J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL 50/70

BEFORE: The Hon. Mr. Justice Shelley - Presiding.
The Hon. Mr. Justice Fox - J.A.
The Hon. Mr. Justice Edun - J.A.

R. v LANCELOT BARRETT

Mr. H. Edwards, Q.C. and Mr. H. Harris for the Appellant.
Mr. P. Robinson for the Crown.

8th and 9th October, 1970.

SHELLEY, J. A.:

Six grounds have been argued in support of this application for leave to appeal from conviction in the Home Circuit Court on 23rd April, 1970 for robbery with aggravation and rape. We find no merit in any of them. We make a short comment on one of those grounds.

It was contended that the learned trial judge erred in refusing to allow counsel for the defence to see the statement of a witness who had identified the applicant at an identification parade held ten days after the commission of the offence. Counsel submitted that in view of the evidence of the witness that she had given a description of the applicant to the police, the defence was entitled as a matter of law to know the details of this description for the purpose of cross-examining her, and that the judge's refusal prevented a proper testing of her credibility. Counsel cited the cases of R. v Clarke, 22 C.A.R. 58, and R.v Hall, 43 C.A.R. 29, in support of this submission. Neither case is authority for the proposition for which counsel contends. In R. v Clarke, counsel was attempting to show that the description of an appellant which a constable had given at the Police Court was not the same as that which he had given to his superior officer, and the description which was given at the trial was not the same as that which he had given at the Police Court, or given to his superior officer.

In delivering the judgment of the Court, Mr. Justice Avory described as proper the attempt made by sounsel to get the written description which had been given to the superior officer, for the purpose of cross-examining the witness in order to show that the evidence he was then giving did not tally with the description which he had given previously. The decision makes it clear that in those particular circumstances, counsel for the defence is entitled to see the written description of a prisoner given by a witness. But he is so entitled not by virtue of any general rule of law to this effect, as the case of R. v Hall shows. The 'right' flows from the duty which is upon the prosecution to inform the defence of statements in their possession of a witness whose evidence at the trial differs substantially from what has been said earlier in the statements. R. v Clarke illustrates that 'where the discrepancy involves detail, as in identification by description, it may be difficult effectively to give such information to the defence without handing to them a copy of the earlier statement,' (Archbold Criminal Pleading Evidence and Practice 26th Edition, Para. 1374). The 'right' to see statements in the possession of the prosecution is therefore really a rule of practice described in terms of the ethics of the profession, and based upon the concept of counsel for the Crown as minister of justice, whose prime concern is its fair and impartial administration.

The true position was stated by Mr. Justice Waddington P.(Ag) in R. v Richard Purvis and Another, Supreme Court Criminal Appeals Nos. 102 and 103 of 1968 (unreported) of the 20th December, 1968. In that case as in this, counsel for the defence was unable to suggest that there was any discrepancy or inconsistency between the evidence which the witness had given in Court and the statements given to the police. After stating this fact, Waddington P. (Ag.) continued:

" If there was in fact any such material discrepancy or inconsistency, it would have been the duty of counsel for the Crown to inform the defence of the fact, and indeed the learned trial judge expressly referred to Crown

Counsel's duty in this respect. Crown Counsel did not make any offer of the statements and in the circumstances the learned trial judge was entitled to assume that there were no discrepancies or inconsistencies therein and to refuse to order production of the statements. We have no doubt that if there was the slightest suggestion that the statements differred materially from the evidence given by the witnesses, the learned trial judge would have called for these statements and examined them himself and if necessary would have made them available to the defence."

If, therefore, for any unhappy reason, counsel for the defence is unable to accept the assumption which stems from the fact that a particular statement has not been made available to him by the prosecution, it would become counsel's duty to invite the judge to exercise the discretionary power which is given to him by the proviso to Section 18 of the Evidence Law Cap. 118, by examining the statement himself and directing that it be used in such manner as the justice of the case demands.

In this case the judge was not so invited and counsel may not complain of failure to exercise the discretionary power in the proviso because the learned judge was entitled to rest his judgment on the assumption referred to above.

The application is therefore refused.