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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 238/88

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

REGINA

VS.

HORACE CAMERON

Delroy Chuck for Appellant

Samuel Bulgin for Crown

October 9 and 23, 1989

CAREY P. (AG.):

On 2nd December 1988, this appellant was convicted in the Portland Circuit Court before Harrison J. and a jury of the offence of Burglary and Larceny, and sentenced to eight years imprisonment at hard labour. On the 12th July last, another Division of this court, granted him leave to appeal on the issue of identification. When the matter came before us on the 9th instant, we enquired of learned Crown Counsel whether he was able to support the conviction. He conceded that he could not. Thereupon we allowed the appeal, quashed the conviction, set aside the sentence and in the interests of justice ordered a new trial. We promised to put our reasons in writing. We now fulfil that promise.

The case depended wholly on the visual identification of a sole eye-witness, viz. the householder, Mr. Richard Wilson. He said that he knew the appellant for a considerable number of years. He spoke of the lighting available, a kerosene lamp some five feet from where he was, the period of observation, three quarters of an hour.

Nowhere, however, in the course of his summing up did the learned trial judge alert the attention of the jury to the need for caution in considering visual identification as he is required to do. In R. v. Whylie (1978) 25 W.I.R. 430 at p. 432 we said:

> ".... the trial judge should alert the jury to approach the evidence of identification with the utmost caution as there is always the possibility that a single witness or several witnesses might be mistaken."

We emphasized the requirement of the warning in R. v. Bradley Graham and Randy Lewis, C.A. 158 and 159 of 1981 (unreported) dated 26th June 1986 when we observed at p. 37:

> "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."
>
> [Emphasis supplied]

Although these cases were criticized by the Privy Council in Junior Reid and Ors. v. R. and Errol Reece and Ors. v. R., Privy Council Appeals 14, 15 and 16 of 1988 and 7/89 (unreported) dated 27th July, 1989, and Scott and Another v. R. [1989] 2 All E.R. 305, nothing said in these judgments of the Privy Council overruled or cast any doubt on the correctness of the dicta quoted above. There is therefore no excuse for a trial judge in failing to warn the jury of the dangers inherent in identification evidence. The need for the warning

is all the more necessary when the evidence is given by an obviously honest witness because the honest witness is likely to appear all the more convincing to the jury, although he might well be mistaken. As was said in the Australian case of R. v. Dickson [1983] 1 V.R. 227:

> "The second thing which the jury are unlikely to know is the substantial degree of risk that honest witnesses may be wrong in their evidence of identification. Jurors who, unlike trial lawyers, have not given thought to the way in which evidence of visual identification depends on the witness receiving, recording and recalling accurately a fairly subjective impression on the mind, are unlikely to be aware of the extent of the risk that honest and convincing witnesses may be mistaken, especially where their opportunities for observing a previously unknown offender were limited. The best way of explaining and bringing home to the jury the extent of this risk is by explaining the reasons for there being the risk and that it is essential to distinguish between honesty and accuracy and not assume the latter because of belief in the former."

The effect of a failure to give the warning to the jury in a case based on visual identification was stated thus by Lord Griffiths in Scott and Another v. R. (1989) 2 All E.R. at pp. 314-5:

> "...... if convictions are to be allowed on uncorroborated identification evidence there must be a strict insistence on a judge giving a clear warning of the danger of a mistaken identification which the jury must consider before arriving at their verdict, and that it would only be in the most exceptional circumstances that a conviction based on uncorroborated identification evidence should be sustained in the absence of such a warning."

In the latter case of Junior Reid and Ors., Privy Council Appeals 14, 14 and 16 of 1988 (unreported) dated

27th July 1989 Lord Ackner stated in emphatic terms that the failure to warn will lead to the conviction being quashed:

> "Their Lordships have no hesitation in concluding that a significant failure to follow the guidelines laid down in Turnbull will cause the conviction to be quashed because it will have resulted in a substantial miscarriage of justice."

That statement of principle has overruled the decision of this court in R. v. Whylie (supra) as later explained in R. v. Bradley Graham and Randy Lewis (supra). In the latter case, we said this:

> "The further argument was that the first rule as adumbrated by the Court of Appeal in England in Turnbull's case required both a general warning as to the special need for caution when considering visual identification, and the reason for the need of such a warning, consequently if such a double warning had not been given, notwithstanding the quality of the evidence, the omission should lead to a quashing of the conviction. Our Court of Appeal was not prepared to establish such an absolute rule and formulated the applicable principle thus:
>
> > 'We have considered the decision in the cases of Arthurs v. A. G. for Northern Ireland; R. v. Turnbull; R. v. Peggy Gregory; R. v. Desmond Bailey; R. v. Dennis Gayle and from these cases we extract the principle that a summing-up which does not deal specifically, having regard to the facts of the particular case, with all matters relating to the strength and weaknesses of the identification evidence is unlikely to be fair and adequate. Whether or not a specific warning was given to the jury on the dangers of visual identification is one of the factors to be taken into consideration in determining the fairness and the adequacy of the summing-up."

[Emphasis added]

> "The passage quoted above was deliberately formulated in that manner to allow for the gradual development of the law as it relates to the value and importance of visual identification evidence."

It would appear therefore, that no matter how cogent the evidence, how excellent its quality, no matter the extent of the discussion with the jury by the trial judge of the strengths and weaknesses of that evidence, or a consideration of the factors suggested in Whylie, this court is bound by the English Court of Appeal decision in Turnbull, (1977) 1 Q.B.D. 224 in all respects. A conviction cannot stand therefore, if the warning and the reason therefor, are not given by the trial judge to the jury.

The failure therefore of the trial judge to warn the jury in this case must result in the appellant's conviction for burglary and larceny being quashed. No one has sought to suggest that anything said by the Privy Council in Reid and Ors. v. R. (supra) or Scott and Another v. R. (supra) prevents this court from ordering a new trial. At all events, we are satisfied that where there is evidence, as here, fit to be left to the jury, but the judge has fallen into error by his non-direction on an important issue in the trial, that the interests of justice would require a new trial which we ordered, as announced at the completion of submissions.