JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 46/75

BEFORE: The Hon. Mr. Justice Graham-Perkins, J.A.(Presiding).
The Hon. Mr. Justice Robinson, J.A.
The Hon. Mr. Justice Watkins, J.A.(ag.).

R. v. DENNIS PEART

Mr. R. Small with Mr. A.J. Nicholson for the applicant.

Miss R. Neale for the Crown.

April 28, ~~May 21~~ June 4, 1976

WATKINS, J.A.(Ag.):

On April 28, 1976 we allowed the appeal in this matter, treated the application for leave to appeal as the hearing of the appeal and quashed the convictions and set aside the sentences imposed by Chambers, J., on April 8, 1975 in the Home Circuit Court. We promised to put our reasons in writing and now do so.

The indictment against the applicant contained two counts. The first charged that he, together with other persons unknown, on January 16, 1974 in the parish of Kingston, being armed with guns, together robbed Reginald Ebanks of $260, whilst the second charged that he alone, on the same date, and in the same parish, shot at Norman Ricketts with intent to do him grievous bodily harm.
The evidence led by the prosecution was to the following effect.
On the morning of January 16, 1974 Reginald Ebanks, a salesman, was held up on Charlotte Street, East Kingston, at gun point by a boy who was immediately joined in the felony by some four to six men all armed with guns, among whom was the applicant who rifled the complainant's pockets. In the course of so doing, the applicant is said to have released his hold on a piece of rag which, held fast to the left collar of his shirt, was extended by his right hand across his face in the form of a mask. When the mask fell Ebanks, according to his testimony, recognised the applicant by a scar on his face as a person to whom he had, upon request on a former occasion, given twenty cents. Shortly after the robbery Ebanks reported his misfortune to Special Constable Norman Ricketts, and they both, accompanied by other

policemen in another vehicle, set out in search of the wanted men. At the intersection of Fleet Street and either Laws Street or Tower Street - there was some conflict as to this - a group of men, variously described as numbering four to eight, were seen gathered together in an open lot. They ran at the sight of the approaching policemen and, in the course of the ensuing chase, the applicant was seen to discharge two or three shots from a firearm in the direction of Special Constable Ricketts who returned the fire. The applicant who was hit in his back, fell into a nearby gully where he was apprehended. Ebanks testified that later at the Elletson Road Police Station he had said that he recognised the applicant as one of his assailants. Taken to the Kingston Public Hospital, the applicant was not long thereafter removed to the Rehabilitation Centre at Mona where he remained until April of 1974 when he was discharged. Detective Constable Campbell said that he arrested the applicant on January 16 and charged him in connection with the crimes committed that day.

The defence was an utter denial of either the aggravated robbery or the shooting. The applicant who gave evidence on oath denied all involvement in the robbery at Charlotte Street. He was never there. On the day charged in the indictment he was on his lawful business at the intersection of South Camp Road and Barry Street when three men passed him running. He heard an explosion and he fell to the ground. He had been shot. When taken to the Police Station Ebanks who was there was asked "if is me rob him" to which he replied "that is not the man". Neither at the Kingston Public Hospital nor at the Rehabilitation Centre was he ever placed under guard. Whilst at the Kingston Public Hospital a Police Inspector spoke with him. Some five months after his discharge from the Rehabilitation Centre the applicant heard that he was wanted at the Elletson Road Police Station and when he went there he was taken to the office of the Criminal Investigation Department where he was asked if he was going to sue the Police. He replied "no". Asked also who was his barrister he said he had none but in fact a certain named gentleman was later consulted in connection with litigation pursuant to the gun-shot injuries which he had received and he handed over to him a medical

certificate given to him at the Rehabilitation Centre.

Before us and by our leave counsel argued amended supplementary grounds of appeal which read:- (i) "that there was an hiatus in the prosecution's case in respect of the whereabouts of the accused between January 1974 and September 1974 which went directly to the issue of identification, wherefore ..... (a) in the absence of any explanation flowing from the evidence of the witnesses for the Crown, and (b) since the only evidence on the point was that provided by the accused himself, then the Crown had not satisfied the burden resting on them on this vital issue, (ii) that the learned trial judge misdirected the jury in that (a) he directed the jury that "accused's defence which he has not got to prove and which I have told you already is that they are making a mistake, he was not in Charlotte Street and he was an innocent person walking along the road when he was shot", (b) he withdrew from the jury's consideration evidence given by the applicant himself and by his witness to the effect that it was intended to institute an action against the Police to the knowledge of the Police themselves, and (iii) that he failed to adequately direct the jury on the various links of the defence and relate the evidence to these issues".

The principal issue in the case was of course that of identification. Was or was not the applicant one of the men who had held up and robbed Mr. Ebanks at Charlotte Street on the date charged? Ebanks, as already noticed, said that he was, and that he had recognised him as a person whom he had known before and one to whom he had extended the charity of twenty cents, when, upon the fall of the mask from his face, he saw a scar thereon. It had not been solicited, however, in examination, nor of course in cross-examination as well, how long before this incident Ebanks had come to know the applicant, nor whether he had had opportunity on any subsequent occasion, and if so, how recently, to renew this acquaintance. It was apparently not solicited during the course of the proceedings below, and certainly not put to the jury for consideration what the real conditions were under which Ebanks said that he was afforded his opportunity of recognising the applicant on the day of the assault, so that an informed judgment could have been brought to bear by the jury upon this subject of identification,

a matter rendered so highly controversial by the fact that the defence was that the applicant was not at all on Charlotte Street that day, that Ebanks had said that the applicant was not one of his assailants, and that the Police themselves, so far from being satisfied of the criminal involvement of the applicant in the incident of that day, had not arrested the applicant as alleged on January 16, but did so only in September 1974, and that, after they had heard or had entertained suspicions that the applicant had taken civil proceedings against them in respect of the serious gun-shot injuries which he had received at their hands.

It was brought to notice that the informations on which the applicant was first brought before the Resident Magistrate's Court in Kingston in respect of these charges were laid by Detective Constable Campbell just short of nine months after the date of the incident, namely on October 1, 1974. Equally significantly, neither during his two weeks stay in the Kingston Public Hospital nor during his longer hospitalisation of two to three months at the Mona Rehabilitation Centre was the applicant, according to his unchallenged testimony, as a person under arrest for grave criminal charges, placed under guard in order to secure his necessary attendance at the contemplated trial which was to follow. Further the fact of the applicant's arrest in September 1974, whether for the first or second time, after the Police had solicited information from him as to his intentions in respect of civil litigation against them, brought into sharp focus the question whether that arrest was made in the honest belief that the applicant was a party to the crime on the date charged or was actuated merely by the fear of civil litigation, considerations which could not be divorced from a determination of the central issue, namely the identification of the applicant. These matters called for a thorough, careful and explicit exposition to the jury of the niceties of the evidence in order to bring home to them for their informed consideration in conformity with their oath the vital issue of identification which fell for their determination. The relevant directions of the learned trial judge were in these terms:

> "In regard to the arresting of the accused on the 16th January as stated by the crown witness it was brought out that the accused was brought into the station at a later date and the accused said that he was at home having been discharged from hospital. That portion of his evidence goes to the reliability of the crown witnesses as to whether he is speaking the truth or not, but whether the man was arrested a second time does not seem to be of much importance or it does not seem that any book need to be brought, if you are satisfied that the arrest took place on the 16th of January 1974 and the accused does not have to prove that he was arrested at all or whether it was in September or otherwise. The Crown would not have to prove a later arrest because that arrest only goes to credibility as to whether the witness is being a credible witness or not. He said he went to hospital and he does not know whether he was discharged by the doctor or not. .....
> In regard to the suing matter, it hardly makes any difference to the case because you judge the case on the evidence which is not whether the accused has sued anybody for you might sue and win and you might sue and lose."

One observation on these directions which cannot on any account be avoided is that they regrettably failed to place the conflicting issues in proper perspective before the jury. If Ebanks had in fact informed the Police that he had identified the applicant as one of his assailants, then, as happens almost invariably in such cases, the arrest of the applicant would have followed automatically and, injured as he was, a guard would have been mounted over him whilst hospitalised and it would be expected that he would have been taken into Police custody upon discharge from the institution. There may have been good reasons, although none was forthcoming from the Police, why in this instance this well trodden path of established police practice was not followed. At least it was owed to the jury, and most certainly to the applicant, that they should have been invited to ponder this matter. On the other hand, the absence of the guard, the failure to take the applicant into custody immediately upon his discharge from the Mona Rehabilitation Centre, the apparent disinterestedness of the Police even to keep themselves informed of the likely date of his discharge, and the peculiar and rather suspicious conjunction of circum-

stances in which Police solicitations concerning the applicant's intentions in respect of civil suit against them were followed by the applicant's arrest, were matters which both severally and collectively bore directly upon the veracity of the contention of the defence that Ebanks had expressly denied that the applicant was one of his assailants. As was said in this Court in R. v. Valentine Francis CA No.63 of 1971 March 8, 1972 "such directions deprived the accused of the chance of a possible verdict of not guilty on the indictment". Accordingly we did not hesitate to make the order already adverted to, and in all the circumstances of the case we did not consider that the interests of justice could be served by an order for a new trial.