JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 82 OF 1999

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.

REGINA vs. JULIUS CHRISTIE

Dennis Daly, Q.C. for the applicant

Paula Tyndale for the Crown

July 3 and December 20, 2000

BINGHAM, J.A.:

The applicant was tried and convicted on an indictment in the High Court Division of the Gun Court for the offences of illegal possession of a firearm (count 1), wounding with intent (count 2) and shooting with intent (count 3). He was sentenced to twelve years at hard labour on count 1 and fifteen years at hard labour on counts 2 and 3, respectively. The sentences were ordered to run concurrently.

THE EVIDENCE

1. The Prosecution Case

The circumstances leading up to the trial and conviction of the applicant arose out of an incident on November 16, 1996, at the then Metropolitan Arcade situated at the corner of Barry Street and Church Street in Kingston. At about 3:30 p.m. that afternoon it was raining. It had rained heavily earlier in the afternoon but the showers had subsided at the time of the incident. Constable Robert Forbes, who was then attached to the Protective Service Division of the Constabulary Force, was in the Arcade conducting some private business. He was seated on a bench talking to a higgler when he observed three men through a hole in the fence by the Mark Lane boundary with the Arcade. His attention was drawn to the men, as they appeared as if they were fixing some object in their pants. The applicant was one of the men. The applicant was dressed in a green army-type jacket. The back and sides of his head were clean-shaven but the top had the hair plaited. The men walked towards the direction where Constable Forbes was seated. He became suspicious and got up from the bench and went further into the Arcade. He observed the men as they continued to walk slowly observing the goods on display and they enquired about a special shoe known by the name "Desert". This was a Clark swede shoe which when fitted goes above the ankle. Constable Forbes continued to observe the men but as they came closer to him he went down a passage nearby. The men went out of his sight. He then returned to where he had been before he moved away. He then saw the three men heading back in his direction. They were walking one

behind the other. The applicant was in front. Constable Forbes took up a shoe as if he intended to make a purchase. He then heard a voice coming from the direction of the men saying, "Nobody move, nobody move." He then saw all three men brandishing guns. The applicant who was five feet away from the Constable had the gun pointing at him. He attempted to pull his firearm from his waist but before he could do so he heard an explosion coming from the direction of the applicant's gun and he received a bullet wound to his left hand. He managed to pull his firearm and returned the fire in the direction of the men. The discharge of gunshots resulted in pandemonium as everybody started to run up and down seeking a way of escape. Constable Forbes, who was seriously injured and bleeding profusely, managed to make his way to Barry Street. The men ran away. Because of his condition he was, however, unable to say in what direction they went. He was taken by the police to the Kingston Public Hospital and then transferred to the University Hospital where he was treated and admitted for eight days. While there a major operation was performed on his left hand. In the hospital he made a report to the police.

On Friday January 30, 1997, at about 3:30 p.m. Constable Forbes attended at the Central Police Station where an identification parade was conducted. This was a parade involving the use of the one-way mirror. From a line-up of nine men he identified the applicant, who was standing in the line-up, by calling out the number over his head. At that time the applicant's features were now changed. The plaits to the top of his head were no longer there but

they were standing out like dreadlocks. Hair was now on the back and sides of his head.

District Constable Phillip McCurbin along with another Special Constable were on foot patrol in the Church Street area around 3:30 p.m. They were seated in the Barry Street entrance to the Arcade sheltering from the rain. District Constable McCurbin observed a white Toyota motor car with dark-tinted glass drive down Mark Lane and park by the intersection of Barry Street and Mark Lane. He supported the description of Constable Forbes as to the manner of dress of the men and the army-type jacket worn by the applicant as also the approach made by them as they entered the Arcade through a hole in the fence. When District Constable McCurbin saw the men entering the Arcade he, along with the Special Constable, got up and walked towards the direction where the car was parked. As they got closer to the car, it drove off at a fast speed down Mark Lane. They then turned to return to the Arcade when they heard gunshots coming from that direction. District Constable McCurbin then observed one Sergeant Patrick Murdock running towards him along with some shoppers who were calling out for "Murder!" Along with Sergeant Murdock, District Constable McCurbin ran towards the corner of Barry Street and Mark Lane. They saw the same three men including the applicant come through a space in the Arcade fence into Mark Lane. They were then about three-quarters of a chain away from them. Sergeant Murdock called out "Police!" Each of the men turned and fired shots in their direction. Murdock returned the fire. District Constable McCurbin ran along Barry Street to Duke Street then down Duke Street to Water Lane but

lost sight of the men. He returned to the corner of Mark Lane and Barry Street where he now saw the applicant seated in the rear seat of a marked police radio-controlled car, which was surrounded by several persons who were behaving in a boisterous manner. He pointed out the applicant to the police personnel present as being one of the men who had been seen earlier going towards the Arcade and later firing shots at Sergeant Murdock and himself. When pointed out, the applicant denied the accusation.

Corporal Ransford Scott was the driver of the radio-controlled car in which the applicant was seen seated. At about 3:45 p.m. on November 16, 1996, he received a radio message as he was on patrol down Church Street. He saw a crowd of about twenty-five to thirty persons chasing the applicant up Church Street. As he came alongside the car, the applicant stopped, opened the rear door and jumped inside. He then said, "Officer, dem a go kill me!" Persons from the crown shouted, "Officer him just shot a policeman down the road in the Arcade." He drove the car with the applicant to the City Centre Police Station where he was handed over to the police.

Inspector Raymond Robinson conducted an identification parade at the Central Police Station on January 30, 1997, at about 3:30 p.m. This parade involved the use of the one-way mirror. There were nine men on the parade, including the applicant who was the suspect. Before the parade, all the necessary safeguards required by the rules governing the holding of such parades were adhered to. The applicant himself assisted in the holding of the parade by selecting the other persons who formed the line-up of men. The long

delay of six weeks in holding the parade was due to the continued absence of the applicant's attorney-at-law who, although contacted on the five previous occasions that arrangements were made for the holding of the parade, failed to turn up. On the occasion when the parade was eventually held, the officer took the added precaution of inviting two Justices of the Peace to be present to ensure fairness to the applicant in the manner in which the parade was conducted.

On the day of the parade, Constable Forbes attended at the Central Police Station. When summoned, he went on the parade conducted by Inspector Robinson. He received his instructions from the parade officer in the presence and hearing of the two Justices of the Peace. He looked on the line-up of men and identified the applicant, the suspect standing at position No. 4, by calling out the number above his head.

Detective Sergeant Zimroy Green, the investigating officer, was at the City Centre Police Station on the day of the incident. About 3:45 p.m. he received a radio message which led him to proceed to the Arcade with other policemen. He made observations and received certain information which caused him to return to the City Centre Police Station where he saw the applicant. He told him of the reports made to him by Sergeant Murdock and District Constable McCurbin. The applicant then said, "Mi Boss, a nuh mi shoot the man, sir, mi only rob two pair name bran sneakers and me hear gun shot fire and people a run up and down." When asked by Detective Sergeant Green what had happened to the sneakers, he said, "The people them get them back."

A further search of the Arcade by Detective Sergeant Green led to the recovery of two 9mm expended cartridge casings and a copper-coated lead bullet, which he kept in his possession. Later that evening, he visited Constable Forbes in the University Hospital and observed his wound. On Saturday November 30, 1996, he arrested the applicant for shooting with intent and illegal possession of a firearm. When cautioned he made no statement.

2. The Defence's Version

The applicant in his defence gave evidence on oath and testified of going to the Arcade on the afternoon in question around the time of the incident to purchase a pair of shoes. He went to one "Juicy" who sells in the Arcade, a person with whom he was acquainted. "Juicy" was not present. He later heard an explosion in the Arcade, saw persons start to run and shout. In the excitement that ensued, he grabbed up a pair of shoes that were on display and ran out of the Arcade and down Church Street. He then ran towards the direction of Tower Street with a crowd of persons chasing after him calling out for "Thief". After turning on Tower Street he sighted a radio-controlled car which stopped.

The driver of the radio-controlled car, Corporal Scott, enquired from him as to "what was the matter" and he told him that "men were chasing him." The car then drove off. Before this, the applicant said that he had discarded the pair of shoes during the chase. He then continued running, going up Mark Lane and towards Barry Street. He again saw the radio-controlled car now parked at the corner of Mark Lane and Barry Street. In fear for his life, he opened the rear door of the car and jumped in.

The learned trial judge reviewed the evidence in a very careful manner. He highlighted the fact that the applicant had in his sworn testimony admitted to being on the scene at the time of the incident. He saw this as material to the issue of visual identification, narrowing down this issue and leaving the sole remaining question as being, whether the applicant was one of the three gunmen who were engaged in an attempt to rob vendors and shoppers in the Arcade, and, who shot and wounded Constable Robert Forbes, and shot at Sergeant Patrick Murdock and District Constable Phillip McCurbin. This question, nevertheless, left the issue of visual identification as a live one requiring the approach called for in cases in which visual identification was a crucial issue falling for the determination of the trial judge. As this issue forms a separate ground of complaint, I shall return to it later on in this judgment.

The learned trial judge saw the main issue arising out of the evidence as being one of credibility. It was on the basis of his acceptance of the evidence given by the prosecution witnesses and, by that same token, his rejection of the account given by the applicant, that he returned a verdict of guilty against the applicant in respect of all the counts charged on the indictment.

Learned Queen's Counsel sought and obtained leave to argue four supplementary grounds of appeal. They read as follows:

> "**1. (a)** That the learned trial judge erred in fact and in law by concluding that identification is not an issue (p. 188) and further supporting this conclusion by commenting (p 191) that "what turns out to be an identification parade seem (sic) to have been even a little superfluous in the light as I said, of what the

defense had agreed; 'yes, I was on the scene but I did not shoot the complainant'."

(b) That the learned trial judge in accordance with his conclusion that identity was not an issue, completely failed to warn himself of the dangers associated with visual identification evidence, especially that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken, and that an honest witness may be mistaken in his identification.

2. That the learned trial judge in referring to the evidence of identification by Detective Corporal Forbes led by the prosecution misdirected himself (p. 189) that 'judicial note can be made that in all but the most outstanding and unusual circumstances 3.30 p.m. in the month of November in Jamaica usually have (sic) enough lighting for one to see', thereby ignoring the evidence of at least one prosecution witness that it was raining heavily at the time of the incident (see pp. 28 & 36) and the likely effect that this could have on visibility.

3. That the learned trial judge failed to recognise the existence of an irreconcilable conflict between the evidence of the prosecution witnesses District Constable Phillip McCurbin (pp. 45-48) and the appellant, on the one hand, and Corporal Ransford Scott (pp. 63-64 & 68-69) or the other, as to how the appellant came to enter a police radio car and was thereafter taken to the City Centre Police Station. On the contrary, his Lordship only referred to 'discrepancies' which he described as 'minor' which did not affect the credit of the prosecution witnesses (p. 191).

4. That the learned trial judge to the prejudice of the defense erred in law in allowing a ballistics report to be adduced into evidence in support of the prosecution's case to show that Corporal Forbes had discharged his firearms (sic) twice in the Arcade on the day in question, without a proper

> foundation being laid for the admission of such evidence."

On a careful examination of these grounds of complaint, we found that there was no merit in grounds 2 to 4. In the result, the Crown was called upon to respond to ground 1. We will, however, give our reasons for the stance taken in respect of these grounds.

Ground 2

In so far as the question of the state of the visibility in the Arcade at that time of the incident was concerned, the learned trial judge gave full consideration to this question. While having regard to what could be seen as the normal weather conditions prevailing in the month of November in Kingston, he was aware of the fact that the visibility which existed at the time of the incident had to be viewed against the background of the fact that the heavy showers of rain that had fallen earlier that afternoon had subsided at the time of the incident. The learned judge also mentioned the display of wares on sale in the Arcade, in concluding that this supported the existence of adequate visibility being in existence in the Arcade which was not materially affected by the overcast conditions in the weather at the time of the incident. We saw this situation as justifying the learned judge's view that such conditions as there were in the weather would not have, in any way, materially affected the ability of the police officers to properly observe the movements of the men who entered the Arcade and were behaving in a suspicious manner.

We accordingly found no merit in respect of the complaint on this ground which fails.

Ground 3

We saw this ground as being totally lacking in substance. While it became apparent from the evidence that there was a conflict in the accounts of District Constable McCurbin, Corporal Scott and the applicant as to where the applicant entered the radio-controlled car, when the evidence was examined as a whole, there was nothing emerging therefrom which materially affected the credibility of any of the witnesses. There was in fact no issue that the applicant did enter the car or as to the point at which he said he did so. Nor for that matter was there any issue as to the reason that led him to that course. What was most material, and this seemed to have escaped the notice of learned Queen's Counsel, was not only the words uttered by the applicant when he jumped into the rear seat of the car, viz., "Officer, dem a go kill me", but the immediate reaction of the persons in the crowd to this statement, viz., "Officer, him just shoot a policeman down the road in the Arcade." To this accusation, the applicant did not retort, in denial, as one would have expected. This statement of the applicant and the reaction of the people in the crowd, which went unchallenged, would have given support to the identity of the applicant as being no shoe thief, as he testified, but one of the gunmen who took part in the shooting incident in the Arcade shortly before entering the radio-controlled car. This ground, therefore, fails.

Ground 4

In so far as this complaint was levelled at the decision of the learned trial judge admitting into evidence the Ballistics Certificate of the ballistics expert, this in effect followed upon an application made by the prosecution to which the defence raised no objection. In so far as it satisfied the requirements of section 46A of the Firearms Act, no valid reason can be seen for this complaint. While one can accept that there could be some basis for a complaint on the ground that evidence contained therein, in so far as it related to the analyst's report and findings, regarding the firearm which was in possession of Constable Forbes at the time of the incident, that evidence not being directly relevant to the charge against the applicant as no firearm was recovered from him, this evidence, it was being argued, was highly prejudicial. We found this contention on the part of learned Queen's Counsel to be untenable. As the case for the prosecution sought to establish that there was an exchange of gunfire during the incident in the Arcade, the 9mm shells and copper bullet recovered would have gone a far way towards establishing that:

> **1.** There was, indeed, a discharge of firearms in the Arcade, given the evidence of Detective Sergeant Green as to where he recovered the 9mm shells and the copper bullet.
>
> **2.** The testimony of Detective Sergeant Green, if believed, would have gone to strengthen the credibility of Constable Forbes that despite being shot and seriously wounded he was able to return gunfire at his attackers.

In any event, the evidence at its highest did not advance the prosecution's case, and certainly did not affect the case for the applicant in a manner as to

alter the ultimate burden which remained on the prosecution in so far as the important issue of identification was concerned.

In short, therefore, we were of the firm view that the prosecution gained no advantage and the defence suffered no real detriment from what occurred, hence our reasons for concluding that there was no merit in this ground.

Ground 1

This brings us now to the first ground of complaint which sought to challenge the issue of identification in two areas, viz.:

> **1.** The identification parade and the learned trial judge's comments in respect of the holding of such a parade.
>
> **2.** The treatment of the identification evidence and the failure of the learned trial judge to warn himself of the dangers associated with visual identification.

In so far as the learned trial judge may have commented upon the necessity for the holding of an identification parade this did not materially affect the decision to which he came. Constable Robert Forbes whose testimony was crucial as to the circumstances in which he was shot and wounded has testified to not knowing any of his assailants before the incident. This would have, therefore, necessitated the holding of an identification parade in order to avail him of the opportunity to identify, if possible, all or any of the men who were involved in the incident at the Arcade on November 16, 1996. The fact that it was some six weeks following the incident before the parade was held was due entirely to the fault of the attorney-at-law retained to represent the applicant on that parade. The evidence of Inspector Robinson, the parade officer, was that

the parade had to be postponed on five previous occasions because of the absence of the applicant's attorney.

As a parade was necessary, therefore, the comments of the learned judge can be seen as superfluous and meaningless.

The Complaint As To The Learned Judge's Treatment Of The Issue Of Visual Identification

The summation of the learned trial judge revealed that while adverting to the factors present in the manner of the identification by Constable Forbes of the applicant as being the person who shot him, it was evident that he omitted to follow the guidelines and to administer the necessary self-imposed warning laid down by the authorities in respect of cases of this nature. Learned Queen's Counsel has submitted that it has long been established that in identification cases a trial judge without a jury in the Gun Court, as in this case, is no less obliged to warn himself about the dangers inherent in identification evidence than a judge in a trial by jury who is obliged to direct a jury.

He relied for support on the dictum of Wright, J.A., in ***R. v. George Cameron*** [1989] 26 J.L.R. 453 at 457 (H-I) where the learned judge, in adverting to the necessary requirements to be met, said that a trial judge:

> "...must demonstrate in language that does not require to be construed that in coming to the conclusion adverse to the accused person he has acted with the requisite caution in mind."

Learned Queen's Counsel submitted that not only did the learned trial judge completely fail to demonstrate that he acted in keeping with the said guidelines but he stated that he did not consider that identification was in issue,

but went on to regard this issue as being "even a little superfluous." Such being the situation, counsel contended that it could not be posited that the trial judge simply forgot to express the required caution but must have taken it into account. Since he did not regard identity as being an issue he would not have considered that a warning was necessary.

Learned Crown Counsel, in responding with commendable frankness, conceded that the learned trial judge, in his summation, failed to directly warn himself. She adverted to the fact that the case was concerned with a situation in which gunmen including the applicant shot at the complainant injuring him. The applicant was accosted within minutes of the shooting incident. There was a chase of the men by shoppers before the applicant, who was then being chased, took refuge in the rear seat of a police radio-controlled car. In his defence the applicant put himself on the scene but said that he was in the Arcade to steal shoes.

The learned trial judge saw these facts as giving rise to a credibility issue as to which of the two accounts, viz., that from the Crown witnesses and the evidence of the applicant was to be believed. Counsel contended that in the circumstances there was no compulsion on the learned trial judge to give the requisite warning. Identification was an issue in the sense that it was the applicant who was armed with a gun who shot Constable Forbes. Counsel submitted that the absence of the warning was not fatal to the conviction.

In any event, the evidence presented by the prosecution was overwhelming hence the failure to give a warning would not have affected the eventual decision. In the event, the proviso ought to be applied.

In this case, given the evidence presented by the Crown as to the identity of the applicant, which was accepted by the learned trial judge as credible, the crucial question to be determined is, did the failure by the learned judge to single out and to deal with the issue of visual identification by way of applying self-imposed warning by reminding himself of the reasons for the same, whether this would have been fatal to the conviction.

Since the decision in ***R. v. Turnbull et al*** [1976] 3 All E.R. 549; [1976] 3 W.L.R. 445; 63 Cr. App. R. 132, the courts in England and in Jamaica have, to a large extent, tended to follow the guidelines laid down in that case in seeking to reduce, if not entirely rule out, miscarriages of justice which may result from a failure to assess the identification evidence with the necessary caution.

This court, however, in ***R. v. Oliver Whylie*** [1978] 25 W.I.R. 430; [1978] 15 J.L.R. 163, saw the ***Turnbull*** decision as going too far in seeking to require a general as well as a specific need for caution in those cases as well as the reasons for the need for such a warning.

In ***R. v. Bradley Graham and Randy Lewis*** [1986] 23 J.L.R. 230 at 238, Rowe, P., referred to ***Oliver Whylie*** (supra) where the court said:

> "We have considered the decisions in the cases of ***Arthurs v Attorney-General for Northern Ireland*** (1970) 55 Crim App Rep 161, ***R v Turnbull*** [1977] QB 224, ***R v Gregory*** (1973) 12 Jamaica LR 161, ***R v Bailey*** (1973) (unreported), ***R v Gayle*** (1973) 12 Jamaica LR 1077 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 of the dangers of visual identification is ***one of the facts to be taken into consideration in determining the fairness and adequacy of the summing-up***." [emphasis supplied]

In ***Graham and Lewis*** (supra) the court was not unmindful of the fact that, although an examination of the printed record might tend to indicate that the learned trial judge, from the manner in which he set about the task of reviewing the evidence in a given case, demonstrates that he may well have been aware of the factors to be considered in assessing the strengths and weaknesses in the identification evidence as well as the law to be applied, nevertheless, other factors arising in the case may have led him to overlook some other area to be considered and dealt with. On this score, Rowe, P. had this to say:

> "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. That is a starting point from which he ought not to swerve. Judges, however, are human and due to an oversight in a particular case a judge might omit to give the general warning although he alerts the jury to the possibility of mistaken identity. Such a lapse might not be fatal if there are elements in the identification evidence which renders the acceptance of the identification evidence inevitable."

Also, on the question of a failure to give a general warning as to the dangers of visual identification and its effect upon a summing-up, this was a matter to be considered having regard to the facts of the particular case. Where there was other cogent evidence implicating an appellant, a summing-up in such

a case could not be considered to be unfair or inadequate, despite the absence of the general warning: ***R. v. Champagnie et al*** S.C.C.A. 22-24/80, per Kerr, J.A. (unreported) delivered September 30, 1983.

Having carefully considered the submissions of counsel, and while being not unmindful of the guidelines laid down by the several authorities, the crucial factor calling for examination in all cases of visual identification is as to the quality of the identification evidence as to the matter of distance, the lighting, period of observation by the witnesses of the offender, coupled with the subsequent identification of that person after apprehension by the police.

In the absence of the general warning alluded to by the authorities, where the summation of the learned trial judge clearly indicates that he adverted his mind to these essential factors, taking into consideration the strengths and weaknesses, if any, of the identification evidence of the witnesses, not only would this have been evidence from which it may be inferred that he acted with the requisite caution in mind: but of equal importance is the cogency of the evidence establishing the existence of these factors, which could lead an appellate court examining the printed record to the conclusion that no miscarriage of justice has resulted as, given the powerful case mounted by the prosecution against the applicant, had the guidelines been followed by the learned judge administering the self-imposed warning, the verdict of guilty could ultimately have followed.

In dealing with this question of identification, as the applicant in his testimony sought to put himself on the scene at the time of the incident, the

crucial issue which fell to be resolved was, in what circumstances was he in the Arcade. In determining this question, the learned judge said:

> "Now, although identification is not in issue, a particular submission made by Defence Counsel makes it necessary for me to look at the evidence which purports to have identified the accused as the man who shot Detective Corporal Forbes, and that submission was to the effect that not only could the accused man not have gone back to the scene if he had shot Detective Corporal Forbes but that it is very strange that no firearm was recovered and that no question was directed at the accused as to who owned the firearm; but I look in particular at the evidence of identification on which the Crown relies, coming from Detective Corporal Forbes. Detective Corporal Forbes not only describe the clothing that the accused man had on, he indicates that when he first saw the accused man the accused man was some ten feet from him. He indicated the peculiar nature of the hairdo of the accused man, plaited head top, bare sides. He says that the accused man approached initially as one of three men abreast of each other; that when he heard 'nobody move' and looked around the men were now in single file and the accused man was no more than about five feet away from him. This incident happened at roughly about 3:30 p.m. and the judicial note can be made that in all but the most outstanding and unusual circumstances 3:30 p.m. in the month of November in Jamaica usually have enough lighting for one to see; and I doubt very much that anybody could display goods in circumstances where lighting was less than clear.
>
> I accept Detective Corporal Forbes evidence that the men were about five feet from him. He said he could see the accused's face because the accused was pointing the gun in his direction and there was the accused man who was in front of the other two. I accept his evidence when he said he heard the explosion the accused man pointed the gun in his direction and that he was shot.
>
> Now, the question of the identification parade. The allegations are, and the suggestions are made to

> support that contention that the identification parade was held in dubious circumstances. It is suggested that the accused man was forced into going on the identification parade, that the accused man, according to him, was beaten to be on the parade; that the accused man was fooled into believing that his attorney was present; but the evidence of Inspector Robinson to my mind, puts the lie to that because it would seem very strange that a police officer who postponed the identification parade on five occasions prior to it being held for the simple reason that the accused man's named attorney-at-law had failed to turn up, it would in these circumstances have warrant, one, forced the accused; two, was beaten for the accused to come on that parade. I accept his evidence that, and this is Inspector Robinson, that the accused man had arranged to select the other men for the parade; that the accused man was forced, that two Justices of the Peace would have been called into the parade; that the accused man indicated that the parade satisfied him both before it was held and after it was held. In point of fact Inspector Robinson needed only have invited one Justice of the Peace on that parade after the initial parade fell through because of the absence of his attorney-at-law and he went further to invite two. So I do not accept the allegation that the identification parade was unfairly held. What turns out to be an identification parade seem to have been even a little superfluous in the light as I said, of what the defence had agreed. Yes, I was on the scene but I did not shoot the complainant."

After giving anxious consideration to the failure on the part of the learned trial judge to express himself in a manner indicative of the fact that he was mindful of the requisite warning to be applied in cases of this nature, we are not, however, convinced that he got his focus all wrong. An examination of the printed record revealed that the applicant, in testifying, sought to place himself on the scene at the time of the incident. This left, therefore, the only remaining issue for the determination of the learned trial judge, that is, in what

circumstances was the applicant present in the Arcade? Was he there, as the witnesses for the prosecution were contending, as part of a group of three armed men attempting to rob persons who were engaged in doing business in the Arcade and, more particularly, was he the gunman who, on the evidence of Detective Corporal Forbes, had shot and seriously injured him or, was he, as he said, there to purchase shoes?

Although expressing the view that on the applicant's own evidence his identification was no longer in issue, the learned judge, from the manner in which he went on to express himself, showed that he considered the matter of identification as still a matter requiring his consideration. From a reading of words used by him he has further demonstrated that he acted with the requisite caution in mind in assessing the identification evidence in the case. From his summation, it can clearly be seen that his mind was adverted to the following important factors, viz:

1. The opportunity that Corporal Forbes, District Constable McCurbin and Sergeant Murdock had of viewing the gunmen, which included the applicant as they entered the Arcade.

2. The distance the men were from Corporal Forbes when they first entered the Arcade.

3. The distance the men were from Corporal Forbes as they approached him armed with guns on the second occasion, the applicant being in the front of the other men.

4. The reaction of the applicant in discharging his gun as Constable Forbes attempted to get hold of his firearm.

5. The state of lighting at the time of the incident and the nature of known visibility in Kingston at that time of the year when the incident occurred.

6. The ability of the officer Detective Corporal Forbes, given his experience of seven years, to properly observe persons who from their conduct he regarded as acting suspiciously.

7. The detailed description given by all the witnesses including Detective Forbes of the manner in which all three gunmen including the applicant was attired.

All the above factors alluded to are matters which, if accepted as true by the learned trial judge, would have gone towards strengthening the quality of the identification evidence and supporting the verdict to which the learned trial judge came.

Given the factors highlighted, it is also clear that the learned trial judge focussed his assessment of the identification evidence on facts which he accepted, which he viewed as bolstering the quality of the identification evidence. While he did not resort to following the verbal formula laid down by the authorities, one need to be reminded of the words of Lord Widgery, C.J., in ***R. v. Turnbull*** (supra) that:

> "Where the quality of the identification evidence is strong and remained at the end of the accused's case then the dangers of a mistaken identification are lessened."

It is this quality that is greatly sought after and, where present, removes the likelihood or possibility for miscarriages of justice brought about through errors in the visual identification by witnesses. When the factors, which were alluded to, are considered we are of the firm view that the learned judge

approached his task in dealing with this issue with the necessary caution called for in these matters. Even if it could be said that his approach may have been deficient, in that he omitted to use the express words indicating that he had warned himself of the possible dangers inherent in weighing and assessing the evidence in the case, as it related to the issue of identification, having regard to the powerful case mounted against the applicant in which the evidence establishing his guilt was nothing short of overwhelming, we would be minded to apply the proviso as, in our considered opinion, no miscarriage of justice would have resulted from such a defect as may have existed in the lack of any self-imposed directions on identification.

It is for the above reasons that we have treated the application for leave to appeal as the hearing of the appeal, which is hereby dismissed. The convictions and sentences are affirmed.

The sentences are to commence on July 28, 1999.