JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 176/73

BEFORE: The Hon. Mr. Justice Edun - presiding
The Hon. Mr. Justice Hercules
The Hon. Mr. Justice Swaby

R. v. DESMOND BAILEY

R. Small, Esq. for applicant
P. Harrison, Esq. for crown.

MAY 1, 1974

EDUN, J.A.:

The applicant was convicted of the offence of robbery with aggravation and sentenced to twelve years' imprisonment at hard labour and to receive five lashes. He has applied for leave to appeal against his conviction.

Witnesses for the prosecution claimed that about 8.45 p.m. on September 16, 1972, the applicant who had a gun, and two others with knives, robbed Roy Harper at a gas station at the corner of Caledonia Avenue and Caledonia Crescent of one hundred dollars. The police said that they caught the applicant, who then had no gun, on Marescaux Road.

In his defence the applicant claimed that at about 8.20 that night, he left his home, travelled by bus, alighted at Caledonia Crescent and was on his way to a dance at Up Park Camp. He walked along Caledonia Crescent and was on Marescaux Road when a policeman from a patrol car grabbed him and took him at first to the gas station and then to the police station where he was later charged.

Learned attorney for the applicant made submissions on several grounds of appeal, but only two of them we thought it necessary to consider, that is:

i) the learned trial judge failed to put the

defence adequately to the jury; and

ii) the learned trial judge failed to adequately direct the jury on the question of identification. "

Learned attorney for the Crown submitted in effect, that there was ample evidence to support the conviction and though the summing-up could have been expressed with more clarity, it did not in fact amount to inadequate directions.

We have studied the record of the summing-up carefully and we are of the view that the arguments of learned attorney for the applicant are amply justified and the less we say about other criticisms of the summing-up, the better. On the grounds of appeal, there is no doubt that the question of identity was the most important issue. In Arthurs. v. Attorney General for Northern Ireland (1971) (55) Cr. App. Reports p. 161, and in Reg. v. Robert William Long 1973 (57) Cr. App. Reports p. 871, the principle is quite clearly stated that in a case where the issue is identification and guilt depended on visual identification, it is unlikely that the summing-up will be fair if it failed to remind the jury of the circumstances in which the identification was made and any weaknesses in it. Reference to the circumstances will usually require the judge to deal with :

i) the length of time the witness had for seeing who was doing what is alleged;

ii) the position in which he was;

iii) his distance from the person he seeks to identify; and

iv) the quality of the light.

If the witness has made a mistake on the identification parade or at any other relevant time, the jury should be reminded of it.

Instead of the learned trial judge dealing with the facts along those lines, he had in no uncertain way built up a case for the prosecution. For example, there was no evidence as to whether or not at the time of the robbery the gas station had lights on, yet he told

the jury at pp. 21 and 22 of the summing-up:

> "I suppose we all know what a gas station looks like at night, what type of lights are there, even though there is no particular evidence here of how many bulbs or how many fluorescent lights were there. In other words, a gas station is normally a well-lit premises. I think we can accept this right here that the gas station was lit up and what is alleged to have happened by the crown is given in evidence by those two witnesses that you heard, a series of events that happened in there."

Again, when the applicant was brought back to the station, the police asked the witness Lee if the accused was the man and Lee said he was not certain.

At the trial no evidence of an identification parade being held was given. It does appear from the evidence that there is a sharp dispute as to whether or not there was an identification parade held. The applicant maintained that no identification parade was held. It may well be that an identification parade was held and the applicant was not on the parade. This was a case where the witnesses for the Crown did not know the applicant before and it would have been important to make clear, by evidence, whether or not an identification parade was held and if the witnesses failed to identify anyone, that that aspect of the evidence be pointed out to the jury. The learned trial judge, however, said on page 20:

> " I don't think it is necessary for you to pay much attention to that question of the identification parade. I believe there was evidence that Mr. Harper- there was some identification parade and Mr. Harper didn't point out anybody, but there was no evidence that the accused, for example, if there was an identification parade, was a man on the parade; I don't know if the man was on the parade if there was one. "

" The allegation by the Crown is that these two men, Harper and Lee, went into the gas station immediately or shortly after the accused was brought there and he was in the open and they identified him. But, I cannot tell what police will do, but it seems to me a little ridiculous from an identity point of view to cause the police subsequently to hold an identification parade, but sometimes I have seen it done."

Again, the defence may well be spoken of as one of mistaken identity, i.e.that the applicant's presence at the place where he was caught was unconnected with the robbery. The learned trial judge dealt with the defence under the classification of alibi but, be that as it may, the police witnesses claimed that the applicant was never out of their view when he ran with "a shine thing in his hands". Despite a search, soon after, no gun or "shine thing" was found in the area. Instead of directing the jury on the strength or weakness of that aspect of the evidence, the learned trial judge said at pp. 20 - 21:

" The other point that was brought out by the defence was this question of the gun. Well, there was allegation of a gun in so far as the charge of robbery with aggravation is concerned; but, in the majority of cases the robbery with aggravation, gentlemen, where offensive weapons are used, for obvious reasons, unless a man is caught in the act the weapon is never produced or found in a court. As I said, the reason for that is a very obvious one. A man gets away, if in fact he did have a gun or a knife, he isn't going to be carrying around the gun or knife for hours or days afterwards, or any time afterwards if he has an opportunity to get rid of it, and it is not necessary for any gun or knife to be produced here. "

There are other points in the summing-up which we need not particularise

and which are not entirely free of criticism; suffice it to say, that the summing-up amounted in many instances to inadequate directions and as a whole is unfair. We, therefore, treat this application as the hearing of the appeal. The appeal is allowed, the conviction quashed and sentence set aside. In the interest of justice a new trial is ordered to take place at the current sitting of the Home Circuit Court; the applicant will in the meantime be kept in custody.