JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS: 83, 85 & 86/91

COR: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A. (AG.)

R. v. DEVON LAIDLAY
EVERTON ALLEN
ANTHONY WHYTE

Lord Gifford Q.C., with Miss Norma Linton for Whyte

Dr. Paul Ashley for Laidlay

Lloyd McFarlane instructed by Ian Ramsay for Allen

Michael Palmer ... with Kissock Laing for the Crown

22nd March & 1st April, 1993

FORTE, J.A.

On the 22nd March 1993, we granted leave to appeal, and treating the hearing as the hearing of the appeal, we allowed the appeals, quashed the convictions, set aside the sentences and ordered a new trial. We promised then to put our reasons in writing. This we now do.

The appellants were convicted for the murder of Everton Blair, before Wolfe J, and a jury sitting in the Home Circuit Court on the 12th July, 1991.

The murder with which they were charged, occurred on the night of the 10th June 1990. The deceased, who worked as a watchman on a chicken-farm, was killed while he was on the job on the farm situate at Harbour Road and Wareika Road in Kingston. The sole eye-witness and on whose testimony the prosecution totally relied, was Mr. Neville Phillips, who also worked as a watchman on the same farm. On that night Mr. Phillips was on the job, along with the deceased, and another gentleman described by the

witness as "Quell." Mr. Phillips had just gone up to the upper floor of the chicken-coop when he heard the deceased say something and thereafter the sound of gunshots. As a result he lay on his belly, and looked through the "mesh" unto the lower floor of the coop. He then saw the deceased on the ground, and all three appellants, armed and standing over the deceased. There were several other men present, seven of whom in addition to the appellants he identified by name at the trial. He testified that he saw the appellant Allen search the deceased, take two rings off his fingers and then fire shots into his stomach. Thereafter the appellant Whyte, also went over the deceased, and shot him in his stomach. The appellant Laidlay who was also there "alongside the other two appellants" and armed with a gun was not seen by the witness to fire any shots. After this, all three appellants left the scene, leaving their victim dead. After remaining in hiding for a sufficient period of time to secure his safety, the witness came out from where he had observed the actions of the appellants, and hurried to the mother of the deceased to whom he made a report.

The appellants, all in sworn testimony, denied their presence on the scene, and maintained that they were elsewhere. The purported identifications by Mr. Phillips were therefore challenged by all three appellants, putting the issue of visual identification as the primary focus in the case.

Before us, several grounds of appeal were filed alleging various errors on the part of the learned trial judge in his directions to the jury. Because of the apparent merit in the ground dealing with the complaint of the learned trial judge's treatment of visual identification in his charge to the jury, we invited Lord Gifford Q.C., to address us firstly in relation to that complaint and as a result of our conclusion in respect thereof no arguments were advanced in relation to the other grounds of appeal which were filed.

It was common to both sides, that the case for the prosecution depended solely on the evidence of the witness Phillips. Lord Gifford Q.C., in his submissions also conceded that the evidence in relation to the lighting, the distance which separated the appellants from the witness, the duration of ten minutes which the incident lasted, the fact that all the appellants were known to the witness before for periods of five to six years, the uninterrupted view which the witness had of the appellants, were all strong features of the purported identification of the appellants. The learned trial judge, did, as he is required to do, direct the jury in relation to all these factors, and in so doing informed them that they had to exercise caution before acting upon his evidence, as mistakes in identification can be made.

The appellants however made the following complaint:

> "That the directions by the learned trial judge on identification/recognition evidence were inadequate. Basically they dwelt on the need for caution on the analogy of a motor car going up Mount Rosser which, it is respectfully submitted, misses the gravity of the situation: that the direction entirely omitted serious reference to the historical and psychological bases from which the need for caution in identification arises: And this amounted to misdirection."

The complaint in the first part of this ground refers to an analogy given by the learned trial judge, in an attempt to explain to the jury what he means when he directed them to approach the evidence of visual identification with caution. Counsel for the appellants, argued that the analogy could have been understood by the jury to mean that having exercised caution, they were bound to convict the appellants. While not agreeing with the interpretation advanced by Lord Gifford Q.C., it does demonstrate that the use of an analogy in cases of visual identification can result in misleading the jury as to the approach to be taken in

assessing the evidence. The word 'caution' is a simple English word which needsno explanation as it is capable of unassisted understanding. Alternative words such as 'careful' or 'dangerous to convict' would be equally acceptable, such words not being exhaustive, as to the manner in which the jury should approach such evidence. Trial judges should therefore refrain from creating analogies so as to attempt to bring an easier understanding to jurors, as such an approach may well mislead the jury, in the manner advanced here by learned counsel for the appellants. Instead, it is sufficient to indicate to the jury that caution must be exercised in assessing evidence of visual identification and the reasons for such caution. It is to this issue that the second part of this ground is addressed. To recognize the validity of this complaint, all that is needed is a reference to the relevantly recent authorities on the subject-matter. In this regard the case of **Thomas Palmer v. The Queen** P.C. Appeal No. 44 of 1990 (unreported) delivered on 3rd February 1992, sufficiently deals with the point in issue. Lord Ackner in delivering the opinion of the Board reminds that previous cases had emphasized that a mere statement that a jury must treat visual identification evidence with extreme caution, accompanied by detailed references to the witness' opportunity to identify the accused, was not sufficient.

He then makes reference to a passage from the Australian case of **Regina v. Dickson** (1983) 1 V.R. 227 which was cited in the case of **Junior Reid** (1989) 3 W.L.R. 771 with approval and which is reported at page 231 (supra);

> "It is difficult to convey to the jury the reality of particular dangers which exist in the evidence without drawing to the attention of the jury two things which they are unlikely to know. The first is that experience in the courts over the years has shown that in a not insignificant number of cases erroneous

> "Identification evidence by apparently honest witnesses has led to wrong convictions. For this knowledge the judge draws largely on accumulated judicial experience. One sees instances of erroneous identification from time to time ... The second thing which the jury are unlikely to know is the substantial degree of risk that honest witnesses may be wrong in their evidence of identification. Jurors, who, unlike trial lawyers, have not given thought to the way in which evidence of visual identification depends on the witness receiving, recording and recalling accurately a fairly subjective impression on the mind, are unlikely to be aware of the extent of the risk that honest and convincing witnesses may be mistaken ... The best way of explaining and bringing home to the jury the extent of this risk is by explaining the reasons for there being the risk and that it is essential to distinguish between honesty and accuracy and not assume the latter because of belief in the former."

Then Lord Ackner concludes:

> "The trial judge never told the jury that visual evidence of identification is a class of evidence that is particularly vulnerable to mistake, and the reasons for that vulnerability, nor that honest witnesses can well give inaccurate but convincing evidence. Their Lordships have previously stated in **Scott v. The Queen** [1989] A.C. 1242 at page 1261, and reiterated the observation in the **Junior Reid** decision, that unless there are exceptional circumstances to justify such a failure the conviction will be quashed, because it will have resulted in a substantial miscarriage of justice."

In the instant case though the learned trial judge told the jury that identification evidence should be approached with caution, because there are inherent dangers, one of which was that a witness can be mistaken, he never told them that judicial experience has shown that in a number of cases, erroneous identification evidence by apparently honest witnesses had led to wrong convictions, and that an honest witness can be a convincing witness even though he is mistaken. In the end, though the jury were aware of the fact that they had to exercise caution in acting upon the evidence of Phillips,

because he may be mistaken, they were not given the benefit of judicial experience which would demonstrate effectively the real reason why they ought to exercise great caution in acting upon such testimony. We are of the view that this was a serious omission by the learned trial judge.

In those circumstances and in accordance with the dicta of the Board in **Scott v. The Queen** (1989) A.C. 1242 at 1261, unless there are exceptional circumstances to justify such a failure, the conviction ought to be quashed, because it would have resulted in a miscarriage of justice.

After careful examination we have found no exceptional circumstances, to justify such a failure in this case, and consequently on that ground we made the order referred to at the beginning of this judgment.