

J A M A I C A

IN THE COURT OF APPEAL

R.M. COURTS CRIMINAL APPEAL NO. 290/66

BEFORE: The Hon. Mr. Justice Duffus (President)  
The Hon. Mr. Justice Henriques  
The Hon. Mr. Justice Waddington

R. v. BANCROFT BEEN

Mr. R.O.C. White for the Crown  
Mr. L.H. McLean for the Appellant

16th November, 1966

HENRI JES, J.A.,

This appeal arises out of conviction of the appellant on the 19th of September this year of the offence of larceny of a revolver and his subsequently being sentenced to 12 months hard labour. The facts as adduced at the trial and given in evidence by Harold Soltan and Veronica McKoy, witnesses for the prosecution, were as follows: that Soltan went to a restaurant along Victoria Avenue carrying his revolver in his back pocket and there proceeded to order some refreshment. A man came up, grabbed the revolver and ran at great speed into Victoria Avenue. Mr. Soltan stated at the trial, "I think I would know the man if I saw him again." Under cross-examination by the appellant he said, "I saw the person who robbed me and you are the person - I reported to the Police."

The woman, McKoy, who was a waitress in the restaurant said that she had seen Soltan come there. He was carrying his gun, he was at the counter partaking of refreshment and that she saw a man pick the gun from Soltan and ran away. She further stated that she had known the man before, she had seen him in the restaurant before. She went on to say that she attended an identification parade

parade and there picked out the appellant as being the man. Under cross-examination by the appellant she stated, "At identification parade the Police Officer say I to pick out three persons - I walk down the line and look for I want to be sure and I know you have a scar and all people in line had a scar." She further stated, "I told Police man had a scar on his head." Further, "I picked out three people on the parade. The three had same complexion and you are one of them I wanted to be sure of it."

The appellant's case at the trial was, in effect, an alibi. He and his father had been away in Christiana for the day and they did not return to Kingston until a time which was subsequent to the time at which it was alleged the offence had been committed.

Learned counsel for the appellant has taken two points before us. The first point is that the evidence on identification "was utterly hopeless and at times farcical and at other times the result was suggested." In view of the conclusion to which we have arrived at on another ground of appeal, it is unnecessary for us to express any opinion with regard to that matter. The second ground of appeal is that the learned Resident Magistrate applied the wrong standard in his approach to the evidence given by the defence in that he implied the reason for his rejection of the defence's evidence was that there was no certainty about it, whereas even if that evidence had not persuaded certainty it could possibly raise doubt and that this possibility appeared to be entirely overlooked by the learned trial Judge.

At page 10 of the transcript there appears the following passage which purports to be a summarisation of the reasons upon which the learned Resident Magistrate based his conclusions:-

"I think the female witness went to great care to make sure that she did not make the mistake of identifying the wrong person. Three of you looked so much alike, she had to be sure."

" I do not accept the evidence of yourself and your father as there is no certainty about it that you were out of town or did not return in time to

"commit .....

"commit the offence."

It is in respect of the latter part of that passage that learned counsel has made his submissions to us. We agree with learned counsel for the appellant that the standard which the learned Magistrate appeared to have adopted in his approach to the defence was a wrong one and that being so, in our view, this appeal must be allowed.

The conviction is quashed, the sentence set aside and in the interests of justice a new trial ordered. The appellant, in the mean time, will remain in custody.