JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 46 & 47/89

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

REGINA
vs.
GEORGE WEIR
MICHAEL KENTON

A. J. Nicholson for appellants

Kent Pantry, Deputy Director of Public Prosecutions, for Crown

May 14 & 15 and September 24, 1990

MORGAN, J.A.:

These appeals came before us by leave of the single judge.

On the 10th, 13th and 16th March, 1989, these appellants stood their trial in the Gun Court and were convicted and sentenced on an indictment containing three counts; count 1 of which charged them with illegal possession of firearm; count 2 shooting with intent and count 3 robbery with aggravation.

Both appellants were represented on the record by counsel on a private retainer. When the trial began, it was the tenth trial date set and on all dates, but one, the prosecution witnesses had been in attendance. On this day, defence counsel was not present, he was out of the jurisdiction to return that day. Crown Counsel carefully

related the details to the learned trial judge, who, in our view, properly ordered the trial to proceed. Copies of the statements and the indictment had been handed to the appellants but in the belief, no doubt, that counsel would attend, the trial judge elicited no information as to their witnesses, if any, from the appellants at that stage. The case proceeded in the absence of their counsel.

Mr. Keith Garrison, the victim, gave evidence. He was a mini-cinema operator and was walking in a lane in the district of Yallahs, St. Thomas, on his way home at about 1:40 a.m. on the 9th April, 1988. His bicycle was held in his right hand and he had a bag over his right shoulder. While walking he heard a sound and looking back he saw two men approaching about a chain behind him. One of the men walked quickly passing him and then across his path, held him in his waist, pointed a gun at him and told him to keep quiet. But Mr. Garrison did not obey. He responded and the gunman fired hitting him on his left thumb and side. This incident lasted about five minutes.

The second man, who had been standing about five yards behind Mr. Garrison, came up and held on to the bag. A struggle ensued between them for five seconds; the man got hold of the bag and both men ran away - down the lane. In the bag were some video cassettes, money six thousand dollars ($6,000) and other small items.

At the time of the first incident, Mr. Garrison's face was turned towards a floodlight, which shone from the front of his house, about 1½ chains away on the lane. He said he saw "the whole of him (i.e. the appellant Weir's) face, right side". It is apparent that if the first man crossed his path, what he saw was an entire side view of him. As to the second man, he said that the light shone

in his face and he recognised him as they struggled for five seconds. Mr. Garrison, however, later attended an identification parade and purported to identify both appellants.

The appellant Weir gave sworn evidence in the nature of an alibi and was cross-examined. He was a security guard working with Expol Security Limited at West Avenue, Kingston. On the early morning of the incident he was working at the Island Medical Stores at 17 Bell Road, Kingston, from 4:00 p.m. on Friday 8th April to 6:00 a.m. Saturday 9th April and had been posted there by the company. A co-worker, Donald Hinds, was with him and he was checked at 10:30 p.m. and again at 4:00 a.m. by his supervisor, Neville Watson. The records of his duty, he said, were with the company and would establish his alibi. He wished to call both gentlemen as witnesses one of whom, Donald Hinds, had attended on several previous occasions. Fruitless efforts were made by the police over the week-end adjournment to locate these witnesses and on the resumption, another counsel, who appeared for the appellants, closed his case to the apparent surprise of the judge.

The appellant Kenton then gave sworn evidence which also amounted to an alibi as he was at a "nine night" celebration at his sister's home from 3:00 p.m. till 7:00 a.m. about half a mile away.

Before us, Mr. Nicholson was granted leave to argue the following supplemental ground of appeal:-

> "That the learned trial judge failed to properly analyse and to attach due significance to all the material weaknesses in the evidence of identification of the appellants.

This he fully developed before us.

We note that the evidence showed that the victim

knew the appellant Weir as well as his parents; that at the time of the incident, the mother of Weir was working with him as a domestic helper. Curiously, he did not bring these facts to the attention of the police either when they visited on the same day and took his first report at the hospital or a week later when he gave them a written report. Neither did he inform the mother of the appellant that her son had robbed and shot him. What description, if any, he gave to the police was not disclosed. As stated above, Weir was not then represented by Counsel and the learned trial judge failed to give him the much-needed assistance he required in this area.

The evidence also showed that the uncle of the accused Kenton was a neighbour and relative of Mr. Garrison and that Mr. Garrison knew the appellant Kenton, who visited this uncle. This also was not told to the police. It emerged that all that was told to the police was that the appellants were known to him as they had been visitors to his cinema where he collected from all patrons under a bright light and they had been there on three to four occasions.

The critical point from the defence perspective was the fact, which was not disputed, that the appellants were well known to Mr. Garrison and he to them. The significance of this knowledge appears to have escaped the trial judge. In his summing-up at page 101 he said:

> "The accused men both said in evidence that Mr. Garrison knew them before and knew them well. The accused man George Weir says that Mr. Garrison would sometimes call him by a name, the name 'Lindon' which he said is the name of his father. He would refer to him as 'Lindon' and that he knew him well. And as far as the other accused man is concerned, he said that there is some

> "blood relation between himself and Mr. Garrison through his the accused man's father side. Not only does he live near to Mr. Garrison, but he would visit premises adjoining Mr. Garrison's premises. So both were well-known to each other. There is, therefore, undisputed evidence that both accused men were known to Mr. Garrison. So I must still bear in mind that mistakes may be made in identification where the complainant knew his assailants before the incident." (Emphasis supplied)

Indeed, the learned trial judge used the fact that they were known to strengthen the identification evidence whereas it was a weakness and ought to have been so considered by the trial judge as it gave rise to the fact that, if indeed the victim had recognised the appellants, he would not have withheld such vital information from the police.

Mr. Nicholson also submitted that: having regard to the quality of the evidence of identification upon which alone the prosecution sought to establish the appellants' guilt at the closure of the prosecution case, the learned trial judge erred in calling on the appellants to state a defence.

It is correct that the appellant Weir came from behind, quickly past Garrison crossways, and then he saw the right side of his face - aided by a light 1½ chains away which shone in his, Mr. Garrison's, face. As to Kenton, he was seen for five seconds during the struggle. The learned trial judge referred to this as a "short time span". This, however, is a classic "fleeting glance" case and plainly a weakness, but the judge did not view it in that way. Mr. Pantry has properly conceded that he could not support the conviction on this point.

In R. v. Junior Reid et al Privy Council Appeal

(unreported) delivered 27th July, 1989, at page 8 their Lordships, after affirming that the case of R. v. Turnbull (1977) 1 Q.B. 224 was applicable to Jamaica, referred to the judgment of Lord Widgery, C.J. in that case thus:

> "Their Lordships have no doubt that the direction of Lord Widgery C.J. that 'when in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the judge should then withdraw the case from the jury and direct an acquittal, unless there is other evidence which goes to support the correctness of the identification', applies with full force and effect to criminal proceedings in Jamaica."

If the judge were sitting with a jury then he would be obliged to withdraw the case from the jury. This could be described as a "weak case". We, therefore, agree with Mr. Nicholson that the learned trial judge should not have called upon the appellants for their defence.

Another area of challenge which we think to be well-founded, related to the trial judge's failure to apply the guidelines as set out in R. v. Whylie (1977) 25 W.I.R. 430. It is true that the learned trial judge clearly had in his mind the principles to be applied in identification evidence as set out in that case, as he said this at page 100 of the transcript:

> "As I have said, the central issue is the issue of identification. In fact it is the real issue in the case. It is the live issue. This is a case where the case against both accused men depends wholly on the correctness of the identification of the accused men, which the Defence alleges to be mistaken. I warn myself of the special

> "need for caution before convicting in reliance on the correctness of the identification and I am quite aware that the reason for this is that it is quite possible for an honest witness, and I find that Mr. Garrison is an honest witness, a truthful witness, to make a mistaken identification and indeed notorious miscarriages of justice have occurred as a result. A mistaken witness, I remind myself, can be a convincing one ....."

and again at page 101:

> "I remind myself that where identification involves recognition as is the case here, I remind myself that mistakes in recognition even of close friends and relatives are sometimes made."

The learned trial judge referred to Mr. Garrison as "an honest witness, a truthful witness". He found: "Mr. Garrison is not only a truthful witness but a reliable witness". This witness made a good impression on the judge. The result was that, although he recited the principles correctly, as above, he failed to apply them in dealing with the particular factors in the identification evidence which should have been identified as weaknesses.

There remains one other matter which relates to the trial judge's duty to assist unrepresented defendants. The single judge did grant leave on this aspect of the matter but he was concerned with the failure of the trial judge to assist the appellants to obtain their witnesses. In our view, however, we are of the opinion that the trial judge could not be faulted on this basis because the appellants were represented by the time they came to make their defence and it was their Counsel's decision not to call any witnesses. We wish to state, however, that when a judge proposes to proceed with a trial in the absence of Counsel, he should enquire whether the defendant has

witnesses whom he wishes to call and, if so, issue appropriate instructions to ensure their attendance. In the present case the trial judge, in our view, did not give the appellants any assistance as we think he should have done in the conduct of their case. Some accused persons may well assume that it is sufficient to await their turn to give evidence, at which time any explanation they have to offer may be made. A judge should, therefore, try to identify the substance of the defence while the Crown witnesses are being cross-examined and give such assistance as is necessary. This is particularly important in identification cases. As an example, the description which a witness gives to the police of an assailant is always important. Even if it is being said that the defendant is known, the period of knowledge, the frequency with which they come in contact with the other is important and he should also suggest areas of the evidence which should be probed. Justice is not done when a Judge, in such cases, allows matters to remain unexplained - matters which would assist him in assessing and arriving at a correct determination of the issue.

For these reasons the appeals were allowed, the convictions quashed and verdicts of acquittal entered.