JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 130/90

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA VS. KEITH RENNICK

Everton Bird for the appellant

Hugh Wildman for the Crown

23rd June & 16th July, 1992

DOWNER, J.A.

The appellant was tried by Wolfe, J., in the High Court Division of the Gun Court on 13th September, 1990 for unlawful possession of firearm and two counts of wounding with intent. He was convicted and sentenced to 7 years imprisonment with hard labour on count 1 and 15 years imprisonment with hard labour on counts 2 and 3. The appellant then sought leave to appeal. This was granted by the single judge.

The issues now raised concern the adequacy of the reasons for judgment where the issue was identification and they also concern the application of section 14 (1) of the Judicature (Appellate Jurisdiction) Act. The material part of this section states that "... the judgment should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence." [Emphasis indicates reference to section 14 (5) (b) Gun Court Act.

The Facts

The facts as rehearsed in the judgment pinpoints Constable Clarke who was on duty on Payne Avenue with Constable Cole as the sole witness as to identification. When it started to rain, both sought refuge at the Haile Selassie Secondary School. It was

about 2:30 p.m. on the 8th March, 1989 and visibility was good. At that point, Clarke overheard his colleague alerting him and then he was able to observe three men approaching in the form of a triangle. His evidence was that the appellant whom he did not know before was to the right of the man at the apex and both of these men had guns. Constable Clarke's evidence was that the men opened fire and that he and his colleague threw themselves on the ground. Constable Cole was wounded and Constable Clarke realised that his own gun fell from his grip. Constable Cole then threw that gun to him which he caught and fired at the men who escaped. Of the three men, Constable Clarke reported that he knew "Munchie" an ex-soldier but not the others.

The other occasion when Constable Clarke saw the accused was 5th July, some four months after the incident. On that day Constable Clarke picked out the appellant on a properly conducted identification parade. So the issue on appeal was whether the visual identification satisfied the rigorous tests laid down by the authorities which are binding on the Court. See **Junior Reid & Ors. v. R.** [1990] 1 A.C. 363. As to how these authorities are to be applied by a judge sitting in the High Court Division of the Gun Court, see **R. v. Alex Simpson R. v. McKenzie Powell** S.C.C.A. 151/88 and 71/89 delivered 5th February, 1992.

How was the identification evidence assessed in the Court below?

The crucial passage in the learned judge's reasons which comes after a summary of the Crown's evidence runs thus:

> "... Now, what are the circumstances under which he sees these men? Broad daylight, 2:30, open country so-to-speak. The men were some distance away at first but the men walked towards him, they kept walking towards him, when he turned around the men were walking towards him. I have to bear in mind this is a police officer. They are not always good observers but it is something I have to consider. I have

> "to take into consideration the factor that this accused man was never known to him before. I have to take into consideration the factor that the officer goes on a properly conducted identification parade and points him out and that the propriety of that parade, of how it was conducted, was never challenged. So in the light of that, I find that the parade was duly held, fairly conducted and that the accused was pointed out by Mr. Clarke on his own without any assistance from anybody."

Mr. Bird for the appellant pointed out that some weaknesses of the identification evidence was never adverted to in this passage or at all. The conditions were difficult. The time available for identification was about ten seconds and Constable Clarke was under fire, and shot in the left buttock. He returned four shots and he also saw his colleague Constable Cole on the ground wounded in his crotch. Also the distance from which Constable Clarke saw the accused was about five to ten yards.

The learned judge continued his assessment thus:

> "... That pointing out of the accused man by Mr. Clarke does not end the matter because as we know, a man can honestly be mistaken and point out a man or he can deliberately point out this man, well knowing it is not the man. These are the dangers which are inherent in visual identification and I warn myself of those dangers. I have already pointed out the circumstances under which Mr. Clarke viewed the accused man. I have already pointed out the circumstances of the identification parade and I have already given myself warning which I am required to give. So it is against the background of the warning and the circumstances, to which a judge must address his mind as pronounced in **Oliver Whylie** by the Jamaican Court of Appeal, I am reviewing the evidence as to identification."

It is acknowledged that the learned judge recognized the inherent weakness of identification evidence in general, but the complaint of counsel for the appellant, was that the specific weaknesses as regards the difficult conditions adverted to above,

were not clearly on the judge's mind. Also, the time lapse between the identification and the parade was never mentioned and this was the specific ground on which leave was granted. In this regard, it is pertinent to refer again to **R. v. Alex Simpson** and **R. v. McKenzie Powell** (supra). In that case there is a reference to **Knowles v. The Queen** (1930) A.C. 366 where the trial judge sitting without a jury failed to address his mind to the issue of recklessness which arose on the evidence. Because of this, he did not advert to the issue of manslaughter in his judgment. The Privy Council allowed the appeal on that ground.

There was another aspect of the judge's assessment which was criticised. He stressed the credibility of Constable Clarke because he acknowledged that of the three men that day, he asserted "Munchie" was the only one he knew previously. Here is how the learned judge puts it:

> "... Now, if the man was such a deliberate liar, would he have come here and said, 'The only man I recognized was Munchie?' 'The only one I knew before was Munchie.' Wouldn't it be much easier for him to say 'the accused man is the one I see all the while,' then ground the reason for his being able to point him out on an identification parade. He said, 'Munchie is the only one I knew of the three men,' so to my mind that bit of evidence discloses to me that he is a man upon whose testimony I can rely; he is a witness worthy of belief, that is my assessment of Mr. Clarke, having seen him."

But this aspect of the evidence could not strengthen the weak identification evidence. It could only be strengthened if there was independent evidence to support the visual identification. It is against this background that ground 3 which reads:

> "3. The Learned Trial Judge failed adequately to consider the lack of opportunity and true circumstances under which the witness called had to observe his assailant whom he did not know before and the possibility of this witness making a mistake at the identification parade held three (3) months later"

was argued. It succeeds.

Should the judgment of guilty be set aside pursuant to section 14 (1) of the Judicature Appellate Jurisdiction Act?

As ground 2 contends that the judgment was unreasonable, the law regarding this aspect of the case must now be considered. A trial judge sitting without jury must demonstrate in his judgment either expressly or by necessary implication, that the prosecution's evidence was of such a nature that he is satisfied with it to the extent that he feels sure. In our judgment, the evidence in the instant case falls short of that standard. In this context, it is pertinent to advert to the power of this Court to set aside a judgment if it is unreasonable or cannot be supported having regard to the evidence. In **A.G. for Northern Ireland's Reference** (No. 1 of 1975) (1977) A.C. 105 or (1976) 3 W.L.R. 235 Lord Diplock in a case of a soldier tried for murder by a judge sitting without a jury, adverted to the origin of this section thus:

> " Where upon trial by jury for an offence of this class an issue is raised as to whether the conduct of the accused fell short of the standard to be expected of the reasonable man it does not seem to me that a decision on that issue can ever be a point of law. If in the judge's view the evidence that the accused has fallen short of what the judge himself considers to be the requisite standard is so weak that a verdict of guilty would, in his view, be perverse, he is no doubt entitled to direct the jury to acquit. But, in doing this he is not performing the function of deciding a question of law but is exercising the overriding discretion of the judge in any criminal trial to take whatever steps are necessary to ensure that the innocent are not convicted. This overriding discretion derives from a time when the accused in trials for felony were not legally represented and before there was any comprehensive provisions for appeals in criminal cases. When statutory provision was made for appeals in criminal cases the duty of the judge to exercise this discretion, and the distinction

> "between its exercise and a decision by the judge of a question of law, was recognised by conferring upon the appellate court in criminal cases jurisdiction to allow the appeal upon the ground that in all the circumstances of the case the verdict of guilty was unreasonable (now unsafe or unsatisfactory) as a ground distinct from that of a wrong decision by the judge of any question of law."

The relevance of this section is that, having regard to the specific weaknesses ignored by the learned trial judge, his finding of guilt was not reasonable and thus could never be supported having regard to the evidence. The Crown's case failed to come up to the standard of proof and Mr. Wildman for the Crown, after some reluctance, conceded.

So this Court by a majority [(Carey & Downer, JJ.A.) (Morgan, J.A. dissenting)] on 23rd June, 1992, allowed the appeal and quashed the judgment of guilty, set aside the sentence and entered a judgment and verdict of acquittal.