JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 77/76

BEFORE: The Hon. Mr. Justice Swaby, J.A. (Presiding).
The Hon. Mr. Justice Zacca, J.A.
The Hon. Mr. Justice Melville, J.A. (Ag.).

R. v. DENNIS REID

Roy Taylor for the appellant.

Glen Andrade for the Crown.

January 10, 11, 12, 13, and March 11, 1977

SWABY, J.A.:

On March 11, 1977 we granted the application for leave to appeal against the conviction for murder and the sentence of death pronounced against the appellant in the Home Circuit Court on May 7, 1976, for having on April 6, 1975 murdered Fedlan Walsh. We treated the hearing of the application as the hearing of the appeal and by a unanimous decision allowed the appeal, quashed the conviction and set aside the sentence. By a majority decision it was agreed that in the interest of justice there should be a new trial of the case during the current session of the Home Circuit Court. We promised to put our reasons for our decision in writing. We now do so. In view, however, of the order for a new trial we consider it undesirable to discuss the evidence in any detail in giving these reasons.

At about one o'clock in the early morning of April 6, 1975 Walsh's Beach Club situated at Eight Miles along the St. Thomas Road in the parish of St. Andrew was open for business. There is a bar, a restaurant and, a kitchen on the ground floor of the two storey building and what is described as a 'drive-in" on these premises. One Miss Sadie Samuels a waitress at the Club who gave evidence for the prosecution at the trial said that she was at the hour previously mentioned seated beside a table at the door of the restaurant leading out to the drive-in when two men, one armed with a gun and wearing a mask entered the premises. The man with the gun pointed it at her and came up to her saying "don't move", while the other man went straight into the bar without stopping. She said that when she first saw the gun-man he was wearing a mask over his face but at some stage, she could not remember exactly when, the mask fell off his face before he left where he was with her. She recognised him as the appellant by lights which were turned on in and around the club, restaurant, bar and kitchen. After holding her at gun point for a few minutes the appellant left her and went into the bar and she ran into the kitchen. While in the kitchen she heard more than one gun shot coming from the direction of the bar, and as she was about leaving the kitchen she was again confronted by the appellant who was still carrying the gun in his hand. She recognised him by the aid of the kitchen and restaurant lights which were on. The appellant held her by her hand and pointing the gun at her at the same time ordered her to take off her 'pants'. She said she had taken off her pants when he told her to open her legs, but just then somebody rushed out of the bar into the restaurant and the appellant let go her hand, and ran out into the drive-in at the back part of the premises, carrying the gun in his hand, and she ran upstairs the building. She did not see the appellant again that night. After a while Miss Samuels said she returned downstairs where she saw the dead body of Mr. Fedlan Walsh lying on the floor.

Doctor Victor Badhoo, a registered medical practitioner who performed a post mortem examination on the body of the deceased said that on external examination he found three bullet 'entrance' wounds on it. In his opinion death was due to shock from haemorrhage within the chest caused by the third bullet wound over the right deltoid muscle, the track of which he traced into the chest between the 3rd and 4th ribs into the lower part of the right lung, through the thoracic spine into the upper part of the left kidney through the back, the bullet being recovered under the skin in the left loin.

The appellant was arrested on April 17, 1975 and an identification parade held at the Half Way Tree Police Station on April 23, 1975 when the witness Miss Sadie Samuels pointed him out as the man who came into the bar that night with the gun. The crown was unable to prove which of the two men who had entered the bar had fired the gun shots one of which killed Mr. Walsh and so had to base its case on the doctrine of common design.

At his trial the appellant made an unsworn statement from the dock in which he stated in effect that while he had been serving a sentence in the St. Catherine District Prison, he escaped from that prison on February 14, 1975. He had previously been at the General Penitentiary, and while there two of his front teeth were knocked out by another prisoner. After his escape from the St. Catherine District Prison he had been hiding at a relative's home near August Town which he hardly left until the night of April 17, 1975 when he went looking for his mother as he needed a few things. He was stopped by the Matilda's Corner Police on his way back to August Town whilst travelling in a taxi, as he was recognised because his photograph had been published in all newspapers and shown on television and his description given on the radio. He was taken to the Matilda's Corner Police Station where he had been placed on an identification parade in connection with a charge of murder. Five or six persons went on the parade to look at him and one of them whom he believed to be the witness Sadie Samuels pointed him out and he was subsequently charged with the murder of Fedlan Walsh. He was not a saint but he never killed anyone. Were it not because he had escaped from prison they could not have said he did anything. His defence was in effect an alibi. Two witnesses Dr. Percival Henry, and Mr. Uel Gordon, Resident Magistrate for Portland who held the preliminary examination into the charge testified on the appellant's behalf.

The grounds of appeal argued were:-

1. That the verdict was (a) unreasonable and (b) cannot be supported having regard to the evidence in view of the fact that (i) the evidence of the sole witness, Sadie Samuels, who purported to identify the accused as the man who held her up at gun point was totally discredited on nearly every major aspect of her identification of the accused as well as on the peripheral matters, (ii) because the sole identifying witness said she could be mistaken in her identification of the accused and, because, (iii) certain aspects of the identification parade were unsatisfactory.
2. That the learned trial judge erred in disallowing the submission of "no case to answer" for the reasons set out in ground 1 above.

3. That the learned trial judge failed adequately or at all to assist the jury in resolving the issue of identity by dealing together or sufficiently with the matters relevant thereto.

4. The Summing-up was thrown out of a fair balance by the judge's comments and inaccuracies in reviewing the evidence. Further, the contradictions as they related directly to the all-important question of identity were not adequately dealt with.

Learned Counsel for the appellant submitted that the weaknesses in the identification could be succinctly stated as follows:-

(i) The limited time afforded the only eye witness, Sadie Samuels, for noting the features of the appellant - they were merely fleeting glances when the evidence was properly analysed.

(ii) The evidence as to lighting was totally unreliable on both occasions that Samuels allegedly saw the appellant on the night in question.

(iii) Sadie Samuels admitted that she had heard a description of the appellant before going on the identification parade after the commission of the offence on April 5, 1975 and before the date of the parade.

(iv) The witness both at the preliminary examination and trial admitted that she could have been mistaken as to the identity of the appellant.

(v) The failure of Sadie Samuels to mention that the appellant or either of the two men who had entered the Club premises was masked before the actual trial.

(vi) The witness' failure to give a description to the police of the man whom she stated was the appellant though there were obvious peculiarities as identifying features, i.e. a large scar on his forehead, and two missing front teeth which she could not have failed to observe and so report same to the Police.

(vii) The conflict on the height of the appellant and the height of the person whom she said was armed with a gun and masked.

(viii) The fact that the photograph of the appellant had been published both in the newspapers, and on television before the murder.

(ix) The fact that the appellant was unknown to the witness before the incident.

(x) The failure of four other persons called on the identification parade to identify the appellant.

(xi) The fact that the witness Sadie Samuels stated on a number of occasions that she was extremely frightened.

(xii) The fact that the credibility of the identifying witness was entirely destroyed or at least severely impeached.

Learned Counsel for the defence then embarked upon a detailed examination of the evidence of the witnesses particularly that of Sadie Samuels dealing with the various "weaknesses" as set out under the twelve heads above, pointing out various contradictions and inconsistencies in her evidence, relating to her identification of the accused, and observing that the net result was that the quality of the identification evidence which depended solely on Miss Samuels' evidence was so poor and in his view totally discredited that no reasonable jury ought to have convicted the accused on that evidence. He further submitted that the learned trial judge ought in the state of the quality of the evidence to have ruled in favour of the "no case" submission made by him at the close of the prosecution's case.

Dealing with grounds 3 and 4 Mr. Taylor mentioned various instances where he said the learned trial judge failed adequately or at all to assist the jury in resolving the issues of identity. There was no complaint about the general directions given to the jury concerning cases of visual identification, as this case was, but he submitted that it had fallen short of the assistance a trial judge should give which has been set out in numerous cases dealing with visual identity both locally and in the United Kingdom culminating in what might be considered a codification of these guidelines by Lord Widgery, C.J. in R. v. Turnbull, (1976) 3 All E.R. p. 549, at pp. 551-554. Mr. Taylor dealt particularly with the "weakness" listed as (iii) above. It arose in this way. During the cross-examination of Detective Inspector Sweeney it was brought out that the appellant had escaped from the St. Catherine District Prison on February 14, 1975, and was not recaptured until April 17, 1975, eleven days after the events of April 6. It was alleged that a photograph of the appellant had been published in the Daily News on or about February 19, 1975 and circulated on television and possibly radio also.

This matter was dealt with in the summing-up thus:-

> "Now, the witness Sadie Samuels was recalled at this stage, members of the jury, because up to when Mr. Sweeney gave evidence there was no suggestion put to her that she had received any aid in identifying this man at all.
> So when this came out in the evidence of Mr. Sweeney, it was only right and proper, and I allowed it, that the witness should be recalled for this to be put to her and remember I even commented at the time that I was glad she was not in court when Mr. Sweeney was giving his evidence because she was outside and she was sworn and she was asked these questions:
>
> Q.: Did you ever see any photograph of the accused or pictures in any newspaper or on television anytime between the 19th of February and the 24th of April?
>
> A.: No, sir.
>
> Q.: Did you hear of any description of the accused anywhere between the 19th of February and the 24th of April?
>
> A.: Yes, up by where I was living.
>
> Q.: When?
>
> A.: In the same time when the killing go on out there.
>
> Q.: Before or after?
>
> A.: After.
>
> She said between the killing and the parade she had not seen the accused anywhere and she had not seen any photograph of him either on the television or in a newspaper."

After dealing with the further cross-examination of Miss Samuels on this aspect of the matter the learned trial judge continued:

> "So, you are being asked by counsel for the defence to bear this in mind, members of the jury, that that man's description was circulated and his picture was publicised and people could have seen it and by that they could have been facilitated in pointing him out. In other words they are asking you to say that this young lady - she hasn't said so because she specifically said she did not see any photograph, but they are asking you to say that since it was in the paper then there is a distinct possibility that this might have assisted her unconsciously or consciously to say that this man was one of the men at Walsh's Beach Club on the morning in question.
>
> But you saw the girl, members of the jury. If she was assisted by this photograph, it would mean that she would have seen the photograph on the 19th of February when it was published, remembered his face on the 6th of April and when

she saw him at the club as she says and still remembered it on the 23rd of April when she saw him on the parade. You are the judges of fact, you must say what you make of all this evidence."

The gravamen of defence counsel's complaint in this regard was that the judge apart from merely repeating the evidence of the witness that she had obtained a description of the appellant up where she was living, before attending the identification parade, no questions had been put by the Court, in the interest of justice, (Crown Counsel having failed to re-examine the witness with this in view), in order to ascertain whether the description of the appellant she had received had enabled her to point out the appellant on the identification parade and that in the absence of any such questions or directions the learned trial judge had not assisted the jury on how they should deal with her identification of the appellant in the state of her evidence on this aspect of the identification of the appellant. In the circumstances it could not be said that the appellant had been properly identified on Miss Samuels' evidence or that he had had a fair trial. Learned Counsel for the Crown while conceding that Miss Samuels' evidence regarding the description she got required clarification said that the appellant would have suffered no injustice having regard to the learned judge's general directions.

We were, however, of the view that there was merit in appellant's Counsel's submission. Bearing in mind that this was a case where visual identification was involved and that the evidence depended entirely upon that of the sole witness, Miss Sadie Samuels, the inconsistencies in her evidence surrounding her ability properly to identify the appellant required particularly careful directions as to any special weaknesses which appeared in the identification evidence, along the guidelines indicated in these types of cases, now codified in Turnbull's case. It was unfortunate that the "description" evidence was allowed to remain as it was left to the jury, as this Court is unable to say whether Miss Samuels was able to identify the appellant wholly by reason of this prior description she had received, or whether it was wholly from her own powers of observation or a combination of both. At all events the evidence being in the state that it was, it appeared incumbent on the learned trial judge to assist the jury as to how they should treat this evidence. Had it been that the witness was able to identify the appellant other than from her own powers of observation serious thought would have had to be given to the "no case" submission made at the close of the Crown's case. If, however, the identification turned out to be from the witness' own observation, then the matter was one properly to be left for the determination of the jury.

Miss Samuels had sworn that she had not known the appellant before the night of April, 6. In the circumstances we are unable to see how the jury could have resolved the question of the identity of the appellant so as to be sure because clarification had not been obtained of the witness' answer regarding the description of the appellant she said she had received. The omission to direct the jury on how that aspect of the evidence on identity should have been resolved was in our view a non-direction amounting to a misdirection which was fatal to the conviction recorded against the appellant.

Accordingly we granted the application for leave to appeal, treated the hearing of the application as the hearing of the appeal and ordered as previously stated.