JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 16/85

BEFORE: The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Downer, J.A. (Ag.)

R. v. GLENROY WILLIAMS

Horace Edwards, Q.C. for the appellant

John Moodie for the Crown

September 24 - 26, December 18, 1986
& April 9, 1987

DOWNER J.A. (AG.)

This is an appeal from a conviction for murder in the Home Circuit Court before Bingham J. and a jury. At the end of the trial which lasted from 5th to 8th February, 1985 the appellant was sentenced to death, while his co-accused David Jackson was discharged as the jury returned a verdict of not guilty in respect of him.

We propose to treat this application for leave to appeal as the hearing of the appeal as the issues raised involve points of law. The indictment charged David Jackson and Glenroy Williams on count I that they murdered Hilda Bogle and on count II they were charged for murdering Moses Edwards, both murders having taken place at Pondside in the parish of St. Thomas at the same time on the 7th day of March, 1981.

The case against the appellant rested on the evidence of Mrs. Joy Williams. She told the court that she was at home on 7th March, 1981 at around 10.30 p.m. when she heard her parents car coming up the drive way. The area outside was well lighted from 100 watt bulbs on the verandah and car porte and flood lights from outside. She heard gunshots coming from the eastern side whereupon she shouted out for thief! With great courage she went for a length of P.V.C. pipe, and then she saw her mother going towards the verandah with a box in her hand, which she used to try and hit the accused Williams. She continued by stating that Williams had a gun in his hand, at a distance of about 20 ft. away and that he was shooting at her mother Hilda Bogle.

Mrs. Williams explained that she used the iron pipe to try and hit the accused whom she described as that Indian man and she said that the other accused whom she pointed out in Court shot at her. Her mother and Moses Edwards died subsequently but what is important is that after her mother had entered the house bleeding profusely, the witness returned to the verandah and saw the accused Williams again and three others one of whom she stressed was the co-accused Jackson.

It is noteworthy that Mrs. Williams herself was shot that night, both she and her mother went to the hospital next day where her mother died.

The cardinal issue was identification. Mrs. Willaims stated that she had given a general description of Williams to the police and that she picked him out at an identification parade at which the accused said to her that he would catch her when he came out.

Mrs. Williams was cross-examined on behalf of the co-accused Jackson. The judge put questions to her on behalf

of Williams. In particular he questioned whether Williams had any striking features to distinguish him from any other Indian and she did not recall any.

The learned trial judge stressed that the identification was one year and nine months after the incident and she agreed. She denied that she was frightened when she saw Williams that night and she also said that she was sure that she was not mistaken as regards his identity.

When Mrs. Williams was recalled, she stated that Williams was the shorter of the two men whom she saw at first, the other was tall and fair skinned. The judge put it to Mrs. Williams that she had told the police that when the men jumped over the fence three minutes had elapsed, yet in court she gave the time as ten minutes. Again she told the police that of the two men she saw at first, the Indian one was taller and on recall she stated that the accused Williams had on a tam which fell from his head when he grappled with her mother.

As Mrs. Williams picked out Williams we must now turn to that exercise to see what happened on 30th December, 1982. Sgt. Christie told the court that he held an Identification Parade in respect of the murders of Hilda Bogle the mother of Mrs. Williams and Moses Edwards which took place on 13th April, 1981. The suspect was the appellant. He was represented by Mr. Bonner of counsel and Mrs. Williams had no hesitation in picking out Williams. Ralph Sullivan the eyewitness who knew the co-accused Jackson said he saw him there on the fateful night but did not identify Williams at the identification parade.

Other features emerged from these questions put by the judge on behalf of Williams. Sgt. Christie could not give an account as to how Williams came to be in custody nor could the arresting officer Cpl. Ellis who told the court he found him in custody on 5th December, 1981.

At the end of the Crown's case counsel for Jackson made a submission of no case to answer. In his address he concentrated on the issue of identification by pointing out that Mrs. Williams' evidence in respect of Jackson was a dock identification and that the evidence of District Constable Sullivan was sufficient to warrant Jackson being called upon. He adverted to the fact that although Sullivan alleged that he knew Jackson before, he did not inform the police of that, but instead gave a general description. As for Mrs. Williams she admitted, that she saw Jackson at the Preliminary Enquiry; that his face was partly covered on the night in question, yet it was on that basis that she identified him in Court.

Mr. Wilson who appeared for Jackson assisted the Court in relation to Williams, he pointed out the discrepancy in her evidence in relation to the height she gave to the police and what she said in Court about the height of Williams and the contradictions concerning the time she had to observe him.

Mr. Wilcott for the Crown in his reply adverted to the duty of the judge to leave the case to the jury once the evidence met the minimum requirement but he did not deal specifically with any authority which pertained to identification evidence.

It was against that background of what may be termed inadequate assistance, because neither counsel referred to the all important issue of the reliability of the identification evidence given. No mention was made of the particular

circumstances of this case where the identification parade was held some one year and nine months after the date of the offence, and further there was no reference to the fact that there was no account as to how Williams was taken into custody.

It was in those circumstances that the judge made the following ruling at page 108 of the record:

> "On the basis of the evidence in the case there is a case, there is sufficient evidence to be left for the jury's consideration and I am ruling accordingly that he has a case to answer, in respect of both accused."

It was then that Jackson gave evidence on oath of an alibi and that Williams elected to say nothing at all.

Jackson was acquitted by the jury and so he only concerns us marginally, but Williams was convicted. In relation to him, was the evidence sufficiently credible, having regard to the inconsistencies in the evidence of Mrs. Williams and the circumstances under which the purported identification was made, to establish a prima facie case against him? Over the past decade the Courts have paid particular attention to the important issue of visual identification so as to ensure that the quality of evidence put to the jury is of such a nature that it is capable of supporting a conviction given the frequent instances of mistaken identity that has occurred in the past. In R. v. Bradley Graham and Randy Lewis unreported Supreme Court Criminal Appeal 158 and 159/81 the accepted approach was stated thus by Rowe P. at page 16:

> "In Turnbull's case Lord Widgery C.J. had said at page 553 (b) of (1976) 3 All E.R. that:

> " 'Where in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on the fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification.
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> In Whylie's case we considered that if this passage was taken too literally the lines separating the functions of the judge and the functions of the jury could become blurred. We thought that if there was insufficient evidence to support the prosecution's case, a no case submission would succeed and that if the prosecution witnesses were discredited to the extent that they became manifestly unreliable, the rule laid down in the Practice Direction by Lord Parker of 1961, at (1962) 1 All E. R. 448 would equally apply and a no case submission would be upheld. We hesitated to lay down a special rule for visual identification evidence which would be anomalous having regard to the general rule that the jury are in the best position to attach weight to admissible evidence from whatsoever source it might arise'."

We find that with regard to ruling on a submission of no case to answer that this passage contemplates instances where the Identification Parade was held nearly two years after the incident and where there was no account as to the reasons for the delay. Also the fact that no one could explain when the accused was taken into custody was a matter that should have been considered at the end of the Crown's case. Had the learned trial judge been specifically alerted to these factors in all probability he would not have called upon the appellant. Implicit in the tenor of his summing up was his concern as to the want of cogency in the evidence for the Crown for he said:

> "When she is confronted by her statement, what do you find? She couldn't see the man's face; he had on a mask which went over his nose right down covering his face and head dress which only left part of the forehead and a part of the nose. So all she was looking at, was really two eyes and part of a forehead of a man she didn't know before that night, on her own admission. So her statement, a situation here in relation to Jackson, as far as Sullivan's evidence is concerned and as far as Mrs. Williams' evidence is concerned, puts the credibility - the credibility being whether any of these two witnesses are capable of belief, having regard to their performance. Not only has Sullivan changed his story but Mrs. Williams has sought to change her story too in relation to Jackson, because she couldn't see his face, she never got a good look at him, according to her statement, but all of a sudden when she comes to give evidence now, she is sure about him. How can you be sure about somebody and you didn't see the face; you didn't get a good look at them.?"

Later at pp 195 - 196 he puts it thus:

> "When you come to consider Williams, what you have to be looking at here, is the crown's case and the case against him rests entirely on the evidence of Mrs. Williams and her credibility. You have to look at her credibility insofar as it relates to her evidence in relation to Jackson and you need to ask yourselves when you come to consider that evidence, when you come to deliberate on your verdict, if you find that her credibility has been shaken in relation to Jackson, whether you can rely on her evidence to return a verdict of guilty against the accused person Williams."

It would seem that the learned judge had serious second thoughts and if all these second thoughts had been adumbrated by counsel who assisted Williams in the no case submissions or recognized at the end of the Crown's case by the judge that would have been the end of the case in respect of both accused. Because of that error of law in the judge's ruling we allowed the appeal and set aside the conviction and sentence.

Another ground of appeal which was argued with great force by Mr. Horace Edwards was that the appellant through no fault of his own was denied the services of counsel of his choice or of counsel appointed by the Court. To appreciate the merits of this contention it is necessary to examine in some detail the circumstances which influenced the judge to embark on a trial without counsel for the accused Williams. At the trial, neither Mr. Hamilton Q.C., nor Miss Norma Linton whom the trial judge described correctly as an experienced junior, was present. Counsel for the Crown indicated that the case had a chequered history and that Mr. Hamilton was due to return on Circuit on Wednesday or Thursday.

It was in that situation that the learned trial judge remarked that he was well acquainted with the history of the case from the endorsations on his bundle and in particular that the offence had occurred from 1981. Moreover the judge added that there was no space on the bundle for further endorsations. In order that we could appreciate the significance of these endorsations we directed that they be copied and circulated to counsel in this appeal.

Before there is any further recourse to the transcript it is necessary to examine the endorsations to see what the judge had in mind when he stated that the record spoke for itself.

The accused was arrested on the 30th December, 1982 and was indicted pursuant to a Voluntary Bill, and jointly with David Jackson. The case was mentioned on 6th April, 1983 and put for mention on 11th April for representation to be determined. After two further mention dates it was mentioned again before Vanderpump J. and Mr. Howard Hamilton was then on the record as appearing for Williams on a private retainer. There was another mention date and 20th April, 1983 was the date fixed for trial.

The trial did not commence on that day but was fixed for mention on 27th June, 1983 when it was traversed to the Michaelmas term commencing 16th September, 1983. On the 4th July, 1983 the matter was transferred from the Home Circuit Court by Smith C.J. to the St. Thomas Circuit where it was mentioned on 11th July, 1983. It was at that stage that Mr. Hamilton by letter sought an adjournment to the Michaelmas term and on the 5th of December, 1983, the matter was traversed and fixed for 2nd March, 1984.

During 1984 although there was a series of court appearances there was no trial. On the first trial date 2nd March, it proved impossible to make an assignment of counsel for the co-accused Jackson. The matter was traversed on April 9, 1984. Before Malcolm J. the matter was mentioned on 31st July for a bail application to be made for Jackson. On 31st July, 1984 the matter was traversed to the Michaelmas term.

The 10th of December, 1984 was significant for that was a trial date and the Crown was ready to proceed. Neither Mr. Wilson who appeared for Jackson nor Mr. Hamilton for Williams was present and the matter was adjourned to 11th December, 1984. The Crown was again ready and Miss Norma Linton holding for Mr. Hamilton stated that her leader was engaged in the Home Circuit Court. Significantly the matter was then transferred to the Home Circuit Court marked 'Priority' and on 7th January, 1985 it was fixed for trial on 4th February, 1985 in the Home Circuit Court. The net result was that eleven mention dates and four trial dates were fixed during the period 6th April, 1983 to 5th February, 1985 before the trial commenced. From the history outlined it is easy to understand the reason for the learned trial judge's remarks that he was previously on the St. Thomas Circuit and that he knew the difficulty of securing the witnesses. This was a vital

consideration as was recognized in Robinson's case (1985) 32 W.I.R. 330. Further, he adverted to the problems of counsel for the defence of whom it was reported that he had engagements elsewhere. It was then, taking into account what had happened that he remarked that he was under no obligation to postpone the trial any longer and that he would give to the accused Williams who was without either of his counsel all the assistance at the court's disposal. The judge considered the matter carefully. He took into consideration the probable length of the case and the number of witnesses and although the appellant had asked more than once for legal aid, the learned trial judge took into account the time it would take to make an enquiry to determine if the accused was eligible for a legal aid certificate. Further there was the known difficulty of securing counsel to undertake legal aid assignments in the Home Circuit Court. Of relevance also were the length of time the accused was in custody and the backlog of cases in Circuit Courts. To illustrate the judge's grasp of the issues, here is his reply as extracted from page 3 of the record:

> "Who is going to undertake his assignment at this late stage? On each of the occasions it has been Mr. Hamilton and Miss Linton in it from the very outset. What I was told yesterday, Mr. Hamilton is not here and today Miss Linton chooses to depart from the scene."

Bingham J. continued thus:

> "I will give him whatever assistance I can, but I think it is time we start this case if and when the case is going on, any Counsel chooses to come in and assist him I will give them whatever assistance they wish but the trial must now start."

It was this ruling which Mr. Edwards attacked.

Because the appellant alleges that the absence of counsel on his behalf during the trial resulted in breach of his fundamental rights, it is necessary to examine Section 20 (6) (c) of the Constitution which deals with the issue. It reads:

> "20 (6) Every person who is charged with a criminal offence -
>
> (a) .....
>
> (b) .....
>
> (c) shall be permitted to defend himself in person or by a legal representative of his own choice;"

The judge attempted to assist the accused during the trial but the accused refused to ask any questions or make an address. In our view there can be no legitimate complaint that he was not permitted to defend himself in person.

With regard to being defended by a legal representative of his choice, neither leading counsel Mr. Hamilton nor Miss Linton turned up on any day of the trial to defend the accused thus no complaint could be justified on that ground.

The gist of the complaint therefore is the judge's refusal to assign counsel under the provision of the Poor Prisoners' Defence Act. Section 3 of that Act reads as follows:

> "3 (1) Where it appears to a certifying authority that the means of a person charged with or as the case may be convicted of a scheduled offence are insufficient to enable that person to obtain legal aid, the certifying authority shall grant in respect of that person a legal aid certificate which shall entitle him to a free legal aid in the preparation and conduct of his defence in the appropriate proceedings or in such of the appropriate proceedings as may be specified in the legal aid certificate and to have counsel or solicitor assigned to him for that purpose in the prescribed manner.
>
> (2) For the purpose of determining whether a legal aid certificate ought to be granted a certifying authority

(a) shall

(i) upon application made by or on behalf of the person charged; or

(ii) where the person charged appears to be a person of unsound mind,

make such enquiries as he considers necessary into the means of a person charged; and

(b) may direct any probation officer to enquire into and report to him on the means of the person charged.

(3) A report to a certifying authority as to the means of a person charged with a scheduled offence shall be made in open court or in chambers by evidence upon oath given in the presence and hearing of the person charged who shall be entitled to cross-examine the person making the report.

The question therefore turns on the exercise of the judge's discretion to grant an adjournment so as to ascertain whether the appellant was eligible for legal aid and this would take time. Because of this, it is always necessary to apply for legal aid from the Preliminary Enquiry or at committal. To await the commencement of the trial to make such an application would in the circumstances of this case frustrate the trial. Additionally the judge had to take into account the difficulty of making assignments even after proper notice, because of the low rate of remuneration and that in this case counsel on the record had withdrawn from the case without giving the court any explanation. When these factors are considered together with the backlog of cases in all the circuits, we are not prepared to interfere with the exercise of the learned trial judge's discretion.

The main thrust however of Mr. Edwards' submissions on this ground was that on a fair interpretation of Robinson v. The Queen (1985) 32 W.I.R. 330 or (1985) 2 All E.R. 595 the appeal ought to be allowed. The first point made in the majority judgment delivered by Lord Roskil in this case at page 596 is as follows:

> "The Board when granting special leave to appeal was not apprised of the reasons how the absence of legal representation arose."

However, the principle which governs the case was expressed in the following passage at page 600:

> "In their Lordships' view the learned judge's exercise of his discretion, which the learned counsel for the appellant rightly conceded to exist, can only be faulted if the constitutional provisions make it necessary for the learned judge, whatever the circumstances, always to grant an adjournment so as to ensure that no one who wishes legal representation is without such representation. Their Lordships do not for one moment underrate the crucial importance of legal representation for those who require it. But their Lordships cannot construe the relevant provisions of the Constitution in such a way as to give rise to an absolute right to legal representation which if exercised to the full could all too easily lead to manipulation and abuse. In the present case the absence of legal representation was due not only to the conduct of counsel but to the failure of the appellant, after his decision not to seek legal aid, to ensure that those by whom he wished to be represented were put in funds within a reasonable time before the trial or, if such funds were not forthcoming, to apply in advance for legal aid. If a defendant faced with a trial for murder, of the date of which the appellant had had ample notice, does not take reasonable steps to ensure that he is represented at the trial, whether on legal aid or otherwise, he cannot reasonably claim that the lack of legal representation resulted from a deprivation of his constitutional rights."

In Robinson's case counsel was not put in funds and when the junior counsel appeared he refused a legal aid assignment. No explanation was given in the instant case why both counsel on the record failed to appear but the principle enunciated remains the same, and we find that the learned judge's exercise of his discretion cannot be faulted.

There was yet another aspect of Mr. Edwards' submissions. He contended that Robinson's case was not an identification case and that their Lordships expressly stated that they considered whether as a result of the absence of legal representation there was any risk of miscarriage of justice. In the instant case at every stage the court attempted to assist the accused and at every stage such assistance was refused. For instance at the stage when the jury was empanelled he was invited by the Registrar to challenge any juror whom he wished, his response was "M'Lord, I think it is a disgrace to try a case without a lawyer, I have no one to represent me, M'Lord. Even when the judge intervened Williams was adamant. The intervention at page 5 of the record was as follows:

> "His Lordship: I have disposed of that aspect of the matter, what I am asking you is to look at these seven jurors and to tell me if you are satisfied with them so you wish to challenge, all or any of them.
>
> Williams: I don't wish to say anything M'Lord."

Further efforts were made to involve Williams in this aspect of the trial but to no avail. Additionally although Williams was invited to cross-examination the sole witness as to identification, Mrs. Joy Williams, who picked him out at an Identification Parade, he refused to do so and the judge cross-examined the witness on his behalf, an aspect of which covers three pages of the transcript.

The manifest impression was that the appellant came with the settled intention to force an adjournment by being deliberately uncooperative.

The other vital witness was Sgt. Christie who conducted the identification parade at which Williams was pointed out. Again the judge cross-examined extensively in Williams

interest and although he was again encouraged to participate he took no part.

Williams moreover although invited to do so made no attempt to address the court when submissions of no case to answer were being made or either to give evidence, or make a statement from the dock, neither did he address the jury. On a careful examination of the record we find that the appellant was afforded all the procedural safeguards to ensure a fair trial. Despite his uncooperative attitude both the judge and counsel for Jackson gave him all the assistance they could. In the light of all these factors we find that there was no risk of a miscarriage of justice during the course of the trial.