FVMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 50/98

BEFORE: **THE HON. MR. JUSTICE RATTRAY, P.**
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE PANTON, J.A. (Ag.)

R v Dave Sewell

Terrence Williams for Applicant
Lloyd Hibbert, Q.C. and **Evan Brown** for Crown

March 8, 9 10, 1999 and July 30, 1999

PANTON, J.A.(Ag.):

On April 6, 1998, the applicant was convicted in the Home Circuit Court for the offence of murder, and sentenced by Mrs. Justice Norma McIntosh, (acting) to suffer death in the manner authorised by law. This is an application for leave to appeal against that conviction.

The events that led to the trial of the applicant occurred on June 11, 1993, between 9:15 a.m. and 9:35 a.m. approximately. The deceased Errol Cann, a businessman of Spanish Town, St. Catherine was sitting in the left front seat of a motor car driven by Dorothy Shim, an employee of the deceased, along Martin Street, Spanish Town. Sitting in the back of the car was a female clerk who had a bag with over half million dollars. They were making their way to a bank.

Miss Shim saw a boy struggling with a cart in the middle of the road. She stopped the car. A man appeared on the road in front of the car pointing a gun in the direction of the car. Several men appeared behind the car as well as on its left side, that is, the side

on which the deceased was seated. One of the men to the left had a long gun. According to David Morris, the most important witness in the case, the applicant was the man with the long gun. The applicant had taken it from a shopping bag which also had flowers in it. The applicant, according to Mr. Morris said to the deceased "P....hole, a long time you fi dead". He then fired at the deceased and ran. Blood was then seen coming from the mouth of the deceased who told Miss Shim that he had been shot in the heart and mouth. The official cause of death was a shotgun wound to the chest. The deceased had twelve pellet wounds scattered over the upper and middle interior chest, damaging the heart and left lung.

The applicant ran from the scene while an accomplice with gun in hand, pushed the upper part of his body into the car which by then was speeding. Eventually he fell from the car. It appears that during this period of violent activity the money in the possession of the clerk was stolen as it was missing by the time Miss Shim had driven the car to the hospital, a few minutes away.

David Morris, an apprentice welder who is called Cougar, and who was seventeen years old at the time of the trial, was the only witness to implicate the applicant in respect of this murder. He said that the applicant was a friend with whom he "partly" grew up in St. Catherine and who was called "Dave 18". On the night before the murder, he (Morris) said he was kidnapped by a friend named Toushan and taken to the new nursery where he remained overnight. The next morning, the applicant visited the nursery, spoke to another man named German, then left in a car. The witness (Morris) went into a van in which there was a handcart. The van was driven to Martin Street. It stopped at a palm tree. He came out; the van drove off, leaving the handcart. He was instructed by German to shove the handcart down a little more. He obeyed. German then told him to

leave. He pretended that he was leaving, but went back to the palm tree instead. There he hid himself with a view to observing what was in store, as he did not know what the plan entailed. After the shooting, he left the area and went to Caymnas Park where he remained for a week. The next time that he saw the applicant was when he pointed him out in a cell at the Central Police Station.

The circumstances of the identification are interesting. The prosecution alleged that the applicant sought to avoid being pointed out on a formal identification parade by arranging with one Christopher Baker, a prisoner, to stand in his stead. The prosecution further alleged that in the presence of the applicant and Baker, Sgt. Hopeton Watkis who conducted the formal parade told Inspector Grant, the investigating officer, that Baker had gone on the parade in place of the applicant; whereupon Baker remarked to the applicant, "I told you it wouldn't work". In this regard the defence offered for the jury's consideration the evidence of Seymour Stewart, Attorney-at-law, who said that he watched the proceedings relating to the formal identification parade, and that the prosecution's contention was false as the applicant was very much on the parade on July 27, 1993 when the witness David Morris failed to identify him. He further said that both the applicant and Baker were on the parade, and that the applicant changed clothes with Baker. Clearly, on this issue, the jury had to decide whom to believe – David Morris, the seventeen year old apprentice welder or Seymour Stewart, the sixty nine year old with forty two years at the Bar. They chose the former.

When quizzed as to the reason for holding a formal identification parade, Inspector Grant said that the applicant had an alias and the police were merely trying to be sure that the person with the alias was the "said person" that the witness was "speaking about". Inspector Grant arrested the applicant on August 19, 1993.

The applicant, in his defence, made an unsworn statement which is a regular feature of criminal trials in Jamaica. He declared that he was "totally innocent of this terrible murder". He did not know Morris and he never grew up with him as he (the applicant) was "a big man" aged thirty two years. He said he had no previous conviction and at the time of the incident he was engaged in work at a construction site at Naggo's Head Hellshire. He had worked from minutes to eight o'clock in the morning until noon and had heard the sad news of Cann's death on the radio just before he had his lunch in the site canteen. He said that he had been on the identification parade on July 27, but had not been pointed out.

GROUNDS OF APPEAL

The applicant was given leave to argue amended grounds of appeal that were filed on March 9, 1999. These are they :

> **"Ground 1 - Informal Parade – Directions**
>
> The learned trial judge failed to properly direct the jury on the issues and considerations concerning the informal identification parade.
>
> **Ground II – Prejudicial Evidence Improperly Admitted**
>
> The learned trial judge wrongly admitted evidence of:
>
> (1) an Identification Parade Form;
>
> (2) comments made by a prisoner in the suspect's presence;
>
> (3) Investigating Officer saying whether witness Morris knew suspect Sewell before.

Ground III - Surprise Evidence by Crown

The applicant was denied a fair trial by the Crown's adducing evidence that he had at a previous trial admitted to being called by the very alias claimed by the witness Morris.

Ground IV – Failed parade Directions

The learned trial judge's directions on the failed parade and its related 'scam' were confusing, misleading and overstated."

It will be readily seen that with the exception of ground three, the grounds of appeal are in respect of the informal parade that was held in the applicant's cell. It is therefore appropriate to deal with grounds one, two and four in that order and then ground three.

GROUND 1

Mr. Williams, on behalf of the applicant, complained that the informal parade was unfair because of the following:

(1) only four other men were on the parade;

(2) there was no evidence as to any similarity in age, height, general appearance and position in life; and

(3) the suspect was on top of a bunk along with another man.

He made particular reference to regulation 7-13 (iii) of the regulations published on July 29,1939, in the Jamaica Gazette Extraordinary. To appreciate fully that portion of the regulation it should be set out alongside regulation 7.12.

Regulation 7.12

"In arranging for personal identification, every precaution shall be taken:

(a) to exclude any suspicion of unfairness or risk of erroneous identification through the witnesses' attention being directed to the suspected person in

particular instead of indifferently to all the persons paraded;

(b) to make sure that the witnesses' ability to recognise the accused has been fairly and adequately tested."

Regulation 7.13

"It is desirable therefore that:

(i)...
(ii)...
(iii) the accused shall be placed among not less than eight persons who are as far as possible of the same age, height, general appearance and position in life".

The judge's summing – up , Mr. Williams said, was deficient in that she did not explain to the jury all the relevant matters for them to contemplate. Particularly, he said, the jury ought to have been told of the breaches that he said had occurred in the conduct of the parade so that they could make their own assessment. He referred us to page 388 of the record where the jury was told the following:

> "There is absolutely nothing wrong with that informal parade that was held by the police."

This, he said, could have led the jury to believe that it was not their duty to decide whether the parade was a true and fair test of the witness' ability to recognise the suspect. He prayed in aid the following cases:

(1) ***R v Cecil Gibson*** [1975] 24 W.I.R. 296;

(2) ***Bernard v R*** [1994] 45 W.I.R 296; and

(3) ***Irving Cox and Floyd Howell v R*** (S C C A Nos.104 and 105 of 1993 (unreported) delivered on December 20, 1995.

In ***R v Cecil Gibson***, the appellant was charged with robbery with aggravation. The case for the prosecution depended solely on the evidence of two witnesses who identified him at an identification parade which was held in breach of the regulations mentioned earlier, in that the investigating officer was actively involved in the arrangements for the holding of the parade, and was present during the parade itself. The learned trial judge did not inform the jury of the breaches. At page 297 H of the judgment of this Court, Graham-Perkins, J.A. said:

> "...it is by no means easy to exaggerate the critical importance of an identification parade conducted with the most scrupulous care. It is fundamental to the administration of our criminal justice that where the prosecution relies soley on the identification of an accused person at an identity parade, nothing should be done or left undone, to impinge on the absolute fairness of that parade. An accused is entitled to no less. This is the clear duty of those charged with the responsibility of conducting, or arranging for, identification parades. Of paramount importance, too, is the right of a jury in a criminal trial to have placed before them the fullest disclosure of every material fact that might conceivably affect their deliberation; more particularly they are entitled to be informed of any impropriety, and the reason therefor, that may have occurred in or about the conduct of an identification parade."

Mr. Williams placed much reliance on this passage. However, he overlooked the fact that the instant case was not one in which complaint was being made in respect of a formal identification parade. As Mr. Hibbert for the Crown pointed out, the regulations referred to earlier relate to the holding of formal identification parades.

In ***Bernard v R*** (supra), the applicant relied on their Lordships' opinion at page 303(a) where the advice of the Board reads thus:

> "Their lordships have mentioned the identification parade. It is accepted that in this area, as well as in other aspects of the trial, the judge was most careful

> to set out the facts and to leave their determination to the jury. But even if no objection was voiced against the composition of the parade, their lordships consider that a warning note should have been sounded concerning the presence of only two tall men, one of whom was the suspect."

Here again the observations are in respect of a formal parade.

The case of ***Cox and Howell*** (supra) involved an informal parade. There, **Cox** refused to go on a formal parade.

The police arranged an informal parade with the applicant and at least seven other prisoners of almost similar height and appearance in the holding area of the Central Police Station lockups. There were two Justices of the Peace in attendance. However, no statement was taken from either, and they never attended at the trial. A witness who pointed out the appellant claimed that he knew the appellant by an alias but never told the police. This Court quashed the conviction as the probity of the evidence as to identification was in great doubt, especially when it was considered that the photograph of **Cox** had been published in a newspaper prior to the parade. These facts make for a clear distinction with the instant case.

It is unrealistic for it to be expected that an informal parade would be conducted on lines equivalent to a regular formal parade. The applicant was quite specific in not wishing to participate in a formal parade. It was his refusal, which was within his rights, that led to the effort to get confirmatory identification by an informal route. Although Inspector Grant gave a reason for the holding of a parade, this is not a case in which the identification of the applicant depended on the holding of a parade. In view of the witness Morris' statement to the police and his subsequent evidence that he knew the

applicant before the date of the incident, the holding of an identification parade was a redundant exercise.

Notwithstanding the lack of need for an identification parade, the learned trial judge did address the situation properly and gave adequate and fair directions to the jury. The sentence "there is absolutely nothing wrong with the informal parade that was held by the police" ought not to be viewed in isolation. The full context is this:

> "I must tell you that our law permits informal identification. There is absolutely nothing wrong with that informal parade that was held by the police. You must remember the police had intended to hold the formal identification parade and has been making arrangement to hold it but was prevented from holding one because the accused man refused to do so and clearly they were not able to pick him up and take him to the identification room, so they have to do the next best thing and hold the parade in the cell. If you accept that witness, there is nothing wrong with the identification."

There is nothing in the passage that lends itself to an interpretation that the learned trial judge had usurped the function of the jury. In addition, she clearly had in mind ***R v Trevor Dennis*** [1970] 12 J.L.R. 249, a decision of this Court where Shelley, J.A. at page 250 c-d said:

> "Perhaps identification on parade is the ideal way of identifying a suspect but it is not the only satisfactory way. The particular circumstances of a case may well dictate otherwise".(emphasis added).

Unlike the case of ***Cox and Howell,*** the jury in the instant case had the benefit of the evidence of one of the Justices of the Peace who attended the informal parade in the applicant's cell. That witness, Nevis Powell, gave evidence which indicated that there was no prompting of the identifying witness Morris who viewed the men as they sat on a bunk or a bed.

In ***R v Haughton and Ricketts*** (unreported) S C C A 122 and 123/80 delivered on May 27, 1982, Carey, J.A. said:

> "Where no identification parade is held because in the circumstances that came about, none was possible, again the evidence should be viewed with caution to ensure that the confrontation is not a deliberate attempt by the police to facilitate easy identification by a witness. It will always be a question of fact for the jury... to consider carefully all the circumstances of identification to see that there was no unfairness and that the identification was obtained without prompting. In a word, the identification must be independent."

The learned trial judge gave directions to the jury in keeping with the guidelines as to identification given in ***Turnbull*** (1977) 1 Q.B. 224 and reinforced in ***Junior Reid and others*** (P.C. Appeals Nos, 14,15 & 16 of 1988 and 7 of 1989 delivered on July 27, 1989).

She also stressed the need for the jury to give careful thought in respect of the credibility and reliability of the witness Morris as well as the other witnesses involved in the informal parade. There is no merit in the complaint contained in ground one.

GROUND II

(I) The admission of the identification form into evidence

Mr. Williams submitted that the admission of the identification form into evidence prejudiced the applicant's case in that it was used to corroborate the witness Hopeton Watkis who had conducted the formal identification parade. He submitted also that the learned trial judge should have instructed the jury that the form "at most could only show consistency of what Watkis had said."

The factual situation, however, is as pointed out by Mr. Hibbert. The form does not corroborate Watkis. It supports the applicant who insisted that he was on the

parade; the form shows him to have been at no.5 on the parade. Watkis was saying he was not there at all.

Mr. Williams made reference to the case ***R v Edward Harvey*** (1975) 13 J.L.R. 142. There an undisclosed document apparently containing notes taken on an identification parade was consulted by a witness without that witness having said that he wished to refresh his memory. Also, the document was not put in evidence. The appeal was allowed by this Court as the rules for refreshing a witness' memory had been breached and the trial judge had directed the jury that the document, though not admitted in evidence, was the best evidence of what an important witness had said in pointing to the applicant at the identification parade.

Clearly this case is distinguisable from the instant one.

Regulation 7. 13 (viii) of the regulations governing identification parades provides:

> "Every circumstance connected with the identification shall be carefully recorded by the officer conducting it whether the accused or any other person is identified or not."

This regulation highlights the importance of an identification form. Every circumstance connected with the parade is to be carefully recorded. The names of the persons on the parade were, according to the applicant's witness Seymour Stewart, recorded by Cons. Johnson in the witness' presence. As a record of what transpired on the parade, the admission of the form into evidence is unobjectionable. It is even moreso when there is evidence from the defence as to its preparation in keeping with the regulations.

(2) Comments made by a prisoner in the suspect's presence

This aspect of the evidence is best dealt with in conjunction with Ground IVand is done below.

(3) Investigating officer saying whether witness Morris knew suspect Sewell before

The evidence given by Inspector Grant was to the effect that he knew the witness Morris before the investigations had commenced in the case. During the course of the investigations, he said, it came to his knowledge that the applicant was known to the witness. As learned Queen's Counsel, Mr. Hibbert, pointed out, there was nothing definitive as to how the inspector had come by that knowledge. In any event this was not a line that was pursued by the Crown. It was not a significant feature of the case presented against the applicant. The learned trial judge placed the emphasis where it ought to have been; that is, on the credibility of the witness Morris.

At pages 369-371 of the record, after she had related what Morris had said up to the point where the deceased had been shot, she said:

> "This is for you to decide whether Morris is speaking the truth. You heard and saw him, you have to ask yourselves, did he really know the accused as he said. The robbery and killing was in broad daylight and he showed you in this courtroom the distance he was when the accused man shot Mr. Cann. This distance was estimated to be about ten feet. He said there was nothing to obstruct his vision and the accused was his friend, he knew him before. Knew him well. They lived in the same community. Were members of a gang and kind of grew up together, although the accused is older than him. He would see the accused very regular, although not all the time and he had seen him at the one room house earlier.

> He watched the accused throughout the incident killing and robbing until he ran away. That is his evidence and it is for you to decide whether he is a credible witness. You saw how he answered questions put to him and in assessing him you may wish to compare his evidence that he gave about the incident of that morning with that of another prosecution witness Miss Shim, the driver of the motor car in which Mr Cann was driving that fafetul morning. You may feel well, it is similar to the accounts given by Miss Shim. Was he present or is it as suggested by the defence a story made up with the assistance of the police.
>
> This a matter for your determination, was he set up? In the evidence he gave you remember how he answered the question when he was asked about the time?. One time he said it was a waste of time for counsel to press for an answer because he didn't know, he didn't have a watch, he don't give time. When he was asked he said he didn't see the accused everyday but he saw him most times. Was he being frank? Was he being truthful? That is for you to determine." (Emphasis supplied)

Ground IV – Failed parade directions

In respect of the directions on the "failed parade," Mr. Williams submitted that they were confusing, and referred to page 379 where the learned judge said:

> "... the scam was taking place from then; if you believe him that the man was identified to him and that it was only when he heard these things and went with Mr. Grant to the cell and the right person was pointed out to him that he realised... that does not mean that you must come to the conclusion that the accused had nothing to do with it or that if he did and it resulted in him not being pointed out then that must lead you to a conclusion that he is guilty."

In order to get the full picture however, it is necessary to begin on page 378 at the beginning of the paragraph. When that is done it will be seen that the learned judge had said:

> "Remember that Sgt. Watkis told you that he did not know the suspect and so he was not aware that he did not have the correct person on that identification parade. Now from his evidence it would appear that from the time that he first went to tell the accused man his rights that the scam was taking place from then."

It is obvious that there was a typographical error where the word "nothing" appears in the earlier passage. (See there the word underlined). The learned judge must have said "anything." When that necessary correction is made, there is nothing confusing or misleading about the passage. The learned judge had a proper understanding of the evidence and gave appropriate directions to the jury as seen on page 395:

> "Now, the Crown's witnesses –the prosecution, rather, is asking you to accept the evidence of their witnesses on the point but if you believe that the police concocted the evidence and used Morris to carry out their purpose, you must acquit the accused. If you have a reasonable doubt about it, you must acquit the accused. If you believe that the accused was not the man on the parade, that must not lead you to the conclusion that he is guilty. Even on his subsequently being pointed out that must not lead you to the conclusion that he is guilty. You must consider the prosecution's case and see whether on the prosecution's evidence you are satisfied until you feel sure of the guilt of the accused that he was the man who shot and killed Mr. Cann and that he did this in furtherance of robbery."

The directions were not only clear and appropriate, they were fair.

Comments made by a prisoner in the presence of the suspect.

The prosecution, as stated before, alleged that there was a meeting of the applicant, the prisoner Christopher Baker, Sgt. Hopeton Watkis and Inspector Grant. During that meeting at the cell block there was a discussion as to the identity of the person or persons who had gone on the formal identification parade. The prosecution alleged

that Baker had gone on the parade instead of the applicant; as a result, the witness Morris was unable to identify anyone. It is in that context that the witness Watkis testified that Baker had said to the applicant, "I tell you it wouldn't work".

The learned trial judge, after recounting the sequence of events leading up to the making of that statement said to the jury:

> "Now do you believe that this is what happened or do you believe as the defence is urging upon you, that this is a concoction by the police? Then it was pointed out by the defence that Sgt. Watkis had said that he had seen the suspect three times before the parade was actually held, twice before the day of the parade and once on the day of the parade. And so the defence is saying that it is not credible that he could have seen this accused man or this suspect three times and did not know that it was the wrong person on the parade."

The credibility of Sgt. Watkis was again adverted to on pages 387 and 388 of the record. Indeed, the learned trial judge dealt with the matter in a manner that may be described as protective of the applicant.

In permitting the admission of Baker's statement into evidence she was not in any way breaching any rule of evidence, as the applicant was present. The intention here was clearly not to establish the truth of the statement but only to indicate that it was made.

GROUND III

Surprise evidence by Crown

The applicant complained that the prosecution, through Detective Insp. Grant, gave evidence that at a previous trial he, the applicant, had admitted that he was called "Dave 18". This is the name that the main prosecution witness used in reference to him.

In this complaint, the applicant alleged that he was surprised by this evidence as no notice of the prosecution's intention to rely on it had been served on him. Acorrding to the applicant, the prosecution has breached a procedural rule. Mr. Williams relied on

Berry (Linton) v R [1992] 41 W.I.R. 244. and ***Burke (Leroy) v R*** [1992] 42 W.I.R 245 In ***Berry*** , a case of murder, three statements made by witnesses in the case were not made available to the defence in advance. When compared with the evidence of the two important witnesses, significant discrepancies were revealed. The evidence involved in these statements had not been foreshadowed in the depositions. The prosecution's failure to give advance warning to the defence by furnishing them with copies of the statements was held by the Privy Council to be a material irregularity. The conviction was quashed and the case remitted to the Court of Appeal which ordered a new trial.

In ***Burke,*** a detective corporal surprised both the prosecution and the defence by saying at the trial that the appellant had admitted to him and a sergeant that he had committed the crime of murder with which he had been charged the day before the alleged admission. The corporal said he had recorded the confession in his notebook which was not produced by the prosecution. There was no clear warning given to the jury that this evidence was to be treated with great caution. The Judicial Committee of the Privy Council held that the treatment of this confession amounted to a material irregularity which might have resulted in a grave injustice. In this case, however, because the evidence of the appellant's presence at the killing was overwhelming, a verdict of manslaughter was substituted.

In the instant case, there was no question of surprise. There is no dispute that the applicant's attorney-at-law at the trial was in possession of the transcript of the earlier proceedings. Indeed, he used it in cross-examination at the trial that has resulted in this appeal. This ground is patently without merit.

Having found no merit in the grounds of appeal that were argued, and having considered the conduct of the trial and the summing up of the learned trial judge, we are

satisfied that the issues were properly and adequately dealt with. There was ample evidence to support the conviction of the applicant.

The incident occurred in daylight after what must have been careful planning from the previous night. The main issue for determination by the jury was whether the witness David Morris was credible and reliable. The directions of the learned trial judge placed this witness under the searchlight.

The jury having accepted him as a witness of truth, was justified in returning a verdict adverse to the applicant. Consequently, the application for leave to appeal is refused. The conviction and sentence are affirmed.