JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 105/90

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

R. v. RON POWELL

Mrs. Marvalyn Taylor-Wright & Mrs. Janet Taylor for Applicant

Brian Sykes for Crown

May 6 & 10, 1991

CAREY, P. (AG.)

In the High Court Division of the Gun Court held in Black River in St. Elizabeth before Harrison J. sitting alone on 5th July, 1990, the applicant was convicted of the offences of illegal possession of a firearm (count 1) and robbery with aggravation (count 11). He was sentenced to concurrent terms of 5 years and 6 years imprisonment at hard labour respectively.

The Crown's case depended on the visual identification evidence of two witnesses Dennis Rowe an electrician and farmer, and Clive Blake, his uncle, both of Delightful District, Junction in St. Elizabeth. The trial judge did not however rely on the identification by Clive Blake rejecting him as unreliable. Dennis Rowe the remaining eyewitness, related that he was awakened sometime in the night of 22nd March 1990 by a knocking on the door and shouts of "Police". He went to his grandmother's room where he saw two men armed with guns who announced that they were police who had come on a raid. He invited them to search. They were total strangers to him. These pseudo-police officers led him and Blake to another room where they were ordered to lie on a bed. Others of the household were similarly

put under restraint. The applicant, who the witness identified as one of the intruders, stood guard while others of his colleagues pillaged the house. Having taken what they wished, the raiders departed. It was at this point that Dennis Rowe appreciated that his unwelcome visitors were not policemen but thieves who had garnered a T.V. set, 2 tape recorders jewellery and cash, this loss altogether valued in excess of $20,000.00.

Some 3 months later at an identification parade, this witness pointed out the applicant as one of the men who had participated in breaking into the house and robbing the occupants.

In relation to the identification evidence, the witness testified of the lighting available, the distance at which he saw the applicant, the time which he had for observation, and demonstrated how he was able to see the applicant from his position on the bed.

The defence was an alibi. As is customary, the applicant made an unsworn statement and called no witnesses.

A number of grounds of appeal were argued very forcefully by Mrs. Taylor-Wright but at the end of the day, we were not persuaded that any cogent reason had been demonstrated to enable us to interfere with the decision of the trial judge.

Learned counsel complained first that the trial judge failed to warn himself of the dangers inherent in visual identification evidence. We called attention to the learned trial judge's express statement in that regard at page 147-148. He said:

> "..... as far as the identification is concerned, I am mindful of the fact that it is dangerous and unsafe to convict on visual identification, and in particular of one witness. I am mindful of the fact that sometimes when it comes to visual identification, it has been proven that person who

> "seems convincing are at time (sic) mistaken and do in fact make assertions as to identity and as a consequence they are at times wrong convictions on the evidence of visual identification of a witness."

Counsel then shifted her stance by submitting that there was a fundamental deficiency in the warning as the trial judge did not rely on all the guidelines as set out in **R. v. Turnbull** [1976] 3 All E.R. 549 and **R. v. Whylie** [1978] 25 W.I.R. 430.

We cannot agree. The learned trial judge was plainly mindful of the guidelines as to the circumstances which a jury should take into account in considering identification evidence. At page 149 he said -

> "..... I accept that the lighting in the mother's room would have been sufficient for him to have seen the accused for the period of time he saw him. He described the distance that the accused was from him inside the second room in which he was told to lie down. He said that the light was on the wall, on the same side of the room on which the accused was standing. He said that he had turned around several times and saw him while he was lying face down on the bed. I accept that that would have given him sufficient opportunity to have seen the accused man."

Mrs. Taylor Wright next turned her attention to the prosecution case. She submitted that at the trial, the no case submission made, should have succeeded on the basis of the second limb of Lord Parker's Practice Note [1962] 1 All E.R. 448, viz:

> "..... when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it."

She referred us to the evidence of the witness Rowe which, she submitted, contained internal contradictions. When she condescended to particulars, she pointed to the fact that while the witness had related that after he was awakened, he had gone to his grandmother's room where he had seen two armed men, under cross-examination he had put himself inside that room and in a previous statement given to the police, he was recorded as saying that - " as [he] approached the room, the men said it was a raid."

It is difficult to appreciate wherein lay the internal contradiction for plainly the extract from the previous statement is in no way inconsistent with the evidence which the witness gave at trial.

As an alternative, counsel dealt with a ground challenging the verdict as being unreasonable and not supported by the evidence. She made the point that it would have been difficult for the witness Rowe to have been able to observe the features of the applicant as "they would have been on different planes [and] the witness was lying on the bed."

The witness had stated that he had been required to lay face down on the bed while the applicant guarded him at gun point in a position one foot behind his legs. The witness demonstrated these relative positions in court before the trial judge who in his summation, expressed himself as satisfied that the witness would have been able to observe the applicant from that position in which the witness had described. We do not see that we could come to a different view in the face of that non-verbal evidence.

It was contended also by Mrs. Taylor-Wright that although the trial judge had rejected the evidence of Clive Blake entirely as to identification, he had used the rejected evidence

to buttress the evidence of the preferred witness, Dennis Rowe. She said further that the trial judge erred when he accepted the evidence of Rowe and rejected the evidence of Blake by relying solely on the intelligence of the preferred witness.

Learned counsel, we fear, misunderstood the trial judge's analysis of the evidence in the case. He rejected the evidence of Blake only in some respects. He expressed himself thus at page 140:

> "When it comes to the evidence before me, I do not accept the evidence of Clive Blake in some respects and I reject it.
> In any event, when it comes to dealing with identification and where he conflicts with the evidence of Dennis Rowe, I accept the evidence of Dennis Rowe."

The trial judge was at liberty to use Blake's evidence on those points which did not conflict with Rowe's to buttress or corroborate Rowe's evidence. Thus, the judge could properly use Blake's evidence as to statements made by the applicant to confirm Rowe's evidence as to the length of time the applicant would have stood in the room engaged in a conversation with his colleague outside the room and thus enabled Rowe to observe his features. The trial judge stated the basis of his rejection of the witness Blake at page 146:

> "..... So that in this respect of the evidence of identification of the witness, Blake is unreliable, have been discredited by his admission and by the evidence of Cpl. Shaw."

He preferred the witness Rowe, as he found the evidence of the witness "to be that of a witness who is by far more intelligent than the evidence of Clive Blake." Counsel discounted intelligence as a proper indicator of accuracy. The test, she suggested was honesty and accuracy.

Again, we think that there is a misconception of the analytic process. A judge or a trier of fact must determine the credibility of the witness, that is, the witness' story must be believable. Credibility is concerned, inter alia, with the witness' knowledge of the facts, his integrity and his veracity. Intelligence is relevant in considering whether the witness' statements of his recollection of the facts are understandable or not. Intelligence is referrable to the witness' formulation of his recollection of the facts. When accuracy is mentioned in this regard, the consideration is accuracy in recollection of the facts. Intelligence is thus a component of accuracy and cannot in our view be discounted. In relation to honesty, a jury is often warned in cases involving visual identification that they must not confuse honesty with accuracy for the reason that the honest witness might be the more convincing as a resu

Having said all this, we note, however, that the trial judge did not accept the witness Rowe on the basis of his intelligence but because he found him reliable and he so stated at page 149. He preferred this witness to the other, because the former was the more intelligent and gave reliable evidence. The basic assumption on which counsel's arguments rested, being without foundation, her conclusion that the verdict was unreasonable must accordingly fail.

We must commend counsel for her valiant attempt on behalf of the applicant.

It was for these reasons that we refused the application for leave to appeal which order we announced at the end of counsel's submissions. At the same time we directed sentence to run from 5th October, 1990.