factors which induced the trial judge to accept such evidence.

Cases referred to
(1) R v Lovada (1989) 91 Cr App R 131A
(2) R v Turnbull (1976) 3 All ER 549
(3) Junior Reid v R (1990) AC 363 (1989) 3 WLR 771
(4) R v Fitzroy Craigie et al - RMCA 9/93 - 29/7/93 (unreported)