CRIMINAL LAW/FIREARM — Appeal from Gun Court — (1) Illegal possession of firearm (2) wounding with intent (3) robbery with aggravation. Defence an alibi — whether circumstances as to identification unsatisfactory — whether conduct of identification parade unsatisfactory — whether Rule 553(1) Jamaica Constabulary Force Rules breached by arresting officer locating and bringing witnesses to identification parade — No justice of peace present at parade. (No merit in application) Application for leave to appeal refused.

IN THE COURT OF APPEAL

JAMAICA

SUPREME COURT CRIMINAL APPEAL NO. 146/87

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

No case referred to

REGINA

VS.

NORRIS DOHMAN

F. Phipps, Q.C., and W. Charles for the Applicant

Miss Y. Sibble for the Crown

May 5, 1988

ROWE P.:

This is an application for leave to appeal against conviction in the Gun Court Division of the Westmoreland Circuit Court on the 20th of August, 1987, from the verdicts of guilty of illegal possession of firearm, wounding with intent and robbery with aggravation. The applicant was given sentences of five years, fifteen years and fifteen years on each of these counts.

The case for the prosecution was that on the 11th of January, 1986 somewhere about 2 o'clock in the morning Mr. Rayburn Clarke and his wife Roslyn were in bed in their home at Cain Curran, Westmoreland.

Mr. and Mrs. Clarke kept a shop nearby and one of the matters which came out of trial is that they had very little money in the house as just before the date of the invasion of these men, Mrs. Clarke had gone

and bought goods for the shop. However that may be, this morning as they slept, they heard a great noise outside the door and both witnesses, Mr. Clarke and his wife, spoke of hearing gun-shots on the door. Mrs. Clarke said that a pane of glass of the door was broken out and her husband used a machete to chop at somebody who was still trying from the outside to gain entry.

She said that the house is supplied with electricity and she turned on the lights prior to the time when the husband made the chop at the intruder. The husband's evidence was that light had been left burning in the house when they retired to bed.

Mrs. Clarke said that she ran from the bedroom into an adjoining room where her grandchildren slept. In doing so, it appeared, she had to go down a short passage. When she got into this room, having regard to the way in which the beds were arranged in that room it was difficult to close the door completely and she said, standing in the room, using the door as a shield to prevent entry of an uninvited person, she saw a man standing in the passage. He had a long gun in his hand and he had a flashlight. She said that this man picked up a glass lamp which was on a dresser and the man demanded money from her. She said that she eventually agreed to give him two hundred dollars which she kept under her bed and that money was handed to the man by the grandson. The thief took the gun and 'tucked' the boy in his head before he got the key for the shop from her and went away.

Mr. and Mrs. Clarke told of how after they had heard the shooting on the door they heard another shot and Mr. Clarke received gun-shot wounds to his chest. He was treated at the Savanna-la-mar public Hospital and the Police Officer who gave evidence told of seeing Mr. Clarke's chest pock-marked, as if he had received wounds from the pellets of a shot-gun.

On the 21st of January, some ten days later, Mrs. Clarke went to an identification parade at Whithorn Police Station and she identified the applicant as the person who came into her home and robbed her and on that occasion her husband was shot.

At trial the defence put forward an alibi. The trial Judge rejected the alibi and he accepted the evidence of Mrs. Clarke as to identification. He said:

> "What is the evidence on which they seek to make me feel sure; the evidence of Mrs. Clarke. So again you look at the circumstances. I take into consideration the fact that Mrs. Clarke was seeing this man for the first time in her life. I take into consideration as I said, the very remarkable and outstanding features of this accused man; I take into consideration the fact that there was light in the room; I take into consideration the fact that there was a distance of only three to four yards between Mrs. Clarke and the accused man, and I take into consideration the fact that the accused man, Mrs. Clarke saw him for a period of time between five to fifteen minutes. I am satisfied that under those conditions and having regard to the remarkable features of this accused man, the very outstanding features, that sharp and unforgettable feature of the accused man, that Mrs. Clarke had ample opportunity to observe her assailant, to recognise him and to subsequently identify him on a parade."

Mr. Phipps has challenged the correctness of the conviction on two Grounds. Firstly, he said that the circumstances as to identification were unsatisfactory. He said that the evidence did not clearly reveal whether there were two men intruding into the house or just one man. He said that Mr. and Mrs. Clarke did not speak with a single voice as to the time at which the light was turned on. He referred to the important fact that Mr. Clarke did not see a man with a gun. He saw a man but he did not see him with a gun and he said also that Mr. Clarke, when he went on to the parade was unable to identify anyone. So said Mr. Phipps, that points to the fact that the circumstances under which the identification could have been made were difficult.

He referred also to the evidence led by the prosecution that the assailant, whoever he was, had a flashlight which he used to shine in the face of Mrs. Clarke which would render the opportunity to observe the assailant more difficult. He said therefore, in those circumstances the identification was weak and unsatisfactory and would render the verdict unreasonable.

Mr. Phipps said, too, that the conduct of the identification parade was unsatisfactory. The first unsatisfactory feature to which he referred was that the constable who was in charge of the investigation located the witness, Mrs. Clarke, and carried her to the place of the identification parade. He said that that act by the arresting constable breached Rule 553 (1) of the Jamaica Constabulary Force Rules dealing with identification parades where it is said that it is desirable that arrangements for an identification parade shall not be made by the member of the Force in charge of the case against the prisoner.

We do not believe that the arresting constable, who did not have anything to do with the actual drawing up of the parade or the selection of the men on the parade or the process by which Mrs. Clarke went on the parade to identify if she could, the assailant, that he is disqualified under Rule 553 (1).

In a practical way it is the investigating constable who would have had contact with the witnesses. He is the one who would probably know where to find the witnesses. He is the one who would probably have an interest in the case and ensuring that the witnesses come to the parade and try to make an identification. Therefore when we take a practical view of how a parade can be organized and arranged we think that there is in Rule 553 (1) referred to above, no prohibition against the arresting officer locating and bringing witnesses to the place where the parade is going to be held.

We think also that although in the conduct of the cross-examination of the officer it was suggested that he told the potential witness that a suspect had been arrested and the Judge intervened at that

point, that the question asked was somewhat ambiguous and the effort of the learned trial Judge was not to stifle the cross-examination but rather to let counsel formulate his question precisely.

There was no Justice of the Peace present on the parade. The officer conducting the parade seemed to have asked the suspect on the parade, in this case, the applicant, if he wished to have a Justice of the Peace present. Mr. Phipps rightly points out, the duty is on the officer who is conducting the parade to find a Justice of the peace, if it is practicable so to do. It is desirable for a Justice of the Peace to be present on the parade, but it is not a mandatory requirement and in this particular case having regard to the evidence, especially of Mrs. Clarke and of the findings of the learned trial Judge, it does not seem that any injustice could possibly have been done by the absence of a Justice of the Peace from the identification parade.

Mr. Phipps referred us to the English Home Office Rules of 1978 dealing with identification parades in England. It seems that those Rules are far more explicit as to what should be done than the Rules we have in Jamaica. Interesting as they are, we do not think that they introduce any new principle than what we have. In the final analysis we do not think that there was any substantial breach of the Identification Parade Rules which exist to ensure fairness on an identification parade.

The learned trial Judge had in mind all the arguments put forward by Mr. Phipps this morning because on page 94 of the Record he said:

> "I am of the view that the men who were on the parade, there was not such disparity in height as to make the accused man so outstanding that Mrs. Clarke had no choice but to point him out. I don't think that that is the position. I accept what Mrs. Clarke said - 'when I went on the parade I didn't even notice anybody because when I went there I saw my assailant and I went straight for him, I had no time to notice anybody else.' I believe her that she was not influenced by the fact that this man was one of the 'taller', she was

> "influenced by the fact that the man she saw was the man she saw in her house."

He said also:

> "I find that the parade which was conducted, albeit, a Justice of the Peace was not there, was a fair parade. I find that Mrs. Clarke was unaided in identifying this man; I find that she identified him on her own esteem, (sic) because he was the man she saw in her house and that she was not mistaken at all."

So the learned trial Judge did direct his mind to the very issues which Mr. Phipps have addressed to us today.

In the circumstances we are of the view that there is no merit in either of the points so succinctly put forward by Mr. Phipps and we conclude that the application for leave to appeal should be refused. Sentences will run from the date of conviction.