JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CRIMINAL APPEAL NO. 7/92

BEFORE: THE HON. MR. JUSTICE ROWE, P.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA
VS.
CLARICE STEWART

Mrs. Priya Lawrence for the appellant

Bryan Sykes for the Crown

July 1 and 31, 1992

MORGAN, J.A.:

The appellant was convicted in the St. Andrew Resident Magistrate's Court, Half Way Tree before Her Honour Mrs. Norma McIntosh on the 8th January, 1991, on three counts.

On the first count she was charged with obtaining money - $400 - on September 27, 1990 from Marie Mullings by falsely pretending that "she could clear goods at the wharf for her, sent by her daughter"; on the second count that on September 27, 1990 she stole cash - $600 - "from the dwelling house of Marie Mullings knowing the same to have been stolen." The third count charged that on a day in September, 1990 she obtained $500 from Daisy Black by falsely pretending that "she could clear goods from the Airport sent by her son." On each count the appellant was found guilty and fined $2,000 or six months imprisonment. At the conclusion of the hearing we allowed the appeal, quashed the convictions and entered verdicts of acquittal. We now include our reasons for so doing.

Mrs. Marie Mullings, a woman seventy-five years old, lived alone at 1 Arawak Drive, Kingston. She is the mother of three adult children Valrie, Patsy and Colleen all residing in the United States of America. She alleged that at about 3:00 p.m. on September 27, 1990, the appellant, who she did not know before, attended at her house and engaged her in a conversation during which the appellant called all three daughters by name, thus giving the impression that she knew them well - that Patsy was her friend, she had seen her in Miami, and Patsy had given her a package to take to Jamaica for Mrs. Mullings. Mrs. Mullings said that the appellant asked her for a few hundred dollars to clear the package at the Airport. Mrs. Mullings said she believed the appellant and gave her $400 from an envelope which she then threw on her bed. The appellant, mumbling that she had to pay taxi-fare and customs fees, took from the envelope on the bed a further $600 and immediately left through the door walking hurriedly away. Mrs. Mullings felt helpless, she could not even shout for thief but she made a report to the Police at the Half Way Tree Police Station. The appellant, she said, never returned with the package or the money.

On October 31, 1990, approximately one month later, she identified the appellant as the person who defrauded her. It is the circumstances of this identification which gave rise to the determination of the appeal.

Mrs. Daisy Black, eighty years old, is the mother of a son named "Ken" who lives in New York. She was at home at Johnson Terrace, Rollington Town in September 1990 at about 1:00 p.m. when a woman whom she identified as the appellant arrived. She said that she was to discover later that she had previously met the appellant some three years before but she did not recognise her on this occasion as her features had changed. Mrs. Black said that on this last visit the appellant told her that Ken had sent a box of food for her and she wanted

money to clear it at the Airport. She gave the appellant $500 and in spite of her insistence she refused to give her more.

The defence was an alibi. The appellant denied she was the person who had visited the ladies and defrauded them. The issue, following the pattern of a multiplicity of cases before our Courts, was solely one of identification, and the learned Resident Magistrate in her findings of fact properly alerted herself to this fact.

It was successfully argued, however, by counsel, Mrs. Levers, on appeal that:

> "1. The learned Resident Magistrate misdirected herself and/or did not direct herself properly on the evidence as to identification in that:
>
> (a) she failed to properly address and or assess the material discrepancies and contradictions in the prosecution witness's evidence as to identification.
>
> (b) she failed to adequately appreciate the weakness in the quality of the evidence as to the circumstances in which the identification was made."

She referred to the Resident Magistrate's findings of fact at page 44 of the transcript:

> "I consider the circumstances under which Mrs. Mullings identified the accused on the 31st of October 1990, to be unsatisfactory. She attended at the Half Way Tree Court House as a result of newspaper reports and went into the court room where the accused was pointed out to her by a man. However, I find she was not influenced by those factors. I accept that she had seen and recognised the accused before the accused was pointed out to her and that she did so on the basis of the recollection of the accused."

and again at page 45:

> "The same circumstances in which Mrs. Black identified the accused was also unsatisfactory, she too also came to the Half Way Tree Court house as a consequence of reports read in local newspaper and saw the accused in the Number One Court room where the accused attended in answer to charges arising out of the reports. Other report similar in nature to the complainant's report. Both complainants clearly

> "knew when the accused was to have attended court. However, I accept that she was not unfairly assisted in her identification of the accused. She went into the court room before the accused did, she recognised the accused as soon as she entered the room and sat in the bench next to that one on which the complainant sat, not in the docks."

Counsel submitted that to hold that the complainants were not unduly influenced by these facts is not the true test. The true test is whether a dock identification or an identification parade was not prejudicial in anyway to the accused person and if it was not prejudicial could be supportive of the evidence given by the complainants as to identification. Further that the learned Resident Magistrate did not address her mind to whether it was prejudicial in fact, and has completely eroded the stringent rule and principles that govern identification in the manner in which she addressed it.

Identification evidence has, in recent years, become a special class of evidence because of the inherent risk of mistaken identification and magistrates sitting alone must therefore warn themselves of the need for caution in similar manner as a Judge sitting without a jury. See R. v. George Cameron (unreported) delivered 30th November, 1989. Further, having given the warning they must faithfully heed it. Matters relating to the strength and weakness of the identification evidence must be identified and dealt with as these go to the quality of the evidence and it is only if the quality is good and remains good at the close of the accused's case that the dangers of mistaken identification are eliminated so as to satisfy the standard of proof.

Mrs. Mullings had clearly come to the Court on that day because she had expected to see the appellant there and while there the appellant was pointed out to her by a Mr. Morris who was inside the Court room with her. It was not her own spontaneous recognition of the appellant. The entire action

indicated that she was assisted and unfairly aided in her identification. The unfair advantage gained by Mrs. Mullings became a serious weakness in the prosecution case.

The case of Mrs. Daisy Black was that she saw the report in a newspaper "The Enquirer", went to the police and made a report. The police sent her a telegram telling her to come on a certain date but she did not see the appellant then until she journeyed to Half Way Tree Court to see her and pointed her out to a Detective Clarke. This pointing out was not in the presence or hearing of the appellant.

Again the evidence of identification was weak in that what occurred was a seeming confrontation with the suspect.

In R. v. Gilbert (1964) 8 J.L.R. the appellant was taken into custody and left alone in a room at a police station in a position where he could be seen by the victim as he was entering the room. Lewis, J.A. said:

> "The Court feels strongly that this method of identification is a most improper one."

He continued:

> "Where it appears as it must have appeared clearly in this case that the evidence against the suspected person is going to depend to a great extent upon identification, there is a distinct duty upon the police to take every care to see that the witness who is going to identify that person is not brought into proximity with him before the identification parade is held."

In this matter the case rested solely on the identification of the two witnesses. The quality of the evidence pointing to the circumstances in which the identification came to be made in each case was poor and at the close of the prosecution's case the identification was unsatisfactory.

It was Lord Widgery, C.J. who enunciated that when in the judgment of the trial judge the identifying evidence is poor the judge should withdraw the case and direct an acquittal

unless there was other evidence to support the correctness of the identification. See **R. v. Turnbull** (1976) 3 All E.R. 549.

Crown Counsel conceded that he was unable to support the convictions, and in particular that Count II could not stand.

Indeed, the particulars of offence on that count state an offence not known in law. Magistrates should make it their duty to examine Indictments and or listen carefully to statements and particulars of offence when accused persons are pleaded to avoid such error as was contained in the second count.

For these reasons we allowed the appeal.