JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 144 of 1990

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

REGINA vs. KENUTE PALMER

Dr. Paul Ashley for the applicant

Terrence Williams for the Crown

November 25 and December 20, 1991

MORGAN, J.A.:

The applicant was convicted in the High Court Division of the Gun Court on 3rd October, 1990, by Reid, J. on an indictment which charged him, along with one Patrick Williams, for Illegal Possession of a Firearm and Robbery with Aggravation and he was sentenced to four (4) years imprisonment at hard labour on each count. His application for leave to appeal was treated as a hearing, the appeal was allowed, his conviction quashed and sentence set aside. We promised to put our reasons in writing which we now do.

The short facts are that the complainant was pasting posters of a political nature on a wall at Hangard Avenue, Saint Andrew, at 1 o'clock on the afternoon of the 23rd May, 1990. He was in a stooping posture when he felt something hard at the side of his head and a male voice said, "Don't move." He looked around and saw three men, one of whom was the applicant who was holding a gun at his head. One of the men took two gold chains from his neck and the other sprayed some liquid in his face. He thought then it was acid but at the trial he said it was not. He did not know the men before but

was less than two yards from the applicant during the five-minute episode in broad daylight. About 4 o'clock that afternoon, while riding his bicycle, he saw the applicant. He went to the Hunts Bay Police Station, returned with a policeman and pointed him out.

The applicant's defence was an alibi. He said it was Labour Day and he was at home assisting his mother to clear some rubbish.

Counsel filed three grounds of appeal and sought permission to begin with Ground 3, viz., "The learned trial judge erred in law by failing to give a reasoned decision for coming to his verdict." This ground, by the nature of counsel's argument, included Ground 2, which reads:

> "The learned trial judge erred in law by failing to warn himself in the fullest form of the dangers of acting upon uncorroborated evidence of visual identification."

Mr. Ashley argued that the learned trial judge gave few, if any, findings and did not indicate in his summation the principle applicable to the particular facts, and demonstrated the application of the principles, nor warned himself on the dangers of acting on uncorroborated visual identification as required by the various authorities. The learned trial judge found the witness to be a honest witness and based this "honesty" on the following facts: (a) that the witness admitted the fluid was not caustic soda, (b) having been robbed of his gold chain, he disclaimed the chain found on the neck of the second accused. Again when the applicant was apprehended and denied the complaint, the witness repeated, "Ah him have the gun", the learned trial judge found that the repetition showed a degree of consistency which made him an honest witness - thus equating consistency with honesty. He pointed to several discrepancies in the evidence of the sole witness and submitted that the witness was not speaking the truth or was unsure.

On an examination of the transcript, we found a disturbing situation. The witness, in his statement to the police, said he was in a minibus and was sitting by a window when he saw the applicant.

He admitted he was riding a bicycle at the time, as he said on oath. When asked why he said so, he replied, "Just a lie me a tell." Questioned as to what was the lie, he said, "Everything what me tell (the police) a lie your Honour." In answer to the learned trial judge, he said he did not wish to continue the matter as he did not remember most of the things that happened as it was about six (6) months since the event. He was reminded he had taken an oath and asked if he was afraid of anybody. His reply was that he was not, he just got mixed up and could not quite remember what happened except the fact that he was robbed. Indeed, when he was cross-examined with respect to the other accused Williams he said he was not sure and this led to the acquittal of that man. As to this applicant, the witness sought to rehabilitate himself by saying that he knew who robbed him.

He impressed the learned trial judge as an honest witness but how reliable was he? He was the sole eye-witness yet he denied, then he admitted, then he retracted. He was sure of both then not sure of one. He admitted lying. He was indecisive, unreliable and untruthful in his evidence and the discrepancies were such that, taken altogether, made the identification of the applicant unreliable.

Crown Counsel indicated his concern was in respect of the failure of the learned trial judge to demonstrate that he had warned himself as to the dangers inherent in visual identification and conceded that the evidence of identification of the applicant could not be supported.

This was entirely consistent with our view and for these reasons we allowed the appeal.