JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 106, 104, 107 & 105/83

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE ROSS, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A.

REGINA

VS.

CALVIN MATTIE
ANTHONY ASHWOOD
ANTHONY GRUBER
FITZROY WILLIAMS

Enoch Blake for Mattie

Anthony Spaulding & Miss A. Haughton for Ashwood

K. D. Knight for Gruber

Dennis Daley & L. Green for Williams

Kent Pantry for Crown

NOTE OF JUDGMENT

CAREY, J.A.:

The applications for leave to appeal convictions for the murder of Leopold Smith were heard on 6th November, 1985 when an oral judgment was delivered refusing all the applications. At that hearing, Mr. Dennis Daley who appeared on behalf of Fitzroy Williams intimated that he had nothing to say in support of the application. Mr. Enoch Blake took a short point on behalf of Mattie, viz., that the trial judge's directions as to duress were inadequate. Mr. Knight, on

behalf of Gruber contended that the trial judge had given no warning as required in R. v. Whylie 15 J.L.R. 163 nor had he pointed out the strengths and weaknesses of the Crown's case. Miss Haughton for Ashwood adopted the strictures of Mr. Knight with respect to the directions relating to identification.

Shortly stated, the Crown's case depended, but for one of the applicants, on visual identification evidence of two witnesses, Harold Smith and Maxine Dias. The exception was Calvin Mattie who was captured on the scene of the crime. The circumstances were these: In the early morning of 6th June, 1982, five men, four of whom were identified as these applicants, staged what can only be described as a terrorist-type raid on premises 23 York Street where the slain man Leopold Smith lived with his wife, his son and live-in girlfriend, and their infant child. The raiders were all armed with firearms, two of them identified as Ashwood and Gruber were furnished with assault rifles, viz., the M16, a weapon used by United States forces in the Vietnam campaign. One of their number, Williams, climbed the light-post outside the premises and cut the telephone wires. Mattie eventually entered the house after efforts were made to break in doors and windows on the house. Unfortunately for him, he was rendered hors de combat by Mrs. Smith who hit him in his head with a hammer. The pistol which he had in his possession was then removed from his hand. It was not produced at trial because no one was able, satisfactorily, to explain its absence. Certainly, it was never handed over to the police. During the course of a struggle between Mattie and Harold Smith in the house at a time when Mattie felt he was being bested and requested help from his fellows, a fusillade of shots was discharged

into the house. When it died down, Harold Smith and Mrs. Laurel Smith were injured. Leopold Smith was dead. He had been shot through the chest. A number of M16 expended rounds were retrieved by the police.

The defence, as appears from the unsworn statements of the applicants, save Mattie, was an alibi. Mattie's defence was duress. He said he was forced to go into the house by four men who were not previously known to him.

We can now examine the identification evidence which was adduced in the case against these applicants. This Court is at somewhat of a disadvantage in fully assessing one aspect, in particular, of this evidence. In giving evidence of distance, witnesses referred to points in the court room in relation to the witness-box. Although we are ourselves familiar with Court 1 (now renamed the Chief Justice's Court) we do not presume familiarity with location of benches or seats in that Court. We apprehend, however, that the jury being present would appreciate that evidence.

Harold Smith and his lady, Maxine Dias, both said they observed these applicants enter the premises across a little footbridge. There were two external lights on the premises and as well, a street light immediately in front of the house and one chain away. Smith knew them for periods of four to six years and played football with them all. The distance at which these men were observed was actually indicated to the jury in the courtroom. From the back of that courtroom to the witness-box is, in our estimate, about a chain. They approached to some nearer point of which we have no knowledge. The time given for observation was one and a half minutes, hardly a protracted period but neither a "fleeting glance".

Mr. Knight said that the learned trial judge did

not warn the jury of the dangers inherent in visual identification. The learned trial judge at pages 354-357 dealt with the matter in this way:

> "Perhaps I better tell you about identification first because that is all-important in this case. Remember these witnesses, two of them, said they saw these accused men plus Crashie for at least a minute-and-a-half. One of them says that the first time they were seeing them were some fifteen yards away from the window through which they were looking.
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> I believe it is learned counsel, Mr. Green who was submitting before you yesterday that they did not have time, sufficient opportunity to properly identify these men. You will have to be satisfied where the question of identity arises that there was sufficient opportunity for the person being identified to be seen by the person doing the identifying, so that a sufficient impression of the features of the person being identified is made on the mind that that person would be able to recall with certainty afterwards that the person he saw and she saw was these accused persons. You have to be satisfied there was sufficient opportunity before you can say the witness' evidence is reliable where the question of identity is in issue. And, it doesn't matter, Madam Foreman and members of the jury, that these accused persons were known for some years, if you believe them, it doesn't matter because you can know a person for years and yet you can mix them up for somebody else. Just because you happen to know them beforehand for some years, that does not say that the identification is all right; you have to examine it. You might well think that if a person sees another person whom he knows before, it is easier for that person to be able to say that the person he saw was so and so than if he had never seen him before in his life because he knows him; he sees him and at just a fleeting glance was sufficient for him to say that he was so and so. But, even if the person was well-known mistakes can be made. That is why a person has to be careful. How long was he seen?

> "One and a half minutes, if you believe them, at least. What position were they seen? Was his face seen so that it could afterwards be recalled? How far would it be? Was he sufficiently close so that his features could be seen?
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> Remember Mr. Green told you yesterday how when they were beating off dogs with long guns if they had to bend down to do that because it was short, mongrel dogs, it seems, not the big thoroughbred. Well, I didn't notice the witness but Mr. Green said that while the witness was giving his evidence he said that they didn't have to bend down yet the witness himself was slightly bent. I didn't see that but if learned counsel say that, of course I accept. So, if they did bend down, would that affect the identification, bearing in mind that it was only the faces they were going by? One witness actually said that he didn't want to look at the clothes because clothes would change; face couldn't. So, that is what you must consider: whether there was a sufficient opportunity for the features to be impressed on the mind's eye, as it is called, sufficiently so that Smith and the lady have come now and said that it was so and so. You have to deliberate a lot on that, Madam Foreman and members of the jury, because that is the first hurdle that you are going to come to when you are deliberating on your verdict. And, you cannot jump over it. If you cannot surmount it, then you must find all of these accused not guilty."

The jury by these directions were being alerted to the dangers of mistaken identity and being cautioned to examine the evidence with care. We are not in the least doubt that counsel who appeared at the trial would have focussed the attention of the jury wholly on this issue. These directions were clearly stated and adequate to bring home to the jury the onus on the prosecution to prove the identity of the persons who participated in that early morning raid beyond reasonable doubt. In our view, the trial judge was clearly aware of the factors which he was required to bring to the

attention of the jury in accordance with a decision of this Court, viz., R. v. Whylie 15 J.L.R. 163.

It was further said that the trial judge did not itemize the weaknesses or strengths of the identification case. But he did advert to the discrepancies in the evidence of the two witnesses who gave visual identification. See page 379 where the learned trial judge was more than kind to the applicants:

> "But, if she knew them all before, why had she to concentrate on the faces? You see, this is an important witness because this is one of the two who is purporting to identify these men, three men. You have to examine what she says carefully, weigh it and see if it makes sense. So, Mr. Spaulding asked if she happen to see anything else; she said yes, she saw the flowers and she saw the trees. No wonder, because she seem to be concentrating on faces only. She says that the window that was broken out she had fixed the glass over and burglar-barred it and she had put blades at the top, clear blades but the other six are all frosted. And, on that night they were not all frosted, she said. She couldn't tell if it is the second top was plain then. She has been living there for four years and she used to go and look for Harold Smith regularly before she went to live, presumably with him and not every one at the top was frosted; she cannot tell how many were frosted; she doesn't agree that all were frosted; some were plain, some were frosted. That wouldn't matter to her so much because she opened the window and look out. She probably was setting the stage for Harold but Harold gave evidence before about this matter: 'When I stand before the window the two plains are above me' - the two plain ones, he means. When Harold stands in front of it, the two plains are above his face - the two plain ones are now there.
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> So, I don't know... If you accept all this, then Harold couldn't see through because it is all frosted. She said, 'I opened the window to

> "look outside; I can't remember if four below were frosted and four above were frosted on that night, I do not remember how many on the upper part were plain and how many were frosted'."

The applicant Mattie put forward duress as a defence. It is not necessary to consider whether as a principal in the second degree, that defence was open to the applicant, for the trial judge told the jury that if they accepted what he said in his defence or they were in doubt about it, they should acquit him. We are at a loss then, to appreciate what further explanation could be offered to the jury by the judge. We were not persuaded there was any merit in this point.

The crucial question for the jury was visual identification in regard to all the applicants save Mattie. That issue was clearly and adequately put to the jury. This was a "recognition case" where the jury plainly accepted Harold Smith and Maxine Dias as witnesses of truth despite some hyperbole on the part of Smith, viz., shooting Mattie in his mouth and no injury later found. They were entitled, on the evidence, to return the verdict in fact returned. As to Mattie, his defence was hardly likely to achieve success.

In our view, the jury came to a correct verdict and further we were not persuaded that the trial judge's directions either as to identification evidence or duress were otherwise than adequate.