JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 38 of 1993

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.

REGINA

vs.

RADCLIFFE FRANKLYN

Jack Hines for the appellant

Lloyd Hibbert, Senior Deputy Director of Public Prosecutions, for the Crown

September 19 and October 24, 1994

WOLFE, J.A.:

On the 19th day of September, we dismissed this appeal, affirmed the conviction and sentence of the court below and promised to reduce our reasons, for so doing, into writing. We now do so.

The appellant was tried before Harrison, J., sitting without a jury, in the High Court Division of the Gun Court during a session of the St. James Circuit Court on March 26 and April 1, 1993. He was convicted on both counts of an indictment which charged him with illegal possession of a firearm and shooting with intent. He was sentenced to be imprisoned at hard labour for seven (7) years and fifteen (15) years respectively.

On November 21, 1992, Joel Hines, a businessman, was at home at Lot 296 Fifth Avenue, Montego Hills, which is situated on the outskirts of the city of Montego Bay in the parish of St. James. At about 9:30 p.m. he was alerted by the barking of his dogs. He left his verandah and went to the corner of his house whereupon he was confronted by a man who was armed with a

gun. He was virtually looking down the business end of the gun. Seized with fright, no doubt, he jumped back and heard the gun click two or three times. His only response to the dreaded clicks was, "Jesus Christ." He used a bottle which he had in his hand to hit the gunman and retreated, hotly pursued by the lone gunman. He ran onto his verandah where he engaged the gunman in a desperate struggle using a knife which he had to keep the gunman at bay. The gunman, no doubt, overawed by the courage and tenacity of the indomitable Joel Hines went into retreat but not before discharging two shots at Mr. Hines. The police who arrived on the scene later that night found on the premises two expended bullets. The uncontroverted evidence is that the area was well lighted.

Subsequent to the departure of the gunman, Mr. Hines noticed blood on his clothing. He testified that he was not injured. So the clear inference is that the blood on his clothing was as a result of an injury or injuries which the gunman had received.

A week after the incident Mr. Hines, accompanied by a friend, Constable Colin Davis, paid a visit to the Falmouth Hospital when, lo and behold, Mr. Hines observed his attacker reposing in a hospital bed and nursing injuries. He alerted Constable Davis and they sought and obtained assistance from the Falmouth police and returned to the hospital where Hines pointed out the appellant to the police as the man who had shot at him at his home on the night of November 21, 1992.

The appellant at the trial, as accused persons are wont to do in this jurisdiction, sought the shelter of the dock to deny being present at the home of Joel Hines on the relevant date or indeed at any time. He explained that the injuries which occasioned his hospitalization were sustained when a group of men set upon him, as he attempted to prevent them from robbing his sister on November 26, 1992.

Dr. Arthur Malcolm, who treated the appellant, was satisfied that the injuries for which he treated the appellant could not have been inflicted on November 21, 1992.

It must be noted that at no time did the Crown contend that the injuries had been inflicted upon the appellant by Joel Hines. Indeed, Mr. Hines was not certain whether or not he had injured the appellant when stabbing at him with the knife. The issue, therefore, at the trial was one of visual identification.

Mr. Jack Hines for the appellant argued before us two grounds of appeal. The first ground complained that the learned trial judge failed to warn himself expressly in the fullest form of the dangers of acting upon the uncorroborated evidence of visual identification. I can only hope that my precis has done justice to the very prolix ground set out by Mr. Hines.

At page 106 of the transcript, Harrison, J. advised himself thus:

> "Mr. Hines's evidence is one of visual identification. The court is mindful and warns itself of the danger of convicting a person on visual identification. This is not a case of a fleeting glance, this is not a case of no proper opportunity of seeing the accused man, this is not a case where the lighting was bad, the lighting was in fact good. It is true that the complainant did not know the accused man before, and so the question of the identification is one that the court warns itself of the danger in those circumstances, in spite of the discrepancies and in spite of the evidence given by the witness, Mr. Davidson, who also discloses a discrepancy as far as where the confrontation of the accused lies.
>
> I am of the view that Mr. Hines' evidence is one that the court can rely on as far as the visual identification is concerned. I take into consideration the fact of where he (sic) made the accusation of the accused as his assailant to Davidson. It is challenged by the defence and Davidson himself does not support it in that respect, but I find that there was a spontaneous identification of the accused by Mr. Hines in the hospital, and in those circumstances I find that

> "I am satisfied and he was correct when he said that the accused man was the one he saw outside his house that night, who fired the shot at him, and suddenly at whom he had thrust the knife."

It is true that the learned trial judge did not use the hallowed phrases that have come to be associated with evidence of visual identification but the passage quoted, supra, in our view clearly demonstrates that he had the established principles of how to approach evidence of visual identification in the forefront of his mind and further that these principles were applied by him in his assessment of the uncorroborated evidence of visual identificatioin. Again, we remind counsel that substance and not form is the test. To require that the judge employ a particular formula has long been discounted by their Lordships of the Judicicial Committee of the Privy Council. This court has reiterated that principle in several of its decisions. We are satisfied that the trial judge warned himself properly and that the complaint is without merit.

The second ground is a complaint that the learned trial judge failed to consider adequately or at all the medical evidence to wit that the injuries which the appellant had sustained could not have been inflicted on the night of November 21, 1992, and that there was no injury seen on the appellant which could have been sustained on the said night. It is further contended that the judge failed to resolve what was clearly a conflict which seriously affected the identification by Joel Hines.

As was pointed out at the outset, at no time was the Crown relying on the injuries sustained by the appellant to support the identification by Joel Hines and the learned trial judge so stated. Indeed, the conflict to which counsel referred was more imagined than real. In support of this conclusion, we set out in extenso the judge's treatment of the medical evidence:

> "When one looks at the medical evidence, the real evidence as to the injuries, the accused man is saying that he had received these injuries on the 26th of November. The doctor saw him on

"midnight of the 26th, and the doctor said that he saw these wounds to the head, palm of the hand and also to the back. It is clear that these injuries could not have been inflicted on the 21st of November. It is true that the prosecution is not saying that these injuries were in fact the injuries inflicted on the 21st of November. What the prosecution has in evidence from Mr. Hines, is to say that at the time he thrust the knife, that he subsequently saw blood to his shirt and blood to his shorts.

The inference there being given, is that the accused had received the injury at that time, and as a consequence resulted in blood on the shirt and shorts.

The accused man in his statement said that he had been with his sister on the 26th. At the attempt to rob her, one of the men took a machete and chopped him in the head, palm of his hand, chopped him in the back. He went to the Falmouth Hospital; and then while he was there, one of the five men came there and said: 'This is the man who shoot me'. He denied it and he said subsequently he was transferred to the Cornwall Regional Hospital, and then taken to the police station. He denied the charge of being the person who shot Mr. Hines. He was taken to Salt Marsh, he didn't find the sister and subsequently he was taken to Falmouth Hospital.

Now, what the defence has is evidence brought by Dr. Malcolm to say that the wounds inflicted on the accused were not the wounds inflicted by Mr. Hines. The doctor did in fact say that he did see many wounds. He didn't observe any such scars on the accused that could have been inflicted within that six day period. A wound inflicted six to seven days before would be healed but friable, he expect to see the scab or redness. He said he did not see any such scars that he can remember. The doctor's evidence therefore is to the effect that had he seen scars or wounds inflicted six to seven days before, they would have been friable, but he didn't see any that he can remember. So the prosecution's case, as far as infliction of the wounds is concerned, not being evident to the doctor, none that in his view that he could remember. So it means therefore that when Mr. Hines said that he received this blood to his shorts and his shirt, it may well have been blood from the person who was his assailant, but certainly not the wound that the doctor saw, the three inch wound, and certainly not a wound that the doctor could remember. He remarked on a surgical scar that he had