J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 52/77

BEFORE:

THE HON. MR. JUSTICE ROBINSON (P)
THE HON. MR. JUSTICE HENRY
THE HON. MR. JUSTICE ROWE

REGINA

v

DANIEL McLEAN

Mr. Denis Daley for Applicant

Mr. Derek Hugh for Crown

December 8, 9, 1977, January 23, 31, 1978

HENRY J.A.

On February 16, 1977 the applicant Daniel McLean was convicted in the Hanover Circuit Court for the murder of George Phillips and was sentenced to death. On January 23, 1978 we treated his application for leave to appeal from that conviction as an appeal, allowed the appeal, set aside the conviction for murder and substituted therefor a conviction for manslaughter. We promised to put our reasons in writing and now do so.

The deceased George Phillips and one Miranda Jourey lived together in a one apartment house at Beanses in Hanover. On the night of October 1, 1976 they retired to bed at about 10 p.m. At about 2 a.m. Miss Jourey was aroused by the sound of dogs barking. She awakened Mr. Phillips and shortly after there was a knock on their door. She got up, dressed and heard a heavier knocking on the door which then burst open. Through the open door came a barrage of stones two of which hit Mr. Phillips - one over his eyes and the other in the lower abdomen. When the barrage of stones ceased a man whom Miss Jourey subsequently identified as the applicant entered the room and demanded "the gun".

Miss Jourey and Mr. Phillips retreated,opened the back door and escaped to the bushes where they remained till day break. Mr. Phillips was treated at the Lucea hospital for the injuries he recieved but succumbed some days later. Death was due to faecal peritonitis arising from perforation of the small bowel by a puncture wound extending through the abdominal wall in the region of the right groin. This wound in the doctor's opinion could have been caused by a pointed stone being flung and hitting the deceased.

Complaint was made as regards the learned trial judge's summing-up in two respects, - the first as regards the manner in which he dealt with the question of identification, the second as regards his failure to leave for the jury's consideration the question of manslaughter on the basis of a lack of intention to kill or to cause greivous bodily harm. It is on this latter ground that we allowed the appeal.

On a charge of murder the intention of the accused is always a question of fact for the jury to decide. An intention to kill or to cause grievous bodily harm is essential to the crime of murder but not of manslaughter. Where there is overwhelming evidence of an intention to kill or to cause grievous bodily harm a trial judge may properly decline to leave for the jury's consideration the question of manslaughter based on the issue of intention. Where however, the evidence or the inferences to be drawn from it are equivocal as to intention, it is always the duty of the trial judge to leave the matter for determination by the jury. In this case the forcible entry of the deceased's home followed by a barrage of stones at close range might be regarded as indicative of an intention at least to cause him grievous bodily harm. On the other hand only two of the barrage of stones hit the deceased. He and Miss Jourey, both in their late sixties, were allowed to open their back door and escape without further injury. It is arguable that this manifested an intention to frighten them into leaving the premises as they did

rather than an intention to kill or cause grievous bodily harm to either of them. In the circumstances it was eminently a matter for the jury to decide and the learned trial judge fell into error in withdrawing it from them. Indeed, early in his summing-up he indicated to the jury that the intention to kill or cause grievous bodily harm was one of the things the prosecution was required to prove and although he proceeded to explain how the jury could determine whether that was the intention of the accused he stopped short of telling them what was the consequence of a failure by the prosecution to prove that intention and ultimately he directed them at p. 85 that "there are two verdicts open to you: guilty or murder or not guilty of murder". It seems clear from his summing-up that the learned trial judge did not place much reliance on the evidence of Miss Jourey as to the identity of the intruder and it may be that he was apprehensive of introducing the element of manslaughter and thereby depriving the applicant of a clear acquittal. As it turned out, however, this omission by the learned trial judge may well have adversely affected the applicant.

'arInsofar as the learned trial judge's directions on identification are concerned complaint was directed against it principally on two grounds:-

> "(1) He failed to warn the jury as to the dangers inherent in relying solely on evidence of identification, of the special need for caution before convicting on such evidence and of the reasons for such warning.
>
> (11) He misdirected the jury to effect that in deciding whether or not to accept the evidence of identification of the applicant they must consider whether the witness was certain about this man or whether she made a mistake (pp. 83-86), while on the other hand he failed to direct the jury that there is no necessary correlation between the certainty of the witness that she is correct and the factual accuracy of her identification."

Insofar as the first ground is concerned, we consider it desirable to state that in our view no fixed formula of words of warning or caution is contemplated by the dicta in R v Turnbull and

R v Oliver Whylie which state that in appropriate cases a jury ought to be warned of the dangers of relying solely on identification evidence and of the need for caution in convicting on such evidence. If a jury is alerted to these dangers the method adopted is immaterial. In this case the only witness as to identification was Miss Jourey. She did not know the intruder before the night in question. She saw him for a very short time by the light of a small glass lamp and at the subsequent identification parade she took some 8-10 minutes to identify the applicant. All these matters were put before the jury in terms which made it clear that the learned trial judge himself considered that the evidence of identification required the most cautious consideration. Thus at page 76 he said:-

> "Now, can you, members of the jury, having heard her be satisfied that by that small glass lamp she was able to make out that this man was the one out there throwing stones? The one who came into the room and hit Mr. Phillips? After hearing her evidence can you feel sure about it? Defence attorney has asked you to say that on that evidence you could never feel sure about it. That is the crucial area of this case. That is the crucial area of this case, the lights, the opportunity. She said that it happened very quickly."

Then he went on to say:-

> "Now, you must examine her evidence and you must try to decide whether in that short time that she mentioned to you with the light, a small lamp, whether she could be sure that the accused was the man who was there that morning."

In reviewing the evidence of Miss Jourey at page 79 he said:-

> "She told us that just then the door burst open. Mr. Phillips was more or less about two and a half yards from the door and she went on to describe the lamp again, and she told us that this lamp was about six inches tall, and, as I remark before and I remind you again, you must consider this question of the lamp very carefully in deciding whether you are satisfied that Miss Jourey had the opportunity and the necessary lighting facility to be able to make a proper identification of the accused on that night. She told you that she sleeps with the light on all the while and that the light was on a table in the corner. She told you, and that you have been reminded of already, that she didn't see where the person got the stones from. The person threw several stones and you may well wonder how come that here she is so positive about

> the fact that this is the man, this accused man is the man who was throwing the stones but she never saw where he got the stones from. It has been mentioned by Mr. Cunningham and I mention it again, I make my own comment here, that one would have expected that if she had this clear and good view of what was going on and of the accused man, she would have been in a position to help us more to say where did the stones come from. Did somebody pass them to him, did he take them up from the ground, he couldn't have had them in his pocket, not from the size of them anyway; and it is something that you will have to consider when you come to deliberate in this matter. I personally think it strange that she was not able to say where the stones came from."

Then at page 80-81 he said:-

> "She was cross-examined in a little more detail about the identification parade and she said that she walked up and down the line, "it could have taken me ten minutes more or less to point out the man." Mr. Cunningham has asked you to pay great store to what happened on the identification parade and it is a very important feature of this case, because defence counsel has told you that had she been this sure she wouldn't have taken all this time, ten minutes, to point out the man. On the other hand, Mr. James tells you that it is something in her credit that she never just went there and willy-nilly without careful thought without looking properly, point out the somebody, she took her own time and she pointed him out. As I said, arguments both ways; points suggested to you for your consideration. If you agree with them, accept them, if you don't, brush them aside in the same way as you would brush aside my views if you do not agree. Because counsel for the accused pointed out that even after the men spoke, because you will remember that she asked that the men should say something, even after hearing the voices, she had to stand off, she had to walk up several times up and down the line before she was able to point out this man. Was that the action of somebody who was certain?

Finally, towards the end of the summing-up he said at p. 85:-

> "There is very little else I want to tell you except to remind you of what I consider the crucial areas: the lighting; the opportunity that Miss Jourey had for observing everything happening quickly according to her; you have to decide whether she had this man's face imprinted in her mind when she went on the parade and say, "I want to hear them talk.", whether that strengthened the identification. These are matters for you, because the case turns on her evidence; the crown's case stands or falls on how you accept the evidence of Miss Jourey. Was she certain; are you satisfied; are you, after listening to her, are you left in doubt as to whether this was the man or not. If you are in doubt, well, your verdict would be not guilty. If you believe Miss Jourey, and you saw her, you are the ones the judges of the facts, if you believe her, your verdict would be guilty; if

> you are satisfied so that you feel sure about it, that would be your proper verdict. So, give it a thought that it deserves."

We do not consider that the jury could have been in any doubt either as to the crucial nature of Miss Jourey's evidence or the care with which they had to approach it. They must have accepted her evidence that the light was turned up bright, that the intruder came within a yard of her and that she looked in his face. They must therefore have concluded that she was in a position to identify him at the identification parade.

Insofar as the second ground is concerned although at p. 83 the learned trial judge did say:-

> "You must consider whether the witness, Jourey, was certain about this man that she pointed out or whether she made a mistake."

in the passage at p. 85 which we have already quoted he made it clear to the jury that they had to decide not only whether Miss Jourey was certain but whether they were satisfied that the applicant was indeed the intruder.

Finally, complaint was made that the verdict was unreasonable having regard to the evidence. The prosecution's case rested almost entirely on the evidence of Miss Jourey and in particular on her identification of the applicant. No complaint was made as to the manner in which the identification parade was held. The evidence in respect of the identification was clearly put to the jury in a manner which can be described as favourable to the applicant. The learned trial judge did not hesitate to communicate to the jury his own misgivings. Nevertheless the jury who had the opportunity to see and assess the credibility of the witness accepted her evidence. Although we must as against that consider the fact that the learned trial judge who also had the opportunity of seeing the witness had obvious misgivings, we cannot in the state of the evidence say that the verdict was unreasonable.

For these reasons we allowed the appeal and substituted a conviction for manslaughter.