JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 220/89

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

R. v. ERROL SIMMS

Delroy Chuck & Miss Helen Birch for the Applicant

Bryan Sykes & Robert Brown for the Crown

24th September, 1990

CAREY, J.A.:

On the 16th of November, 1988, after a trial on the 10th, 11th and 14th days of November, this applicant was convicted for the murder of one Michael Demercado. Sentence of death was duly imposed on him.

The short facts in the case may be stated as follows:

In the early morning of April 12, 1987, the house of one Miss Carmen Hanson was invaded by three armed men. They identified themselves as "Junglists," that is, that they were habitues of Concrete Jungle which is the popular name for Arnett Gardens one of the conurbations in the parish of St. Andrew. During their occupation of this lady's house, they demanded money, the proceeds of a dance which the gunmen must have thought was organised by Miss Hanson. They threatened to kill her son and she herself was brutally assaulted by these intruders. She begged them to spare her son's life and in the event she handed over some $750.00 but that did not appease their

greed because they persisted in their demands for money; their threats continued and they did not abate their search for more money.

In the course of all this trauma, the victim who had come onto the premises called out to Miss Hanson; he used her pet name "Miss Polly". When the intruders heard the hail, they went out and there they were confronted by Michael Demarcado and another man, Owen Wiggan who had accompanied the victim thither. The victim was shot by one of the intruders who was identified as being this applicant.

The visual identification evidence of this applicant came from two of the prosecution witnesses namely, Owen Wiggan and another man called Tyrone Wiggan who lived with Miss Hanson in that home and who all during the robbery was inside the house in another room. It was from that vantage place that he said he was able to identify this applicant whose pseudonym is "Pretty Bush". Both Miss Hanson and Tyrone Wiggan gave evidence before the jury that all three men were masked. Nevertheless Tyrone Wiggan said that he was able to identify the applicant really because he had a slight hunch in his back. Curiously, he said that the man had a big mouth and a broad nose. It is not quite clear how he could see a big mouth and a broad nose masked though he was, because the evidence was that there was a handkerchief tied over the lower part of the face of these men. He said that even in the darkest night he would have been able to recognise the applicant because he had known him for some time. He gave evidence as to the relevant distance separating them when he was viewing **him** and he gave evidence of the lighting namely electric light which had been switched on by these intruders.

So far as the other witness went, he was able to see the applicant as he entered the premises from a distance of some 10 feet, and was able to use lighting from the street lamp nearby. He stated also that this was the person whom he had known from school days and as regards the opportunity for viewing him, he estimated that time to be some three minutes. Moreover, he gave evidence that he had seen him earlier that evening at the party and at that time he had been involved in a quarrel with the slainman at the gate. The evidence showed that the slain man was the gate-man at the party which had been held in some sports complex quite near to Miss Hanson's home.

So far as the defence went, that is the usual defence put forward of alibi. The applicant swore that he was home with his lady friend a Miss Sandra Stephens and he called her to support that story.

Mr. Chuck who argued before us this morning, began by saying that the summing up of the learned trial judge was inadequate in that he failed to meet the standard laid down in decisions of The Privy Council in R.v. Reid & Ors., (1989) 3 W.L.R. p. 771. He also called attention to an unreported decision of this court Leroy Barrett S.C.C.A. 45/89 delivered on the 16th of July. The point he was endeavouring to make derives support from Leroy Barrett where according to counsel, the court required that in a case of visual identification, a trial judge would not be fulfilling his duty if he did not call to mind personal experiences, the judge's personal experience to reinforce the dangers inherent in acting upon uncorroborated visual identification evidence.

With the assistance of Mr. Chuck, we have examined the summing up very carefully and we were quite unable to find wherein the judge had fallen short of the standards laid down in

any of the decisions. The learned trial judge quite correctly identified identification as the sole issue. He gave the required warning. He pointed very carefully to the evidence of identification as given by the witnesses for the prosecution, and he pointed out the dangers that are inherent in acting upon evidence of visual identification.

The issue before the jury, in our view was clearly put. The jury could have been under not the slighest misapprehension of what it was they were called upon to determine. Learned counsel who appeared below, and we note, that that is not the counsel who appeared before us, put his defence very clearly and candidly to the jury. What was suggested was that these witnesses were mistaken in concluding that this applicant was the assailant and therefore guilty of murder. The jury were made aware that this was a case where what they had to determine, was whether having regard to the evidence given in this case namely, the lighting that was available, the distance between the particular witnesses and the particular intruder, the time of observation, the evidence of their previous knowledge of this applicant, given the fact that in one case the witness spoke about a mask whether, in all the circumstances, they could be satisfied to the required standard that the visual identification had reached that degree of cogency to prove the guilt of this applicant.

In our view, the learned trial judge did not fall into error and we hold that his summing up cannot be faulted. We have examined very carefully the evidence in its entirety and have listened with particular care to all that has fallen from Mr. Chuck but in the end we are not persuaded that there is any reason that should urge us to interfere in any way with the verdict at which the jury arrived. In the circumstances therefore the application for leave to appeal is refused.