JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 6/78

BEFORE: The Hon. Mr. Justice Zacca, J.A.
The Hon. Mr. Justice Carberry, J.A.
The Hon. Mr. Justice Rowe, J.A.

R. v. DANIEL DACRES

Mr. Richard Small for Applicant

Mr. A. Smellie for Crown

May 1, 2, July 31, 1980

ROWE J.A.

The applicant was convicted on January 19, 1978 before Orr J. sitting alone in the High Court Division of the Gun Court for the offences of illegal possession of a firearm and for robbery with aggravation. His conviction on the first count attracted the mandatory penalty of imprisonment with hard labour for life and for the aggravated robbery he was sentenced to ten years imprisonment at hard labour. The single judge refused an application for leave to appeal and when the matter came before this Court after hearing arguments by Mr. Small, we refused the application for leave to appeal and as we then promised to do we now put our reasons in writing.

Edwin Graham, a 22 year old taximan was cruising for hire in his station-waggon taxi along the Washington Boulevard on September 29, 1977 at about 9:15 p.m. At the intersection of Pembroke Hall Drive and Washington Boulevard a man in a green shirt later identified as Herman Graham flagged down the taxi. Graham wished to be taken to Brotherton Avenue to pick up "two beef"

which term Grant understood to mean to be "two women." As they conversed, a man walked from a nearby bus stop and joined Graham. Both entered the taxi, Graham in the front seat of the right hand drive taxi and the other man in the rear seat, just behind the driver.

At Brotherton Avenue the taxi stopped. Graham asked what was the fare. Grant wanted to know if they were not going to make the return trip. Eventually he asked for $2.00. The left front door of the taxi was partly open so that the roof light in the car was turned on and three clocks in the taxi were also showing lights. Graham pushed his hands into his trouser pocket as if to take out money and came up with an open knife. He said, "this is a hold up you know star." The man from the rear seat alighted from the car and came beside the driver's door. In one hand he held an open knife and in the other what Grant described as a gun. Grant could see the "round hole of the gun mouth" and there was a handkerchief covering the handle of the gun. That knife was pointed at his ears and the gun at his neck. The two men were face to face and Grant said he was able to recognize the features of that man by means of the roof light in his car. That man he said is the applicant Dacres. The armed men demanded money and Dacres after shifting the knife into his gun hand rifled the pockets of Grant. Graham did likewise and together they were enriched to the tune of $6[illegible].00 and a ring. They escaped taking the switch keys of the taxi with them.

Grant returned to the Brotherton Avenue area on the following day and while driving he saw Graham and Dacres walking down Waltham Park Road and together Go into a business place on Waltham Park Road. Grant parked nearby and saw and stopped a passing policeman who went with him into the business place where he charged and identified the two accused. Graham protested innocence but Dacres said nothing.

The policeman took Graham and Dacres into custody. Grant said both men were dressed in exactly the same clothes as on the previous night and in addition the police found on Dacres a pair of "mafia glasses" which Grant alleged Dacres had been wearing the night before. Grant also purported to identify Dacres by a "cut on his nose."

Dacres' defence was an alibi. He was at home all the previous evening and night with his girlfriend. The learned trial judge did not believe Dacres nor his girlfriend and after rejecting the alibi, he accepted Grant as a witness of truth.

It is true that the only evidence implicating the applicant in the crimes the subject of this appeal was that of the victim. That by itself we do not consider to be a weakness in the case. There was no suggestion at the trial that Grant had concocted a tale of his being robbed and the case proceeded on the basis that he was a truthful witness as to the fact of the robbery but was either mistaken or deliberately lying as to the identity of his attackers. Here was a case in which the victim did his own investigation and within twenty-four hours he found, as he testified in court, two men answering the physical description of those who had robbed him at gunpoint, they were dressed in exactly the same manner as on the previous night and if Grant is to be believed the dress of one of the men was so unusual as not to be easily forgotton as he was wearing "green shirt and yellow pants." The apparel of the other man was only a little less distinctive as he was wearing "a whitish colour shirt with some little flower business on it; some little black flowers on it," and in his pocket was a pair of mafia glasses. Again, if Grant is to be believed, the two men were found together in the same vicinity of the robbery. Although the lighting was artificial and the observation of the assailants made when the victim must have feared for his life as on more than one occasion one of the assailants encouraged the other to shoot Grant, the proximity between the robber and the victim was so close that the young man Grant, had every opportunity to make an observation of the physical features of the robber.

Accordingly we did not find any merit in the second ground of appeal argued by Mr. Small wherein he complained: "That the learned Trial Judge by his comment:

> ".....As I have told you already I may be wrong, but I believe you had Mr. Grant into this area and held him up, a taxi man,"

clearly indicated that he was in some doubt in relation to the evidence and therefore was wrong in law in arriving at a verdict of guilty.

The learned trial judge could not have meant, and could not have been understood to have meant, anything more than that no human being is infallible and that in view of the protestation of innocence of the applicant, he the judge was trying the case and deciding it on the rules of law and on the evidence and he was not claiming for himself any divine powers. Having said that, however, we wish to make it clear that in the act of passing sentence the remarks of a trial judge should be considered and relevant, otherwise they can become otiose.

In a very able argument, Mr. Small developed ground 1 of the Supplementary Grounds of Appeal which was framed thus:

> "The Learned Trial Judge failed to adequately direct, warn and advise himself of the law and evidence in relation to identification."

He submitted that the Court of Appeal should pronounce as a rule of practice applicable to the trial of cases in the High Court Division of the Gun Court that in cases involving identification evidence the Judge sitting alone is required to direct, warn and advise himself of the law and evidence in relation to identification and in particular to analyse the weaknesses and any other features of the identification evidence which may effect the reliability of such evidence. He said the Court of Appeal should apply the same principle in relation to identification evidence when the judge sits

alone as that which exists when the trial is by Judge and Jury.

In practical terms this submission means that in giving judgment the trial judge should articulate fully all the principles of law governing identification evidence and if he fails to articulate those principles this should amount to a non-direction in law sufficient to warrant the allowance of the appeal. For the purposes of this submission the strength or other state of the evidence in a particular case would be immaterial as it would be a pure question of law as to whether the trial judge had given himself the proper directions in law.

Mr. Small referred us to some West Indian and some English decisions. These cases in the main dealt with situations requiring corroboration/tried in cases by magistrates or judges sitting alone and canvassed the need for them to properly direct themselves on corroboration. These we now proceed to examine.

We begin with the West Indian case of Jacobs v. Matthews (1962) 5 W.I.R. 442. There the magistrate trying a postman for larceny or destruction of postal articles acted on the evidence of girl of eleven years and omitted in his reasons for decision to say that he had warned himself of the risk of acting on the uncorroborated evidence. Giving the judgment bof the Court of Appeal in Trinidad and Tobago Wooding C.J. at p. 445 E observed that the magistrate had indicated by the care with which he approached the case that:

> "He realized the necessity for corroboration; that he realized that there was a risk in acting on her uncorroborated evidence; and that he realized the necessity for him to be convinced of its truth before he proceeded to act upon it."

Wooding C.J. in delivering the judgment of the Court of Appeal of Trinidad and Tobago in Bates v. James (1964-65) 7 W.I.R. at 203 followed the decision in Jacobs v. Matthews (supra) and at page 207 B he said:

> "The criticism which was levelled against the magistrate however was that in his reasons he said nothing specifically about corroboration. The same point was taken before us in Jacobs v. Matthews and we pointed out there that it was not necessary for a magistrate to state specifically that he had considered the matter of corroboration if there was in fact corroborative evidence on which he could and did reply. Our function, therefore, in this court is to consider whether there was clear evidence of corroboration which in fact the magistrate believed. If we find that he believed evidence which would fall within the scope of corroborative evidence, then, whether or not he specifically directed himself to consider the point, the fact that he believed evidence which would be corroborative evidence would suffice."

The applicant's attorney admitted that these decisions which he very properly cited were against his proposition but submitted that they were clearly in conflict with some English decisions which ought to be preferred.

Though neither of the two earlier Trinidad cases referred to above were cited in the Jamaican case of R. v. Malek and Reyes (1966 7) 10 W.I.R. 97, the Jamaican Court of Appeal reached a similar conclusion. The facts are unimportant. The resident magistrate was not then under a statutory duty to record his findings of fact when arriving at a conviction and he had made no note of his oral judgment. An incomplete record of the magistrate's summing up was available on the basis of which the court was unable to hold that the magistrate did not warn himself of the danger of convicting on the uncorroborated evidence of an accomplice. Although the Court's attention was drawn to the Privy Council decision in Chiu Nang Hong v. Public Prosecutor (1964) 1 W.L.R. 1279 it observed:

> "It may be that while the duty of a judge sitting alone to warn himself is a judicial duty, an obligation to record that he had in fact done so can only be based upon some statutory requirement, but we express no opinion on the question."

The approach of the Court of Appeal of Jamaica was in effect similar to that taken by the Trinidad Court of Appeal in Jacobs v. Matthews and Bates v. James. It had been argued in R. v. Malek and Reyes that the magistrate having failed to indicate in his judgment that he had addressed his mind to the danger of convicting on uncorroborated evidence two situations were possible. If he thought that there was corroboration he was wrong and if he had thought that there was no corroboration but he would nevertheless proceed to conviction on the strength of the evidence of the accomplice, he was equally wrong as he had failed to record that this was how his mind worked. To this the Court of Appeal said:

> "In our opinion, the question that we must ask ourselves in the circumstances of this case are: "Did the learned magistrate accept the evidence of Searchwell as true?" And secondly "was there evidence capable of affording corroboration which the resident magistrate accepted as true"."

The Court of Appeal then analysed the evidence and came to the conclusion that there was corroborative evidence and consequently held that the ground of appeal was without merit.

Mr. Small urged the Court not to follow Malek and Reyes on the ground that the decision was per incurian and that the distinction which was sought to be drawn between that case and Chiu Nang Hong v. Public Prosecutor was untenable. These cases should be contrasted he said with the series of English cases which show that there is a duty on the magistrate sitting alone to explicitly give himself the traditional warning. Mr. Small cited five English cases commencing with the decision of B. v. B. (1935) All E.R. 428 (1935) p. 80; including Fairman v. Fairman (1949) 1 All E.R. 938 (1949) p. 341 (Divisional Court); Davidson v. Davidson (1953) 1 All E.R. 611

(Divisional Court); Galler v. Galler (1954) 1 All E.R. 536 (Court of Appeal) and ending with Ali v. Ali (1965) 3 All E.R. 480: all deal with matrimonial offences, the requirement of corroboration and the necessity on the one hand for magistrates or commissioners sitting alone and on the other hand a judge trying the case with a jury, to warn itself fully in the first case and in the second case the jury, of the dangers of finding the matrimonial offence of adultery proved on the uncorroborated evidence of an accomplice, usually a willing party to the adultery. It is sufficient we think to quote from the first and the last of the cases referred to above to illustrate the rule and the reasons therefor.

In B. v. B. Sir Boyd Merriman P. said (at p. 429 H):-

> "The Court demands that when a matrimonial offence, whatever it is, is charged, the evidence of the spouse making the charge should, if possible, be corroborated and not least with matters of this sort about which, if there was not a reasonably strict rule in this respect, one spouse would be so easily at the mercy of the other in relation to things which in their nature must happen in private. But when that has been said it is admitted that the necessity for corroboration is not an absolute matter of law. Magistrates should direct themselves, just as a judge should direct a jury, that it is safer to have corroboration, but when the warning has been given, and given in the fullest form, there is no rule of law which prevents the tribunal from finding the matter proved in the absence of corroboration."

The later cases showed that Sir Boyd Merriman P. was wont to warn himself when he sat without a jury thereby making it clear that even when the tribunal of fact consisted of a trained lawyer, there was to be no presumption that it knew and would apply the law.

In Ali v. Ali Sir Joslyn Simon P. reviewed a number of authorities including those referred to above, (except Fairman v. Fairman), and at page 484 summed up the matter thus:

> "The question then arises for decision whether it is incumbent on the justices, in their reasons for their decision prepared for this court, to signify that they have had the question of corroboration in mind and whether the court will quash the decision if there is no such reference?"

He referred to the decisions in Galler v. Galler B. v. B; Davidson v. Davidson and Statham v. Statham (1928) All E.R. 219 (1929) p. 131 and then continued:

> "We think that this discrepancy is significant and due to two classes of case. In the first - those alleging sexual misconduct and those where the evidence of adultery is that of a willing participant - experience has shown that there is such an exceptional risk of a miscarriage of justice unless the Court has in mind the danger of acting on uncorroborated evidence that an appellate court will intervene unless the trial court has expressly warned itself of that danger. However, in other classes of cases, the risk is less acute and the absence of an express indication that the desirability of corroboration was in mind will not of itself call for the intervention of an appellate Court;".....

Ali v. Ali was a case where the wife had alleged desertion and wilful neglect to maintain and notwithstanding that the justices had not expressly stated that they had warned themselves as to corroboration their decision was upheld.

Chiu Nang Hong v. Public Prosecutor (1964) 1 W.L.R. 129, a decision of the Privy Council on an appeal from the Court of Appeal of Malaya, was concerned with a conviction for rape in a trial before a judge sitting without a jury. The issue was one of consent and in a written judgment the judge found that there was corroboration. On appeal, the Privy Council held that there was no evidence capable of amounting to corroboration and the judge having so misled himself deprived the appellant of the protection which the law afforded him as the judge did not apply his mind to the situation of acting upon uncorroborated evidence of the prosecution witness.

Having disposed of the case on that ground, the Board went on to say:

> "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."

The cases on identification evidence have not established any principle that in the absence of a particular warning as to the dangers of identification evidence there would be an irregularity in the trial notwithstanding the quality of the evidence. As we will endeavour to demonstrate when we come to consider the matrimonial cases referred to above, the old rules as to corroboration are rooted in history and should not be extended without compelling cause.

The analogy which Mr. Small sought to draw between the rule of practice as to corroboration in matrimonial or sexual offences and identification evidence in criminal trials cannot in our view be substantiated. We entirely agree that the series of cases beginning with B. v. B and ending with Ali v. Ali places a duty on the judge not only to have the caution in mind but to express it fully, certainly where the matrimonial offence alleged is adultery. But this rule was developed in a very narrow and special class of cases which today hold a decreasing significance in England due to legislation abolishing specific matrimonial offences as the ground for dissolution of marriage.

In legislating as it did to simplify the procedure for the trial of "gun crimes" by authorising trial by judge alone instead of the time honoured method of trial by judge and jury, Parliament ought not to presumed to have intended that the courts should declare new technical rules of procedure which would add to the length of the trials without necessarily improving the standard and quality of the administration of justice. It is not to be lightly suggested that the judges who preside in the Gun Court who are all judges of the Supreme Court, some with many years of experience as judges of fact and of law and others with many years of experience at the private Bar, will not have in mind the substantive rules of law in relation to identification evidence in any given case.

In December 1973, the Judicature (Resident Magistrate) Act was amended to require the Resident Magistrate to record his findings of fact on conviction in a criminal trial. That provision reads:

> "Where any person charged before a Court with any offence specified by the Minister, by order, to be an offence to which this paragraph shall apply, is found guilty of such an offence, the Magistrate shall record or cause to be recorded in the notes of evidence, a statement in summary form of his findings of fact on which the verdict of guilty is founded."

There is no statutory requirement for the resident magistrate to fully record that he has directed himself on the law of corroboration in the multiplicity of circumstances when that issue is bound to arise before him. Neither is there any statutory dictate that he should record that he has so directed himself when the vital issue is identification of the alleged criminal.

We are persuaded that it would not enhance the administration of justice to lay down the rule of practice for the trial of cases in the Gun Court for which Mr. Small contends. The Court of Appeal said; in R. v. Whylie (1977) 25 W.I.R. 430 at 432 I:

> "In every such case what matters is the quality of the identification evidence"

and at 433 D.

> "We have considered the decisions in the cases of Arthurs v. Attorney General for Northern Ireland, R. v. Turnbull, R. v. Peggy Gregory R. v. Desmond Bailey R. v. Dennis Gayle and from these we extract the principle that a summing up which does not deal specifically, having regard to the facts of the particular case, with all matters relating to the strength and the weaknesses of the identification evidence is unlikely to be fair and adequate. Whether or not a specific warning was given to the jury on the dangers of visual identification is one of the factors to be taken into consideration in determining the fairness and adequacy of the summing up.

We accept this to be a correct statement of the law in regard to jury trials but can see no reason in principle to extend a rule applicable to trial by jury to a trial by judge alone. In a jury trial the jury, all laymen, are constantly reminded by the Attorneys-at-law that whatever they say on the law is subject to what the judge will tell them as he is the supreme judge of the law. The jury are then waiting to hear from the judge and if he does not deal with the issues they are left in a void. Further, juries do not give reasoned judgments and consequently one is always left to speculate as to what facts the jury found. This is otherwise with a trial by judge alone. By virtue of being a judge, a Supreme Court Judge sitting as a judge of the High Court Division of the Gun Court in practice gives a reasoned decision for coming to his verdict whether of guilt or innocence. In this reasoned judgment he is expected to set out the facts which he finds to be proved and when there is a conflict of evidence, his method of resolving the conflict. The judge would have had the benefit of the speeches of Counsel, and it is to be remembered that in the Gun Court all accused persons are entitled to legal aid and are legally represented, and we do not think counsel

could fail to draw the judges attention to any aspect of the case including the proper approach to identification evidence as laid down in R. v. Whylie (supra).

We consider too that the comment of Scarman L.J. in R. v. Peter Paul Keane (1977) 65 Cr. App. R. 247 Turnbull's case is equally applicable to our decision in R. v. Whylie. There the judge said:

> "It would be wrong to interpret or apply Turnbull (supra) inflexibly. It imposes no rigid pattern, establishes no catechism, which a judge in his summing up must answer if a verdict is to stand."

In the instant case the learned trial judge reminded himself at p. 13 of the record, that:

> "Now of course the most important aspect is the question of identity, very complex, and one which the court has to approach with meticulous care and caution."

Then he went on to discuss the prosecution witness' opportunity to observe his assailant, the possibility of mistake, the absence of a description to the police before the time of identification, the fact that at some time the man said to be the applicant had a portion of his features obscured by a hat and dark glasses and the proximity of the witness to his attackers. We are clearly of the opinion that the learned trial judge directed himself in law and in fact in respect to this case in an impeccable manner. There is no merit in the grounds of appeal argued.