

A.Crim. a.m. - Gun Court - Trial - (Illegal possession of firearm, robbery with
aggravation) - Evidence - Identification - Visual identification -
identification parade - other men on parade much shorter than
appellant - whether parade improperly constituted - whether unfair
Rules governing identification parades - JAMAICA - whether judge applied correct
principles - APPEAL dismissed Cases referred to

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 235/87

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (Ag.)

REGINA

v

NOEL STERLING

EVIDENCE

CRIMINAL PROCEDURE

H.G. Edwards, Q.C. for Appellant

Kent Pantry and Hugh Wildman for Crown

March 8, and April 3, 1989

GORDON, J.A. (Ag.):

This is an appeal from conviction before Ellis J. sitting in the Gun Court Division of the High Court at Black River in the parish of St. Elizabeth on 16th December, 1987. The appellant was convicted on charges of Illegal Possession of Firearm and 2 counts of Robbery with Aggravation and was sentenced to concurrent sentences of ten (10) years imprisonment at hard labour on each count. On 8th March, 1989 when we dismissed the appeal and ordered that the sentence which we confirmed should commence on 16th March, 1988, we promised to give our reasons in writing and do so now.

The facts are that on 28th September, 1986 about 10.00 a.m. Mr. Freddie Bennett, a business man of Savanna-la-mar in the parish of Westmoreland was at the Jamaica Industrial Development Corporation Complex at Salt Spring in the parish of St. James sitting on a bench along with Mr. Andre Morales, the manager of an ice-cream plant on the

premises. As they sat and conversed outside the complex, they were approached by two men, one of whom was the appellant, who held them up at gun point and robbed them. The two robbers were joined by a third who was left outside to deal with ice-cream vendors who had ridden up on motor cycles, while the appellant and the other partner in crime marched Mr. Morales and Mr. Bennett into the premises and proceeded to rob the cashier of the ice-cream plant. It was the appellant, Mr. Bennett said, who did most of the talking. He assumed the role of leader. At the first encounter, the appellant commanded - 'none of you move'. Later he asked 'where is the money?' 'Where is the gun Mr. Morales, where is the gun?'. It was the appellant who took the pouch containing money \$3,800.00 and US\$200 from Mr. Bennett. Mr. Morales was robbed of an undetermined amount of cash as the robbers pillaged his office. The complainant and Mr. Morales were made to lie on the floor and one robber stood on Mr. Bennett's hand. The robbers left after being with their victims some 15-25 minutes.

In the course of the robbery, the appellant struck Mr. Morales with his gun and he also hit the witness Bennett in his face telling him that he 'talked too much' and he must not look at him. The robbers were not masked.

On the 6th April, 1987 the complainant, Bennett, identified the appellant at an identification parade held at the police station in Montego Bay. Appearing at the identification parade on behalf of the appellant was Mr. Carl Miller, Attorney-at-Law who assisted in the selection of the volunteers on the parade.

The appellant testified that he was innocent of the charges. He said at the identification parade Mr. Miller, his Attorney, expressed his reservations about the height of the men on parade but he the appellant expressed a desire to have the parade held. Mr. Miller corroborated the evidence of the appellant in that he said he was unhappy with the array of volunteers as their height ranged from 5'2" to 6' and the

appellant was 5'11" but the parade was held as the appellant expressed a desire to have it done.

Leave to appeal was refused by a single judge and on the 18th January, 1989 the Court granted leave to appeal on the issue of identification.

Mr. Edwards obtained leave to argue additional grounds filed which challenged the fairness of the identification parade. He submitted that the identification parade was improperly constituted as the height of the men varied between 5'2" and 6', the suspect-appellant was 5'11" and only two volunteers were of height similar to the appellant. He supported his submissions by referring to Archbold Criminal Pleading Evidence and Practice 41st Edition p.14 - Rule 14 -

"The suspect should be placed among persons (at least eight or if possible more) who are as far as possible of the same age, height, general appearance (including standard of dress and grooming) and position in life as the suspect."

(Emphasis supplied)

The evidence of Sergeant Burke who conducted the identification parade was that this was the second attempt made at holding an identification parade in this case with the appellant as the suspect. The first attempt was aborted for want of sufficient volunteers. On this latter occasion the suspect's Attorney-at-Law was in attendance. He selected from the volunteers the eight (8) men to go on the parade. While it is true that there were differences in the height of the men the officer said it was difficult to get eight (8) men similar in every respect to the appellant. The volunteers satisfied the other criteria as to general appearance, age and position in life. The suspect was invited to change his clothes with any volunteer on the parade and to select any position in the line. After he consulted with his Attorney-at-Law, he selected position 4 in the line. It is thus seen that the appellant had the benefit of the advice of counsel on the parade.

Sergeant Burke averred that counsel said he was satisfied with the parade.

The rules governing Identification Parades are made under the Constabulary Force Act and published in the Jamaica Gazette on 29th July, 1939, and amended by the Jamaica Constabulary Force (amendment) Rules 1977. These rules provide inter alia -

"552 - Identification Parades

In arranging for personal identification every precaution shall be taken:

- (a) to exclude any suspicion of unfairness or risk of erroneous identification through the witness' attention being directed to the suspected person in particular instead of in-differently to all the prisoners paraded.

553 - It is desirable therefore that:

- (i)
- (ii)
- (iii) The accused shall be placed among not less than eight persons who are as far as possible of the same age, height, general appearance and position in life."

(Emphasis supplied)

These rules do not differ in any material particular from those contained in the reference relied on by Mr. Edwards, which were the equivalent rules in England. The rules are framed to ensure that the holding of an identification parade is fair and

- "552 - (b) to make sure that the witnesses' ability to recognize the accused has been fairly and adequately tested."

The object of an Identification Parade is to expose the suspect in conditions considered fair which test the ability of the witness to identify him. The regulations dealing with the holding of identification parades are 'procedural only and any positive breach will have the effect of weakening the weight to be given to an identification made at such

parade'. (R. v. Bradley Graham and Randy Lewis S.C.C.A. 158,159/81 - 26th June, 1986). When a suspect is placed on a parade with others who are similar in general appearance, age, height and position in life, the parade is considered fair. General appearance would include complexion, physical built, grooming, dress. It must be conceived that it is in most cases difficult, if not impossible, to get eight persons who qualify in general appearance, age and position in life to be of the same height. Thus differences in the height of the men on parade must be expected. So long as disparity in the relative heights between suspect and others on the parade are not such as to make the suspect conspicuous or outstanding, the parade would be considered fair. Since it is difficult to determine age solely by appearance, persons within a range of 10 years on parade could be considered fair. Where the suspect is a labourer, one would expect the majority of the volunteers to be selected from that group. This would satisfy the requirement that all on parade should be of the same position in life as far as is possible. An Identification Parade in which the suspect is conspicuous in any particular would plainly not be fair. It will always be a question of fact for the judge sitting alone or a jury to determine whether in all the circumstances the 'witnesses ability to recognise the accused has been fairly and adequately tested'. An Identification Parade is held for a suspect who was not known by the witness before the crime was committed and a judge would be obliged to withdraw from the jury a case in which the witness was given a preview of the suspect.

In R. v. Graham and Lewis (supra) the men on the Identification Parade ranged in height from 5' to 5'8½". This was made an issue on appeal. The evidence was that the appellant Lewis assisted in selecting the volunteers with whom he appeared on parade. This Court held that the differences in the height of the men did not invalidate the proceedings. Difference in height of a few inches, without more, in the

men on parade will not render an Identification Parade unfair.

The learned trial judge in his summation mentioned Mr. Fairclough, the defence Attorney's reference to Mr. Bennett as a 'very strong and convincing witness'. He then proceeded to analyse carefully the evidence of identification. He referred to the fact that Mr. Fairclough conceded the opportunity the witness had to observe the applicant -- 15 to 20 minutes -- was not a 'fleeting glance'. The judge was mindful of the decision of this Court in Bradley Graham and Randy Lewis and the guidelines on identification in R. v. Oliver Whyllie (1977) 15 J.L.R. 163.

At page 90 of his summing-up he said -

"It is clear in this case that if the identification parade was bad the identification of the accused would be weakened.

Now, one has to examine all this, where the only evidence is visual identification, and however positive that identification is a tribunal of fact has to consider the issue of identification with great care. An identifying witness may be - well, may give the impression of truth and accuracy, but that impression, I accept, is not to be taken or equated with truth of the witness' accuracy in identifying. I sitting as the tribunal here, have to examine and be reminded what is to be found. What is to be found here is not the accuracy and conviction with which the witness says that this is the man, what we want is the accuracy of the identification, and this tribunal has to be careful, because it is accepted that a mistaken witness can be very, very, very convincing. An identification parade was held in this case and was used primarily to confirm the witness, Bennett, identity to find the man, generally in his application it must present a picture of being fair, it must not deploy or display any unfairness or risk that the witness would have seen or could have seen the suspect before.

The purpose of the identification parade then, when it is being held, it should make certain that the witnesses' ability to recognise the offender was fairly and accurately tested. The circumstances here outlined says that there were nine men and

"the nine men were brown. The height ranges from five feet two to six feet -- the accused was five feet eleven inches. All the men were neat and none of them had anything that anybody else had or did not have. The requirement as to fairness in that respect, to my mind, was satisfied. You think you could ever find nine men in that time all of them five feet eleven inches? True enough, two inches, but the witness, Bennett, said 'Look, I was not looking at anybody's height'."

The witness, Mr. Bennett appeared to be a simple country man endowed with a lot of common sense. He said on the parade he did not pay attention to the respective heights of the men arrayed. He was looking for a face he remembered and the appellant was the person who committed the crime complained of. He was positive he was not mistaken. The appellant had assumed the role of leader of the robbers, he gave orders and on the parade he spoke. Mr. Bennett said - 'I mark him face, everything like that, him eye and him talking'...

The learned trial judge applied the correct principles in assessing the evidence of identification and the circumstances associated with the holding of the identification parade. The conclusion at which he arrived was inevitable.