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SUPREME COURT CRIMINAL APPEAL NO. 133/71

IN THE COURT OF APPEAL

BEFORE: The Hon. Mr. Justice Fox - presiding
The Hon. Mr. Justice Smith
The Hon. Mr. Justice Hercules

PEGGY GREGORY v. REGINA

W.B. Frankson, Esq., for the Applicant
C. Orr, Q.C., for the Crown.

6th March, 1973

FOX, J:

At about 3:10 p.m. on the 30th of April, 1971, Winston Thomas, a clerk employed to the Jamaica Carpet Company, was riding a motor bicycle from Half Way Tree to the place of business of the Company at Matilda's Corner. He had with him a leather bag containing $926.00 being the payroll of the Company. He had obtained this money from a bank at Half Way Tree. He came on to Waterloo Road with a view to turning up Hope Road in a northerly direction and in this way to arrive at Matilda's Corner. Whilst riding on the Waterloo Road on the left side of the road, he was overtaken by a motor car which he described as a light blue Buick Special. This car swung into him and forced him off the asphalted surface on to a portion of the road which was being repaired. The car then stopped ahead of him in a line of traffic which was waiting on the traffic lights at Waterloo Road and Hope Road. Thomas said that he continued riding his bicycle and overtook this car. As he passed, he looked back to the car because he intended to say something to the driver. Apparently at the last moment he decided to say nothing. At that stage he noticed that the driver

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of the car was a woman and that it contained, in addition, four male passengers. Thomas said that he turned up Hope Road, riding on the left side of that road with the leather bag with the money being held on his left leg. The same light blue Buick motor car came up behind him along this road, came beside him, swung into him, forced him on the bank, and brought him to a standstill. The car stopped, a man came out from the car by way of the left back door pointing a gun at him and demanding the bag. A second man in the car also pointed a gun at him. The first man asked him what he had in the bag. Thomas replied that it was the Company's payroll. That man then took the bag from him and, still covering him with the gun, entered the car with the bag. The car then moved away slowly. It was still being driven, Thomas said, by this woman.

In relation to the encounter along the Waterloo Road, Thomas gave evidence to this effect:-

> "When the car dipped into me and stopped at the traffic light, I passed the car and looked at the car from the front and I saw it was a woman and four men was in the car. That time I had a clear look at the woman's face."

In relation to the second encounter on Hope Road, he was asked: "How you knew it was the same woman driving the car" and his reply was:-

> "Because I knew it was the same woman. I looked at her face, it was the same woman that was in the car on Waterloo Road."

Thomas picked out the applicant at an identification parade on the 8th of June, 1971, as being the driver of the car at the time of the robbery on the 30th of April, 1971. On the 8th of June he also identified a car which he then saw at the police station as the same light blue Buick Special

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motor car which was being driven by the applicant on the day of the robbery. This motor car was taken into the possession of the police on the 4th of June, 1971. The police evidence was that this car was registered in the name of the applicant and was being driven by her on the 4th of June, 1971, when she and the motor car were taken into custody of the police.

This is an application to appeal from the conviction which was subsequently recorded against the applicant for robbery with aggravation in the Home Circuit Court on the 8th of December, 1971. The applicant was sentenced to imprisonment with hard labour for five years. In respect of this sentence, leave to appeal was granted by a single judge.

The defence at the trial was an alibi. In an unsworn statement the applicant said that she was the manager of a drugstore in Spanish Town. She went to work during the week at about 9:00 a.m. and closed the drugstore at 8:00 or 8:30 p.m. On Saturday nights the drugstore was closed at 10:30 to 11:00 p.m. She said she knew nothing about the robbery. The date of the alleged offence was the 30th of April, 1971, which was a Friday. Friday was one of her busiest days of the week. She had been engaged in the business at the drugstore for fifteen years. She concluded by saying, "My aunt Lynne Gregory is the owner of the Buick Special, colour my blouse here, sir, green." She said that during this period of fifteen years when she had worked at the drugstore, she had never left the business on a Friday.

The critical question in the case was, of course, the identity of the applicant. On this issue a single ground of appeal was advanced. It was contended that the directions of the learned trial judge on the question of identification were inadequate. In support of his submissions, learned attorney for the applicant relied almost

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exclusively on the judgment of the House of Lords in Arthurs v. Attorney-General for Northern Ireland, (1971) 55 Crim. App. Rpts. p. 161. This was a case of disputed identity in which the prosecution relied substantially on the visual identification of the defendant by a police officer at night time during a riot in Dungannon, County Tyrone, Northern Ireland. The point of law considered was whether there was any duty on the presiding judge in such a case to give a general warning to the jury of the danger of acting on such an evidence. The House held that in the circumstances of that particular case such a warning was not necessary and that in their view all the issues which arose for the jury's consideration had been fairly and adequately dealt with in the summing-up. This was a case, be it observed, in which the police officer said that he knew the defendant prior to the time of his arrest. The judgment then proceeded to state at page 169:-

> "There will, however, be some cases where the situation is very different. I refer to cases where a witness has seen someone whom he does not in any way know and has had over a period of time to carry in his mind's eye a recollection of the person and then is at some later date asked (either at an identification parade or at some place) to say whether he can recognise the person whom he previously saw. In such a situation it is manifest that dangers may result from human fallibility. I would leave for future consideration the question whether there is need to lay down any rule for the guidance of courts in such cases. A summing-up that fails to give adequate instructions to the jury or which in the circumstances and in relation to the facts of a particular

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> "case fails carefully to alert them to the risks of convicting an innocent person might in any event be held to be defective......"

Mr. Frankson submitted that the instant case before this court was such a case as was contemplated in this passage. He drew attention to numerous aspects of the evidence and submitted that they described a real danger of an innocent person being wrongly convicted. The substantial complaint was that in the absence of a specific warning that it was unsafe to act upon the evidence of Thomas, the jury had not been carefully or sufficiently alerted to the risks of this danger, and for that reason the conviction should be quashed.

In considering this complaint, it is important to note observations following upon the passage quoted above in the Arthurs case, which concluded the judgment of Lord Morris of Borth-y-Gest. At page 169 he continued:-

> "But I do not think that it would be helpful to prescribe that in certain defined or described circumstances a judge must use certain words. Nor do I think that reference to cases in the past is either necessary or desirable.
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> I consider, therefore, that it would be undesirable to seek to lay down as a rule of law that a warning in some specific form or in some partly defined terms must be given. A summing-up does not follow a stereotyped pattern. It need contain no set form of words. Each case has its own features and a summing-up must be related to those features and to the problems of the particular case. A judge will invite

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> "the jury to give due consideration to the special issues which are presented by the evidence. He will be guided by his duty as well as by his desire to ensure, so far as he can ensure, that no innocent man is convicted. But the effectiveness of the guidance which in his summing-up he may give to a jury will not be enhanced if he is under the compulsion of having to incorporate some particular formula. An incantation of certain words will be a poor substitute for or a useless addition to the discerning guidance which the features of a particular case may require."

Admittedly, the critical issue in the case before us was the identification of the applicant. In this respect, the credibility of Thomas was of a first importance. At page 6 of the summing-up the learned judge said:-

> "There is only one Crown witness, the complainant Winston Thomas, so in order to be able to convict this accused at all you must be satisfied that Winston Thomas is a responsible person, a reliable witness and an honest witness; a witness whom you feel personally confident that you can trust. He is not superhuman, he is an ordinary man as anyone else and as such is prone to error and mistakes, but so are we all and in the context of the fabrication (sic) of the frailty of humanity you examine his evidence and see whether you are satisfied with it or whether you reject it....."

We think that in this passage the judge made clear to the jury the need to be sure not only as to the truthfulness of the witness but also as to his reliability. They were distinctly alerted to the possibility of the witness being in error or mistaken. The issue of identity was not left to

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the jury with this general direction only. Further on in his summing-up, after emphasizing that the question of identity was of paramount importance, the learned judge discussed the evidence and continued:-

> "You the jury are called upon to decide this on the weight of the evidence. You have to be satisfied on this question of identity from the manner, as I told you, of the giving of the evidence in this regard by Thomas in particular, because he was the only eye witness to this incident; his demeanour in the box, his candour as a witness of truth, his trustworthiness, when you come to consider all this in the final analysis whether the identity of the accused person by the identification parade or otherwise is a matter for you jurors on the weight of all this evidence."

The learned judge then went on to point out that Thomas swore that when he identified the applicant, that he said, "this is the woman", whereas the officer in charge of the parade said that Thomas said, "it looks like this woman." This conflict in the evidence was dealt with in these words:-

> "Now that is something for you to ponder and to determine. You will agree that there is quite a difference in the two expressions, "this is the woman" and "it looks like this woman." The first expression, "this is the woman" is a positive expression, the expression "it looks like this woman" suggests doubt on the part of the person identifying another at the parade.....
> I am just projecting certain views with regard to the differences of these two expressions for you which you have got to apply from your impression of the witness whom you saw in the box and heard under cross-examination. Do you think

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"there was really a doubt in his mind when he said, "it looks like this woman"?

The learned judge then proceeded to discuss with the jury the bearing on the identity of the applicant of the police evidence in relation to the motor car being driven by her when she was taken into custody by the police, and the evidence of Thomas that that car was the same car which the applicant was driving at the time of the robbery. The learned judge concluded the discussion with this statement:-

> "If you believe him that it was the same car and you are satisfied with his identity about the car, it may or may not assist you to decide whether the person in the dock, the accused, is the person who was driving the car that day."

In the light of these passages we take the view that the issues which arose on the evidence were fairly and adequately dealt with in the summing-up. In all cases in which an accused pleads not guilty there is always a danger of an innocent person being convicted. The extent of this danger will vary from case to case and will depend upon the nature of the evidence. In some cases, this danger will emerge from the evidence led by the prosecution but in the majority of cases in which the danger has been discerned in a crucial form a substantial body of evidence challenging the identity of the accused, was forthcoming from the defence. It is in such cases that courts have felt themselves compelled to conclude that juries were in error in assessing the weight of the evidence and for that reason to be of the view that their verdict was unsafe or unsatisfactory, and should not be allowed to stand. To show that a verdict is against the weight of the evidence, and is for this reason 'unsafe and unsatisfactory' is, of course, not a ground of appeal in this jurisdiction. It was only made a ground of appeal in England at the passing of sec. 4 of the Criminal

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Appeal Act, 1966, now re-enacted by sec. 2 of the 1968 Act. We recognise that based as it is on personal impressions evidence as to identity is peculiarly open to the possibility of error, however bona fide the evidence may be. We are of the view, however, that although he did not use specific words to this effect, this danger was sufficiently drawn to the attention of the jury by the learned trial judge. This being the only ground upon which the conviction was challenged, the application for leave to appeal against conviction is accordingly refused.

An interesting argument was made in relation to sentence. Under sec. 34(1) of the Larceny Law as amended by the schedule to the Prevention of Crime Special Provisions Act, 1963, a convicted person shall be liable to imprisonment with hard labour for any term not less than five years and not exceeding twenty-one years and shall, in addition, be flogged. In R. v. Brown 7 W.I.R. p. 47, it was held that the two types of punishment authorised by those provisions, "must be regarded as component parts of one punishment or sentence."

Mr. Frankson submitted that since the sentence was "one and indivisible", there was no authority for the imposition of the sentence of five years imprisonment with hard labour by itself and without a flogging. He referred to sec. 9 of the Flogging Regulations Law, cap. 131, which provides that, "in no case shall a sentence of flogging be passed upon a female either by the courts or in the prisons of the island", and argued that since under the provisions of the Flogging Regulations Law, the applicant could not be flogged, and since the penalty under the Larceny Law as amended was one and indivisible and included flogging, a sentence under sec. 34(1) of the Larceny Law could not be passed upon the applicant. These submissions were made to the learned trial judge who seemed to have found the advo-

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cacy with which they were sustained before him delightful and attractive. He nevertheless refused to be constrained and imposed a sentence under the section.

We think that the learned trial judge was right. The situation is not uncommon where a court is required to construe the provisions of a statute in the light of qualifying provisions in a previous statute. But for the purpose of this case the liability in the amending provisions is imprisonment as specified and in addition flogging if the offender is a male. The appeal as to sentence is therefore dismissed.