JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 151/88 & 71/89

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

REGINA VS. ALEX SIMPSON

REGINA VS. MCKENZIE POWELL

Delroy Chuck for the Applicants

Paulette Williams for the Crown

21st January, 1991 & 5th February, 1992

DOWNER, J.A.

The important point of law which has to be decided in these applications for leave to appeal, was the nature of the warning which a trial judge sitting in the High Court Division of the Gun Court, was obliged to give in these instances, where the prosecution's case was dependent on evidence of visual identification. The common law has insisted on a mandatory warning when reliance has to be placed on the evidence of an accomplice, children or where the complainant is the sole witness in a case of sexual offence. It is because visual identification evidence has been proved by the judicial system to be unreliable unless certain conditions obtain, that there is an equal insistence on certain prerequisites where there is an absence of corroboration.

That visual identification has joined the special categories of evidence where corroboration is desirable has been re-affirmed by their Lordships' Board in the important case of Junior Reid et al v. The Queen Privy Council Appeals Nos. 14, 15 & 16 of 1988 and 7 of 1989 or [1989] 3 W.L.R. 771.

Here is how it was put by Lord Ackner:

> "Identification evidence
>
> Judicial experience has established that there are certain categories of evidence which are, by their very nature, potentially unreliable and in respect of which, in order to avoid the serious danger of wrong convictions, special warnings and directions have to be given to juries. Such categories include the evidence of children who, although old enough to understand the nature of an oath and thus competent to give sworn evidence, may yet be so young that their comprehension of events and of questions put to them, or their powers of expression, may be imperfect. In sexual cases, the victims of the alleged offences may have a variety of motivations, some of which may never have occurred to a jury, for giving false evidence. An accomplice, with a purpose of his own to serve, such as the hope of lenient punishment, may well tend, when giving evidence for the prosecution, to suggest that the entirety or the majority of the blame for the crime should fall upon the accused rather than upon himself. Yet this possibility may again not be apparent to a jury. Accordingly, in such cases where the inherent unreliability of the witness might otherwise escape the jury, the trial judge has to give the appropriate warning and explanation of the special caution required when considering that type of evidence." (Emphasis supplied)

As a pointer to the emergence of visual identification evidence as a category of evidence which was potentially unreliable, the case of **The People (Attorney General) v. Dominic Case** [1963] No. 2 I.R. 33 was cited. It is appropriate to refer to the following extract which appears at page 2.

> " 'We are of opinion that juries as a whole may not be fully aware of the dangers involved in visual identification nor of the considerable number of cases in which such identification has been proved to be erroneous; and also that they may be inclined to attribute too much probative effect to the test of an identification parade. In our opinion it is desirable that in all cases where the verdict depends

> 'substantially on the correctness of an identification, their attention should be called in general terms to the fact that in a number of instances such identification has proved erroneous, to the possibility of mistake in the case before them and to the necessity of caution.' "

It must be noted that these important passages appear in the context of jury trials and it was essential to stress three aspects of these directions in law namely, the "warning" the "directions" or "the explanation of the special caution required" when considering the categories of evidence which are potentially unreliable. These aspects of the warning and the reasons for the warning were recognised from the outset in **R.v. Turnbull & Ors.** [1977] 1 Q.B. 244 and the following passage cited at pp. 4-5 of **Junior Reid** (supra) is apt:

> " '...the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the idnetification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.' "

It is against this background of the requirement of a warning in clear terms, that the duties of a Supreme Court judge conducting a trial as judge of law and fact in High Court Division of the Gun Court, must be determined. That he must give reasons for his decisions is not in dispute. Just as the reasons delivered by a judge in civil proceedings differ from his summing-up to the jury, modifications also apply in the reasons for judgment in criminal proceedings. Merely to utter the warning and yet fail to show that the caution has been applied to the analysis of the evidence, will result in a judgment of guilty being set aside. The best course in delivering the reasons is to state the warning expressly

and apply the caution in assessing the evidence. That is the general statement of law in R. v. Carroll (Rowe, P., Forte & Morgan, JJ.A.) S.C.C.A. 39/89 delivered 25th June, 1990, and if it is adhered to, the reasoning and judgment of the trial judge ought not to be faulted.

Was the special caution applied in the reasons for judgment in R. v. Floyd Allen & McKenzie Powell and R. v. Steve Daye & Alex Simpson?

Theobalds, J., presided at the trial of Floyd Allen and McKenzie Powell where the indictment charged alleged illegal possession of firearms and robbery with aggravation. Here is how he approached the visual identification evidence in the case of McKenzie Powell at page 181 of the record:

> " Another limb of the defence in this particular case is also one of mistaken identification, and, of course, coupled with the question of alibi, the question of identification is also very important whenever it is a live issue in a case, because it is well known that people do resemble one another and perfectly honest witnesses sometimes are known to make mistakes on the question of identification, and having once made a mistake they hold on to it and they insist that it is in fact not a mistake, and, of course the consequences as far as the accused persons are concerned are usually lethal, because if a mistake is made and held on to and the accused is found guilty on the basis of that mistake then the consequences are invariably a verdict of guilty. So, for this reason, the quality of the identification evidence has to be assessed with great caution, and one has to bear in mind the principles or guidelines laid down in the case of R. v. Oliver Whylie, and those that are relevant to this particular case are, first of all, the lighting that was available in the area at the particular time, and the period of time during which the witness had an opportunity to observe the features of his attacker."

It is appropriate to cite two further passages from the learned judge's reasoning to show that he applied the caution to evidence he had to assess. After detailing the circumstances in which Powell forcibly entered the victim's car and the opportunities to examine his features while Powell was an unwelcome passenger, the

learned judge continued thus:

> "... In addition to that Mr. Henry says that he was tied up, held captive and at daybreak he also had a further opportunity for some two hours to see the features of Mr. Powell. Indeed, as it turned out, according to Henry, Powell was the man who he conversed with, Powell was the person whom he asked whether or not he could urinate, and he has described that Powell partially lifted him up, unzipped his pants and assisted him to urinate.. It seems to me that in those circumstances, clearly, Henry had an abundance of opportunity to see and observe the features of the person whom he says, and whom he has identified in this Court as being the accused man, McKenzie Powell."

Then there was the dramatic incident during the course of the trial of the identification parade. The fact that the judge recognised its significance and included it in his reasons shows how careful his reasons were. Here are his words at page 182:

> " In addition to that, Mr. Henry says that sometime in March the following year he went to Black River where he was shown a line-up of men, it impressed him that all the men did resemble one another. He was impressed by the similarity in appearance of the men in the line-up, but he went up to Mr. Powell and identified him. There is some discrepancy as to whether he kicked or he punched him, I am satisfied from the evidence of the Justice of the Peace and also from police evidence that he was kicked by Henry, and the inference one draws from such a positive and forceful act is that Mr. Henry was satisfied at the time that the person whom he was picking out of that line-up was the same McKenzie Powell who subjected him to the indignity of unzipping his pants and assisting him to urinate on the night of the offence."

The careful reasons of the judge pertaining to the relevant aspects of the evidence show that he applied the caution required by law. Since this was done in clear terms, the irresistible inference must be that he had warned himself of the special dangers inherent in the identification evidence.

Gordon, J., as he then was, delivered the reasons in **R. v. Steve Daye & Alex Simpson** where the charge was also illegal possession of firearm and robbery with aggravation. The learned

judge demonstrated that he was aware of the special nature of identification evidence. He said at pages 75-76 of the record:

> " Now, where identification is concerned, I presume it is desirable for me to mention that I am aware of what the authorities say, and the locus classicus has not been referred to in the course of this case, but usually it is of **The Queen against Oliver Whylie** and the principles therein laid down."

Perhaps at this point it should be stressed that both judges expressly referred to **R. v. Oliver Whylie** [1978] 25 W.I.R. 430 and the following passage approved of in **Scott & Ors. v. The Queen** [1989] 2 W.L.R. 924 and Privy Council Appeals 2 of 1987 and 32 of 1986 page 13, must have been in both their minds:

> " 'Where therefore, in a criminal case the evidence for the prosecution connecting the accused to the crime rests wholly or substantially on the visual identification of one or more witnesses and the defence challenges the correctness of the identification, the trial judge should alert the jury to approach the evidence of identification with the utmost caution as there is always the possibility that a single witness or several witnesses might be mistaken.'"

The defect in **Whylie** relates to weak identification evidence which ought to be withdrawn from the jury and that situation does not arise in these cases.

That the learned judge applied the special caution which is required can be seen from the following passage on page 75 when recounting how Simpson was identified by the Crown witness Skifton DeCordova:

> "... He said Daye commended Simpson to tie him and Mr. DeCordova's telephone was cut and the wire from the telephone used to tie his hands behind him, he was placed on the bed. Having questioned him about the occupants of the house he moved on to Miss Wisdom where she had her ordeal."

The fact that Simpson tied up the witness must have been a salient feature of this case and therefore has an important bearing on the issue of identification. It is sometimes forgotten that their Lordships' Board at page 4 of **Junior Reid** (supra) recognised that in cases of visual identification it was not safe to convict,

> "unless the circumstances of the identification is supported by substantial evidence of another sort. It was however recognised that there would have to be exceptions to this general rule in special circumstances to be worked out in practice."

These prudent words which characterise the development of the common law are of special pertinence to the legal system in Jamaica where trials in the High Court Division of the Gun Court are conducted by a Supreme Court judge without a jury. See **Trevor Stone v. The Queen** [1980] 1 W.L.R. 880.

In making this statement their Lordships were approving the recommendations of the Devlin Committee. Here are the special circumstances of the Simpson identification as recounted by the judge:

> "... Daye, he said, had the gun. Simpson at first had a knife which he later recognised to be his own Mr. DeCordova's kitchen knife and a machete which he kept by the side of his bed, was taken up;"

The evidence reveals that the room was well lighted and Simpson was armed with a knife and machete which DeCordova recognised belonged to him. Simpson pulled a chaperita from DeCordova's hand and searched the room for about ten minutes. The assailants even told DeCordova to stop watching them. It should also be added that Simpson was picked out at an identification parade. Also important, was that when pressed that he was mistaken by counsel for Simpson, his reply was as follows:

> " No, that is the man. There is a cut here at his right eye, under his right eye and I know is him (indicating)."

it is manifest that it must be inferred from the way the evidence emerged and from the thorough reasons of the judge, especially with regard to the special circumstances, that the judge had warned himself of the risks of mistaken identity.

In instances of special categories of evidence, are there decisions in criminal cases which demonstrate that the warning by the trial judge can be inferred from his reasons?

That it is fitting and proper to infer rules of law from a judge's reasons is illustrated in B. v. B. [1935] All E.R. Rep. 428. It was an instance of domestic proceeding akin to a criminal case because of the category of the evidence. Sir Boyd Merriman, P., inferred from the reasoning of Greer and Russell, L.Js., in **Statham v. Statham** [1929] P. 131, that it was a requirement of law that corroboration was desirable in instances where the wife's allegation was that it was perverse acts of the husband which made the husband guilty of desertion. It is instructive to quote the following passage:

> "Magistrate 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, then there is no rule of law which prevents the tribunal from finding the matter proved in the absence of corroboration."

A judge's reasons are always delivered in the context of a trial so it is instructive to note that to determine the extent of the warning on the desirability for corroboration, Sir Boyd Merriman gave "a very full consideration of the note and argument on both sides."

It is important to reiterate that a judge's reasoning requires a different treatment from a summing-up to a jury, and this was acknowledged by the Privy Council in an instance of wrongful admission of evidence. In **Thambiah v. Reginam** [1965] 3 All E.R. at page 664 (D E) Lord Pearce said of a case where the

appellant was tried on indictment by a judge sitting without a jury in a District Court:

> "Thus the evidence was wrongly admitted. Had this case been tried by a jury, its effect on their minds and the degree to which, if at all, it might have affected their verdict would be a matter of speculation. Here, however, their Lordships have the learned judge's careful reasons to guide them in estimating its effect. It is clear that he did not regard it as being of any importance."

This passage stresses the importance for careful reasons which covers the relevant issues of law raised on the evidence. So if there are careful reasons, then on appeal, misreception of evidence may be found to have had no effect on the judge's mind.

It is now necessary to advert to non-jury trials in cases of sexual offences and accomplice evidence decided by Their Lordships' Board as these categories of evidence are comparable to identification evidence in that it requires a warning and a special caution by a Supreme Court judge where there is an absence of supporting evidence.

Lord Donovan in **Chiu Nang Hong v. Public Prosecutor** [1964] 1 W.L.R. 1279 at 1285 recognised in a case of rape that if the reasons of a trial judge are well grounded, the judge's mind upon the matter would have been clearly revealed. Here are his Lordship's exact words on the matter:

> " Their Lordships would add that even had this been a case where the judge had in mind the risk of convicting without corroboration, but nevertheless decided to do so because he was convinced of the truth of the complainant's evidence, nevertheless they do not think that the conviction could have been left to stand. For in such a case a judge, sitting alone, should, in their Lordships' view, make it clear that he has the risk in question in his mind, but nevertheless is convinced by the evidence, even though uncorroborated, that the case against the accused is established beyond any reasonable doubt. No particular form of words is necessary for this purpose: what is necessary

"is that the judge's mind upon the matter should be clearly revealed."

Another instance where the law could have been inferred from judge's reasons is to be found in **Tumahole Bereng v. The Queen** [1949] A.C. 253. There Lord MacDermott found that the reasons regarding accomplice evidence were erroneous and concluded thus at page 270:

> " For these reasons their Lordships are of opinion that the learned judge misdirected himself as to the nature of the corroboration required by the rule of practice which he was obviously endeavouring to apply."

There is yet another example where the reasons of the trial judge were not well grounded. In **Knowles v. The King** [1930] A.C. 366, Viscount Dunedin in examining the reasons for judgment said at page 375:

> " Their Lordships must now examine the judgment. In the judgment of the circuit judge is to be found what to a jury would have been the summing up, and then the verdict."

Then in reviewing the reasons and finding them deficient, as the judge failed to address his mind to the issue of recklessness which raised the issue of manslaughter, his Lordship puts it thus at page 376:

> "... Having come to the conclusion that the story of an accident could not be substantiated, and the position and direction of the wound excluding all idea of deliberate self-infliction, he was driven to the conclusion that the shot was fired by the appellant. That there was criminality in what happened is a necessary result of that conclusion. In a fit of drunken recklessness to fire a shot to silence a nagging woman, which shot the woman, even though the shot was not intended to hit her, is a crime. But the fatal flaw in the judgment is that having set aside Mrs. Knowles's account of the occurrence as accident he at once assumed that the only alternative to accident is murder. There is not the slightest inquiry whether assuming that the shot was fired by the accused, the act amounted to manslaughter and not murder. There is

> "no attempt to face the question whether the standard of proof required to prove murder as against manslaughter has in this case been reached. If the case had been before a jury and the judge had not explained to them the possibility of a verdict of manslaughter, but had said if not accident the only alternative is murder that would have been an erroneous summing-up. That is what is to be found in the judgment. The question as between manslaughter and murder is entirely undealt with and their Lordships are therefore, as the learned judge failed to consider the question, bound to consider whether the evidence here reached the standard of proof necessary to involve a conviction for murder. They are clearly of opinion that it did not. A conviction for manslaughter might have been a different matter, but that is not before their Lordships." (Emphasis supplied)

It is to be noted that the fatal flaw in the reasons of the circuit judge as stated by Viscount Dunedin was that there was not the slightest enquiry from which it could be presumed that he had considered and rejected manslaughter as an alternative finding to murder.

It is of interest to note that Mr. Chuck who argued for the applicants in these cases was also counsel in **R. v. Anthony Peryer & Everton Powell** S.C.C.A. 155 & 159/88. He had there contended that the requisite warning cannot ever be inferred from the conduct or careful reasoning of the trial judge. There (Campbell, Forte & Downer, JJ.A.) the Court rejected that argument in a judgment delivered on March 5, 1990. In affirming the judgment of the Court below, this Court at page 8 said:

> " In the instant case, the judge expressly stated at page 101 of the record that the Crown relied solely on visual identification as the basis to prove its case. There was no supporting independent evidence to implicate the appellants. But the fact that the judge examined all the features that pertained to the strength and weakness of the identification evidence, took the precaution of visiting the locus, meant that he acknowledged the importance of the issue of mistaken identity projected in cross-examination. All these

> "features, therefore, clearly revealed that the possibility of mistaken identity was clearly in the judge's mind."

In this case, the submission was reiterated and comfort was sought from the important case of **R. v. Locksely Carroll** S.C.C.A. 39/89 delivered 25th June, 1990: (Rowe, P. Forte & Morgan, JJ.A.). In delivering the judgment, Rowe, P., at page 11 appropriately recognised the specific issues which were to be determined. As for those issues, they concerned firstly, the weakness of the identification evidence and secondly, the conflicting descriptions given by the witness which were never addressed by the trial judge. The failure of the trial judge to address these vital issues was akin to the situation where the trial judge in **Knowles v. The King** (supra) never addressed his mind in his reasons for judgment to the issue of manslaughter.

Rowe, P., also "made some general remarks on the law," which, if followed by Supreme Court judges, will result in clearer reasons for decisions and fewer successful appeals. The essence of those remarks is that the safest course for a judge when giving reasons for his judgment in the High Court Division of the Gun Court, is to warn himself expressly of the potential unreliability of identification evidence and to heed his warning when he comes to analyse the evidence.

However, the main thrust of the applicants' submission was that there was a conflict between **R. v. Cameron** S.C.C.A. 77/88 delivered on November 30, 1989 and the later case of **R. v. Carroll** S.C.C.A. 39/89 delivered June 25, 1990. In **Cameron** Wright, J.A. delivering the judgment of the Court (Rowe, P., Wright, J.A. and Gordon J.A. (Ag.) said this:

> "...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. 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."

Then in **Carroll** (supra) Rowe, P., delivering the judgment of the Court (Rowe, P., Forte & Morgan, JJ.A.) puts it thus:

> " 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."

The extract from these two cases emphasize that the trial judge sitting without a jury must demonstrate in language that does not require to be construed that he has acted with the requisite caution in mind and that he has heeded his own warning. However, no particular form of words need be used . What is necessary is that the judge's mind upon the matter be clearly revealed.

In these applications the warning was to be found from an examination of the careful reasoning of both learned judges and so this Court had no hesitation in agreeing with the order proposed by Rowe, P., which was that the applications for leave to appeal were refused. The convictions and sentences were to be affirmed. The sentence of McKenzie Powell for 10 years hard labour is to run from 19th July, 1989 while the sentence of 12 years hard labour imposed on Simpson from September, 22, 1988.