JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 120/89

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

REGINA vs. ANTHONY WILSON

Delroy Chuck and Miss Helen Birch
for the appellant

Miss Marcia Hughes for the Crown

November 12 and December 3, 1990

MORGAN, J.A.:

This is an appeal against conviction and sentence in the High Court Division of the Gun Court on August 3, 1989, for illegal possession of a firearm on the 24th and 28th August, 1988, respectively (Counts 1 and 3) and shooting with intent on the 24th (Count 2).

The appeal comes to us by leave of the single judge.

The facts which give rise to these incidents are that about 8:00 p.m. on the 24th August, Special Constable Andre Brown, while walking along a pathway at Seaview Gardens, St. Andrew, saw two men, who had detached themselves from a group, walking in his direction. He recognised one of them as the appellant. When about five yards away, the appellant pointed a pistol at him and fired twice. He took cover, returned the fire and ran to the Hunts Bay Police Station, where he made a report.

On the 28th at 11:00 a.m., while in the company of Special Constables B. Brown and Dwyer, he saw the appellant standing by an unoccupied building. The appellant pulled a "shine object" from his waist, threw it to the ground and ran. He was chased and caught and the "shine object", when retrieved, proved to be a pistol with two cartridges in the magazine.

The appellant gave evidence on oath and in his defence denied the allegation of the 24th. As to the incident of the 28th, he said that together with his witness, Beaumont, and one "Daddy", he went to the gate of the home of one "Sugar" who had sent for him. There he saw Special Constable Andre Brown who approached them. "Sugar" came out of the house, pointed to the appellant and told Special Constable Brown to "deal with him". This was because he had been given a contract to fix a road but "Sugar", who is a political activist, wanted to take the contract away from him. He was taken into custody and accused of shooting at Special Constable Brown. Some days later, while in custody, a policeman came with a gun and said "Boy you get cook up now", meaning, no doubt, that he was going to be charged for illegal possession of the gun.

He called the witness, Delroy Beaumont, who corroborated him in respect of the events of the 28th.

Mr. Chuck argued two grounds of appeal -

1. That the learned trial judge failed to adequately and properly direct himself on the law of identification.

2. That the verdict was unreasonable and cannot be supported having regard to the evidence in particular the learned trial judge failed to consider factors in evidence which could affect the credibility of the prosecution witnesses.

As to Ground 1, it is with some regret we note that, in spite of the several cases on this point, this ground is still

successfully argued by counsel. In this case, the learned trial judge did identify the issue of visual identification at an early stage but failed to warn himself either expressly or impliedly of the dangers inherent in visual identification evidence as is required.

In **R. v. Junior Reid et al** (1989) 3 W.L.R. at 771, their Lordships set out the Judge's duty thus, quoting from the judgment of Lord Widgery, C.J., in **R. v. Turnbull & others** (1977) 1 Q.B. 224 at 228:

> "First whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words."

also in **Scott & others vs. The Queen** (1989) 2 All E.R. 305 at 314 P.C., their Lordships said:

> "... if convictions are to be allowed on uncorroborated identification evidence there must be a strict insistence on a judge giving a clear warning of the danger of a mistaken identification which the jury must consider before arriving at their verdict and that it would only be in the most exceptional circumstances that a conviction based on uncorroborated identification evidence should be sustained in the absence of such a warning."

This authority was exemplified in a more recent case, S.C.C.A. No. 45/89, **R. v. Leroy Barrett**, delivered July 16, 1990 where Rowe, P., at page 11, said:

> "It is insufficient to rely on a warning as to personal experiences of jurors in mistakenly identifying strangers or old friends. A new formula must be devised. Jurors should be told that where the prosecution's case is supported wholly or substantially by uncorroborated evidence of visual identification they should approach the case with the greatest caution because there are certain inherent, grave and serious risks associated with visual identification evidence. These grave risks are that experience inside the Courts has shown that persons have been wrongly identified by honest, respectable, responsible and positive witnesses who had ample opportunities for observation and who made strong impressions in the witness box. However positive the witness, there is the strong possibility that he might be mistaken for any number of reasons. Consequently if their verdict is to be one of guilty based on evidence of visual identification they must distinguish between the apparent honesty of the witness and the accuracy of the evidence which he gives."

In the instant case, the evidence of Andre Brown as to the events of the 24th was uncorroborated and required a warning. Here the judge sat alone whereas **Barrett's** case was tried with a jury. But the obligation of a judge sitting with a jury and a judge sitting alone remains the same as the following cases make clear.

In **R. v. Donaldson & others** S.C.C.A. No. 70, 72 and 73/86 delivered 14th July, 1986 (unreported) in a case of rape, tried in the High Court Division of the Gun Court, where the complainant was uncorroborated, the question arose as to what was required of a judge sitting in the High Court Division of the Gun Court as to a warning. It was held that the warning required in the Circuit Court must also be given in the Gun Court.

This was later clearly elucidated in **R. v. George Cameron** S.C.C.A. 77/88 dated November 30, 1989, where this Court stated as follows:

> "... where the judge sits alone he is required to deal with the case in the manner established for dealing with such a case though he is not fettered as to the manner in which he demonstrates his awareness of the requirement. What is impermissible is inscrutable silence. What is of critical importance here is not so much the judge's knowledge of the law but his application. Even if there is a presumption in his favour regarding the former there is none as to the latter.
>
> He must demonstrate in language that does not require to be construed that in coming to the conclusion adverse to the accused person he has acted with the requisite caution in mind. Such a practice is clearly in favour of consistency because the judge will then be less likely to lapse into the error of omission whether he sits with a jury or alone."

It is now, therefore, settled law that a warning is required in cases of uncorroborated visual identification tried by a judge sitting alone.

Mr. Chuck submitted, as to Ground 2, that the learned trial judge accepted Beaumont's presence at the incident but failed to use his evidence otherwise and, in so doing, he did not properly consider or assess the defence. He also submitted that the learned trial judge failed to consider the main factors of malice and politics, which could have motivated Special Constable Brown to act as he did - factors which could have affected the credibility of the witnesses.

It is, in our view, permissible to take note of the political realities in this Island and how politics motivates our people to do things which they might not otherwise have done. This is a notorious fact.

In Halsbury's 4th Edition (1976) Vol. 17 "Evidence" at paragraph 106 appears -

> "Notorious facts: The Court takes judicial notice of matters with which men of ordinary intelligence are acquainted, whether in human affairs, including the way in which business is carried on, or human nature, or in relation to natural phenomena.
>
> He may also act upon his general knowledge of local affairs, but he may not import into a case his private knowledge ...."

Malice born out of party politics is a notorious fact of which every ordinary citizen of Jamaica is aware. Judges, then, must view with caution evidence where political rivalry is a real live issue in a case, as it can be indicative of the mood and behaviour of the parties. It follows, therefore, that when such evidence appears, it must be considered with care and dealt with.

In the instant case, this appellant was clearly saying that "Sugar" was motivated by politics and wanted to get him out of the way to get the contract for the road the appellant had worked on, and that "Sugar" had used Special Constable Andre Brown to assist him in removing the appellant from the scene. The witness Beaumont said that "Sugar" commenced work on that project the day after the appellant was taken away. This was the crux of the defence, as evidenced by the appellant and his witness, Beaumont.

The learned trial judge used the evidence of Beaumont in his summation to support the prosecution's case that two policemen were present, a statement which was contrary to that which the appellant had stated. It seems, then, that he accepted that Beaumont was present at the scene.

We feel that these factors called for an analysis of the evidence for the defence. The political rivalry, which the

appellant spoke of, ought to have been dealt with as it might have assisted the judge in assessing the witnesses and interpreting the evidence in the case. The learned trial judge, however, dealt with it summarily in one sentence:

> "I reject the defence, the evidence of the defendant himself and also the evidence by his witness."

In our view, this was a totally inadequate and unsatisfactory manner in which to deal with the defence case.

Crown Counsel conceded that she was unable to support the conviction on any ground, and for the reasons stated we agree.

In the event, Mr. Chuck succeeded on both grounds. It was for these reasons we allowed the appeal, set aside the conviction and entered a judgment and verdict of acquittal.