JAMAICA

IN THE COURT OF APPEAL

COR: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

SUPREME COURT CRIMINAL APPEAL NOS. 23 & 24/90

R. v. LEBERT BALASAL
SONEY BALASAL

Delroy Chuck for Appellants

Marcia Hughes for Crown

SUPREME COURT CRIMINAL APPEAL NO. 86/89

R. v. FRANCIS WHYNE

Dennis Morrison for Appellant

Marcia Hughes for Crown

29th October & 5th December, 1990

GORDON, J.A. (AG.)

We treated the hearing of the applications in the above matters as the hearing of the appeals and allowed the appeals, quashed the convictions, set aside the sentences imposed and in the interest of justice ordered new trials.

The Balasals were remanded in custody pending their retrial and Whyne remains in custody serving sentences otherwise imposed. As the basis on which these appeals were allowed are similar and involve the same points of law it is convenient to deliver the reasons we promised then together.

R. v. LEBERT BALASAL
SONEY BALASAL

These appellants were convicted in the High Court Division of the Gun Court in Westmoreland on 9th February, 1990 for

illegal possession of firearm count I and for robbery with aggravation count II and each on a count for rape counts III and IV.

The Crown's case was that at about 3.00 a.m. on the 31st January, 1989 the home of Miss Mavis Forbes at Long Pond in the parish of Westmoreland was broken into by two men each armed with a gun. Money $150.00 was taken from Miss Forbes' purse and two of her daughters taken to the bushes outside and raped. One by each of the intruders.

The evidence was that the appellants were the two men involved. At the time of the incident Lebert Balasal wore a mask made of nylon stocking while Soney was unmasked. Miss Forbes said she grew up in the same village with Lebert Balasal and had purchased milk from him. She knew him well and the mask did not mask his features as it was a sheer nylon stocking. In addition she recognized his voice. The complainant in the rape charge also said she recognized him as a person she knew. She recognized him when he removed the mask and kissed her while raping her. Miss Forbes said she recognized the appellant Soney Balasal by his features and her daughter, the complainant on the charge of rape against Soney also said she recognized him by his features. Miss Forbes on 7th February, 1989 saw Soney in Savanna-la-mar and pointed him out to the police who took him in custody.

The defence of each appellant was an alibi.

The sole issue in this case was that of identification and the learned trial judge after reviewing the evidence said:

> "Now, what do I make of this identification? I find that the evidence is overwhelming. I find that Lebert Balasal is well known to all three witnesses. I find that Lebert, although he had on this mask, the mask was one which the witnesses could see through. I believe and I accept the

> "evidence of the witnesses for the Crown that Lebert was one of the men, and I find as a fact that he entered this house and he was armed with a gun; that he took Shelly-Ann, he took her off the premises and raped her. I accept the evidence of Miss Mavis Forbes. I also accept the evidence of Julia Bennett that the accused man, Soney Balasal, was the other man. I reject the evidence given by him that he was elsewhere. I find as a fact that he was in the house; Soney Balasal was in the house; that he pulled out Julia Bennett and took her to the back of the premises and raped her, and he too was armed. They went there with one common purpose, that is, to rob money from this premises, and further to that, that they raped these two girls, and having said that, I accept the case for the crown and I reject that of the defence."

Mr. Chuck for the appellants argued one ground of appeal.

> "That the Learned Trial Judge failed to adequately and properly direct himself on the law of identification. His subsequent remarks, after being reminded, do not remedy the defect since he had already arrived at a verdict."

He conceded that on the facts of the case there was evidence on which a tribunal of fact could find a verdict of guilty. He submitted that recent decisions of this Court strongly demand of the learned trial judge that he should express in his summing-up, the law on visual identification before arriving at a verdict. He cited **R. v. Locksley Carroll** S.C.C.A. No. 39/89 delivered on 25th June, 1990 and **R. v. George Cameron** S.C.C.A. No. 77/88 delivered 20th November, 1989. He further submitted that the learned trial judge did not express that he was aware of the dangers of acting on uncorroborated evidence of visual identification and that a retrial would be the proper course to be adopted.

Miss Hughes conceded that the trial judge failed to follow the prescribed course and agreed that there should be a retrial.

By the Gun Court (Amendment) Act 1976 a Supreme Court judge was given jurisdiction to try without a jury Gun Court cases. These cases involve offences committed with the use of an illegal firearm and cover a range of serious offences, rape, robbery, burglary, shooting with intent. Murder only is excepted.

The trial judge is required to give a reasoned decision in cases determined by him. In **R. v. Dacres** [1980] 33 W.I.R. 241 this obligation of the trial judge is stated thus:

> "By virtue of being a judge, a Supreme Court Judge sitting as a judge of the High Court division of the Gun Court in practice gives a reasoned decision for coming to his verdict whether of guilt or innocence."

In the majority of cases which fall to be decided by the judges of the Gun Court, the prosecution relies on the evidence of visual identification in discharge of the burden of proof. In **Dacres' case** the question arose whether a judge of the Gun Court was required to warn himself of the dangers of acting on evidence of visual identification. This Court dealt with the question in this manner.

> "The cases on identification evidence have not established any principle that in the absence of a particular warning as to the dangers of identification evidence there would be an irregularity in the trial notwithstanding the quality of the evidence."

The validity of this statement was pronounced on by Rowe P, in **R. v. Locksley Carroll** (supra) when he said-

> "This statement cannot now be regarded as good law, as the Privy Council in two cases, **Scott and Others v. The Queen** [1969] 2 W.L.R. 924 and **Junior Reid and Others v. The Queen** [1969] 3 W.L.R. 771 have laid it down that visual identification evidence does fall within a special class of evidence and is to be given special and specific treatment by the trial judge in a trial before a jury. The trial judge is required to give a clear warning of the danger of a mistaken identification, explain the reasons for such a warning and advise the jury to heed the warning when considering their verdict. **Scott's** case (supra) and **Junior Reid's** case (supra) are binding upon this Court."

It therefore becomes the duty of a judge in his summation in the Gun Court to indicate the principles applicable to the particular facts and demonstrate his application of those principles. The duty then of this Court is as stated by **Carey, J.A.** in **R. v. Clifford Donaldson et al** S.C.C.A. Nos. 70, 72, 73/86 (unreported) dated 14th July, 1988:

> 'It is the duty of this Court in its consideration of a summation of a judge sitting in the High Court Division of the Gun Court to determine whether the trial judge has fallen into error either by applying some rule incorrectly or not applying the correct principle. If then the judge inscrutably maintains silence as to the principle or principles which he is applying to the facts before him, it becomes difficult if not impossible for the Court to categorise the summation as a reasoned one."

The difficulty posed by visual identification evidence was considered by this Court in **R. v. George Cameron** (supra). This Court recognized that this type of evidence has to be accorded specialised treatment such as is given to accomplice evidence, evidence in rape cases and that of children of tender age. Failure to give such a warning in jury trials will lead to the quashing of a conviction. **Junior Reid's case** (supra).

In the reasoned judgment that a judge gives he must therefore deal with the current law and where a warning would be appropriate in a trial with a jury he must give himself the requisite warning. Wright J.A. in **Cameron's case** (supra) in dealing with the passage quoted above from **Donaldson's case** said:

> "The relevance of this decision to present considerations is that it states emphatically that where the judge sits alone he is required to deal with the case in the manner established for dealing with such a case though he is not fettered as to the manner in which he demonstrates his awareness of the requirement. What is impermissible is inscrutable silence. What is of critical importance here is not so much the judge's knowledge of the law but his application. Even if there is a presumption in his favour regarding the former there is none as to the latter. He must demonstrate in language that does not require to be construed, that in coming to the conclusion adverse to the accused person he has acted with the requisite caution in mind. Such a practice is clearly in favour of consistency because the judge will then be less likely to lapse into the error of omission whether he sits with a jury or alone."

In **R. v. Carl Peart** S.C.C.A. 106/88 delivered 7th February 1990, **R. v. Leroy Barrett** S.C.C.A. 45/89 delivered 16th July, 1990, **R. v. Horace Cameron** S.C.C.A. 230/88 delivered 23rd October, 1990 **R. v. Keith Gray** S.C.C.A. 186/88 delivered 23rd October, 1990, the prosecution relied on evidence of visual identification and this Court had to pronounce on the duty of the trial judge when he had to deal with this evidence in his summation. **Carey J.A.** in **Peart's case** said:

> "The law is well settled however that where a case depends wholly or substantially on the correctness of one or more identifications of an accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting in reliance on the correctness of that identification. The judge is also required to direct the jury as to the reason for the need of such a warning."

In R. v. Keith Gray (supra) Carey J.A. quoted from Horace Cameron (supra) in support of this theme:

> ".... the need for the warning is all the more necessary when the evidence is given by an obviously honest witness because the honest witness is likely to appear all the more convincing to the jury, although he might well be mistaken. The reason for the caution is the need to distinguish between honesty and accuracy and not to assume accuracy because it is held that the witness is honest."

An honest witness may be mistaken and several honest witnesses may be mistaken. Several witnesses who make a common mistake do not corroborate each other. The possibility of one or more witnesses being mistaken must be adverted to by the judge in his assessment of the evidence. In the instant case the judge regarded the witnesses as honest but he did not seek to distinguish honesty from accuracy. One of the appellant was masked and previously known by the witnesses. the other not masked and not known by the witnesses before. The incident occurred at night and identification was aided by lamplight. Although Mr. Chuck conceded that on this evidence a tribunal of fact could find a verdict of guilty nevertheless this situation called for a careful summation in conformity with the principles adumbrated in the decided cases.

In Lockeley Carroll (supra) Rowe P, said:

> "We hold, that given the development of the law on visual identification evidence since the decision in R. v. Dacres (supra) in 1960, judges sitting alone in the High Court Division of the Gun Court, when faced with an issue of visual identification must expressly warn themselves in the fullest form of the dangers of acting upon uncorroborated evidence of visual identification. In this respect we hold, that there should be no difference in trial by judge and jury and trial by judge alone."

This case stands alone in the requirement of an express warning in its fullest form. But the learned trial judge erred in failing to conform even with the law as established in the earlier cases cited and his omission was identified by Crown Counsel at the end of the summation in this passage:

> "Mr. Bulgin: M'Lord, I know that Your Lordship would have no doubt taking (sic) certain things into consideration, but arising out of your findings, M'Lord, I am guided to the fact that the authorities seem to suggest, 'expressly stated' that it should be expressly stated.
>
> His Lordship: I expressly state that having warned myself, at length, having warned myself of the dangers of visual identification, nevertheless I find that it was these accused men who were in the house that morning and who committed the offences."

But, with all respect to the learned trial judge, nowhere in the summing-up to that stage had he expressly warned himself of the dangers of visual identification nor had he demonstrated in language that does not require to be construed that he had this warning in mind. He did not refer directly or inferentially to the possibility of honesty being mistaken for accuracy nor did he distinguish them. It is sufficient to dispose of this assertion by saying that learned Crown Counsel conceded that the warning the learned trial judge should have given was not given.

In the development of the law on visual identification evidence in this jurisdiction, the weight of authority in the cases of **Dacres** through **Clifford Donaldson** and **George Cameron** requires a trial judge in the Gun Court faced with evidence of

visual identification to "demonstrate in language that does not need to be construed that in coming to a conclusion adverse to the accused person he acted with requisite caution in mind." The learned trial judge failed to faithfully follow these authorities and so fell into error.

R. V. FRANCIS WAYNE

This appellant was convicted on 4th May, 1989 on an indictment which contained 4 counts. Counts I and II charged illegal possession of firearm and shooting with intent and counts III and IV charged similar offences. On each of counts I and III a sentence of 7 years at hard labour was imposed and on counts II and IV, 12 years at hard labour each.

He appealed against conviction and sentence.

The grounds of appeal filed and argued by Mr. Morrison referred only to the convictions on counts I and II. Indeed the evidence on counts III and IV was overwhelming and identity was not in issue. The appeal against conviction and sentence on counts III and IV was dismissed.

Mr. Morrison relied on **R. v. Locksley Carroll** (supra) in support of the sole ground of appeal:

> "That the learned trial judge erred in law in that he failed to warn himself of the dangers and the need for caution in assessing the evidence identifying the Appellant as the offender, particularly in relation to Counts I and II of the indictment."

So convincing, it was argued, was the evidence on counts III and IV where the appellant was shot in a shoot-out and arrested that the learned trial judge failed to heed the caution and deal with the issue of identification in counts I and II.

About 2.30 p.m. on 12th January, 1988 District Constables Barrington Kalston, Lloyd Ewan and Michael Morris were on patrol on Livingston Street in Hannah Town, Kingston when they

saw appellant walking towards them with his head down. When he was about 1½ chains from them he stopped, pulled a gun from his waist fired several shots at them then he ran away through an adjoining premises. The incident happened quickly, the witnesses claimed they knew him before but District Constable Morris said he called to his companions saying "Is Little Roy that is firing." Little Roy is the name by which the appellant was called.

In his summation the trial judge said:

> "A lot of heavy weather has been made by the Defence about the fact of identification. There seems to be a blurring of the edges. This is not one of the situations where the accused or the person before the Court is not known to the witness, not where we have the fleeting glance situation. We have the question of lighting and distance etc. One of the factors that has to be considered as a matter of law in every case, was the accused known to the witness before? The Prosecution says, it is not identification but recognition. When one looks at the features of the accused and the common ground that he is known to them and the question of his holding up his head and being one and-a-half chains away, I am afraid I can't agree with the Defence's submission that they did not have time to recognize the accused. The question of identification has been made a live issue but in my opinion it is a secondary issue. So, we are coming back to whether this whole thing depends on identification, the whole case stands or falls together. I am not looking at it that way; .....".

We agree with counsel that the judge neither warned himself in the fullest form nor used language which required no construing as to the need for caution.

We have already dealt with the principles involved in the companion case of Balasal and it is unnecessary to repeat them. They apply with equal force to this case.

Crown Counsel quite rightly conceded that the learned trial judge fell into error.