CRIMINAL LAW – Gun Court – Trial – Identification – Visual identification – whether judge failed to adequately direct himself on the law of identification – form of words used – duty of judge. Application for leave to appeal against convictions and sentences dismissed.

Cases referred to:
JAMAICA (1) R v Whylie (1977) 25 W.I.R. 420
(2) R v Anthony Mc. Donald SCCA 145/89 - 18/2/91

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 48 & 49 of 1990

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A. (Ag.)

REGINA
vs.
HUGH MODEST
BALDWIN PARCHMENT

Delroy Chuck for the applicants

Carolyn Reid for the Crown

June 3 and 17, 1991

WRIGHT, J.A.:

In an escapade which bears the hallmark of careful planning or connivance, two men, identified as these two applicants, on August 3, 1989, at gun-point robbed Miss Verona Gordon of $32,593 and, but for the quick-thinking of an alert Mr. Nigel Grey, they would have succeeded in enjoying the fruits of their crime.

Miss Gordon, an employee of Romans & Associates, whose offices are located at 3 Hillview Avenue, St. Andrew, had just returned from the bank in a van driven by Emery McKenzie conveying the money in a large brown envelope and just as she was approaching the office door to press the buzzer at the front door to gain entrance, there came these two men rushing in through the gateway and interposed themselves between Miss Gordon and the door. Parchment, the taller of the two, with gun pointing at her demanded the envelope which she threw to the ~~ground after~~ some hesitation. Modest was all the while behind Parchment as

Miss Gordon stood there facing them but, quite understandably, paying the greater attention to Parchment who was menacing her with the gun. Parchment picked up the envelope and both men ran off as Miss Gordon bawled for thief. The time was then about 10:30 a.m.

Mr. Grey, another employee, was just about returning to the office from number 4 Eastwood Park Road, just opposite to the gateway of number 3 Eastwood Park Road where the robbery had taken place, when he heard Miss Gordon's cries and saw the two men running off - Parchment with the gun and the envelope in his hand. Mr. Grey gave chase down Eastwood Park Road, through Central Plaza, and down Constant Spring Road, always keeping his quarry in sight. He refrained from getting too close because of the gun in Parchment's hand. He watched and saw them board the lone "Quarter Million" minibus at the bus stand and then he took a taxi and went ahead of the bus towards Cross Roads. At Cargill Avenue, just a few chains down the road, fortune smiled on him. He saw a police patrol car which he stopped and to the four policemen on patrol he made his report. In about three minutes time the bus arrived and was stopped by the police. Mr. Grey recognized and pointed out the two men to the policemen. The door of the bus was open and Mr. Grey was able to see Modest sitting near the front and Parchment standing. As he pointed them out, he observed that Parchment drew the gun from his waist and tucked it under a seat while Modest threw the envelope through a window of the bus on the right side. It fell in the road and was retrieved by one of the policemen. Grey pointed out the gun to the policemen, who took possession of it. Both applicants were removed from the bus and together with Grey were taken back to the office at 3 Hillview Avenue, where a greatly relieved Miss Gordon identified them as the two men who had robbed her a bare half-hour earlier. Gratefully she exclaimed, "A God deh pon mi side".

Apparently because of the damaged condition of the envelope with the money some had fallen out (one parcel fell out when the envelope was thrown through the window) and as a result the amount was reduced to $20,778.

In the presence of Miss Gordon and both applicants, the witness Nigel Grey stated how he had witnessed the incident and had chased the men and eventually pointed them out to the police. Neither applicant said anything. They were thereupon arrested and charged by the officer, Corporal Michael Scott, with Robbery with Aggravation and Illegal Possession of Firearm. On being cautioned, Parchment is alleged to have said:

> "Boss, mi nuh have nutten fi sey because when di police ketch mi wid gun dem woulda kill mi."

Modest's response:

> "Is a bwoy name Maddoo set up the robbery."

At the trial before Gordon, J. on March 27, 1990, the live issue was the identity of Miss Gordon's attackers. The learned judge regarded the evidence of Emery McKenzie, the driver of the van which conveyed Miss Gordon from the bank, as being of such doubtful quality that he eliminated it from consideration. The relevant evidence to be assessed, therefore, was the testimony of Miss Gordon and Mr. Grey and the statements attributed to the applicants. Though not related to the issue of identification, it is of importance that the gun recovered, a .38 Calibre SPL Colt revolver, was certified to be in working order and the four .38 calibre cartridges with which it was loaded were found to be live ammunition. Of course, in determining the issue of identity, the defences of the applicants had to be considered as well. Both men admitted being on the bus, having boarded it at different points - Modest at Dumbarton Avenue and Parchment at Patrick City - but maintained that they knew nothing about the incident.

In the course of a detailed assessment of the evidence, the trial judge expressed himself as being satisfied with Miss Gordon's identification of Parchment because of the concentrated attention she paid him since he had the gun. But he was not as satisfied with her identification of Modest and had that issue rested solely upon her evidence he would not have accepted it. But as he said, there were other factors principally the evidence of Mr. Grey in which he said he found no discrepancy. The very valiant role played by this witness singled him out for attention and, in this regard, the learned judge, at page 72, said:

> "I saw him and I heard him. I was very careful in watching him. He does appear to be of a higher level of intelligence than the other two witnesses. He displayed a lot of sense or commonsense in the pursuit of the men and while he said that at one time he did see the faces of the men his identification of them is based solely or mainly on the garment they wore. He said he identified them by the garment they wore but as a human being in a situation which occurred minutes before, he saw the two men. As you see them you can know, one is taller than the other, that is very obvious; one is of a lighter complexion than the other, that is very obvious."

Finally, he said at page 73:

> "I am impressed by the evidence of Mr. Grey, I am satisfied that he is a witness of truth and I am satisfied that in the circumstances of this case the evidence of the connection of the accused with the commission of this crime and their identification by Mr. Grey, coupled with the circumstances attendant on the recovery of both the money and the discovery of the gun satisfies any test of identification. I am satisfied beyond doubt that these two men committed the crime as charged in the Indictment and are guilty on both counts of the Indictment."

Against the weight of such evidence, their defences were rejected and having been found guilty were sentenced each to seven years imprisonment at hard labour on Count 1 and eight

years imprisonment at hard labour on Count 2.

The single ground of appeal filed by Mr. Chuck reads:

> "That the learned trial judge failed to adequately direct himself on the law of identification.
>
> In support thereof, the learned trial judge has not stated the law by indicating that he is 'aware of the most recent decision on the question of identification' (See P.71)."

With his usual candour, Mr. Chuck admitted that the evidence against the applicants was overwhelming and his only concern was such as is reflected in the ground of appeal. He suggested that the case be remitted for re-trial.

What the learned trial judge had said when he purported to warn himself was:

> "Now, I am aware of the most recent decision on the question of identification, the possibility of where people could be mistaken or mistakes being made. Indeed Miss Gordon said she has never mistaken anyone or she has never made a mistake in identifying anyone, not even in matters of you know, where no criminality is involved. I find it a bit difficult to accept because one knows there are times when people make mistakes in recognising people and the law accepts that."

The burden of Mr. Chuck's submission centered around the use of the word "possibility", contending that thinking along such lines tends to minimize the element of danger which calls for attention. However, so far as the merit of that submission is concerned, we note that the use of the word "possibility" in this regard is not novel. In **R. v. Whylie** (1977) 25 W.I.R. 430 at 431, the Court, in dealing with the need for caution with reference to visual identification, 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."

Here, therefore, is authority for the use of the word "possibility" about which complaint is made. The ground of appeal accordingly fails.

What needs to be borne in mind is that what is involved in the warning in cases dealing with the issue of visual identification is much more than a question of semantics. What really is involved is ensuring that evidence of identification is not accepted and acted upon without the utmost care being taken to eliminate the possibility of an accused person being identified honestly but mistakenly or as a result of deliberate lies. It is to this end that the various factors which could affect the quality of the evidence have been singled out for careful attention whether the trial be by judge and jury or by a judge sitting alone. Judges would, therefore, be well advised not to adopt short-cut methods in dealing with the issue of visual identification which unnecessarily provide room for contention as to the adequacy of treatment. But this is not to say that a judge sitting alone must be expected to expatiate as though he were addressing a jury. The presumption that he knows the law does not carry over to its application. This he must demonstrate by the language he employs. And it should be noted that inasmuch as this aspect of the law is new in its development, much will depend upon the consistency of the judges in their application.

In this regard, however, it is to be noted, as a matter of exception, that there will be circumstances in which the judge will be excused for not giving the normally required full treatment to the issue. An example is provided by the case of **R. v. Anthony McIntosh** S.C.C.A. 145/89 (unreported) delivered 18th February, 1991. In that case the trial judge had failed to direct himself as is required. But in the circumstances of the case, this failure was held to be not fatal. Rowe, P. at page 3 of the judgment said:

> "This Court has in a plethora of judgments advanced the rule that a trial judge ought not to adopt any technique of shortening the directions to himself on this issue of visual identification. The issue is commonplace; it arises in the criminal courts every day. Each trial judge owes a duty to himself to get this simple, but important aspect of his trial technique word perfect. In this case nothing turns upon the trial judge's failure to expand the directions to himself so as to place the matter beyond doubt that he is aware of the reasons why visual identification evidence has been placed on the list classified 'highly suspect' as there was the most cogent corroborative evidence in the virtual admission of the applicant to the police officer and his recent possession of a quantity of easily identifiable stolen goods."

But even in such instances, where the judge is refraining from directing himself fully, he should demonstrate his grasp of the situation by stating his reason for the course he adopts.

In the instant case, insofar as the evidence of Miss Gordon is concerned, very cogent corroborative evidence is supplied by the evidence of Nigel Grey in which the trial judge found no discrepancy and with which he expressed himself as being satisfied. But his evidence does not stand alone in this regard because the money is found in the hand of Modest. In addition, the statements attributed to them both can only enure to strengthen the prosecution case - Parchment explaining why he sought to dispose of the gun and Modest disclosing that the robbery was as a result of a conspiracy.

In these circumstances, we were satisfied that nothing turns on the truncated manner in which the trial judge dealt with the issue of visual identification. We, therefore, dismissed the applications for leave to appeal against convictions and sentences and ordered that the sentences commence from 27th June, 1990.