CRIMINAL LAW – Firearm offences – Whether Crown had made out a prima facie case – whether evidence of identification manifestly unreliable – Alleged offences occurring at night – Identification evidence unreliable – Appeals allowed.

No case referred to

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 71/85

BEFORE: The Hon. Mr. Justice Rowe - President
The Hon. Mr. Justice Carberry, J.A.
The Hon. Mr. Justice White, J.A.

R. v. DELROY BROOKS

C. Dennis Morrison for Appellant

Miss Marcia Hughes for Crown

July 15 & September 21, 1987

ROWE: P.

After hearing counsel for the appellant and the crown, on July 15, we allowed the appeals quashed the convictions, set aside the sentences and entered verdicts of acquittal. As we then promised, we now reduce our reasons to writing.

Mr. Lloyd Hamilton was riding his motor cycle along Allan Town Road in St. Thomas at about midnight on January 28, 1984. He approached a section of the road where there was a street light. A four foot wide track ran from the main road in the vicinity of this street light. Mr. Hamilton who was travelling at about 20 m.p.h. saw two men standing in the track about 7 - 10 yards from the street light. In examination-in-chief he said:

> "After a pass them I see somebody point, Delroy Brooks point, point a gun on me and after him point the gun -- a duck on the handle, duck towards the handle."

He said further that he heard the echo of a gun and he saw a flame of fire came out of the point of the gun. He said he saw the whole of the "front of the appellant, when he was asked for how long he had this man under observation, Mr. Hamilton replied that he was riding along and he just looked towards the

track as his father had cows tethered in that area. His account of the time which he had to make the observation and identification of the man standing in the track was candid in that he said it was "around two seconds or so, because it was a quick look." But that is not an end of his evidence on this question of opportunity. In cross-examination as well as in answer to the learned trial judge, Mr. Hamilton made it clear that it was only when he approached the "track mouth" that he was able to see the gun in the hand of one of the men. This would mean that Mr. Hamilton had not recognized the applicant before he reached up to the mouth of the track and that once Mr. Hamilton had flashed by the "mouth of the track" at 20 m.p.h., he would have no further opportunity to see up the track. His estimate of two seconds would be an extreme exaggeration of time as at speed of 20 m.p.h., he would have covered 4 feet in about 1/7 of a second and admittedly he bent forward over the handle of his motor cycle once he had glimpsed what he concluded was a firearm.

In those circumstances it is doubtful if Mr. Hamilton could have seen a flame of fire coming from the gun inasmuch as his further evidence was that he swerved away from the track bending forward over the handle of his motor cycle.

The appellant had been well-known to Mr. Hamilton for more than twenty years, however for the two years before the alleged shooting, the appellant had been away from the area and had had no contact with Mr. Hamilton. On an otherwise dark road, there was this street light which shone into the track and which together with the headlights from his motor-cycle were relied upon by Mr. Hamilton as aids in identifying the appellant. This evidence seems to have impressed the learned trial judge who in delivering judgment said:

> "He recognized the accused when he came to the track and he said he saw him for about two seconds. Is that enough? I must consider what happens when one is moving along and at night time. I for myself and anybody that cares to admit it, even driving a car at thirty miles per hour, there are many persons that you see on the road and so long as you know that person, you are able to identify the person and to say that that is such and such a person."

In the quoted passage the learned trial judge accepted without critical analysis the estimate of two seconds which might have been fourteen times exaggerated and he used the inapposite analogy of the driver of a motor car seeing someone on the road, presumably ahead of him, and being able to identify that person with the aid of the headlights. Mr. Hamilton was riding a motor-cycle and the person was standing in a track some 7-10 feet from the edge of the roadway.

In our view the learned trial judge did not give sufficient weight to the weaknesses in the identification evidence, that he did not fully appreciate that that Mr. Hamilton could have had at best a fleeting glance of the person standing in the track and that the evidence of Mr. Hamilton of what transpired afterwards could at best be an educated reconstruction of what he thought must have happened. Demonstrably, on his evidence, he could not have seen any flame of fire coming from the firearm, yet he swore positively that he had observed this phenomenon. Had the learned trial judge rejected the evidence of Mr. Hamilton as to seeing a flame of fire emitting from the alleged firearm, there would have been insufficient evidence from which he could have inferred that the object in the person's hand was a firearm.

In our view the crown had not made out a prima facie case against the appellant and consequently there was merit in ground one of the grounds of appeal which complained "that the quality of the evidence of identification adduced by the crown was so lacking in cogency and manifestly unreliable that the appellant ought not to have been called upon to answer at the close of the case for the crown." For these reasons the appeals were allowed.