JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 112/2006

BEFORE: THE HON. MR JUSTICE HARRISON, JA
THE HON. MR JUSTICE MORRISON, JA
THE HON. MR JUSTICE BROOKS, JA (Ag)

GEORGE THOMPSON v R

Norman Godfrey for the applicant

Miss Natalie Ebanks for the Crown

29 and 30 April 2010 and 20 January 2011

BROOKS, JA (Ag)

[1] On 7 July 2006, the appellant Mr George Thompson was sentenced to serve six years imprisonment at hard labour. This was after a jury, sitting in the Saint Elizabeth Circuit Court, had found him guilty of the offence of causing grievous bodily harm with intent.

[2] He was granted leave to appeal against the conviction and sentence. On 30 April 2010 we heard and allowed his appeal. We quashed the conviction, set aside the sentence and entered a judgment

and verdict of acquittal in their stead. At that time we promised to put in writing, our reasons for so doing. We now fulfil that promise.

[3] The prosecution's case was that at about 1:00 a.m. on 25 February 2001, Mr Donald Deer, a jerked chicken vendor, was plying his trade at Lazarus' Plaza, Santa Cruz in the parish of Saint Elizabeth. A car drove up to his stall and an order was made. He says that as he turned away to prepare the meal, he heard a car door being opened. He turned back toward the car and saw a hand coming toward him. He was doused with a liquid which proved to be corrosive. The learned trial judge quoted him as testifying that "from the time I hear the car door open, to when the liquid throw on me, was just a flash, it was a flash" (page 28 of the transcript). Yet, he said, he saw that it was the appellant who had "ducked" him with the liquid. The appellant then ran away. Mr Deer sustained serious injury resulting from the burns caused by the liquid.

[4] He testified that he had known the appellant before that day, but not by name. Some four years later, he attended at the lock-ups at the Santa Cruz Police Station. There, he pointed out the appellant to the police, as being the perpetrator of the offence.

[5] The appellant, for his part, gave an unsworn statement stating that he did not know Mr Deer, was not at the scene of the offence and did not carry out the alleged act. He also denied ever having worn dreadlocks,

as Mr Deer had testified. The latter assertion was, however, contradicted by a district constable, who testified that he knew the appellant to have worn that type of hairstyle in the past.

[6] There were a number of difficulties with the identification evidence. Firstly, Mr Deer did not know his attacker by name. He was supplied, by the police, with the nickname "Lizzard" as being the perpetrator's name. Secondly, the investigating officer, although he originally had a warrant of arrest prepared in respect of a person named "Lizzard", later changed the warrant to one with the appellant's full name. Thirdly, Mr Deer agreed that he had said to a news reporter, at some point between the incident and the arrest, that he did not know the person who had attacked him. Fourthly, and perhaps most importantly, having been informed that the appellant was in custody, the investigating officer caused Mr Deer to attend the police station and point out the appellant, while the latter was at the cell block of the police station.

[7] Mr Godfrey, on behalf of the appellant, argued five grounds of appeal. We based our decision mainly on the grounds concerning the absence of an identification parade, but for completeness will list all the grounds, which were:

> "1. The learned trial judge erred in law in failing to uphold the submission of No case to Answer made on behalf of the Appellant and direct an acquittal, notwithstanding the poor quality of the evidence

identifying the Appellant and the unfairness and impropriety of the purported identification by confrontation thus resulting in a substantial miscarriage of justice.

2. The verdict is unreasonable and cannot be supported by the evidence.

3. The Learned Trial Judge misdirected the jury by failing to direct them adequately or at all on the Appellant's Defence of Alibi.

4. The Learned Trial Judge misdirected the Jury by failing to direct them adequately or at all on the issue of identification and the need for an identification parade.

5. The Learned Trial Judge misdirected the jury by failing to direct them adequately or at all on the issue of a (sic) material inconsistencies:

   (a) Between the Statement given by the Complainant and his testimony before the court.

   (b) Between the evidence of the Complainant and that of Constable Mervin Harrison as to the identification of the Appellant at the Santa Cruz Police Station."

[8] On the issue of the failure to hold an identification parade, Mr Godfrey submitted that in addition to what was identification by way of a "fleeting glance", "the Complainant Donald Deer purported to identify the Appellant on a confrontation in circumstances where there was no refusal by the Appellant to participate in an identification parade". Learned counsel submitted that an identification parade should have been held. "As a result [of the failure]", he said, "the appellant was

deprived of an advantage which was available to him". Mr Godfrey relied on the authority of ***David Ebanks v The Queen*** PCA No. 4 of 2005 (delivered 16 February 2006).

[9] In ***David Ebanks*** the Privy Council emphasised "that the holding of an identification parade was desirable where the witness's (sic) claim to have known and recognised the suspect is disputed" (paragraph 17). In that case the witness was a female. Their Lordships stated that "[t]he function of the parade would accordingly have been, not the normal one of testing the accuracy of the witness's (sic) recollection of the person identified, but to test the honesty of her assertion that she knew the accused".

[10] Miss Ebanks for the Crown strenuously resisted the majority of the submissions made by Mr Godfrey but eventually, and in our view, properly so, conceded that an identification parade should have been held.

[11] We agree with Mr Godfrey in his submission that "since the evidence of identification was so slender, considering the fact that the witness described the opportunity to identify the appellant as occurring 'in a flash'", an identification parade was desirable and should have been held. It is also to be observed that there was a long lapse of time between the date of the attack and the date that the appellant was taken into custody. There was, in addition, no evidence of any

circumstance preventing an identification parade being held. In all those circumstances therefore, we are of the view that the appellant was deprived of, to use the words cited by their Lordships in ***David Ebanks,*** "the potential advantage of an inconclusive parade".

[12] In dealing with the issue of an identification parade, the learned trial judge indicated that counsel for the defence had submitted that one should have been held, but merely confirmed that one was not held. He then turned to the issue of the fairness of the pointing-out at the cell block and thereafter went on to outline conflicts between the evidence given by Mr Deer and that given by the investigating officer, as to how that pointing-out was effected. In our view, that direction would not have brought to the attention of the jury, the need for holding an identification parade and the danger posed by the failure to hold one.

[13] Mr Deer's identification of his assailant being the crucial issue in the instant case, it is our view that, not only was the failure to hold an identification parade fatal to this conviction, but that there would have been no useful purpose served by ordering a new trial.

Conclusion

[13] It is for those reasons that we ruled that the appeal should be allowed, the conviction quashed, the sentence set aside and a judgment and verdict of acquittal substituted therefor.