J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 160/77

BEFORE:
THE HON. MR. JUSTICE HENRY J.A.
THE HON. MR. JUSTICE KERR J.A.
THE HON. MR. JUSTICE ROBOTHAM J.A.

REGINA

v

VICTOR FRANCIS

Mr. Winston D. Young for the Applicant

Mr. R A. Stewart for the Crown

May 24, June 2, 1978

HENRY J.A.

On June 28, 1977, the applicant was convicted in the High Court Division of the Gun Court on all four counts of an indictment charging him with illegal possession of a firearm, robbery with aggravation (2 counts) and shooting with intent. On May 24, 1978 we treated his application for leave to appeal as an appeal, allowed the appeal and set aside the conviction and sentences. We promised to put our reasons in writing and now do so.

At about 8 pm. on February 25, 1977, three armed men carried out two robberies at the Central Liquor Store in Central Plaza in the course of which a by stander was shot. After the incident the men escaped but about half an hour later a prosecution witness Ricardo Housen saw the applicant walking across Central Plaza and pointed the applicant out to his mother as having been one of the participants in the robbery. The applicant was apprehended and taken to the Police station, but there is a conflict of evidence as to the circumstances in which this occurred; Corporal Pinnock alleging that the applicant was taken to the Police Station by a group of persons including the witnesses Thorpe and Housen, while Thorpe and Housen deny this. According to Pinnock upon

arrival at the Police station both Thorpe and Housen identified the applicant as having been a participant in the robbery, the applicant saying nothing in the face of this accusation. According to Thorpe when he arrived at the Police station the applicant was already there and was being beaten by the Police when he made his identification. He did not see Housen at the Police station. According to Housen when he went to the Police station both Thorpe and the applicant were already there. Some days later an identification parade was held at which both Thorpe and Housen duly identified the applicant.

The applicant gave sworn evidence denying participation in the robbery. He had been to the Odeon cinema and to a club at the shopping centre and was on his way to a bus stop to go home when he was held.

At the hearing of the appeal submissions were directed mainly to the question of identification. The two witnesses who identified the applicant were Dennis Thorpe and Ricardo Housen. Ricardo is a boy of 10 who gave unsworn evidence. That evidence required corroboration and the only corroboration on the question of identification had to come from Mr. Thorpe. Although both Mr. Thorpe and Ricardo identified the applicant at an identification parade, that can be of little value in view of the fact that they had already seen and identified him at the Police station on the night of the robbery. It is to that identification that we must look in order to determine whether it was a proper identification upon which a conviction could safely be based. When Mr. Thorpe gave his evidence in chief no mention whatever was made of the confrontation at the Police station. In cross-examination, however, it emerged that not only did Mr. Thorpe have the opportunity of seeing the applicant at the Police station but he saw him being beaten by the Police. The matter does not end there. On his own evidence Mr. Thorpe's visit to the Police station was not mere coincidence. He went there he says "because me boss say I must go look if is him", the clear implication being that he had heard that a suspect had been held by the Police. Finally, there appears the following

passage at page 17 in his evidence.

"His Lordship: You say you saw him at the Liquor store the night; when was the next time you saw him?

A: After that?

His Lordship: Yes.

A: I don't saw him again. Is when I go to the station the same night they told me is him same one."

If one takes the words "I don't saw him again" literally it is possible to conclude that when the witness identified the applicant at the Police station he did so not because he recognised the applicant but as a consequence of what he had been told. In any event we consider that a purported identification in those circumstances ought to be viewed with the greatest care, because of the inherent danger of that identification not being based on genuine recognition. It is true that, as Crown counsel submitted, an honest witness would not identify a suspect merely as a result of what had been conveyed to him by others, or of the circumstances in which he saw the suspect. Nevertheless, it must be recognised that an honest witness may be genuinely mistaken and the risk of a mistake being made would be magnified if a suspect bore some superficial resemblance to the real offender and there was a confrontation with a potential witness in the circumstances in which there was the confrontation in this case with Mr. Thorpe. We consider that it would be dangerous to rely on Mr. Thorpe's evidence as corroboration of Ricardo Housen's. It must be remembered that Ricardo himself also identified the applicant at the Police station when he was being beaten by the Police and although we do not overlook the fact that he had pointed out the applicant to his mother earlier that night, it is not impossible that he may have been influenced by the consideration that the Police would not be beating an innocent man. The result may well have been that what up to then had been suspicion as to the identity of the applicant became confirmed into certainty. We do not consider that the evidence as to identity taken as a whole is satisfactory in all the circumstances.

We are aware that an appellate court does not lightly interfere with the decision of a judge on what is essentially a question of fact but in the particular circumstances of this case, we are of the view that a verdict of guilt based on this evidence of identity is so unsafe as to be unreasonable.

It is for these reasons that we adopted the course indicated at the commencement of this judgment.