JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 164/99

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

R. v. DAVID KILDARE

Jacqueline Samuels-Brown for the applicant

Paula Llewellyn, Acting Deputy Director of Public Prosecutions
& Tanya Lobban for Crown

November 28, 29, 30 & December 20, 2000

FORTE, P.

The applicant appeals from his conviction on the 22nd September, 1999 in the High Court Division of the Gun Court for the offences of (i) illegal possession of firearm, (ii) shooting with intent (iii) robbery with aggravation and (iv) kidnapping with intent. On these four counts he was sentenced to fifteen, fifteen, ten, and twenty-five years respectively. On the 30th November 2000 having refused leave to appeal, we promised to put our reasons in writing. This we now do.

Having regard to the issues raised on appeal there is no necessity to indulge in a detailed rehearsal of the evidence adduced at the trial. It is sufficient to indicate that on the 21st November 1998 while the virtual complainant Harold Shields was at his farm at Goshen in St. Elizabeth in the company of his farm manger Mr. Levy, two men one later

identified as the applicant entered the farm on the pretence that they were employees of the National Water Commission, who had come to check on a reported leak in the pipes. Before Mr. Shields could make an effective rebuttal that there was no leak in his pipes, each man brandished a firearm which he described as 9mm guns. The guns pointed at him, the men demanded from him "whatever he had in his possession." He took an envelope containing $43,000 from his pocket and threw it to the applicant who put it in his pocket. The other man then searched him enquiring of Mr. Shields where is his gun. This man then ordered Mr. Shields to go down on the floor, and when he refused, a shot was fired at him but he was not sure which of the two men did so. With smoke on his face as a result of the shot that was fired, he obeyed the order and went down on the floor.

While the other man held the gun pointed at Mr. Levy, Mr. Shields and a lady who was in the room, the applicant went to the Sunny Nissan motor car in which the men had come to the farm, and returned with rope with which he tied the hands and feet of Mr. Shields. He was then placed on the floor at the back of the car. The applicant sat on the back seat with the gun pointed at him. The driver (i.e. the other man) then went back to the room where Mr. Levy and the lady were, and then returned shortly thereafter and drove the car out of the premises. With the applicant and himself remaining in the same position until he was later allowed to sit on the back seat, the witness was driven to a home in Kingston. Before reaching there however, a stop was made in Williamsfield in Manchester where the driver bought soft drinks for the three of them. On reaching six miles in Kingston the applicant "pulled a pants" over the head of the witness saying at the same time that the witness was not to know where he was going. Nevertheless the witness was able to see through the pocket of the pants, and was able to know when he had reached Constant Spring Road where it intersects the end of the Washington Boulevard. He was able to see where he was going until the vehicle turned on

Shortwood Road, when the applicant realizing that he could see, tightened the pants and turned it around his face. He could nevertheless still "glimpse" through the holes in the pants. He was eventually taken to a house where the "pants" were removed from his face. By then it was about 12.30 p.m. It was at the house, after his feet and hands were untied that the applicant demanded "$5m or my life". He was allowed to call his wife on his cellular phone which he still had on him. He told them he could not find $5m at that time as it was a Saturday and they negotiated the figure to US$10,000 and J$600,000. He told his wife of the arrangement and asked her to make the arrangements to find the money. To summarize the events that took place thereafter, the police were informed, and subsequently took into custody a young man who was sent to collect the ransom money. This young man took the police to the home where Mr. Shields was being held. Mr. Shields was released from the custody of his assailant who had run and made good his escape when he realized that the police were at hand.

The defence was an alibi thus placing into focus the identification of the applicant who was subsequently identified by Mr. Shields at an I.D. Parade. It is events which occurred at this parade which have formed the major complaints before us. Mrs. Jacqueline Samuels-Brown contended that there was a breach of the Jamaica Constabulary Force (Amendment) Rules 1977 and in particular the Identification Parade Rules of 1939. The breach alleged is that before the witness Shields identified the applicant on the parade, he had come into contact with another witness Mr. Levy who at that time had already gone on the parade. The relevant rules are as follows:

> "**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 witnesses' attention being directed to the suspected person in particular instead of indifferently to all the prisoners paraded, and (b) to make sure that the witnesses' ability to recognize the accused has been fairly and adequately tested.

553. It is desirable therefore that:

(i), (ii), (iii), (iv), ...

(v) The witnesses shall be introduced one by one and on leaving shall not be allowed to communicate with the witnesses still waiting to see the persons paraded, and the accused shall be allowed, if he so desires, on being informed of his right to change his position after each witness has left. A witness shall be required to touch any person whom he purports to identify."

However, in the case of the use of "one way mirrors" at Identification Parades the Jamaica Constabulary Force (Amendment) Rules 1977 provides that the person identifying the subject shall not be required "to touch any person whom he purports to identify."

This is how Mrs. Samuels-Brown framed her ground of appeal:

> "1. The evidence as to the second identification parade attended by the witness Shields was wrongly admitted into evidence, as:
>
> (a) The said parade was held in breach of the Jamaica Constabulary Force (Amendment) Rules 1977 made under the Constabulary Force Act and the Identification Parade Rules 1939.
> (b) The said parade was held in circumstances which were patently unfair."

The factual basis for this ground stems from two occurrences on the occasion of the holding of the Parade.

(i) When Mr. Shields initially went on the Parade, he immediately complained that he needed his glasses which had been left in his car, and requested an opportunity to get same. Counsel for the suspect (i.e. the applicant) who attended the parade objected to the "waste of time" as he had other pressing duties in Sav-la-mar and insisted at first that Mr. Shields be required to make his attempt at identification at that time. Mr. Shields did so, and pointed out someone else whom he said he had seen at the time of the incident. He was then allowed to leave the room, and to proceed to another room, where according to

his testimony he was locked away by himself. On later receiving his glasses, he went back into the parade and without any apparent difficulty identified the applicant as one of his assailants.

(ii) In his testimony, Mr. Levy who had gone on the Parade after Mr. Shields had left it for the first time, stated that he had been taken into a room, and was together with Mr. Shields in that room before Mr. Shields went back on the parade.

Mrs. Samuels-Brown contended that Mr. Levy's evidence if it were to be accepted, clearly disclosed a breach of the Identification Parade Rules of 1939 in particular rule (v) which states that a witness who has been on the parade, shall not be allowed to communicate with witnesses still waiting to go on the Parade. It should be noted, however, that when Mr. Levy attended on the Parade, he failed to identify anyone on the Parade, and consequently would be unhelpful to Mr. Shields as to whom to identify. This was a consideration that found its way into the learned judge's deliberations as is revealed in the following words from his judgment:

> "Now, was this parade conducted fairly because this is the crux of the matter. I think the defence has challenged that it was not fair. Was there any communication from anyone else to Mr. Shields? The officer says he was taken to a room and he spoke to the accused man on the parade who changed his position, changed his clothes, in fact he took up number six position and this was done when Mr. Shields was out of the room. Mr. Shields said he was in a room alone, albeit Mr. Levy is saying he saw Mr. Shields in a room and he was in the room but one must remember that Mr. Levy who went on the parade never identified anyone. I find that the parade on which Mr. Shields pointed out the accused was fair."

In our view the learned trial judge directed his mind to the irregularity or possible irregularity, given the discrepancy in the evidence in this regard, and came to the conclusion that the identification parade was nevertheless fair in all the circumstances. It is difficult to disagree with his reasoning given the fact that the person with whom possible contact was made was Mr. Levy who himself could not identify anyone on the

parade. Mrs. Samuels-Brown relied for the most part on English authorities and the English Regulations which provide for the evidence of identification parades to be excluded from the evidence if there are breaches of the rules governing their conduct. It is sufficient, however to refer only to a passage from the case of ***Francis Joseph Quinn*** (1995) 1 Cr. App. R. 480 at 488 to discover that even in those circumstances the trial judge in that jurisdiction still has a discretion as to whether the evidence ought to be admitted. Lord Taylor C.J. stated in that case:

> "The fact that there have been breaches – even several breaches – of the Code is not conclusive as to whether or not the evidence should be admitted. The judge has a task, if there have been breaches, to consider whether those breaches, taken either singly or in the aggregate, are such as to make it requisite for him, pursuant to section 78 to exclude the evidence. He will only do so if he comes to the conclusion – it is a matter for his discretion – that to admit the evidence would have an adverse effect on the fairness of the proceedings."

Perhaps it needs to be reiterated that the underlying and cardinal consideration is whether in all the circumstances it can be said that the Parade was fair.

In our jurisdiction in the case of ***Regina v. Graham & Lewis*** [1986] 23 JLR 230 this Court held that our own rules (supra) are procedural only and opined that "any positive breach will have the effect of weakening the weight to be given to an identification made at such parade."

The circumstances that existed in this case, are not such that could lead to the conclusion that the parade was unfair and consequently that no weight ought to have been put on the identification of the applicant made by Mr. Shields.

It should also be noted that Mr. Shields had had ample opportunity to see and retain in his memory the image of his assailant so that he could later identify him. In his judgment the learned trial judge demonstrated that he carefully considered this

evidence and used it in coming to his verdict. He commenced in the knowledge that the applicant was not known to Mr. Shields before and then continued:

> "Now, the evidence coming from Mr. Shields is that the incident at the farm lasted some forty minutes and that he viewed the accused man for some thirty minutes, he was there, he spoke with him and he says that he observed a scar to the left cheek, just below the left eye of the accused. Further he says when he was taken in the car he was placed in a position where he was viewing the accused. He said the accused held a gun at him, he was looking at the accused. Then says he, the time between the journey from Mandeville to Kingston, he was looking at the accused man for some nine hours. He says that a part of the journey, the men, that is to say the driver and the accused, thought that he might be seeing and a trousers was put over his face. He said it wasn't put properly, it was loose and he was able to see through the zipper and in fact he was able to tell at what point they had reached, he stopped at Williamsfield, they travelled to May Pen bypass and he recognised when they were at Three Miles and when they were on Constant Spring Road, he said he recognised the stop light then. Then he went on to say that when he was taken to this house, and he says this is the house of the accused man because the accused told him it was his house, he was there talking with the accused. The accused engaged him in argument and in fact it was there that the accused made the demand. He says not only himself and the accused was there but also another man, this man known as Jeffery. Jeffrey left some time and he was in this room when he said he was hungry, meals were sent for and he had these meals, he had drinks with them so he had ample opportunity to see them. In fact he was seeing them. He says the negotiation in the room lasted for some two to two-and-a- half hours, and during these two and a half hours it was broad day light, the room was clearly lit and it was not until night fall that the accused man turned off the light in the house. So here is it, the accused man, the complainant is saying he had some nine hours of looking at this man, looking at the accused, he had some two hours with him in a room. He is saying and he described what he saw as a scar on him. Now, did he have sufficient opportunity to view this character or the accused whom he said was the man sitting in the back of this car with him? That is the question to be asked, that is the question to be answered, some nine hours plus an additional two and a half-hours in this room. I hold that that was sufficient opportunity he had of viewing the accused and here it is, the evidence is that the accused was not wearing anything, no mask on him. "

This was a case in which the witness had an abundance of time within which to identify his assailant, and in the end, the learned trial judge, correctly in our view, having expressed his awareness of the careful approach that ought to be taken in accepting evidence of visual identification, came to the conclusion that the evidence was credible and the identification made on the parade fair even if there had been a breach of the rules.

Mrs. Samuels-Brown argued several other grounds of appeal, which in our view were without merit, and which do not require any examination except to say that they all failed to convince us that there was any reason to interfere with the conclusions of the learned trial judge.

For those reasons, we dismissed the appeal, and ordered that the sentence of the applicant should commence on the 22nd December, 1999.