JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 26/95

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.

DWIGHT FENDER v. REGINA

Ravil Golding for the appellant

Carrington Mahoney for the Crown

October 23 and November 20, 1995

PATTERSON, J.A.:

On the 7th February, 1995, the applicant Dwight Fender was convicted in the Home Circuit Court on an indictment which charged him jointly with one Marcus Jackson with the capital murder of Greg Williams in the course or furtherance of a robbery. At the time of the offence, the applicant had not attained the age of eighteen years, and he was therefore sentenced to be detained during Her Majesty's pleasure.

At the close of the case for the prosecution, counsel for the Crown admitted quite frankly that a case had not been made out against the accused Marcus Jackson. Counsel for the applicant then made submissions to the judge to the effect that there was no case for the applicant to answer. The judge ruled that there was a case of capital murder for the applicant to answer, and continued:

> "There is no case for the accused Jackson to answer. Now, Mr. Foreman and members of the jury, we have got to the stage where the Prosecution has closed its case. The Crown Counsel has conceded that the Prosecution has failed to make out a case against the accused Jackson. In relation to the accused Fender, Counsel for the Defence has submitted that the Prosecution has also failed to make out a case against Fender. I don't agree with that submission in relation to Fender, and my ruling is

> that Fender has a " case to answer. But I agree that the Prosecution has failed to make out a case against Jackson. So I am going to direct you at this stage to return a verdict of not guilty in respect of the accused Jackson. After you do that, then the case will continue against the accused Fender, and at the end of the day, it will be for you to say whether the accused Fender is guilty or not guilty of this charge of murder."

The submission of no case to answer in respect of the applicant and the ruling, which is quoted above, took place in the presence of the jury. There was no objection to the procedure as it was then the accepted practice, but before us Mr. Golding submitted that the trial judge " erred in law when he allowed a submission that the accused should be discharged at the end of the prosecution's case to be made in the presence of the jury." This submission, no doubt, was prompted by the ruling of their Lordship's Board in the recent case of ***Rupert Crosdale v. The Queen*** (unreported) Privy Council Appeal No. 13 of 1994 delivered 6th April, 1995. It was readily conceded by counsel for the Crown that an irregularity had occurred, but counsel for the applicant did not make an issue of it as he expressed the view that the applicant was in no way prejudiced by the procedure adopted. We are in complete agreement with counsel. Although the judge should have invited the jury to withdraw during the submission of no case and his ruling thereon, his failure to do so is not fatal to the case. He remained silent during the submission, and in the circumstances of this case, we are of the view that there was no risk of prejudice resulting from the irregularity.

The second and third grounds of appeal questioned the ruling of the trial judge that there was a case for the applicant to answer, and both grounds were argued together. Mr. Golding advanced two distinct reasons why the case should not have been left to the jury. Firstly, he contended that the evidence of the sole eyewitness for the prosecution was so discredited and was so manifestly unreliable, and, secondly, that the quality of the visual identification evidence was so poor, that on both limbs, it was the duty of the trial judge to stop the case upon the no-case submission.

The crucial witness called by the prosecution was Gregory Williams, the twin brother of the deceased. He related the circumstances in which his brother died. At about 8:00 p.m. on the 30th September, 1993, both brothers were riding bicycles in a southerly direction along Orange Street in Kingston. The witness was proceeding on his left hand side of the road ahead of his brother, who was riding nearer to the middle of the road. On reaching the junction of Drummond Street and Orange Street, the witness said he saw a group of boys, about five in number, standing on the sidewalk by a betting shop on the right hand side of the road. He recognised the applicant, whom he knew before for " about three to five years" , and two of the others. He was riding slowly, and on reaching by a bus stop further on, he looked back and saw his brother going to the right hand side of the road to where the group of boys were. The witness said he was just about bringing his bicycle to a stop when he heard his brother shouting him by his pet name, " Ally, Ally, hospital, hospital, hospital." He jumped from his bicycle and ran towards his brother who was also running towards him with blood spurting from his neck. His brother's bicycle was lying in the middle of the road about ten feet from the witness, and he saw the applicant, who had a knife in his hand, taking it up. His brother was then just about a foot from his bicycle. That was the last time he saw the applicant and his brother's bicycle. He concentrated his attention to stopping the bleeding from his brother's neck while they both ran to the nearby Kingston Public Hospital. There his brother collapsed and died.

The witness in his examination-in-chief said that he was able to see and recognise the applicant and two others by means of a street light which was about two feet away from where they stood on the sidewalk. (On pointing out the distance, it was estimated to be " five to six feet"). As he rode by the applicant, he saw " his face and his body" , and he looked at him while slowly riding a distance of twelve feet (estimated). The witness said he saw the applicant's face again when he was taking up the bicycle, albeit sideways. On each occasion, he said he saw the applicant for " just a couple of seconds." He

noticed that the left eye of the applicant " was damaged" , but that was not the first time he was noticing that about the applicant.

The witness was subjected to a most searching cross-examination, which ferreted a number of inconsistencies, discrepancies and contradictions in his testimony. He said the group of boys were standing on the sidewalk on Orange Street and the light which was on Orange Street shone on Orange Street as well as on Drummond Street but mostly on Orange Street. His deposition on this point, taken at the preliminary enquiry, was put to him and he admitted that he said then that he " saw couple of guys standing on Drummond Street" , and that the streetlight " did not shine on Drummond Street, it shine mostly on Orange Street." Again, he said he did not know if his brother was talking to the boys or they to him, when his brother went over to where they were. He admitted that at the preliminary enquiry he said then, " I saw him ride and stop right in front of the boys; they were talking to him; it looked like about two of them talking to him." He explained this inconsistency by saying that what he said at the preliminary enquiry was true, but he did not remember but " it look like them did a talk to him" , although he did not hear what they were saying. He said he could not say how long a time had elapsed between the time he first saw the group of boys on the sidewalk, and when he heard his brother calling to him, but on refreshing his memory from his deposition, he agreed that it was " less than a minute." He further admitted that at the preliminary examination he said, " I saw 'Goatie' and Riley but I could not make out the others' faces" , while at the trial he said he recognised " Goatie" and two others. (The applicant is called " Goatie"). His explanation of this discrepancy is quite revealing: " Your honour, I was mixing them up." He further said he did not recognise all the persons in the group. He knew a man named Riley, but he denied saying that Riley had a knife in his hand that night. Again, his deposition was put to him and he admitted saying he saw " Goatie" and Riley with knives and that Riley had a knife in his hand. He admitted that he was frightened and shocked when he saw his brother bleeding, but he said that he was not mistaken that it was the applicant with knife in hand

who was taking up his brother's bicycle; they were then about twenty feet (estimated) apart. He was towing someone on the cross-bar of his bicycle and riding in the wrong direction along a one-way street, while one or two vehicles with lights came up in the opposite direction, and it was in those circumstances that he first saw and recognised the applicant " for a couple of seconds". His evidence that he knew the applicant for " about three to five years" did not go unchallenged. He was cross-examined in this fashion:

> " **Q:** Now tell me, you and Goatie didn't go to school together?
>
> **A:** No, sir.
>
> **Q:** You and Goatie not friend.
>
> **A:** No, sir.
>
> **Q:** You never talk to Goatie?
>
> **A:** No, sir.
>
> **Q:** You don't know where Goatie lives?
>
> **A:** No, sir.
>
> **Q:** You don't know that? So when was the last time that you had seen Goatie before the incident?
>
> **A:** I don't really member (sic) you know.
>
> **Q:** You don't really 'member'? You don't remember? All right, Mr. Williams...
>
> **A:** Yes, sir.
>
> **Q:** ...When was the first time you saw Goatie with a bad eye, with a deformed eye?
>
> **A:** I don't quite remember.
>
> **Q:** You don't remember? So tell me, it is about a year or two years you may have seen him. You say you know he had a deformed eye, was it two years?
>
> **A:** I don't remember.
>
> **Q:** You don't see him often?
>
> **A:** No, sir."

He finally admitted that he did not see who it was that stabbed his brother.

The real issue that emerged at the close of the prosecution's case was whether the applicant had been correctly identified by the sole witness as the man who committed the murder. There was no evidence whatsoever to corroborate the evidence of the sole eyewitness. Two men were arrested by the police on warrants, the applicant and Marcus Jackson, but the witness did not mention Jackson's name at the trial, and, as we have seen, he was acquitted on a no-case submission. The question that arises for a decision is whether the trial judge should have exercised his power to stop the case against the applicant also at the close of the prosecution case. It does not appear that the credibility of the witness was in issue; then it would be the function of the jury and not of the trial judge to assess the value of the evidence. It is the quality of the identification evidence that is relevant at this stage.

In ***R. v. Turnbull*** [1976] 3 All E.R. 549, Lord Widgery, C.J. stated the principles by which a trial judge should be guided when faced with a case in which the crucial issue is identification. At page 553 the relevant passage reads:

> " When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."

The principle laid down in ***Turnbull*** (supra) is a part of our law, and this was emphasized by their Lordships' Board in ***Junior Reid v. R.*** [1989] 3 W.I.R. 771 P.C. Identification evidence has emerged as a special class of evidence which requires special treatment and warnings, and their Lordships concluded without hesitation " that a significant failure to follow the guidelines laid down in ***Turnbull*** will cause the conviction to be quashed because it will have resulted in a substantial miscarriage of justice."

In the instant case, there were palpable weaknesses in the identification evidence. The witness did not say how far away the applicant was on the first view. They were on opposite sides of the road, and nothing was happening then

to attract the witness' attention to the applicant. His evidence of seeing the applicant for " a couple seconds" could be taken literally, since he said that he travelled an estimated twelve feet while looking at the " face and body" of the applicant. That would mean that he was travelling at approximately 4 m.p.h. which fits in with his evidence that he was riding slowly. There is evidence of on-coming vehicles that certainly would call for his attention. The next view he said was when the applicant was an estimated eighteen to twenty feet away, bending over to take up his brother's bicycle, and then he only saw " the right side of his face." This view must be looked at in the light of what was happening then. The witness said he heard his brother bawl out and he continued:

> " ...when him bawl out, him call out my name, right? Him did a run come towards me and me jump off my bicycle and run towards him."

He said he saw blood spurting from his brother's neck - he was frightened and shocked. It seems quite clear that a view in those circumstances for " a couple of seconds" could only have been made in very difficult conditions. The situation must have been quite terrifying.

Given the numerous contradictions and inconsistencies in the evidence of the witness, his admissions which clearly show that he was not well acquainted with the applicant, the difficult conditions in which the alleged views were made, it is crystal clear that the quality of the identification evidence was extremely poor. There was no other evidence to support the correctness of the identification. It was in those circumstances and on that evidence that defence counsel made the submission to the learned trial judge that the case should be withdrawn from the jury. Counsel for the Crown was not heard in response; the submission was rejected and the defence called upon.

Before us, Mr. Golding reviewed the identification evidence in particular, and the prosecution case generally, and submitted that the case ought not to have been left to the jury. He relied on ***Turnbull*** (supra) and on ***R. v. Galbraith*** [1981] 2 All E.R. 1060. He submitted that the prosecution case was tenuous

and that the trial judge should have concluded that " the crown's evidence, taken at its highest, is such that the jury, properly directed, could not properly convict on it", and in those circumstances, it was his duty to stop the case.

There is merit in the submission on both limbs of Mr. Golding's arguments, and the application for leave to appeal must be granted. The quality of the identification evidence is extremely poor and so unreliable that the case ought not to have been left to the jury by the learned trial judge. Further, when the prosecution case is viewed as a whole, it is plain that a conviction based on such evidence would result in a miscarriage of justice.

The reasons stated above and the conclusions arrived at are sufficient to dispose of this application, but Mr. Golding put forward a fourth ground which is worthy of mention. It is this:

> " 4. That the learned trial Judge should not have left the charge of Capital Murder to the Jury as there was absolutely no evidence to support this charge and that in so doing he left the Jury to speculate."

He argued that there was no evidence to support the charge since the sole witness could not say who it was that stabbed the deceased.

As we have seen, the indictment charged capital murder committed in the course or furtherance of robbery. The Crown alleged that the appellant was seen taking up the deceased's bicycle with a knife in hand while the deceased was about one foot off, running away from his bicycle with blood spurting from his neck. The bicycle was never found. The post mortem examination revealed that death was caused by an incised stab wound at the base of the left side of the neck which travelled downwards into the left chest cavity where it penetrated the ascending aorta. The pathologist who performed the examination opined that the wound was inflicted with a sharp instrument such as a knife. It seems plain that the irresistible inference must be that it was the appellant who inflicted the injury and stole the bicycle. Murder committed in those circumstances is capital murder [see section 2(1)(d) of the Offences against the Person Act (as amended)]. There is no merit in this ground.

From what has been said before, we are of the view that there would be a miscarriage of justice if the conviction was allowed to stand. In the event, the application for leave to appeal against conviction is granted. We will treat the hearing of the application as the hearing of the appeal. We therefore allow the appeal against conviction and quash the conviction and sentence. We enter a judgment and verdict of acquittal.

Cases referred to

① Richard Crosdale v. The Queen (Trinidad & Tobago) Privy Council Appeal No. 13 of 1994 — delivered 6th April 1995

② R v Turnbull [1976] 3 All E.R. 549

③ Junor Reid v R [1984] 31 W.I.R. 77 (P.C.)

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