JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 40/89

BEFORE: THE HON. MR. JUSTICE CAREY, P (AG.)
THE HON. MR. JUSTICE FORTE, J.A
THE HON. MR. JUSTICE GORDON, J.A (AG.)

REGINA v. VINCENT CAMPBELL

Dr. A.J Nicholson for Applicant
Lancelot Clarke for the Crown

July 1 and 17, 1991

FORTE, J.A

The applicant was convicted on the 7th March, 1990 of the offences of illegal possession of firearm, robbery with aggravation and wounding with intent, by Bingham, J., sitting in the High Court Division of the Gun Court. He was sentenced to terms of imprisonment of ten years, twelve years and ten years respectively, and the sentences ordered to run concurrently.

Leave to appeal having been refused by the single judge, the applicant renewed his appeal before us. Arguments having been heard from his counsel, on the 1st July, 1991, we refused his application for leave to appeal, and confirmed the convictions and sentences. This now is our promised reasons in writing for so doing.

The facts are briefly set out for better understanding of the complaints made by the applicant. On the 4th June, 1985, at about 8:35 a.m Ralph Douglas was enjoying a peaceful evening at home with his family sitting in his living-room watching

television. a sudden noise from the kitchen, created some concern, but that concern became real when he heard a male voice coming from within his house saying "Don't move. Everybody pan dem face". He turned to find a gun, held by an intruder, pointing 'straight' at him. Another man who passed the one with the gun, searched the witness and took his keys from him. Soon after, yet another man came into the living-room carrying with him Mr. Beresford Green, a conductor employed to Mr. Douglas who is the operator of mini buses.

This third man who was subsequently identified as the applicant, came into the room while Mr. Douglas was lying on the floor and at that time the gun man "stamped" him in his face saying "Wey the money, bwoy?" He informed them that he had given the money to his common-law wife who was then also lying on the floor in the living-room.

The applicant then said "Gi me the money, gal, a kill off the whole a oonoo in yah tomight. Whole a oonoo a dead tonight." He took up Mr. Douglas' eleven month old baby, held a knife to her throat and threatened to slit the throat if he was not told the whereabouts of the money. Mr. Douglas then told his wife, Carol Francis, to give them the money so that they would leave. Miss Francis went with the applicant into the bedroom where she gave him the money referred to by Mr. Douglas. However, under the threat of a knife, she showed the applicant the whereabouts of other sums of money which she had in the room; the applicant helped himself to these sums of money also. When he returned to the living-room, the applicant and the other men took the complainant Douglas to the children's room where they harassed him, asking him for more money. During this process, the applicant cut him over his left eye and in his abodomen. He then went back into Douglas' bedroom ransacked it, then returned to

the living-room. Somehow, Douglas managed to escape through a bedroom window, but in that process was shot in his right leg by one of the men. Nevertheless, he was able to get away and to go to the Chapelton Police Station where he made a report. After Douglas had made his escape, the men left taking with them an amplifier, one equalizer, one toaster, articles of clothing and a travel-bag. The applicant was subsequently arrested, and placed on an identification parade where he was identified by Douglas and Francis.

Before us, Mr. Nicholson for the applicant, argued two grounds of appeal. In ground 2, which he argued first, he complained that the learned trial judge in his summing up did not examine with the jury:-

> (i) the fact that there was no evidence of any distinctive mark or feature in respect of the applicant;
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> (ii) that the witness Douglas having been "stamped" upon, his vision could have been impaired, thereby affecting his ability to identify his assailants;
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> (iii) whether the applicant was identified at the identification parade because he resembled his brother who was known to "at least the male witness before."

In the trial, none of these matters was ever raised as an issue in the case. The learned trial judge would therefore be indulging in speculation, particularly in regard to the question of whether the witness' vision was impaired, and as to the resemblance of the applicant to his brother who was known to the witness. In our view, in dealing with the question of identification the learned trial judge demonstrated by his words, that he was very careful, in assessing the quality of the identification evidence, considering all the factors necessary for such a determination. This is what the learned trial judge

stated in his reasons for his conclusion:-

> "It is the unchallenged evidence of these witnesses, there are no questions that this incident lasted for about 40 to 45 minutes, that all the lights, the two lights in the bedrooms, the light in the living-room and the light in the bathroom and the light in the kitchen were all on. According to Mr. Douglas, apart from the light in the living-room which is fluorescent light, all the other lights are 60 watt electric bulbs. The house was therefore, based on their evidence, well lit and the time during which the men were in the house was a long time."

He then went on to examine the opportunity that the witnesses had of identifying the applicant, considering the fact that their assailants were unmasked and the fact that the applicant was not known to either witness before the incident. In the end, after this careful analysis, and a reminder to himself of the cautious approach he ought to take in relation to the question of visual identification, he accepted the evidence of identification.

The applicant also complained, as part of ground 2 that:-

> "It cannot reasonably be said that the identification parade was fairly conducted. It is submitted that in these circumstances, at the very least, a Justice of the Peace ought to have been present."

Mr. Nicholson developed his argument, more so on the allegation that the applicant was told of the identification parade, only one hour before it was held, rather than on the basis of the absence of a Justice of the Peace. The evidence from Sergeant Morgan who conducted the identification parade, reveals that he did inform the applicant of the parade one hour before it commenced. However, when he asked the applicant if he had a lawyer or a relative to represent him the applicant said that he had sent a message to his relatives but he didn't see any of

them arrive. This reply was significant in that it suggested that the applicant must have been told previously by someone that the parade was to be held. The answer is revealed in the evidence of one of the investigating officers, Detective Acting Corporal Powell, who testified that he told the applicant on the 1st July, 1988 that he would be placed on an identification parade. In the absence of a relative or lawyer, the applicant chose a cell-mate to protect his interest at the identification parade.

The fact that he was told of the parade only one hour before it was held remained the only ground before us for the contention that the parade was unfair. This cannot be, in our view a serious ground for complaint having regard to the circumstances. Quite apart from the fact that the applicant had had sufficient notice within which to arrange for the attendance of a lawyer or relative, the parade as it was conducted proceeded in a manner fair to the applicant. The manner in which the learned trial judge dealt with it is an adequate treatment of the evidence in that regard. He stated:-

> "...when one comes to examine the evidence there is no material challenge made as to the fact that this identification parade was held, was fairly conducted. The accused didn't raise any objection to the other men who were on the parade. There was no suggestion that there was any opportunity for either of these two witnesses, Mr Douglas or Miss Francis to get a view of the accused who was the suspect on the parade before the parade was held to assist the witnesses in any way in pointing him out. So that based on the evidence of Detective Acting Corporal Powell and Sergeant Morgan, Sergeant Morgan being the person who conducted the parade and Detective Corporal Powell being the officer who after the accused was taken into custody first

> informed the accused that he would be put on a identification parade, so insofar as the accused was made aware of the fact that a parade might have been held in connection with these pending charges against him he was certainly alerted of the fact that one such identification parade might be held in that case, but he had ample opportunity to alert and he did, as the evidence disclosed, alert a lawyer to represent him on that identification parade.
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> On the day of the identification parade, Sergeant Morgan informed the accused of the fact that the parade was about to be held, he was informed of his rights then, and the accused indicated that he had made effort to get in touch with relatives but without success. He asked Morgan who was in custody with him to represent him on the parade to see that the parade was fairly conducted.
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> It is true that that man might not have been a lawyer and wouldn't know what to look out for, but based on what Sergeant Morgan has said as to how he held the parade, it seems that he took steps to ensure that the witnesses were kept out of sight and hearing of the men on the parade, that the accused was told in relation to clothing that he could change his clothing with any of the men on the parade, also that he was made to select his position in the line and did in fact exercise some of the rights that he had because he changed his position between the first witness being called and the second witness being called, he changed his clothing, his shirt with one of the men on the parade, between that same period as well, and he seemed to, from all appearances, have taken a very active part in the proceedings as in the parade. So there really doesn't seem to be anything in the evidence to suggest that the accused's rights were prejudiced in any way, in the manner in which this identification parade was held."

This in our view is a proper assessment of the evidence, which disclosed that every step was taken to ensure the fair and

proper conduct of the parade. We therefore found that there was no merit in this ground.

The applicant also raised the following ground:-

> "That the learned trial Judge, in his "Look ... at the ALIBI Defence raised by the accused and his witness" misdirected himself on the evidence "which is of some significance" regarding Exhibit One. The finding of Exhibit One had nothing to do with Marvalyn Thomas (The witness called by the defence) your Applicant or his place of abode. This was <u>not</u> an Exhibit representing recently stolen articles found in the possession of your Applicant and which would tend to destroy his defence and lend support to an Inference of Guilt.
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> It is submitted that these misdirections on the part of the Learned Trial Judge must have impaired his "Look at the ... Defence raised" by your Applicant."

The basis for this complaint arose from the following statement of the learned trial judge:-

> "Now let us look first at the alibi defence raised by the accused and his witness. I think something emerged in the evidence of Marvalyn Thomas which is of some significance. Why I say so is this. It did emerge, because up to the time the accused gave evidence one was left with the distinct impression that he had a brother by the name of Michael Campbell who lived somewhere in Vere. There were a number of articles which were taken from a house by the police led by Inspector Elsworth Johnson after the incident on the 4th of June and before the accused, sorry, and after the accused was taken into custody. I am referring to Exhibit 1, electric appliances, the tester, the amplifier and the equilizer. The fact that those articles have been properly identified is not in issue.
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> Marvalyn Thomas, it emerged from her evidence that when the police came there some time in June, there was a raid at this house in June, there was a bag. So on the 11th of June, there was a bag which had some

> articles in it and when the police asked her whose bag it was she said that it belonged to Patrick Campbell."

It is a fact that the articles recovered, and subsequently identified as the property stolen from the complainants on the night of the incident, were never connected to the applicant, and consequently had no relevance to the case against him. In fact the articles were produced in respect to the case of Patrick Campbell, who because the witness Douglas who knew him before, testified to his absence from the scene of the offence, was acquitted and transferred to the Resident Magistrate's Court for process in relation to the charge of receiving stolen goods.

Mr. Nicholson, contended that the passage complained of indicated that the learned trial judge in coming to his conclusion took into consideration this evidence which was totally irrelevant, and consequently his conclusion must be coloured by that fact. We were, however, unable to agree with that contention. It does appear that the learned judge took time out to remind himself of this evidence, but immediately thereafter he returned to his assessment of the identification evidence and clearly demonstrated thereafter that his conclusion rested solely on such evidence. There is no statement that gives even a suggestion that the evidence of the recovery of the goods formed any part in respect of his deliberation as to the guilt of the applicant. Immediately after the passage complained of, the learned trial judge summarily related the facts, and then commenced his assessment of the evidence of identification, a passage referred to in respect of ground 2 (supra). He then continues:-

> "The subsequent identification by these two witnesses of the accused, at any rate, which on the evidence was only some five weeks subsequent

> to the date of this incident, I wouldn't regard as being too unduly long a period. So although I have to bear in mind that I have to approach the question of visual identification with caution, and I certainly do so, the quality of the identification evidence as to the factors which are present in this case both as to the length of time that these persons were in the house, the state of the lighting, the distance that these witnesses were from the accused at the time they were able to view him, the fact is that when the evidence is looked at, the physical conditions existing in that house on that night in question couldn't have been more ideal for a positive identification to be made of all these persons and in particular of the accused man.
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> I have to bear in mind also that at one stage Miss Francis said that it was the accused who went into the room with her to search their room, kept insisting that they must have more money. There was a light on, in the bedroom there, that it was the accused, according to Mr. Douglas, who was actively engaged in doing these awful acts to him. The accused, it was who was seen when Mr. Douglas tried to escape, to make an opportunity to attempt to head off Mr. Douglas and when he didn't succeed, gave directions to the gun man to shoot Mr. Douglas. And it was the accused who consistently uttered threats during that night in question, the shirtless accused man, to use the evidence of the witnesses, the man without the shirt.
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> So on this evidence, I am satisfied, I feel sure, I have no doubt in my mind that both these witnesses have had the opportunity to see and make up their minds there on this night in question and the accused man in particular. I accept their evidence as being evidence of truthfulness and I find that the accused was one of these three men."

We were of the view that it was absolutely clear, in the reasoning of the learned trial judge, that he did not take this aspect of

the evidence into consideration in coming to his conclusion; but on the contrary came to his conclusion solely on the evidence of visual identification.

It is for these reasons that we refused the application for leave to appeal and directed that the sentences commence on the 7th June, 1989