JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 80/86

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE GORDON, J.A (Ag.)

REGINA

VS.

LESTER PERSHADSINGH

Mr. Delroy Chuck for the appellant

Miss Carol Malcolm for the Crown

June 5, 1989

ROWE, P.:

This case has certainly given the Court anxious consideration. At first the single judge refused leave to appeal. The matter came before the Full Court on the 8th of May and the Full Court granted leave to appeal so that the questions of identification could be considered. This morning Mr. Chuck has appeared on behalf of the appellant and he has urged in support of the appeal that:

> "The Learned Trial Judge failed to deal adequately with the issues and circumstances leading up to the identification (of the appellant) and to warn himself, as the tribunal of fact, of the dangers of identification evidence",

and he submitted that that failure amounted to a misdirection in law and would therefore in his submission lead to the conviction being quashed.

The Crown's case at trial rested almost solely on

the evidence of the virtual complainant, Howard Harvey. He knew the appellant for some sixteen years. The appellant and himself had gone to the same Primary School. They lived in the same area and they had for over a period of time been fully acquainted one with the other. It was night on the 22nd of May, 1985 and Mr. Harvey and his friends were gathered at a tailor shop and were playing Poker. They were enabled to conduct their game by the aid of electric lights. Mr. Harvey was in the act of "dealing" when he said that the appellant appeared at the door-way having roughly pushed the door inwards. He was dressed in soldier uniform but his head was uncovered. The intruder stood there without saying anything. Mr. Harvey looked curiously at the appellant. He spent more time than the other players wished because they called to him saying: "Don't you see is soldier is not police, come on with the game", indicating that soldiers would not normally be interfering with illegal gambling; that was more for the police. Mr. Harvey said that he then took his eyes off the appellant and continued dealing the cards when he was shot at point blank range by the appellant. The shot passed through his shoulder and entered his arm. Mr. Harvey was seriously wounded and he was taken off to the hospital where he spent more than six weeks and at the time of trial he was having some difficulty with the use of his arm.

The question at trial was identification. Other persons who had been present at the tailor shop refused to assist the police in any way and were not witnesses at trial.

Mr. Harvey was comprehensively cross-examined and the purport of much of this was to show that Mr. Harvey had a motive for wanting to tell an untruth on Mr. Pershadsingh because he, Mr. Harvey, had been suspected of being associated with a robbery which had taken place not long before at

Mr. Pershadsingh's premises. It was suggested, of course, that Mr. Harvey did not have sufficient opportunity to see who it was that had fired the shot because he had looked at the person for less than a minute, but Mr. Harvey persisted that he was in no doubt at all that Mr. Pershadsingh was his assailant.

The police went along to Mr. Pershadsingh's home and they found a suit of clothing which could be described as "soldier uniform". The police said that they took these garments down to Mr. Pershadsingh, who was then in custody, showed them to him and Mr. Pershadsingh denied that they were his. Of course, at trial Mr. Pershadsingh did say he had these garments and he had had them for some time, but the police did not show them to him at the police station. Indeed, if the police had shown them to him he would have been so willing to have said: "They are mine". The learned trial judge rejected the evidence of Mr. Pershadsingh on this issue and accepted what the police officer said.

Mr. Chuck has taken us to the passages in the learned trial judge's summary of the evidence in which the trial judge alluded to the fact that identification was the issue. The judge referred to the one questionable aspect of identification, that is to say, the length of time which the witness had to observe the person who came to the door and he not only referred to the evidence, but found that that was a sufficient length of time for a recognition to be made. Further, the trial judge alluded to the fact that Mr. Harvey might have had a motive of his own to place the responsibility for his injury upon Mr. Pershadsingh. The suggestions made in the course of the trial by counsel for the defence were all taken into consideration and the learned trial judge specifically said that from the demeanour of Mr. Harvey and from the evidence which he had given he was quite sure that Mr. Harvey recognised the person who came to the door and discharged the

who

firearm, to be the accused, and that there was no concoction between the police and the witness Harvey to impute the offence to Pershadsingh merely because the police had discovered the soldier uniform at Pershadsingh's premises.

It is true that the learned trial judge did not specifically, in his summary, direct his mind to what are the several aspects which might affect identification. He did not say that he warned himself of the dangers of visual identification and that he being aware of those dangers, nevertheless went on to consider the evidence of the witness Harvey as being truthful.

This Court, as well as Her Majesty's Privy Council, has laid it down in the most explicit terms that it is the duty of a trial judge to warn himself of the dangers of visual identification and where the case rests solely on the evidence of visual identification this is even more necessary.

We think that whereas that generality in the law is applicable in most cases this was the kind of case in which what was at stake was the credibility of Harvey, as there could really have been no possibility of Mr. Harvey making a mistake as to the identification of Mr. Pershadsingh, who was so well-known to him; who was within only a few feet of him in good light at a time when Mr. Harvey was under no particular pressure and therefore unable to make a recognition. So we think that this case can be distinguished from the cases where what is really at stake is an identification rather than a recognition and that although the judge ought properly to have articulated the fact that he had warned himself, failure to have given himself the warning in this case is not fatal to the conviction. This is an appropriate case in which the proviso ought to be applied in the interest of justice and

the Court proposes to so apply the proviso to Section 14 of the Judicature (Appellate Jurisdiction) Act and to confirm the conviction.

The appellant had at one time been a police officer. It was urged upon the learned trial judge that he should be as lenient as possible with the appellant. The learned trial judge who took into consideration the nature of the injuries, imposed a sentence of ten years at hard labour on each of the counts of illegal possession of firearm and shooting with intent.

We think that there might have been an element of provocation surrounding this serious case of shooting. There had been the robbery at the appellant's premises and the suspicion, whether well-founded or not, that Mr. Harvey was implicated in that robbery. This could conceivably have motivated the appellant to take matters into his own hands. We think that this is a circumstance which the learned trial judge could have taken into consideration in fixing the appropriate period of sentence.

We, therefore, will allow the appeal as to sentence and we will reduce sentences to one of six years imprisonment at hard labour and we will order that the sentences run from the date of conviction.