JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 24/89

BEFORE: The Hon. Mr. Justice Carey, P (Ag.)
The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Forte, J.A.

R. V. BYRON JOHNSON

L. Cousins for Applicant

Miss M. Hughes for Crown

17th October, 1989

FORTE, J.A

The applicant was convicted for the offence of Burglary and Larceny committed on the 26th day of October, 1988 in the parish of Saint Catherine. The date of his conviction was on the 16th of January, 1989 on which date sentence was postponed to the 31st of January, 1989 when he was sentenced to 7 years hard labour.

The case arose out of an incident that occurred on the 26th of October, 1988. Janet Simmonds, the complainant retired to bed at 9.00 p.m. having locked up her home. At 2.00 a.m. she was awakened by a banging on her living room door. Frightened she called for help, by which time a lot of people came. She got the courage, went from her bedroom into the living room where she discovered that her living room door had been kicked off. Immediately, she missed her television and her video/recorder. Soon after, a time which she described as five minutes, she saw her brother-

in-law who lived in the same premises, coming into her home from the gate with the television and video/recorder.

The case against the applicant rested solely on the evidence of Fitzroy Henry the brother-in-law and he testified that he had heard his sister-in-law crying out from his home which was nearby. Having heard that and the banging on the door, he opened his window, saw somebody running with things under his arm. He took up his machete and his flashlight, turned his flashlight in the direction of the person whom he saw running and then recognized the applicant whom up to that time he had known for eight years. He testified that at that time the applicant was a distance of what the learned trial judge described as a cricket pitch which is well known to be 22 yards. He shone the flashlight into the face of the applicant and called the name of the applicant who then dropped the things and ran. He chased him but the applicant having fled into the bushes, he stopped his chase, went back to where the T.V. and video/recorder had been dropped, retrieved them and took them to his sister-in-law. He then made a report to the police who after that report issued a warrant for the arrest of the applicant.

In his defence the applicant set up an alibi. He said that he spent the night in question i.e. the 26th of October, 1988 with his grand-uncle. He testified that on the 14th of September, 1988, two days after the hurricane 'Gilbert' had struck, he had left his district to go to where his grand-uncle lives and he stayed with his grand-uncle but returned to his district on the 19th of September, 1988 and then subsequently went back to his grand-uncle. In the event, he testified that he was not in the district on the 26th of October, 1988 and therefore not the person who committed the offence for

which he was charged. He called in support his grand-uncle, who testified that the applicant did come to stay with him on the 14th of September, but that he remained throughout that period from the 14th September to the 30th of October. That therefore created a discrepancy between the evidence of the applicant and his grand-uncle. The grand-uncle saying that he remained with him throughout that period, the applicant admitting that he had returned to the district for a short period during that time. Before us learned counsel for the applicant Mr. Cousins argued two main grounds and for convenience I read from his grounds.

> "1. The learned trial judge misdirected the jury about the quality of evidence required to satisfy them as to the identity of the intruder that night into the complainant's house. He failed to alert the jury as to the 'weaknesses' in the identification evidence."
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> 2. In view of the 'bad blood' existing between Fitzroy Henry and the appellant, the learned trial judge failed to direct the jury that they should view his testimony with the gravest suspicion and reject it. This witness had sufficient motive for giving false testimony against the appellant. Moreover he had declared the person I saw 'was going away from me up the street' and 'when I shone the flashlight the person was running away from me'."

Mr. Cousins attempted to argue these grounds but in the course of his arguments it turned out that he was pursuing a course alleging that the verdict was unreasonable and cannot be supported by the evidence. Having reviewed the evidence as outlined in the summation of the trial judge to the jury, we cannot agree with those submissions. There is ample evidence upon which the jury could, as they did, find the applicant guilty of the offence for which he was charged.

Mr. Cousins in pursuance of those two grounds argued also, that the learned trial judge did not warn the jury of the dangers of convicting on visual identification of the applicant when that evidence is not corroborated. For this proposition he relied on the case of Scott & Others vs. The Queen (1989) 2 W.L.R. 924. In our view the learned trial judge directed the jury in words which at the end of the day made it very clear that caution had to be exercise in relation to the question of mistaken identification before they could arrive at a verdict adverse to the applicant. He directed the jury thus:

> "Mr. Foreman and members of the jury, bearing in mind that it was night, there is special need for you to be cautioned as there can be no proper conviction unless you are satisfied as to the correctness of the evidence given by Henry on this question of identification.
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> Mistake it is said, and no doubt it is so, mistake is a real possibility when it comes to identification and a witness may make an honest mistake and while making this honest mistake a witness may yet be a convincing witness. So you have to consider Mr. Henry's evidence carefully. You remember how in cross-examination he kept saying, 'I saw him, I saw him, I saw him.' You have to consider that. Is he making a mistake? Is he speaking the truth? You examine closely the circumstances involving the identification here when he said he had armed himself with his machete and a flashlight, and you consider also his evidence that he had the flashlight trained so to speak on the accused man. You remember that he said he had it on him for about 22 minutes, but bearing in mind the evidence from Miss Simmonds as to how long it was after the breaking that she got back her goods. You may well say to yourself that 22 minutes is an exaggeration that it was less than that. So you have to consider that defence. Enough time to see him to recognize him. Both say they knew each other before. The accused man is saying that he knew Henry and Henry is saying that he knew the accused. So you take that into consideration."

We are of the opinion that those directions were very adequate in the circumstances of this case, and we cn find no fault with the summation in relation to the question of visual identification. Perhaps I should make one short reference to another point argued by learned counsel for the applicant. Mr. Cousins attempted to argue that the learned trial judge did not direct the jury in relation to the absence of finger-print evidence. In the view of this court, that is a non-point. There was no evidence of fingerprints and therefore there was no responsibility in the learned trial judge to direct the jury in that regard. In the event, we find that the conviction cannot be faulted. The application for leave to appeal is refused and the conviction and sentence are affirmed. The court orders that the sentence be commenced from 30th of April, 1989.