CA. CRIMINAL LAW - Gun Court -

Const. Law - s20(6)(c) Constitution - whether applicants deprived of their constitutional rights by trial in absence of legal representatives - whether trial judge failed to assign counsel to applicants who were unrepresented - Identification - CA. heard identification of Roberts weak re: Cargill - appeal in case of Roberts - allowed - Cargill - appeal dismissed - Comment on conduct of Counsel) conviction quashed - sentence set aside - verdict of acquittal entered.

IN THE COURT OF APPEAL

JAMAICA

SUPREME COURT CRIMINAL APPEALS NOS. 130 & 131/84

BEFORE: The Hon. Mr. Justice Rowe, President
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice White, J.A.

CRIMINAL PRACTICE & STATUS

R. v. LEROY CARGILL & PATRICK ROBERTS

Dennis Daly for Roberts and as amicus curiae for Cargill.

Kent Pantry and Miss Marlene Harrison for Crown.

March 10, 11 & June 5, 1987

ROWE, P.:

These are applications for leave to appeal from the decision of Gordon J. in the High Court Division of the Gun Court.

Ellis Malcolm was enroute to the bank with the substantial lodgment of $124,000 in cash and cheques. He stopped at the stop sign at the intersection of Perth Road and Grove Road in Mandeville. Two men pounced upon him, one from the right the other from the left. His evidence was that each had a gun. They demanded money. The man on the left of the car shot Mr. Malcolm through the left jaw, the bullet also fracturing his right hand. The man on the right of the car held Mr. Malcolm and began to choke him, then the two men lifted the two paper bags containing the money from the car seat and walked up Perth Road. Mr. Malcolm

was taken away by a passing motorist to the hospital.

Mr. Neville Johnson arrived on the scene. He spoke to a group of men and one pointed to two men "going up the road" i.e. up Perth Road, 6-8 chains from Mr. Malcolm's car. Mr. Daly considered it of great importance that at the instance of the judge the following answer was given:

"HIS LORDSHIP: Who pointed out the two men?

WITNESS: One of the men that was standing at the spot."

Mr. Johnson sought the assistance of Mr. Neville Cornwall, the driver of a pick-up, and Mr. Johnson rode in the pick-up towards the two men. These men, one of whom was carrying a brown paper bag like an envelope, signalled to Mr. Cornwall to stop and sought a ride in the pick-up. Mr. Cornwall obliged. As they were being driven along Perth Road, another pick-up approached and the two vehicles stopped. A police-man in uniform alighted from the on-coming pick-up. Thereupon the two men who had been picked up by Mr. Cornwall and who were riding in the back of his pick-up jumped out, ran and jumped over a gully. A police radio car came on the scene, the police jumped over into the gully and gunshots were heard. Mr. Johnson said that he saw the police return with the applicant Cargill who was bleeding from a wound to his foot. His opportunity to recognize the applicants consisted of his looking at them through the rear glass of the pick-up while they were in the back, for about one minute.

Mr. Cornwall said he picked up Mr. Johnson, drove along Perth Road, and that he saw two men walking fast, one of whom had a yellow bag. The men turned to beg him a

drive and he saw their faces. They got into the back of the pick-up and every time he glanced back he took a glance at the men. Mr. Cornwall said that the applicant Roberts had a peculiar mouth formation, commonly called "buff-teeth" so that he could hardly keep his mouth closed. Mr. Cornwall said he went to the C.I.B. room at the Mandeville Police Station later that day, heard the police interrogating the applicant Roberts, and heard Roberts say that it was the other man and not he who had shot Mr. Malcolm, and that he had asked this other man why he had done so.

Det. Superintendent Walker gave evidence for the prosecution that he saw the applicant Cargill at the Mandeville Hospital, and that, upon caution, Cargill admitted being present at the shooting of Mr. Malcolm, but blamed "Patrick" whom he had followed to Mandeville. Det. Supt. Walker also said he witnessed a caution statement being taken by Det. Inspector Brown from the applicant Roberts, and gave evidence to suggest that it was obtained voluntarily. Supt. Walker denied that he saw a wound to the head of Roberts which necessitated 12 stitches, that he saw Det. Insp. Brown with a knuckle-duster beating the applicant Roberts on his knee, that he saw another policeman with a baton, and finally, he denied that Det. Insp. Brown held the hand of the applicant Roberts and caused Roberts to sign a paper.

The final witness for the Crown, Det. Insp. Brown said he took a brown envelope from the back of Mr. Cornwall's pick-up which contained over $40,000 in cheques and cash together with a lodgment book. He commenced investigations.

At the Mandeville Police Station he saw one Constable Pinnock and the applicant Roberts. In the presence and hearing of the applicant Roberts, Constable Pinnock reported to him that:

> "This bwoy and another bwoy travelling with .38 Special Revolver opened fire on me on Perth Road",

that he returned the fire, that the other man was injured and that the applicant Roberts was later held in a house on Ward Avenue. The applicant Roberts, according to Det. Insp. Brown made no statement in response to the accusation. Then, said Det. Insp. Brown, he asked the applicant Roberts if what Cons. Pinnock had said was true, and that the applicant Roberts answered that it was Leroy Cargill alone who had a gun. After a brief visit to the Mandeville Public Hospital, Det. Insp. Brown said he returned to the Mandeville Police Station and interrogated the applicant Roberts who said:

> "A Leroy Cargill carry me down there",

and then expressed his desire to give a statement. That statement, said Det. Insp Brown, was written by him at the request and dictation of the applicant Roberts and it was witnessed by Supt. Walker. In a full cross-examination by the applicant Roberts, it was suggested to Det. Insp. Brown that he had a big baton with which he beat Roberts on his knee, another policeman with a knuckle-duster inflicted an injury requiring 12 stitches to the head of Roberts; that Roberts was ordered to bend and suck blood from the floor, and that finally a paper with writing was

produced which Roberts was ordered to sign. Roberts said he declined to sign the paper as he could not write, but the Det. Insp. held his hand and made the signature on the paper. Roberts in cross-examination suggested that the explanation he offered was that he had come to Manchester to purchase ganja. Det. Insp. Brown did not accept Robert's suggestion that Roberts was taken to the Mandeville Hospital on that very night for injuries to his head, and returned for treatment on two further occasions. As it became a ground of appeal, this is how the applicant Roberts phrased his question:

> "Yes m'lord, I would like to say one more thing. If you feel that is lie I telling, m'lord, you could send to the Mandeville Hospital, m'lord, is three times I go down there. My name is Patrick Roberts, mi name down there in the book m'lord."

Crown counsel replied that the doctor was not present although his name was on the back of the indictment, and that she would not need him for the prosecution. The doctor was not called in support of the defence.

A feature of the Crown's case which needs to be mentioned is that one Constable Pinnock who had taken a prominent part in the investigations was not available at trial. Det. Insp. Brown could not say from his own knowledge how Roberts came into custody of the police, but he gave the court the impression that citizens had assisted in the capture of Roberts and any injuries that he may have could have been caused in that encounter. Roberts emphatically denied that he was

injured other than by the police. The Crown intended to rely on the statement allegedly given under caution by the applicant Roberts, and after the two police officers had given evidence and had been cross-examined as to the manner in which the statement came into being, the judge ruled that it be admitted in evidence but that it should not be read at that stage.

Both applicants gave sworn evidence in their defence. Cargill said he had come to Mandeville to work on the Bauxite Company's belt-line, and while he was trying to find its exact location he was accosted by policemen who accused him of robbery. Two shots were fired and he was injured in both feet. He denied knowledge of the robbery of Mr. Malcolm.

The applicant Roberts said he was walking on Waterloo Road in Mandeville when he was stopped and questioned by two men in civilian clothes who took him to Mandeville Police Station. There he saw Det. Insp. Brown and Supt. Walker. Det. Insp. Brown questioned him about a robbery and shooting. He denied knowledge of this. Then he said:

> "From there so, Mr. Brown take up a baton and knuckle-duster. A tall policeman thump me in my headside with a knuckle-duster, left hand side. The bald head, stout man say to me must tell Mr. Brown what me know because if me don't tell Mr. Brown what me know me nah go wey and them want let me go.
>
> Meanwhile, Mr. Brown licking me m'lord, the other man thumping me in me head, right side, with a knuckle-duster. Send me inna de corner, the tall policeman send me inna de corner. Say me must go suck up the blood, no nasty up the place."

> "After Mr. Brown came out with two sheet of paper, tell me to write mi name. I told Mr. Brown I can't write. I cannot read ..... Mr. Brown came and hold me to write on the paper."

Neither applicant called any witnesses. It was after all the evidence had come in and Roberts had been cross-examined that the trial judge permitted the statement of the applicant Roberts to be read. A trial in the High Court Division of the Gun Court is by judge alone, and unlike a trial in the Circuit Court where the judge is given a copy of the depositions before trial commences, in the Gun Court the trial judge is not privy to the contents of the police statements on which the trial is based. Consequently, until the statement of the applicant Roberts was read out in court the trial judge would have had no knowledge of its contents. This is what the statement said:

> "Me down at de hardware this morning, Leroy come and say him want me walk with him go 'pon a road. Me walk up the road with him. Him stop at a point right beside a stop-sign and cross-road. We de there and see a car coming. Leroy get up and said, 'A dis car ah waiting on.' The car come down and stopped at the stop-sign. Same time, me see Leroy shuffle fi him waist and take out a gun and point it on the driver of the car and the driver pushed it away and Leroy fire one shot and run off with a brown small bag him take out of the car. The driver of the car start bawl out and me say to Leroy, 'Why you shoot the man fah?' Leroy start run and me just run backa him too. Running coming up the road me see a van. Leroy stop the van and the van-man slow down and me and Leroy jump up on the van. After we go upon the van I saw a police-van coming down the road. A car stop before the van and talking to the

> "police. The police then fly up, then down, coming out, and when the police dem coming out, Leroy first jump off the van and say to me, 'You not running!' I run a different way from Leroy and while running me hear the shots them a fire. Me run and try and see a lady house down upon (sic) and me just run inside and sit down. Same time, the police come and held me and took me to the station and me tell the police exactly how everything go. Signed by Patrick Roberts, witnessed by W.G. Walker, Detective Superintendent of Police."

Gordon J. did not rely on the statement said to have been given by Roberts, remarking that, "It does not take the Crown's case anywhere." For proof of the identity of the robbers, the learned trial judge relied on the evidence of Mr. Malcolm, and especially the portions of evidence when Mr. Malcolm said the two men came to the side of the van door and he saw their faces. He relied also upon the evidence of Mr. Cornwall, the truck driver who gave two men a lift in his truck, and who said in evidence that the applicant Roberts had a peculiarly shaped mouth, so that he had great difficulty in closing his lips. Indeed the learned judge formed a similar impression of the oral configuration of Roberts.

In his first ground of challenge to the correctness of the verdict of guilty against both applicants, Mr. Daly argued that they were deprived of their constitutional rights under section 20 (6)(c) of the Constitution in that the trial judge proceeded to try their cases in the absence of the legal representatives of their choice, viz. Mr. Sheckleford, and refused to allow counsel to be assigned for their defence despite

the absence of circumstances which might prejudice the public interest in granting legal aid assignments to the applicants.

Before the applicants were called upon to plead, crown counsel informed the court that an important witness for the Crown, Constable Pinnock, had been suspended from duty as a constable and was not available. One count of the indictment could not therefore be proceeded with at all. No attorney-at-law appeared for the applicants. The following dialogue ensued:

> HIS LORDSHIP: I propose a 15 minutes adjournment to see if Mr. Shackleford turns up. If he fails to turn up, Leroy Cargill, Patrick Roberts, understand this: this attorney of yours has been your lawyer for some time - ever since this case came up. He arranged for it to be taken today. It could have been taken any day last week or the week before. He asked for today and we accommodated him by fixing it today at his request. If he fails to turn up I am going to try the case. You will, therefore, be prepared to ask questions that you may have in your defence. Your lawyer isn't here. I am taking it. This Circuit sits now and it ends on Friday and the case is on the list to be taken. That is why the crown, long before the Circuit was due to commence - as far away as the 21st of September, invited your attorney to fix a date convenient to him. The Circuit commenced on the 8th of October. Actually, this date was fixed more than a month ago, so he had ample time. Have you seen him recently?
>
> ACCUSED: Since I get remand I don't see him but I don't know whey he don't come to court, my lord. Him don't finish get the money so him not going to appear for me, my lord. Him told

"my people say him don't get any money so him not going to defend me, mi lord.

"HIS LORDSHIP: Be prepared to ask questions of the witnesses when they come up.

ACCUSED: My people say dem would check the Legal Aid Clinic and I must put it to you and hear what you say.

HIS LORDSHIP: I am not postponing this case. The attorney has not conveyed to the court that he does not appear so I will allow a 15-minute adjournment and then we will go to trial. I understand the witnesses have been attending very regularly.

MISS EDWARDS: Yes, m'lord."

After a 17 minutes adjournment, the court convened at 10:50 a.m. and crown counsel gave the following history of the case:

"HIS LORDSHIP: Miss Edwards, can you tell me anything of the record of this case?

MISS EDWARDS: Yes, my lord. I was crown counsel in the Gun Court or the 4th of February, 1984 when the case came up for trial. All the witnesses were there then, as well as Mr. Shackleford, who appeared for both accused. This case was not reached and at the suggestion of her Ladyship, Miss McKain, the case was transferred to the Gun Court Division of the Manchester Circuit Court for the 21st day of May, 1984. The case was not reached during the last Circuit in Manchester.

HIS LORDSHIP: A note is here that on the 27th June Mr. Shackleford was absent. All the crown witnesses were present, and on the application of the accused, it was adjourned to the 8th of October and the accused were remanded in custody. That was done by the late Mr. Justice Parnell on the 21st September. Mr. Shackleford said he would be here today?"

The trial proceeded and the first witness Ellis Malcolm gave evidence-in-chief. Before the applicants were given the opportunity to cross-examine, crown counsel addressed the trial judge as follows:

> "Mi lord, it just occurred to me that since the accused are defending themselves they ought to have statements of what the witness said. I do not have any."

To this the trial judge retorted:

> "The attorneys have it."

On the invitation of the registrar, the applicant Cargill cross-examined Mr. Malcolm. Roberts said he was seeing the witness for the first time and declined to cross-examine. However, both applicants participated freely in the trial as it went from stage to stage.

The gravamen of Mr. Daley's submission was that the applicants were in custody, were unaware of Mr. Sheckleford's intention to abandon his responsibility to defend them until a very short time before the trial, and certainly after September 21, 1984, that they had no real opportunity to apply for legal-aid until they came before the court on October 22, 1984 and that, therefore, the learned trial judge had a duty as the certifying officer under the Poor Prisoners' Defence Law to offer legal aid to these applicants.

The Poor Prisoners' Defence Law was passed in 1961. It repealed the Poor Prisoners' (Capital Offences) Law, and made provision in the First Schedule for legal aid to be granted by a certifying officer who is a Resident Magistrate or a Judge of the Supreme Court in five types of cases, viz:

(1) Any capital offence.

(2) Any offence under the Forgery Law in which a Resident Magistrate has ordered that a preliminary examination be held.

(3) Infanticide.

(4) Manslaughter.

(5) Rape.

Over the years other categories of offences have been added and the schedule now includes the following additional offences.

(6) Carnal knowledge of a girl under the age of 12 years.

(7) Carnal knowledge of a girl above the age of 12 years and under the age of 14 years.

(8) Concealment of birth.

(9) Robbery with aggravation.

(10) Burglary with intent to commit an offence other than rape.

(11) Attempt at rape.

(12) Juveniles charged with Gun Court offences.

(13) Any offence the trial of which is to be held in the Gun Court established under the Gun Court Act.

This last category includes illegal possession of a firearm, any offence whatsoever involving a firearm and in which the offender's possession is contrary to section 20 of the Firearms Act. In addition the Schedule to the Gun Court Act contains four other categories of offences which are triable in the Gun Court.

We have referred to the provisions for legal aid for poor prisoners in some detail to underscore the fact that nearly every serious crime falls within these provisions. Consequently, unless the Legal Aid Scheme

is made to function efficiently there is every likelihood that trials will be hampered.

What is the fee structure for the remuneration of attorneys-at-law? In 1961 the fee for the first day of trial was ≠12.12.0. with refreshers of ≠8.8.0. for additional trial days. Today the fee provided by law is $42 for the first day and $25.20 for each succeeding day. These fees are unrealistic and derogatory to the legal profession, and if the level of fees is the sole inhibiting factor in attorneys refusing to accept legal aid assignments when the statute law requires and mandates that persons charged with named criminal offences ought to have legal aid, then the State may very well find itself liable to compensate persons whose trials are unduly delayed.

In Trinidad and Tobago, the State was ordered to compensate a barrister-at-law who had been wrongfully imprisoned for contempt of court. In that case although the State could not have been held liable for the acts of a Superior Court Judge acting in his judicial capacity, the State's liability arose because it had the primary duty to provide an efficient judicial system.

The Privy Council in Maharaj v. The Attorney General of Trinidad and Tobago (No. (2)(3)) [1978] 30 W.I.R. 318 approved the dictum of Phillips J.A. that:

> "The combined effect of these sections (i.e. ss. 1, 2 and 3) in my judgment, gives rise to the necessary implication that the primary objective of Chapter I of the Constitution is to prohibit the contravention by the State of any of the fundamental rights or freedoms declared and recognized by section 1."

The Privy Council went on to hold that when a right which was protected under section 1 of the Trinidad and Tobago Constitution had been contravened, an order for monetary compensation could be ordered and that the claim for redress was a claim in public law. There Maharaj, a barrister-at-law, was committed to prison for contempt of court and the Privy Council held that the failure of the trial judge to inform him of the specific nature of the contempt of court with which he was charged contravened a constitutional right in respect of which he was entitled to protection under the Constitution. We apprehend that a failure by the government to provide adequate fees for legal aid might lead to quite expensive and embarrassing litigation in Jamaica.

In our view there is the most abundant reason for the immediate amendment of the Poor Prisoners' Legal Aid Rules to provide adequate fees for attorneys-at-law to whom legal aid assignments are made.

Delays in the trial of cases in criminal courts in instances where the accused are charged with offences which fall within the First Schedule to the Poor Prisoners' Defence Act have reached notorious proportions in Jamaica. A judge, it is said, may not proceed with a trial if counsel who appears on the record for the accused person is not present in court whether or not he or she offers an excuse or explanation. The court it is said, too, is at the mercy of counsel, and if counsel chooses to be unprincipled and to be guilty of gross professional misconduct in not attending court at the appointed time to represent his client, the court has no power to commit him or her for contempt, but may only report him or her to the Disciplinary Committee of the Bar in the hope that

it will in the fulness of time enquire into the matter. In the meantime what does the court do?

Mr. Daly says that in the face of the unprincipled conduct of Mr. Sheckleford, for whom he could not, even at the date of hearing of the appeals, offer one word of excuse, the court had a clear duty to offer to these applicants the opportunity to be defended on legal aid assignment. In real terms this means that the learned trial judge should have caused the applicants to sign legal aid application forms 19 months after the date of the commission of the offence, that these applications would then go to the Probation Officer who would enquire into the means of the applicants and report back to the judge. If the judge then found that the applicants had insufficient means to obtain legal aid, a legal aid certificate would be granted and then would come the search for an attorney-at-law willing to accept the legal aid assignment.

The drill through which a registrar now goes to find a willing attorney-at-law would provide Charles Dickens with valuable material for a companion novel to "Bleak House". Almost to a man, senior or experienced attorneys do not accept legal aid assignments at the trial stage in the Gun Court or in the Circuit Court. They complain, and with justification as the fee structure referred to above indicates, that the legal aid fees being offered are ignominiously low, and secondly, that in the cases where they do accept assignments, their accounts rendered are never honoured within a reasonable time. Junior attorneys who accept legal aid assignments, all too often return the briefs without assigning a reason and the merry-go-round begins again. And as

Rule 13 of the Poor Prisoners' Defence Rules now stand counsel who is unable to appear for a prisoner on a legal aid assignment may return the brief eight days before the commencement of the trial. Registrars complain that this rule is being grossly abused.

What is the effect of these internal delays? Firstly, witnesses lose interest in the cases after the frustration of several attendances at court and adjournments simply because counsel are not available. Secondly, when the cases do come on for trial memories have faded, and viva voce evidence becomes more and more a test of memory than a graphic recall of an important and often traumatic event. The verdicts returned in many such cases favour the defence but may not in truth promote justice. Thirdly, old cases clutter up court lists and in the effort to deal with them new cases get pushed out of the list and in the long run suffer a fate similar to the "old cases".

We now return to the instant case. Mr. Sheckleford was privately retained either by the appellants themselves or by others on their behalf. The appellants did not before October 22, 1984, give any indication that they wished to be considered for legal aid. And even then what was indeed said was not an unequivocal application for legal aid. One or other of the applicants said:

> "My people them would check the Legal Aid Clinic and I must put it to you and hear what you say."

This applicant was inviting the trial judge to determine whether, he, the applicant, should apply for Legal Aid. The trial judge exercised his discretion not to interfere and directed the case to proceed, having first heard of the series of adjournments and the readiness at all times on the part of the Crown to proceed.

Did the trial judge exercise his discretion judicially? In Robinson v. Queen, P.C. Appeal 3/84, the Privy Council emphatically said that there is a discretion in the trial judge whether or not to grant an adjournment to enable an accused person to obtain the services of an attorney-at-law to conduct the defence. This court applied that principle in R. v. Glenroy Williams, S.C.C.A. 16/85, unreported, (Judgment delivered on April 9, 1987). Crown counsel informed the court at trial that between February 4 and September 21, 1984, Mr. Sheckleford appeared in court representing the two applicants on a private retainer. Mr. Sheckleford did not inform the court up to October 22, when the trial came on, that he was no longer appearing for the applicants, and the trial judge declined to treat the matter as if Mr. Sheckleford had formally withdrawn.

This is the third case in recent times when an attorney-at-law having accepted a private retainer and having appeared for the accused persons on occasions, has failed to appear and represent those accused persons at trial. Normal trial procedures cannot be maintained if attorneys behave in this manner, by withdrawing at will without advising the court of the reason. In our view, the Legal Profession which has a duty and the legal machinery to discipline itself, should make and rigidly

enforce rules which will prevent any of its members from frustrating the orderly conduct of cases in the courts. Canon IV (iv)(i) of the Legal Profession (Canons of Professional Ethics) Rules, 1978, provide that:

> "An attorney may at any time withdraw from employment where the client fails, refuses or neglects to carry out an agreement with, or his obligation to, the attorney as regards the expenses or fees payable by the client."

If this Canon is literally interpreted by attorneys, trial judges will be put to intolerable inconvenience in the conduct of cases, as at any time they might find themselves faced with a situation of going on with the case without counsel, or adjourning so as to find an attorney willing to act on legal aid.

We agree entirely with what Downer J.A. (Ag.) said in R. v. Glenroy Williams, supra, that:

> "It is always necessary to apply for legal aid from the preliminary enquiry or at the committal. To await the commencement of the trial to make such an application would in the circumstances of this case frustrate the trial."

In addition to the circumstances which he instanced, we would add that in a Gun Court case triable in the High Court Division, the proper time for an application for legal aid to be made by an accused person is at the time of his arraignment. If an accused person, aware of his right to apply for legal aid, refuses to so apply and instead retains counsel of his choice who for any reason fails to attend and appear for him, the question of whether the trial should be adjourned to allow for the investigation and probable grant of legal aid, should be balanced against all the other

factors in the case including the convenience of the court, the convenience of witnesses, and the general public interest that the trial of cases should not be unduly delayed.

In the instant circumstances the trial judge took into consideration the relevant circumstances and his determination that the trial should proceed ought not to be disturbed.

Mr. Daly argued that the trial judge failed in his duty to assist the applicants who were undefended, and he relied on the fact that so far as the court was aware neither applicant had in his possession a copy of the police statements containing the allegations against them. On the face of it this was an irregularity which need not have occurred. Crown counsel had a set of statements and a short adjournment to have them copied and served upon the applicants would not have set back the trial of the case inordinately.

Mr. Daly brought to our attention certain differences between the statements and the evidence and submitted that if the applicants had the statements in their possession they would have cross-examined on the discrepancies. An important discrepancy was that the victim of the robbery, Mr. Malcolm, had said in his statement that he did not have a good look at one of the men as his attention was riveted on the one who shot him. At trial he said he saw the faces of both men.

Another discrepancy is that Mr. Malcolm said in his statement that one man had a gun but at trial he swore that both his assailants had guns. The learned trial judge had no way of knowing that these discrepancies

existed between the statement and the evidence as he is not supplied with a copy of the police statements, but if the applicants had the statements they could have made use of those discrepanices to endeavour to discredit the witness. Mr. Cornwall's evidence differed from his statement in one particular, in that he said at trial that he saw one of the men with a bag before they entered his truck, but in the statement, although his mind was directed to whether or not either man had anything in his hand, did not mention the presence of a bag.

A ground of appeal much relied upon by Mr. Daly in respect of the applicant Roberts was that the trial judge did not conduct a trial within a trial before he admitted into evidence the statement allegedly given to the police by Roberts. We think that there is no merit in this submission as it is both illogical and impractical for a judge sitting as judge of law and fact to truncate a trial in the way it can be done in a trial before judge and jury.

In Conway v. Hotten [1976] 63 Cr. App. R. 11, the Divisional Court in England acknowledged that in a trial before justices, the court will have to answer questions as to the admissibility of confessional evidence based on the Crown's case alone. But Watkins J. added:

> "Of course, should they admit the confession and afterwards hear the evidence of the defendant himself, they may come to the conclusion at the end of the case having regard to that evidence to reject the confession and allow it to play no part in their considerations of the guilt or otherwise of an accused."

In R. v. Craigie et al (unreported) R.M.C.A. 100/85, (Judgment delivered on May 22, 1986), Kerr, J.A. said:

> "On the question of voir dire, as the Resident Magistrate was judge of the law and the tribunal of fact, a preliminary test of admissibility by way of a voir dire was impractical and unnecessary."

A point at issue in Craigie's case was at what stage certain tape recording became evidence, whether when they were formally admitted into evidence, or when the tapes were played, and the court held that it was at the latter time. By parity of reasoning, although the trial judge admitted the statement allegedly given by the applicant Roberts at the close of the prosecution's case, it only became evidence when it was read out at the end of all the evidence in the case. We find no merit in the complaint that the trial judge ought not to have admitted the statement before formally inviting the undefended applicant to address him on the admissibility of such a statement.

The identification of the applicant Cargill by the witness Mr. Malcolm came about when Cargill was taken, wounded, to the Mandeville Public General Hospital where Mr. Malcolm was a patient. It is unlikely in those circumstances that the police could keep the suspect away from the interested Mr. Malcolm, and there was no real opportunity for an identification parade. Mr. Malcolm promptly identified Cargill as one of the robbers. Superintendent Walker said that when cautioned at the hospital, Cargill said:

> "It is not me sir, is Patrick. Him say me fi follow him go up the road. We go up there. Him sit down and when him see the van a come, him stop it, shoot the man, tek the money and run. Me run follow him but a just yesterday me come down yah. Me no know the place."

If this evidence was believed it would strengthen the visual identification of the witness Malcolm that indeed the applicant Cargill was one of the robbers.

The case of Roberts is somewhat different. There was no admissible evidence as to how he came into police custody, but the witness Cornwall was permitted to see Roberts in the Mandeville Police Station the same afternoon of the robbery. Mr. Cornwall purported to identify Roberts. His opportunity to have observed Poberts was minimal in that at one time he was seeing the back of the two men whom he gave a lift and as they jumped into his truck he could only have had a momentary look at them. Mr. Cornwall said he glanced at them through his rear view mirror from time to time. Soon the police arrived and the men jumped from the truck and ran away. No identification parade was held for Roberts. In essence the evidence of identification consisted in the confrontation at the police station and the dock identification at trial. The learned trial judge discounted as valueless the contents of the statement taken from Roberts, and he place no reliance upon the finding of the bag of money in Mr. Cornwall's truck. Mr. Malcolm identified Roberts in the dock some 19 months after the robbery.

We are of the view that the evidence of identification in respect of the applicant Roberts showed great weaknesses and following the decision of this court in R. v. Leroy Hassock [1977] 15 J.L.R. 135 the evidence of the confrontation at the police station ought not to have been relied on.

In the result therefore the applications for leave to appeal are treated as the hearing of the appeals. In respect of the appellant Cargill, the appeals are dismissed and the convictions and sentences affirmed. In respect of the appellant Roberts, the appeals are allowed, the convictions quashed, sentences set aside and verdicts of acquittal entered.