

*Qualifying evidence - sufficient evidence - whether judge warned self as to circumstances of the identification. Application for leave to appeal dismissed*  
JAMAICA *No leave referred to*

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 69/92

THE HON MR JUSTICE FORTE J A  
THE HON MR JUSTICE DOWNER J A  
THE HON MR JUSTICE PATTERSON J A (AG)

R v MICHAEL TENNYSON

Rudolph Smellie for the applicant

Patrick Cole for the Crown

29th March 1993 & 9th March 1994

DOWNER J A

The applicant, Michael Tennyson was charged on an indictment for illegal possession of firearm, robbery with aggravation and shooting with intent. The trial took place in the Gun Court before Courtenay Orr J, on several days during the month of June 1992 and at its conclusion, the applicant was found guilty on all counts and sentenced to fifteen years imprisonment at hard labour on each count. Those sentences were to run concurrently.

The basis for finding the applicant guilty, was the cogent and reliable identification evidence given by Sergeant Elkanah Thompson, who knew the accused for upwards of four years and had seen him frequently during that period. He was stationed at Vineyard Town Police Station and it was because the accused frequented that area that he knew him.

This was a case which required a careful analysis of the strength and weakness of the identification evidence, since there was no independent evidence connecting the accused with the crime.

The incident took place on 9th February 1991 during the night. The complainant told the court that he was aroused by a noise. Men shouted police, police, and he then went to a door

which led to his verandah and observed what was happening outside. There were two openings from which he observed what was happening. There was a double door and there was also a gap which enabled him to observe the scene. There was also a large key hole which he used. He reported that he saw three men, two of whom were masked, on the verandah. Two were armed with revolvers and another with an M16 rifle. There were other men under a mango tree near by. As for lighting, he said there was an electric light on the verandah which provided ample illumination for him to note the features of the applicant. This light shone both on the verandah and inside the room when the men entered.

The other opportunity to observe the men occurred after the three men broke and entered the house. So far as the applicant was concerned, he removed a television from a whatnot, and discharged his firearm at the complainant. The complainant dodged and so escaped being shot. The applicant recognized the complainant as ('you a police') a policeman and when he pointed the gun at his head, he remarked "You dead now."

It is appropriate at this stage to show how the trial judge assessed the evidence as regards the time and opportunity the complainant had to observe the applicant. The learned trial judge said:

"... 'At no time from the approach of wife and daughter until they are coming out back were men facing me.' So remember two of the men approached his wife and daughter while one had the gun at him, and he said the one who held the gun was the only one who spoke to him. So although he said that he had ten minutes to observe the accused when he was outside and inside the house another ten minutes, I do not think that he had as much as that, having regard to the circumstances. He said that the light shun (sic) in from the verandah into the room but I regard as important time the ten minutes during which he observed him outside in the light. That afforded him a proper opportunity to my mind, of seeing the face of the accused."

It is to be noted that reliance is being placed on the complainant's view of the face of the applicant bearing in mind this was a recognition case. The other principal factor was the distance from which the complainant made his observation when he was in a position to, clearly and without obstruction. Here is how the learned trial judge treated the matter:

"Now, the second question one must ask themselves, at what distance, and while they are outside the door trying to break in, the distance was obviously shorter. The witness demonstrated to us. At most it would have been arms length, so I regard the distance as favourable. I do believe he was also able to see when the accused took the television off the whatnot inside the room."

There was therefore opportunity for identifying the applicant.

As this was a recognition case, it must be noted that both the complainant and the applicant asserted that they knew each other for a period of upwards of four years. They saw each other in the area several times, at times as frequently as four times weekly. It may be said that in such circumstances, there was no need for an identification parade, but there was, and the applicant was picked out. This was important as the complainant gave a description of the applicant and mentioned in particular a scar on the left side of his face. However, it was established that while in chief, he gave the scar as on the right side, under cross-examination, he said the left.

The fact of the scar was the important factor. The inconsistency between the left and right was never resolved in re-examination. However, the other cogent identification evidence coupled with the parade and the fact that he knew the applicant, were sufficient to support the conviction.

The defence was twofold. The first aspect was the alibi - I was not there. The second was mistaken identity and he purported to adduce evidence which would account for the mistake. He gave several instances when he was in custody and in the police station at which the complainant served and he stated that on those

occasions, the complainant failed to identify him. This account was denied by the complainant.

The learned trial judge rejected this evidence and since he had the opportunity to have his credibility tested, this finding ought not to be disturbed. The learned judge expressly warned himself thus:

"... I am aware that it is possible for an honest witness to make a mistake with identification. I am only too aware that there have been wrongful convictions in the past as a result of such mistakes. I am aware too that an apparently convincing witness can be mistaken and that a witness though honest may persist in his mistake without realising it."

He applied the warning to the circumstance of the identification. The complainant gave a description of the applicant and of the special features. He noticed that he was of a clear complexion while the other two who entered the house were dark.

As for the other aspect of the case, there was abundant evidence showing that there was spent shells found after the incident, and the robbery from the wife of jewellery and television was uncontested. Mr. Smellie who also appeared below, carried out a long and detailed cross-examination and went through the evidence with great care on appeal.

There was no merit in his submission and the application was refused. As was announced when judgment was delivered, the conviction and sentence was affirmed and sentence of 15 years imprisonment at hard labour is to run from 3rd September 1992.