JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 168/90

BEFORE: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

R. v. HOPETON McCALLA

Dr. Paul Ashley for Appellant

Miss Carol Malcolm for Crown

17th February, 1992

FORTE, J.A.

In this case the appellant was convicted for the offences of illegal possession of firearm and robbery with aggravation in the High Court Division of the Gun Court held on the 11th day of December, 1990. He was sentenced to 7 years imprisonment on each count at hard labour to run concurrently.

This appeal comes from the grant of the application for leave by a judge sitting in Chambers.

Before us, Dr. Ashley for the appellant argued three grounds of appeal, the first reads:

> "1. The learned trial judge erred in law by failing to warn himself in the fullest form of the dangers of acting upon uncorroborated evidence of visual identification.
>
> 2. The learned trial judge erred in law by refusing the no-case submission of counsel as the identification evidence adduced was weak, of poor quality and uncorroborated.

> "3. The learned trial judge by shifting the burden to the accused to establish his innocence misdirected himself in consideration of the matter at hand."

Consequently, this court cannot be sure that the relevant and appropriate considerations were given by the learned trial judge in arriving at this verdict.

Having heard the arguments of Dr. Ashley, and Miss Malcolm having been called upon she, in our view, correctly conceded that grounds one and two were grounds of appeal to which there was no answer. In view of the decision that the court has taken in relation to this matter, no detailed reasoning will be given for our judgment. Suffice it to say that in relation to ground three the passage complained of by the appellant in the learned judge's summation when he was considering his verdict reads as follows:

> "... What the Prosecution said, I believe the prosecution has proved their case beyond a reasonable doubt and that the burden shifts to the accused to establish their innocence. ..."

There is really little that we can say about such a direction. It discloses a complete misconception by the learned trial judge in relation to the burden of proof in a criminal case. To say that the burden shifts to the accused to establish his innocence is a statement which is absolutely wrong in law and on that ground alone the conviction could never stand.

In relation to the first ground of appeal, with the diligence of Dr. Ashley, we have examined the summation by the learned trial judge and no where can it be found that he demonstrated by what he said that he approached the question of visual identification with the caution required in such cases. Needless to say there are no express words which showed that he applied that principle. That ground also standing alone would be sufficient to dispose of this appeal.

Dr. Ashley also argued ground two in which he contended that the learned trial judge erred in law by not upholding the no-case submission. In our view Miss Malcolm gave the answer to that submission. The question of credibility did arise in the case but that is a question of fact for the tribunal to decide at the end of the case. There were no such serious discrepancies which would necessarily prevent a jury properly directed from coming to a conclusion adverse to the appellant. In those circumstances we find that ground two fails. Nevertheless on the basis of grounds one and three the appeal is allowed, the convictions quashed and the sentences set aside. However, having regard to the evidence and in the interest of justice we order a new trial.