JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO: 21/2000

BEFORE: **THE HON. MR. JUSTICE DOWNER, J.A**
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE SMITH, J.A. (AG.)

R. V. MARCELLENO JOHNSON

Berthan Macaulay, Q.C. for Appellant

Marjorie Moyston, Crown Counsel for the Crown

January 24, 25 and July 31, 2001

BINGHAM, J.A.

The appellant was tried and convicted on an Indictment for unlawful wounding (Count 1) and robbery with aggravation (Count 2) in the Resident Magistrate's Court for Saint Catherine on 6th January, 2000. He was sentenced to three years at hard labour on Count 1 and five years at hard labour on Count II. The sentences were ordered to run concurrently. He appealed from the convictions and sentences imposed on him by the learned Resident Magistrate.

After hearing the submissions advanced by counsel, we dismissed the appeal and affirmed the convictions and sentences. At that time we

promised to put our reasons into writing. This is a fulfillment of that promise.

The Facts

On 2nd October 1999, about 1:45 a.m. the complainant was seated in his taxi cab near to a night club in the Naggos Head Square in St. Catherine. While there, he was approached by two men who engaged him for a fee of $150.00 to take them to Waterford in the same parish. One man got into the front passenger seat and the other sat in the back seat. When the complainant got to Waterford he was given further directions by the man sitting in the front of the vehicle to continue onto Portsmouth in St. Catherine. When they arrived there the two men got out and went to the rear of the vehicle and had what appeared to be a conversation. They then returned to the driver's side of the car where the complainant remained seated behind the steering wheel. The man who had been seated in the front then took out his wallet and pretended to be taking out the fare for the journey. The other man at this time was leaning on the front door by the driver's side. The first man then told the complainant that he wanted him to take the other man to the Plaza. The complainant glanced down at his watch and as he did so he suddenly realized that this second man was now holding a knife on him. He attempted to avoid this man but was cut twice on his neck by this man. The first man then re-entered the car and sat in the front passenger seat. He was also armed with a knife which he used to cut the complainant on his wrist causing him to release his hold on the steering wheel. This man then kicked the complainant out of the vehicle. The second

man then got into the front of the vehicle which was then driven away. The vehicle was never recovered. The complainant made a report at the Waterford Police Station. He was assisted by the police in receiving treatment for his wounds at the Spanish Town Hospital. He received stitches on his neck, his throat and his wrist. He returned to the Waterford Police Station on 5th October, 1999, and gave a statement to the police.

The complainant subsequently went to the Hunts Bay Police Station and was called onto an Identification Parade where he identified the appellant from among a line of men as one of the men who robbed him by calling out the number over his head.

In his defence the appellant told of hearing in the first week of October that the Waterford Police were looking for him. They had come to his house at Pineapple Lane in Bog Walk enquiring for him. As a result he went to Bog Walk Police Station and spoke to the police there. He was directed to go to Waterford Police Station. His mother accompanied him. At the station he spoke to Detective Constable Jackson the investigating officer who asked him where he was on the night of the robbery? He told the officer that "he was at home in bed." The officer told him that "on Friday night about 2:00 o'clock a man was robbed – a taxi driver, whether he knew anything about it?" He said "no." That day he had played football at Bog Walk Comprehensive School football field until 6:30 p.m. Afterwards he went home at about 7:00 p.m. He never went out that night. He was told that he would have to be placed on an identification parade. He was then transferred to the "100 man" station at Portmore.

On the 12th of October 1999, he was taken from Portmore Police Station to Hunts Bay Police Station where an identification parade was held. He was represented by his mother and an attorney-at-law. A Justice of the Peace was also present. While in a line of men on the Parade he heard a male voice call out the number placed over where he was standing and he was told that he was identified. He was later charged for the offences.

The defence called two witnesses, his sister and his mother, in support of the alibi defence put forward by the appellant. The sister in her account related sleeping in the same bed next to the appellant throughout the night that the incident at Portsmouth took place. The mother in her account told of going to work as a domestic helper on the Friday in question and being away from home from 8:30 a.m. to 5:30 p.m. She then left to visit her husband in Port Maria returning home about midnight. She saw the appellant, his sister and a younger brother all asleep in their bed at her home in Bog Walk. That night her younger son slept with her. The appellant and his sister slept together in their bed. When she woke up the next morning they were still asleep in their bed.

On the account of the appellant and his witnesses, if accepted as true or raising a reasonable doubt, a verdict of not guilty would inexorably followed from this course. Even if rejected, a finding of guilt would not be automatic as a false alibi is sometimes put forward to bolster what may at times be a genuine defence. The Court would now have to examine carefully the whole of the evidence in the case including what the complainant had said in relation to the critical issue of visual identification also having due

regard to the necessary warnings which the evidence called for in determining whether the burden and standard of proof in this most crucial area of the evidence was satisfied. Then and only then could it be said that a verdict adverse to the appellant could then flow from such an exercise.

It was in the face of this situation that leading counsel for the appellant sought leave to amend the "Notice and Grounds of Appeal." The original Grounds of Appeal filed on 10th January 2000, were:

> "**1.** that the finding of guilt by the Learned Resident Magistrate was unreasonable having regard to the evidence;
>
> **2.** the sentence was manifestly excessive."

The "amended grounds" when examined did not qualify as such and were at best, arguments seeking to expand the sole ground of complaint which sought to challenge the conviction. These arguments may conveniently be addressed as follows.

The Idendification Evidence

Learned counsel submitted that the identification evidence which was by a single eye witness was fraught with inherent weaknesses and did not come up to the standard required in cases which rest solely on the evidence of one such witness. This was so as:

> **1.** The learned trial Magistrate did not consider whether or not the total time and opportunity was adequate for the complainant to have affected his identification however seemingly honest and convincing he was.
>
> **2.** The learned trial Magistrate also failed to consider that if the complainant was distraught and in a distressed condition because of the physical pain which he was suffering as a result of his being

consistently struck with the point of a knife at the back of his neck, the condition of his distress may have affected his identification.

3. The identification parade was arranged in such a way as to make conspicuous the appellant. He was the tallest person. One was 5 feet 6 inches. Three persons were 5 feet 7 inches. Four persons were 5 feet 8 inches and the appellant was 5 feet 9 inches. The Parade Officer testified that the appellant was represented on the Parade by an Attorney at Law and that a Justice of the Peace was also present.

Counsel submitted that although the officer mentioned that the men on the parade including the suspect (the appellant) were of similar complexion, age, appearance, status and position in life, he made no mention of the height of the men.

In assessing the evidence in relation to the holding of the Identification Parade, the question for the learned Resident Magistrate was as to whether, taking all the factors into consideration, the parade was fairly conducted. Here was a situation where the rules governing the holding of such parades called for the requirements being directory to be satisfied as far as was possible. The complaint here was directed at the height of the appellant, he being one inch taller than four other men and three inches taller than the shortest person.

The appellant was represented on the Parade by an attorney-at-law whose duty it was to see that the Parade was fairly conducted. He would have assisted in the selection of the men on the Parade and would also express his satisfaction with the arrangements before the witness was called onto the Parade. There was no evidence in the printed record to indicate that any objection was raised by either the Attorney or the Justice of the

Peace who was present, to suggest any semblance of unfairness in the conduct of the Parade.

In reviewing the evidence in relation to the holding of the Identification Parade the learned Resident Magistrate said:

> "Although he (the accused) was well represented at the identification parade by an attorney-at-law he sought to tell the Court that none of the men on the Parade looked like him and that he picked only five of them. He denied saying that he was satisfied with the men on the Parade and even denied the presence of his attorney-at-law when this question was put to him."

In treating with the alibi defence put forward the learned Magistrate said:

> "His witnesses were clearly witnesses of convenience who sought to support his Alibi. His sister Janice Johnson recalls his movement on the particular date with great detail - even more detail than the accused himself. She recalls that when he came in he rested for about five minutes and then spent fifteen minutes in the bathroom as opposed to twenty-five minutes he said he spent there. Here is a family of four - two males and two females. Yet the males do not sleep in the same bed especially considering the stature of the accused and the fact that the other male is but a child of nine years old. Janice Johnson and her mother were fairly small in stature and would seem to be better suited as sleeping partners and it would seem that the accused was evidentially placed in bed with his eighteen year old sister so that it could be inferred that he was in bed throughout the night in question because she is a light sleeper and if he had gotten up she would have known."

All this led the learned Magistrate to conclude in relation to her assessment of the witnesses for the defence put forward that:

> "The evidence of his witnesses also lack sincerity and I find that they are not witnesses of truth."

Given the fact that the learned Magistrate had the distinct advantage of seeing and hearing the witnesses all of whom testified before her, it was her function as the Tribunal of fact and law to determine where the truth lay and, having done so, whether the prosecution had discharged the burden placed upon it to her satisfaction. She saw the witnesses as they were examined under oath, had their evidence tested by cross-examination, and observed their demeanour. This judgment call was one for her to make. When her findings are examined and put to the test they remain unshaken. It was in the light of the above that the learned Magistrate concluded:

> "In the final analysis, I reject the accused man's alibi as a fabrication. The police had been to their home and it was known that he was being sought. As his sister put it, when he came home they spoke, then their mother was summoned to the house and then they went to the police station. All parties had the opportunity to formulate a plan of action."

Fully mindful that for the prosecution to succeed on establishing the charge against the appellant, it was necessary for them to do so on the strength of their own case and not on the weakness of the defence, the learned judge quite correctly said:

> "Even as I reject the accused man's defence, I must return to the Prosecution's case to see whether it has been proved to the required standard and at the end of the day I must make the following findings:
>
> **1.** After giving full weight and effect to my warning, the accused has been properly identified as the second man in the complainant's account of the incident. I

> must here add that in the view of this Court the stature of the accused is consistent with the complainant's evidence about that second man being tall and sitting with one leg behind the passenger's seat and one behind the driver's seat and requiring time to get in and out of the vehicle.
>
> **2.** The accused used a knife to inflict injuries to the neck of the complainant which bled.
>
> **3.** The accused and another man who was also armed with a knife, by force and with violence, took from the complainant one Nissan motor car valued at $280,000.00.
>
> Accordingly, I find the accused guilty as charged."

In the light of the above observations, the complaint levelled in the arguments by learned counsel for the appellant that the learned judge came to her conclusion of guilt before assessing and rejecting the alibi defence, was totally unfounded and without any basis.

Conclusion

This was a case in which the critical issue was one of visual identification of the assailants by the complainant. The learned Resident Magistrate applied her mind to this important issue with extreme care and caution. In expressing her assessment of how she viewed the quality and reliability of the identification evidence she said:

> "In considering the evidence of the complainant on the issue of identification, I a mindful that an apparently convincing witness such as the complainant can be mistaken and that he was encountering these men for the first time. Further, in the scenario which he presented to the Court, the time spent observing the men would have been divided between both but I accept as the truth his evidence that he looked at each man separately

> and was able to note the features of each man, that he had good reason for so doing and that the identification of the one he said was the second man was made within ten (10) days of the incident, when his features would still have been fresh in the complainant's mind."

When the manner in which the learned judge went about her task in weighing and assessing the testimony of the witnesses, there is nothing emerging therefrom that could lead this Court to disturb the verdict to which she came.

Sentence

The sentences passed were within the powers of the Magistrate to impose. Although the Magistrate saw the need to impose the maximum sentence on each of the Counts, she saw the need to resort to this course in the light of the gravity and prevalence of these offences. Taking these factors into consideration, this Court can find no plausible reason to interfere with the sentences passed on the appellant.

It is for the above reasons the Court came to the decision reached referred to at the commencement of this judgment