Judgment Book

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS: 122 & 123 of 1980

BEFORE: The Hon. Mr. Justice Kerr - President (Ag.)
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice White, J.A.

R. v. ERROL HAUGHTON
HENRY RICKETTS

Mr. K. D. Knight for applicants

Mr. Howard Cooke for Crown

February 23, & May 27, 1982

CAREY J.A.

Both applicants who were convicted in the High Court Division of the Gun Court on an indictment charging illegal possession of firearm and robbery with aggravation, having been refused leave to appeal against their convictions, now renew their applications before us.

The bare facts are that in the night of 9th January, 1979 the home of one Herman Spoerri was broken into and he was relieved of a number of items including cigarette lighters and jewellery by these appellants, one of whom Ricketts was armed with a revolver. The house-holder who during that night became aware of the presence of two men in his bedroom said he was able to make them out by the illumination supplied by a street light outside one of the windows, filtering through the louvres and shining in their faces. Some days later, on 12th January he went to the Constant Spring Police Station to report the stealing of some chairs from his verandah and there he recognized Ricketts whom he pointed out to the police. The circumstances of this identification formed the basis of the main ground of appeal argued on his behalf. This applicant in the course of the robbery had been in close proximity to his victim and had not only faced him with the gun but had touched him with it.

As to the other applicant, he was picked out on an identification parade on 3rd March by Mr. Spoerri, as the person who had removed several items from a dresser in the bedroom. On 12th January, police visited the applicant's house and recovered one of these items viz. a cigarette lighter with the owner's initials "H.L.S." which Mr. Spoerri later claimed as his property.

Before us in this court, Mr. Knight put forward on behalf of both applicants that the verdict was unreasonable and could not be supported having regard to the evidence. With respect to the applicant Haughton, there was ample evidence of his identification by Mr. Spoerri. There was further evidence of the recovery of one of the stolen articles from his house on a date shortly after the robbery, namely on 12th January, 1979. In his statement from the dock, he contended himself by saying this "I was in the country and live in a tenement yard. I don't know anything about the matter." There was ample evidence to support the verdict of the learned trial jduge and we can see no reason to disturb the verdict. His application is accordingly refused.

With respect to the other applicant we do not think it necessary to consider that ground as learned counsel did not really press the common ground of appeal. The ground of appeal strongly urged on his behalf was formulated in this way:

> "The learned trial judge erred in his statement of the principle of law which governs confrontation identification and further failed to properly assess the circumstances of the identification."

We can therefore go straight to the circumstances of the identification which were these: On 12th January, Mr. Spoerri called at the Constant Spring Police Station to report the robbery of some chairs. When he arrived in the C.I.D. office there was a man whose face he was unable to see because his head was bowed. The police officer, it is alleged, touched this man who then lifted his head, at which point Spoerri recognized the man as being one of his assailants. The officer enquired

if he knew him whereupon he replied "yes, this is the man who had the gun in my house."

Mr. Knight contended that it was the police officer's act in touching the applicant which called attention to him, and was not therefore a spontaneous recognition. Learned counsel further pointed to the following colloquy between the learned trial judge and the witness Spoerri:

> His Lordship: "Now you are aware I suppose, that people sometimes are honestly mistaken about the identity of other people. Bearing in mind the circumstances under which you say these two gentlemen on that night, the quality of the lighting, the fact that you had just been awakened from your sleep and the fact that a gun was being held at you and your life was being threatened, do you think that there is any possibility that you could have been mistaken about the identity of either of these two?
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> A. Not one bit, sir, at the time the only thing in my mind was to be able to concentrate heavily of their features so that I could be able to identify them if the situation arose.
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> His Lordship: Thank you very much Mr. Spoerri. I have no other question."

He said that the question was quite improper as it sought an answer which was within the judge's province to determine in his adjudication of the case. As to the learned trial judge's statement of the law regarding confrontation, viz, that "any identification which appears in any way tainted by some conspiracy among the Police themselves or between the Police and the witnesses to destroy the evidence of that identification is bad in all circumstances and must be rejected," he complained that this approach was wrong. The emphasis on "conspiracy", and the use of other words elsewhere in the summation, such as "chicanery" "trap", was unfortunate because once it was accepted that the witness was credible and there had been no conspiracy, then the evidence was regarded as satisfactory.

We can now turn to examine these arguments in the light of the law applicable in cases where no identification parade has been held for a suspect not know to a witness prior to the crime. A convenient starting point is R. v. Dickman 5 Cr. App R. 135 where the allegation was that a witness who had gone to see whether he could identify the appellant was first invited by someone, possibly on behalf of the police to look through a window and on doing so, did see, sitting alone, the appellant. The Lord Chief Justice expressed himself in firm language thus at page 142:

> "We need hardly say that we deprecate in the strongest manner any attempt to point out before hand to a person coming for the purpose of seeing if he could identify another, the person to be identified, and we hope that instances of this being done are rare - I desire to say that if we thought in any case that justice depended upon the independent identification of the person charged, and that the identification appeared to have been induced by some suggestion or other means, we should not hesitate to quash any conviction which followed. The police ought not either directly or indirectly, to do anything which might prevent the identification from being absolutely independent and they should be most scrupulous in seeing that it is so."

We are of the opinion that the language of the Lord Chief Justice focussed attention on the principle that scrupulous conduct on the part of the police was demanded in cases which depended on visual identification. We are very mindful that the instances of recorded miscarriages of justice have invariably involved visual identification of accused persons, and since R. v. Whylie 15 J.L.R. 163, judges have been enjoined to alert juries in cases where identification is crucial, to approach such evidence with caution. In the United Kingdom R. v. Turnbull (1976) 3 All E.R. 549 is the definitive authority in this area of the law. It is now accepted that where a witness is expected to give evidence identifying an accused person whom he does not know or never set eyes on before the occasion of the offence, the accused should be placed on a parade with other persons of similar height, appearance and status as far as is feasible, to demonstrate that the witness' recollection has been properly tested.

If that is the correct procedure, then it is plain that no assistance should be afforded the witness in identifying a suspect. R. v. Dickman (supra) is therefore important as showing that identification of an accused should be absolutely independent. The circumstances of the present case show that there was no opportunity for a parade to be held. Indeed if it were the case that the police officer had not called attention to the applicant, and a parade were to be conducted subsequently with the applicant on the parade, objection would undoubtedly be taken on his behalf to this identification on the ground that an opportunity had been allowed the witness to see the suspect before the actual parade. The strictures in Dickman (supra) would plainly be applicable.

The question which therefore arises is, what is the position where no parade has been held and the witness is confronted with an accused in police custody. In R. v. Gilbert (1964) 7 W.I.R. 53 where that question arose for decision, the facts were that after the appellant was taken into custody he was left alone in a room at a police station in such a position that he could be seen by the prosecutor as he was entering the room. The prosecutor thereupon identified the accused as the man who had stolen his money. The judgment of the court was delivered by Lewis J.A. (as he then was) who said this at p. 56:

> "The court feels strongly that this method of identification is a most improper one. This case does not stand alone in that respect. In several cases within the last few months the court has observed that there is a tendency for the police to confront a suspected person with the person who is required to identify him in circumstances in which it is possible for the identifying witness to say that he merely came upon him. Where it appears, as it must have appeared clearly in this case, that the evidence against the suspected person is going to depend to a great extent upon identification, there is a distinct duty upon the police to take every care to see that the witness who is going to identify that person is not brought into proximity with him before the identification parade is held."

Again, the emphasis is on independent recognition: no assistance should be given to render the holding of a parade a mere farcical exercise.

We were referred to R. v. Hassock 15 J.L.R. 135 on which much reliance was placed by Mr. Knight. In that case, and for convenience we take the facts from the headnote:

> "The applicant was convicted on four or five counts of an indictment for illegal possession of a firearm (2 counts) robbery with aggravation and shooting with intent. No identification parade was held and three witnesses to whom the applicant was previously unknown were allowed to see him at the police station with a view to identifying him."

Melville J.A. (Ag.) (as he then was) was critical of the conduct of the police and remarked:

> "The conclusion cannot be avoided that the police here had embarked on a deliberate course of confronting the applicant with the various witnesses."

We do not consider that view of the facts unjustified. But the learned judge went on to make certain observations which, we think have often been uncritically cited. He said this at page

> "Although it is always difficult to formulate universal rules in these circumstances, where the facts may vary so infinitely, a prudent rule of thumb would seem to be where the suspect was well known to the witness before, there may be confrontation. That is, the witness may be asked to confirm that the suspect is the proper person to be held. If the witness did not know the suspect before, then the safe course to adopt would be to hold an identification parade, with the proper safeguards, unless of course there are exceptional circumstances."

If the effect of this suggested procedure is that an identification parade is, in the absence of exceptional circumstances, the proper method of testing a witness' ability to identify an assailant whom he does not know before the incident, then these observations, we think are unexceptionable. However if it is being suggested as a matter of law that where an accused person is unknown to the witness before an alleged incident and is guilt rests solely on visual identification by those witnesses, an identification parade should be held, any confrontation in these circumstances would lead to an appeal being allowed, then we desire to say most emphatically that there is no such principle. An

earlier decision of the Court makes the position perfectly clear. We have in mind R. v. Trevor Dennis 15 J.L.R. 249, where the applicant was apprehended some 20 - 25 chains from the house in which he had allegedly committed a robbery. He was seen in the house for 10 - 15 minutes by the complainant. He was arrested within half an hour of leaving the house. He was taken back there and identified by the complainant who had given a description of the robber to the police. The headnote in the report accurately reflects the law on this point.

> "Identification on parade was the ideal way of identifying a suspect but it was not the only satisfactory way as the particular circumstances of a case may well dictate otherwise; having regard to the elements of time and distance between the offence, the description to the police, the apprehension and identification of the applicant no valid ground existed for holding that the identification of the applicant was improper."

The decision in Hassock is, we think, correct because the court held there that the police had embarked on a deliberate course of confronting the applicant with various witnesses. The result of that conduct would operate unfairly and to the prejudice of an accused person. The evidence of identification would be gravely impeached and would have no weight. The headnote in Hassock must therefore be seen as applicable to the peculiar facts of that case and not as laying down any principle of law of general application.

In the result, we would state the law in this way. Where a criminal case rests on the visual identification of an accused by witnesses, their evidence should be viewed with caution and this is especially so, where there is no evidence of prior knowledge of the accused before the incident. Where an identification parade is held as is the case where there is no prior knowledge of the accused, the conduct of the police should be scrutinized to ensure that the witness has independently identified the accused on the parade. Where no identification parade is held because in the circumstances that came about, none was possible, again the evidence should be viewed with caution to ensure that the confrontation is not a deliberate attempt by the police to facilitate easy identification by a

witness. It will always be a question of fact for the jury or the judge where he sits alone, to consider carefully all the circumstances of identification to see that there was no unfairness and that the identification was obtained without prompting. In a word, the identification must be independent.

In the present case, we think the learned trial judge properly advised himself of the caution with which he should approach this question. He fell into error in putting the question which he did to Mr. Spoerri in a manner so comprehensively inclusive of factors which he had to determine that he virtually abdicated his function to consider all the circumstances of the identification to ensure that identification was independent and cogent. We are of the opinion that the learned judge's statement at page 127, was not inaccurate in that it sought to highlight the importance of fairness in the evidence of identification. It is in the application of that approach that we must differ from the learned trial judge. On the evidence before him he accepted that Mr. Spoerri was a witness of truth, but there can be no gainsaying the fact that Mr. Spoerri did not unaided or independently identify the applicant Ricketts. It was after the police officer touched him and he moved his head and the officer asked Spoerri if he knew him, that the identification was made.

We are content to say that learned counsel is entitled to succeed on this ground for the reasons we have given. As this ground is one of law, the application is treated as the hearing of the appeal which is allowed and a verdict and judgment of acquittal entered in respect of the appellant Ricketts.