CA. CRIMINAL LAW — Robbery with aggravation — Illegal possession of firearm — Identification — Failure of trial Judge to advert mind to circumstances which made identification virtually impossible — Descriptions to police and evidence at trial — diametrically opposed — CA held identification insufficient — Appeals allowed — convictions quashed — Sentences set aside.

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 22 & 23/86

BEFORE: The Hon. Mr. Justice Rowe - President
The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Bingham, J.A. (Ag.)

R. v. DAVID LOWE
JOHN LOWE

Norman Manley instructed by Ballantyne, Beswick & Co., for Applicants

Miss Donnaree Banton for Crown

30th September, 1987

ROWE: P.

On the 18th of December, 1985 at about 2.00 o'clock in the morning at Windsor Castle Cross Roads in Portland, a Mr. Smith and a Mr. Hudson were sitting in a van waiting on other men to join them as they were about to go about their lawful business. They were attacked, that is Mr. Smith and Mr. Hudson by two men. One man had a short gun, and eventually the other man armed himself with a machete which he took from the van.

At trial the applicants were convicted of robbery with aggravation and illegal possession of a firearm, on evidence which turned upon the visual identification of these two applicants. Both Mr. Smith and Mr. Hudson had gone along to the police station on the very day of the robbery the 18th of December, and had given statements to the police, in which they both gave descriptions of the persons who had attacked them. The question at trial was whether or not the evidence which they gave identifying the applicants was inconsistent with what they had told the police the very day of the incident.

One man has been described by the two witnesses as having a beard. In the police statements it was alleged that this man was the attacker of Mr. Smith. But at trial the evidence was that the man who had the beard was the attacker of Mr. Hudson.

Mr. Smith was not able to identify more than one of the men because, said he, the other man was only a shadowy figure whom he knew had been attacking Mr. Hudson.

Mr. Hudson gave the most explicit evidence that he had not been able to do more than "glimpse" the other man, that is the man who had not been attacking him. He was not able "to determine the man," to use his own words. At another time he said he was not able "to penetrate the man," and yet he went on an identification parade and picked out positively as one of the attackers, the person whom he said he was not able to penetrate or determine and of whom he had only had a glimpse.

Notwithstanding, that state of the evidence, the learned trial judge did not advert his mind to other circumstances which would have made it virtually impossible for these witnesses to have identified the persons who attacked them. The evidence was that the only light available was from the headlights of the vehicle, and from the security light inside the vehicle. The attacks took place entirely to the side of the vehicle, not in the glare of the beam of the headlight, and therefore the lighting would have been very difficult. That was exactly the situation which could have hindered a recognition and eventual identification of the assailants and to this weakness in the identification evidence the learned trial judge made no mention.

The evidence tendered as to the description given to the police immediately after the attack and the evidence at trial was diametrically opposite as to the person who was bearded, and it would have been impossible between the 18th of December and the 3rd of January for a man to have grown a long beard as if he were a member of the Rastafarian cult. The learned trial judge did not advert his mind to this factor and if he had done so he would have found that the evidence of these witnesses as to identification, was inherently unreliable. He approached the case in a curious way. He realized, having regard to the submissions made to him and the evidence led, that there were inconsistencies in the evidence of the witnesses which were unexplained and this is what he said:

> "We have to go further, because there are other elements, there which the defence used to challenge the parade or the identification, and it is the statements of both Mr. Smith and Mr. Hudson, part of those statements were placed in evidence. We have to look at them, and it deals clearly with, where the man is saying the person who held him up had a beard at one stage and at another stage he is saying the person who held him up had no beard. And so, the defence quite rightly pointed that out as a discrepancy in the identification. But what the crown is relying on here is the doctrine of common design, and I upheld that two persons were there, and that the identification of the persons were proper and it is immaterial at that stage what the one was doing. Once they are there aiding, assisting or in a position to aid or assist it is enough to satisfy me." (emphasis mine)

There was no issue as to the common design to rob. However, to find who the robbers were, the identification evidence should place each man on the scene and to do so in this case his exact role should be pinpointed. We find that the learned trial judge seemed, as Mr. Manley said, "to have

skipped a step" and to have avoided deciding whether or not the identification was reliable in respect of each of the applicants and to be sufficient to warrant a conviction. We are of the view that the evidence as to identification, was insufficient that the learned trial judge's decision was in error when he said simply, "I upheld that two persons were there, and that the identification of persons was proper." For the reasons which I have given, we have decided that these applications for leave to appeal should be treated as the hearing of the appeals, that the appeals should be allowed, the convictions quashed and the sentences set aside. Verdicts of acquittal are entered.