JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 183/87

BEFORE: The Hon. Mr. Justice Rowe - President
The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Wright, J.A.

R. v. DESMOND WILLIAMS

Mr. Carlton Williams & Mr. D. McKoy for the Applicant

Miss Strawe & Miss Fara Brown for the Crown

May 24 & June 21, 1988

CAMPBELL, J.A.

The applicant was convicted of murder by a jury and sentenced therefor by Wolfe, J., in the Home Circuit Court on October 5, 1987.

Against this conviction he has applied for leave to appeal.

The facts are simple and brief. At about 10.30 p.m., on May 28, 1985 Raphael Hart retired to bed at the home of his father Ernest Hart the deceased, at 1A Texton Road, St. Andrew. Mrs. Helen Hart wife of the deceased, and the deceased had earlier retired to bed. At about 2.30 a.m., the following morning, Mr. Raphael Hart was aroused from his slumber by his mother Mrs. Helen Hart who came to his room, held his hand and called his name. He responded, but before he could get off the bed he heard a loud bang on the front door of the house. This front door provided both entry to the living room and exit to a verandah. The loud bang was followed by gunshot explosions which appeared to come from the same area. About a minute after, he left his mother in his room and was proceeding through a corridor from his room to the living room when at the internal door leading from this corridor to the living room he was held up by the applicant who had a knife and another man who had a gun. Raphael Hart was menaced by both the knifeman and the gunman and was ordered to produce money. He explained that he had no money but that if there was any money,

it would likely be under his mother's mattress. He was escorted by the gunman and the applicant to his mother's room. Mr. Hart lifted his mother's mattress but as there was no light of any sort in the house, the applicant struck a match which he had and lit a piece of newspaper which he the applicant gathered from under the mattress. With the aid of the light from the burning newspaper the applicant searched for money. When the burning newspaper flickered out, the applicant lit another piece and moved with Mr. Hart to a dresser in the room where he continued his search. No money was found. The applicant however took from the top of the dresser two watches belonging to Mrs. Hart and the deceased respectively. He also took the handbag of Mrs. Hart and thereafter the applicant and the gunman left the home through the living room. The applicant and the gunman were in the home with Mr. Hart for about thirteen minutes and for about ten minutes, Mr. Hart observed the face of the applicant by the light of the burning newspaper and prior to that from the Sodium street light which flooded in through two louvre windows and the living room door which had been kicked open. The applicant was throughout the incident close to Mr. Hart. On the departure of the intruders, Mr. Hart proceeded to the living room where he saw his father lying unconscious in a pool of blood across the living room doorway which led on to the verandah. His father died shortly after. He died from gunshot injuries. Mr. Hart subsequently on July 9, 1985 identified the applicant on an identification parade.

Before us Mr. Williams complained that the issues which required determination by the jury before they could find that the applicant participated in a common design were not clearly delineated and presented by the learned trial judge to the jury so as to make it clear to them that they were required to determine these underlying issues, some of which were largely matters of inference, before they could find that the applicant was party to a common design. These issues, Mr. Williams submitted were:

(a) whether the gunshot explosions were effected by the applicant or someone who was with him at the time;

(b) whether Mr. Ernest Hart met his death from these explosions;

(c) whether if the applicant was not the person who fired the gun, albeit present with the person who actually did so, he was party to a common design not merely to rob but to rob using violence if necessary, and finally;

(d) whether the applicant was present at the time of the explosion or only came on the scene after.

We are of the view that the learned trial judge fully directed the jury on the factual situation exhibited by the circumstances. He directed them that the resolution of the issues raised by the factual situation was a matter of inference to be drawn by them. He had earlier correctly directed them on the concept of inference and of its circumscribed use in arriving at conclusions of fact. We see no basis on which the learned trial judge's summation to the jury can be faulted as having manifested a failure to alert the jury to the issues raised before us by counsel for the applicant.

Mr. Williams next complained that the directions of the learned trial judge to the jury on the identification of the applicant on the identification parade held on July 9, 1985 were inadequate in that he failed to direct them on a serious breach which occurred in the conduct of the said identification parade and further that he compounded this inadequacy by telling the jury in effect that there had been no impropriety in the conduct of the said identification parade.

The pith of Mr. Williams' complaint is that Rule 554A introduced by the Jamaica Constabulary Force (Amendment) Rules 1977 which regulated identification parades using "one way mirrors" had been breached in that no attorney-at-law was present at the parade as prescribed by the said rule. The evidence of Sergeant Leander Gordon who was in charge of

the identification parade is that he asked the applicant if he had a lawyer whom he would wish to be present at the identification parade. The applicant answered in the negative. He then asked the applicant if there was anyone else whom he wished to be present at the parade. The applicant requested the presence of his father who was accordingly called and was present at the parade. There was also a Justice of the Peace who was called by Sergeant Gordon and was present at the parade "to watch proceedings that the parade is conducted properly." Sergeant Gordon confessed that he was not aware that a suspect is entitled to have a lawyer at an identification parade on which he the suspect is put.

Rule 554A supra so far as is relevant states thus:

> "554A (i) An attorney-at-law subject to sub-paragraph (iii) hereof, and a Justice of the Peace shall be present and both shall be placed in a position to be decided by the officer conducting the parade.
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> (ii) The attorney-at-law shall be one chosen by the prisoner, so, however, that if the prisoner chooses no particular attorney-at-law, or if the attorney-at-law of the prisoner's choice is not available for the parade, the attorney-at-law shall be either drawn from a Legal Aid Clinic or selected by the officer conducting the parade from among attorneys-at-law willing to undertake the assignment.
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> (iii) When an attorney-at-law fails or is unable to attend for an identification parade the identification parade may be postponed once and if on the date set for the postponed parade an attorney-at-law does not attend but a Justice of the Peace is present the identification parade may be held in the absence of the attorney-at-law."

The above regulation was undoubtedly breached, since no attorney-at-law was present at the identification parade on which the applicant was put and identified, and there is no evidence that this identification parade was a postponed one within Regulation 554A (iii) (supra). The reason for the non-attendance of an attorney-at-law is given in the evidence of Sergeant Leander Gordon. It is that he was not aware that the applicant as a suspect was entitled to have one at the parade. The inference to be drawn from his evidence is that had he been aware of this requirement, he would not have asked the applicant to nominate someone else as a substitute for an attorney-at-law thereby securing the presence of the applicant's father; rather he would have taken steps to secure the presence of an attorney-at-law.

The failure and or neglect to secure the attendance at an identification parade of an attorney-at-law was the subject of consideration and determination by this court in R. v. Bradley Graham & Randy Lewis S.C.C.A No. 158 & 159/81 dated June 26, 1986. The court in that case per Rowe, P., held thus;

> "Notwithstanding the imperative nature of the language used in Regulation 554A that an attorney-at-law ..... 'shall be present' we decline to interpret this provision to mean that his absence will, in all circumstances, except those provided for in 554A (iii), invalidate the parade and render an identification made thereat a nullity. We think that the Regulations are procedural only and any positive breach will have the effect of weakening the weight to be given to an identification made at such a parade."

The Court having established the above principle considered whether the absence of an attorney-at-law was shown to have created the possibility of a miscarriage of justice. In that case the court found that the failure and or neglect to have an attorney-at-law at the parade did not stem from "callous disregard of the rights of the suspect" in having the identification parade conducted in a fair manner. In this case also Sergeant Leander Gordon could not be indicted on any charge of manipulating the identification procedures to secure an unfair result. He secured

the presence of the applicant's father and he secured the presence of a Justice of the Peace as witnesses to the fairness of the conduct of the identification parade. Apart from the error innocently made, in not endeavouring to secure the presence of an attorney-at-law, all other aspects of the identification parade procedures were unimpeachable. It was in relation to these other aspects that the learned trial judge was undoubtedly referring, when he told the jury that the applicant's father gave evidence and that no questions were asked of him by the defence to suggest that any "impropriety occurred on the parade." We do not consider that the absence of an attorney-at-law at the parade in this case in any way prejudiced the applicant by placing him in a situation where he could be unfairly and in consequence, wrongly identified.

We do not consider that the learned trial judge in not informing the jury that Regulation 554A supra requires that effort be made to have an attorney-at-law at the identification parade rendered his directions on identification at an identification parade inadequate. In the context of his actual directions this complaint has no foundation. The directions were as follows:

> "He [Sergeant Gordon] was cross-examined and the gravamen of the cross-examination was to establish whether or not the parade was held in accordance with the regulations laid down. He was questioned about whether he knew that a lawyer should be on the parade; whether or not a J.P. The whole object of having somebody on the parade is to ensure that there is fairplay. You heard that a Justice of the Peace was on the parade. You heard that the man's father was there. The man's father came and he was not asked any questions to indicate that any impropriety occurred on the parade. So you are the judge's of the facts. Was the parade a fairly held parade. If you say the parade was not fair, it would mean that you cannot rely on the identification, and in those circumstances you would acquit him. If you are in doubt about whether the

> "parade was fair, you must also acquit him. But the father came and there was no attempt by counsel to elicit from him any impropriety which occurred on the parade."

We were of the view that the grounds in support of the application for leave to appeal were without merit, we accordingly refused the application on May 24, 1988.