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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 169 OF 1981

BEFORE: THE HONOURABLE MR. JUSTICE KERR, J.A.
THE HONOURABLE MR. JUSTICE CAREY, J.A.
THE HONOURABLE MR. JUSTICE WHITE, J.A.

REGINA v. CARLTON LINTON

Ferdinand Johnson for applicant.
Howard Cooke and Mrs. Carol Lawrence-Beswick for Crown.

April 21; January 16, 1984

CAREY, J.A.:

On 21st April, last, when we dismissed this appeal, having treated the hearing of the application for leave to appeal as the hearing of the appeal itself, we undertook to provide our reasons. We now do so, and express our profound regret at the delay.

The applicant was convicted on 17th November, 1981 in the Home Circuit Court Division of the Gun Court, before Morgan, J., and a jury, on an indictment which averred that "Carlton Linton on the 2nd day of July in the parish of "Clarendon, murdered Simeon Jackson" and sentence of death was accordingly passed. It will be necessary to set out the facts of the case in some detail because one of the grounds of appeal challenges the verdict of the jury on the footing that it was unreasonable having regard to the evidence.

The deceased who was a security guard at the Vere Technical High School in Clarendon was shot to death by one or more of three gun men who invaded the school premises on the morning of 2nd July, 1979. They all made their escape into an adjoining canefield. The appellant, it was alleged, was one of the three gun men. His defence was that the main Crown witness had falsely accused him of this crime because

of malice.

Mr. Jackson arrived on the school premises to take up his duties just before 7:00 a.m., collected his key, and went off to the guard-house which is situated by the entrance to the school. Within five minutes of his going in, two men were seen to walk through the gate, one positioned himself at a window in the guard-house, while the other went to the door. Two gun shots were heard from the direction of the guard-house and thereafter the same two men escaped into a canefield. At about this time, Wilby Barrett, a district constable, who is also employed at the school, was driving his car towards the school on the main road between Lionel Town and Hayes. As he approached, he noticed three men running from the entrance to the school towards him. They came within three yards of his car which had sharply reduced its speed. Among them was the appellant whom he knew for a considerable time before this incident and he had a gun stuck in his waist. Another of them also had a gun in his waist. They ran to his right and into a canefield. When Barrett reached the guard-house, he saw Jackson lying dead.

The medical evidence showed that he had been shot twice, once through the left chest and once in the region of the right lower jaw. Both injuries were inflicted from close range. A bullet was removed from one of the injuries and handed to the police. It was shown to have been fired from a pistol recovered subsequently from one of the men seen by Wilby Barrett fleeing the scene shortly after the murder. This man was shot on the 4th July, 1979, in an exchange of gunfire with a police patrol, who had gone out in search of them. According to the evidence, this man was seen in the company of the appellant and another man but they escaped capture. The other man was shot, on the 3rd July, in another shooting incident with the police. Both incidents took place within a radius of five miles from the school, and the appellant on both occasions escaped arrest. It was not

until 9th November, 1979, that the appellant was arrested. He denied any involvement in the murder of Simeon Jackson.

Mr. Ferdinand Johnson, who appeared before us, and it is right to point out, did not appear at the trial, argued a number of grounds. He complained first that the verdict of the jury was manifestly unreasonable and could not be supported by the evidence. He drew our attention to R. v. Nugent and Hughes [1974] 12 J.L.R. 1355 as supporting the view that this court had power to allow an appeal where the verdict was not so much unreasonable as unsafe. We think it would be helpful if we made some observations on this case which is cited with some frequency in this court.

It is sufficient, so far as the facts in that case go, merely to indicate that the appellants were convicted of robbery with aggravation. The victim, and indeed the sole eye-witness, had been relieved of $8.35 by these appellants and another man who apparently did not challenge the jury's verdict. The Court (Luckoo, Fox and Edun, JJA) held that on the vital issue of identification, the evidence of the complainant was so gravely and successfully impeached that the verdict could not be allowed to stand. A careful reading of the judgment of the court, does not, we think, justify the view that this court was laying down the proposition contended for by learned counsel. This court, speaking through Edun, J.A., said this at p. 1358:

"Here in Jamaica, and in many of the West Indian "territories, judges to whom we accord high respect, have, "in many appeals quashed convictions on the ground that they "were 'unsafe' and/or 'unsatisfactory'. But in those cases "it may well be said that the conclusions were based upon a "consideration of the evidence and not upon the reaction "produced by the general feel of the case as experienced by "the court. Here, in their earnest desire to avoid a mis- "carriage of justice, judges, in their experience, have, in "effect, determined, as in England, that the word 'unreasonable',

"in the context of their powers under the criminal appeal Laws, "carried the same meaning as the words 'unsafe' and/or " 'unsatisfactory'. If the new meaning of the words 'unsafe' "and/or 'unsatisfactory' is the reaction which may not be based "strictly on evidence but on the general feel of the case as "experienced by the court, legislative sanction must be accorded "the judges here. We will go on to state that, having regard "to the extended meaning of 'unreasonable' to include the words " 'unsafe' and/or 'unsatisfactory', Parliament must make it quite "clear, in any amendment, that in certain cases, on questions of "fact, three judges of the Court of Appeal can substitute their "experience for a trial by jury. Until then, the criminal "division of the Court of Appeal can yield to their reaction by "the feel of the case only when an examination of the evidence "justifies the quashing of a conviction. This court cannot "re-try cases on paper. Though the words 'unsafe' and/or " 'unsatisfactory' have been interpreted to mean the reaction "produced by the general feel of the case in R. v. Sean Cooper "(1), and though the criminal divisions of Courts of Appeal in "the West Indies have, without legislative sanction, quashed "convictions, and, in their conclusions, used the words 'unsafe' "and/or 'unsatisfactory', it is too dangerous a precedent to "allow an appeal against conviction merely by the general feel "of the case as experienced by the courts. Such a precedent "would in effect substitute a trial by three judges for a trial "by jury and encourage frivolous appeals."

The court was at pains to point out that while it was perfectly true that convictions have been quashed in other Commonwealth Caribbean countries on the basis that the verdict was unsafe or unsatisfactory, this court would not allow an appeal based on the emotional reaction of individual members of the court to the facts appearing in a transcript. So long as section 13(1) of the Judicature (Appellate Jurisdiction) Act was extant, then the view that the verdict is unsafe or unsatisfactory, based upon the "lurking doubt theory,"

cannot constitute a proper foundation for concluding that an appeal should be allowed. To put the matter beyond doubt, the court plainly indicated its role and function where the ground relied on was that the verdict was unreasonable: "we are in "duty bound to examine the evidence in the case before us and "to arrive at our conclusion on a consideration thereof." per Edun, J.A. in R. v. Nugent & Hughes (supra) at p. 1358.

One further observation, may we think, be usefully made. An appeal to this court on facts is not a substitution for the trial below. We are firmly of opinion that the above citation is a correct expression of the law and the proper approach by this court to a ground of appeal that the verdict "is unreasonable or "cannot be supported having regard to the evidence." [See 13(1) Judicature (Appellate Jurisdiction) Act.]

Learned counsel in dealing with the facts pointed to conflicting evidence between two of the principal witnesses called on behalf of the prosecution, viz., Wilby Barrett and Roy Morgan. He argued that if the jury accepted Morgan's narrative of the events, then Barrett could not have seen what he recounted. Morgan had given evidence that after the shooting, he had fetched the school van, found the driver and both left for the Hayes Police Station. As they went through the gate, he had seen Wilby Barrett approaching some 10 chains away from the school gate. Barrett's account was that he had seen three men running away from the school when he was eight chains away. As the argument ran, the men who had been seen leaving the premises would have long gone before Barrett could have seen them.

It was further argued that if Morgan's version were accepted, then the Crown had no case because he referred to two men running away after the shooting and neither of these was identified as the appellant. Moreover, it was said, if Morgan's testimony were rejected and Barrett's accepted, then the evidence of the latter would not link the appellant with the crime. Barrett's evidence was that he saw three men running from direction of gate and he saw objects looking like guns in

the waist of the men. There was no evidence to show the role of each man in the murder which occurred that morning. The fact that the appellant was seen running from the scene did not involve the inevitable conclusion that he also had the intention to kill.

The question for the jury was, firstly, whether they would accept the account given by these witnesses. The fact that one saw two men while the other saw three men, did not in our view demonstrate an irreconcilable conflict. The witness Morgan was positioned inside the premises of the school and was attracted to two men who entered and eventually made off, after the shooting. Barrett was on the main road approaching the school and he saw three men running away from the direction of the school compound.

The next question would be, having accepted Barrett as a witness of truth, did he have a fair opportunity to recognise the appellant as he approached the car and ran off into the canefield? We are quite unable to accept that in considering the evidence given by these two wintesses, the jury were faced with accepting the evidence of one rather than of the other. In our view, their evidence was complementary to each other. Seen in this way, it was open to the jury to conclude that while two men were involved in the actual shooting of Simeon Jackson, the appellant must have been a look-out man outside the compound. The suggested motive for the killing was to obtain the pistol with which Simeon Jackson was armed. After the shooting, no one saw the pistol on the deceased's person. There really was no evidence that on that morning, Mr. Jackson was in fact armed, but in the normal course of things, he would have been, because that was his habit. The common enterprise on which all three men had embarked was the seizure of the guard's pistol, by violent means. In those circumstances, it mattered not who fired the fatal shot, once it was accepted that all three men that morning were acting in concert.

It must also be bourne in mind that on subsequent days

after the fatal shooting of the guard, the appellant was seen in the company of the two men who were shot by police officers in an endeavour to arrest them. On both occasions, the police were fired at. It must be plain that the three men were intent as well as resisting their lawful apprehension by violent means, It is not correct to suggest, as Mr. Johnson endeavoured to do, that the fact of the appellant precipitately fleeing the scene of the crime was the only evidence from which the jury were entitled to draw the inference that he too was particeps criminis in the murder of Simeon Jackson. The jury was entitled to look at the conduct of the appellant both at and after the crime. We are inclined to think that those associated in the crime would do all that would be necessary to escape their lawful apprehension, and as the evidence makes plain, those men seen in the company of the appellant did fire at the police officers sent to effect their capture.

There was also some faint challenge regarding the evidence of identification of the appellant by Wilby Barrett. Learned counsel pointed to the speed at which Barrett's car travelled as he approached the appellant and the fact that Barrett only had a fleeting glance not only of the appellant but at the two men with him. As to those two other men, counsel conceded that the evidence of their identification after they had been shot, albeit admissible, was of negligible probative value.

We do not accept this to be valid. The jury was entitled to accept that Mr. Barrett who had seen these two men approaching his car over an appreciable distance, who came within three yards of his car then travelling at a speed of 15 miles per hour would have had ample opportunity to make out their features, so as to be able to identify one within a day, and within two days as regards the others. In all these circumstances, we are not persuaded that the verdict was unreasonable and could not be supported having regard to the evidence.

Another ground questioned the learned trial judge's admitting in evidence the events of 3rd and 4th July, 1979, on the footing that that evidence had no nexus with the murder and was therefore prejudicial to the appellant's case. On each of those days, police officers engaged in apprehending those responsible for the murder which had taken place on 2nd July, shot and killed one man. On each occasion, the appellant was seen in their company but on each occasion eluded capture. These men were identified by Barrett as two of the men he saw fleeing from the scene of the murder with the appellant. The events leading up to their capture was relevant as part of the circumstantial evidence in proof of the case for the prosecution. The men responsible for the crime had made off after it had been accomplished. Their subsequent conduct, i.e. shooting at the police constituted facts which rendered the fact that they had indeed shot the deceased more probable. Unless they had perpetrated some serious crime, it is unlikely they would have acted so rashly as to shoot at armed police officers. We would mention in this connection, the unreported case of R. v. Sutcliffe & Barrett SCCA. 148 and 149 of 1978, delivered 10th April, 1981, which is directly in point.

The final ground of substance argued on behalf of the appellant challenged the learned trial judge's direction on circumstantial evidence. It was said to be inadequate. At p. 243 et seq. the learned trial judge expressed-her self thus:

"Now we have been talking about evidence not always "being able to be provided by persons who actually saw, and so "Madam Foreman and members of the jury, the fact that you have "not got an eye-witness as it were, to the commission of the "offence, does not mean that the offence cannot be proved. A "charge can always be proved from inferences from certain "circumstances and this is called circumstantial evidence.

"You heard Crown Counsel read from Archbold, and she "said it has the precision of mathematics, as you say two plus "two equals four. That is how circumstantial evidence goes.

"It is as valuable in proving a charge as direct evidence or "eye-witness evidence. Circumstantial evidence to prove guilt "of an accused is like this. One witness must prove one thing "another witness prove another thing, then you take them all "together to prove the charge to the extent that you feel sure; "but none of these things taken by itself, separately, will prove "the guilt of an accused person. When you take them all together, they lead to one inevitable conclusion of guilt, and if that is "the result of circumstantial evidence, it is said that it is a "much safer conclusion to come to than if one witness goes into "the witness box and gives direct evidence and say I saw so and "so. So let us go back to the indictment and see if the crown has "proved what it is required to prove."

Mr. Johnson pointed to R. v. Cecil Bailey [1975] 13 JLR 46 as laying down the principle that where the Crown relies on circumstantial evidence in proof of the guilt of an accused, a jury should be directed in accordance with the rule in Hodges's case (1838) 2 Lew. C.C. 227. There is no question but that the learned trial judge did not loyally follow the dictum in R. v. Bailey (supra). But such a failure, as was held in that case, does not inevitably lead to a quashing of a conviction. In the instant case, the learned trial judge after giving directions on circumstantial evidence as indicated above, proceeded to review the evidence for the benefit of the jury with great care and commendable clarity. There was evidence which, as we have earlier recounted, and do not find it necessary to repeat, pointed in one direction and one direction only, and was inconsistent with any other rational conclusion than guilt.

However, it is as well to point out that trial judges are expected to follow the guidelines laid down by this court in their charge to the jury, as we feel it will preclude grounds of appeal of this type. In a recent decision of this court, in R. v. Lloyd Barrett (unreported) S.C.C.A. 151 of 1982, delivered November 4, 1983, this court pointed out that:

"The weight of authority beginning with R. v. Clarice "Elliot 6 J.L.R. 173; R. v. Elijah Murray 6 J.L.R. 256; "R. v. Burns and Holgate 11 W.I.R. 110 and R. v. Cecil Bailey "(supra) is that where the case for the prosecution depends on "circumstantial evidence, the judge should make it clear to the "jury that not only must the evidence point in one direction "only, and that being guilt, it must be inconsistent with any "other conclusion. The approach in this country is not the same "as in England."

We are of the opinion that in the circumstances of this case, what was said by the trial judge was adequate to make it plain to the jury that all the facts must point to one conclusion and that being the guilt of the accused. The facts could not fall short or lead elsewhere.

It was for all these reasons that we came to the conclusion, which we expressed in our decision last April, viz., that the appeal should be dismissed.