JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 23/88

BEFORE: The Hon. Mr. Justice Carey, P (Ag.)
The Hon. Mr. Justice Wright, J.A.
The Hon. Mr. Justice Gordon, J.A.(Ag.)

REGINA

v.

GLENFORD SOMERS

Application for leave to appeal

Hugh Wildman for Crown

October 2, 1989

CAREY, P. (AG.)

In the High Court Division of the Gun Court held on the 21st of November 1988, before Clarke J., this applicant was convicted on an indictment which charged him with the offences of illegal possession of firearm and robbery with aggravation. He was sentenced to concurrent terms of ten years imprisonment at hard labour and he now applies for leave to appeal that conviction and sentence.

The short facts in the case are that on the 4th of May, 1988 at about 11:00 p.m. the victim of this offence, Mr. Ralph McKenzie, was in bed when he was awakened by an explosion in his bedroom and felt a burning sensation to the left side of his head which must have startled him no end. His wife spoke to him and the next thing he was aware of was a voice saying: "Sh-sh-sh, i.e. be silent, whereupon he realized that there was a man in the room pointing a gun at him. He was ordered not to get out of bed and in the event he was robbed

of money about $500.00 and also about seven bags of cigarettes which he had in that room.

This brazen intruder when he was making his exit quoted scriptures reminding his victim that "he that keepeth his tongue, keepeth his life." With those words of wisdom, he made off.

The victim did not know the applicant before but had some forty-five minutes or so to make him out. He said he was able to do because there was light which shone in the room from a kerosene lamp, it seems, which was in the hall and the bean of which shone into the room. Although the lighting would not have been of the best, the proximity would be a factor in enabling him to discern his assailant and the time which the man spent in the room ransacking it and questioning him, were other relevant factors in assessing the quality of the evidence.

The defence, as is customary in these cases, was a denial of the charge and essentially he was saying that the reason why the victim was able to identify him at the parade, which took place on the 14th of June, was that the victim had a sight of him prior to the holding of the parade. This was strenuously refuted by the police officer who gave evidence.

This case was of course, a question of fact for the learned trial judge who gave the matter his very best consideration. As we said, there was cogent evidence on which he could rely and the learned trial judge was very aware of the principles which this court had enunciated in the case of Whylie 15 J.L.R. 163 because he said this at page 34 of the record:

> "..... this is a case that turns on the question of the correctness or otherwise of identification, visual identification. I must warn myself and I do so now of the need for caution before convicting in reliance on the correctness of identification purported to have been made by Mr. McKenzie and I remind myself that the reason for this is that it is quite possible for an honest witness to make a mistake, a mistaken identification and indeed notorious miscarriage of justice have occurred as a result a mistaken witness can be a convincing one and even a number of apparently convincing witnesses can all be the same, so I take note of all that. What I must do and I have proceeded to do is to examine fully the circumstances in which that identification was made and to remind myself of any particular weaknesses in the identification evidence."

Thereafter the learned trial judge subjected the evidence of identification to his very careful scrutiny. He dealt with the question of the opportunity of viewing the assailant, the quality and nature of the lighting in the area in the room, the size of the bedroom and the proximity of assailant and victim and the like. He also noted that the applicant was pointed out in a matter of five to six weeks after the offence. As he said:

> "Mr. Kenzie pointed out this accused man some five to six weeks after he saw the accused in his bedroom and on the identification parade he positively pointed him out."

Then he continued:

> "It is clear that the features of the accused were so imprinted in the mind of Mr. McKenzie that he was able to positively identify the accused man on the identification parade."

He also adverted to the point made by the applicant as to the possibility of being seen prior to the parade and he discounted that.

In our view the approach of the learned trial judge was eminently correct. He dealt with all the issues which fairly arose on the matter. He did so correctly and adequately and we can see no reason therefore to fault that approach or interfere with the verdict at which he arrived.

In so far as the sentences imposed are concerned, we think that they are justified by the circumstances of the case. Accordingly the application for leave to appeal is refused and the court directs the sentence to commence on the 21st of February, 1989.