JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 34/96

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

REGINA vs. ASTON WILLIAMS

Dr. Randolph Williams for the applicant

Anthony Armstrong, Crown Counsel for the Crown

September 27 and December 20, 1999

HARRISON, J.A.:

The applicant was convicted in the Manchester Circuit Court on the 23rd day of February, 1996, of the offence of murder of Huzel Facey on the 6th day of June, 1988, and sentenced to life imprisonment, with the recommendation that he be not eligible for parole before he had served a period of ten years.

The facts relevant to this case are that a witness Derrick Robinson on Monday the 6th day of June, 1988, at about 6:00 p.m. was sitting on his fence at Good Intent, Manchester, when the applicant, known to him as "Lumsie",

and accompanied by three men, grabbed him in his shirt front and pointed a gun on him and ordered him to take them to Whitby, a walk of about 25 minutes, to the home of Douglas Facey and call him out. Robinson told the applicant that he was not going to call out Douglas because he was his cousin. Robinson, then 17 years old, was the cousin of Douglas Facey, the brother of the deceased Huzel Facey. Robinson walked reluctantly to Whitby with the men, including the applicant, where the applicant said, "I am going to kill a man tonight and any fudgie is the same fudgie." The witness then saw the deceased, with whom he had grown up in Good Intent, standing in the road about 30-35 feet in front of him and near to one Mr. Elvie's house. He was able to see the deceased because the electric light bulb in a house on the side of the road where the deceased was shone "...up as far as where Huzel was standing." The applicant then released the witness Robinson who ran home.

Another witness, Rudolph Elvie, 54 years of age, a resident of Whitby, had known the deceased for over 20 years from he, the deceased, was two years old. He was accustomed to speak with the deceased over this period when the deceased came to his shop and on other occasions and knew his voice. He also knew the applicant as "Lumsie". At about 7:00 p.m. on the 6th June, 1988, the deceased passed Elvie who was standing at his gate at Whitby; they spoke. At about 8:00 p.m. he, Elvie, was in his bathroom bathing and he heard a voice shouting from the street. He recognized the

voice of the deceased, bawling out, "Lumsie, Lumsie, you kill me to rass." He dressed, came out and saw people standing in the road and the deceased lying on the ground off the road. The body was covered with blood.

Subsequently, Dr. Jones, who performed the post mortem examination on the body of the deceased, identified by his cousin David Elliott, found a two-inch wide, one-inch deep laceration to the forehead, a two-inch wide, one-inch deep laceration below the right eye, an eight-inch long, three-inch deep laceration across the left scapular region, a twelve-inch wide, twelve-inch deep wound to the left back penetrating the chest wall and a wound to the centre of the back. Internally, the left lung was pierced and collapsed and the left ventricle of the heart was sliced. Death was due to the collapse of the lung and heart failure, with extensive haemorrhaging, and would have occurred within an hour of infliction. The injuries could have been caused by a sharp instrument, such as a machete, used with severe force.

Previously, on Friday the 3rd day of June, 1988, at about 7:30 p.m. Douglas Facey, another prosecution witness, the brother of the deceased, saw the applicant, also known to him as "Lumsie", on the street at Whitby, in front of one "Maas Babe's shop", a popular place for young people. He asked the applicant, "Why you draw knife at my sister's neck?" The applicant replied that he was to go and not talk to him and that he, the applicant, was going for his gun and return. The following day, Saturday,

Douglas Facey again saw the applicant at his shop at about 8:00 p.m. The applicant shoved him, held him and they both wrestled, fell to the ground and rolled over into a gully. The applicant used something and "jooked him over his eye", causing a cut which bled. He, Facey, made a report to the police. He had a sister named Sandra.

The applicant, in his unsworn statement, confirmed that he had a relationship with a lady named Sandra. Douglas knew the applicant "from school days", having attended the Harry Watt (sic) school together; and knew that the applicant lived at Norway, a district near to Whitby. Huzel, the deceased, who also lived at Whitby, had gone to Kingston about one month before the incident and had not yet returned to Whitby when Sandra made the report to Douglas.

Dr. Randolph Williams, for the applicant, argued four grounds of appeal. Grounds 3 and 4 may, for convenience, be considered first and together. They read:

> "**3.** The learned trial judge erred in law in admitting in evidence an oral statement purportedly made by the deceased for the purpose of proving the identify of the attacker. There was no material to enable the trial judge to exclude the possibility of mistake by the deceased.
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> (See page 52 of summing up line 7-15)
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> **4.** Alternatively the quality of the identification evidence was so poor that the learned trial judge erred in law in admitting the oral statement reportedly made by the deceased."

Dr. Williams advanced the view that there was no evidence of the nature of the lighting nor where the deceased was prior to the attack or during the "bawling out" and, consequently, the identification evidence was so poor that the learned trial judge should not have admitted the hearsay evidence and should have withdrawn the case from the jury.

The oral statement referred to was given in evidence by the witness Elvie, were the words used by the voice which he identified as that of the deceased, and was admitted, although hearsay, as a part of the res gestae. This exception to the hearsay rule was confirmed as admissible in ***R. v. Andrews*** [1987] 1 All E.R. 513, where the House of Lords approved ***Ratten v. R.*** [1971] 3 All E.R. 801. Forte, J.A. (as he then was) in ***R. v. Aston Williams*** S.C.C.A. No. 16/91 delivered 30th November, 1992, referring to evidence as a part of the res gestae, said at pages 2-3:

> "The evidential basis for this principle was settled in the case of ***R. v. Andrews*** [1987] 1 All E.R. 513 since cited with approval in this Court in the cases of ***R. v. Hankle*** S.C.C.A. 163/90 dated 23rd March, 1992 and ***R. v. Osbourne*** S.C.C.A. 61/91 dated 23rd November, 1992.
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> In the ***Andrews*** case (supra) it was held that:
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> > 'Hearsay evidence of a statement made to a witness by the victim of an attack describing how he had received his injuries was admissible in evidence, as part of the res gestae, at the trial of the attacker if the statement was made in conditions which were sufficiently spontaneous and

> sufficiently contemporaneous with the event to preclude the possibility of concoction or distortion. In order for the victim's statement to be sufficiently spontaneous to be admissible it had to be so closely associated with the event which excited the statement that the victim's mind was still dominated by the event. If there was a special feature, e.g. malice, giving rise to the possibility of concoction or distortion the trial judge had to be satisfied that the circumstances were such that there was no possibility of concoction or distortion. However, the possibility of error in the facts narrated by the victim went to the weight to be attached to the statement by the jury and not to admissibility'."

The evidence of the witness Robinson was that while the applicant was holding him and "... marching him with the gun", he saw the deceased standing in the street facing him about 30 feet away. He was able to see him by the aid of the electric light which shone from a house on the same side of the street where the deceased was. The deceased was then "...a distance of between 30 to 35 feet from Mr. Elvie's house." The applicant had used the words, "I am going to kill a man tonight, any fudgie is the same fudgie." When the witness Robinson saw the deceased, the applicant let him go and he ran away.

The witness Rudolph Elvie, who knew and had spoken to the deceased for over 18 years stated that "going up to 8 p.m." he heard a shouting and heard Huzel bawling out "Lumsie, Lumsie, you kill me to rass." Coming out into the road he saw the deceased Huzel's body on the ground.

In view of this evidence, namely, the recognition by the witness of the voice of the deceased, the identifying of the applicant, known as "Lumsie", by the deceased, the ability of the witness Robinson to see the deceased about 30 feet away, in that state of the lighting, and the subsequent discovery of the deceased's body on the ground nearby, cumulatively, rightly, enabled the learned trial judge to conclude that the said statement was "...made in conditions sufficiently spontaneous and... contemporaneous with the event to preclude the possibility of concoction or distortion." The evidence further reveals that the deceased lived at Whitby near to the district of Norway where the applicant lived, and the inference could have been drawn that when the witness Robinson saw the deceased standing in the road at Whitby on the fateful night, the applicant also saw him then. We are of the view that there was sufficient evidence, both in respect of the visual identification, the recognition of the voice uttering the statement, and the proximity in time in respect of the events, to satisfy the learned trial judge that he could properly admit the said statement as a part of the res gestae.

We agree with Mr. Armstrong for the Crown that, besides the visual identification, there was the identification by the recognition of the voice of the deceased and also other circumstantial evidence in the case, on which the Crown relied. We find no merit in these grounds.

Counsel for the applicant further argued as ground 1 that:

> "1. The learned trial judge misdirected the jury in saying (at page 54):
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> > **'It is Mr. Elvie's evidence as to what he heard that would make the evidence sufficient... You could only find this defendant guilty of murder if you accept that Mr. Elvie did hear what he said he heard and you are prepared to say that he is not making no mistake about what he says he heard; ...'**
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> In fact Mr. Elvie's evidence identifying the applicant was admissible hearsay and its cogency was dependent on the quality of the identification by the deceased of his assailant. The evidence of identification by the deceased was scant; (p. 52) and could not be tested. Little, if any, weight could be attached to the statement reportedly heard by Mr. Elvie."

We are clearly of the view, that this direction complained of is taken out of context, and the entire direction given must be examined to appreciate the context in which it was made. The learned trial judge said at page 54:

> "Let me tell you this, if you don't accept the evidence of Rudolph Elvie as to that statement that he said that he heard from his bathroom, then the rest of the evidence in the case would not be enough for you to say that this defendant is guilty of murder. It is Mr. Elvie's evidence as to what he heard that would make the evidence sufficient. So without that statement that Mr. Elvie says he heard Huzel Facey make, you will not have enough on the basis of which you could return a verdict of guilty. Your verdict would have to be not guilty. So if you reject Mr. Elvie as to that statement your verdict must be not guilty. You could only find this defendant guilty of murder if you accept that Mr. Elvie did hear what he said he heard and you are prepared to say that he is not

> making no mistake about what he says he heard; he is not telling any lie about what he says he heard, only in those circumstances you could find the defendant guilty of murder."

The learned trial judge was here correctly telling the jury that the evidence of Mr. Elvie was supplementary to the rest of the evidence in the case which, by itself, would not be sufficient without the evidence of Mr. Elvie. He also directed the jury to examine the evidence of Mr. Elvie, in the light of the identification of the applicant by the voice of the deceased. The learned trial judge said at page 51:

> "I have to direct you, members of the jury, it is for you to decide if Mr. Elvie heard anything at all; that is the first thing. You have to be sure that Mr. Elvie is not telling a lie or making a mistake about what he said he heard. If you believe that he heard anything at all - if you didn't believe he heard anything at all, that is the end of the matter. You would have to reject his evidence altogether and your verdict would bound to be not guilty. If you believe he heard something, then you have to be sure that what he said he heard he did hear. You have to be sure he is not making a mistake about what he said he heard or telling a lie. You have to be sure that he never heard 'Rimsy', or 'Limsy', or 'Benjy' or any other thing but Lumsy.
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> You must be satisfied that the person who was bawling out was not concocting or distorting to his advantage or to the disadvantage of this defendant about that statement that Mr. Elvie said he heard. You have to be satisfied that the person who was bawling out was not calling a wrong name, because if the person who was bawling out was calling the wrong name, Mr. Elvie would have heard the wrong name too. You have to be satisfied that the person who was bawling out

> knew what he was saying and knew who was attacking him, if he was being attacked.
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> The weakness in the Crown's case is that the evidence suggests that the street was dark; there is no evidence, nobody knows exactly where the person who was bawling outside was? And the evidence is that there are street lights at certain points along that road from Good Intent to Witby, but there is no evidence as to where the person who was bawling out was at the time he was bawling out, and whether he had sufficient light by which he could see who was attacking him, if he was being attacked, so as to be able to bawl out the person's name."

The jury could not have failed to appreciate the importance of examining carefully the said evidence. In directing the jury as he did, he properly left for them the determination of the weight which they should attach to it, pointing out the weaknesses in the said evidence of such identification, both visual and voice identification, and the necessity for them, the jury, to decide on the ability of Mr. Elvie to recognize the voice of the deceased and to be satisfied the statement was made "sufficiently spontaneous and... contemporaneous with the event to preclude the possibility of concoction or distortion": (***R. v. Andrews*** [supra]). The learned trial judge faithfully followed the text propounded in the latter case; we find no merit in the ground argued.

The complaint in ground 2, summarized, was that the nature of the evidence of the identity of the assailant made the verdict unreasonable because of:

(1) the inability of the deceased to identify the assailant;

(2) the absence of any basis on which the deceased identified the assailant;

(3) the absence of evidence of light available to enable the deceased to see and identify his attacker, and

(4) the location of the wounds on the deceased being consistent with an attack from behind.

As we have observed above, the evidence relied on by the prosecution and left for the jury's consideration was, in addition to the visual identification by the witness Robinson, the voice identification by the witness Rudolph Elvie and the circumstantial evidence led. The learned trial judge directed the jury faithfully on the ***Turnbull*** principles ([1976] 3 All E.R. 549) as to the need for caution, the possibility of mistaken identity and the reasons therefor. The instant case did not, however, depend "wholly or substantially on visual identification" by the witness Robinson. After directing the jury's attention to the evidence of Robinson that he knew the applicant for about a month before the incident, that there was sufficient lighting for him to see the applicant when he took him off the fence at Good Intent, also to see him when he marched him for about 25 minutes to Whitby and also when he Robinson saw the deceased on the road at Whitby, the learned trial judge pointed out the weaknesses of the said evidence to the jury in respect of the lighting. He then directed the jury, at page 50:

> "Ask yourself: Did Mr. Robinson know this defendant before that night or was the defendant a stranger to him? Mr. Robinson says he knew this defendant for about one month before the night of this incident so the defendant was not a stranger to him if you believe that evidence. These are some of the questions that I suggest you ask yourselves when you come to decide whether you can believe Derrick Robinson, firstly, that anybody held him that night and took him away and secondly, whether if you find that somebody did that whether that somebody was this defendant. Can you rely upon Mr. Robinson's evidence which says that the person who did that to him was this defendant? Could Mr. Robinson be making a mistake or what is worse, could he be telling a lie? Could it be nobody held him up at all that night? Could it be that somebody did hold him up but it wasn't this defendant, it was somebody else that he has mistaken for this defendant? Are you satisfied, then, with the visual identification of Derrick Robinson?"

As we had earlier mentioned, there was evidence that the lighting at Whitby was sufficient for the witness Robinson to see the deceased from a distance of 30-35 feet. This would be evidence from which the jury could have drawn the inference that the deceased could have seen and been able to identify the applicant, moreso on the facts, from a shorter distance. The evidence of the witness Douglas Facey was that the deceased knew the applicant before the 6th of June, 1988, thereby providing the jury with the basis on which they could have found that the deceased was able to identify the applicant.

The medical evidence revealed that, although there were three wounds to the back of the deceased, there were also two wounds, to the forehead and below the right eye, from which the jury could properly have found that they were inflicted by the assailant at a time when he was facing the deceased.

Furthermore, the jury heard the circumstantial evidence, namely, the altercations between the witness Douglas Facey and the applicant on the Friday and Saturday prior to Monday 6th June, 1988, the demand by the applicant, accompanied by three men, at gunpoint, that the witness Robinson take him to Douglas Facey's house and call him out, the use of the words of intention, "I am going to kill a man tonight, any fudgie is the same fudgie", and the release of the witness Robinson as soon as the deceased was seen on the road near to Mr. Elvie's house. The learned trial judge directed the jury how to consider the circumstantial evidence on the principle of the rule in ***Hodge's*** case (1838) 2 Law CC 227. This was evidence from which the jury could have found that it pointed unmistakably to the applicant, and from which the jury could further find that the applicant directed his attack on the deceased Huzel Facey in substitution for Douglas Facey, with his explanatory words, "... any fudgie is the same fudgie." The argument advanced in support of grounds 1 and 2 therefore fails.

For the above reasons, the application for leave to appeal is refused and the conviction and sentence affirmed. Sentence shall commence as from 23rd May, 1996.