CA CRIMINAL LAW — Burglary and larceny — Identification — Whether summing up of trial judge re identification unhelpful and defective (ok) — Sentence: Dennis 8 years h/l, Lawrence 5 years h/l. Appeal against conviction — Dismissed. Sentences reduced to 4 years h/l each.

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS #37 & 38/86

COR: The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice White, J.A.
The Hon. Mr. Justice Downer, J.A. (Ag.)

R. v. DERRICK DENNIS
LLOYD LAWRENCE

Mr. B.J. Johnson for Appellants

Mr. Canute Brown for Crown

May 18, 1987

CAREY, J.A.

This matter comes before the Court by leave of the single judge, and relates to a conviction against these appellants in the Clarendon Circuit Court on the 8th of April before Malcolm J., sitting with a jury. The appellants were charged for burglary and larceny and upon conviction, were sentenced to 8 years hard labour and 5 years hard labour, respectively.

The single ground of appeal taken before us challenges the learned trial judge's summing-up in relation to identification, as those directions were criticised on the ground that they were unhelpful and defective.

The facts in the case are quite short, and are as follows: On the night of the 31st October, 1984, the dwelling house of a gentleman called Mr. Lloyd Williams, who lives at Savannah in the parish of Clarendon was, apparently, broken into. Mr. Williams said he was awakened by a sound which woke him, and he saw three men when he looked through a hole which was left by the breaking, apparently. The sound he heard was the sound of that breaking. He said, that the door burst open like a swing door, and he could see quite plainly. He saw two men near the door, and the two men were identified as the appellants. Lloyd, it was, who struck a match and also lit

a piece of paper. Then there was a second striking of another match, a paper bag was lit and it was by reason of that lighting that he was able to make out their faces. These were persons whom he had known for some time before. As to the lighting of a paper bag, he was not able to say which of the men had, in fact, done so. These men stole 9 bags of peanuts which were in the house. The defence of each appellant was an alibi.

The learned trial judge at page 3 of the record gave some general directions on the question of identification. First of all, he correctly pointed out that the issue of identification was important. He said this:

> "This case, Members of the Jury, turns on the question of identity, which is very important in this matter, because as Mr. Johnson rightly said, nobody is disputing the fact that Mr. Williams' house wasn't broken, what is important is whether these are the two men who were engaged in that enterprise that night. So the critical issue is the identification of the two accused persons ....."

And then he gave the classical direction which is taken from The Queen v. Whylie in these words:

> ".... and it is my duty to tell you that where the evidence for the prosecution connecting the accused to the crime rests only or substantially on visual identification of a witness, and the defence as it does in this case, challenges the correctness of that identification, you should approach the evidence of identification with the utmost caution. There is always the possibility that a witness can be mistaken, and a mistake is no less a mistake, even if honestly made. So you bear that in mind."

In continuation of those general directions, the learned trial judge went on to indicate those factors to which the jury should pay attention in making up their minds as to the cogency of the evidence as to identification. And he said this:

> "In every case like this, what matters is the quality of the identification evidence. To determine the quality of the identification, you should have full regard to all the circumstances surrounding the identification; these usually include the opportunity which the witness has of viewing the accused person; was it known or was the person known to the witness before the date of the commission of the crime,

> "and if so, for what period and in what circumstances? The physical condition existing at the time of the viewing of the accused persons, that is lights and distances and obstruction, if any; any special peculiarities of the accused men, in this case there was none, and any other evidence which can support the identification evidence."

The learned judge then promised to go into more detail in this regard when he came to review the evidence of Mr. Williams. And it was argued by Mr. Johnson that although he promised much, he did not fulfil that promise. We do not think that view to be correct, because when the learned judge did come to review the evidence of Mr. Williams/who, as we have said, was the main witness for the Crown, he said this:

> "If you are satisfied with Mr. Williams, that he saw them, and that he made them out, and that he is not making a mistake, well you do your duty and you are not bound to accept it. But it does to my mind appear that the identification was done under circumstances of some difficulty. I put it that way, paper, paper bag matches. He said he made them out. Well I say I make that comment, but you may be satisfied that he could see clearly and that he made out who they were. But the circumstances to my mind, of identification, was somewhat difficult."

Now, in our view, what the learned trial judge had done in those words to which we have drawn attention, was to indicate to the jury the specific area of difficulty which arose on the question of identification. He had already indicated to the jury that the accused were persons who were known to the witness. He had, in reviewing the evidence told them the distance that separated them, as he viewed them, viz they were just outside his door at the time when he looked out, and they had, apparently, broken open the door. So the distance was not a factor: the question was the lighting. That is precisely what Whylie ordains should be done viz, that the learned judge ought if he is to discharge his duties as is required, to indicate to the jury, the strength or weaknesses of the evidence that is adduced. In this case, we think the learned judge was right in focusing on the one area of difficulty, namely, the nature of the lighting. In the result, we do not think that that ground of appeal can succeed.

There was an appeal also in regard to the sentence. The learned trial judge imposed sentences of 8 years hard labour in respect of Dennis and 5 years hard labour in respect of Lawrence. Neither of these appellants had any previous conviction for dishonesty. The accused Dennis had one previous convict-on for assault at common-law, in respect of which, he had been placed on probation for 2 years. This was in 1983. Dennis was aged 17 years and Lawrence, 26 years. We do not think that the circumstances of this case warranted a draconian term of 8 years hard labour, or for that matter 5 years hard labour. In the circumstances, we propose to reduce the sentences, each to four years imprisonment at hard labour. And we order that the sentences begin to run from the date of the conviction.

In the result, the appeals against conviction will be dismissed, and in so far as the sentences are concerned, we vary them in the manner which we have stated.