JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 92/89

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

R. v. DENZIL DAWES

Leonard Green for Appellant

Mrs. Lorna Errar-Gayle for Crown

26th November & 17th December, 1990

FORTE, J.A.:

The appellant was convicted in the High Court Division of the Gun Court sitting in the Hanover Circuit Court for the offences of illegal possession of firearm and robbery with aggravation by Pitter J, sitting alone. He was sentenced to 5 years and 7 years imprisonment at hard labour respectively.

He was granted leave to appeal by a single judge, on the very issue which formed the only relevant ground of appeal advanced at this hearing. It reads as follows:

> "The learned trial judge erred in failing to warn himself of the dangers inherent in relying on the evidence of visual identification particularly under circumstances where this was the only evidence capable of grounding a conviction in this case."

Counsel for the Crown, in an honest and forthright manner correctly conceded at the commencement of the hearing that this ground of appeal was unanswerable, and as a result of our agreement, the appeal was allowed, the conviction quashed and a verdict of acquittal entered. Nevertheless,

it may be useful to give an outline of the facts adduced at the trial.

The appellant was alleged to have robbed the complainant on the 10th May, 1989 at about 10.30 p.m. when he (the complainant) had driven up to his home in his van and after he had alighted from it. During the robbery, the complainant made an alarm which caused his girlfriend to come unto the verandah of their home calling out to find out what was happening. The appellant then threatened "If you say anything I shoot you in a you b.... c.... " On being ordered to do so, the complainant took his wallet from his pocket, and threw it down on the ground whereupon the appellant with the assistance of the light from a flashlight picked it up. He was then ordered back into the van and having obeyed this order he drove the van directly to the police station where he made a report. When he had gone, his girlgriend who had gone back into the house after she had called out, returned with a machete and then saw a man whom she identified as the appellant walk up to her and say "Whey you a go with the machete?" She repeated what he said and then retreated into the house, calling for help.

The complainant testified that he had been with his assailant for about 15 minutes, and that he was aided in his identification by a light on the verandah, the moonlight which was bright, and the fact that the assailant was known to him before that night.

This identification was supported by that of his girlfriend who testified that she also knew the appellant before, as in fact she taught his child at school and that he lived in the area and was known as Clive.

At the time of the incident, after the departure of the assailant, a gentleman known by the name "Lucky" was the first to respond to the call for help and on being informed of the robbery went with others in search of the assailant, but was unsuccessful. He however testified for the defence at trial, to the effect that he was present on the complainant's return from the police station and that at that time he (the complainant) had said his assailant was Balvin Myrie. That Myrie's brother who was then present said "It could not have been my brother because I just leave him watching T.V. down there". In response to this, the girlfriend asked if it could not have been "Mama Sugar" son (the appellant) because he resembled Balvin Myrie. The complainant and his girlfriend denied these allegations in their testimony.

This therefore on its own special facts was a case which required careful consideration in respect of the identification.

The learned trial judge though recognizing that he had to examine the circumstances under which the opportunity for identification of the assailant presented itself, did not either expressly or impliedly demonstrate any awareness of the cautious approach that ought to be taken in acting upon the uncorroborated evidence of visual identification because of the inherent dangers that exist in so doing. It is surprising that this error continues to form the basis of appeals to this Court having regard to the many cases in recent times in which the law has been carefully elucidated.

The two most recent are **Regina vs. Anthony Wilson** C.A. 128/89 delivered on the 3rd December, 1990 (unreported) and **R. v. Lebert Balasal and Soney Balasal** heard together with **R. v. Francis Whyne** C.A. 23 & 24/90 delivered on the 5th December, 1990 (unreported) both of which thoroughly examine

the cases from this Court which settle this principle.

We need only refer to one of those cases which indicate the proper approach a judge sitting alone should follow in dealing with the issue of visual identification.

In the case of **R. v. George Cameron** S.C.C.A. 77/88 delivered 30th November, 1989 (unreported) this Court stated thus:

> " ..... 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 crucial 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."

Unhappily the learned trial judge in the instant case remained silent and at the end of the case we cannot be sure that -

(1) he was aware of the inherent dangers of visual identification and

(2) that he was conscious of the risk when he concluded that the appellant was accurately identified.

For those reasons we allowed the appeal.