JAMAICA

IN THE COURT OF APPEAL

CRIMINAL APPEAL No. 116/1973

BEFORE: The Hon. Mr. Justice Luckhoo, J.A. (Presiding).
The Hon. Mr. Justice Graham-Perkins, J.A.
The Hon. Mr. Justice Robinson, J.A. (ag.).

R. v. WINSTON SIMPSON

Mrs. Marva McIntosh for the appellant.

Courtney Orr for the Crown.

Heard: November 15, 1973

LUCKHOO, J.A.:

On November 15, 1973 we allowed the appellant's appeal quashing his conviction and setting aside the sentence which had been imposed on him. We promised to give reasons at a later date and this we now do.

The appellant was convicted on July 30, 1973 in the Home Circuit Court of robbery with aggravation on an indictment which alleged that on December 16, 1971, in the parish of Kingston he and certain other persons unknown being armed with knives and a gun together robbed Cecil Besenti of an iron safe containing money $3800, five passports and several insurance papers. He was sentenced to imprisonment at hard labour for 12 years. The sole ground urged before us was that the verdict of the jury was unreasonable and could not be supported having regard to the evidence. No complaint was made as to the summing up of the learned Chief Justice.

On the night of December 15, 1971, Cecil Besenti was on duty as night watchman at the business premises of Hector Prendergast at 157, Spanish Town Road. He was in the watchman's house near the gate of the premises when three men jumped over the gate and came to him. They forced him to come out of the watchman's house. He was asked to show them the office. They took him to a point near to the office and put him forcibly into a lubrication pit under a shed. The shed was situate under a large building under which there was an office. Later Besenti was taken out of the pit and put into a toolroom. The intruders broke and entered the office

and ransacked it. They broke open an iron safe kept in the office and stole money $3,800 as well as some passports and insurance papers. They then proceeded to burn the passports and insurance papers. Apparently the intruders used Prendergast's welding torch and cylinders to open the iron safe for these were later found in the office and not in their accustomed place in a storeroom.

On or about January 19, 1972, the appellant was placed on an identification parade in respect of that incident. Besenti pointed to the appellant and said "This favour one of them". The appellant then said "But, man, you know me. Man, you know me, you know." This observation on the part of the appellant sprang from the fact that the appellant had been employed as a mechanic by Prendergast during 1968 at which time Besenti was employed as a watchman at Prendergast's premises and knew the appellant by the name of "Belly". According to Detective Constable Lloyd Thomas the appellant was cautioned and when cautioned said "I will take you to Little Reds and you can get back some of the money and the things whe him buy." That he told Detective Constable Lloyd Thomas so was denied by the appellant. It does not appear from the transcript of the summing up whether evidence was adduced as to action being taken by Detective Constable Lloyd Thomas on this information he said he received from the appellant. However, Mrs. McIntosh learned attorney for the appellant has informed us that Detective Constable Lloyd Thomas did testify that he went to certain premises in pursuance of that information though he did not have the appellant take him there.

At the trial Besenti proceeded to identify the appellant in a manner which is best related by setting out verbatim what the learned Chief Justice told the jury in dealing with that aspect of the matter -

> "Now, let us look at the evidence. First of all, Mr. Prendergast says that this accused is well-known to him. He is well known to Mr. Prendergast because, as the accused himself told you, he worked at Mr. Prendergast's place. The accused said he worked there for some one year - one year in 1968 - and then he left. Well, Mr. Besenti has been night watchman at Mr. Prendergast's over seven years, so that you will probably think that the accused would have been known to Mr. Besenti. They know each other. Actually, he is supposed to have said so on the identification parade. Mr. Besenti said he had known the accused some months before this offence. No, not some months. He said he knew him

before for a very long time and he knew him as 'Belly' although he didn't know the name 'Simpson'. He knew him as 'Belly'. Well, one would expect if the accused was well-known to him, that there should have been no difficulty in Mr. Besenti's pointing him out in court. But you will remember what happened. When Miss Hylton was examining Mr. Besenti she asked him if he knew any of the three men before and he said only Simpson of the three he knew. He was asked if he saw Simpson in court and, as far as I could see, the witness was looking directly at the accused. He looked at him for the longest time and said he didn't see him in court. You will remember I asked him whether he had looked and he looked again and, as far as I could see, he looked directly at the accused almost all the time and he said he didn't see him. Then I intervened and asked the accused to stand. I asked Mr. Besenti if he knew the accused and the answer was: "If he is Simpson (if the man is Simpson) is him." That's the man he said was implicated in the offence. Then afterwards he said the accused 'favour' Simpson, and you will remember what happened after that. I said, "How you mean 'favour' him?" and that is the time when I referred to the fact that to say a person 'favour' another doesn't mean that that is the person, and then after that he said, "It is him." He says, "I know him", and he went on to say, "He look like Simpson. He favour Simpson to me". Then immediately afterwards he says: "He don't look like him to me." Then Miss Hylton wondered whether he could see properly and I invited him to go down to the well of the court and he went up near to the dock and said, "Yes, sir, is him." Now, this is significant. What is happening here is, he knows the difference between 'favour' and certainty that it is he, you see, because some people, especially our Jamaican people who are not too educated say 'it favour him' and they really mean that it is the person. You, as members of the jury, all the time have to really think and decide when our Jamaicans speak what they really mean, but Mr. Besenti demonstrated that he knows the difference between 'is him' and 'it favour him.' Up here he said, "It favour him", or he says, "It look like him", and then, "It don't look like him", and he goes down and says, "Is him."

Now, he was asked in cross-examination whether his eyes were bad and he said he can't see so good. He was asked if he could see the clock and he said yes. He was asked to say what time it was when the clock was then saying 12.40 and the witness said that the time that the clock was then saying was about fifteen or so to one, or twenty minutes to one, which was the accurate time. Well, now, if he could see the clock and tell the time, what prevented him from seeing the accused and saying whether it was Simpson or not? Bear in mind that this man is a man he

knows for a long time, so what prevented him from sitting up there and telling that that was the accused if he could sit there and tell the time by the clock, as it seems to me that the clock is a little further away from him than the accused? I don't know if how the accused is sitting was preventing him or anything like that, but it seemed to me that there was at least some reluctance on his part to say it was the accused, and you will have to say why there was this reluctance if you agree that he was reluctant to say it was the accused, whether that reluctance was from the fact that he knows that the accused was not there at all. Of course, that is what Mrs. McIntosh will ask you to say the reluctance sprang from, or there might be some other reason why he was reluctant to say it was the accused - I don't know - but the same type of behaviour, if you believe the evidence, was demonstrated at the identification parade."

After referring to the evidence of what took place at the identification parade the learned Chief Justice continued -

"Apart from that, you will have to consider whether Mr. Besenti was able to see enough that night of the men - the three men, assuming you find that there were three men who went to rob this place - whether he was able to see sufficiently of the three men to be able to identify them again. You will remember he told Miss Hylton that when the accused was working at Mr. Prendergast's place his hair was as it is now. When he saw him on the night of the offence he had locks like Mr. Besenti has locks, and when he was on the parade he had locks. Well, on the question of whether he saw the men sufficiently, you heard his evidence. He said there were electric lights in the place. There is no light in the watchman's house. He said there are lights round and about the premises and the nearest light to where he was in the watchman's house was under a shed about the distance from the witness box to the back of the courtroom from the watchman's house.

He said the accused had a gun; the others had knives in their waists and the accused stood over him with a gun and the others burst down the office. What he said was that the accused was left guarding him out there with the gun and was there with him most of the time guarding him with the gun at the pit when the others were in the office breaking it open and breaking the safe. You will have to say whether he would have had sufficient opportunity in those circumstances to see the accused. He said there was one light under the shed where the pit was and that was the only light in that shed. I thought that was what he said, that he knew the accused a few months before. Earlier he said he

knew him for a very long time but later on he said that he knew the accused a few months well before. He was working there as a mechanic - that is at Mr. Prendergast's, and the accused stopped working a few months well before the 15th of December, 1971. He denied in cross-examination that he had seen the accused between the time the offence was committed and the time when he saw the accused on the parade. The accused has said that Mr. Besenti saw him on several occasions and said nothing to him.

Now, on the question of whether you can believe Mr. Besenti members of the jury, he was contradicted by his deposition. Remember that he said here that the accused had a gun and the other two men had knives. It was suggested to him that he had said at the preliminary enquiry that one of the other men had the gun and the accused and another one had knives. Well, he denied that he said it. He said he never said it at all. His deposition was put in to contradict him and the deposition had him as saying at the preliminary enquiry that one of the men had a gun and the accused and the other one had the knives. Well, that contradicts his evidence here."

The appellant in his defence made a statement from the dock in which he denied that he took part in the commission of the offence charged. He complained of having been beaten by Detective Constable Thomas in order to have him say that he knew something of the offence and that he told the constable that he did not know anything about it.

It seems that acceptance of Detective Constable Thomas' evidence that the appellant told him "I will take you to Little Reds and you can get back some of the money and the things whe him buy" cannot by itself amount to proof that the appellant was one of the three men who took part in the commission of the robbery. Indeed as the learned Chief Justice told the jury the prosecution asked them to say that it <u>assisted</u> in identifying the appellant as one of the three intruders. As we understand it such assistance cannot be in substitution for Besenti's purported identification nor can it be used to bolster a purported identification which itself is uncertain. The statement alleged to have been made by the appellant to Detective Constable Thomas certainly does not amount to a confession of participation in the offence of stealing. It could be said to tend to support Besenti's identification if that identification might itself be regarded as certain or definite. The manner of identification at the trial and indeed at the identification parade demonstrates that it cannot reasonably be said that the identification of the appellant by Besenti as one of the intruders was certain or definite.

Further as the learned Chief Justice observed the holding of an identification parade in this case was a farce for Besenti had known the appellant for some years. Indeed had Besenti recognised the appellant as one of the intruders he could have had no hesitation in identifying the appellant at the identification parade and at the trial. In addition it is passing strange that if the appellant was one of the three intruders there should be inquiry of Besenti as to the location of the office.

In these circumstances we were of the view that the verdict of the jury was unreasonable and could not be supported having regard to the evidence and we accordingly allowed the appeal.