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IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 63/77

BEFORE: The Hon. Mr. Justice Leacroft Robinson, President
The Hon. Mr. Justice Henry, J.A.
The Hon. Mr. Justice Rowe, J.A.(Ag.)

R. v. CONRAD DWYER

Mr. F. Phipps, Q.C. and Miss Donna McIntosh for applicant.

Mr. Henderson Downer and Mr. F. Park for the Crown.

November 28 & 30, 1977

PRESIDENT:

On the 30th November, 1977, having treated the application for leave to appeal herein as the hearing of the appeal, we dismissed the appeal and intimated that we would put our reasons for so doing in writing. This we now do.

On the 23rd March, 1976, at about 9.15 p.m. four men entered a shop at 100 Barbican Road, each with a gun, and staged a hold-up in the course of which the deceased was killed.

Special Constable Raphael Williams was the only eye-witness called by the Crown and if his account of what took place in the shop was believed, then all the four men were clearly guilty of murder and the only other issue in the case was whether the applicant was one of those four men. Special Constable Williams testified that he was. He identified him as being the one who was about 2 yards from where he (Williams) was standing, who was to his right and nearest to the door through which he (witness) had entered

the shop , who was the one who called out when one of his colleagues was engaged in a struggle with the deceased - "Shoot the blood-cloth boy nuh man," and who was the one who opened the door to which he was standing nearest, and through which he (the applicant) and one other of the four men made their escape from the shop.

Special Constable Williams also testified that there was a large drum containing kerosene oil almost behind that door, that on the floor underneath the tap of the drum was a bucket large enough to hold four or six quarts of liquid, that as the applicant was leaving the shop he kicked over and stumbled across the bucket and that kerosene oil which was in that bucket overturned on the applicant's shoe, that the applicant and another man ran across the road towards a motor-cycle that was parked directly across the road in front of the shop with its engine running, that he (Williams) fired a shot in their direction, that he did not know if the shot caught any of those two men but that they then moved away from the motor-cycle and ran westerly along Barbican Road, that the applicant ran into premises 104 Barbican Road; that he (Williams) went across the road to where the bike was parked, switched it off, took out the keys and pushed the bike over to the shop-side of the road; that about 20 minutes to half-an-hour later that night he saw the applicant in a police vehicle that was then parked on the other side of the road in front of the shop, that he recognised him as one of the men who entered the shop with a gun in his hand and that he told Detective Corporal Holness that "this is one of the men who came in the shop a short while ago. "

Cross-examined, Williams said the applicant appeared to him to be the second youngest of the four men who had entered the shop that night, that it was after he had seen the applicant in the jeep that Cpl. Holness came up to where he then was at the front of the jeep whereupon he told Cpl. Holness about the applicant being one of the men, that when he went up to the jeep, he was not expecting to

see anyone in the jeep other than policemen, that it was to the front of the jeep that he went, not to the back; that he did not expect to see any suspect in the jeep; that he was not told to go there and he would see a man in the jeep; that he did not go there specifically because he knew the applicant had been held in the jeep and was in the jeep. He denied suggestions by counsel for the applicant that Det. Cpl. Holness had called him to see the man they had held, that Cpl. Holness had told him where the man was sitting and that he went to the side window and looked on the man sitting down in the jeep.

This evidence by Special Constable Williams was contradicted in parts by other evidence led by the Prosecution. Corporal Leaford Cookhorn agreed that when he returned to the front of the shop with the applicant in the jeep, he saw Special Constable Williams and heard Williams say to Detective Corporal Holness, in the presence and hearing of the applicant, that "This is one of the men who shot and killed Campbell."

Under cross-examination, however, he stated that on his return to the scene with the applicant, he saw Det. Cpl. Holness with Williams standing in the road together. The transcript of his evidence then reads as follows:

"Q. You drove along with the suspect and stopped across from the shop?

A. Yes, ma'am.

Q. Both of them then walked to the side of the jeep or did you go up and speak to Holness or Williams or both of them? What happened next?

A. I called both of them to the vehicle. I did not leave the vehicle.

Q. And what did you do? You spoke and told them that you had a suspect?

A. Yes, ma'am.

Q And they both looked at him?

A. Yes, ma'am.

Q. He was sitting beside you?

A. I was not sitting in the vehicle. I was standing outside.

Q. You had come out of the vehicle then.

A. Yes, ma'am. "

He went on to say that the accused was not in the front of the jeep. He was sitting on a seat in the back - nearer to the front where the driver was - and that Williams and Holness were looking from the back of the jeep.

The transcript then proceeds to record as follows:

"Q. You said that Williams said, 'This is one of the men that shot and killed Campbell?' Those were the exact words?

A. Well, I don't remember, but is something relating to that. I don't remember the direct words. "

Pressed further as to what Williams did say, he replied:

"A. This is one of the men who shot and killed Campbell. "

It was submitted that the effect of this evidence was to show that the identification of the applicant by Williams was done after Cookhorn had told him that he had a suspect. Indeed this portion of Cookhorn's evidence was so represented to the jury by the learned trial judge who puts it as follows:

> " When he had the accused in the back of the Land Rover, both Holness and Williams were standing together on the road, and he called to both of them and told them he had a suspect, and both of them looked at the accused and it was then that the witness Williams pointed him out as being one of the men. "

Det. Cpl. Holness agreed with Williams that they did not go to the jeep because of being called by Cpl. Cookhorn or anyone else. He stated that he did not see when the jeep arrived; he was in the shop when he first observed it and it was when he reached the jeep that he saw Williams leaning on the jeep. They were not standing together in the road and they did not walk to the jeep together. He saw Corporal Cookhorn sitting in the back of the jeep and it was while Cpl. Cookhorn was sitting in the back of the jeep that Williams spoke to him. He further testified

that it was not anything said by Cpl. Cookhorn that caused him to go over to the jeep, that Cookhorn did not call him and then go over to the jeep, that he did not hear Cpl. Cookhorn call Williams and see Williams then go over to the jeep, and that he and Williams were not standing together and were not called over to the jeep by Cpl. Cookhorn or anyone else. "

He agreed with Cookhorn, however, that it was at back of the jeep that he saw Williams standing. And he more or less agreed with Cookhorn as to the exact words used by Williams. The transcript reads as follows:

> " Mr. Morris: ..... Now you said you saw Mr. Williams at the jeep. What is the exact words Mr. Williams used at the jeep that night?
>
> A. He pointed to the accused and said: 'This is one of the men who shot Campbell?'"

Now the discrepancies shown in the portions of evidence just recounted were all pointed out to the jury by the learned trial judge in the course of his summing-up, and they were advised to bear them in mind in determining what evidence they could safely accept. In fact the learned trial judge was careful to direct the jury's attention to all the discrepancies in the case and at one stage he told them as follows:

> " If the discrepancy is something important, members of the jury, or they are so numerous or so significant that lead to the conclusion that the witnesses are not speaking the truth, you are entitled to reject the evidence of the witnesses concerned and if you do that you may either do it in its entirety or in so far as the discrepancy arises. "

Dealing particularly with the discrepancies in relation to the identification of the applicant by Williams, and relating them to the evidence of the applicant that there was no identification at all - that all that happened was that Det. Cpl. Cookhorn picked him up, took him to them and said, "See, I have a suspect here," and they looked at him, the learned trial judge told the jury that -

" That is important, members of the jury, when it comes to the question of identification, because if you don't believe that Williams pointed him out some twenty minutes after and it was Cookhorn who said: "Oh, see I have found a man here",then you would have to consider that when you are going to decide whether you believe Williams or not when he said he saw the accused there that night and he took part in this hold-up and fatal shooting of the deceased man, Campbell. It is important as to the question of identification."

And still later, he told the jury -

" So when you have one witness saying one thing, and another witness saying another thing, then it is open to you, if you think it serious enough, to disregard that completely and believe what the accused told you, that he was not pointed out at all."

Having high-lighted the discrepancies and having advised the jury as to how to deal with them, the learned trial judge then directed the jury as to the hazards of visual identification, the pitfalls to be encountered and the caution to be exercised before one can safely act on visual identification. And he told the jury that in this case:

" So far as direct evidence goes, members of the jury, the circumstantial evidence does not matter because if you reject Williams or if you are not sure about him, then automatically the circumstantial evidence about the shoe and about the kerosene oil on the shoe and the lace and socks, that automatically goes by the board. So the position is, you only have one witness and you must consider what he said carefully and bear in mind that there were other people there, there was a barmaid or rather a grocery attendant and some man but the fact that only one witness has been called does not mean that this accused man must be acquitted. If you believe implicitly what he has told you then you will have to say what you make of his evidence, and depending on what you make of his evidence you come to a decision whether this man is guilty or not guilty. "

Near the end of his summing-up at p. 312, after reviewing the evidence of the applicant and after reminding the jury that the applicant's evidence was that when the jeep stopped with him in front of the shop Cookhorn had said: "See the man that we hold yah," but that nobody had pointed him out as being one of the men who shot the deceased, he again reverted to the prosecution's evidence about the

identification and addressed the jury as follows:

> " Now, remember this is important, members of the jury, because as I told you, identification is paramount in this case. Williams said he looked through the front of the jeep. Holness said he looked through the back and Boreland didn't see anything at all and this witness said it did not happen. So it is for you to conclude whether it did happen or not. When the crown witnesses are at so much variance with one another on an important aspect you may well disregard it and find that Williams did not point him out that night, twenty minutes to half hour after the incident because of the discrepancy. "

And finally he told the jury not only that if they accepted what the applicant told them from the witness-box or that if they were in doubt about it they should acquit him, but also that if they accepted that the statement signed by him was made voluntarily and if they accepted what was in the statement or if they were not sure whether what he said was true or not they should also find him not guilty. And he concluded his summing-up as follows:

> " ..... The whole of the Crown's case involves predominantly the evidence of the witness Williams, including the evidence of the expert about the kerosene oil and about the samples from the shoe matching the sample from the footprint from adjoining premises, but primarily you must think of Williams' evidence and cast back your mind to when you saw him in the witness-box, how he stood up to cross-examination. You may also find this accused man not guilty if you do not believe this witness Williams or if you are not sure whether to believe him or not. You may also find him not guilty, if having regard to what I have told you about this one witness evidence, if you think that these other people in the shop should be called, albeit they could not identify the accused. If you feel that you want something else and you say that you are not prepared to act on his evidence like that, then you must also find the accused not guilty. And if you don't want to draw the inference that the Crown is asking you to draw, that there was this common design existing between the accused and these other men, if you find that he was there but you find there was no common design, you must also find him not guilty. But if you find to the extent that you feel sure that the accused man was there on that fateful night, and that he acted in concert with the other three men to cause the death of the deceased person, then it is open to you, members of the jury, to find him guilty of murder and the verdict in this case must be either murder or nothing. There is no question of manslaughter. "

In our view this summing-up was more than favourable to the applicant.

The only complaint of substance against the summing-up was that it did not deal with the position if the jury found that the purported identification [illegible]

assisted by a previous statement made to him by Cookhorn to the effect that he had a suspect.

It was argued that this was a non-direction amounting to a misdirection which was fatal to the validity of the conviction. We agree that that this was a misdirection but we consider that it is not fatal to the validity of the conviction. In the particular circumstances of this case it would have been going beyond what was necessary or desirable in the interests of justice if the jury had been told that if they found that Cookhorn did tell Williams that he had a suspect in the jeep and that it was after Williams had been so informed that he proceeded to identify the applicant, then they should reject the identification entirely and acquit the applicant. In our opinion it would have sufficed, in the circumstances of this case, to have told the jury that if they so found they should consider carefully whether they could safely accept and rely on that identification as they should ask themselves whether it might not be that Williams was assisted in his identification by what was said to him by Cookhorn. In our view if the jury had been so directed, they would inevitably have come to the same conclusion.

Our reasons for so concluding are as follows:

1. For the jury to have returned a verdict of guilty of murder, they must have accepted the evidence of Williams as to what took place in the shop.
2. They must have rejected the evidence of the applicant given at the trial.
3. They must have rejected the account contained in the statement which the applicant gave to the Police. But they must have accepted that portion of his statement in which he admitted being one of a party of four persons who rode on motor-cycles to outside the shop in which the deceased was murdered. They must have found, however, that it was all four of them who went into the shop and not two only as stated by the applicant in his statement.

4. They must have accepted the Crown's evidence as to kerosene oil being found on the applicant's socks and lace and soil found on his left shoe which compared with a sample of soil taken from a spot in the yard of 104 Barbican Road in which a left shoe-print matching that of the applicant's left shoe was found.

5. They must have accepted that he was found in close proximity to the scene of the murder at the time of his apprehension.

Having regard to the details which Williams was able to give in relation to the applicant's presence in the shop - that it was he who said 'shoot the man, nuh' - that it was he who kicked over the bucket of kerosene oil and spilled some on his shoe - that it was he who, with one other, headed towards the motor-cycle that was parked across the road from the shop with its engine running - this coupled with the applicant's statement that it was he who rode a motor-cycle and parked same in front of the shop, that it was he who ran into premises 104 Barbican Road where was found soil from a spot which had the imprint of a left shoe similar in size to the applicant's and which matched soil found on the applicant's left shoe; having regard to the fact that Williams knew that Cookhorn did not witness the killing, but attended the shop afterwards and spoke with him before proceeding on the patrol which led to the apprehension of the applicant almost immediately afterwards; having regard to the very short time which elapsed between the killing and the applicant's apprehension and the very short distance from the scene to where he was apprehended, it would in those circumstances have been absurd for the jury to have been told to discard entirely Williams' evidence of identification because of a preceding remark by another police officer to the effect that he had a suspect.

It is our view that these were exceptional circumstances such as would excuse an identification following on a confrontation, as was the case in R. v. Trevor Dennis, S.C.C.A. 27/70 referred to in R. v. Hassock, S.C.C.A. 111/76.

In the event we unhesitatingly applied the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act as we were satisfied that on the whole of the facts as given in evidence and accepted by the jury they would have arrived at the same verdict on an appropriate direction on the question of Williams' identification of the applicant. There was no miscarriage of justice resulting from that omission.

The appeal was, therefore, dismissed.