JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS. 27 &31/99

COR. THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

ROHAN HENRY
RICHARD W. ROWE
V
R

Delano Harrison, Q.C. instructed by
K. Churchill Neita & Co. for Henry

Lynden Wellesley and **Vincent Wellesley**
for Rowe

Anthony Armstrong for the Crown

30th October and 20th December 2000

WALKER, J.A:

On February 10, 1999 at a trial held in the Gun Court Division of the Home Circuit Court, Kingston before Cooke J, sitting without a jury the applicants were convicted on both counts of an indictment which charged them jointly with illegal possession of a firearm (count 1) and wounding with intent (count 2). On the same date each of them was sentenced to a term of imprisonment of five (5) years at hard labour on count 1 and 10 years at hard labour on count 2, the sentences to run concurrently with each other.

The principal argument advanced on behalf of both applicants on these applications for leave to appeal concerns the quality of the identification evidence that was adduced by the prosecution. That evidence came from a single witness, Christopher Pinnock. It was most helpfully summarized in the summing-up of the learned trial judge as follows:

> **Rohan Henry**
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> "He had been seen from time to time, occasionally not over an extended period of time, by the complainant but earlier that evening there had been two encounters. Encounter one, when the lights shone and encounter two, at the dance when he spoke to him and at the dance I accept there was the house light and the shop light. It was a dance which was in an open area and he would expect, most likely it was a shop that would be selling beers and what have you. So very shortly before the incident there was this encounter with Mr. Henry, and shortly after Mr. Henry is in this group with this long gun. I am of the view that the message about the girl to meet him at the tank was a ploy engineered by the persons including Rohan Henry to lure him so that they could 'deal with him'.
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> I am going now to deal with the lighting at the scene. Now, the first comment I make is that the complainant said that up that area whether it is moonshine or no moonshine that area has good visibility. There are no trees, it is barren, no shrubs. I found it quite interesting, this phenomena and I asked Sergeant Dell if she knew the area and she confirmed that for whatever reason there is this type of visibility up there, because it is at nights, in the night it is that she leads her raiding party up there. So there is adequacy of lighting but besides that there was this light at the shop. Where he was encircled in half semi-circle there was a light which I accept which was about two-and-a half feet behind the men from the top of the shop and he was about fifteen feet, fifteen to twenty feet away from the men; the semi-circle, because they were around him and he said that

> when he was encircled he was looking at the faces one by one to see who these people were and he was able to see. About six of them had guns and he used a name which he made out and he knew others like Fitz. Here is a situation where shortly before there was this encounter with Mr. Henry and the encounter show an animosity which existed and therefore there is this reason now for later on indulging in this ambush where he had gone away and got the group almost like a mob to descend. He says that he never drive a car in his life. I reject that as false; he was the taxi man and he had the long gun, and I am satisfied so that I feel sure that he was present with the long gun".

Richard Rowe

> "He was known to the complainant over six years. The complainant says he used to see him day and night, regularly and he had a baby mother up in the area. The complainant did not know about the cosmetologist but he also had another girlfriend in Big Lane. So he was well known to each other. He was the person whom he describes as the shooter. He was in front firing because I don't know if I had forgotten this part; after they searched him they hit him in his head with a gun, gun-butted by Matthew and it is Rowe who fired the shot."

Added to the above was the evidence of Pinnock that the confrontation between himself and the applicants at the time of the incident spanned a period of time of about two minutes.

In his written submissions before this Court Mr. Harrison, Q.C. for the applicant Henry complained as follows:

> "Pages 32 and 34 of the transcript record the Complainant's version of what transpired when the police summoned him to the Police Station to identify two men that they 'had'.
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> On arrival, complainant was taken by the police into a room where the two applicants were sitting in police company, and asked if he knew them. It is then that he purported to identify the Applicant.

> It is submitted that that exercise was so unfair as to enervate the identification of the Applicant. Its 'potential danger (evidently) escaped judicial perception', as the learned trial judge made no reference to it in his directions.
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> The non-direction here complained of constitutes a fatal misdirection".

As support for these submissions Mr. Harrison referred the court to the case of ***David (Frank) v the State*** [1987] 41 WIR 154, a decision of the Court of Appeal of Guyana. The headnote to that case reads inter alia as follows:

> "Following an incident on 3rd June, 1984, the appellant was charged with burglary, robbery and rape. The prosecution case depended entirely on the evidence of identification by the complainant. The complainant had reported the matter promptly to the police on 3rd June, but did not make a statement until 6th June, some hours after she had identified the appellant who had been sitting in an office at the police station. She then for the first time stated that she recognised her assailant as someone called 'Frankie'. At his trial the appellant was not represented, and, although he challenged the complainant's evidence that she recognised him, the allegation of recognition was virtually unexplored. In his summing-up the trial judge did not criticise the identification at the police station, nor did he deal with weaknesses of the identification in the complainant's bedroom. The appellant appealed to the Court of Appeal.
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> **Held,** allowing the appeal and quashing his conviction, that the identification at the police station ought to have been strongly criticised by the trial judge and stigmatised as worthless; the jury should have been told that the failure to hold an identification parade tended to lessen the force of the prosecution case; further, the trial judge's failure to deal with the weaknesses of the evidence of identification in the bedroom was a serious non-direction".

In our view there is an important distinction to be drawn between ***David*** and the present case. In ***David*** it was only after seeing the appellant at the police station that, for the first time, the complainant stated that she recognised her assailant as someone called "Frankie". By contrast in the present case the witness Pinnock had, many days before observing the applicants at the police station, named both of them, albeit by the alias names of "Joobie" and "Bunpipe" as two of his assailants. In this way Pinnock's initial identification of his assailants to the police was confirmed when he later saw the applicants at the police station. Against the background of the witness' previous knowledge of the applicants we can discern in the circumstances of this identification of them no "potential danger" as Mr. Harrrison submitted. Nor, it must follow, do we find that there was any such danger which "escaped judicial perception" for the reason suggested by Mr. Harrison.

For the most part Mr. Wellesley for the applicant Rowe was content to adopt the submissions of Mr. Harrison, but he also advanced a further ground which was framed in this way:

> "The trial judge failed to warn himself that evidence of visual identification is a class of evidence that is particularly vulnerable to mistakes, the reason for that vulnerability, and that honest witnesses can well give inaccurate but convincing evidence".

This ground was plainly misconceived as a perusal of the record showed that in this regard the learned trial judge duly warned himself in the following terms:

> "This is a case in which the Crown relies solely on the visual identification of the complainant, Mr. Christopher Pinnock. It is a case in which the usual caution has to be exercised albeit that it is a recognition case, and I am quite well aware of the reason for the caution and that is in the forefront of my mind as I come to the verdict which I will shortly pronounce".

In our opinion these directions were adequate and do not now admit of a successful challenge.

The present case as was conceded on all sides is, undoubtedly, a recognition case and not a "fleeting glance" case within the context of ***Junior Reid v R*** [1990] 1A.C. 363. Here we cannot say that the identification evidence was weak. If Christopher Pinnock was found to be a credible witness his evidence was sufficient to support a conviction of both applicants. In the result the learned trial judge having at the very outset administered unto himself the necessary ***Turnbull*** warning did, indeed, accept Pinnock as a credible witness.

These applications are, therefore, refused and the convictions and sentences affirmed. In each case the applicant's sentence is to commence on May 10, 1999.