Privy Council Appeal No. 19 of 1995

Cedric Gordon *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.
Delivered the 24th June 1996

Present at the hearing:-

Lord Keith of Kinkel
Lord Griffiths
Lord Jauncey of Tullichettle
Lord Steyn
Lord Cooke of Thorndon

*[Delivered by **Lord Keith of Kinkel**]*

The appellant, by special leave as a poor person, appeals against a decision of the Court of Appeal of Jamaica (Carey, Wright and Morgan JJ.A.) dated 15th November 1990, whereby the court dismissed his appeal against conviction for murder in the Home Circuit Court, Kingston (Ellis J. and a jury) on 4th July 1989.

The circumstances of the murder were described in evidence by the witness Junior Brown, who was aged 17 years at the time. He had been living for some time at the house of the victim, Lenford Cameron, at Red Hills in St. Andrew. At about 7.00 p.m. on 21st March 1983 he was in the house playing computer games on the television set with Cameron and another youth called Ainsley Williams. Four men came into the room, all but one masked. That one he identified as the appellant, whom he knew as "Ricky", having seen him on two previous occasions and heard him speak on those occasions. The appellant carried a gun and the others knives or icepicks. The appellant said "this is a hold-up" and demanded money and Cameron's car keys. The appellant then complained that Cameron would tell the police

about him and stabbed Cameron in the stomach. Cameron was then taken away. Junior Brown and Williams were tied up, blindfolded and gagged and then stabbed. Junior Brown managed to free himself and raised the alarm. Cameron was found to be dead. His body bore six stab wounds.

Detective Sergeant Robinson gave evidence that in March 1983 he was assigned to assist in the investigation into the murder of Lenford Cameron. He received from another police officer warrants for the arrest of the appellant "Cedrick Gordon otherwise called Rickey". He knew the appellant well and went in search of him, but failed to find him. Over two years later, on 14th April 1985, he went as a result of information received to Kingston Public Hospital, where he found the appellant lying in bed suffering from burns. He was accompanied by Assistant Superintendent Brown, who cautioned the appellant and said that he had information indicating that the appellant was involved in the murder of Lenford Cameron. The appellant replied "when I tell you how it go you tell me if you would not do the same thing". Brown then told the appellant that he intended to make a written record of what he had to say. The appellant said "anything sir, a the truth me a tell", and proceeded to dictate a statement to Brown, who recorded it. The appellant signed the statement and Sergeant Robinson witnessed it. Later that day Sergeant Robinson returned to the hospital with the warrant for the appellant's arrest. He read the warrant to the appellant, arrested him and charged him with the murder of Lenford Cameron, and cautioned him. The appellant said "long run short catch, a Cameron caused it".

The appellant made an unsworn statement from the dock. He said that in 1981 he stayed for a time in the home of Lenford Cameron, for whom he once did business. Cameron made sexual advances to him which he rejected. He threatened to expose Cameron and did so. He left Cameron's house and went to live elsewhere. In March 1983 he heard that Cameron was dead and that he, the appellant, was implicated. So he laid low for two months and afterwards started to go about his normal business. Sergeant Robinson did not know him and he had never seen him till he came to the hospital in April 1985. He denied making the two statements attributed to him by Sergeant Robinson. On the evening of 21st March 1983 he was in his home in Kingston and never left it. He had never seen Junior Brown, but when Cameron made his unwanted advances he showed the appellant photographs of a number of youngsters whom he said were his friends, including that of Junior Brown. He suggested that it was because of a relationship between Cameron and Junior Brown that the latter had given evidence of seeing the appellant at Cameron's house on 21st March 1983.

The principal argument for the appellant before the Board centred round the statement dictated by the appellant on 14th April 1985 at the Kingston Hospital which was recorded by Assistant Superintendent Brown. This statement was not tendered in evidence by the prosecution at the trial. It was maintained that this statement must have been exculpatory and that it was incumbent on the prosecution to put it in evidence. In any event, the statement not having been put in, the jury should have been directed to disregard entirely Sergeant Robinson's evidence about the appellant's two somewhat Delphic oral statements. Instead the trial judge had directed the jury that these oral statements might be corroborative of Junior Brown's identification of the appellant. The written statement, if made available to the jury, might have made it clear that the oral statements were quite innocent in character.

A similar argument was presented to the Court of Appeal of Jamaica. The Court of Appeal held that it was unfair on the part of the prosecution not to tender the written statement in evidence, considering that it was made in the context of the first oral statement, of which it could have been explanatory. When the trial judge found that the written statement was not to be given in evidence he should have directed the jury to disregard the evidence about the first oral statement. However, the court did not find the second oral statement to be vitiated but that on the contrary it went to strengthen the visual identification evidence of Junior Brown. The court therefore held that there had been no miscarriage of justice and applied the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act. Leave to appeal was accordingly refused.

It is a feature of this case that the conviction which is the subject of the appeal occurred at a retrial. The appellant was originally tried for the murder of Lenford Cameron in 1987 and was convicted on 9th November in that year. There was an appeal upon two grounds. The first related to certain unfortunate remarks made by the trial judge in her summing up to the jury about the desirability of getting rid of criminals and criminality. The second was concerned with the alleged wrongful admission in evidence of the first oral statement in the absence of the written statement, which is essentially the same ground as is advanced in the instant appeal. On 14th November 1988 the Court of Appeal of Jamaica allowed the appellant's appeal against his conviction of 9th November 1987 and ordered a retrial. It did so on the basis of the first ground of appeal and expressly refrained from coming to any decision on the second ground.

So it appears that at the second trial the evidence led for the prosecution was the same as that led at the first, apart from the circumstance that Ainsley Williams, who had given evidence at the first trial, was not available for the second, having emigrated. There was the same evidence about the two oral statements and the same failure to put in the written statement. At the second trial the defence must have been fully aware of the second ground of appeal advanced after the first trial, and might have been expected to object to the admission in evidence of at least the first of the oral statements failing the tendering in evidence by the prosecution of the written statement. No such objection was, however, made. Nor did the defence endeavour to insist that the written statement should be tendered. There is also no record of the trial judge having been asked by the defence to direct the jury to disregard the evidence about the oral statements or either of them. These matters are to be kept in mind in considering whether there has been a miscarriage of justice.

The principal ground of appeal was sought to be buttressed by a number of other considerations, though it was not suggested that any of these in itself afforded grounds for allowing the appeal. They were (1) that the trial judge failed to direct the jury that the appellant's failure to give sworn evidence could not corroborate the identification evidence; (2) that the trial judge did not adequately direct the jury's attention to weaknesses in the identification evidence; (3) that the trial judge wrongly directed the jury that the oral statements might be corroborative of the identification evidence; and (4) that the trial judge wrongly directed the jury that the warrant for the appellant's arrest having been prepared shortly after the murder might support Junior Brown's identification evidence.

As to the first of these matters their Lordships see no reason to suppose that the jury in this case might have thought that the appellant's failure to give sworn evidence corroborated Junior Brown's identification. The judge did direct the jury, in general terms, that this failure should not tell against the appellant. The jury, having seen and heard Junior Brown giving evidence must have accepted him as a credible and reliable witness. That was the one important issue in the trial. As to the second matter, the trial judge directed the jury that they should be very careful in dealing with visual identification evidence, because people can and have been known to make mistakes about identity. He also directed them to consider circumstances which might have impaired or facilitated identification, such as the lighting and the length of time for which the person identified was seen and whether that person was known to the identifying witness. The directions were an adequate application of the guidelines in *R. v. Turnbull* [1977] Q.B. 224. As to the significance of the oral statements, the trial

judge left it to the jury to decide whether these were made and, if so, what they meant, and whether they might be corroborative of Junior Brown's identification of the appellant. The meaning of the statements is extremely obscure and it is doubtful whether the jury would have attributed any significance to them. Here again, the jury's assessment of Junior Brown's credibility and reliability is likely to have been crucial. So far as the warrant for the appellant's arrest having been prepared shortly after the murder is concerned, it was a relevant matter for the jury to consider, as bearing on the credibility of Junior Brown's evidence, that his identification was made promptly and was consistently adhered to. Junior Brown had himself given evidence that he named the appellant to the police the day after the murder.

Returning to the main ground of appeal, there can be no doubt that the prosecution should have tendered the appellant's written statement in evidence. The fact remains, however, that the defence made no attempt to insist on its production. The nature of its contents can only be the subject of speculation. Mr. Guthrie Q.C., for the respondent, informed their Lordships that every effort had been made to trace the statement, but without success. The defence must have been aware from the previous trial and appeal that the statement at one time existed. There is no knowing why its production was not insisted on, but it may be that production was not considered to be helpful to the defence. For example, it may not have been consistent with the alibi defence which the appellant proposed to put up. It is possible that its production might have taken the edge off any adverse inferences which were capable of being drawn from the first oral statement, but that too is a matter of speculation. As to the second oral statement, that was made some time after the written statement on Sergeant Robinson's second visit to the hospital. It had no direct relationship with the written statement and there was no injustice in it being admitted in evidence and allowed to be considered by the jury. Although its meaning was extremely obscure, the jury, had they attributed any significance at all to it, would not have been wrong in thinking that it indicated some involvement of the appellant in the murder and thus went to support the evidence of Junior Brown.

The appellant in his statement from the dock suggested that Junior Brown had a motive for untruthfully implicating him in the murder in that Brown had a homosexual relationship with Cameron and may have resented the appellant having, as he said, exposed Cameron as a homosexual. Counsel for the appellant at the trial embarked on a cross-examination of Brown on the lines that on the occasion of the murder Cameron, Brown and Williams were dressed only in their underpants. The trial judge

stopped that line of cross-examination as being irrelevant. The appellant's counsel did not submit that the questions were relevant as being related to what the appellant was going to say in his unsworn statement, nor did he put directly or indirectly to Brown the motive for lying which was going to be suggested by the appellant. The trial judge in his summing up did not remind the jury of what the appellant had said on this matter in his unsworn statement. It was not, however, incumbent upon him to do so, and counsel for the appellant before the Board did not seek to place any reliance on this aspect of the case.

In all the circumstances their Lordships have not been persuaded that any miscarriage of justice may have occurred, and they will humbly advise Her Majesty that the appeal should be dismissed.