JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 43 & 44 of 1970

BEFORE: The Hon. Mr. Justice Luckhoo, J.A., Presiding.
The Hon. Mr. Justice Fox, J.A.
The Hon. Mr. Justice Edun, J.A.

R. V. CHANCIE NUGENT
RAYMOND HUGHES

Mr. E. de Lisser for the appellant Chancie Nugent

Mrs. R. Walcott for the Crown.

28th November, 1973
6th February, 1974
22nd March, 1974

EDUN, J.A.:

This appeal was first heard by us on November, 28, 1973. We reserved decision. There were, however, certain features in the evidence which gave us concern and because we could not find agreement, on December 14, 1973 we granted leave to appeal. The appeals were again heard on February 6, 1974 and after further submissions from learned attorneys both for the appellants and the crown, we again reserved decision.

Three men, Carlton Robinson, Chancie Nugent and Raymond Hughes, were charged with robbing Douglas Ramsay on August 11, 1971. After two days' hearing they were on March 23, 1973 convicted as charged by a majority of six jurors to one. On March 30, 1973 Chancie Nugent and Raymond Hughes were each sentenced to three years imprisonment at hard labour. The appeal record does not

disclose what has happened to Carlton Robinson and so far as we are concerned there has been no appeal by him.

Douglas Ramsay gave evidence for the Crown. He said that on August 11, 1971 about 8.30 p.m.. he was walking on Church Street going in a Southerly direction on the left side of the road. On approaching the intersection of Church and Charles Streets, he saw some "fellows" on the right side of Church Street. He continued walking and as he approached Charles Street he felt someone hold him from behind and a voice said: "Hand over what you have." He was looking in the face of the person who held him. Then two other fellows came in front of him and he was able to see their faces; they were wearing tams and they took from his pocket $8.35 which was made up of 1 $5.00 , 1 $2.00 in notes and 1 $1.00/and the 35 cents in change. He never recovered his money. Ramsay said that after being robbed, he continued his way down Church Street until he reached King Street where he saw a police patrol car which he stopped and he made a report to the policemen therein.

He was taken in the car and as they were proceeding back into Church Street Ramsay saw some fellows at the corner of Beeston and Church Streets; he recognised the fellow who was wearing a tam. The car slowed down and in the group there were about six to eight men and some girls. The car stopped. Ramsay came out with the police and Ramsay said he saw the other two men. In the presence and hearing of the three men who were later charged for robbing him, he alleged they were the three men who had robbed him some

twenty minutes ago.

Corporal Fuller who was in the police car, gave evidence for the Crown. He said that after he received Ramsay's report he proceeded with him in the car to the corner of Beeston and Church Streets where there was the group of men and the girls. As the car stopped Ramsay pointed to Hughes and said that he was the one who had the knife at his throat. Hughes said "Ah nuh me." Ramsay pointed to two other men and said that they were two of the three men who held him up; each said: "Ah nuh me, Sir. Ah nuh me at all." Fuller frisked the men and he claimed he found a switch-blade knife in Hughes' pocket. The knife was not identified by Ramsay as being the one used in the robbery. Fuller found on one of the three men $6.00 made up of three $2.00 notes and on each of the other two, a $1.00 note. He took five men with him in the police car and later he arrested the three accused and charged them for robbing Douglas Ramsay. Along with the five men, money and knife, the police took a bicycle to the station. At the end of the prosecution's case, no-case submissions made on behalf of each appellant were overruled.

The appellant Nugent, in his defence, made an unsworn statement. He said that in the evening in question about 8.30 p.m., he left the Jamintel building where he worked and he was walking down Church Street. He passed the appellant Robinson below Charles Street and on reaching Beeston Street, a man out of the crowd stopped him. Just then a police car drove up, blocked the escape of the men, then a policeman pushed out his gun and said "Don't move." They were all backed up with their faces to the wall and a police-

man felt their pockets. Other men were also searched. Other police cars came up and they were all taken to the police station. They had taken $1.00 from him and $3.00 from Robinson and some moneys from Hughes. Out of the money found they took out $4.00 and at the station they wrote down $8.00. He denied committing any robbery.

Carlton Robinson in his defence said in an unsworn statement that on the night in question he was riding his bicycle along Beeston Street and as he reached Church Street, a schoolmate of his stopped him and they spoke. He saw Chancie Nugent coming down Church Street and one of them stopped him. They were talking when the police car came up and someone said: "the one in the tam." A policeman pointed a gun and said "Don't move." The police told Ramsay to come and look at the men. He was put against the wall and searched; they took from him $12.60. Robinson was then coming up when he too was stopped and searched. They were all taken to the station.

At the hearing of the appeal, no one appeared for Raymond Hughes. Learned attorney for Chancie Nugent made his submissions on two of his grounds of appeal:-

"1. The verdict is unreasonable having regard to the evidence.

2. The learned judge did not deal adequately with the question of identity."

It is not disputed that the question of identity was

the most important issue and learned attorney for the appellant dealt with the evidence in some detail and urged that there were many disturbing features which should cause this court to conclude that the verdicts were unreasonable.

Learned attorney for the Crown submitted that there was evidence to support the convictions and that learned attorney for the defence had to concede that the summing-up was adequate and fair. The jury had the opportunity of seeing and hearing the witnesses and the issues were purely on questions of fact.

We are of the view that the learned judge in the summing-up emphasised how important was the issue of identity; he was at pains to deal with all the circumstances in which the identification was made and of any weaknesses in it. We do not agree with the contention of learned counsel for the appellant that there was any iadequacy in the summing-up on the question of identity or for that matter on any other issue. However, we have been or are concerned or disturbed that a miscarriage might well have occurred in the convictions of the appellants. But we have to recognise that the provisions of our criminal appeal law were never meant to substitute a trial by three judges for a trial by jury. We do not forget that a transcript cannot reproduce the atmosphere of a trial. On the other hand, identification is an area in which the court has tended not to speak with consistent voice and the ambition of all concerned in the administration of justice is to avoid the commission of an injustice. In England, investigations

along those lines have resulted in an amendment of section 4(1) Criminal Appeal Act 1907 by a provision in the Criminal Appeal Act 1966 and a re-enactment of that provision in section 2 of the Criminal Appeal Act 1968. The Court of Appeal (Criminal Division) must now allow an appeal against conviction in a case where the verdict or the finding of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory.

In R. v. Sean Cooper (1969) 53 Cr. A.R. 82, in accordance with section 2 of the Criminal Appeal Act 1968, on an appeal on the ground that the verdict was unsafe and unsatisfactory, it was held that the Court of Appeal must now ask itself the subjective question whether it is content to allow the verdict to stand, or whether lurking doubts would cause it to wonder whether injustice has been done. The reaction may not be based strictly on evidence, but can be produced by the general feel of the case experienced by the Court.

We have not in Jamaica had the benefit of legislative assistance along those lines and our appeal courts in criminal jurisdiction are still governed by the text of section 13 of the Judicature (Appellate Jurisdiction) Law No. 15 of 1962 (which is the same as the original section 4(1) of the Criminal Appeal Act(U.K) 1907). Section 13(1) provides:-

> "The Court on any such appeal against conviction shall allow the appeal if they think that the

verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the Court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law, or that on any ground that there was a miscarriage of justice, and in any other case shall dismiss the appeal:

Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

Before the amendment of section 4(1) of the Criminal Appeal Act 1907, there have been many reported cases where judges did upset verdicts of the jury where they felt were "unsafe" and/or "unsatisfactory." Lord Parker had this to say in the House of Lords debate on the proposed 1966 amendment:-

"Then an opportunity is taken of elaborating or changing the grounds which entitle the court to set aside a conviction. I would join issue with the noble and learned Lord on the Woolsack on this point. It is not, in my view, an innovation.

> I am afraid that for years on many occasions I have used these words 'In all circumstances of the case, the Court has come to the conclusion that it is unsafe for the verdict to stand.' This is something which we have done and which we continue to do, although it may be that we have no authority to do it. To say that we have not done it, and we ought to have power to do it, is quite wrong. It is done every day, and this is giving legislative sanction to our action."

Here in Jamaica and in many of the decisions of English-speaking Courts in the West Indies by judges in whom we accord high respect, many appeals there are, where convictions have been quashed on the ground that they were "unsafe" and/or "unsatisfactory". But in those cases it may well be said that the conclusions have been based upon a consideration of the evidence and not upon the reaction produced by the general feel of the case as experienced by the Court. Here, in their earnest desire to avoid a miscarriage of justice, the judges in their experience have in effect determined as in England that the word "unreasonable" in the context of their powers under the criminal appeal laws carried the same meaning as the words "unsafe" and/or "unsatisfactory." If the new meaning of the words "unsafe" and/or "unsatisfactory" is the reaction which may not be based strictly on evidence but can be produced by the general feel of the case as experienced by the Court, legislative sanction must be accorded the judges here.

We will go on to state that having regard to the extended meaning of "unreasonable" to include the words "unsafe" and/or "unsatisfactory", in any amendment, Parliament must make it quite clear that in certain cases on questions of fact, three judges of a court of appeal can substitute their experience for a trial by jury. Until then, the criminal division of the court of appeal can yield to their reaction by the feel of the case only when an examination of the evidence justifies the quashing of a conviction. This court cannot re-try cases on paper. Though the words "unsafe" and/or "unsatisfactory" have been interpreted to mean the reaction produced by the general feel of the case in R v. Sean Cooper (supra) and though the criminal divisions of the court of appeal in the West Indies have without legislative sanction quashed convictions and in conclusion used the words "unsafe" and/or "unsatisfactory" it is too dangerous a precedent to allow an appeal against conviction merely by the general feel of the case as experienced by the courts. Such a precedent would in effect substitute a trial of three judges for a trial by jury and encourage frivolous appeals.

Having said so much, we are in duty bound to examine the evidence in the case before us and to arrive at our conclusions on a consideration thereof. In this case, the vital issue is identification and guilt depended upon visual identification by Ramsay alone. He did not know any of the appellants before and there was no identification parade held. Therefore, such circumstances

as, the length of time for Ramsay to see who was doing what, the position in which he was, the closeness or distance from the persons he seeks to identify, the quality of the light and what mistakes, if any, he has made concerning the identification, must be adequately and fairly dealt with by the judge in the summing up to the jury. As we have mentioned before, we find no inadequacy in the summing-up. Above all these points, the jury must be left in no doubt that before cinvicting they must be sure that the visual identification was correct; on this aspect the learned trial judge made no error in his direction as to the onus of proof.

Evidence of visual identification.

Ramsay maintained that someone held him from behind and he was looking in the face of the person who held him. Two other fellows came in front of him and he was able to see their faces and features. Those three men were those in the dock. If Ramsay's mere ipse dixit was sufficient, then there will be no need for a testing of his evidence by cross-examination and a consideration of all the other evidence in the case.

Under cross-examination Ramsay said that his interest was aroused when he saw a coloured tam on one of the men in the crowd; he was then in the back of the police car. He had, however, seen a lot of those tams around the place. At the corner of Beeston and Church Streets, Ramsay pointed out some men. The police took five of the group to the station; there too, Ramsay pointed out some men. The police released some of them. Ramsay said he did not tell the police that those released had anything to do with the robbery. Corporal Fuller gave evidence for the prosecution and on

this point he said that Ramsay gave him a description of the men and that five men held him up. If Ramsay had seen the faces and features of the three assailants, why did the police take five men to the police station? The men were already searched before being taken there, so it could not be said that another search would help in the police investigations.

The incident of the robbery was completed in ten minutes. Ramsay claimed that there was a street light there but in cross-examination, he explained that the street light was on the other side of the road and about one chain from the place where he was robbed. He admitted saying at the preliminary enquiry that the light was far away and he did not notice anything about the clothes of the robbers, except the tams. When he first saw the police, he did not give any description of the men. Also he admitted saying at the preliminary enquiry: "I did not notice anything particular about these fellows; one of them was wearing a tam." On the vital question as to whether or not Ramsay was able to see the faces and features of his assailants, his credibility was literally impeached when he admitted making those statements in the preliminary enquiry.

Ramsay said it was Raymond Hughes who had the knife at his throat. Corporal Fuller at the trial said that it was upon Hughes he found a knife yet he admitted saying at the preliminary enquiry that it was upon Robinson he found the knife. He explained however, that he might have made a mistake as he was not familiar with the names of the suspects. Fuller also claimed that he had

searched the men in the presence of the complainant and it was on the second search (apparently at the station) that he found money which included a $5.00 bill. However, the money produced in court as an exhibit did not include a $5.00 bill. The learned trial judge quite rightly emphasised to the jury that they must not allow any evidence concerning the finding of the money or knife to influence them on the identification of any of the accused with the robbery. Yet when all the other evidence including that of Corporal Fuller was taken into consideration, instead of the visual identification of Ramsay being confirmed or supported, it was literally destroyed.

In arriving at our conclusions we find much assistance from the reasons for decision in R. v. William Long (1973) 57 Cr. A.R. 871. In that case a similar problem arose whether, having regard to the evidence of visual identification, the verdict can be said to be unsafe and unsatisfactory. After considering the evidence, the Court of Appeal dismissed the appeal. Lawton J. in his judgment at page 879 said: "..... We cannot emphasise too strongly that this court cannot re-try cases on paper. The jury in this case had the benefit of seeing and assessing the demeanours of the witnesses, - an advantage we did not have. There was ample evidence of identification for them to consider; and the other evidence did nothing to evoke a "lurking doubt."

But we differ from the results arrived at, in that case on the ground that in this case -

1 the evidence which constituted the visual identification of the appellants was of no value whatsoever;

2 all the other evidence led on behalf of the Crown has wholly impeached or destroyed the value, if any, of the visual identification; and

3 the statements of each appellant in his defence, though not made on oath, in the circumstances of this case, may well be true, in that:-

(a) Raymond Hughes said he arrived at the corner of Beeston and Church Streets riding on his bicycle - a bicycle was taken to the police station;

(b) Ramsay was accusing the men not because he saw their faces and features but because one of them had on a tam; and

(c) the presence of all of them at the corner of Beeston and Church Streets was unconnected with the robbery.

In R. v. Cassels (1965) 8 W.I.R. p. 270, the Court of Appeal in Jamaica in allowing the appeal and quashing the conviction in that case, said per Lewis J.A., at p. 27 -

> "In the opinion of the Court the gravamen of the ground of appeal taken is not so much that the verdict was unreasonable - because undoubtedly there is evidence to support it - but that it was unsafe.

In cases of this nature the credit of the police officers is of the highest importance, and to support a conviction upon the credit of police witnesses which had been so gravely and successfully impeached on a matter which was so vital to the whole case is something that this court feels itself unable to do."

In this case the evidence of the complainant on a matter of visual identification which was so vital to the whole case has been gravely and successfully impeached. Our reaction is based strictly on a consideration of the evidence and not by the general feel of the case as this court experiences it. And so,we say, that the verdicts in this case were unsafe and unsatisfactory and for the reasons given, the appeals are allowed, the convictions quashed and sentences set aside.