JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 27 & 28/81

BEFORE: THE HON. MR. JUSTICE KERR, P. (AG.)
THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A. (AG.)

PHILIP GREY AND NEVILLE CARTER

V.

REGINA

Mr. A.J. Nicholson for Appellant Phillip Grey.

Mrs. P.E. Benka-Coker for Appellant Neville Carter

Mr. Andrade for the Crown.

April 21, 1982

KERR, P. (AG.):

These applications for leave to appeal against convictions in the Home Circuit Court in March, 1981, before Mr. Justice Ross and a jury for the offence of murder, are being treated as the hearing of the appeal because the grounds of appeal involve questions of law.

The deceased Egbert Taylor, at the time of his death, was living at Zepherton in the parish of Saint Catherine, and in his house there also lived, his wife Lolita and Danette Rodgers and Almira Taylor. Rodgers and Taylor were, at the time, school girls of twelve (12) and fourteen (14) years respectively.

To this house, on the night of the 17th January, 1979, came six men who were armed with guns and who broke and entered the house of Egbert Taylor and demanded money of him and of his wife, and eventually shot both - Taylor, fatally, and his wife seriously.

The Crown's case is that of those six men the appellants were there and were involved. The identification of them rested in the main, on the evidence of Danette Rodgers. She gave an account of the men going from room to room; of the lighting in the house and of knowing both appellants before that night. She knew the appellant Phillip Grey as "Day Old" and she also knew the appellant Carter.

The defence of both was a challenge to the identification by the witnesses for the Crown, and supplementary to that challenge, that they were elsewhere at the material time.

As regards the identification of the appellant Grey, it transpired that both Rodgers and the other girl Almira had gone to the station and there, according to their evidence, they identified the appellant Grey as one of the men who went to the home that night. The elder girl Rodgers said she had given information, including his name, to the police before she identified him at the station.

With regards to the identification of the appellant Carter, there was an identification parade at which only Rodgers identified him. Almira made a 'dock identification', explaning her failure to identify him on the parade as due to fear.

The police who investigated gave evidence of visiting the premises, of seeing the spent shells and of attending the post mortem on the deceased. The doctor said he died from gunshot wounds, and I do not think there is any issue as to how he met his death. The main issue is the question of identification.

Before us Mr. Nicholson, for the appellant Grey, yesterday contended that the learned trial judge removed from the jury's consideration one of the limbs of the defence, namely: that at least one member of the constabulary personnel at the Linstead station had a motive to have him placed in

custody, and that the appellant, facing this serious charge was entitled to have his defence laid before the jury, regardless of how remote that defence might have been.

The evidence in support of what he called his "Limb of defence" was to the effect that sometime - some six months before, a certain Special Constable named Errol Raimbridge had been charged with rape of the girlfriend of the appellant Grey, and that at the time the alleged identification had been made he was present in the police station.

The defence called a witness to put in the records pertaining to the charge of rape, which indicated that sometime in July, 1979, this charge was not pursued, - the complainant indicating to the Resident Magistrate that she was not pursuing the matter.

The learned trial judge, in his summing-up on this aspect of the case had this to say:

> "There is no evidence that Errol Baimbridge, a Special Constable, was in any way concerned in the investigation of this case or that anyone acting on his behalf or at his request tried to do anything - not even the accused, in his unsworn statement tried to suggest that such a thing - so there is nothing to suggest that these girls were pressured or prompted - in fact, it was suggested to them and they flatly denied it, and that is the end of that, because, no evidence has been called to suggest that it was otherwise.
>
> What is more, what motive could the girls have to come here and tell deliberate lies on Grey or Carter?"

We think that that accurately sums up the position. There is no evidential link to connect Baimbridge with the investigations; - not one scintilla of evidence that he in any way influenced the conviction or that he communicated or in any way influenced the evidence of the two witnesses Rodgers and Taylor. Accordingly, we do not find any merit in this ground of appeal.

Mr. Nicholson contended that there were discrepancies and variations between the evidence given by Rodgers at the preliminary enquiry and at the trial, and that even though the learned trial judge had given perhaps adequate directions on the law relating to discrepancies generally, he erred in those directions, as on page 217 when he said:

> "On this matter of differences between deposition of a witness at the preliminary enquiry and at the trial, the position is this, Mr. Foreman, that too much importance ought not to be attached to such variations, and, in fact, if there is a substantial agreement between the evidence given at the preliminary enquiry and that adduced at the trial, that is sufficient. And here you have seen how long Danette and the other girl gave their evidence and you have noticed on how many occasions or respected how many sentences which have been put to these girls as being different - what they said here as being different from what they said at the preliminary enquiry. So, you have got to bear this in mind and remember that you ought not to attach too much importance to such variations because if there is substantial agreement between the evidence a witness has given at the preliminary enquiry and what the witness has said at this trial here, then, it is quite sufficient.
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> So, it is a matter for you what you make of these differences then, Mr. Foreman and members of the jury, between what the witness has said here and what the witness has said at the preliminary enquiry."

In support of his argument he relied on the case of Queen against Jones and White, [1976] 15 J.L.R. p. 15. We think that this case is easily distinguishable because although a portion of the summing-up there was similar to that quoted here, the real complaint was that the judge, in his directions to the jury, invited them to take the entire deposition of the witness into retirement and to make a sort of comparative analysis between what was said in court and what was said at the preliminary examination, thus denying them their untrammelled consideration of the witness' performance before them. The effect of that direction was to cause the jury to consider the evidence in the preliminary examination as a sort of corrobora-

tion of the evidence in court and that was manifestly wrong.

In this case the judge was dealing with only the specific questions - the specific instances where the defence put to the witnesses the inconsistencies between the evidence at the preliminary enquiry and that which was said to be different at the trial; and we interpret this passage as meaning no more than if what is given before the court is substantially the same as that given at the preliminary enquiry it was of no great moment.

The learned trial judge had earlier told them, with commendable clarity, how they should treat discrepancies that were material and substantial.

Mr. Nicholson further submitted that a particular discrepancy namely as to whether she had given "Day Old's" name before she went to the police station or only at the police station was of such importance that these directions denied the jury a fair consideration of this aspect of the matter. We are of the view that there really is no merit in that contention.

Mr. Nicholson did not pursue his complaint that the directions in relation to alibi were inadequate. Quite properly so, in our view, because the judge gave the jury a concise, clear direction on that issue.

Today, before us, Mr. Nicholson asks, notwithstanding it was not pressed at the trial, and that in the challenge to the veracity of the witnesses for the prosecution the motive for falsehood put forward at the trial was more or less subornation of the witness, by or on behalf of Bambridge, the Special Constable, to consider, on the evidence tendered by the Crown, whether the quality of the identification evidence was sufficient to establish a prima facie case relating to the appellant Grey. He directed our attention to the

circumstances under which the identification was "suppo[illegible]" to have been made and to the opportunity which the witness Rodgers had of making that identification.

The evidence was that sometime after Taylor was shot she went to the door in an endeavour to escape and she saw the appellant Grey on the verandah and he ordered her back inside and she shut the door and went back inside. Mr. Nicholson contended that having regard to her physical and mental state, the panic she was in - she had been hit in the head - and in all these circumstances the opportunity was not sufficient for reliable recognition. He however conceded that the judge, in his directions to the jury, left it to them for their consideration, but nevertheless this court ought to consider whether there was sufficient evidence to be left to them.

We have given our careful consideration to this aspect of the matter. We consider the lighting, as given by the evidence. We consider also that the girl Rodgers had known the appellant for a considerable time - over two years - and that she had been seeing him fairly frequently in the interim, and we are of the view that this was an issue that ought properly to have been left to the jury as was done in an impeccable manner by the trial judge.

Now, turning to the appellant Carter, Mrs. Benka-Coker, in pleasing presentation, contended that the learned trial judge erred when in directing the jury at page 214 of the transcript said:

> "The other thing you will bear in mind is that the accused himself hasn't said anything to suggest why either Dannette or Almira should come here and tell the police deliberate lies on him. Similarly with "Day Old", nothing has been suggested by the defence to suggest any reason why either of these two girls should come here and tell this wicked lie which they said that these two girls are telling on "Day Old."
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> They have come up with a suggestion that these two girls were prompted - that there was this

> "police against "Day Old" and you may think that they were at some difficulty having raised the matter, to indicate how it was that Neville Carter was in the same box with "Day Old" ...."

She submitted that by these directions the judge implied that there was a burden on the appellant Carter to establish a motive in the witnesses for the allegations of murder made against him, and thereby expressly transferring the burden from the Crown to the Defence and so depriving the appellant of a fair chance of acquittal.

We gave anxious considerations to these submissions and we sought the basis upon which the judge could have made those comments; searched anxiously, with the assistance of Counsel to find where in the course of the evidence it was ever suggested by Carter's counsel that the witnesses were deliberately lying as opposed to being mistaken. We did not find that evidence, but what we did discover, that notwithstanding it was never put deliberately to the witnesses. Counsel, in his address to the jury, suggested that the evidence against Carter was concocted by the two girls and that this affected the whole case and that the jury should reject their evidence. He further suggested to the jury that the girl Almira be totally discredited, and as far as the other girl Danette is concerned her sulkiness, stubbornness "was not a result of her deliberate concoction, but in relation to her playing the part of a liar."

A judge's summing-up is conditioned by the nature and the conduct of the case and, in our view, what the judge was bringing to the attention of the jury is that notwithstanding these suggestions by Counsel, there really was no evidence on

behalf of Carter to suggest any such motive, and despite Mrs. Benka-Coker urging that the judge's comments went too far, we are of the view that those submissions by the attorney for the appellant before the jury, merited comments along those lines from the trial judge.

Accordingly, for these reasons, the appeals by both appellants against convictions are dismissed and the convictions and sentences are affirmed.