JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 186/88

COR: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

R v. KEITH GRAY

Bert Samuels for Appellant

Miss Carol Malcolm for Crown

October 8 & 23, 1990

CAREY, J.A.:

On 8th October, 1988 in the High Court Division of the Gun Court held in Lucea in the parish of Hanover before Wolfe J sitting alone, the appellant was convicted on charges of illegal possession of a firearm (count I) and wounding with intent (count II). He was sentenced to concurrent terms of 5 years and 10 years imprisonment at hard labour.

The matter comes before the Court by leave of the single judge and on 8th October we allowed the appeal, quashed the conviction, set aside the sentence and directed that a verdict and judgment of acquittal be entered. We intimated our intention to put our reasons in writing, which we now fulfil.

Donovan Cunningham aged 17 years, the victim on count II, deals in ganja. In the early morning at 2.00 a.m. of 3rd July 1987 Cunningham who was asleep in the kitchen which is but a short distance of the house, was awakened by the noise of his doors being knocked. Since he was guarding

valuable stock-in-trade he called out for "robber". He did not think that was an hour for legitimate buyers and, as if in confirmation, was greeted by the sound of gun-fire. Indeed he received an injury to his right thigh. The door was brusquely pushed open. Three men entered, one of whom Mr. Cunningham identified as the appellant, and who relieved him of 2ulbs of ganja. He said he recognized the appellant by moonlight which filtered in through a hole in the kitchen. He never explained where this "hole" was situated and the matter was left in what we consider an unsatisfactory state. He did say "when time get rotten" (sic) which suggested that the kitchen was old and dilapidated. So far as time for observation went, he stated "no time". "Them take no time to take out the herb and come out". With respect to proximity the witness said that the appellant held him and he saw his face. He was acquainted with the appellant since school days; they attended school together but the appellant was a few years his senior.

Another witness who gave identification evidence, was not accepted by the trial judge and her evidence must therefore be discounted.

In his unsworn statement from the dock, the appellant attributed illwill to "them" and put forward an alibi. At the material time, he said, he slept at his mother's and he called her to substantiate that defence.

The verdict of guilty depended wholly on the visual identification of a sole eye-witness who was uncorroborated. The learned trial judge who is very experienced did not at any time in his summation state expressly that he warned himself of the dangers inherent in identification evidence nor can we discern in the language of the summation

an appreciation of the special genre of evidence with which he was dealing and therefore the need for especial care. The argument of counsel for the appellant was that the learned trial judge failed to warn himself expressly in the fullest form of the dangers of acting upon uncorroborated evidence of visual identification. He relied on R. v. Carroll (unreported) S.C.C.A. 39/89 dated 25th June, 1990 which we readily admit was a decision of this court subsequent in time to the trial and therefore not available to the learned judge.

We cannot help but point out that this latest decision adds an obligation in the judge's treatment of such evidence viz., that he must himself warn expressly. In R. v. Dacres (1989) 33 W.I.R. 241, the obligation was for a reasoned judgment. In R.v. Donaldson & Ors. (unreported) S.C.C.A. Nos. 70, 72, 73/86 - the reasoned judgment meant that the court would not imply application of correct principles in the fact of "inscrutable silence": reasons had to be stated, the warning had to be given. In R. v. George Cameron (unreported) S.C.C.A. 77/86 30th November, 1989, the court approved and applied R. v. Clifford Donaldson (supra). We said -

> "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."
> (per Wright J.A.)

In the result, even if it could be said that the trial judge was unaware of the requirement of an express warning to himself, the weight of authority at the time of the trial called for him to at least use language to demonstrate the particular care necessary where visual identification was concerned.