JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 39/99

COR. THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

REGINA vs DAVID THOMPSON

George Soutar for the Appellant

Mrs. Vinette Graham-Allen for the Crown

November 4, 5, 1999 ; February 23, and March 6, 2000

WALKER, J.A.

On March 2, 1999 in the High Court Division of the Gun Court presided over by Cooke J, the appellant was convicted on all of three counts of an indictment which charged him with illegal possession of a firearm (count 1) and assault (counts 2 and 3). Concurrent sentences of ten years imprisonment at hard labour on count 1 and three years imprisonment at hard labour on each of counts 2 and 3 were subsequently imposed. By leave of a single judge, the appellant now appeals against those convictions and sentences.

The case for the prosecution reveals that at about 6:00 a.m. on July 25, 1998, the complainant, Mr. Alwyn Daley, a security guard, visited a bar known as the Corner Stone Pub situated at Beeston Street in Kingston. He had gone

there to settle a debt which he owed to a lady named Sandra. He saw Sandra and had a brief conversation with her. Then Sandra went away from him saying that she would soon return. Within 2-5 minutes Sandra returned in the company of the appellant and three other men. Then and there Mr. Daley recognised the appellant as someone whom he had previously seen and knew by the alias name "Manna". He had been used to seeing "Manna" in Sandra's bar once or twice weekly over a period of three months prior to that day. The appellant was now armed with a firearm which he pointed at Mr. Daley causing the latter to become fearful for his life. Mr. Daley was struck in his head by one of other men, action which prompted the appellant to advise "Don't lick him yet until the father see him". Thereafter Mr. Daley was taken to premises nearby where he was placed in a "grill cage", the gate of which was secured with a padlock. Mr. Daley remained in that cage until about 3:00 p.m. that day at which time the same four men returned along with a fifth man. That fifth man, Mr. Daley later identified as Donald Phipps o/c "Zeeks" . For the record it must be stated that Donald Phipps was jointly charged and tried with the appellant but was dismissed by the learned trial judge on a no-case submission made by his Counsel at the close of the prosecution's case. But to return to the narrative of events, upon his arrival the man identified as Donald Phipps accused Mr. Daley of taking credit at Sandra's bar in his (Phipps') name. This accusation having been denied by Mr. Daley, Sandra was called. She came on the scene and confirmed the truth of the accusation. Then, said Mr. Daley " him

(referring to Donald Phipps) say him find me guilty and him sentence me to death". For all of this time the appellant and the other men were present, the appellant still armed with the firearm which he held in his hand. After being "sentenced to death" and while still imprisoned in the cage, Mr. Daley was set upon by the men around him and assaulted with stones and bottles which they threw at him. Using a knife and a pick-axe they also "cut me up" said Mr. Daley who recounted how "mi start scream and bawl" before hearing one of the men advise the others to desist from their assault and "wait until the night fi kill me and dash whey mi body". Eventually the men departed the scene leaving one man on guard over Mr. Daley. But, unwilling to surrender without a fight, Mr. Daley somehow managed to work himself free of his cage. Having done so, and amidst the shouts of his guard Mr. Daley ran for his life. He ran out of the premises and into a store on a nearby street. From this sanctuary Mr. Daley was later rescued by the police. On July 28, 1998, the appellant was apprehended by the police and on August 3, 1998 he was placed on an identification parade on which he was positively identified by Mr. Daley.

In his defence the appellant relied on a plea of alibi which at the end of the day was rejected by the learned trial judge.

On this appeal against conviction the sole ground for complaint questioned the validity of the identification parade on which the appellant was identified by Mr. Daley. It was argued that that parade was in point of law to be regarded as a nullity inasmuch as it was conducted in breach of the regulations

governing identification parades made under the Jamaica Constabulary Force Act and published in the Jamaica Gazette dated July 29, 1939 and amended by the Jamaica Constabulary Force (Amendment) Rules, 1977 . More specifically, the complaint centred around the fact that the appellant was the shortest man among the nine men on parade. It was contended that this had the effect of causing the appellant to stand out conspicuously in the line-up of men thus aiding the witness in the process of identification. The particular Rule to which our attention was drawn was Rule 553 which so far as is relevant reads as follows:

> "553 It is desirable therefore that:
>
> (i)...
> (ii)...
> (iii) The accused shall be placed among not less than eight persons who are as far as possible of the same age, height, general appearance and position in life."

It cannot be disputed that the appellant was, in fact, the shortest man on the parade standing, as he did, at a height of 5ft 7 inches. Closest to him were two other men each of whom stood at a height of 5ft 9 ½ inches . A similar situation arose for the consideration of this court in ***R v Bradley Graham and Randy Lewis*** [1986] 23 J.L.R 230. In that case an identification parade had been held in respect of the appellant, Lewis, on which four of the men in the line-up were two and one half inches taller, and one man considerably shorter, than Lewis. Only one man was of the same height as Lewis. Unlike the present case

there were other features of the parade in that case against which complaint was taken. It was held that, so constituted, the identification parade was not conducted in breach of Rule 553 (iii) (supra) and did not invalidate the parade or render the identification resulting therefrom a nullity. In delivering the judgment of the court Rowe, P. put the matter in proper perspective when he said (at p. 244):

> "We think that the Regulations are procedural only and any positive breach will have the effect of weakening the weight to be given to an identification made at such a parade".

It is clear, therefore, that these Rules are not mandatory but procedural only, and that a failure to comply with any of them would go to the weight to be attached to the evidence and not to the validity of the identification parade: (see also ***R v Michael McIntosh and Anthony Brown*** , (unreported), Supreme Court Criminal Appeals Nos. 229 and 241 of 1988, judgment delivered October 22, 1991).

In the context of the present case it cannot be gainsaid that the learned trial judge gave due consideration to the broad question of the identification of the appellant including the propriety of the identification parade which was held in respect of the appellant. Illustrative of the close attention which the judge gave to this aspect of the matter is the following excerpt from his summation which I quote below:

> "Now, the purpose of an identification parade is to test the witnesses' ability to point out the person who

they suspect and the central aspect of the testing is that the identification parade should be conducted clearly (sic); this means that the witness should not be assisted in any way in pointing out anybody. There should be no suspicion at all, nothing to influence the identifying witness to point out a particular person. Let us go now to the identifying parade. I have already given the height, 5' 7", two at 5' 9 ½; two at 5' 10", and two at 5' 11"

Now, the witness when cross-examined could not recall if the accused was the shortest man on the Parade.

Well, now, the guidelines, and I have used the words specifically because it is no more than guidelines in respect of identification parades so by that they must be of similar height and stage in life. It is clear that there is a difference in height so the question I have to ask is, whether or not the fact that there was this parity (sic) in height was a significant factor or a factor of any significance? I prefer to put it that way in respect of the pointing out of the accused and although the case against Mr. Phipps - any evidence that occurs in the whole case I am entitled to take into consideration and it is in that respect of the identification, a purported identification, it may be the man under No. 7. There is no such uncertainty but even with identification parades, an identification parade can be faultless and yet still there is no great weight put on identification parade. The reason for this is that the crucial - one of the crucial aspects of identification is the primary identification. So, if in the beginning at stage one, the identifying witness did not have an adequate opportunity, the fact that he comes later on and points on somebody on an I.D. Parade is neither here nor there but in this case there was familiarity of the accused to the identifying witness. He has been seeing him once or twice per week in Sandra's bar and there was adequacy of opportunity during the ordeal which Mr. Daley encountered that day and accordingly, perhaps it was unnecessary for any identification parade to be held

> any at all, but one was held. I suppose the police were being cautious and I hold that if unfairness there be, that unfairness was not of any significance in the proper identification of the accused man".

In the above quotation we take to be obvious typographical errors the printing of the word "clearly" for the word "fairly" and the words "this parity" for the word "disparity".

We are satisfied that the identification parade on which the appellant was identified was in no way invalidated by the obvious disparity in height between himself and the other men on parade. As the learned trial judge recognised, the purpose of an identification parade is to test the ability of the witness to recognise the suspect on parade, to which end every precaution should be taken to exclude any suspicion of unfairness, or risk of the witness knowing beforehand the identity of the suspect on parade. In the instant case that purpose was fulfilled.

Furthermore, it is to be observed that this was a recognition case as the learned trial judge found in accepting the prosecution's case of previous familiarity over a period of three months between the complainant and the appellant. Indeed, in the circumstances of this case it would seem that an identification parade was held primarily for the benefit of the police who had apprehended the appellant entirely on the basis of a physical description and an alias name and needed to be satisfied that they had got the right man.

For the above reasons we find no merit in the appeal against conviction.

There is also an appeal against sentence which we must consider. Here the complaint is that the sentences imposed by the learned trial judge are excessive in all the circumstances. This is so, Counsel for the appellant submitted, since at worst the evidence cast the appellant in the mould of a mere foot soldier, no more. However, in whatever capacity the appellant took part, he participated in a heinous crime. He was a willing, armed participant in a harrowing experience to which the complainant was subjected. It was an experience that might so easily have ended in the complainant's demise which, after all, was the expressed objective of his captors. On the evidence in the case, the complainant was "tried" and "convicted" and "sentenced to death". That sentence would, in all probability, have been carried out had the complainant not managed to escape from his cage of confinement. Against this background we are of opinion that the sentences imposed on this appellant represent condign punishment with which we ought not to interfere.

One final comment must now be made. Prior to embarking upon the hearing of this appeal we entertained an application to adduce fresh evidence in this matter. That initial application was grounded on four affidavits, all sworn to on October 25, 1999 and made by the appellant, himself, the appellant's counsel, Mr. Michael Clarke, Mr. Wayne Bromfield and Mr. Raymond Morris, respectively. The essence of the appellant's complaint as disclosed in those affidavits was that the appellant was coerced by his co-defendant to proceed to trial of the criminal charges on which they were

indicted and being jointly tried when at the time the appellant was not in a position to avail himself of the potential evidence of Broomfield and Morris which supported the appellant's defence of alibi. Having, ourselves, read those affidavits and after hearing the competing arguments of counsel we concluded that the evidence sought to be adduced did not meet the requirements of the fresh evidence rule, being at best evidence of which both the appellant and his counsel were aware and which was clearly available to the appellant at the time of his trial. Accordingly, we were unanimously of the view that this application should be refused.

PANTON, J.A.

I am unable to agree with the decision arrived at by my learned brothers.

The main issue in the case was identification, and it is readily acknowledged that the learned trial judge accurately stated the law as to identification. There are, however, some areas of fact that I am not satisfied that he properly addressed his mind to. I think that this deficiency is serious enough to cast a very thick cloud over the verdict of guilty, and for this Court to say that the convictions ought to be quashed on the ground that the identification was flawed.

The witness Alwyn Daley (the complainant and sole eye witness) said in examination- in-chief that he did not know the appellant before the incident by **any name.** However, in cross-examination, he said that he had heard **"them call him by some alias name."**

When the witness was asked if he had told the police of the alias name, he at first did not respond; **then, he replied that he never knew the name of the person. He went on to say however that he knew him by the alias "Manna."**

The witness said he gave to Det. Sgt. Masters (the investigating officer) the names, aliases and descriptions of the persons involved. He also said that in his statement he had described the person Manna, whom he knew before. Det. Sgt. Masters testified that he prepared a warrant for "Manna" based on the complainant's report. The warrant is still unexecuted as he does not know the person called Manna. **The complainant, he said, never told him anything that would assist in discerning who Manna was.** There was no indication to him that Manna was ever in police custody. As far as his investigations were concerned, Manna had not yet been apprehended.

It is noted that the witness Masters, in answering a question from the learned trial judge, said:

> "Thompson was apprehended based on the description given by Daley in his statement."

This, however, is clearly hearsay and inadmissible as the officer who did the apprehension never gave evidence at the trial, and so there was nothing from which there could have been a conclusion as to the basis for his action.

The cross-examination of the complainant by Mr. Churchill Neita, Q.C., reveals a mystery in that the witness answered positively to a reference to the man with the gun being called "Planner". This name is repeated without any query or demurrer being made by the witness, in a situation in which the appellant was supposed to be the man with the gun, and known as Manna.

It seems to me that the learned trial judge did not deal with these obvious contradictions in respect of the name of the man with the gun. Bearing in mind these conflicts, the reliability of the complainant's evidence required serious assessment. In my view the learned judge erred in law in accepting the witness' evidence as to recognition without having carefully assessed the contradictions as to the name, and as to the witness' communication with Masters, as well as Masters' evidence on whether or not Manna had been arrested.

There is a further matter which has convinced me that the convictions should be set aside. It is this. The learned trial judge, having convicted the appellant before he had properly and fully assessed all the evidence in the case, came to a late recognition of his error after the antecedents had been read. He then did something that may well have been unprecedented – he continued his summing-up after the antecedents had been read.

In doing so, he dismissed out of hand the relevance of the evidence as to name. At the beginning of his continuation of the summing-up, he said this:

> "Part of my summing-up which I said I would come back to, I am going to deal with it now..."

Well, a perusal of the earlier summing-up reveals that at no stage had the learned judge said that he would have come back to deal with anything. It appears therefore that his continuation of the summing-up was not a mere procedural lapse. It seems more a matter of a verdict of guilty being returned before there had been a full consideration of all the issues. That, to my mind, amounted to an error of law.

In the circumstances, I am of the view that the convictions should be quashed, the sentences set aside, and verdicts of acquittal entered.

WALKER, J.A.

In the result by a majority (Bingham and Walker JJ.A., Panton J.A., dissenting) this appeal is wholly dismissed and the convictions and sentences affirmed. The sentences are to commence on June 2, 1999.