

JAMAICA

*Judgment Book  
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SUPREME COURT OF JAMAICA  
KINGSTON  
JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 287/77

BEFORE: THE HON. MR. JUSTICE ROBINSON (PRESIDENT)  
THE HON. MR. JUSTICE ZACCA, J.A.  
THE HON MR. JUSTICE CARBERRY, J.A.

R. v. BARRINGTON HOUSEN

Mr. B. Macaulay, Q.C., for the Appellant

Mr. Belnavis for the Crown

23rd November, 1978

CARBERRY, J.A.

On the evening of the 5th of February, 1977, at somewhere between nine o'clock and ten o'clock or thereabouts, in a small shop in the district of Adelphi, near Montego Bay, some men were playing dominoes outside the shop, when suddenly there were gunshots and one man was seen firing a gun at the players who sat in the front of the shop. Some people were wounded. One of the players was actually killed. His name was Sydney Hemmings. It appears that most of his friends knew him by the name of James.

The accused, Barrington Housen was charged with the murder of the deceased and his trial took place before Mr. Justice Carey, the opening day of the trial being the 23rd of November, 1977.

The trial lasted for several days and the summing-up took place, I think, on the 29th of November, 1977. The jury, on the evidence before it, after retiring for 23 minutes, brought in a verdict of guilty of murder.

421

The principal issue in this trial was the question of identity of the gunman. There was evidence by one of the witnesses, Constantine Crooks, who was watching the domino players outside of the house, that he clearly saw and identified the accused as being the gunman who fired the fatal shots that evening. He claimed to have known the accused for some two years before that night and on that score his evidence was not challenged.

There was another witness on the scene, a lady called Lucille Higgins, who was in a bamboo shed in front of the shop, from which she could see the domino players.

The evidence of both witnesses was to the effect that they saw the accused fire the fatal shot. They also saw a group of three men who were on the other side of the road but they did not see the three men take any part in this incident. There was some suggestion that the accused and the three men went off together and possibly that they arrived together.

The shop and its premises are somewhat below road level. There was evidence that there was lighting in the shop, that there was lighting on the outside of the shop by which the domino players were able to see the games that they were playing. There was evidence that there was street lighting on the road outside.

As far as the witness, Lucille Higgins was concerned, she also gave evidence to the effect that she had known the accused before this incident, and had seen him on one or two previous occasions.

The witness, Crooks, the first witness who gave evidence, was himself hit by one of the shots that were fired that evening

and on the strength of such information as the police had, a search was made for the accused and he was arrested.

There was evidence that when he was charged with this offence he said, "Me, sir?" The defence asserted that he also added the words, "I don't know anything about it."

On the face of it, then, there were two eye witnesses who purported to identify the accused as the gunman firing the shots that evening. It is clear that his identification was the principal matter of concern and that the learned Trial Judge, in his summing-up clearly advised the jury of the necessity to be sure as to his identification.

The defence was an interesting one. Some three or four days after this incident took place in Adelphi a man called Anthony Griffiths, with some other people, were surrounded in a police cordon. A shoot out took place and Griffiths was killed. From Griffiths' body the police recovered a firearm and the defence elicited from the police witnesses that a spent shell which was found at the murder scene at Adelphi had been fired from the gun that the police recovered from the deceased, Anthony Griffiths; at least, one of the Crown's eye witnesses purported in his evidence to say that Griffiths was one of the three men who were also on the scene of the murder. On that evidence therefore the defence suggested strongly that the man who had fired the fatal shot that evening at Adelphi was not the accused, Barrington Housen, but might have been, or the more probable person, was the deceased, Anthony Griffiths.

There was some evidence offered by the Crown to the effect that Barrington Housen, the accused, and the deceased

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Anthony Griffiths, were friendly or acquainted with one another.

But when all was said and done the question which still remained was had the Crown, through the eye witnesses, satisfactorily identified the accused, Barrington Housen, as being the gunman who fired the gun that evening?

I should add that there was one further bit of evidence and that is that one of the domino players was called by the defence. He gave evidence which supported the Crown's story of the people playing dominoes in front of the shop and of the gunman coming up and firing at them, but he also said in his evidence that he was not able to identify the gunman and indeed as far as the other three persons were concerned, apart from the witness who identified Anthony Griffiths, the man killed in the shoot out, as being one of them, the other witnesses were not able to identify any of the other three persons who had been present that evening. So we have a situation then in which two eye witnesses have identified the accused as the gunman, a third eye witness had failed to identify anybody and there is some evidence from one of the two eye witnesses that Anthony Griffiths was on the scene that evening but did nothing. There is further evidence that Anthony Griffiths apparently a gunman, was killed in a shoot out by the police three or four days later and that the gun recovered from his body had fired one of the shots, possibly all the shots that were fired that evening before the shop at Adelphi. These facts, with what to make this evidence was clearly something that was a matter for the jury. Was it safe evidence on which to rely?

There was in this case in our view a very fair and adequate summing-up by the Trial Judge. In the course of that summing-up the Judge, in our opinion, fully directed the jury as to both the onus and standard of proof required. We will indicate one or two of the passages in the summing-up which illustrate this. There is a passage at page 152/3 which says:-

"Now the accused man is presumed to be innocent. That presumption remains until you by your finding say that he is guilty. There is no requirement that he must prove his innocence. The grave responsibility of proving the case against this accused man rests on the Prosecution throughout this trial, and that heavy responsibility does not shift. Before you can convict this man on this indictment charging him with murder, the Prosecution must satisfy you by the evidence adduced in this court to the extent that you feel sure of his guilt.

Now I must, however, having told you that there is no duty on the accused to prove his innocence, he may attempt to do so. And he did so attempt. He made a statement from the dock. And he called witnesses in support of his story that he is putting forward. Now if you consider that the attempt he has made has succeeded, in other words he has proven his innocence, in that event you are obliged to return a verdict of not guilty.

If, however, you consider that the attempt he has made fails, then you must consider all the evidence including what he told you as well as his witnesses, and see whether you are satisfied to the extent that you feel sure that the prosecution has proved its case."

Now the accused, in this case, did not give sworn evidence. He made a statement from the dock and that statement which appears at page 127 to 128 of the record, was to the effect that he knew nothing about what happened at Adelphi on the 5th of February. Perhaps I better quote it more fully -

"M'lord, I was at my yard on that night when time the incident happened. I was playing domino at my yard, My lord. I didn't leave my yard, My lord. I wasn't in the connection of Irwin. I don't leave my Yard, sir."

It is perhaps unfortunate that although he must have been playing dominoes with other persons the defence apparently were not able to secure any supporting evidence of the fact that he was at home that evening. Be that as it may, the issue remains, was this accused the person who fired the gun that evening?

This issue was clearly and fairly put to the jury by the learned Trial Judge and at page 179 of the transcript he dealt with the alibi put forward. He had this to say:-

"Well now we come to look at what the accused has to say in answer to the charge. His first answer is what is called an alibi. Now you cannot convict the accused man on this indictment unless you reject the alibi. If he was where he said he was at his yard, then he couldn't be at Irwin shooting anybody.

Now when a man puts forward an alibi, he is not assuming any burden of proving that alibi. I said to you earlier there is no burden on him so it is no use sitting there and asking yourselves why didn't he call witnesses to prove he was at his yard. All he needs to do is raise it for your consideration.

However, having made a statement, you have to consider what it is that he says and what weight what he says has. His evidence is that he was at his yard. He is raising the question of identification. If I was not there, then the witnesses for the Crown are gravely mistaken when they point to me. Now in his endeavour to strengthen that stance which the defence has taken, it has been argued before you and there is no (sic) evidence to show if you accept it that the gun which was used that night was this weapon this Mauser pistol: evidence from the police sergeant Sterling that he recovered a spent shell, and there was evidence that that shell came from that gun that was fired."

He then goes on to deal with the matter raised by the defence with respect to the gun recovered from the deceased, Anthony Griffiths. Complaint has been made in the grounds of appeal that:-

"The learned trial judge failed to direct the jury that even if they rejected the evidence relating to the defence of alibi, it did not follow that the prosecution would have proved its case to the extent that they feel sure of the applicant's guilt, and that they would have to consider the prosecution's case, notwithstanding their rejection of the evidence relating to the defence of alibi."

The sum and substance of this ground of appeal is that there should have been a special direction with regard to the defence of alibi and that the learned Trial Judge <sup>should</sup> have directed the jury that there was an onus on the Crown to disprove the alibi set up by the accused. We were referred to two cases in this connection. One was the case of R. v. Braithwaite No. 1, which is reported in 1969 from the Court of Appeal, Barbados, 15 W.I.R. p. 263; and our attention was directed to a passage dealing with alibi which appears at p. 268/9. I think it is sufficient to quote the passage at p. 269B. After referring to the summing-up, Williams, J. said:-

"This puts the defence quite clearly to the jury that he was at the relevant time in Queen's Park listening to music at a dance. It was unfortunate, however, that the learned trial judge did not go on to give the jury a specific direction on the burden of proof in relation to alibi defence and to tell them that even if they rejected the alibi they must nevertheless consider the Prosecution's case and could only return a verdict of guilty if the evidence in support made them feel sure of the guilt of the accused."

It appears to us that was precisely what the learned Trial Judge did do in this case because after the passage at page 179, already cited, and indeed, in perhaps the most telling passage in the whole summing-up, because it is his parting thought to the jury, the passage in which he advised them on the whole of the case immediately before their retirement, the learned Trial Judge said at page 182 as follows:-

"Can you rely on the evidence given by the prosecution witnesses? What is your view of them as witnesses? Are they truthful witnesses? Has their evidence satisfied you to the extent that you feel sure when they say this is the man that is the fact? If you come to the conclusion, having given such weight as the statement made by the accused man deserves, that he was not there, he was in his yard playing dominoes, then of course, you would return a verdict accordingly. Even if the effect of his evidence is to raise a reasonable doubt in your mind it means that the Crown have not established the case to the extent that you feel sure, and again you would be obliged to acquit. Even if you reject his statement as being unreliable, without any foundation or basis of truth, you could not on that account say he is guilty. What you do is bear in mind and consider the evidence given by the Crown so far as the facts of this case are concerned, you look on the nature and quality of the evidence dealing with the question of identification and if you come to the conclusion that the witnesses who spoke on these matters are witnesses of truth, that their evidence is reliable, that they had an opportunity and could make out who they said they made out

I think by that he means, see and recognise.7

.....if you are satisfied on that point it would be open to you to convict on this indictment."

It seems to us that in that passage and elsewhere the learned Trial Judge did in fact point out that mere disproof of the alibi, or rather that even if they did not believe the alibi, that that was not the end of the matter. They still had the duty to consider whether the evidence was sufficient to make the jury satisfied and sure that the accused was the man who fired the gun on that fatal evening.

For the accused, Mr. Macaulay, with his usual skill and perhaps I would say, without offence, dexterity, has argued that the jury should be alerted that when the special defence is raised if they reject that special defence they should still consider other evidence of the case and in connection with those the onus of proof still remains.



ground on which we can or ought to allow the appeal in this matter and the application for leave to appeal against the accused's conviction for murder is refused.

The appeal is dismissed.

On the face of it this and the other passages that we have cited from the summing-up appear to us to have more than answered this complaint. I would say for myself personally that I am not satisfied that alibi necessarily constitutes a special defence within the meaning of the submission that has been made. We do not, in this country, have the system by which notice of alibi is given to the prosecution, so that they have not in fact an opportunity of examining it before the trial. But quite apart from that, it seems to me that an alibi goes to the root of the whole matter. If the alibi succeeds then obviously the identification of the accused must be wrong. On the other hand if there is adequate evidence of identification - if an alibi is rejected, - and there is adequate evidence of identification, then once again it seems to me that that too goes to the root of the whole matter.

But be that as it may, it seems to us that the learned Trial Judge's summing-up in this matter cannot be attacked. He put the case for the accused very fairly to the jury. The question as to whether the deceased, Anthony Griffiths may have been the gunman, in as much as the gun was found on him, which had fired a shell at the fatal scene that day, was adequately left to the jury. There was evidence on which the jury could find the accused guilty. They could accept the identification evidence and they did accept the identification evidence. And it appears to us that there is no