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IN THE COURT OF APPEAL

SUP. COURT CRIMINAL APPEAL NO. 118/73

BEFORE: The Hon. Mr. Justice Edun
The Hon. Mr. Justice Graham-Perkins
The Hon. Mr. Justice Hercules.

R. v. CECIL GIBSON

Hugh Small, Esq., for the appellant

R. Stewart, Esq., for the Crown.

20th June, 1975.

GRAHAM-PERKINS, J.A.:

The applicant and another man, Glenford Blair, were convicted by a jury in the Home Circuit Court before Wilkie, J., on two counts of an indictment each of which charged them jointly with robbery with aggravation at the Bank of Montreal on the Constant Spring Road in St. Andrew.

The case advanced by the prosecution against the applicant depended entirely on the evidence of two witnesses who identified him at an identification parade. The evidence of these witnesses - a Mr. Cawley, the manager of the Bank, and Mr. Ogilvie, a cashier - was to the following effect: Cawley said that shortly after noon on March 2, 1971 he was seated at his desk when he heard a voice say: "Don't anybody move." He then saw three men, one holding a gun and "covering" the other two. The man with the gun told the people in the bank to put their hands in the air. Cawley did so. The other two men came over the counter on to the staff side and relieved two cashiers of their monies. The three men then left the bank. The robbery lasted two minutes. Understandably, Cawley was quite frightened by this incident. Some eight days later, at an identification parade held at the Half Way Tree Police

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Station, he identified the applicant as the man with the gun he had seen in the bank. He was able, he said, to identify the applicant by his general appearance, and, more particularly, by his slender face, a pronounced Adam's apple and a receding forehead. He said, too, that the applicant wore a bowler hat and a scarf. It is, perhaps, significant that no explanation was forthcoming from Cawley as to his ability to identify the applicant by reference to his forehead and Adam's apple notwithstanding that he wore a hat and scarf. It appears that these considerations did not attract any comment from the learned trial judge.

Ogilvie said that he was attending to a lodgment when he heard a voice say: "Nobody move, this is a hold-up." He saw the rest of the staff holding up their hands and he, too, raised his hands. He saw a man with a gun and another man come over the counter. They emptied his cash pan of its contents and left the bank. Like Cawley, he said he was very scared. He attended the same identification as the one attended by Cawley and he identified the applicant as the man with the gun. He did not, however, assert that he was able to identify the applicant by reference to any particular feature.

It should be observed at this point that as between Cawley and Ogilvie there was a not unimportant conflict. Whereas Cawley swore that the applicant had remained on the public side of the counter duing the two minutes that the robbers were in the bank, Ogilvie said he was one of two men that came over the counter. It is, we think, also important to note that neither Cawley nor Ogilvie had seen the applicant prior to March 2, 1971.

In the foregoing factual situation it is by no means easy to exaggerate the critical importance of an identification conducted with the most scrupulous care. It is fundamental to the administration of our criminal justice that where the prosecution relies solely on the identification of an accused person

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at an identification parade nothing should be done, or left undone, to impinge on the absolute fairness of that parade. An accused is entitled to no less. This is the clear duty of those charged with the responsibility of conducting, or arranging for, identification parades. Of paramount importance, too, is the right of a jury in a criminal trial to have placed before them the fullest disclosure of every material fact that might conceivably affect their deliberations; more particularly, they are entitled to be informed of any impropriety, and the reason therefor, that may have occurred in or about the conduct of an identification parade. With these considerations in mind we proceed to an examination of the substantial complaint advanced by Mr. Small on behalf of the applicant. That complaint reads:

> "....the directions of the learned trial judge in respect of the parade....were inadequate in that he omitted to point out to the jury that it was improper by the rules governing such parades for an officer who was investigating the case to be present at the parade."

Sgt. Hibbert was the officer, or one of the officers, charged with the investigation into the robbery, the subject of the indictment. He had taken statements from the witnesses called at the trial. Sgt. Hanson was the officer in charge of the parade. It appears that Hibbert and Hanson worked together in organising the parade. Hibbert was not called as a witness at the trial. It is, however, clear from the evidence of Hanson that Hibbert it was who selected the eight men who, with the applicant, formed the parade. These eight men were all chosen from among men in custody at the Station. The applicant, as it turned out, was,at 5' 11", the tallest man on the parade, the other men ranging from 5' 8½" to 5' 10". It is equally clear that Hibbert remained on the parade throughout.

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Hanson agreed with a suggestion by the applicant's counsel that Hibbert's part in the parade was unwise; yet, as the officer in charge of the parade he does not appear to have offered the least objection when, as he well knew, Hibbert was selecting the men for the parade nor, it appears, did he object to Hibbert's presence on the parade as the several witnesses came and went. At this point we quote from the Jamaica Gazette Extraordinary, July 29, 1939, Rules and Regulations relative to the Jamaica Constabulary Force, paragraphs 552 and 553, at page 1155:

> "552. Identification Parades.-- In arranging for personal identification, every precaution shall be taken (a) to exclude any suspicion of unfairness or risk of erroneous identification through the witnesses' attention being directed to the suspected person in particular instead of indifferently to all the persons paraded, and (b) to make sure that the witnesses' ability to recognise the accused has been fairly and adequately tested.
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> 553. It is desirable therefore that:-
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> (i) Arrangements for an 'Identification Parade' shall not be made by the Member of the Force in charge of the case against the prisoner.
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> (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.
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> (vi) All unauthorised persons shall be strictly excluded from the place where the 'Identification Parade' is held."

The foregoing regulations must, we venture to think, be known by every senior police officer. There cannot be the least doubt that the parade with which we are here concerned was held in deliberate

breach of those regulations. How did the learned trial judge deal with this crucial area of the case? We quote the relevant part of his summing-up:-

> ".....you remember the evidence of Mr. Hanson was that Hibbert was also present on this parade. And you remember that Hibbert was one of the investigating officers in the case, and he (presumably the applicant's counsel) suggested that it is unwise, and Hanson agreed, to have someone on the parade who is a sort of interested party, because he was involved in the investigations of the case, because all kind of things might happen. And he said that Hibbert was on the parade. As a matter of fact, Hanson said Hibbert was the man who selected the other members who comprised the parade and the suggestion is put out that it would be easy for say a person like Hibbert who knew the heights of the other men, knew the height of the accused to tell the witnesses to look for the - and complying with that, the question of the photograph. I think I have dealt adequately with the question of the photograph before. But none of the witnesses said that they were assisted by Hibbert or anybody to identify Gibson. Not only that, Hanson said that Hibbert was on the parade; Hibbert in no way assisted any of these witnesses to identify Gibson. But it is a matter for you, Mr. Foreman and members of the jury. If you feel that the composition of the parade was unfair to the accused in the circumstances, if you feel that it never tested the recollection of the witnesses in a fair and reasonable sort of way then it is open to you to say what weight you place on the identification parade. And if you find that these witnesses were assisted in any way at all, whether by photographic evidence, by suggestion as to the height of the accused in relation to the height

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> of the other men, if this is your belief, if you feel this, or if you are in doubt about it then such doubt should be resolved in favour of the accused."

The foregoing passage attempts, ex facie, fairly to place before the jury the circumstances surrounding the parade, and Mr. Stewart urged us to say that there was nothing more that the trial judge could have done to alert the jury to the dangers posed by Hibbert's presence on the parade, his having selected the men to form the parade and Hanson's acquiescence in these improprieties. We are unable to share Mr. Stewart's view.

Let it be observed that nowhere in the passage above quoted or, indeed, in any part of the summing-up, is any reference made to the regulations governing the conduct of identification parades or to the duty of police officers in charge of such parades to ensure that those regulations are, as far as is possible, strictly observed. Nowhere in his summing-up did the learned trial judge warn the jury that Hibbert's presence on the parade and his selection of men to form the parade were clear breaches of the time-honoured regulations laid down for the holding of identification parades, and that no explanation had been advanced for those breaches.

It is true that the trial judge did tell the jury that "none of the witnesses said that they were assisted by Hibbert or anybody to identify Gibson", and that Hanson had said that "Hibbert in no way assisted any of these witnesses to identify Gibson." If it were indeed the fact that either Cawley or Ogilvie had been assisted by Hibbert or anyone else in the identification of the applicant it is, we think, quite unreal to assume that either Hanson, Cawley or Ogilvie would have volunteered any such admission. The direction last quoted does not, however, do justice to the circumstances of the case. It assumes no impropriety in or about the parade. It ignores the clear right of the jury to be told that Hibbert and Hanson had been guilty of positive breaches of

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the relevant regulations and that no explanation for those breaches had been offered. Indeed, the jury must have been left with the distinct impression that the conduct of Hanson and Hibbert was no more than "unwise" and that no impropriety had been shown since neither Cawley nor Ogilvie had said that he had been assisted by Hibbert or anyone else in his identification of the applicant.

Equally true it is that the jury were told that if they entertained any doubt whether Cawley or Ogilvie had been assisted in any way they were to resolve that doubt in favour of the applicant. When once, however, they were left in the dark, albeit unwittingly, as to the deliberate breaches by Hibbert and Hanson of the regulations and the reasons, if any, therefor, and bearing in mind that Hibbert did not give evidence, what basis could there be for doubt? If, on the other hand, the jury had been told as they ought, in our view, to have been told, that Hanson and Hibbert had been guilty of breaches of regulations designed to ensure the exclusion of any suspicion of unfairness or the risk of erroneous identification and that they had not had an opportunity to hear from Hibbert the reason for those breaches, we are quite unable to say what effect this knowledge would have had on their deliberations. There was, it will be recalled, an important conflict between Cawley and Ogilvie as to the part played by the applicant during the robbery; there was, too, the question of the receding forehead by means of which, inter alia, Cawley said he was able to identify the applicant notwithstanding the evidence as to a hat on the applicant's head. These and other considerations, which we need not detail, viewed on the background of the positive improprieties in and about the parade may well have led the jury to question the reason for those improprieties. Their answer may well have been in favour of the applicant. The point we make is that it is impossible for this Court to say that they would, inevitably, have come to the same conclusion if they had been directed on the lines we have indicated in a case where the only evidence against the applicant was that of Cawley and Ogilvie.

What has given us very anxious concern is whether we should order a new trial. Having given the matter our most careful consideration we have come to the conclusion that, in the interests of justice, there should be a new trial, since, in our view, on a proper direction a jury could justifiably return a verdict adverse to the applicant on the evidence adduced by the prosecution. We order that this new trial take place at the current session of the Home Circuit Court.

Before parting with this case we wish to say that we are of the view that in passing a sentence of imprisonment for 20 years at hard labour on each count the trial judge proceeded on a clearly wrong principle. Among other things he said:

> "I must confess that the purpose of sentencing in all criminal cases is that some consideration should be given to the individual. It is always painful for judges to look past an individual and look on the wider issues as regards the protection of the public, but I think we have reached that point in this country today."

Although it is not a little difficult not to sympathise with the thinking of Wilkie, J., we are constrained to say that it should never at any time be thought that a convicted person standing in a dock is no more than an abstraction. He is what he is because of his antecedents and justice can only be done to him if proper and due regard is had to him as an individual, and a real attempt is made to deal with him with reference to the particular circumstances of his case. To ignore these is to ignore an essential consideration in the purpose of punishment, namely, the rehabilitation of the offender.