JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 147/90

COR: THE HON. MR. JUSTICE CAREY, P. (AG.)
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

REGINA

VS.

WINSTON STEWART

Delroy Chuck and Miss Helen Birch for Appellant

Kent Pantry - Deputy Director of Public Prosecutions for Crown

October 7 and 22, 1991

CAREY P. (AG.):

On 22nd October 1990, in the High Court Division of the Gun Court at Kingston before Reckord J. sitting alone, the appellant was convicted on an indictment containing five counts as follows:

Count 1: Illegal possession of firearm.

Count 2: Robbery with Aggravation on Garfield Williams.

Count 3: Rape on D.M.

Count 4: Robbery with Aggravation on M.V.

Count 5: Rape on M.V.

He was sentenced to varying terms of imprisonment all made to run concurrently. We heard submissions on 7th October when we allowed the appeal, quashed the convictions and set aside the sentences. We directed that verdicts and judgment of acquittal be entered. We promised to put our reasons in writing. These then are the reasons for our decision.

The matter came before us by leave of the single judge on the issue of identification. The ground of appeal filed however, complained that the verdict was unreasonable and could not be supported having regard to the evidence. The particulars were stated in the following terms:

> "(a) The discrepancies and inconsistencies in the witnesses evidence on the main issue of identification are inexplicable and are sufficiently grave and significant to leave room for reasonable doubt.
>
> (b) The two witnesses, on whom the learned trial judge relied, identified the appellant in the dock, and the learned trial judge failed to warn himself of the dangers of dock identification."

We desire to say at once that Mr. Pantry, in response to the Court's enquiry, candidly conceded that he could not support the conviction. We were constrained nevertheless, to put our reasons in writing because it appears that some judges sitting as judges of fact have still not appreciated the significance of the caution with which they must approach identification evidence. The instant case illustrates quite positively this opinion which we have expressed. The facts and circumstances must therefore be given in some detail.

The victims together with other persons all occupied a large building in Spanish Town. Two of these, Garfield Williams, and his girlfriend D.M., occupied one room on the building whilst the third his mother M.V. occupied another room therein. On the 11th October 1989 at about 1:00 a.m. Garfield Williams and D.M. awakened to discover two armed men in their bedroom. These men

switched on the lights which allowed observation but the intruders were perfect strangers. While one used a handkerchief as a mask, the other employed his jersey which he pulled up to cover the lower half of his face including his nose, as his mask. These men demanded drugs, questioned both as to the other occupants and began searching the room. They ordered Williams to rouse his mother M.V., who occupied another room, a command with which he hastened to comply. Thereafter the men robbed the occupants of considerable cash and a variety of articles which they packed into suitcases and eventually loaded into a car. They remained in the house altogether for about an hour.

Mr. Williams also testified that in the to-ing and fro-ing which occurred, the jersey fell away from that intruder's face. He observed that face from a distance of eight feet while lying on the floor. He identified this appellant as the intruder who had used his jersey as a mask. He estimated the period of time during which he could view the appellant's face unimpeded as fifteen minutes. On 27th March 1990 while he was at Court, he saw the appellant entering the court-yard and pointed him out to a police officer.

Mr. Williams' girlfriend spoke of being raped by one of the intruders. She identified the appellant as being responsible for that offence and as the man with the handkerchief. With respect to the other man, she spoke of him as wearing a hat: she never mentioned him as using his jersey as a mask. She was able to see the appellant's face when the mask fell off. This was before she was taken outside and raped. In Court, she pointed out the appellant as the man with the handkerchief. No identification parade was held to test her powers of recollection and identification. Under cross-examination, she said that she described the rapist to the police as "black, big eyes, straight nose". She added that she thought he had a scar on the left side or right

side of his face. She further stated that the police enquired from her whether he had "'pact'(sic) teeth or gather teeth". She replied that his teeth were not as straight as "mine". All this testimony was at variance with the description in the statement she had given to the police. In the course of questions by the Court, she said she observed a scar on the appellant in Court. She said she had informed the police of that identifying mark but they had neglected to note it. She admitted that she had read over her statement.

The third eye-witness was M.V. the mother of Mr. Williams. She stated that after she had opened her door to a knock, she observed two men. She paid particular attention to one of them because he "hackle" her so much. She said he used a red blouse from her own travelling-bag as a mask to tie across his face i.e. the nose and mouth. She spoke of being robbed and raped by that man whom she identified as the appellant. He had taken some twenty minutes after he had entered her room to conceal his face behind this mask. The other man who accompanied the appellant wore a hat.

Before dealing with the ground of appeal, we think it is necessary to make some general observations. The decisions of this Court and the Privy Council which deal with visual identification are manifold. They make it clear beyond a peradventure that this type of evidence falls into a special category calling for special treatment by judge and jury. "Trial judges when sitting alone must expressly warn themselves in the fullest form of the dangers of acting upon uncorroborated evidence of visual identification" - per Rowe P. in R. v. Locksley Carroll (unreported) 25the June 1990. Wright J.A. in R. v. George Cameron (unreported) 30th November 1989, said, in approving observations of mine in R. v. Clifford Donaldson & Ors. (unreported) 14th July 1988:

> "He (i.e. the trial judge) must demonstrate in language that does not require to be construed that in coming to the conclusion adverse to the accused person he has acted with the requisite caution in mind."

In the present case, we do not think that the trial judge acted with the required caution in mind. So far as any expressions of his approach to the facts bearing in mind the warning now settled by the cases, we can find but two extracts. Firstly, at the very outset of the summation he said this:

> "The issue of identification is a live issue in the case. ....."

and later towards the end, he expressed himself in these words at p. 111:

> "The Court is quite fully aware that in matters of identification - that this matter of identification is a very live issue in this case and that it is my duty to address my mind to that issue. I am aware that thousands of people in Jamaica - that there is always the possibility that one person may bear a mark(sic) similarity or resemblance to another in many geographical area and the possibility exists that an honest and prudent person may make a mistake in identifying another - that a mistake is no less a mistake if it is made honestly. ....."

We think that these bland statements fall well short of the caution expected to be expressed when dealing with the particular facts in the instant case. It should be borne in mind that only one witness identified the appellant prior to the hearing. The circumstances of that identification were at best dubious. The trial judge did not deal with the circumstances of that identification. In our view, it was a weakness which had to be addressed if he were to demonstrate that he was acting with the caution in mind. Did it amount to a contrived identification? Was it a confrontation? An inscrutable silence was maintained by the judge. We stated in R. v. Donaldson (supra) at p. 8:

> "It is the duty of this Court in its consideration of a summation of a judge sitting in the High Court Division of the Gun Court to determine whether the trial judge has fallen into error by applying some rule incorrectly or not applying the correct principle.
>
> If then the judge inscrutably maintains silence as to the principle or principles which he is applying to the facts before him, it becomes difficult if not impossible for the Court to categorize the summation as a reasoned one."

There were clearly a number of inconsistencies and discrepancies in the evidence between the Crown's witnesses. The trial judge was aware of them as he highlighted them at p. 112 as follows:

> "..... In this issue all three witnesses stated that they never knew any of those men before that night, all three gave a description but in giving those descriptions there have been a number of discrepancies and contradictions. In Garfield Williams' description the accused man is the one who had a guernsey and he was pulling it off and covering his nose and this guernsey pulled down in the rush. He said he could see from some 80 feet away, he described the accused man as medium built, his eyes were large, his eyelash long and he said there was a missing upper front tooth although he never told this to the police. Miss Manderson in describing this same man, the accused man, said he was the one who had a kerchief over his nose and that he was the one who raped her and the kerchief came off before he carried her out, he heard and it was the same man who took Miss Pam outside, he had black eyes, straight nose, not that tall and he thinks that he had a scar and his teeth were not too clean. This same man Miss Virtue says is the man who had the red blouse covering his face. It was he who raped her, he had full eyes, not too tall, not too short, dark complexion, stout body, he had on black guernsey and black pants. So while Mr. Williams is describing this man, the accused man, as the man with the guernsey, Miss Manderson says that he was the one with the kerchief. The other man Mr. Williams said it was the one that was wearing the kerchief and that kerchief never fell off, while Miss Virtue says this same accused was the one with the red blouse and the witness is saying that he had - that he had the black guernsey pulled up over his face and the other one had a red guernsey, the

> "other one had a kerchief, those are discrepancies that I have picked out and I am certain there are others. Can the discrepancies be reconciled? It is admitted that the incident took place almost exactly a year ago; it is expected that in incidents of this nature they are referring to - giving their account and there will be some variation as they affect the real issue of the case which is the identification, the visual identification of the accused man. The Court recognizes that more than one witness can be mistaken quite honestly as to the identity of a person who is alleged to have committed the offence - offences, I have looked at the discrepancies. I have looked at the demeanour of the witnesses as they testified, the witnesses for the Crown, especially the three witnesses who gave evidence as to the identification. Two of the witnesses stated that the accused man had a scarf across his face while a third witness says that he had a handkerchief, she didn't get the colour handkerchief."

Then he came to a conclusion which we find, to say the least, remarkable:

> "I find that these contradictions and the discrepancies do not affect the real issue of the case."

If these contradictions and discrepancies do not affect the real issue i.e. identification, we are at a loss to understand what they did affect. Seeing that they did not affect peripheral matters, his conclusion is necessarily, incorrect. He did not set out his reasons for that conclusion and so we were without the assistance they may have afforded.

It is to be noted as well that two of the witnesses made dock identifications. The trial judge has not shown that he appreciated the significance of such identification. He was content to say that from their demeanour he found that all three witnesses were witnesses of truth. The case rested substantially therefore on the uncorroborated evidence of Mr. Williams but we are unable to find where that was the trial judge's approach to the case.

There is another matter of significance which we must mention. Mr. Williams in the course of cross-examination in answer to the question:

> "What you noticed about his face? You noticed anything special about his face?"

replied: "The missing tooth."

This important identifying mark, which the witness recognized as such, was never vouchsafed by him to the police when the description of one of the intruders was being asked for. This was of crucial importance because it was apparent that the appellant did have a missing tooth. Significantly none of the witnesses adverted to it. Again, although the trial judge recites this evidence (as appears in an extract from the summation in this judgment) he made no comment in that regard. If the visual identification evidence were being treated with the requisite caution, it is quite impossible in our view, to dismiss such evidence without comment.

The description of an assailant with which the police may be provided by a witness, must play a critical part in determining the cogency of the evidence of identification. The judge is in truth concerned with honesty but that perception of the witness, cannot blind him to the important factor of the accuracy of the witness' testimony. It cannot be sufficient for a judge to utter the formula that an honest witness can be mistaken. It is essential as well to demonstrate plainly that the principle embodied therein is understood and is being applied to the facts and circumstances being adjudicated. That we regret to say, the trial judge failed to do.

For all these reasons which include matters not raised in the ground of appeal filed, we came to the conclusion that the appeal must be allowed.