JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 39/89

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA

VS.

LOCKSLEY CARROLL

Richard Small and Carlton Williams for Appellant

Miss Marcia Hughes for Crown

March 5-6, 16 and June 25, 1990

ROWE P.:

We gave our decision on this appeal on March 16 and now include our reasons for treating the hearing of the applications for leave to appeal as the hearing of the appeals, which were allowed, the convictions quashed and verdicts of acquittal entered.

For Stephen Bentley, his wife and son, his sister and her husband, their first visit to Jamaica was an unmitigated tragedy. On their way from the Norman Manley Airport they were robbed and Mr. Bentley was shot and grievously wounded. Carroll was arrested, charged and convicted for these crimes but for reasons which will appear hereunder the convictions could not be allowed to stand.

THE ROBBERY

Vincent Oliver, an attorney-at-law, was transporting in his Escort motor car five English visitors along Spanish Town Highway at 10 p.m. on the night of April 2, 1988. In the vicinity of Ferry Inn a Toyota Cressida forced Mr. Oliver's car off the road on to the soft shoulder, and stopped some distance ahead. From the rear seat of the car Mrs. Bentley estimated that the Toyota stopped 7 feet ahead. Mr. Oliver estimated the distance to be about 10-20 yards. Four armed men all dressed in military style uniform alighted from the Toyota motor car. One man carried a pistol and the other three, sawn-off shot guns.

Mistaking the men for law enforcement officers, Mr. Oliver was not apprehensive. He obeyed when one man ordered him from the car but protested when he was ordered to remove and hand over his watch and jewellery. The robber threatened to shoot him if he did not comply. He was stripped of his watch and rings and ordered to lie on the ground facing downwards. The two passengers in the front of the car as also Mr. Bentley from the rear seat were ordered from the car and robbed of cash and jewellery. Mrs. Bentley disposed of her jewellery before she left the car, but her son too was robbed. Mr. Bentley was taken from the side of the car to the front of the car. Because a ring could not be easily dislodged from his finger and because he was arguing with one of his attackers, another man shot him on his right arm disabling him permanently to about 70% of the use of that limb. Mr. Oliver retrieved his

firearm from its concealed position and fired at the robbers. They retreated walking backwards, entered the Toyota and drove away with cash and jewellery to an amount exceeding $25,000.00.

In vain did Mr. Oliver give chase. A passing motorist took the injured Mr. Bentley to the Spanish Town Hospital from whence he was transferred to England three days later. He has undergone numerous complicated surgical operations including tendon-graft.

IDENTIFICATION

Mr. and Mrs. Bentley and the other English visitors left Jamaica on April 5, 1988 and only returned on February 25, 1989 for the trial. Mr. Oliver identified the appellant at an Identification Parade on April 30, 1988. Mr. and Mrs. Bentley purported to identify the appellant in the dock. The other three occupants of the Escort on the night of April 2, 1988 did not give evidence.

The head-lights of the Escort were left burning when it came to a stop on the grass verge. The man who robbed Mr. Oliver came up to him at the side of the car by the front door and was with him for 2-3 minutes. One man took Mr. Bentley to the front of the Escort and both Mr. Bentley and his wife said they had an opportunity to see the assailants by the aid of the head-lights from the Escort. Mr. Oliver added that there was additional light from buildings housing Ferry Inn, Van Leer Foundation, Oxygen Acetyline, Ferry Police Station and Jet Pet. A defence witness Robert Bailey presented a drawing which showed that the Spanish Town Highway in the vicinity of Ferry Inn and Ferry Police Station is a dual carriageway, that on the southern

side which carries traffic from Kingston to Spanish Town there is one building Jet Pet Foods, the remainder of the land is comprised of a cane field, the median verge between the two halves of the road has trees ranging from 1 to 12 to 30 feet in height and there are no electric street lights on that section of the road.

ISSUES AT TRIAL

1. Did Mr. Bentley and/or Mrs. Bentley identify the appellant unaided?

2. Were they credible witnesses on the issues of Identifications?

3. Did Mr. Oliver identify the appellant unaided?

4. Was he a credible witness on the issue of Identification?

Neither Mr. Bentley nor his wife had a real opportunity to attempt to identify the appellant in controlled conditions. On humanitarian grounds Mr. Bentley had to be returned to England for medical treatment. At that time the appellant had not been arrested and it would be idle to say one or other of these witnesses should have been brought back to Jamaica for the Identification Parade on April 30, 1938. From the answers given in cross-examination, it does not appear that there is any security for prisoners entering Court II at the Gun Court and no screening of them from the members of the public who attend at that Court. Three versions emerged on the prosecution evidence of just what transpired at the entrance to Court II of the Gun Court on the morning of February 27, 1989. Mrs. Bentley said she had not seen any of her assailants from April 2, 1938 until the day she was giving evidence. Here is the series of questions and answers (p. 13 of the Record):

"Q: Did you ever see any of those men .... again after that night?

A: Not until today.

Q: You said not until today?

A: Not until today.

Q: Meaning what?

A: He is here in court."

Certain objections from defence counsel followed and cut off further elucidation of this matter.

Mr. Bentley was asked and allowed to answer some direct questions in examination-in-chief over the objections of defence counsel who added some questions and suggestions of his own.

"HIS LORDSHIP: ..... have you ever seen any of the men who attacked you on that night since then?

A: I was waiting outside, a line of men came round the corner and I recognised the man immediately.

HIS LORDSHIP: You were waiting out there when?

A: Just before we came into court.

HIS LORDSHIP: Today?

A: Today, yes.

HIS LORDSHIP: You recognised how many men?

A: I only recognised one.

HIS LORDSHIP: Yes.

A: He recognised me outside.

HIS LORDSHIP: This is an opinion. You feel so?

A: He put his hand up in surrender outside."

Later he was asked in cross-examination:

"HIS LORDSHIP: Who were with you when you saw the line of men?

A: My wife, Mr. Creathorn and Mrs. Creathorn.

.....

Q: Mr. Oliver was with you when the line of men passed?

.....

A: Mr. Oliver was not with me. Mr. Oliver was called away at the time.

Q: Where?

A: He was standing by his car.

Q: I am suggesting to you that that is not true; Mr. Oliver, in fact, was with you, and that Mr. Oliver pointed out the accused to you.

A: This is not true."

The final of the three versions came from Mr. Oliver. Cross-examination concerning a photograph of the appellant had been going for some time and then defence counsel switched to a suggestion. He asked:

"Q: I am suggesting to you further that this morning you pointed out this young man to your friends who you were standing with when the line of prisoners were coming into this Court.

.....

A: I merely confirmed to my friend to see whether or not they recognised the individual. I did not point anyone out to them."

Crown Counsel with the trial judge's express permission explored this admission of confirmation.

"HIS LORDSHIP: Where were you standing in relation to where they were standing?

A: We were all standing together.

HIS LORDSHIP: I and my friends (sic) were all standing together when you made this confirmation."

Here the judge seems to be repeating aloud what the witness had said:

"CROWN COUNSEL: By this confirmation, what do you mean, Mr. Oliver?

A: I said to Mr. Bentley if he recognised the individual among the prisoners here."

The appellant gave evidence on oath. He said nothing at all in examination-in-chief about the incident at the Court door on Febraury 27. In the course of a thorough cross-examination it appears that the appellant was saying that he first saw Mr. Bentley on that morning in the witness box. As the cross-examination persisted the appellant said that while he was walking in a line of prisoners to the Court he saw Mr. Oliver pointing him out to four white people, whom he termed visitors, and of whom Mr. Bentley might very well have been one.

Reckord J. resolved the internal contradictions in the Crown's evidence by deciding not to attach any weight to the dock identification of the Bentleys. He said at page 129 of the Record:

"It seems to me that whether he pointed them out or merely commented concerning the accused - the accused was passing, this could tend to negative the evidence given by the Bentleys of their identification of the accused in the dock, this being the case the Court does not propose

> "to attach any weight at all to their purported identification of this accused man in the dock, that is as far as the evidence of the two Bentleys are concerned; the Court will not be relying upon their evidence as far as this identification is concerned."

Mr. Small submitted that as the credibility of Oliver was of such importance in the case, the trial judge ought to have made a specific finding, having regard to the evidence of the accused, whether Oliver did point out the appellant to two potential witnesses as a finding that he did could undermine his credibility on essestial aspects of the case. We will deal with this contention in due course.

The 3rd and 4th issues identified above relate to the witness Mr. Vincent Oliver. It was the contention of the defence that Mr. Oliver had been shown a photograph of the appellant prior to his attendance at the Identification Parade and consequently his purported identification was suspect. Mr. Oliver was asked in cross-examination:

> "Q: I am suggesting to you that before you attended the identification parade you were shown a photograph of Mr. Carroll?"

As the witness did not answer the trial judge thought the question was unclear so he said:

> "Q: Of the accused man?"

Defence Counsel replied:

> "A: Yes sir."

Then the trial judge posed the question:

> "Q: Were you shown any photograph of the accused? That was the question, Mr. Small?

"MR. SMALL: Yes, sir.

MR. OLIVER: Yes, I was shown a photograph. Is that a statement or a question?

HIS LORDSHIP: Were you shown a photograph of the accused?

A: I was not shown a photograph. I was asking him, is that a statement or a question."

To further questions from the Court the witness said that he was merely paraphrasing what defence counsel had said "because I could not see why he should have made a statement like that; where would he have got that."

Superintendent Grant who operates from 230 Spanish Town Road said that he caused the appellant to be taken to the Special Operations Office at 230 Spanish Town Road on April 8, 1988 and upon learning of the result of the Identification Parade of April 30 he arrested and charged him for the offences for which he was convicted. Supt. Grant admitted that in cases in which Identification Parades are not scheduled the photographs of persons being processed are sometimes taken. He gave no instructions for the appellant's photograph to be taken and so far as he was aware this had not been done. A Passport belonging to the appellant had been given to Supt. Grant prior to the Identification Parade and he had kept it in his personal custody. He denied showing it to the witness Vincent Oliver.

On April 30, 1988 Sergeant Walker conducted the Identification Parade. The appellant complained at its commencement that he lacked faith in its integrity as the police had taken his photograph and they also had his Passport with his photograph. In evidence the appellant recounted how,

soon after he was taken to Spanish Town Road, he was photographed under the supervision of a police sergeant.

An issue for the trial judge's resolution was whether Mr. Oliver was shown a photograph of the appellant before he went on the Identification Parade and if this aided him in his identification and the further issue was the credibility of Mr. Oliver on this issue of the photographic preview. At p. 120 of the Record in recalling the evidence the trial judge is reported as saying:

> "During cross-examination of Mr. Oliver it was suggested to him by Mr. Small - and it was suggested to him in these words: 'I am suggesting to you that before you attended the identification parade you were shown a photograph of Mr. Carroll, the accused man.' There was a pause, I asked the witness - 'Were you shown a photograph of the accused?' The witness said - 'Why I was shown a photograph - is that a statement or a question?' And I repeated: 'Were you shown a photograph of the accused?' And he answered: 'I was not shown a photograph, I was asking him', meaning the Defence Attorney - 'Is that a statement or a question?', ..."

At the very end of his summation the trial judge said he accepted the explanation of Mr. Oliver that when the suggestion of having been shown a photograph was made, in his answer he was merely repeating the suggestion made by counsel for the defence, and the judge went on to find that no photograph was shown to Mr. Oliver and he was not aided by one in making his identification.

For the appellant it has been contended that the trial judge misdirected himself as to the evidence in the most crucial aspect of Mr. Oliver's reply which misdirection transformed an apparent admission into a straightforward question.

We will return to this specific contention after we have made some general remarks on the law.

This was yet another prosecution founded soley upon visual identification. As a consequence the credibility of the identifying witness was all-important. An impression formed upon the mind of the identifying witness and communicated to the investigating officers soon after the crime can be the lodestone upon which to test later recollection. Mr. Oliver who considered himself as a short man and was aware of his personal height of 5 feet 7 inches described his main assailant, the one who stood at arms length from him for 2-3 minutes as a person 5 feet 6 inches tall. This description meant that the man was slightly shorter than Mr. Oliver. The appellant stood 5 feet 10½ inches tall which would put him on any cursory assessment at close quarters, a head above Mr. Oliver. It was strongly urged at trial and upon us that this difference between perception and fact was so startling that by it alone Mr. Oliver stood discredited. Although the trial judge mentioned the apparent irreconcilable difference in the evidence as to the appropriate height of the appellant he did not explain how he resolved the problem.

One other matter which was said to affect the credibility of Mr. Oliver as to identification was the state of the light on that night. The defence introduced evidence that the southern side of the road was not lighted, that only one building was on that side of the road in the vicinity of the robbery and invited the Court to infer that someone in the position of Mr. Oliver could not benefit from light emanating from the several buildings enumerated by him. If the judge accepted that invitation then the only source of material light would be the head-lights of the Escort. Apart from

recounting the evidence, the judge made no reference to the conflict of evidence as to light.

Trial by a judge of the Supreme Court sitting alone has since 1976 become a feature of criminal procedure in Jamaica as in a significant proportion of serious crimes a firearm is involved. Over the same period the pattern of crime in the country has undergone change in that random attacks by persons unknown to the victims have become commonplace. We take note of the multiplicity of cases coming before this Court where the sole connecting link between the accused and the crime is evidence of visual identification. Mr. Small attacked these convictions in six grounds of appeal including twelve particular instances of alleged unreasonableness, in the judgment. He posed three questions, with which we must deal in this judgment:

> (1) Is a judge sitting without a jury required to warn himself of the dangers of acting on the evidence of visual identification?
>
> (2) If there has been an adequate warning, to what extent is it open to this Court to examine whether the trial judge has heeded his own warning in the assessment of the evidence?
>
> (3) What are the circumstances in which the Court of Appeal can upset the verdict of a trial judge in relation to the determination of facts and/or the assessment of the evidence?

The issue raised in the first question arose in R. v. Daniel Dacres [1980] 33 W.I.R. 241. We declined to treat identification evidence as falling into a special category. We said:

> "The cases on identification evidence have not established any principle that in the absence of a particular warning as to the dangers of identification evidence there would be an irregularity in the trial notwithstanding the quality of the evidence."

This statement cannot now be regarded as good law, as the Privy Council in two cases, Scott and Others v. The Queen [1989] 2 W.L.R. 924 and Junior Reid and Others v. The Queen [1989] 3 W.L.R. 771 have laid it down that visual identification evidence does fall within a special class of evidence and is to be given special and specific treatment by the trial judge in a trial before a jury. The trial judge is required to give a clear warning of the danger of a mistaken identification, explain the reasons for such a warning and advise the jury to heed the warning when considering their verdict. Scott's case (supra) and Junior Reid's case (supra) are binding upon this Court. This Court considered these Privy Council decisions in R. v. George-Cameron [1989] S.C.C.A. 77/88 (unreported) a case of a judge sitting alone in the Gun Court and we said concerning a judge's summation:

> "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."

We do not read this passage as meaning that this Court will be prepared to infer that the trial judge had in mind the applicable principles of law relating to visual identification evidence in any given case. We would adopt the attitude of Sir Boyd Merriman P. in B. v. B. [1935] All E.R. 428 when he said:

> "Magistrates should direct themselves, just as a judge should direct a jury, that it is safer to have corroboration, but when the warning has been given, and given in the fullest form, there is no rule of law which prevents the tribunal from finding the matter proved in the absence of corroboration."

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.

To what extent, Mr. Small asks, is it open to this Court to examine whether a trial judge has heeded his own warning in the assessment of the evidence? In a long line of cases, some of which were brought to our attention by Mr. Small, this Court has consistently maintained that a trial judge is required to give a reasoned decision in the cases determined by him. We said in R. v. Dacres (supra) that:

> "By virtue of being a judge, a Supreme Court Judge sitting as a judge of the High Court Division of the Gun Court in practice gives a reasoned decision for coming to his verdict whether of guilt or innocence. In this reasoned judgment he is expected to set out the facts which he finds to be proved and when there is a conflict of evidence, his method of resolving the conflict."

In Leroy Sawyers and Others v. The Queen [1980] R.M.C.A. 74/80 (unreported), we endeavoured to give some of the practical reasons why a reasoned judgment was necessary. An accused person, we said, was entitled to know what facts were found against him and when there were discrepancies and inconsistencies in the evidence, just how the trial judge resolved them. We did not then refer to the public which has an equal interest in understanding the result of a trial so that it can have confidence in the trial process. Ultimately the Court of Appeal which has the duty to re-hear the case based on the printed evidence and the judgment of the trial judge wishes to be assisted by the thought processes of the trial judge. In 1988, Carey J.A. in delivering the judgment of the Court in R. v. Clifford Donaldson and Others, S.C.C.A. 70, 72, 73/86 (unreported) re-affirmed the attitude of this Court when he said:

> "It is the duty of this Court in its consideration of a summation of a judge sitting in the High Court Division of the Gun Court to determine whether the trial judge has fallen into error either by applying some rule incorrectly or not applying the correct principle. If then the judge inscrutably maintains silence as to the principle or principles which he is applying to the facts before him, it becomes difficult if not impossible for the Court to categorise the summation as a reasoned one."

And the most recent decision indicating the Court's mind on this subject is contained in the judgment of R. v. George Cameron [1989] S.C.C.A. 77/88 where Wright J.A. said:

> "He (the trial judge) 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 the settled practice of this Court to examine the summation of the trial judge sitting alone to determine if he has heeded his own warning as to corroboration where that is the relevant issue and as to visual identification as the decided cases show.

Mr. Small referred extensively to the decision of the Court of Appeal of England in Miles v. Cain (supra) reported in the Times Newspaper of December 14, 1989. There the female patient of a physiotherapist claimed damages in a civil suit alleging that he raped, buggered and desecrated her on one of her visits to his clinic. The trial was before an experienced judge sitting without a jury. No complaint was made of his self-direction on the relevant questions of law but the appeal was allowed on the basis that the trial judge did not abide by his self-direction in his approach to the evidence.

The Master of the Rolls contrasted the role of the trial judge with that of the Court of Appeal when he said:

> "The most important task of the judge was to assess the character and credibility of the plaintiff, the defendant and the other witnesses. Insofar as he did so on the basis of seeing them and hearing them, we are in no position to say whether he was right or wrong. But what we can consider, and have to consider, is whether he indeed approached the plaintiff's allegations with the caution which he declared

> "that he would adopt; whether and to what extent he cross-checked his assessment of their credibilities against the probabilities and improbabilities of their evidence ....."

Nicholls L.J. expressed his distress at finding that the trial judge time and time again did not face and grapple with difficulties which existed if the plaintiff's evidence were to be accepted as true and in the end held that because the plaintiff made an extremely strong impression as an honest witness, the trial judge was led into error in not appraising adequately all the difficulties which had to be satisfactorily answered if the plaintiff's evidence were to be believed.

Butler Sloss L.J. found that the judge's findings of fact on critical issues did not have regard to all the relevant evidence. On one aspect of the evidence Butler Sloss L.J. said:

> "The judge did not refer to the plaintiff's explanation given in her oral evidence. He advanced no theory why he accepted her version ....."

This last comment seems to us to clearly indicate that findings of fact unaccompanied by reasoned assessment of all the relevant evidence are unlikely to be sustained on appeal.

As to Mr. Small's third question which asks the Court to set out the principles upon which it acts when an appeal is taken against findings of fact and assessment of evidence of a trial judge, we adhere to the well known principle, repeated by the Master of the Rolls in Miles v. Cain (supra) that:

> "There is abundant authority for the proposition that where the crucial issues between the parties are issues of fact, an appellate court should never forget the advantage enjoyed by the trial judge in having seen and heard the witnesses giving evidence and it should hesitate long before rejecting or interfering with his conclusions (see The S.S. Hontestroom [1927] A.C. 37 and Benmax v. Austin Motor Co. Ltd. [1955] 1 All E.R. 326)."

We now return to the issues raised in the instant case. On the issue of identification the learned trial judge ought to have resolved with utmost clarity what exactly transpired when the appellant was being taken to Court on the morning of February 27, 1989. If he concluded that Mr. Oliver pointed out the appellant to the Bentleys, he would have to ask himself the second question, viz. why did Mr. Oliver deny this and why was Mr. Bentley anxious to distance Mr. Oliver from the entrance to the Courtroom when the appellant was passing into the Court. Mr. and Mrs. Bentley will probably go away with a permanent sense of grievance that their positive identification of the appellant was rejected due to no wrongful act on their part, and this points to the necessity for a change in the administrative arrangements for prisoners and witnesses at the Gun Court. With the rejection of the evidence of Mr. and Mrs. Bentley the Crown's case was weakened.

There was a glaring weakness in the evidence of identification as it related to the description of the man who first attacked Mr. Oliver. The assailant was described by this witness to the police as about 5 feet 6 inches tall. When the appellant turned out to be 5 feet 10½ inches tall, this presented a situation calling for an explanation and a

reconciliation between the perception and the fact. The trial judge undertook no such exercise and passed it over as if it were an irrelevant factor in the case. Here is an objective fact which this Court can use to say that the trial judge did not put his peculiar opportunity to see and to assess to good use and so did not resolve a crucial issue in the case.

In determining the overall credibility of Mr. Oliver the learned trial judge must have assessed his behaviour when he was asked about a preview of the photograph of the appellant. To the self-directed question: Did the witness display any hesitation in his answer? The trial judge's answer must have been "Yes". Did he appear embarrased by the question? His answer must have been "Yes"? Did the answer have the ring of reliability? His answer must have been "No", had he taken a correct note of the evidence. If it was unclear to the trial judge, having regard to the evidence of Mr. Oliver, whether or not he had seen a photograph of the appellant on or before April 30, 1988, he ought to have been less inclined to rely on the evidence of that witness.

In our view the trial judge did not face the difficulties inherent in the two most crucial pieces of evidence on identification and consequently his acceptance of the evidence of Mr. Oliver that the appellant was one of the four men who committed the robbery was arrived at without a proper assessment of the relevant evidence.

It may very well be that judges will hereafter approach giving their decisions in criminal cases in a slightly different manner than that which now obtains. In the same way that it is advisable for a trial judge to take a short adjournment in a trial with a jury, in all but the simplest

cases, to prepare his summing-up, a judge sitting alone should avail himself of the opportunity to clarify the issues in his own mind, probably to note down what he proposes to say and then deliver his fully reasoned judgment after the adjournment. In the long run this procedure will result in a saving of time and resources for the concerned parties.