JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 126 of 1990

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

REGINA vs. COLLIE SIMPSON

Arthur Kitchin for the appellant

Bryan Clarke for the Crown

March 23 and June 1, 1992

WRIGHT, J.A.:

Leave to appeal was granted by the single judge so that the manner in which the trial judge dealt with the issue of identification may be examined with particular reference to the credibility of the prosecution witnesses. However, the nine grounds of appeal filed reflected different considerations but, after discussions with the Court, Mr. Kitchin agreed to re-structuring his grounds so that they now number four, viz:

1. The learned trial judge erred in law when he failed to uphold the submission of no case to answer at the close of the prosecution case.

2. The verdict is unreasonable and cannot be supported having regard to the evidence.

3. The learned trial judge misdirected himself in the evaluation of the evidence and so deprived the appellant of a fair trial.

4. The summing-up of the learned trial judge was so unfair and so unbalanced that it must have operated to the prejudice of the appellant.

In the result, however, only three grounds were argued because ground 4 was abandoned.

The appellant was convicted in the Gun Court Division of the Saint James Circuit Court on July 30, 1990, before Harrison, J. on an indictment charging him with Illegal Possession of a Firearm and Wounding Clevance Forbes with intent to do him grievous bodily harm. On Count 1, he was sentenced to seven years imprisonment at hard labour and to twelve years imprisonment at hard labour on Count 2 - sentences to run concurrently.

The charges arose out of an incident at the home of Cebert Forbes, the father of Clevance Forbes, in the night of October 19, 1988, at Goshen, Content in the parish of Saint Elizabeth. From the very outset it is apparent that the trial judge must have had great difficulty appreciating the rare manner of speech of Cebert Forbes, the chief prosecution witness. Mr. Forbes testified that because of the activities of thieves in the area he had gone to his farm to check on his cows and had returned home about 12:30 a.m. driving his land-rover. As he put it:

> "Wen time mi drive up to di yard which part me usually drive and stop a couldn't stop there. A see a big stone in di road and a come out."

He explained that that spot was right beside the house and that by road he meant "yard". He had left the vehicle throttling. Then he continued:

> "And a goh fi pick up the stone and a see Collie Simpson come out and sey, 'Boy, yuh dead tonight,' and I run and I grab him wena him two hands yah so."

He said he was able to recognize Simpson by the lights of the vehicle and "the moon shine like a day." The van was parked about three yards from the spot where he held Simpson whom he had known for sixteen years. A struggle ensued:

> "Mi sey to him no, boy you can't kill mi tonight and I grab him in a yah so and him say to me say 'A want the money before a kill you'."

They were facing each other while Simpson had a black gun in his hand. He explained that Simpson was not alone - there

were two others with him.

By this time his son Clevance became aware of untoward events on the outside and came out to make enquiries. Said Mr. Forbes:

> "My son come out and ask what happened and I said Collie Simpson and Jeggie hold me up."

One of the intruders cut the vehicle tyre and Clevance threw a stone at him and he ran. As the struggle continued with him and Simpson:

> "Jeggie cut me eena mi face and mi haffe let him goh. He hold Collie same way and me haffe let him goh and him get fi shoot mi son.... mi let him gon and him fire cha shot, sey, 'Boy, a waan kill yuh' and mi duck it and it ketch mi son."

Asked to say what distance there was between him and Simpson when the shot was fired, he said (indicating):

> "Near on, just from yah soh to yah soh, near on."

The son was shot at the back door:

> "Jus as him bus the door fi come out, him shot him."

The son fell bleeding by the door. The intruders ran off and Mr. Forbes took his son to the Mandeville Hospital.

One thing is abundantly clear and that is that the witness and the appellant were no strangers. As he put it:

> "A my claime brother-in-law. Mi did goh wid him sister."

That relationship had lasted about two years but that was some fourteen years before this incident. He would, however, see the appellant in the area every week and they spoke to each other.

Cross-examined by Mr. Clarke, he explained that he had been accompanied to his property by two men, "Headley" and "Pops" but he had let them off at their homes before proceeding to his home. Mr. Clarke's endeavour to ascertain whether the incident took place beside the house or behind the house produced this response:

"Mi and him haul and goh right to the back. I hold him. Him pull mi to the back of the house. Yes, yes, when mi hold him, him pull mi back of the house and one of the knife a goh so cena mi face."

Having regard to the language of this witness, it does seem strange that counsel should seek to discredit him on the contents of his statement to the police but that is exactly what happened. After he had identified his signature on the statement, the questioning followed at pages 22-25 thus:

"Q. Now the first thing Mr. Forbes, that I want to take you up on, you see, did you tell the police when you gave your statement on the 19th of October, 1966 at about 12:30 a.m., 'Today, 19th October 1966, I returned home, drove up to the side of my house and parked my F 100 Ford pick up?' Did you tell the police that?

A. Twelve o'clock.
Q. Did you tell the police..?

A. Never say --

Q. ..that you drove to the side of the house and parked your pick up?

A. I never say 12:30. I said twelve.

Q. Alright. You told the police twelve. I am still waiting on your answer. Did you tell the police that, 'I drove up to the side of my house and parked my F 100 Ford pick up'?

A. Me haffe stop it come out of it, you know, boss.

HIS LORDSHIP: Did you use those words to the police.

WITNESS: I don't even 'member, my Honour, please.

Q. Let me go a little further, see, if I going into your premises, see, - the next line of your statement tell the police, ' I got out of my pick-up and went to the back of my house to enter the house from the back.' Did you use those words to the police?

A. I never even memba about that your honour, please.

Q. Don't remember that?

A. (shakes head)

HIS LORDSHIP: Yes.

"Q. Go a little further, did you tell the police, the next line of your statement, 'As I reach to the back of my house outside, I saw three men standing at the back of the house outside about one yard from my house.' Did you tell the police those words?

A. (shakes head) I don't think so, sar.

Q. What's that?

A. No, sir.

Q. You didn't tell them that?

A. I don't know, I don't think so.

HIS LORDSHIP: You don't what?

WITNESS: I don't think so, I don't know.

Q. Don't think so. Could it be, Mr. Forbes, that you have forgotten what you may have told the police and you are now telling the Court something that you are making up?

A. A man make up nothing, Mr. Clarke. That man I hold inna my yard. Hold him in him two shoulder so. Not telling any lie.

Q. If it can be proven that that is what you told the police right on the morning after the incident, would you agree with me that what you are telling the Court today about coming out of van to move stone and man stand up in front of light in front of van with van light on, that that is something quite different, would you agree with that?

A. He couldn't agree with that."

It is obvious that the witness is a stranger to the language of the statement which must be seen as the policeman's effort at comprehending and reducing into received English the tale told by this witness. We have great reservations about the propriety of having this witness confronted by the written statement in those circumstances. He denied that Keith Williams, whom he knows by the name "Bigga", and Dave Stephenson travelled on the back of his vehicle that night. Indeed, the unlikelihood of him taking Keith Williams on his vehicle is underscored by his evidence that he and Williams had not spoken to each other for

about five years. Added to that is the fact, he said, that Williams, whom he regarded as an enemy, had reported to Policeman Scott that he, Mr. Forbes, had threatened to shoot him, Williams. He admitted that on return from the hospital that same night he went to the home of Jeggie, apprehended and took him to the police station.

The witness' credit was further tested with the following response. Asked Mr. Clarke: (at page 39)

> "Q. Suggesting to you that there is no truth in your story.
>
> A. A the truth I talk.
>
> HIS LORDSHIP: Listen first.
>
> Q. That this incident, first of all, occurred - that your holding up and seeing of Collie occurred by any van light beside of the house? What is your answer?
>
> A. He nuh hold him, Mr. Clarke? He nuh see him? I hold him yah so, Mr. Clarke. He nuh see him? For about five minutes me and him grab up, you know? A no see me see him a run at all, a hold me hold him."

In that single answer he had given ground for accepting his credit and disposed of any suggestion of a fleeting glance. Asked if he knew that the appellant has fourteen brothers he replied:

> "Yes, but a him me hold."

Further, to the suggestion that whatever happened at his home the appellant was not there he responded:

> "Is there him was Mr. Clarke. Me hold him same way so and I hold him. I know him. Hold him by him hand."

It was suggested that the appellant had not been living in the area since 1984 but the witness said he ran away after the incident in 1966. Said he:

> "Him run wey and gone and come and go and come... From him do him wuck him run wey; him noh tan eena di area."

An interesting interlude represents Mr. Clarke's final effort at discrediting the opportunity afforded by the headlights for identifying Mr. Forbes' attackers: (pages 48-49)

"Q. And I am suggesting to you, sir, no approach was made to you by him or anybody else at the side of your house with any van light on. You are not speaking the truth?

A. Yes, a di truth I speaking. God know sey a di truth I talking.

Q. And when you park your van normally, don't you switch off your lights?

A. No.

Q. What's that?

A. Switch off the light?

Q. When you park your van normally, don't you switch off your lights?

A. When time mi galang a mi bed when mi come out and goh a mi bed mi switch off the light.

Q. I don't understand you at all. When you park your vehicle, man, you don't switch off your lights?

A. But that night it never switch off. It never switch off that night.

Q. I ask you, when you park your vehicle normally, you don't switch off your lights?

A. Wen time you going eena yuh bed you park it.

Q. As far as you are concerned you park your vehicle when you turn it off and go into your bed. Is that what you are saying?

A. (Witness nods head).

Q. Is that what you are saying?

A. (Witness nods head)."

It seems to us that counsel and the witness were at odds over the meaning of parking. The witness seemed to be saying that he did not regard the **stopping** to remove the stone from the path of the vehicle as parking. To the very end of the cross-examination he maintained that he had held the appellant in the area lighted by the headlights and that it was the struggle that took them to the back of the house.

Clevance Forbes testified that he:

> "...heard when the pick up come right beside my room window. It come right 'round the back and I heard when him come in and then I hear an uproaring outside."

When he went outside he saw three men holding up his father. His step-mother opened the kitchen door next to his room door but before he could enter the kitchen to fetch a machete he heard shots one of which struck him in his right side and he bawled out, "The boy shoot me." He stated further that where he saw the men and his father was eight yards away and that he recognized two of the intruders to be the appellant and Jeggie. He knew the appellant for about ten years and he was enabled to recognize him because the moonlight was bright and in all he saw him for about two minutes. He remained in hospital until the following Thursday, that is, five days.

Cross-examined, he said he could not recall whether after the van had passed his room window the engine was shut off. Challenged that he had not seen the appellant that night, he responded:

> "Mr. E, you can't convince me say a know him. A him, you know, because me know him, you know. Yuh noh seen? Me know him, man."

He admitted that the appellant had many relatives but he did not know if all were his brothers or whether some were uncles, but he knew and was able to identify the appellant by his features though they all were of similar colour and the appellant had no marked difference.

Detective Corporal Newton Jones, stationed at Santa Cruz Police Station, who received report of the incident on the very night of the incident, investigated the report and had warrants issued for the arrest of the appellant but up to January 1987, when he left to the Maggoty Police Station, he had not located the appellant. It was not until December 5, 1989, that Detective Sergeant Neville Salmon found the appellant at Ackee Tree Lawn at Goshen that the appellant, who was found hiding,

was arrested on those warrants and being cautioned he said, "Me a keep wey me have fe say san."

A no-case submission having been disallowed, the appellant made an unsworn statement:

> "My name is Collie Simpson. I live in Manchester from 84, sir, and I do higglering at Coronation Market. I don't know nothing about this case sir. I leave from '84 from Cebert Forbes trying, M'Lord up a war on me, sir, I leave from the parish from '84, sir. Since 1989, sir, I come and live in the parish of St. Elizabeth where my father died leave a house for me, sir. Also work with Mr. Rhoden at Acked Tree Lawn Club. Also a cook shop. 5th December I sit down in my cook shop, sir, I saw Cebert Forbes drive up him pickup van, sir, and park it into Mr. Rhoden's business place, sir. I see him come to my cook shop, sir, with Mr. Detective Salmon and six more persons, sir. Chop off my cook shop door, sir. Mr. Cebert Forbes and Mr. Salmon and the other six persons beat me, sir, carry me to the station, sir. Nothing more."

Keith Williams, whom Cebert Forbes labelled as his enemy, testifying for the defence, said that at about midnight on October 19, 1964 (sic) he was at a Mr. Henry's bar in the company of Cebert Forbes and Dave Simpson and that they left there together travelling on Cebert Forbes' van. When they reached his gate at Goshen his step-son told them that he had heard an alarm at Cebert Forbes' home that Clevance had been shot. They proceeded to the home and met Clevance approaching the gate and he confirmed the report that he had been shot. Straightway he left with Cebert Forbes and others on the van to the Mandeville Hospital where Clevance was admitted and that it was after they had returned from Mandeville and Cebert Forbes had left him and the others at their gate that Forbes returned and told them that it was Collie and Jeggie who had shot Clevance. Thereafter, Forbes and others left to apprehend Jeggie. He said, further, that about one month before the trial, that is, July 30, 1990, Cebert Forbes threatened to shoot him if "he came to Court and tell any evidence on him" and he reported this threat at the

Santa Cruz Police Station.

In cross-examination, he said that prior to the threat there was no problem between himself and Cebert Forbes. They fraternised well, he said. He agreed that Cebert Forbes raised cattle but contended that that business was done on the same premises where Forbes lived. On the night of the shooting, he said, Cebert Forbes had come to Henry's bar at about 10:30 and seen him there and they had remained there up to about 12:30 a.m. He, too, had gone to Cebert Forbes' home, which he said was just five chains from his, after hearing about the shooting of Clevance. It emerged that Collie Simpson is his step-son. He said that prior to the day he was testifying in Court, he had last seen the appellant two weeks before the incident in October, 1986. On that occasion he had seen the appellant with a bag and he said "he was going to town where he was living with his girlfriend."

Responding to questions by the Court in an apparent endeavour to unravel the question of the relationship of several persons mentioned, he volunteered that his brother-in-law, one Delroy (the witness was in friendship with Delroy's sister, Miriam Wright) on the day following the incident, had taken a picture of Collie Simpson which had been left at the witness' home and given it to Cebert. No reason was advanced for this conduct nor did he testify that he witnessed this. In all fairness to the defence, this was not even suggested in cross-examination of Cebert Forbes and this disclosure of the photograph, coming as it did, seemed to be no more than the product of a fertile mind. Of the same ilk was his evidence that when he arrived at Cebert Forbes' home on the van he saw Clevance leaving the house towards the gate saying he had been shot.

Mr. Kitchin's submission on ground 1, contending that the no-case submission should have been upheld, was based on his contention that the evidence was discredited. A principal consideration in this regard was the conflict as to whether

Clevance had come from the kitchen door, as Cebert Forbes had said, or from his bedroom door as Clevance testified. But that issue is of no moment. Clevance explained that his bedroom door is next to the kitchen door and while he opened his bedroom door his step-mother had opened the kitchen door so much so that he had endeavoured to fetch a machete from the kitchen when he was struck down.

Undoubtedly, the level of intelligence of Cebert Forbes and his manner of expression posed difficulties which were recognized by the learned trial judge who seemed somewhat ungenerous to the witness in his assessment. Said he at page 97:

> "The circumstances under which the accused man is alleged to have been identified by Mr. Cebert Forbes, does bring into question the reliability of Mr. Cebert Forbes' recollection, because Mr. Forbes, the father, as far as I am concerned, is not of the level of intelligence of Clevance Forbes. Mr. Cebert Forbes was not accurate at times, and I found him to be a witness - perhaps a little hasty in his disposition. The Court is also mindful of the fact that there are various discrepancies and I have noted them as they arose and these discrepancies in the evidence of Mr. Cebert Forbes too, affect the area of the question of identification which is a material area, as far as Cebert Forbes is concerned. He said in the first instance in chief, that he used the light of the van and also the moonlight to identify the accused. He said also that he had parked the van at the side of the house. He had left on the light and that he was approached by the accused at the side of the house, and that at that time they grappled until they went to the back of the house. It would mean that if the van lights was not on when the accused man approached him, the van light would not have assisted him to see the accused in those circumstances. But I find that the evidence can be relied on because the cross-examination of the evidence does show that he was using the van light to assist him in the identification, but he was merely relying on the moon as such and as far as the light of the van **is** concerned I reject that aspect of it. So it means that I do not accept his evidence on that point."

So, then, the issue of identification by the aid of the van light was resolved in favour of the appellant. But to us it is apparent that the difficulty in this regard arose from the

difference between the written statement, which, as we have said earlier, clearly does not reflect the witness' language and his oral testimony. An understanding of his evidence makes it clear that he had not yet reached the spot where he usually parked his vehicle when he was obliged to stop in order to go and remove the stone placed in his path. And, as we have already remarked, it did seem somewhat unfair to the witness to allow him to be confronted by such written statement. But what does emerge from this consideration is that the learned trial judge did pay great attention to the area of concern expressed by the single judge viz. whether the prosecution witnesses should be believed, because in deciding to accept the evidence of the witness he discounted the evidence as he thought appropriate in the circumstances. The ground of appeal is completely lacking in merit and accordingly fails.

The gravamen of the complaint in ground 2 is that the trial judge laid great store by the fact that counsel did not put his case as fully as he ought to Clevance, that is, not putting to him what he had put to Cebert. The contention of the defence, as suggested to Cebert Forbes, was that he was not present when Clevance Forbes was shot but that line of defence was not pursued when Clevance Forbes was being cross-examined. The trial judge's comments which spawned this ground of appeal appear at pages 100-101 of the record as follows:

> "In respect of the alleged circumstances under which the accused is alleged to have been seen, Mr. Clevance Forbes said that he was able to see him for two minutes. It is true that the accused man was wrestling with Mr. Cebert Forbes at the time but Mr. Clevance Forbes said that the moon was quite bright, bright like day. I accept that and knowing him for ten years meant that he wouldn't hav been in the category of a fleeting gla witness, but merely one who sees Mr. Simpson in circumstances of wrestli with his father and able to see his face.
>
> Of course, Mr. Cebert Forbes, in that respect, is supported by Clevance because Clevance said he saw his father there, and whereas the defence is suggesting to

> "Mr. Cebert Forbes that he was not present, he merely came on afterwards and was told by Clevance that he had been shot, it means that Clevance evidence doesn't support that suggestion and clearly Clevance wasn't asked at all of the fact that he is the one who told Cebert that he Clevance had been shot. So it means that the defence is not maintaining what was suggested to Cebert Forbes when Clevance gave evidence as to what he saw that night.
>
> Mr. Cebert Forbes said that he saw the accused man. He held the accused closely for about five minutes. On that evidence it means that they were holding chest to chest, face to face. It is true that the Court doesn't accept the evidence in respect of the light of the van, but certainly, if in fact Cebert Forbes' allegation to have been holding Collie Simpson, which I accept, while they were held up together, and he demonstrated, almost embracing him to his chest, that is a particular circumstance, even stronger than merely looking at a person at arms' length, circumstances that would have afforded him more than an ample opportunity to have seen the person with whom he was wrestling and I find it as a most vital area of evidence, an opportunity for him to have seen quite easily the person who was standing in front of him, who he grappled with, who had the gun who subsequently fired a shot at him."

In our view, those are legitimate comments and cannot provide ground for complaint.

The final ground considered was ground 3, which complained that:

> "...the learned trial judge was so unfair and so unbalanced that it must have operated to the prejudice of the appellant."

Counsel was not able to present any submissions in support of this ground. Reference was made to the passage quoted (supra), which does not in any way support his contention.

We cannot deprecate, too strongly, the filing of grounds of appeal couched, as this ground is, for which there is no basis and which amounts to no more than qualified vituperation of the trial judge.

There being no merit in any of the grounds of appeal, we dismissed the appeal, affirmed the conviction and sentence which we ordered to commence on October 30, 1990.

Before parting with the case, we would call attention once more to the manner in which trial judges are required to deal with the question of visual identification as this Court summarised in its judgment in S.C.C.A. Nos. 151/88 and 71/89 **R. v. Alex Simpson** and **R. v. McKenzie Powell** (unreported) delivered 5/2/92 in which Downer, J.A., delivering the judgment of the Court, said at page 12:

> "Rowe, P. also 'made some general remarks on the law' which if followed by Supreme Court judges, will result in clearer decisions and fewer successful appeals. The essence of these 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."

Then, finally, after considering the decisions in **R. v. Cameron** S.C.C.A. 77/88 delivered on November 30, 1989, and **R. v. Carroll** S.C.C.A. 39/89 delivered June 20, 1990, he had this to say at page 13:

> "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 acted with the requisite caution in mind and that he 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."

We are sanguine that this area of the law which has proved so problematic will cease to be so if these requirements are heeded.