JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 81/93

BEFORE: THE HON. MR. JUSTICE RATTRAY, PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.

REGINA vs. GERALD CROSS

Richard Small, Mrs. Donna Scott-Mottley and Mrs. N. Scott-Bonnick for appellant

Dr. Diana Harrison, Deputy Director of Public Prosecutions, and Miss Audrey Clarke for Crown

April 18 and May 24, 1994

WOLFE, J.A.:

The appellant was tried in the High Court Division of the Gun Court at a sitting of the Clarendon Circuit Court in May Pen on the 19th, 26th and 31st July, 1993, before Theobalds, J., sitting alone. He was charged on an indictment which contained two counts for illegal possession of firearm and robbery with aggravation. He was convicted on both counts and sentenced to imprisonment at hard labour for five and seven years respectively. Sentences were ordered to run concurrently.

Dr. Harrison, for the Crown, on a question from the Court, quite properly indicated to the Court that she was unable to support the convictions as the learned trial judge had failed completely to give himself any directions on the crucial issue in the case, namely, the evidence of visual identification. We agree wholeheartedly with the concession made by Dr. Harrison and as a result we allowed the appeal, quashed the convictions, set aside the sentences and entered a verdict of acquittal.

The sole purpose of putting our reasons in writing is to re-emphasise, once again, the absolute necessity for judges

sitting alone to demonstrate in their summing-up that they appreciate the need to warn themselves of the dangers associated with evidence of visual identification and, therefore, in the assessment of the evidence to approach it with caution.

Their Lordships of the Judicial Committee of the Privy Council and this Court have on numerous occasions in recent history made it abundantly clear that failure of a judge to demonstrate in the summation that the need for caution is appreciated, when visual identification is relied upon, will result in the conviction being quashed. So many and, we presume, so well known are the authorities that we consider it unnecessary to cite any of them in this judgment.

Only a brief summary of the evidence is necessary in the circumstances of this case. The complainant Errol Croseman was held up and robbed by two men, one of whom was armed with a gun, whilst he was riding his bicycle along Fogah Road in the parish of Clarendon. The incident took place at about 9:15 p.m. The purported recognition of the appellant was aided only by the moonlight. Mr. Croseman testified that he knew the appellant for over twenty-five years and that they had grown up in the same district.

The prosecution case was also based on an oral confession made by the appellant at the time of arrest. The learned trial judge in his summation indicated that he would place no reliance on the confession as he was of the view that the appellant had been beaten by the police to induce the confession.

In dealing with the issue of visual identification, the learned judge said:

> "So I turn back now to the issue of visual identification by the complainant. I accept the evidence that moon was shining at the time and I accept the evidence that the accused person came within two feet, and even though the complainant said that after he had recognised the accused the accused attempted to cover his face, I find that there was sufficient opportunity for the identification to have been made and on these findings of fact I find the accused man guilty on both counts of this indictment."

Not another word was breathed about visual identification by the learned judge. He completely failed to warn himself of the dangers associated with visual identification evidence. He failed to examine the circumstances under which the purported recognition was made. This we found wholly unacceptable. This failure on the part of the learned judge, in our view, denied the appellant a fair trial.

This Court does not require a judge to use any particular formula in dealing with visual identification but we repeat once again that the judge must demonstrate that he knows how the principle of law is to be applied. As was said in **R. v. Cameron** S.C.C.A. 77/88 (unreported) delivered November 10, 1989, whilst there is a presumption that the judge knows the law there is no presumption as to the proper application of the law.

Having said all this, we can only implore the judges below to take heed and follow carefully the decisions of the Superior Court.

Where there is evidence to support the verdict and the conviction has to be quashed because of the failure of trial judges to observe a fundamental and basic principle of law, this is an injustice to the victim who no less than the accused is entitled to have his complaint fairly adjudicated upon and have a true verdict returned according to the evidence.

We were urged to order a new trial but so tenuous was the nature of the identification evidence, we concluded that to accede to such a request would be tantamount to giving the Crown an opportunity to bolster its case against the appellant.