JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 74 & 88/90

BEFORE: THE HON. MR. JUSTICE CAREY, PRESIDENT (AG.)
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A. (AG.)

REGINA VS. ERROL GORDON
ALBERT HALL

Application for leave to appeal
Miss Marcia Hughes for the Crown

29th July, 1991

BINGHAM, J.A. (AG.)

In the High Court Division of the Gun Court, held in Montego Bay, St. James before Courtney Orr, J. sitting alone on 11th May, 1990 the applicants were convicted of illegal possession of a firearm (count 1) and robbery with aggravation (counts 2 & 3) and they were sentenced as follows:-

> Errol Gordon, eighteen years at hard labour on each count;
>
> Albert Hall, nine years at hard labour on each count.

The sentences were made to run concurrently.

In relation to the applicant Hall he showed some degree of repentance by going of his own volition to the Montego Bay Police Station shortly following the incident on 13th June, 1988, and acknowledging the role he undertook in commission of the crimes. He admitted being the driver of the car in which the gunman and the other participants went to the scene of the crime at Paradise Acres and afterwards away from the scene following the incident.

The learned trial judge in his summing up expressed the view that Hall ought to have pleaded guilty but took his subsequent conduct into consideration; a fact which is reflected in the sentence that he received.

The evidence against Gordon, as in the vast majority of cases of this nature, turned on the issue of visual identification in circumstances where the hold-up and robberies were effected at night (9:30 p.m.). The assailants were not known to the two complainants prior to the commission of the offences.

The learned trial judge reminded himself of the necessity to approach the evidence with caution and of the dangers inherent in the visual identification by the victims of their assailants, particularly in difficult circumstances as well as the possibility for them to be mistaken. He found nevertheless that there was sufficient opportunity available for both complainants to see and recognize Gordon as being the gunman who carried out the hold-up and that given the short time span of seven days between the incident and subsequent identification at the Montego Bay Police Station that this identification was close enough in time to allow for both complainants to make a positive identification of him.

The crucial issue, however, was the question that, given the circumstances prevailing at the Montego Bay Police Station on 20th June when Gordon was identified by the two complainants, and the fact that they did not know him before the night of the incident, whether this was a case of identification by confrontation or not.

The account of the two complainants and that of Detective Corporal Edmondson, the investigating officer, was that this subsequent identification occurred in circumstances in which the two complainants had been summoned to attend an identification parade which was arranged for that day. While they were seated in the C.I.B. room the applicant Gordon had been taken into custody by some policemen from the Mount Salem area. He was then taken into the C.I.B. room for processing, and both complainants upon seeing him as he entered the room spontaneously pointed him out as being the gunman who held them up and relieved them of their money.

The applicant in his defence related an incident in which he was confronted with the two complainants at the Montego Bay Police Station who were told in his presence and hearing by Detective Sergeant Morant that "see the bwoy deh what rob unoo." To this statement the female complainant replied "I don't know him." The male complainant said "is not him." Despite this as well as a statement made by one Detective Inspector Hart that "he did not fit the description of the man who the police were in search of," he was arrested and charged for the offences.

The learned trial judge having seen and heard the witnesses as well as the unsworn statement of Gordon touching on this question of confrontation, accepted the evidence of the two complainants and that of Detective Edmondson, the investigating officer, that he had nothing to do with the taking into custody of the applicant Gordon. That he did not know Gordon before seeing him at the station on 20th June, 1988. That Gordon was brought to the police station, based upon his description which had been circulated to the Montego Bay Police, by policemen from Mount Salem Police Station.

In this regard, the situation with which the Court was concerned in this case differed from that in **Errol Haughton and Henry Ricketts v. R.** (unreported) C.A. 122 & 123/80 dated 27th May, 1982. In that case, the complainant was taken to a police station at which the suspect was detained and seated at a convenient point to allow for him to be confronted by the complainant. The suspect held his head down to conceal his facial features whereupon the investigating officer raised up his head and asked the complainant "whether he knew him?" The complainant replied "this is the man who had the gun in my house." There this Court allowing the appeal and following **R. v. Hassock** 15 J.L.R. 135 sought to lay down guidelines to be followed by a trial court in cases where this issue arose. In

In R. v. Haughton and Ricketts (supra) this Court said (pp. 7 & 8):-

> " Where a criminal case rests on the visual identification of an accused by witnesses, their evidence should be viewed with caution and this is especially so, where there is no evidence of prior knowledge of the accused before the incident. Where an identification parade is held as is the case where there is no prior knowledge of the accused, the conduct of the police should be scrutinized to ensure that the witness has independently identified the accused on the parade. Where no identification parade is held because in the circumstances that came about, none was possible, again the evidence should be viewed with caution to ensure that the confrontation is not a deliberate attempt by the police to facilitate easy identification by a witness. It will always be a question of fact for the jury or the judge where he sits alone, to consider carefully all the circumstances of identification to see that there was no unfairness and that the identification was obtained without prompting. In a word, the identification must be independent."

We are of the view that in this case the learned trial judge correctly applied his mind to such evidence as was presented on this issue and came to the conclusion that the witnesses for the Crown were credible and reliable in arriving at verdicts adverse to the applicant Gordon.

It was for these reasons that the applications were refused. The sentences will, however, commence as from 11th August, 1990.