JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APEAL NO. 100/94

BEFORE: **THE HON. MR. JUSTICE RATTRAY, P.**
THE HON. MR. JUSTICE WOLFE, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.

REGINA vs. BILL ROBINSON

Lowell Marcus for the applicant

Miss Debra Martin for the Crown

May 23, 24 and June 12, 1995

WOLFE, J.A.:

The applicant was tried before Pitter, J. in the High Court Division of the Gun Court on the 30th September, 1994, for the offences of illegal possession of firearm and robbery with aggravation. He was convicted on both counts. On count 1 he was ordered to be imprisoned for seven years at hard labour and on count 2 three years at hard labour and, in addition thereto, he was ordered to be whipped with six strokes of the tamarind switch.

We treated the application for leave to appeal as the appeal and dismissed the appeal against conviction. The appeal against sentence was allowed and the sentence was varied by setting aside the order for whipping. We then promised to put our reasons in writing. We now do so.

The Crown's case is that on the 5th day of September, 1993, the applicant, along with another man, entered the home of Mrs. Angella Knight and at gun point robbed her of several items of household articles and money. Before leaving, the men tied her up.

Mrs. Knight knew the applicant before, having seen him in her shop at Papine.

Two days subsequent to the robbery, Mrs. Knight saw the applicant in the vicinity of her business place. She called the police and he was arrested and charged.

The defence to the charge was alibi. The applicant stated that at the time of the robbery he was in St. Mary.

The complaint in this appeal is that the learned trial judge's warning, as to the dangers associated with evidence of visual identification, was perfunctory and not in the requisite "fullest form". Further, complaint was made that the learned trial judge failed to give a reasoned judgment to demonstrate how he applied the caution which he was required to give himself.

Mr. Marcus submitted that the caution was deficient and/or inadequate in that the learned trial judge did not remind himself that:

> "(a) there has been a number of instances where responsible witnesses whose honesty was not in question, and whose opportunities for observation had been adequate, made positive identifications on a parade or otherwise, which identifications were subsequently found to be erroneous;
>
> (b) this being a `recognition case' so called, that mistakes in recognition of close relatives and friends even are sometimes made;
>
> (c) that it was essential to distinguish between the honesty of the sole eyewitness called by the Crown, the complainant Mrs. Angella Knight (which his Lordship seems to have accepted) and the accuracy of her purported identification of the Applicant and not assume latter because of belief in the former;
>
> (d) the evidence of the complainant being uncorroborated, there was a duty to view her testimony with special caution ;
>
> (e) having rejected the Applicant's special plea of alibi, in fact `the evidence in total of the defence' (p. 17) and this finding that the Applicant lied

> "about his whereabouts at the material time, that that did not by itself prove that he was where the complainant said he was; further, that false alibis may be put forward for many reasons."

In support of his submission, counsel sought comfort in the decision of ***R. v. Locksley Carrol*** S.C.C.A. 39/89 delivered on 25/6/90 (unreported). Rowe, P., delivering the judgment of the court, said at page 14:

> "We hold that given the development of the law on visual identification evidence since the decision in R. v. Dacres (supra) in 1980, judges sitting alone in the High Court Division of the Gun Court, when faced with an issue of visual identification must expressly warn themselves in the fullest form of the dangers of acting upon uncorroborated evidence of visual identification. In this respect we hold, that there should be no difference in trial by judge and jury and trial by judge alone."

Prior to ***Carrol's*** case (supra), Downer, J.A., delivering the judgment of the court in ***R. v. Anthony Peryer and Everton Powell*** S.C.C.A. 155 & 159/80 delivered on March 5, 1990 (unreported), said at page 8:

> "In the instant case the judge expressly stated at page 101 of the record that the Crown relied solely on visual identification as the base to prove its case. There was no supporting independent evidence to implicate the appellants. But the fact that the judge examined all the features that pertained to the strength and weakness of the identification evidence; took the precaution of visiting the locus, meant that he acknowledged the importance of the issue of mistaken identity projected in cross-examination. All these features therefore clearly revealed that the possibility of mistaken identity was clearly in the judge's mind."

This dictum of Downer, J.A. was in response to a submission made by counsel appearing for the applicants that the requisite warning cannot ever be inferred from the conduct or careful reasoning of the trial judge.

In ***R. v. Alex Simpson*** S.C.C.A. 151/88 and ***R. v. McKenzie Powell*** S.C.C.A. 71/89 delivered on February 5, 1992 (unreported) (Rowe, P., Forte, Downer, JJA) the court revisited the question of the caution by a judge sitting alone in cases of visual identification. Downer, J.A., speaking for the court, referred to two extracts from the cases of ***R. v. Cameron*** S.C.C.A. 77/88 delivered on November 30, 1989 and ***R. v. Carroll*** (supra) and said:

> "The extract from these two cases emphasize that the trial judge sitting without a jury must demonstrate in language that does not require to be construed that he acted with the requisite caution in mind and that he has heeded his own warning. <u>However no particular form of words need be used. What is necessary is that the judge's mind upon the matter be clearly revealed</u>."
>
> [Emphasis supplied]

This is the state of the law in Jamaica today. The question, therefore, is, did Pitter, J. fulfil the requirements of the law. We were of the view that he so did.

At the very outset of the summation, the learned judge advised himself thus (p. 4):

> "Now, this is a case where the case of the Defence depends wholly or substantially on correctness of the identification of the accused. This is the inference that I gathered that the identification by Mrs. Knight is mistaken. The Defence is not saying that Mrs. Knight was not robbed; the "Defence is not saying that Mrs. Knight was not held up at gun point; they are not saying that Mrs. Knight is a liar. Certainly they have not suggested to her that she is lying. The suggestion is that she have been mistaken, it could not be this accused man.
>
> This being so, I must warn myself of special need for caution before convicting on the correctness of the identification of the accused and the reason for this is that it is quite possible for an honest witness to make a mistake on identification and it has been said miscarriage of justice has been the result. Of course, a mistaken

> "witness can be a convincing one and an honest witness can be mistaken and this is how seriously the law looks on the question of identification. It, therefore, leads me to examine the evidence carefully and the circumstances in which identification was made by the witness."
>
> [Emphasis supplied]

The above passage indubitably demonstrates that the learned judge warned himself and further that he heeded his own warning when he said:

> "It, therefore, leads me to examine the evidence carefully and the circumstances in which identification was made by the witness."

Having so said, he embarked upon a careful examination of the evidence of Mrs. Angella Knight, the sole eyewitness in the case. Regrettably, we cannot agree with counsel that the exercise in which the learned judge engaged himself was nothing more than a regurgitation of the evidence of Mrs. Knight. Neither were we convinced that the distinction between an honest witness and an accurate witness was not made.

We found no merit in the complaints made of the summation.

On the question of sentence, we set aside the order made for the applicant to be whipped as we were of the view that a wrong approach to this kind of sentence was employed by the learned judge. The applicant was thirty-eight years of age. He had one previous conviction which was some seven years ago. In effecting the robbery no injury was inflicted upon the virtual complainant. This type of sentence must be reserved for cases where the victims are subjected to personal violence or where the offence can be described as heinous. This case does not fall into any of the two categories mentioned.

The case of ***R. v. Errol Pryce*** S.C.C.A. 88/94 delivered on December 12, 1994 (unreported), which re-

introduced whipping after it had laid dormant for twenty-five years, is clearly distinguishable from the instant case. In the circumstances of ***Pryce's*** case, the order for him to be whipped could never be considered manifestly excessive. In that case, the applicant, in an unprovoked attack upon the victim, plunged an ice pick into her neck after he had punched her to the ground. There was no such show of violence in the instant case. This court, in addressing the question of whether or not the sentence of whipping was manifestly excessive, said:

> "This court is well aware of the high incidence of violent crime in the society particularly against women."

This is what that sentence was aimed at, the unwarranted use of violence especially against women.

We are not to be understood as saying that a sentence of whipping is manifestly excessive per se. However, in the circumstances of this case, we are of the view that it is.

It is for these reasons that we came to the conclusion at which we have arrived.