JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 162/89

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

R. v. CAROL ROSS

Leonard Green for Applicant

Terrence Williams for Crown

7th & 28th October, 1991

GORDON, J.A.

The applicant was convicted in the Gun Court, Kingston on 20th December, 1989 on four counts on an indictment charging him with illegal possession of firearm, robbery with aggravation, wounding with intent and shooting with intent. Concurrent sentences of 5 years, 5 years, 3 years and 7 years imprisonment at hard labour were imposed by the trial judge Cooke J. Against these convictions and sentences he sought leave to appeal and on the hearing, the application was dismissed, the convictions and sentences affirmed and we promised to give our reasons in writing. This we now do.

The complainant Godfrey Evans and his paramour Winsome Taylor, were asleep in their home at Waterhouse on 10th March, 1989. At about 3:30 a.m. they were awakened by strange sounds. Mr. Evans saw the silhouette of a person moving on his verandah. He made an alarm and then he went to investigate. His investigation took him to the low fence around the home and there he was confronted by the applicant who rose from the shadows armed with an automatic pistol pointed at Mr. Evans. The applicant ordered "Hey boy don't move." Mr. Evans

was marched back to his house at gun point. The applicant then demanded money. Mr. Evans said he had none and was promptly struck in the forehead by the applicant with the gun. He sustained a wound which bled. Miss Taylor came out the house shouted "thief" and was ordered "hey gal don't move stop the noise." The applicant then said he wanted the television in the house only if it was a coloured one. They tried to dissuade him but he went in and took it. Mr. Evans ran from his premises shouting "thief" and the applicant discharged a shot at him. The applicant then ran away with the television. Later that same morning about 5.00 o'clock the applicant differently attired returned to the scene while a crowd was there and enquired "What happen awn yah last night?" and was informed that Evans had lost his television. He thereupon said he had once suffered a similar fate. It was Evans' evidence that the following morning the applicant visited the premises and threw stones on the house. Miss Taylor found a spent cartridge case on the morning of the robbery and the shooting.

On the 21st March, 1989 the applicant was pointed out to the police by the complainant Mr. Evans at the Olympic Gardens Police Station. The police, it seems had sent for the complainant at the request of the applicant.

In an unsworn statement the applicant denied the charges. He said he heard of the accusations from two men who called a man to look at him. He invited his accusers to go to the police station with him and at the police station, the complainant attended and identified him. He denied the accusations.

The grounds argued by Mr. Green for the applicant can conveniently be encapsuled "the verdict is unreasonable and cannot be supported having regard to the evidence." Mr. Green criticized the conduct of Constable Robinson. He received a report on the

10th March, 1989 that the applicant was known, he obtained warrants but he did nothing until the applicant was pointed out to him at the police station on the 21st.

Constable Robinson admitted obtaining the warrants on 12th March, 1989 but claimed he did not know the applicant by the name stated on the warrants. He knew him by the name "Kyman." While he had warrants for the arrest of Carol Ross he did not know that that person was one and the same with the person he knew as Kyman. That accounted for the delay in executing the warrants.

The defence relied heavily on what they regarded as weak or unsafe identification evidence. It was the prosecution's case that the applicant was known to Mr. Evans and Miss Taylor before the night of the incident. Mr. Evans had been seeing him passing on the road on a few occasions but Miss Taylor on her evidence, had seen him on a daily basis. She did not recognize the applicant when she first saw him on the premises holding the gun on her paramour. It was when he was on the verandah that she recognized him. The evidence is that there was a bright street light just by the premises. This light, described by the witnesses as a flood light, shone in the premises and on to the verandah where the applicant engaged the complainants in conversation about the television he wanted and before he entered the house to take it.

The learned trial judge approached an assessment of the evidence with the care required. At page 54 he said:

> "I accept that there was floodlight and that this floodlight was adequate in respect of the aspect of lighting. This is not a fleeting glance case this is a case where the assailant and the victims were face to face at the wall, face-to-face for sometime while a conversation took place, it is a situation where the parties are together for sometime, especially, more especially when they are placed on the verandah. It also appears that there was a conversation on the verandah when the accused man came up further to the complainant threatening to shoot him if

> "there was no colour television inside, and I accept that.
> It will be recalled that Evans tried to mislead his assailant. His assailant, Evans said, had a cut on his left cheek from ear to mouth, what is known as a telephone cut. I have seen this scar and I am satisfied that on the night in question that scar was visible and from where the parties were on the verandah the side that had the scar would have been the side which was to both Evans and Taylor as the accused went inside the house. There is also evidence that he, Evans, had seen the accused man pass on the road before, passing on the road before.
> Under cross-examination it came out that the assailant had on a peaked cap, a little peaked cap I think it was called, and I find as a fact that that little peaked cap was not such that it could disturb the quality of the identification, that little peaked cap as demonstrated by the female, Taylor.

In his examination of the evidence of the witness Winsome Taylor he said:

> "The evidence of Winsome Taylor is that, she apparently had been accustomed to seeing the accused man passing her gate much more often than did her common-law husband, and she says that when she was outside at first she did not know who it was but that when he came up, to use her words, she made out his face." ...
>
> It is my view that both witnesses were honest and credible and having in mind all the areas pertaining to the dangers inherent in visual identification I am satisfied so that I feel sure about the quality of the identification."

In our view, the evidence was strong and the learned trial judge in his summation had due regard to the defence and the conclusion he arrived at was correct.