

JAMAICAIN THE COURT OF APPEALSUPREME COURT CRIMINAL APPEALS Nos. 59/84 & 60/84

BEFORE: The Hon. Mr. Justice Rowe, President
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice White, J.A.

R. v. GARFIELD REYNOLDS & RICHARD REYNOLDS

K.D. Knight for the Appellants

Dorrell Wilcott for the Crown

May 29, June 13, 1985

ROWE, P.:

The appellants are brothers. They were convicted before Alexander J. in the Gun Court for the offences of illegal possession of a firearm, and two counts of robbery with aggravation, and were each sentenced to serve concurrent 4 year terms of imprisonment at hard labour on each count. Their applications for leave to appeal were treated as the hearing of the appeals, the appeals were allowed, the convictions quashed, the sentences set aside and verdicts of acquittal entered. We promised to put our reasons in writing and this we now do.

A daring day-light robbery was perpetrated on Tower Street in downtown Kingston at 4.25 p.m. on Friday, May 20, 1983. Mr. Jack Murray, the manager of Randall's Hardware, at the end of the day's work went to the parking lot, entered his van, placed

his switch-key in the ignition, but before he could drive off, a car was driven into the middle of an adjoining lane, where it stopped and from it two men alighted, one with a firearm in his hand. The armed man approached a group of men which included Keith McGregor, the security guard for Randall's Hardware and he robbed Mr. McGregor of his firearm. Mr. Murray then saw another armed man at the passenger door of his van and in response to this armed man's demand, Mr. Murray was attempting to hand over his brief-case when the man who had robbed the security guard came over and took both the brief-case and Mr. Murray's switch-key. They then drove away in the car which had been parked in the middle of the lane.

A report was made to the police at Gold Street Police Station and Det. Cpl. Rose commenced investigations, in the course of which he took a statement from Keith McGregor on that same afternoon. As a result of an incident which occurred at premises 58 Waterloo Road, Kingston 8 at about 5.30 a.m. on Saturday, May 21, 1983 the two appellants were taken into custody and carried to the Central Police Station. The evidence led at trial was somewhat unclear on this point, but it appears that a man was shot and killed in the Waterloo Road incident, and that a brief-case of a description similar to that lost by Mr. Murray was found on those premises as also a firearm identified as that stolen from Mr. McGregor. The finding of these articles originally formed part of the prosecution's case but was rejected by the learned trial judge who held the evidence in connection therewith to be "manifestly unreliable."

Detective Cpl. Rose took Messrs. Murray and McGregor to Madden's Funeral Parlour on the morning of Saturday, May 21, 1983 and from there to the Central Police Station. When, according to Cpl. Rose and Mr. Murray, the party of three arrived at Central Police Station, the appellant Richard Reynolds was seated in the

C.I.B. office in a group of men and women, variously estimated at between 6 and 9 people. Later on the same morning, the appellant Garfield Reynolds was brought into the C.I.B. room while Messrs. Murray and McGregor were present. Mr. Murray was shown a brief-case and its contents and they were so similar to what was stolen from him that he identified and claimed them as his own. Although Mr. McGregor denied identifying a firearm that morning, Det. Cpl. Rose said that he showed a firearm to Mr. McGregor which the latter identified as that stolen from him the previous afternoon.

While the appellants were present in the C.I.B. office on the morning of May 21, neither Mr. Murray nor Mr. McGregor alerted the police officers that these men were the robbers. A spark of recognition appears to have been struck in the consciousness of Mr. Murray in relation to Garfield Reynolds because he is alleged to have mentioned to Det. Cpl. Rose on the homeward journey that Garfield Reynolds resembled one of the men. That intimation was not sufficient to cause Det. Cpl. Rose to return to the C.I.B. office to continue his investigations.

On June 4 and June 13, 1983 Inspector Norris Johnson and Sgt. Reuben Rowe, respectively, conducted identification parades at the Central Police Station. On the June 4 parade, Garfield Reynolds was identified by Messrs. Murray and McGregor as one of the men who held up and robbed Mr. Murray of his brief-case and ignition keys. On the second parade, Mr. McGregor identified Richard Reynolds as the man who robbed his firearm, and then actually relieved Mr. Murray of his brief-case and switch-key. The defence was simply that the appellants knew nothing about the robbery and the cross-examination was directed to show that the identification evidence was wholly unreliable.

Mr. Knight relied upon two grounds of appeal. Firstly, that the learned trial judge did not properly assess the circumstances of the identification of the appellants and failed to apply the proper legal principles in determining the effect of their purported

identification, and secondly, that the verdict was unreasonable and could not be supported by the evidence. At trial the Crown's concern was to show that the opportunity which the prosecution witnesses had for seeing the appellants on May 21 did not amount to the type of confrontation which the Court condemned in R.v. Leroy Hassock, [1977] 15 J.L.R. 135, but was in fact an innocently co-incidental meeting.

It does not seem however, that contrived confrontation or innocent meeting formed the grit of the defence complaint. Given the fact that the appellants and the Crown witnesses had come face to face within 24 hours of the robbery in circumstances in which the Crown witnesses were in the course of assisting the police in their investigation of the robbery, what is the probability that either or both of the Crown witnesses would not have reacted to their presence? Mr. Murray was in the process of identifying his brief-case and its contents, he having given a statement to the police on the previous afternoon. A man is taken into the room in which he is, in the custody of the police. Mr. Murray sees this man and yet he says not one mumbling word. Why? Is it because he did not recognise him as his assailant? And if he did not give any indication then and there that he had recognized Garfield Reynolds, what weight could possibly be placed upon his later testimony that he was positive as to his identification made on the identification parade two weeks later? Why should the photographic impression be more vivid on June 4 than it was on the day following the robbery?

Mr. Keith McGregor purported to identify both appellants. He did so on the identification parades held on June 4 and 13, and pointed out the two men in Court. There was material which could be used to test the reliability of his identification and Mr. Knight with skill and care, tested the witnesses in cross-examination.

First, Mr. McGregor was asked to describe the colouration of various persons in Court and one he described as "dark-brown" while the two appellants he described as "clear." Then he was reminded of the description which he had provided to the police on the very afternoon of the robbery and he admitted that he had signed a statement describing the man who robbed his revolver as "dark." In a context where Mr. McGregor could recognise shades of "dark," "dark-brown" and "clear." could it be said that a man whom he perceived to be "dark" on the 20th May could be "clear" come June 13?

But that was not the end of Mr. McGregor 's testimony. In examination-in-chief, he was asked:

"Q: Where do you see them?"

And he answered: "For the first time at the hold-up, the second time at the identification parade."

He was thereby confidently asserting that he had no intermediate opportunity to see the appellants. Mr. McGregor saw 6 or 7 men seated in the C.I.B. room on the morning of May 21, but he did not recall seeing a man being brought in after his arrival there. Mr. McGregor positively answered that:

"I saw people, but you are pointing at two men, but I did not see none of those two men."

To continue with Mr. McGregor's evidence he said that he saw Garfield Reynolds who was by Mr. Murray's van clearly as "the two of us were face to face." Instantly he was confronted with his statement to the police given on May 20 when he said:

"I did not get to see him clearly."

So Mr. McGregor was discrepant in his testimony as to his opportunity to observe Garfield Reynolds during the robbery, he was discrepant in his description as to the colour of

Richard Reynolds given in his statement and how that appellant appeared in the dock, and he was implacable in his attitude that he had not seen the appellants between May 20 and the dates of the identification parades.

Quite apart from the ever-present necessity for the trial judge to consider the credit-worthiness of a witness, there fell for special consideration in the instant case two of the more common features in visual identification cases to which attention was directed in R. v. Whyllie, [1977] 15 J.L.R. 163, these being:

- (a) "the opportunity which the witness had of viewing the criminal," and
- (b) "if the person was unknown to the witness what description, if any, did he give to the police."

Mr. McGregor did not recognise either of the appellants at the C.I.B. room on May 21, and a not unnatural inference to be drawn from that failure, is that he was on the look-out for men of considerably darker complexion than the appellants. Or does this failure to make the connection demonstrate that Mr. McGregor was for some reason neither vigilant nor observant on that day?

In our view, the learned trial judge did not give sufficient weight to the weaknesses in the identification evidence which resulted from the failure of Mr. Murray to point out the appellant Garfield Reynolds on May 21 at the C.I.B. office. Contrary to the evidence, the learned trial judge formed the opinion that "Mr. Murray seems to have instantly - instinctively, unhesitatingly, recognized the accused Garfield Reynolds." When he had expressed himself in that fulsome way, Mr. Knight then and there challenged the basis of that finding, and in our view, the evidence could not lead inexorably to the inference drawn

855

by the learned trial judge. Mr. McGregor was a very discredited witness and it does not seem that the trial judge gave sufficient weight to the weaknesses in his evidence.

The decision in R. v. Leroy Hassock, supra, was intended to maintain rectitude in police practices as to identification of suspects but as Carey J.A. pointed out in R. v. Haughton and Ricketts, S.C.C.A. 122 and 123/80, unreported (Judgment delivered on May 27, 1982), confrontation between suspect and witness simpliciter is not necessarily fatal to a conviction grounded on visual identification. He 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 witnesses. It will always be a question of fact for the jury or the judge where he sits alone, to consider all the circumstances of the identification to see that there was no unfairness and that the identification was made without prompting. In a word, the identification must be independent."

The investigating police officer was aware that the witnesses for the prosecution had a prior, even if perfectly innocent opportunity to observe the appellants before the date of the identification parade. Such a parade would not have the same weight as one held without similar opportunity. In our view, notwithstanding the identification made on the parade, the pre-existing circumstances were such as to render those parades of little weight and insufficient to outweigh the weaknesses in the evidence of the two prosecution witnesses. No useful purpose could be served in granting a new trial and consequently verdicts of acquittal were entered.