

SUPREME COURT CRIMINAL APPEAL NOS. 75, 76, 77 & 81 of 1971

IN THE COURT OF APPEAL

BEFORE: The Hon. Mr. Justice Luckhoo, J.A. - presiding
The Hon. Mr. Justice Edun, J.A.
The Hon. Mr. Justice Graham-Perkins, J.A.

REGINA v. NOEL ABSOLOM
CARLTON BRYAN
NEWTON COLLINS
MICHAEL FRASER

H.G. Edwards, J.C. and E. Blake for Absolom

P. Atkinson for Bryan

M. Johnson for Collins

V. Elliott for Fraser

Mrs. R. Walcott for the Crown.

February 28, March 1, 2, 5, 6, 8, 9, 1973.

GRAHAM-PERKINS, J.A.:

The applicants were convicted in the Circuit Court for the parish of Kingston on July 16, 1971 on an indictment which charged them jointly with the murder of Patrick Campbell. Absolom, Bryan and Collins were each sentenced to death. Fraser, because of his age, was ordered to be detained during the Governor General's pleasure.

Each of the applicants applied for leave to appeal against his conviction and this court sat through some six days patiently listening to a vast number of submissions - nearly all being without any merit - which sought to challenge those convictions. Undoubtedly the great majority of these submissions involved, in one form or another, questions of pure fact, submissions which ought properly to have been made and, perhaps, were made to the jury. There is, however, one matter which calls for some discussion but before doing so we set out very briefly the case as advanced by the prosecution.

On Friday.....

On Friday, January 30, 1970 at some time between 9:00 and 10:00 p.m. Fitzgerald Smythe and the deceased, both special constables, in the course of their patrol duty arrived at a bus stop on the Spanish Town Road near its intersection with Maxfield Avenue in Kingston. The area in which this bus stop was located appears to have been quite well lit. Each of these constables carried a fully loaded service revolver. The four applicants, two of whom appeared to be carrying guns, walked a short way past this bus stop and, having observed the two armed special constables, turned back and attacked and disarmed them. Having disarmed the deceased Campbell of his gun, Absolom then proceeded to shoot him in his head, causing his death. Thereafter Bryan, who had tripped the deceased causing him to fall, shot Smythe in his arm. Smythe fell to the ground and pretended to be dead. As to Collins and Fraser the evidence pointed to an aiding and abetting by them of Absolom and Bryan in the attack on the two constables.

The crucial area of dispute between the prosecution and the applicants was as to the identity of the persons involved in this brutal murder of Campbell. The defence of each applicant was a denial of any involvement in the shooting of the deceased. Both Absolom and Bryan were identified by Smythe at identification parades held on the 2nd and 4th March, 1970 respectively. Smythe said in his evidence that during the attack on the deceased and himself he was able to see the face of each applicant clearly as, at the relevant time, it was almost as clear as day. As was to be expected he was subjected to prolonged and vigorous cross-examination on his identification of Bryan and Absolom. An acceptance by the jury of his evidence would clearly have compelled a verdict of guilty in respect of these two applicants. It is as to the identification of Fraser and Collins, however, that we desire to make certain observations. During his examination-in-chief Smythe was asked if he would be able to identify the applicants if he saw them again. Thereafter he left the witness box and proceeded

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to the dock where he pointed to Fraser and Collins as being two of the four men involved in the shooting of the deceased and himself. Regrettably, no identification parade had been held in respect of either Fraser or Collins, nor was any reason advanced for the failure to hold such a parade.

Another witness, Cedric McLaughlin, testified to the effect that after the shooting of the constables he saw the four applicants run past him each carrying a gun. Two of these, Bryan and Fraser, he had seen shortly before the shooting. The other two, Collins and Absolom, he saw for the first time as they ran past him and then only for a matter of a second or two. He did not, or could not, give any description of Collins to the police. In these circumstances he, too, was invited to identify the applicants in the dock. Like Smythe, he had identified the applicants for the first time at the preliminary enquiry.

If ever a case called for the most careful directions on the issue of the identification of accused persons, this was such a case. This court recognises that questions of identity are essentially matters of fact to be determined by a jury, and that each case must be resolved with reference to its own particular circumstances. For this reason, among others, no useful purpose will be served by an examination of the several cases to which we were referred. We would, however, remind ourselves of certain passages from the speech by Lord Morris in *Arthurs v. The Attorney-General for Northern Ireland*, reported at (1971) 55 Crim. App. Repts. at pg. 161:-

"The rules and practices which have been evolved in criminal cases have as their purpose that those only will be convicted who are proved to be guilty. It is the aim of all to strive to reduce to a minimum the risks of the conviction of one who is in fact innocent. A judge will have this aim constantly in mind during his conduct of a
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"trial and in his direction to the jury. It is manifest that in cases where the vital issue is whether the identification of the accused person is certain and reliable the judge must direct the jury with great care. However careful is his general direction as to the burden of proof, the judge will feel it necessary to deal specifically with all the matters relating to identification.

"Where conviction will involve the acceptance of the challenged evidence of one or more witnesses in regard to identification, a summing-up would be deficient if it did not give suitable guidance in regard to identification. The circumstances of individual cases will, however, greatly differ. Thus there may be cases in which a witness can say that at a certain place and time he saw and clearly recognised the accused. If the accused was someone who was well known to him or at least was well known to him by sight and if the conditions at the relevant time were such that there was nothing to impede or to prevent recognition or to make recognition difficult, then a jury would mainly have to consider whether the witness was both truthful and dependable....

"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....

"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 instruction to the jury or which in the circumstances and in relation to the facts of a particular case fails carefully to alert them to the risks of convicting an innocent person might in any event be held to be defective and to warrant the use by the Court of Criminal Appeal (Northern Ireland) of certain of its ample powers."

We are of the firm view that the summing-up in this case, in so far as it affected the applicant Collins, fell far short of what was required in the particular circumstances. There was not a single factor pointing to the accuracy of the identification of Collins by Smythe and/or McLaughlin while he was in the dock at the preliminary enquiry. There was certainly no evidence of any admission by Collins that he was at or near the scene of Campbell's death. Nor was there any particular feature or characteristic about Collins that would aid either Smythe or McLaughlin in their identification of him. In so far as Collins is alleged to have been involved, the events of the fatal night as described by Smythe and McLaughlin could not be said to have afforded the best opportunity to either of observing the features of a man whom neither had seen before. Neither Smythe nor McLaughlin had been able to give a description of Collins to the police. In these circumstances, involving as they did, evidence which at its best was far from weighty, the jury should have been alerted to the very grave risks of identification.....

fication in the dock. Nowhere in his summing-up did the learned trial judge attempt to so alert the jury. In the particular circumstances of this case we are of the view that this failure on the part of the trial judge was a very serious error which may very well have resulted in a miscarriage of justice. Accordingly we treat the application of Collins for leave to appeal as the appeal which we allow. We set aside his conviction, and, in the circumstances, make no order as to a new trial.

As to the applicant Fraser who was also identified in the dock for the first time at the preliminary enquiry, different considerations arise. When arrested and cautioned he said "mi never shoot the policeman them. A Noel and Sutton Three Miles them do it." It would have been perfectly legitimate for the jury, if they accepted that Fraser did make this statement, to conclude that Fraser's knowledge of the identity of two persons who participated in the shooting must have been come by as a result of his presence at the scene of that shooting. In this event, the dock identification of Fraser, albeit quite unsatisfactory, would have been supported by Fraser's own statement. It cannot, therefore, be said that Fraser's conviction was wrong. In the result the applications of Absolom, Bryan and Fraser are refused.