CRIMINAL LAW – Murder – Evidence – Identification – No case submission – 'Identification evidence poor, weak and unreliable' – No case submission should have been upheld. APPEALS Allowed, Convictions quashed, sentences set aside. Case remitted to

JAMAICA R v Hayes (1977) 2 All ER 288

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IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS. 76 & 89 of 1990 EVIDENCE

CRIMINAL PROCEDURE

BEFORE: THE HON. MR. JUSTICE CAREY, P. (Ag.)
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

REGINA
vs.
DEAN SANDERSON
MELBOURNE CLARKE

Delroy Chuck and Miss Helen Birch for Sanderson

Dr. Paul Ashley for Clarke

Kent Pantry, Deputy Director of Public Prosecutions, for the Crown

December 2, 1991

MORGAN, J.A.:

The applicants seek leave to appeal against their convictions and sentences in the St. Catherine Circuit Court, Spanish Town, on the 11th May, 1990, on a charge that on the 16th January, 1989, they murdered one Glenroy Smith. Both applicants were sentenced to death.

The facts are that at about 10:00 a.m. on that day an angry mob consisting of over fifty men, women and children crashed through the gate and into the premises of one Icylin Brown, who is the mother of the deceased. She was then at home with the deceased and her grandchildren, the eldest of whom was one Omar Halstead, a boy nine years old at the time of the trial. The members of the mob used several curse words urging Glenroy to come out "mek we get fi kill yuh". When he failed to emerge, they set upon the house with sticks and stones,

breaking down doors and destroying furniture inside. For the safety of his mother and the children, the deceased jumped through a window that had been hit out. Someone then shouted, "See him deh, see him deh". He jumped over the fence - chased by various persons from the mob. Some four hours later his dead body, with several injuries, was seen face down in a river bed about half a mile away.

Dr. Royston Clifford, who performed the post mortem examination, found wounds which perforated both lungs and heart causing his death.

Before us, leave was granted to argue the supplemental grounds of appeal filed on behalf of the applicants. They are all basically the same; that the learned trial judge erred in law in refusing the no-case submission of counsel as the identification evidence adduced was ambiguous, weak, of no quality, and uncorroborated.

The learned trial judge very carefully examined Omar Halstead on the voire dire and, in our view, the witness clearly understood the duty of speaking the truth (and the binding force of an oath) in relation to the Bible. He did not know, in the judge's term, the definition of an oath and so the learned trial judge received his evidence unsworn. The important consideration for a judge in the exercise of his discretion to permit a child to give evidence on oath, is whether the child sufficiently appreciates the solemnity of the occasion and is sufficiently responsible to understand that taking an oath involves telling the truth. (See **R. v. Hayes** [1977] 2 All E.R. 288). His evidence, however, stood eventually uncorroborated by the adult witness Icylin Brown and, in any event, at the end of a searching cross-examination, he retracted what he had said as to the identification of the applicants by saying that he did not actually see any of the men, it was because he heard his uncle, the deceased, shouting out the names of the applicants why he said

they were the attackers. The learned trial judge correctly directed the jury that, based on the quality of the lad's evidence, they should disregard it. Having withdrawn that evidence from the jury, they were left with the evidence of Icylin Brown as the sole eye-witness.

Early in her examination-in-chief, she was recounting what occurred when the mob came in, demanding the presence of the deceased. What transpired is this:

"Q: Did your son say anything at that point or do anything?

A: He didn't do anything. He call back out to them.

Q: What he call back out say?

A: He was calling out all the names them.

HIS LORDSHIP: Junior called out and said anything?

WITNESS: Yes, sir.

Q: And what happened after that?

A: Him call him say, ' "Rocky", "Rocky"...'

(Mr. Usim stands.)

HIS LORDSHIP: The whole point is, he called out names.

WITNESS: Yes, sir.

HIS LORDSHIP: Well, did you see anybody in here who was there?

WITNESS: I saw them, sir, but I didn't recognise these two guys 'Rocky' and 'Crackie' until I come to the court.

HIS LORDSHIP: Oh, the first time you saw them was when you come to the court?

WITNESS: Yes, sir.

HIS LORDSHIP: But did you see them that morning with your eyes?

WITNESS: Your Honour, so many of them I can't tell you."

That ought to have been the end of it but the examination continued with the trial judge intervening:

"HIS LORDSHIP: All I want from you is the truth.

WITNESS: I am telling you the truth.

HIS LORDSHIP: Did you take your two eyes and see these two accused?

WITNESS: Yes, sir, they were there."

Surely, it was unfair and irregular to elicit, by leading questions, evidence on the vital issue of identification. From the witness' further examination-in-chief and cross-examination, the following facts did emerge:

1. she did not know the applicants before the incident.

2. she saw them when she attended the Gun Court

3. her son Everton, who was not at the scene of the incident, told her the names "Rocky" and "Crackie"

4. she could not fit the nicknames to the faces.

5. her son Everton told her the nickname for each face

6. she gave the police names she heard the deceased shouting out to the men outside

7. she did not attend an identification parade

8. she identified the applicants in the dock in court and at the Preliminary Examination.

This, in fact, amounts to a dock identification on hearsay information. She said everything was "rushy", everybody was "boring" through the gate, her things were being destroyed and she was busy trying to secure her television and other property and to hide the grandchildren under the bed and in the bathroom. She further said she saw the two accused engaged in taking down her kitchen window with a crowbar. She was at arm's length then. However, in the atmosphere she described, to be able to identify two persons not known before and part of a mob of fifty persons after a lapse of five and a half months, could only be relied on if the identification resulted from a properly conducted identification parade, particularly, as she said, there were so many people she could not tell, that is, she was not sure.

In this case, clearly identification parades should have been held, as the accused were not known before, were seen in a mob and alias names were used. But Acting Corporal Jacobs said he did not hold any and gave no explanation for this omission. The Deputy Director quite correctly conceded that he could not support the conviction.

Indeed, the quality of the identification evidence was poor, it was weak and unreliable and we agree with counsel that the no-case submission should have been upheld.

The applications for leave are treated as the hearing, the appeals are allowed, the convictions quashed, the sentences set aside and a verdict and judgment of acquittal entered in respect of each.