

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 39/83

BEFORE: The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice Carberry, J.A.
The Hon. Mr. Justice White, J.A.

REGINA V CLIFTON WRIGHT

Mr. Delroy Chuck for the applicant

Miss J. Strawe for the Crown

11th July & 24th September, 1986

CARBERRY, J.A.:

The applicant was convicted in the Home Circuit Court, Kingston, on the 29th March, 1983, before Parnell, J., and a jury for the murder of Louis McDonald on the 28th August, 1981.

He had been jointly charged with one Winston Phillips; the trial lasted some nine days, at the end of which the applicant was convicted of the capital charge, but the jury failed to agree with respect to the co-accused, who was ordered to be retried.

Before us a single ground of appeal was argued.

It reads:

"That the direction of the learned trial judge on the issue of identification was inadequate and he failed to make it abundantly clear that the identity of the applicant was a matter of paramount importance."

At the end of the argument, without calling upon the Crown, we treated the application for leave to appeal as the hearing of

the appeal and we dismissed the appeal and affirmed the conviction and sentence.

We promised then to give reasons for our decision and do so now.

For reasons which will become apparent later on, this was in fact one of the strongest cases against an accused that we have seen, and yet one in which certain aspects of the police investigation were open to criticism and showed a need for improvement.

The events with which we are concerned took place over the week end of 28th August, 1981.

The deceased, Mr. Louis McDonald, was an electrician employed at the Telephone Company of Jamaica. He had been married for some 10 years, with two children, and he and his wife, Mrs. Charmaine McDonald, lived in their house at Passage Fort, a recently built-up area in Southern St. Catherine, overlooking Kingston Harbour from the west. There are a number of other contiguous areas also of recently built housing schemes: in general they border on Gregory Park and are usually reached by traversing the recently built Causeway which connects the area with the city of Kingston.

The deceased was the owner of a yellow Cortina motor car, the licence number of which was F R 0296. He must have had it for some time, as it was well known to his friends and colleagues.

On Friday 28th August, 1981, he took his wife and children to do their weekend shopping. This was the last occasion on which his wife saw him alive. He did not return home that evening from work, and on the Saturday morning his worried wife reported to the Waterford Police station which served that area that he was missing. She also seems to have made similar reports to neighbours, friends and his colleagues.

On the afternoon of Saturday 29th August, 1981, Mr. Eric McIntosh, an electrician, a colleague of the deceased, who worked with him at the Telephone Company and had known him from school days, received the news of his friend's disappearance, called at his home and spoke to Mrs. McDonald, went to see another friend in an adjoining area (Edgewater), and drove along in the area to see whether he could by chance see his friend's car. Approaching the Causeway, he suddenly saw the missing car coming towards him from the opposite direction. In it were two men and a woman.

He recognized the car, but not the occupants. He turned round and began to follow it. The car turned into Waterford (another housing scheme in the same area). While following the missing car he met and stopped a police jeep with three plainclothes policemen in it. He quickly explained what was happening, and was instructed to keep on following the missing car, and they would follow him.

McIntosh did so, and found that the car had parked at a house in the Waterford area. He parked some distance away. The police car drove up and parked nearby.

As they watched the house and the missing car, the applicant Wright came out of the house, went to the car, retrieved a package, and re-entered the house.

The police party, headed by Detective Corporal Burrell of the Flying Squad who had been on mobile patrol in the area, now moved in. They entered the house to find the housewife, her maid (the girl in the car) and the two accused men, the applicant Clifton Wright and the co-accused Winston Phillips.

Detective Corporal Burrell demanded to know where the two men ^{had} got the car from.

Clifton Wright, who had been driving it, remained silent. Phillips, who had been the second man in the car, replied, untruthfully, that he had just come there by bus.

The police did not accept this explanation: at that stage they had a report of a stolen car. They "frisked" the two men for weapons, and recovered from Wright a red pocket knife which he had in a black pouch attached to his waist belt, and also a bunch of keys.

Detective Corporal Burrell then detained the two men and took them in the missing car to the Waterford Police Station. There they were handed over to the station guard, and the mobile police returned to the house to interview the women to see if they could get any further information, returning to the station eventually.

Mr. McIntosh had, of course, been an interested spectator of these events. Either he, or the Waterford Police got in touch with Mrs. McDonald to report that her husband's car had been found, and she was asked to come to the station. She did so.

At the station the two suspects were searched by Detective Acting Corporal O'Neil who had taken them into custody, with the items taken from Wright.

From the applicant Wright the search at the station produced a gold chain with a "bunny" pendant, a Damas wrist watch, a gold ring with a purple stone (amethyst?) and a wallet containing two gold ear rings, and some \$40.00.

From the co-accused Phillips was taken a gold chain with a pendant depicting a man and woman in a sexual position, together with a brown leather wallet with an identification card in it belonging to the missing man, Mr. Louis McDonald.

When she arrived at the station Mrs. McDonald saw her husband's car. On entering she saw the two accused, and

on the counter she saw and recognized her husband's jewellery. They were not only exotic or unusual, they were distinctive and many of them had been hand made for him by a friend who was a jeweller. All of these items were later identified by Mrs. McDonald.

The Waterford police had had from her a report of a missing man. The mobile police had brought in to them a car said to belong to the missing man, and two men, the applicant Wright who had been driving it, and the co-accused Phillips. They had been searched as a matter of course before Mrs. McDonald arrived. When she arrived and identified not only the car but her husband's jewellery, his identification card, switch keys etc. things began to take ^{on} a very different appearance. At this stage there is a conflict of evidence. The two accused claimed that they had been "roughed" up by the police when they were first accosted at the house where they had parked. They claimed that they were again and more drastically beaten at the station. The police version is that while they may have been "cuffed" originally when being detained when the car was seized, at the station when Mrs. McDonald identified her husband's jewellery word spread quickly, a crowd gathered and set upon the two men and the police had such difficulty in protecting them that they had to seek aid from another nearby station, and eventually moved them to Spanish Town. There they received medical treatment and Phillips had to be taken to the hospital where he was admitted. Nothing eventually turned on this conflict: no allegation was made of any confession having been made or the like.

It was now however clear that something serious must have happened to the missing man.

On Sunday 30th August the body of the missing man was discovered in a canefield in the Gregory Park area, about

half a mile from Christian Pen nearby. The body was identified by Mrs. McDonald, and the post mortem examination showed that death had been due to a gunshot wound in the chest, shock and haemorrhage.

The area involved is small and densely populated. Some few days after ^{the} recovery of the body the police received further information concerning the experience that one of its residents had had on the Friday evening and had recounted to friends in the district bar. As a result they interviewed Mr. Sylvester Cole.

Mr. Cole's story was that on the fateful Friday evening, towards dusk, he had been waiting for a lift at the intersection of the Gregory Park Road and the Spanish Town Road. Two other men had been waiting there also. He did not know either before. They stopped a car passing by, and sought a lift, and he too approached the car and got a lift to Christian Pen. He identified the applicant Wright, the tall man, as one of the two men, and said that Wright sat in the front beside the driver. When Mr. Cole got out the car at Christian Pen, the second man who was in the back with him got out too, and appeared to be standing in the middle of the road looking up and down. Mr. Cole then heard "a hard talking" in the car, and saw that the man sitting in the front was shaking the driver vigorously with his left hand and had a gun in his right hand pointed at the driver's neck. He realized that he was witnessing a "hold-up" and he made his escape from the scene, walking away quietly at first and then running when he had got a chain or so away. He ran to where there were some shops nearby and made an alarm. He then saw the car drive off in the direction of Gregory Park, turning off the headlights. He had then sought relief from this unnerving experience in the nearby bar.

The police investigating what had now turned into a murder case took Mr. Cole to Waterford police station where he was shown the yellow Cortina belonging to the deceased, and made a statement. It is not clear whether he identified or was able to identify the car. He was next taken to the Spanish Town Police Station, where the applicant Wright was brought out for inspection. (Phillips was then in the hospital). He there identified Wright as the tall man who had pulled the gun and held up the car driver. He states that a number of other prisoners were taken out of the cells beside Wright, and that he picked Wright out from them.

This was in no sense an identification parade, but if true did provide some test of identification. The defence argued that this was in fact a contrived confrontation between witness and prisoner alone. This court has from time to time indicated in the strongest possible terms disapproval of confrontations between witness and suspect and urged the necessity of having an identification parade, properly conducted, in this type of situation. The failure to have one has two results: it deprives an accused person of the benefit of having the witnesses' identification properly tested before trial, and it reduces very significantly the value that may be attached to any identification made. Pressed as to why no identification parade was held, the police conducting the investigation said that because of the exposure that had taken place when a mob of people from the area had attacked the Waterford Police Station on the Saturday night, and when the accused had been taken on remand before the Resident Magistrate at Spanish Town Court on the Monday, they thought that a parade was unnecessary or would be suspect. There is nothing to suggest that Mr. Cole was present on either occasion. He was an elderly gentleman of 55, employed as a watchman, and appears to have given his evidence

in a convincing manner. He was unable to identify the accused Phillips as being the second man in the car on the Friday evening; though he had travelled in the back with the second man for some two miles he had taken no note of him save that he was shorter than the man with the gun who had sat in the front beside the driver, and whom he identified as the applicant Wright.

Cole was not interviewed by the police until some six days after the events of that week end, by which time Mr. McDonald had probably been already buried, but the police should prudently have made some efforts to have the witness identify the deceased. For example his widow may have had some photographs of her husband that might have been so used.

The accused had already been arrested and charged for the murder of Louis McDonald before the investigating police had heard of and interviewed Mr. Cole. On arrest Wright made no statement, while Phillips replied that he knew nothing about it.

The applicant Wright was content to make an unsworn statement from the dock. He stated that on Saturday the 29th August, 1981, his girlfriend had asked for a lift back to her work place, and that he had borrowed the car, the yellow Cortina, from a friend, and driven her over to Waterford. That on the way over he had met Phillips whom he knew and had given him a drive. He stated that while he was parked by the house at which his girl friend worked as a maid, the police had come and arrested and beaten him, and had taken him to Waterford where he had been further beaten until he was unconscious. He was a battery repair man, and on the fateful Friday night had been working at the gas station to which he was attached, at the intersection of Molyne's Road and the Washington Boulevard. He knew nothing about the death of the deceased, and denied

that any of the deceased's property had been found on him. He did not reveal from whom he had borrowed the car, nor did he call any witnesses in support of his alibi.

The co-accused Winston Phillips elected to give sworn evidence on his own behalf. He offered a detailed account of his movements on Friday the 28th August, and as to the Saturday stated that while walking on the road he had met Wright, whom he knew before, driving a car with a young lady in it, and hearing they were on an outing to Waterford had begged a drive. Wright had dropped the young lady and invited him into the house. He had been there when the police came in and accosted him and Wright, beat them, and took them to the Waterford Station where they were further beaten into unconsciousness and he had had to be taken to the Spanish Town hospital. He denied telling the police that he had come to Waterford by bus, and he denied that any of the deceased's jewellery or the wallet with the I.D. Card had been found on him. He and Wright played on the same football team, and he did not know where Wright had got the car from. He did not know if it belonged to Wright, and it was the first time he had seen him in this particular car. He offered no evidence to support his alibi for Friday night, and after some delay closed his case when the Doctor who treated him in the hospital for his injuries failed to attend court on his behalf.

The evidence was summed up at some length by Parnell J in that judge's own inimitable style. He did leave clearly to the jury (at page 379) the question of whether Mr. Cole had sufficient opportunity to make out either of the two men who had got a lift with him, or to remember any of them. There is no doubt that he did highlight the importance of identifying the two accused as being the two men mentioned by Cole, but it is clear that in doing so he did not employ the formula or approach

which this Court has indicated should be used by trial judges as in Oliver Whyllie [1978] 25 W.I.R. 430, [1978] 15 J.L.R. 163, and more recently in the recent case of Bradley Graham and Randy Lewis, (unreported) S.C. Criminal Appeals 158 & 159/1981 delivered 26th June, 1986. However, this was not a case in which "the evidence for the prosecution connecting the accused to the crime rests wholly or substantially on the visual identification of one or more witnesses". There was an abundance of other evidence; the applicant's possession and driving of the deceased's car on the very afternoon following his disappearance, and his possession and wearing of the personal jewellery of the deceased, and his failure to even suggest any innocent explanation of how he came to be driving that car. The judge discussed with the jury at some length the doctrine of recent possession and also that of common design. It is true that the failure of Cole to identify Phillips as the second man in the car that evening is a factor to be considered. The evidence against him was not as strong as that against Wright. The jury clearly gave the question of whether Phillips was the second man the most anxious consideration. They failed to agree on a verdict with respect to Phillips, but convicted Wright. On the evidence before us there is no reason to interfere with the conviction of the applicant Wright, and there is nothing to suggest that a miscarriage of justice occurred. For these reasons we dismissed the appeal and affirmed the conviction and sentence.