NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 28/2000

BEFORE: **THE HON MR. JUSTICE BINGHAM, J.A.**
THE HON MR. JUSTICE PANTON, J.A.
THE HON MR. JUSTICE SMITH, J.A.

REGINA v DWIGHT HYLTON

Wentworth Charles for the appellant

Donald Bryan for the Crown

October 23, 29, 30 and December 20, 2002

BINGHAM, J.A:

The appellant was tried and convicted in the Home Circuit Court for the non-capital murder of Patrick Dunkley committed on October 21, 1998.

The hearing before a judge of the High Court sitting with a jury occupied the period from January 26 to February 1, 2000. He was sentenced to imprisonment for life at hard labour and recommended to serve a period of twenty years before being considered for parole.

His application for leave to appeal having been considered and refused by the single judge, was renewed before the Full Court.

We heard the submissions of counsel over a period of three days at the end of which we treated the application for leave to appeal, as the hearing of the appeal, allowed the appeal, quashed the conviction and set aside the sentence. In the interests of justice we ordered a new trial to take place during the ensuing session of the Home Circuit Court.

At the time of handing down our decision we undertook to reduce our reasons into writing. This we now do.

In view of the fact that the matter will have to be retried our observations will of necessity be brief.

The Facts

The facts out of which the charge arose related to a shooting incident at premises at Jarrett Lane off Mountain View Avenue, in Saint Andrew. These premises were occupied by the deceased Patrick Dunkley, his common-law wife, their infant child, along with other family members.

On October 21, 1998, about 11:40 p.m., four men armed with revolvers went to these premises pretending to be police officers. They signalled their arrival by knocking on the front door of the house and calling out, "Open up police" and when the deceased opened the door he was pulled out onto the verandah and shot several times by the gunmen. He fell on the verandah after which, his assailants set fire to his

body as also the house which was destroyed. The other occupants however, managed to escape to a neighbour's premises.

The common-law wife and her mother recognized the appellant as one of the gunmen. They were able to see and identify the appellant and the other men by means of a torch lamp which was alight inside the house.

A report was made to the Rockfort Police who collected statements, carried out investigations and obtained warrants for the arrest of four men including the appellant for charges of non-capital murder.

The appellant was subsequently arrested on warrant on December 23 1998, at the Elletson Road Police Station.

In his defence the appellant raised an alibi. He gave evidence and called two supporting witnesses in his defence. Their accounts sought to place him at the material time of the shooting at premises occupied with his common-law wife as also his sister and her baby's father.

The crucial issue at the trial was that of visual identification. The incident having occurred at night, the quality of the identification evidence was therefore of crucial importance in light of the guidelines laid down by a body of judicial decisions and developed with the objective of possible avoidance of miscarriages of justice: **R v Turnbull** [1976] 3 All E.R. 549 [1976] 3 W.L.R. 445; 63 Cr. App. R.132 and **R v Oliver Whylie** [1977] 15 J.L.R. 163.

Learned counsel for the appellant sought and obtained leave to argue six supplementary grounds of appeal. For the purposes of this judgment, however, it is only necessary to resort to grounds 3(i) and 4 which read:

> **"3(i)** The concatenation of misdirection, non-direction and failures to highlight discrepancies deprived the appellant of a fair trial to which he was entitled under section 20 of the Jamaica Constitution.
>
> . . .
>
> **4.** That while the learned trial judge in a general way warned the jury as to the dangers inherent in visual and voice identification, it is submitted that he failed to remind them of the specific weakness which had appeared in the identification evidence of the witnesses albeit that this was a case of recognition."

These two grounds were more fully explored in counsel's written submissions.

Before adverting to the arguments of counsel relating to the particular ground, it may be convenient at this stage to set out the factual matrix which provided the basis for the complaint.

Following the summation of the learned judge, the jury after having retired to consider their verdict, returned to the courtroom, having been out in retirement for an hour and fifty-five minutes (from 11:30 a.m. to 1:25 p.m.). Following the roll call, the following dialogue then ensued:

> "Registrar: Madam Foreman please stand. Madam Foreman and members of the jury, have you arrived at a verdict?

Foreman: No, we have not,. Despite the fact we have listened to the evidence, we have listened to the prosecution ...

His Lordship: Just tell me, at present in terms of numbers only, how are you divided.

Foreman: Eleven to one.

His Lordship: Thank you. Is there any area of the law on which you would require any further directions?

Foreman: Yes, m'Lord. Particular juror is not convinced that the lighting was sufficient.

His Lordship: Thank you. Well, members of the jury, at the outset of this trial each of you took an oath to return a true verdict according to the evidence. That means that each of you as individuals must decide what you consider to be a true verdict. But of course, you have a duty not only as individuals, but collectively and this means that it is the collective verdict of all of you that has to be returned. No one must be false to the oath that he or she has taken to return a true verdict. But in order to arrive at a collective verdict, that is the verdict of you all, there must necessarily be argument and discussion amongst you and also a certain amount of give and take and adjustments adduced as individuals within the scope of the oath you took. None of you should be unwilling to listen to the argument of the rest. If any of you have a strong view or you are in a state of uncertainty, you are not obliged or entitled to sink your views and agree with the majority, but argue out and discuss the matter together, within the scope of the oath you took initially. If you still cannot agree, come back and say so, <u>but I have noted that the division now is eleven to one, so just go and talk it out further and see if you can come back with a collective verdict</u>.

> Foreman: May I say something? The particular juror is asking if you would be kind enough, although you have done it already, to go over the question of the recognition as you have them in your notes and which you have guided us already. His view is that he is not convinced the lighting was sufficient for us to use recognition as a fact.
>
> His Lordship: There is nothing in my view that I can add to the directions which I have given you on the subject of lighting. I dealt with the torch-lamp, I dealt with the distance and there is nothing that I can usefully add to what I told you already. The point is, you are to go back out and discuss the matter, bearing my instructions as regards the disagreement in terms of numbers in mind. You may retire again and come back."
>
> (Emphasis supplied)

The jury went back into retirement for a further one hour and sixteen minutes (from 1:35 p.m. to 2:51 p.m.) before returning a unanimous verdict of guilty of non-capital murder.

Although the charge given to the jury following their first retirement, misplaced as it was, may at first blush appear to be commendable, it entirely missed the point. It is clear from the dialogue that the jury needed further assistance from the presiding judge on what was the most crucial issue in the case, on a matter touching on the circumstances of the identification. From the foreman's comments it was quite clear as to the nature of the assistance that was required. From the learned judge's response rather than dealing with the foreman's request, he chose to ignore it. The learned judge enquired from the foreman as to how the

jury were divided. Given the nature of the charge they were considering this was uncalled for as a verdict either way would have had of necessity to be unanimous. He chose however, to send the jury back into retirement without complying with their request.

It was against this background that learned counsel for the appellant submitted that it is the duty of a trial judge to provide appropriate assistance to a jury throughout the trial and that this should continue throughout the period of the jury's retirement. If questions relate to a matter on which evidence has been given, it is proper for the judge to remind the jury of such evidence and instruct them accordingly.

Learned counsel relied on **Berry v The Queen** [1992] 3 All E.R. 881 a decision of the Judicial Committee of the Privy Council on an appeal from this Court.

In that case, there was a ground of complaint raised that the learned trial judge had failed to deal with a problem which the jury indicated that they had on returning to Court after deliberating for one hour. Having ascertained that the problem related not to law but to the evidence the trial judge said:

> "All right well I have told you that the facts are for you; you have seen all the witnesses in the case, you have heard them and it is for you to assess their evidence and to decide which of them you believe, if any, which of them you disbelieve if any."

While going on to give the jury a brief and accurate summary of the factual contest and while adverting their minds to the burden and standard of proof and reminding them that they were the sole judges of the facts, the learned judge did not enquire from the jury as to what was the problem which had brought them back into Court. In the circumstances it was impossible to determine as to whether anything said further to the jury by the learned judge had resolved the problem or not as no one knew what the problem was. Lord Lowry in delivering the advice of the Board (page 894(H-I) said:

> "Their Lordships have already met this difficulty in some other recent cases. The jury has sought assistance and, once it appears that the problem is one of fact, the judge has not inquired further but has merely given general guidance as in the present case. The jury are entitled at any stage to the judge's help on the facts as well as on the law. To withhold that assistance constitutes an irregularity which may be material depending upon the circumstances, since, if the jury return a guilty verdict, one cannot tell whether some misconception or irrelevance has played a part." (Emphasis supplied)

In the case at Bar there can be no doubt that the jury had a problem with the evidence as to the state of the lighting, a factor which was crucial in determining the relative strength or weakness in the identification of the appellant. This factor lay at the very core of the prosecution's case. There was a request made to the learned trial judge for assistance by way of the memories of the jury being refreshed from his

notes of the evidence. Not unlike the situation in **Berry v The Queen** (supra) the learned judge no doubt erroneously was of the view that as the request related to a question of fact and not of law that was not a matter falling within his province. A resort to the dialogue bears out this contention as the direction of his inquiry of the foreman was to ask him whether the jury needed any assistance "in any area of the law."

As it was clear as to the eventual outcome, the jury failed to get the assistance requested. This failure of the learned judge to render this assistance amounted to a material irregularity given the nature of the problem to which the matter related. One cannot say what the verdict of the jury may have been had they been given the assistance called for. What can be said, given the manner in which the matter was dealt with by the presiding judge, was that a verdict reached in such prevailing circumstances cannot be allowed to stand.

It was for these reasons that we made the order which is set out at the commencement of this judgment.