JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 173/80

BEFORE: The Hon. Mr. Justice Kerr, P. (Ag.)
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Campbell, J.A.

R. v. BARRINGTON MAXWELL

Mr. Ferdinand Johnson and
Mr. Clayton Roache for appellant

Miss H. Walker for Crown

April 19, 20 and July 30, 1982

KERR, P. (Ag.):

The hearing of this application for leave to appeal from a conviction for murder before Parnell, J. and a jury was treated as the hearing of the appeal and judgment was reserved.

The grounds of appeal were to the effect that the verdict is unreasonable and cannot be supported having regard to the evidence. It is but trite learning that in proof of guilt, the evidence should satisfy the jury so that they feel sure and to attain that standard there should be no room for reasonable doubt. Nevertheless it is an important consideration in an appeal based on this ground. "Doubt" in this context cannot be otherwise than personal to the doubter - R. v. Walters (1969) 2 W.L.R. p. 64. Accordingly a Court of Appeal ought not lightly to set aside the verdict of the jury, who have had the benefit of seeing and hearing the witnesses. However, within the confines of these co-relative

aspects, the burden and standard of proof on the one hand and the important role of the jury as the judges of the facts on the other, this court is empowered by section 14 of the Judicature (Appellate Jurisdiction) Act to allow an appeal if the verdict is unreasonable and cannot be supported by the evidence and will do so if the evidence for the prosecution is manifestly unreliable. R. v. Nugent and Hughes (1974) 12 J.L.R. p. 1354; R. v. Guyah (1974) 12 J.L.R. p. 1659.

The appellant was charged with the murder of Arthur Irons on 13th October, 1979. Dr. Louis Dawson who performed the postmortem examination found a gun shot entry wound just below the tip of the left ear. In its course the bullet had cut across the throat and through the windpipe and made its exit on the right side of the neck. Death was due to resultant shock and haemorrhage. He also found bruises and multiple abrasions on the forehead, right side of the face and neck and opined that these could have been caused by a blunt rough instrument or falling on such a surface.

For the purpose of this appeal it is necessary at the outset merely to outline the case for the prosecution and for the defence but in critically considering the evidential worth of the case for the prosecution to make fairly extensive quotations from the transcript.

The vital and sole eye-witness to the fatal shooting of the deceased, Arthur Irons, at the back of a grain store was one Thomas Campbell, aged 66 years. From the inside of a detached toilet through a door which was ajar he had witnessed the incident. He was at the time assistant to the deceased who was the proprietor of the grain store. According to him, at about 2 p.m. on October 13, 1979 while in this toilet his attention was attracted by Irons' cry of "Thief, Thief". He saw the deceased outside the back of his shop being held up by a man with a gun while another man stood near. He heard two shots, he saw Irons fall, and the two men ran from the premises to the Spanish Town Road. The whole incident lasted "3 - 5 minutes" and he was about 15 feet away. He came from the

toilet and saw what appeared to be bullet holes in the neck of the deceased as he lay prostrate. A crowd gathered and about ½ hour after a police radio car came up. In the back seat was the appellant. He went up to the car and then and there identified him as one of the men who had shot the deceased. Corporal Benjamin gave evidence of seeing the appellant whom he had known before running along Harris Street. Benjamin was in the police car and he had heard a radio report of the shooting some six or seven minutes before. He stopped the appellant, asked him where he was going. The appellant said he was going to the shop but he admitted when questioned he had no money. Benjamin denied searching the appellant or knowing about his having a bill-fold with $4.00. He corroborated Campbell as to his spontaneously identifying the appellant. Where he held the appellant was 18 chains from the locus in quo and the appellant was blowing hard and had burrs on his trousers. He handed him over to Sgt. Dyer. Sgt. Dyer gave evidence of the identification by Campbell and of taking him into custody. The identification evidence of Campbell was strongly challenged by cross-examination. In his preliminary search he found no money on the appellant.

In an unsworn statement, the appellant said that at mid-day he left his work place and went to Mr. Holder who gave him $4.00. He was on his way to the shop when Benjamin accosted him and took him in the car. He had with him $4.00. Samuel Skyers also known as Holder gave evidence that he went into his business place at about 12.30 p.m. that day and shortly after that appellant came to him and he gave him $4.00 and he left.

The witness Campbell identified the appellant at the Preliminary Examination but at the trial on October 21, 1980 his performance aptly referred to by the trial judge as a "stage play" but could more accurately be described as a "comedy of errors" was portrayed by the following from the record:-

"CROWN ATTORNEY:

Q: Well you saw any of the men that same day, having seen them the first time you saw any of them the same day?

A: Yes; I saw them the same day when the radio car coming up.

Q: You see that man here today; you see that man you saw in the radio car?

A: (no answer)

HIS LORDSHIP: When the radio car came up you saw one of the men. Where the man was?

WITNESS: Was in the radio car.

HIS LORDSHIP: The man was in the radio car?

WITNESS: Yes.

HIS LORDSHIP: Did you say anything when you see the man in the radio car?

WITNESS: Yes, sir.

HIS LORDSHIP: What you say?

WITNESS: I say that man is one of the men.

HIS LORDSHIP: You point to him?

WITNESS: Yes, sir.

HIS LORDSHIP: And the police hear you?

WITNESS: Yes, sir.

HIS LORDSHIP: And you said that man is what?

WITNESS: One of the man.

HIS LORDSHIP: Who did what?

WITNESS: Shoot Mr. Irons.

HIS LORDSHIP: When you said this did the man you pointed out say anything?

WITNESS: No, sir; he said nothing.

HIS LORDSHIP: Not a word?

WITNESS: Not a word.

HIS LORDSHIP: Well what the lawyer wants to know now is this: You ever see that man again - where that man is?

WITNESS: Here, sir. (witness points to registrar)

HIS LORDSHIP: Where; here?

WITNESS: Yes, sir.

"CROWN ATTORNEY: There are two people sitting there.

HIS LORDSHIP: You see what you have run into now? That man there; pointing to the registrar. Did you go to the preliminary court; the case, the matter was heard at the Gun Court?

WITNESS: Yes, sir.

HIS LORDSHIP: And you did give evidence there?

WITNESS: Yes, sir.

HIS LORDSHIP: You did see the man there then?

WITNESS: Yes, sir.

HIS LORDSHIP: Where was he sitting at the time, or standing at the time?

WITNESS: He did have a different suit ah clothes at that time, sir.

HIS LORDSHIP: And you did point him out?

WITNESS: Yes.

HIS LORDSHIP: Alright; se what you can do now. You say that is the man (His Lordship points to the registrar)?

WITNESS: It look like him.

HIS LORDSHIP: Is your sight good?

WITNESS: Not so wonderful.

HIS LORDSHIP: You want to come down and go around the court and go around and look all around before you finally decide who?

(witness leaves the witness box and walks around the court room)

WITNESS: (Witness stops before the registrar) That man yah really resemble him.

HIS LORDSHIP: Alright, come up this way now. I think you have looked at everybody - two people up there (points to the dock) look up there now?

(Witness looks then returns to witness box)

HIS LORDSHIP: I see you look everywhere except in the dock?

WITNESS: Over there so; yes.

HIS LORDSHIP: You have had a look at everybody. What do you say now; you see the man here now?

WITNESS: Yes, sir.

HIS LORDSHIP: Where the man is?

WITNESS: See di man there so (witness points to accused)

"HIS LORDSHIP: You see the man here yet - that is the man? (points in the direction of the accused)

WITNESS: Yes, My Honour. "

In the circumstances in which this identification in court was eventually made, it obviously would carry little or no weight. However, the reported cases illustrate that failure or uncertainty in the identification of an accused in court is not necessarily fatal to the case for the prosecution providing there was positive identification at an earlier occasion and there was evidence from some other witness of that earlier identification to provide an .

In Regina v. Osbourne, Regina v. Virtue (1973) 2 W.L.R. p. 209:

> "After the interrogation the defendants were put up for identification on parades, at which two women identified persons as having taken part in the robbery. The defendants were then cautioned and charged. Their trial took place some seven and half months after the parades. Evidence of the interrogation of the defendants was given by the interrogating police officer; one of the women said that she could not remember having picked out anyone at a parade; and the other woman, who was very nervous, first said that she thought one of the defendants to be a man she had picked out at a parade, and then said that she did not think that that man was in court. The police inspector in charge of and present at the parades was then called and asked whom the two women had picked out at the parades. "

It was held that the evidence of the officer in charge of the identification parade was admissible for it did not contradict the women's evidence; it was evidence of identification other than identification in the witness box and the prosecution was seeking only to establish the fact of identification at the parades.

In R. v. Maloney Gordon (1968) 10 J.L.R. p. 491 the appellant had been charged with the murder of Andrew Barton who had been fatally shot about 2 a.m. along the Palisadoes Road. The sole eye-witness for the prosecution was Camille Chung who on 28th April, 1967, at an identification parade pointed out the appellant as the person who shot the deceased. At the trial she pointed to Gordon

who was one of two in the dock and said, "I didn't know any of them before. I think he is the one." Inspector Facey gave evidence as to the parade. In giving the judgment of the court, affirming the conviction, Henriques, P. said at p. 494:

> "This court has given anxious and careful consideration to the evidence in the case as well as to the submissions made to it. It is idle to pretend that the case does not present points of difficulty, particularly in view of some of the confusing and conflicting answers of the witness Chung on the question of identity. Despite these, however, there is the undoubted fact that the witness, Chung, at an identification parade, the fairness of which could not be justifiably challenged, identified the applicant as the man who had shot Barton. In addition to that there was her evidence to the effect that the gun never at any time changed hands, and the applicant had furthermore placed himself at the spot where the shooting took place."

In the Osbourne case there were in addition to the evidence of identification statements capable of an inculpatory interpretation made by the accused in the course of investigative interrogations.

In Maloney Gordon's case, there was an admission by the accused that he was present at the scene but the shooting was done by another man and for the uncertainty of the witness in her identification in court the officer in charge of the parade gave evidence that the accused who was in his late teens had improved physically since the identification parade.

In the instant case, the excuse given by the witness for his failure to identify the appellant in court would seem to be on the basis of not having looked at the persons in the dock, but there was further cross-examination:

"Q: Mr. Campbell, am I not correct, sir, that when you were invited to walk around the room you walked down to the end, looking on both sides and came back down?

A: Yes; I didn't look up there you know.

HIS LORDSHIP: Meaning up the dock?

WITNESS: Up the dock.

DEFENCE ATTORNEY:

Q: Why you never look up there?

"A: What you say?

Q: Why didn't you look up there, Mr. Campbell?

A: I didn't look up there. I has to peep to look up there.

Q: Why you didn't peep up there before?

A: I peep up there after yes.

Q: After you came back down here?

A: Yes.

Q: You were invited to go back down and then you peep up there?

A: Yes.

Q: I am asking you why you didn't peep; why you didn't peep while you were going down the first time?

A: No reason; because I believe it was Government people up there. I believe it was a police too.

Q: So is when you came back down here you go back and look and you see it wasn't a policeman?

A: That was the said man that was in the shooting.

Q: But when you passed and looked you saw him and you thought him was a policeman?

A: I saw the policeman before but I thought a next policeman sit beside him.

Q: The person you thought was a next policeman, did you look at him?

A: Yes.

Q: And you thought him was a policeman?

A: When I come back I saw the policeman.

Q: Just a minute, Mr. Campbell, when you went down there and you say you look you thought the other one was a policeman. You looked at him?

A: I looked at him.

Q: And you thought him was a policeman.

A: Yes.

Q: And you came back down to the front; isn't that correct, sir?

A: Yes.

Q: Up to that point in time as far as you know you had not seen the man?

A: (no answer)

Q: Up to that point when you had come back down as far as you were aware you had not seen the man? "

"A: (no answer)."

In the light of this cross-examination his explanation seems unacceptable as he had earlier twice pointed out the Registrar of the Court notwithstanding the duties that officer had been performing and, as I apprehend, his being suitably garbed. Further, it was not that he was merely uncertain or failed to identify the accused but he made a positive error in pointing out some other person.

Unlike the case of Maloney Gordon there was no independent evidence as to the presence of the accused at the scene of the crime. The evidence of the police officers merely confirmatory of the alleged recognition of the accused while in police custody. This will be more fully dealt with later.

It is unarguable that identification by a witness of a suspect at an identification parade is the ideal situation. The witness' ability to recognise the accused upon an occasion subsequent to the event has thereby been well and truly tested. Identification by confrontation nevertheless is admissible and its probative value must perforce depend on the circumstances under which the identification was made including whether or not it was voluntary and spontaneous. This Court has had in a number of cases to consider the probative value of such identification and the commendable approach is as stated in R. v. Trevor Dennis 12 J.L.R. p. 249 where the appellant was apprehended some 20 - 25 chains from the house in which he had allegedly committed the robbery. He was seen in the house for 10 - 15 minutes and was arrested within ½ hour of leaving the house. He was taken back there and identified by the complainant who had earlier given his description to the police. It was held -

> "that identification on parade was the ideal way of identifying a suspect but it was not the only satisfactory way as the particular circumstances of a case may well dictate otherwise; having regard to the element of time and distance between the offence, the description to the police, the apprehension and identification of the applicant no valid ground existed for holding that the identification of the applicant was improper."

This headnote was quoted with approval in R. v. Haughton & Ricketts (unreported) S. Ct. Cr. Appeal Nos. 122-3 of 1980 delivered May 27, 1982, as accurately reflecting the law on this point. In that regard Carey, J.A. who delivered the judgment of the court said:-

> "Where a criminal case rests on the visual identification of an accused by witnesses, their evidence should be viewed with caution and this is especilly so, where there is no evidence of prior knowledge of the accused before the incident. "

Against that background the question in the instant case is: How credit-worthy is the witness Thomas Campbell? At the conclusion of the "comedy of errors" the following transpired:

> "Cross Examination of Mr. Thomas Campbell by Mr. Johnson (Defence Attorney)
>
> Q: Mr. Campbell, let us be quite frank, you didn't know these two men before the incident took place that day?
>
> A: No, sir.
>
> Q: And you really are not sure of the men that you saw?
>
> A: Is true, sir. "

These answers to the attorney's simple questions seem clear and unambiguous. However, let it be assumed in his favour that being a person of limited education he was merely reaffirming that he was unable to say what part the appellant played in the incident. He admitted that after he had made the identification at the car Corporal Benjamin spoke to him but he maintained that at no time did he ever tell the police what part the appellant played. If as he said he saw the shooting, why was he unable to say whether the appellant was the man with the gun or the man standing by? His excuse was: "I was so frighten I couldn't make them out different." This would be understandable were he involved in the action but he saw it from the comparative safety of the toilet; it would be credible if there was a melee of many men and swift kaleidoscopic action, if both men had guns, if they were playing the same role, if they looked or dressed alike.

His explanation is clearly untenable in the light of the following:

"HIS LORDSHIP: Tell me something, the other man you see, suppose that man was to come here now and - or you walk on the street and you see a man walking, you think you would be able to remember him to say this is the other man?

WITNESS: No sir; he was the one next to the doorway; the back doorway.

HIS LORDSHIP: The back doorway; so you would not be in a position if you had seen the other man that very day you would not have been able to mek him out as one of them?

WITNESS: Yes; yes. "

Ignoring for the moment, the inexplicable vacillation, it is clear that he was able in his mind's eye to place the other man at some time in a particular position yet surprisingly he was unable to say who had the gun. What reliance could be placed on such a witness as the transcript depicts? It is against this portrayal that his purported identification by confrontation should be assessed. In the car described by him as a police radio car, were three policemen in plain clothes including the one sitting at the back with the accused. In the light of his appearance as described by Benjamin and being from a station in life apparently different from the police officers even a person as obtuse as the witness may be said to be, by a process of elimination could deduce the appellant was the person in custody and by auto-suggestion conclude that he was one of the persons involved in the shooting and the police had promptly caught the right man. His admission to the trial judge that his eyesight was "not so wonderful" must be taken as an outstanding example of litotes, a figure of speech which may not be known by name to many but finds expression in the every day speech of the ordinary man in the street.

Accordingly notwithstanding the physical circumstances which he described including the time of the day and his proximity to the incident, the transcript depicts a man so manifestly uncertain and unreliable that in our opinion no just and true verdict could

reasonably rests upon his evidence.

For these reasons the appeal is allowed, the conviction quashed and a judgment and verdict of acquittal entered.