JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 30 OF 1983

COR: THE HONOURABLE MR. JUSTICE CAREY, J.A.
THE HONOURABLE MR. JUSTICE WHITE, J.A.
THE HONOURABLE MR. JUSTICE ROSS, J.A.

ANTHONY BERNARD V. REGINAM

A. J. Nicholson and Delano Harrison for Applicant.

Mrs. M. McIntosh for Crown.

February 13, 14 & 22, 1985

CAREY, J.A.:

On the 14th February we refused this application for leave to appeal against a conviction of murder in the Home Circuit Court before Morgan, J., sitting with a jury on 11th March, 1983, and intimated that we would hand down our reasons for so doing today.

The applicant, according to the prosecution case, was one of three gunmen who on 6th December, 1981, near midnight invaded the house of Mr. and Mrs. Nelson Webster at Glendevon in the parish of St. James and shot to death the husband but succeeded only in wounding the wife. The prosecution case depended substantially on her evidence. She identified the applicant at an identification parade which was held on 20th January, 1982. The defence was an alibi. He swore that at the material time he was playing dominoes and had been so engaged from 7:00 p.m. He called a witness to support this defence.

The main thrust of learned counsel's arguments challenged the learned trial judge's treatment of the evidence relating to the crucial issue of identification. We were impressed by the commendable pragmatism in approach of counsel to his task. He urged that the learned trial judge failed to afford the jury adequate assistance and guidance on the issue of identification, so that they could properly deliberate on the matter.

> "observation was not impeded by anything because they had on nothing on their faces; they only had caps on their heads.
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> "She tells you that when she lay on the pillow she was looking straight at them. And she tells you that she went subsequently, on the 20th January, six weeks after, to an identification parade where she said a lot of men were in the room, and she went and she picked him out of those - from those persons as the person. That is the evidence of identification, the opportunity that she had to identify him and how she came to identify him.
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> "You saw the witness in the box, Mr. Foreman and members of the jury, was she frank with you? because that is important. Did she appear frank in the box? Did she impress you as a witness of the truth? Do you think she is making it up? Do you think she is mistaken? These are all questions that you have to consider, because you must feel sure that there has been no mistake in her identification."

It is possible to isolate a number of factors which the learned trial judge clearly set out for the jury's guidance, viz.:

(i) distance between assailant and the witness;

(ii) the lighting;

(iii) the head gear of the assailant, if any;

(iv) whether the witness knew the assailant prior to the incident;

(v) the length of time for observation;

(vi) could the witness be honestly mistaken?

On any reading of the extract we have quoted, it is plain that the learned trial judge related the evidence adduced at the trial to these factors which we have set out and which appear in the extract. To assert as learned counsel for the applicant did, that the directions did not fall within the guidelines (he actually said injunction) of R. v. Whylie 25 W.I.R. 430, must be put down to exuberance in a cause. This court speaking through Rowe, J.A. (Ag.) (as he then was), stated at pp. 432 - 433:

> "The judge should direct the jury that in order for them to determine the quality and cogency of the identification they should have full regard to all the circumstances surrounding the identification. These may include:
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> (a) the opportunity which the witness had of viewing the criminal;
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> (b) was the person known to him before the date of the commission of the crime and if so for what period and in what circumstances;

"(c) if the person was unknown to the witness what description, if any, did he give to the police;

(d) the physical conditions existing at the time of the viewing of the criminal as to place, light, distances, obstructions, etc.;

(e) any special peculiarities of the criminal or any special reason for remembering him;

(f) the lapse of time between the date of the crime and the time of identification;

(g) the conditions under which the identification was made;

(h) any special weaknesses in the identification evidence;

(i) any other evidence which can support the identification evidence.

It is of importance that the trial judge should not consider his duty fulfilled, merely by a faithful narration of the evidence on these matters. He should explain to the jury the significance of these matters, enlightening with his wisdom and experience what might otherwise be dark and impenetrable."

Learned counsel pointed also to the omission on the part of the trial judge to assist the jury by telling them that a yellow bulb would be likely to distort the features of the assailant and accordingly affect the quality of the identification. That there is an absence of such a statement in the summing-up cannot be denied, but we would not accept that the counsel of considerable experience who appeared would have failed to bring this home to the jury. But the colour of the bulb could not have the negative effect suggested by counsel when it is borne in mind that the period of observation was some 30 minutes and the distance for observation was no more than an arm's length away. We are therefore unable to agree that the learned trial judge was not alert to the responsibilities cast upon a trial judge where the evidence for the prosecution connecting an accused with the crime rests wholly or substantially on visual identification of an eye-witness. In our view, the learned trial judge gave the jury every assistance on this aspect of the case.

It was also urged that a contention of the defence at the trial was that the applicant had been exposed to the prospective witness, Mrs. Webster, prior to the holding of the parade. There was some suggestion as well that the composition of the parade was faulty, in that

there was one other person only of the same height of the applicant, but it was not pressed when the court reminded counsel that an attorney who was present at the parade, and the applicant as well, expressed no dissatisfaction on this score either before the witness was called on to identify the applicant, or at the end of the parade. The learned judge, it was said, in respect to her directions to the jury on the exposure of the applicant to the witness before the parade, had not properly dealt with the matter because the impression might have been conveyed to the jury that a lesser burden rested on the Crown in this respect and that some burden rested on the applicant.

The learned trial judge dealt with the evidence concerning this exposure in this way at p. 125. She told the jury as follows:

> "Now it was suggested to her that Detective Shand had taken her to the cell of the accused and that she stood up behind Detective Shand when Detective Shand was talking to him. Well, she denied that she said she doesn't know anything about that, and that is going to be entirely a matter for you, Mr. Foreman and Members of the Jury to decide, but that is what she says and you saw her and you heard her, so you must decide whether she is lying to you or not. She says she went there, the day before. She admits that she went to the station. Of course, Detective Shand is not with us to give us his account, so you just in everything as far as that area is concerned, you have to rely on her evidence alone."

Then at p. 131 she again mentioned this matter and said:

> "Mr. Foreman and Members of the Jury, it is correct that a suspect must not be exposed to persons who are coming to identify them, and you may well see it, because if you see the person before and you know them, when you go inside all you have to do is point out the person."

Again at pp. 136 & 137, when rehearsing the evidence of the applicant, the transcript records her as saying:

> "When he went on the parade, same lady who came with Shand is the same lady he saw on the parade; and the lady walk along the line and point at him and when she did he fell to the ground.
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> "Mr. Foreman and members of the jury, that is what he says. It is a matter for you whether or not you believe him. She has said it is not so. If you accept what he says then, of course, that would be a gross irregularity because it would mean that the witness had already seen the man before and, I mean, the holding of an identification parade would be of no avail. It would have lost its purpose. The whole purpose would be

> "defeated; absolutely no reliance could be placed on the identification parade and you would have to reject it.
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> "This is a matter for you which you will have to determine; it is just as easy for you to say it has happened as it is easy to say it doesn't happen, so you will have to determine everything to take into consideration."

Just before she left the case to the jury, the learned trial judge indicated the several factors about which the jury would have to be satisfied if they were to return a verdict adverse to this applicant:

> "If you are not satisfied, or you are in doubt as to the guilt of this accused man, or if you are in doubt as far as these matters are concerned, then you will have to acquit him, but what the Crown is saying, is that Mrs. Webster had ample time and ample opportunity to see him; she had ample opportunity to make him out, that she did make him out, that she did not see him in the cell, that she went on an identification parade that was properly held, that she identified him on that parade, and that this man was the person who fired that revolver on the night of the 6th December; on those matters if you are satisfied to the extent that you feel sure, then it is open to you to convict him."

We can find no merit in the arguments presented in this regard. The judge reminded the jury of the evidence led by the defence to suggest an exposure, and told them in explicit terms of the effect of an unfair identification parade, viz. - "you would have to reject it." Its effect on the case as a whole was also brought home to the jury. The jury had to be satisfied that the parade was properly held and if they were not satisfied or were in doubt about it, they would have to acquit. The final extract from the summing-up recited above, could, we feel, only convey to the jury the necessity to be satisfied about each and every one of the factors identified therein.

It was also contended that the defence was not adequately put to the jury. The defence was an alibi, and as we understood the argument, it was conceded that the directions as to the approach of the jury to considering such a defence was properly put to the jury. But what was being pressed was that when the trial judge was reviewing the evidence of Pansy Dunn, a witness called on behalf of the applicant, her comments were invariably adverse to the applicant. What had occurred was this: The learned trial judge having reviewed the evidence of Dunn and contrasted aspects of that witness' evidence with that of the applicant and indicated

some discrepancies between them, she observed -

> "On the face of all these discrepancies, what do you think?"

In our view, unless it could be demonstrated that these discrepancies were non-existent, then we can see no merit in these submissions. With the assistance of counsel, we examined the discrepancies to which the learned trial judge had alluded and found that they were discrepancies in truth. We note that the trial judge left it to the jury to consider the defence of alibi in the light of the disarray in the evidence of the applicant and his supporting witness. Nor do we think that it can fairly be said that the defence was being disparaged. In relation to this criticism that the learned trial judge had not put the defence adequately to the jury, it was argued that there was evidence showing that on the same night of the crime under enquiry, and in the same area, there had been other fatal shootings. Two persons supposedly involved in those incidents had been shot by the police and the bullets recovered from their victims, as well as from Mr. Webster, were traced to a gun recovered from one of those two. The clear and inevitable inference, it was said, was that the same person who shot those persons in other incidents on the same night must have been the person who shot Mr. Webster. Since the persons responsible for the shooting had themselves been killed, it supported the defence of alibi and destroyed the identification of the sole prosecution witness.

The evidence which was admitted regarding the commission of crimes by persons not before the court was plainly hearsay and had no weight. But no objection to its admission was made by counsel for the Crown at the hearing nor did the learned trial judge herself demur. It came about by way of cross-examination of a prosecution witness, Detective Corporal Bowen , and Detective Senior Superintendent Wray who was called for the defence. Howsoever that may be, the learned trial judge did remind the jury of the evidence and rival contentions of defence and prosecution. It is right to quote the relevant directions which appear at pp. 143 - 144 of the transcript and is in this wise:

"What he has said that is of moment to this Court is that from the Montego Bay police he received some firearms in respect of a matter involving Keith Harrison and Patrick Hamilton. He got a .38 calibre Special - a .38 calibre Colt Special revolver and he also got a M-16. He got also the bullet which was - the doctor says was taken out of the head of Mr. Webster. And what he says is that he examined this bullet and the opinion that he came to was that it came from the .38 Colt revolver which he received in respect of the case against one Keith Harrison and Patrick Hamilton. That revolver he received on the 21st of January, 1982.

"He was asked about the Summervilles who were shot on the 21st of November, 1981, and he says that that bullet also came from the same .38 Colt revolver. He was asked about the Russells who were shot - you will recall it's the same night, same night but later on later on of the same night that the Websters were shot - and he says that their bullet - put it very simply, in all three cases the bullets came from the same .38 Colt revolver.

"Now, I think the evidence is, from the officer, that there was a spate of robberies in the area in November. Defence counsel is asking you to infer that the fact that the bullet from the Websters came from a revolver which was taken from one of those men, Keith Harrison or Patrick Hamilton on the 21st January, 1982, you are to infer, because of that, that it was these men who killed Mr. Webster.

"He said so too because on the same night that Mr. Russell was killed, is the same night that Mr. Webster was killed, but what the Crown says is that there were three men who came to Mr. Webster's house and a gun is something, Mr. Foreman and Members of the Jury, that can pass from hand to hand very easily. So he is asked what the Crown says that there is an inference you can draw that Mrs. Webster said that it was this man and another man, and that this man, whoever the gun might have belonged to, but this man was in possession of the point three eight - that point three eight on that night, and that it was he who fired the fatal shot at Mr. Webster. To put it very tersely, that this man was in the company of the other two men on that night that one was outside looking out in case of anything to warn them, and two were inside and that of the two inside this accused man was one of them with the point three eight revolver. That is a matter for you."

Although we ourselves are doubtful whether that evidence should have been left to the jury, it was hardly prejudicial to the defence, and we are quite unable to see in what respect those directions can be stigmatized as inadequate or unfair or lacking in objectivity.

Finally, there was some argument that the learned trial judge had not given proper direction on the burden of proof on the prosecution because in one instance she had neglected to say "satisfied that you feel sure." But learned counsel helpfully directed our attention to the four occasions

to which a reference was made to the burden of proof and of these four occasions when this was done, we did observe one instance where there was that omission. In our judgment when the summing-up is viewed in its totality, there could not be the least doubt in the minds of the jury but that the burden on the prosecution was to satisfy them so they felt sure of the guilt of the accused.

We feel it is right to point out that every point on which some argument could be fashioned was strongly pressed upon us by counsel. But having given the matter our best consideration, we were not persuaded that the summing-up of the learned trial judge was significantly deficient nor that the verdict of the jury should be disturbed. There was evidence from the sole eye-witness which, if accepted, showed that the witness had ample opportunity to observe, and so to be able to recognize, her assailant later at the identification parade.

For these reasons we refused the application for leave to appeal.

She should have directed the jury and given her assistance with respect to the opportunity afforded the sole eye-witness to view the assailant at the material time, the propriety of the identification parade and she ought to have analysed the evidence, and steered the jury along the proper lines.

We now examine the summing-up to see whether these strictures are at all warranted. The learned trial judge began by sounding a cautionary note in respect to the jury's examination of the evidence of identification. She said this at page 120:

> "I must warn you that as counsel for the crown and counsel for the defence has told you you must exercise caution when you are relying on the correctness of any identification because a witness can be mistaken and still be a very convincing witness, so you have to examine and you must examine very closely the circumstances under which the identification came to be made by the witness."

Learned counsel considered this warning as impeccable. We do not dissent from that view. The learned trial judge went on to enumerate the factors which the jury should consider on the issue and we quote from pages 121 - 122 of the transcript:

> "Now there are many areas of identification, of opportunities for identification that we have. You look at the distance that she is from her assailant, you look at the lighting under which she saw the assailant, you look at whether her observation has been impeded by anything, by masks, anything like that. You take into account also whether or not she had seen him; whether or not it was a person whom she had known before - in this case it is a person she had not known before, and she had not seen him before.
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> "Now, let us look at the identification that she gives us. First of all she says she saw the three men with three guns on the verandah, and she tells you that there is a bulb, a white bulb on the verandah and that bulb was on. She says that the men were within arm's length of her. She says that lights were on in the bedroom when this accused man and the other man came in; and she tells you that they were in the bedroom about twenty minutes, in the first instance, and ten minutes in the second instance. How good a judge she is of time is a matter for you.
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> "She tells you that when she was put to lie down on her belly she turned her - she put her jaw on the pillow so that she could see what was happening because she was lying behind her husband. Her husband was to the front of the bed and she was behind.
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> "She tells you when they had this conversation about how many persons are living in the building that this accused man was near enough that she could touch him. She said he was right beside her and she could see the whole of his body. She tells you that her