JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 146/90

COR: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA VS. DEVON WILLIAMS

Delroy Chuck for appellant

Miss Diana Harrison, Deputy Director of Public Prosecutions for Crown

9th & 23rd March, 1992

CAREY, J.A.

This appeal comes before the Court by leave of the single judge who certified that the learned trial judge had given no indication in his summation that he had warned himself of the dangers of acting on uncorroborated identification evidence as required.

The appellant was convicted in the High Court Division of the Gun Court held in Kingston on 23rd October, 1990 before Reid, J., sitting alone, on charges of illegal possession of firearm and three counts of robbery with aggravation. The short facts against this appellant were that he and another man on the afternoon of the 29th July, 1989 at about 3:45 p.m. entered the house of Mr. and Mrs. Neville Chen See and robbed them and their son Nigel of money and some jewellery. The appellant whom the victims had never seen before that incident, was armed with a firearm, while his colleague was furnished with a knife. The appellant was pointed out by all the victims at an identification parade held on 4th July, 1990.

Mr. Chuck argued the solitary ground filed with his usual economy and clarity. That ground was in these terms:

> "1. That the learned trial judge failed to warn himself of the dangers inherent in the issue of identification; and nothing can be inferred from his summing up that he was aware of the need for the warning."

He relied on dicta in R. v. Carroll (unreported) C.A. 39/89 delivered 25th June, 1990 where at p. 14 Rowe, P., asserted:

> " We hold, that given the development of the law on visual identification evidence since the decision in R. v. Dacres (supra) in 1980, judges sitting alone in the High Court Division of the Gun Court, when faced with an issue of visual identification must expressly warn themselves in the fullest form of the dangers of acting upon uncorroborated evidence of visual identification. In this respect we hold, that there should be no difference in trial by judge and jury and trial by judge alone."

We called counsel's attention to R. v. Alex Simpson; R. v. McKenzie Powell (unreported) C.A. 151/89 & 71/89 delivered 5th February, 1992 where R. v. Carroll (supra) was considered. Mr. Chuck maintained that the learned trial judge did not follow the guidelines laid down in R. v. Carroll (supra) nor did he clearly reveal his mind as is required by R. v. Simpson; R. v. Powell (supra).

Miss Harrison contended on the other hand, that the learned trial judge had demonstrated that he was acting with the required formulations in mind. He had stated the reason for the warning and therefore impliedly warned himself and had obliquely at another point in his summation shown that he was aware of the caution necessary. She cited R. v. Palmer (unreported) Privy Council Appeal 44/90 delivered 3rd February, 1992.

The approach of this Court in its consideration of appeals from the Gun Court (High Court Division) has undergone a marked shift since 1980. We have moved from the laissez faire of R. v. Dacres [1980] 33 W.I.R. 241 in which the Court was prepared to make assumptions that a judge sitting alone had properly directed himself and applied correctly the principles applicable to the facts before him. At that time, identification evidence had not been elevated into a special genre of evidence. We did not then think that the failure of a judge to warn himself as to the dangers inherent in identification evidence led inevitably to an appeal being allowed. In 1988 in R. v. Donaldson (unreported) S.C.C.A. Nos. 70 72 & 73/86 delivered 14th July, 1988 we required a judge to give a reasoned judgment. We decried inscrutable silence on the part of a judge regarding the manner in which he had arrived at his verdict. In 1989, we refined our approach - see R. v. Cameron (unreported) S.C.C.A. 77/88 delivered 30th November, 1989 - the judge must demonstrate in language that does not require to be construed that in coming to a conclusion of guilt he has acted with the requisite caution in mind. Then in 1990 R. v. Carroll (supra), the court took the view that the judge must warn himself in the fullest form of the dangers of acting on uncorroborated evidence of visual identification. That case has been explained and harmonized with R. v. Cameron (supra) in R. v. Simpson and R. v. Powell (supra). We said this:

> " The extract from these two cases emphasize that the trial judge sitting without a jury must demonstrate in language that does not require to be construed that he has acted with the requisite caution in mind and that he has heeded his own warning. However, no particular form of words need be used. What is necessary is that the judge's mind upon the matter be clearly revealed."

This Court will not interfere if the language used by the judge demonstrates beyond a peradventure that he is not only cognizant of the need for caution, but he has applied that caution to the particular facts and circumstances before him. There must be no question but that the judge's mind is clearly revealed. In this, we have avoided laying down inflexible rules and ensured in this regard, that judges are free to express themselves in language that does not require to be construed.

All that remains then, is to apply the law as we have endeavoured to state it, to the circumstances of this case. The trial judge did not adopt the safe course articulated by us in R. v. Carroll (supra); he did not expressly warn himself in the fullest form of the risks inherent in identification evidence. This is how he expressed himself at p. 92:

> "I would have to be satisfied that the witnesses did have an opportunity to see him clearly, have a good view of him and that lasting impression that made them identify him a year later was one that I can safely rely upon and act upon. So, I have to consider whether they are making a mistake, although they appear to be honest witnesses."

and at p. 93:

> "...but what evidence is before me leads me absolutely no doubt as to the opportunity for identification and that the witnesses saw very clearly that it was the accused."

If a judge were directing a jury, he would be obliged to alert them (inter alia) to the reason for the cautionary approach to identification evidence. Where a judge in his summing up mentions the fact of mistake, we are inclined to think that he is heeding the warning of danger, albeit not expressed. Further where he speaks to the honesty of the witness, we think that he is alerted to the fact that the honest witness equally can be mistaken, but more importantly, can be convincing. He is saying impliedly

that he is aware that he must not confuse honesty with accuracy. Finally, we are of opinion that the use of the words "safely rely and act upon," demonstrate that he is aware of the dangers and concluded that despite the caveat, he can find adversely against the appellant. This exercise which we have undertaken is not intended to construe the judge's language but to demonstrate that he has clearly revealed his mind in the sense that he has acted with the requisite caution in mind and has heeded his own warning.

For these reasons, we reject the appellant's arguments. The appeal must therefore be dismissed, the conviction and sentence affirmed. The sentence will run from 23rd January, 1991.