J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 77/88

BEFORE: THE HON. MR. JUSTICE ROWE, P.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (Ag)

R. v. GEORGE CAMERON

Applicant unrepresented

Miss Carol Reid for the Crown

July 25 and November 30, 1989

WRIGHT, J.A.

On July 25 we treated the hearing of this application for leave to appeal against conviction and sentence in the High Court Division of the Gun Court as the hearing of the appeal. We allowed the appeal, quashed the conviction, set aside the sentence and entered a verdict of acquittal. Here, then, are the reasons which we promised to put in writing. And by way of focussing attention on a matter that has assumed tremendous importance, it is appropriate to note at this point that this is another case which has foundered on the issue of identification. It is significant to observe, also, that the crisis in the evidence was not created by any astute cross-examination. It arose very early in the evidence-in-chief of the two eye-witnesses for the prosecution, Senior Superintendent Isadore Hibbert and his wife Sybil, a journalist.

Along with their two grand-children who were asleep on the back seat of the car, the witnesses arrived at their home in St. Catherine about 1:05 a.m. on April 12, 1987 to find their dogs disturbed - they were growling.

Having been thus alerted, the Superintendent alighted with gun in hand and, followed by his wife, he went to the front door of the house and opened the grill door. Both returned to the car - he to awaken the children and she to fetch her handbag. He opened the back door and as he bent towards the children - his gun having by then been put back in his waist - he heard a voice say "don't move." According to him, he immediately looked behind him and saw two men standing by the gate pillar each armed with guns which were pointed in his direction and at that moment he heard two explosions in quick succession. He felt something brush his hair and he thought he had been shot. Said he -

> "I threw myself down on the ground and immediately took up cover behind an old motor car."

While in that position he heard two more explosions, his wife bawling "murder, police, help" and a voice saying "what we must do now?" Another voice counselled "Shoot the woman and go tek the gun off the man." It had obviously been concluded that the Superintendent was dead. Superintendent Hibbert said he then saw one of the men by the gate fire two shots in the direction of his wife who was then standing by the front door of the house. At that moment he heard footsteps approaching him. He looked and recognised the approaching person who was then about six feet away to be the appellant George Cameron whom he had known for about eight months, during which time he said he had seen him on at least ten occasions. The Superintendent said he jumped up and fired one shot at the approaching person and one at the man who had fired at his wife. Both men ran, and so did a third, across an open lot in front of his premises and as they ran he observed others running too. Certain relevant facts from his evidence are -

1. The premises were well lit with four 75 watt bulbs and a 100 watt bulb on the drive-way.

2. He saw Cameron's face for about 50-60 seconds.

3. The old car behind which he took cover was 3-4 feet from the wall.

4. When he saw Cameron the latter was 8-9 feet from the old car.

5. From the wall to the house was 15-16 yards.

6. When Cameron turned and ran he Cameron was about 3-4 feet from the wall.

7. To his knowledge there was no point in time when his wife was closer to the assailants than he was.

On April 17, 1987 the witness came upon the appellant Cameron along the Sligoville Road and took him into custody.

Provided that the required warning was given regarding the dangers attaching to visual identification, which was here a live issue, a conviction based on that evidence would have been difficult to challenge. But that was not the only evidence.

Enter Mrs. Hibbert and her version. Picking up the narrative from the point where she returned to the car with her husband who began calling to the sleeping children, she said -

> "Just as he was in the act of doing that I went into the car, to the front, the passenger side, and took up my handbag and jacket which were lying on the front seat. I turned (demonstration) and I made one step and as I did that I heard "Don't move." I froze. Then I turned and I looked to my left and in one sweeping glance I saw these seven men lined out against the wall by my premises. .....
>
> I saw my busband in a semi-crouched position, he was sort of trying to get up and he was just like that, as if ..... his hand went back like that but he was still in that semi-crouched position, and just when I looked at

> all of them and at him in that sweeping glance I heard three shots."

Her husband cried out "Lord God" and fell to the ground. She ran to the door and screamed then called to the children to try and run to her. She continued -

> "By this time I thought my husband was dead. I didn't see him. I heard no movement so I continued screaming and looking at the men. They were jumping up and down the wall with the guns and up and down the wall up and down the wall.
>
> .....
>
> I heard a voice say 'whey de man deh, whey de man deh? I heard another voice say "Go tek" 'de gun offa de man.' All this time I was looking at the men moving up and down, moving up and down. I saw George Cameron. He jumped on the wall next to Calvin Barrett. There is an old car parked near to the column where the blocks were and he jumped on top of the car."

Her evidence then shifted to another accused identified as "Perrier." She testified that one man said "Kill the woman" and then ....

> "he (Perrier) left the column and started moving towards me. And as he started moving towards me I heard two shots. About that time Mr. Hibbert jumped up from beside the car and he fired two quick shots, at one Cameron and one at the man in the green shirt (Perrier)."
>
> "Q. Where was Cameron when your husband fired at him?
>
> A. He was on the wall and on the car."

She too had known Cameron for about eight months and had observed him for a total of about eight months and had observed him for a total of about five minutes that night during which time she saw his face.

No cross-examination was necessary to create an identification crisis for the prosecution. It was there - all home-grown. But cross-examination did aggravate the situation because it extracted from the witness that the sweeping glance was a five second glance during which she

ascertained that there were seven men and that each had a long gun. The distance from her to the old car atop which Cameron stood was some ten yards and that was the closest he came to her that night. She was in no doubt that she saw him that night. Reacting to a suggestion that she was not speaking the truth, she said - "That could not be a serious suggestion." Further pressed she obliged "I saw him and I cannot forget that I saw him ..... I am here to give evidence that I saw him because I saw him."

On the critical issue of identification, it is patent that the testimonies of these two witnesses are irreconcilable - one or the other or both must be mistaken. It is apparent from the sequence of events as related by Mrs. Hibbert that her husband fell beside the car from which he was about to take the children while he is positive that he took cover behind the old car. What is significant is that from her evidence, Cameron was never on the ground in her premises but was "on the wall and on the old car", the very car behind which her husband was hiding when he shot at Cameron who was approaching him, presumably to take his gun as it then appeared from his shouts and subsequent silence that he was dead.

A no-case submission suggested itself but no one took the cue - not Crown Counsel who, as a Minister of Justice, has such a responsibility to the Court, not defence counsel who should have been happy to do so nor indeed by the learned trial judge who could, suo motu, have raised the issue for Crown Counsel to answer.

The learned trial judge's summation was brief. In two pages (Panton) J. dealt with 122 pages of evidence involving three accused, each of whom made identification a live issue. The learned trial judge readily

appreciated the real issue to be identification. Said he, at the very beginning of his summation:

> "The essential issue for determination in this matter is the identification of the accused."

Then after referring to the demeanour of the witnesses he continued:

> "Foremost in my mind also is the evidence as to lighting and the distance of each accused from both witnesses during the incident. I take into consideration the evidence relating to the behaviour of the men during the incident and the evidence as to the conduct of the identification parade. I find that Mrs. Hibbert witnessed the entire incident whereas her husband saw only a part. Specifically so because for some moments Mr. Hibbert was on the ground having, as he said, taken cover after the shooting had begun.
>
> There is no doubt in my mind on the evidence that I have heard that both witnesses Mr. & Mrs. Hibbert knew the accused Cameron before the incident and that they are speaking the truth and are not mistaken when they say they saw him with a firearm participating in the shooting that night, no doubt whatsoever in my mind on that."

It only remains to be said that the learned trial judge came to his conclusion without indicating that he had considered the dangers inherent in visual identification evidence. Decisions of this Court and of the Privy Council emphasize the requirement for such a warning and of the consequences attendant upon its absence. See R.v. Whylie 15 J.L.R. 163; R. v. Bradley Graham and Randy Lewis S.C.C.A 159/81 dated June 26, 1986 (Unreported). The great pity is that there continues to be default in this regard despite the very clear pronouncement of the law by Rowe, P., in Graham & Lewis where he stated at page 18 thus:

> "It is not within the discretion of the trial judge to determine whether or not he will give a general warning on the dangers of visual identification, and to elaborate and illustrate

> the reasons for such a warning. That is the starting point from which he ought not to swerve."

And indeed, had the learned trial judge demonstrated that he had addressed his mind to this requirement, it seems inevitable that he would have been confronted by irreconcilable difficulties which were not lurking but were very obvious. But the effort to give the evidence of Mrs.Hibbert pre-eminence over her husband's does not come near meeting the requirement nor resolving the difficulty. Of note in this regard is that he acquitted one accused who had been positively identified by Mrs. Hibbert because he obviously was not persuaded by her evidence to convict. From the evidence of Mrs. Hibbert, the person in the position where Superintendent Hibbert said he saw Cameron approaching him and at whom he fired would be Perrier. Furthermore, Superintendent Hibbert does not mention seeing anyone atop the old car where his wife said Cameron was at the time when she saw her husband fired at him.

The difficulty which has arisen over visual identification evidence which has grown significantly in importance, must be faced squarely. Such evidence, in jury trials, has been accorded the specialized status similar to accomplice evidence, evidence in rape cases and evidence of children of tender age. The absence of a warning when dealing with such cases is fatal to the upholding of a resultant conviction. The requirement in such cases can be taken as well settled: See Privy Council Appeals Nos. 14, 15, 16 of 1988 and 7/1989 dated 27th July, 1989 Junior Reid and Others v. R.

However, we are not here dealing with a jury trial but with the trial of a serious charge by a Judge sitting alone.

The importance of visual identification evidence in such a case is not diminished because of the forum and the immediate concern is to determine what is required of the Judge in such a situation.

In R. v. Clifford Donaldson and Others S.C.C.A. Nos. 70, 72, 73/86 delivered 14th July, 1988 (unreported) this Court had to consider what was required of a Judge sitting in the High Court Division of the Gun Court trying a rape case in which there was no corroboration. Carey J.A. in delivering the judgment of the Court dealt thus with the question at page 10 et seq:

> "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."

He then went on to state that whether the trial of such a case was conducted in the Circuit Court or in the High Court Division of the Gun Court the required warning must be given.

The relevance of this decision to present considerations is that it states emphatically that where the judge sits alone he is required to deal with the case in the manner established for dealing with such a case though he is not fettered as to the manner in which he demonstrates his awareness of the requirement. What is impermissible is inscrutable silence. What is of critical importance here is not so much the judge's knowledge of the law but his application. Even if there is a presumption in his favour regarding the former there is none as to the latter.

He 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. Such a practice is clearly in favour of consistency because the judge will then be less likely to lapse into the error of omission whether he sits with a jury or alone.

In conclusion we must state that the evidence as to identification is unreliable and this is compounded by the unfortunate manner in which it was treated by the learned trial judge. For these reasons we were confident that the conviction could not stand nor would the interests of justice be served by ordering a re-trial.