JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 283/77

BEFORE: The Hon. Justice Henry, J.A.
The Hon. Justice Kerr, J.A.
The Hon. Justice Carberry, J.A.

REGINA

V.

ANTHONY ISAACS &
MICHAEL MILES

Berthan Macauley Q.C. & Bentley Brown for applicant Isaacs

Berthan Macaulay Q.C. & Eric Frater for applicant Miles

Messrs. McIntosh, Ducill for the Crown

February 7 - 9, March 16, 1979

HENRY, J.A.

The applicants were convicted for murder in the St. Catherine Circuit Court and sentenced in the case of Isaacs to death, in the case of Miles to imprisonment during Her Majesty's pleasure. They sought leave to appeal on the following grounds respectively:

Isaacs:-
(1) miscarriage of justice
(2) verdict unreasonable, having regard to the evidence.

Miles:-
(1) miscarriage of justice
(2) conflicting statements by the Crown witnesses.

Subsequent to the conclusion of the trial a fire in the Supreme Court building destroyed the shorthand notes and transcript of the evidence and of the summing-up by the learned trial judge. It was argued before us that the applications for leave ought to be granted and the appeals allowed because this Court had no power to request the learned trial judge's notes of the proceedings and that in the absence of notes it was impossible to deal with the applications. We have already ruled and a separate judgment delivered indicates the reasons for the ruling, that this Court has power to request the trial judge's notes.

Those notes, with the exception of a portion of them dealing with contempt proceedings against one of the counsel who appeared at the trial have been transcribed but no notes are available in relation to the summing-up. Counsel for the applicants has submitted that in those circumstances the Court must at best be at a severe disadvantage in considering any appeal and that the appeals ought to be allowed. He has further submitted that this being the third trial which the applicants have had to undergo, a new trial ought not to be ordered. He pointed to several areas in which it would have been necessary to give particular attention to the summing-up of the learned trial judge and submitted that since there was no presumption that the summing-up was adequate or without blemish in the areas indicated, this court ought to adopt the course he suggested. When we pointed out to counsel for the applicants that no complaint against the summing-up was contained in the grounds of appeal he intimated that such a complaint would in his view be pointless in the absence of a transcript of notes of the summing-up. It was for this reason that he had taken the decision (for which he accepted the responsibility) not to seek leave to argue a supplementary ground of appeal relating to the learned trial judge's summing-up on the question of identification when this was mooted by his junior who had appeared at the trial. We make no comment on this except to observe that if such a complaint had been made it may have been desirable to obtain the comment or recollection of counsel who appeared for the Crown and of the learned trial judge.

In the event there was in fact no complaint before us directed to the summing-up. Where an applicant or appellant seeks to have his conviction set aside on the basis of some error, omission or deficiency in the judge's summing-up the burden rests on him to show the existence or in a case such as this at least the possibility of such error, omission or deficiency. The applicants in this case have not discharged that burden and their applications in this respect cannot be granted. Before parting with this aspect of the matter we would observe that the duties of counsel for the accused in a criminal case do not end with his final address to the jury. It is his duty to note what appear to him to be errors omissions or deficiencies in the summing-up so that he can bring these to the attention of the trial judge (his first concern) or to an appellate court (his last resort). Such notes would be of assistance pursuing complaints against the summing-up on appeal.

The only other complaint made against conviction was that the evidence, particularly in relation to the identification of Isaacs, was unsatisfactory. The sole eye witness, a girl of about 15 at the time of the incident stated that she and the deceased were standing by a dump tank at about 8:45 p.m. when two men approached. One of the men she recognised as the applicant Miles whom she had known for about 2 years before. The other man whom she described to the police and pointed out at an identification parade held 5 weeks later was the applicant Isaacs. As the men came up, Miles held her by the shoulders and spun her round away from the deceased saying "Sky" As he did so the other man, who had something hidden beneath his shirt, passed an arms length away from her; she heard an explosion and when she turned round she discovered that the deceased had been shot.

Criticism of the evidence of this witness was directed along two lines. Firstly it was submitted that she was an unreliable witness who had been totally discredited in cross-examination particularly having regard to the discrepancies appearing in her evidence. Secondly it was submitted that her evidence as to the identification of Isaacs at least ought not to be relied upon having regard to the fleeting opportunity which she had to observe him, the light which was available at the time and her conduct at the identification parade.

The alleged discrepancies were

(a) the witness stated that when she was by the dump tank light came from a house across the road while the Police officer who visited the scene said that light came from a house across the common about a chain away.

We see no discrepancy here

(b) at the preliminary inquiry the witness said it was not a moonlight night, it was dark, while at the trial she said it was not dark. This is not necessarily an inconsistency because the word "dark" is commonly used to describe a moonless night but may also be used to describe the quality of light generally available and it would appear that in the context in which the word appears in the evidence at the preliminary enquiry and at the trial the inconsistency is more apparent than real.

(c) the witness positively denied that she had said at the preliminary enquiry (as she had) that the words used by the assailants were "Dont move."

This is the only real inconsistency and we cannot see that in the light of it the witness has been "totally discredited."

The evidence relating to the identification of Isaacs has received our careful scrutiny. This evidence indicates that the man whom she

identified as Isaacs was not known to the witness before the night of the incident and she had an opportunity of seeing him for a very brief time. On the other hand he passed close to her and it appears that the available light was sufficient to enable the police officer who visited the scene to see what appeared to be bloodstains and according to Miles' evidence to enable the applicant Miles when he visited the scene to recognise persons whom he had seen earlier. The witness' evidence was that she saw Isaacs clearly. She described the men to the Police and identified Isaacs at an identification parade. No complaint has been made about this parade but it was submitted that the fact that the witness walked up and down the line 5 times before identifying Isaacs is indicative of doubt on her part and weakens her identification. Whether this behaviour was indeed indicative of doubt or was the act of an overly cautious person was a matter eminently for the jury having regard to the gravity of the offence, the age of the witness and the jury's own observation of her in the witness box. In all the circumstances, we do not consider that we would be justified in interfering in a matter which was primarily one for the jury.

In so far as the applicant Miles is concerned the only other thing urged on his behalf was that in view of the evidence that he and the deceased had previously been friends it appears unlikely that he would have taken part in the murder.

This again was a matter for the jury to consider.

In the result the applications for leave to appeal are refused.