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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 45/81

BEFORE: The Hon. Mr. Justice Zacca - President
The Hon. Mr. Justice Rowe, J.A.
The Hon. Mr. Justice Campbell, J.A. (Ag.)

R. v. JEFFREY LAWSON

L.V. Daly & S.C. Morris for applicant

Miss Hyacinth Walker for Crown

October 20, 21 November 19, 1982

ROWE J.A.

After a hearing which lasted two days we treated the application of Jeffrey Lawson for leave to appeal against his conviction for murder as the hearing of the appeal, which we allowed and having quashed the conviction and entered a verdict of acquittal we promised to put our reasons in writing. We now honour that promise.

Ten men invaded premises 116 Constant Spring Road on the night of September 28, 1978 and these marauders discharged several shots from their firearms killing Lincoln Masters, a watchman on these premises, and injuring Daniel Robinson and Winston Parks. Robinson and Parks were hospitalized for lengthy periods but survived and gave evidence at the trial of Lawson who was convicted for murder in the Home Circuit Court on April 2, 1981.

Lincoln Masters had been shot in the head on the early morning of September 29, 1978. On the following day Dr. George Cancina, a neuro-surgeon performed an operation on him and removed a bullet from the left lateral sinus of his head. Masters died on November 13, some 45 days after the date of the injury. One of the live issues at the trial was the cause of death.

At a preliminary enquiry held in the Gun Court before His Honour Mr. D.I. Myrie, Dr. Yasmin Williams and Dr. George Cancina gave depositions on oath. They were the witnesses upon whom the Crown relied to prove the cause of death. Neither doctor was present when the trial came on before Ross J. and a jury on March 26, 1981. The Crown applied under the provisions of section 34 of the Justices of the Peace Jurisdiction Act to have the

depositions of the two doctors read to the jury on the ground that the two doctors were absent from the Island. The defence objected. There was no denial that the depositions were taken in the manner provided by section 34 supra although, the attorney for the applicant not being then present, the applicant did not exercise his right to cross-examine either doctor. What the defence was maintaining at trial was that there was no credible evidence that the medical witnesses were outside of Jamaica. The prosecution sought to surmount this hurdle by calling an immigration officer, Calvin Callum, who said that he embarked Dr. Yasmin Williams on an Air Jamaica aircraft on March 29, 1979 bound for Miami. He said that he looked in a book kept at the Immigration Office in Kingston which records the departure and re-entry of doctors and he did not see any record of Dr. Yasmin Williams' return to Jamaica and so he concluded that she was still off the Island. Mr. Callum also said that he examined that same book and observed that one Dr. George Cancina had left the Island on May 3, 1979 and there was no record of his return. The Immigration Book was tendered and admitted in evidence to prove the truth of its contents.

Mr. Morris submitted to the learned trial judge that the Immigration Book was inadmissible in evidence and further that at a previous trial of the accused the doctors were in attendance at the Court and gave evidence upon which they were fully cross-examined. Dr. Cancina, he said gave evidence in Court in July 1979 and at a still later trial Dr. Yasmin Williams gave evidence in July 1980. In the face of these allegations Mr. Morris applied to the learned trial judge to hear evidence for the defence before he ruled as to whether he would exercise his discretion to cause the depositions to be read. Mr. Maragh for the Crown, was most unhelpful to the Court. He took objection and finally the Court over-ruled itself and refused to hear the defence evidence at that stage. Mr. Daly submitted, and in our view quite correctly, that the Immigration Record Book was inadmissible in evidence. The prosecution he said did not bring any evidence to show that it was a public document. Mr. Callum admitted that he did not make the record nor was it made under his direction or supervision. Indeed he did not know

who made the record and he had no duty so to do. In relation to Dr. Cancino, Mr. Callum had no personal knowledge whatsoever of the contents of any of the entries.

R. v. Homer Williams (1969) 11 J.L.R. 185 was decided in this Court and it was held that the serial number of a bicycle could not be proved by production of an invoice on which a number was written unless the maker of the invoice was called and he could say that he had prepared the invoice and had copied, from his personal observation, the serial number on the bicycle frame. This court also held in R. v. Jones & White (1976) 15 J.L.R. 20 at p. 22 that:

> "A police station diary is not a public document. Evidence as to the contents of an entry in a station diary cannot, therefore, be led to establish the truth of such contents but only to establish the fact that such an entry was made."

We are of the view that on the evidence before the trial judge, the book from the Immigration office was not shown to be a public document in the sense that it was made for the purpose of the public making use of it, and being able to refer to it. It could be assumed from the evidence of Mr. Callum that there was a police departmental requirement for the keeping of the record, but this internal administrative procedure is not in principle different from the keeping of a Diary at each Police Station and making appropriate entries therein. We therefore held that the Immigration Book was not admissible in evidence to prove that Dr. Williams had not returned to Jamaica or that Dr. George Cancino had either left Jamaica or had not returned thereto.

In addition to maintaining that the evidence sought from the police witness Mr. Callum, was inadmissible, the defence argued before Ross J., and those arguments were repeated before us, that the issue of the admissibility of evidence was in the nature of a trial within a trial, and the trial judge was entitled to hear evidence on this preliminary issue before he made his ruling. Because neither counsel could produce authority in support of that submission, the learned trial judge reluctantly over-ruled himself and declined to permit the defence to call evidence at that stage, the prosecution

not having then closed its case.

Doe d. Jenkins v. Davies (1847) 10 Q.B.R. 315, was a legitimacy suit. Lord Denman C.J. in giving judgment at p. 323 of the Report, after recounting the possible conditions precedent which were required to be fulfilled before evidence could be admissible before the jury, (and in which he included the example as to whether the witness can take an oath) continued:-

> "The judge alone has to decide whether the condition has been fulfilled. If the proof is by witnesses, he must decide on their credibility. If counter-evidence is offered, he must receive it before he decides; and he has no right to ask the opinion of the jury on the fact as a condition precedent."

The earlier case of Bartlett v. Smith (1843 11 M & W 483 concerned the admissibility of a bill of exchange and the contest was whether it was a foreign or an inland bill. The court held that when the objection was made that the bill was improperly stamped, the judge ought to have received the evidence in that stage of the cause and then and there decide upon the admissibility of the bill.

Another old case Boyle v. Wiseman (1856) 11 Exch. Reports, stated the principle that the judge at trial must decide all preliminary questions of fact upon which the admissibility of evidence depends, and in that case it was held that before he admitted secondary evidence of a letter, he was bound, when the objection was taken, to hear evidence on both sides and then to decide whether the document tendered was indeed the original.

Although these were all civil cases, it would appear in principle that there should be no distinction in this regard between civil and criminal cases. However, we do not have to rely on an analogy. R. v. Robinson R. v. Harris (1972) 2 All E.R. 699 is both a modern case and in the field of criminal law. Two senior police officers were accused of committing various criminal offences including corruption. The crown sought to put in evidence certain tape-recordings to the admissibility of which objection was taken by the defence. Shaw J. heard evidence on the preliminary issue and in his ruling at page 701H of the Report he said:

> "Although in the present case the objection was taken on the question of the originality of the tape recordings the real gravamen of the objection was an attack on their authenticity. The larger issue is manifestly one for the jury in the same way as is the credibility of any witness although, of course, the jury's consideration must be confined to evidence which is in the first place admissible. However for the purposes of this case, I accepted the proposition that I ought to conduct a comprehensive enquiry into not only the history of the tapes but also their nature and condition and that for this purpose I should hear evidence on both sides and decide the question on the balance of probability in the light of all the material before me."

The final case to which we will refer on this aspect of the appeal is R. v. Thompson (1982) 2 W.L.R. 603. There is some similarity between that case and the present one. In that case Thompson's first trial was aborted. A witness who gave evidence of identification at the first trial was unable to travel to court, through illness, to attend the subsequent trial. At that trial the Crown sought to put in evidence before the jury the transcript of the witness' evidence at the first trial. The defence objected and the judge ruled that as a matter of law the transcript was admissible. The report of the case at page 607 shows that after the ruling, the judge did not immediately cause the transcript to be read to the jury. He proceeded to hold a trial within a trial to satisfy himself that the evidence contained in that transcript was prima facie credible and only when he was so satisfied that he exercised his discretion in favour of the prosecution's request. This is how the Court of Appeal summarized what transpired at trial on this issue:-

> "The Crown sought to put in evidence before the jury the transcript of Mrs. B's evidence at the first trial, i.e. the evidence she gave before the first jury. The defence objected, and the judge ruled that as a matter of law it was admissible. There followed a trial within a trial relating to the identification parades. The judge read Mrs. B's transcript and heard the evidence of Inspector Dunn, Sergeant Wareham and Detective Constable Pritchard. He ruled in his discretion that the transcript of the evidence of Mrs. B., should go before the jury, and so it was in due course read to them."

Thompson's case is important to show that it was taken for granted that the trial judge had jurisdiction to hear evidence on the preliminary issue by following the procedure commonly called a trial within a trial. It is in our view a mistake to think that the procedure of a trial within a trial is apposite and relates solely to circumstances when the crown seeks to tender in evidence an alleged confession statement of an accused person to which the defence objects. As the case to which reference is made above show, the principle is of general application whenever any preliminary issue as to the admissibility of evidence arises. Accordingly the learned trial judge erred in law when he ruled that:

> "As I understand it the prosecution are required to satisfy the court that the witnesses are not in Jamaica. The defence in cross-examination have attacked the evidence adduced and say that the witnesses concerned have returned to Jamaica since the date when the prosecution say they last left. Further the defence applies to call evidence to show that subsequent to the date when the prosecution say the witnesses, the two doctors left the country they have returned here to give evidence. As I understand it, the prosecution are not saying that they propose to adduce evidence that the witnesses are presently in Jamaica. It seems to me that this is a matter which goes to the credit of the witness concerned, this witness being Mr. Callum, the Immigration Officer, and generally, evidence is not admissible to contradict answers given in cross-examination as to credit. It does not seem to me that this case falls within any of the exceptions, and consequently, I am now satisfied that when I ruled earlier that the defence could call evidence at this stage as to the witnesses concerned having been in Jamaica subsequent to March 1979, that that ruling was incorrect. I therefore, withdrew that ruling and I now rule that in these circumstances it is not permissible to adduce the evidence sought to be adduced by the defence. It was attempted in the course of the submission by Mr. Morris to say that this case is analogous to those cases where the question is as to the admissibility or otherwise of a statement made by an accused person, but it does not seem to me that any analogy can be drawn to those cases. Accordingly, the defence may not, therefore, at this stage adduce evidence."

Ground 7 contained the complaint that the evidence of opportunity for identification was so slight and the evidence of the prosecution witnesses in that regard to discredited by their inconsistencies and contradictions that it was unreasonable for the jury to have convicted the applicant. The learned trial judge left the case to the jury on the basis of the strength or weakness of the evidence of Daniel Robinson as to the applicant's identification. The witness Parks had made a dock identification on which the jury were properly directed to place little credibility. The whole structure of the crown's case was constructed on the evidence of Robinson who said that when the men approached the building in which he was, he looked through a window and he was able to make out the applicant Lawson. He said at page 7 of the Record that he was able to make him out as "the moonshine did bright so I can make out everybody face." He further said that the applicant entered the building; that he and the other men drew guns then; that the applicant searched and removed money from the pockets of his pants, and thereafter the applicant drew a match and with the aid of the light he looked in the faces of all three men who were inside the building. It was after he had struck the match and looked in their faces that the applicant, according to Mr. Robinson, started shooting. During cross-examination by Mr. Morris, this witness Robinson, admitted that at the Preliminary Enquiry he twice said that the first time at which he recognized the applicant, was when the applicant drew the match and looked in their faces. That admission was in striking contrast to what he had just before said in court to the effect that he had indeed recognized Lawson by the aid of the light of the moon before Lawson entered the building. Throughout his examination-in-chief no mention was made by Mr. Robinson of any factor which would in any way obscure his vision or interfere with his opportunity to observe the facial features of his assailant on that night. When, however, the cross-examination continued, he made certain admissions which would tend to undermine his credibility. The series of questions and answers in that regard are instructive and they run this way:

"Q. You also told the court that when you saw Lawson that morning he was masked and wearing dark glasses?

A. Yes.

Q. And that from the moment he entered that premises to when he left, he was wearing mask and dark glasses? You told that to the Court?

A. I told him that.

Q. Yes.

A. He was wearing a mask and dark glasses.

Q. Yes, from he entered to the time he left?

A. Yes."

When this witness was re-examined he said he was able to know that the man was the applicant because:

> "After he had on a mask he kind a teck it off his mouth and drop down under him throat."

This explanation took Mr. Morris by surprise. He was given permission to further cross-examine this witness and Mr. Robinson admitted that although he had attended two previous trials at both of which he had given evidence against the applicant on this very charge, that that was the very first time at which he was saying in court or to anyone that the applicant had partially removed his mask when he was in that room and so exposed the lower part of his face.

In a dark room, where the assailant is masked and is wearing dark glasses, it would be virtually impossible for a person to identify that assailant if he is relying wholly on his visual identification of that person's facial features. The introduction of a light in the form of a lighted match would provide light but little more than a fleeting glance of even a fully-exposed face. The force of the defence submissions to the jury was that the witness had deliberately and dishonestly given himself a better opportunity to recognize his assailant than he in fact had, and in those circumstances he ought not to be believed. During his summing-up the

learned trial judge remined the jury of the defence strictures and added, "you will bear in mind too the point made by counsel for the crown that witnesses are questioned on evidence adduced in this Court and he may not have been previously asked how he was able to identify the accused if he was wearing dark glasses and mask."

To us it appears inconceivable that a witness who had been precise in his description of the disguise adopted by his assailant and who had given evidence on three previous occasions, could possibly forget or omit to relate at one time or other in the course of those trials that the assailant had partially unmasked himself and so provided him with the opportunity to make a positive identification. The explanation suggested by counsel for the crown and unfortunately repeated by the trial judge as to the reason why the witness had not volunteered this crucial piece of evidence, nor had it extracted from him previously, by counsel, assumes a high level of incompetence in the earlier trials as to which we have no evidence. Mr. Robinson's clear and unequivocal evidence was that the assailant was masked and was wearing dark glasses from the time he entered the room until the time he left. He had left himself no room for mistake or failing memory.

Mr. Robinson gave evidence in examination-in-chief that he learnt from a colleague to whom he spoke whilst he was in the hospital that the applicant was an ex-policeman. Defence Counsel attempted to cross-examine Mr. Robinson as to what was the nature of the conversation which he had with this colleague to determine whether the witness' identification of the applicant was, or might have, been influenced by what he had been told. The learned trial judge so restricted the range of questions that defence counsel could ask, that counsel was effectively deprived of the opportunity to explore this aspect of the case. We are clearly of the opinion that defence counsel was entitled to test the means of knowledge of the witness and if it transpired that someone who was not present at the scene of the crime had told him that his assailant was Lawson, the ex-policeman, that would have been a most relevant consideration for the jury. There is no

substance to the objection that what such an informer might have told Mr. Robinson is hearsay and inadmissible unless the informer is being called as a witness or that he had made his statement in the presence of the accused. See Subramaniam v. Public Prosecutor (1956) 1 W.L.R. 965. If it can be shown from the mouth of the witness that he does not speak of his own personal knowledge, little or no weight will be accorded to his sworn testimony.

As we have said earlier the introduction of the Immigration Book into evidence to prove that Dr. Yasmin Williams had not returned to Jamaica since she was seen to leave the Island by Mr. Callum on March 29, 1979 and to prove that Dr. George Cancina is out of the Island, was impermissible in law. There was therefore no evidence to satisfy one of the conditions precedent in section 34 of the Justice of the Peace Jurisdiction Act in respect of Dr. George Cancina.

The deposition of a witness who is absent from the Island can only be admitted in evidence with the consent of the trial judge. This is expressly provided for in the proviso to section 34 supra. In the instant case it was the duty of the learned trial judge to hear evidence on the issue as to whether the two doctors were out of Jamaica. He should, additionally, have gone on to hear the evidence, which the defence sought to tender, viz, the transcript of the evidence which the two doctors had given at the previous trials. When all that material was before him, the learned trial judge could then have exercised his discretion as to whether or not he would admit the depositions into evidence.

Had the learned trial judge permitted defence counsel to cross-examined Mr. Robinson about his means of knowledge of the identity of the applicant, evidence might have emerged which could have assisted the defence.

In the final analysis, the evidence of identification of Mr. Robinson was so manifestly discredited that no reasonable jury properly directed could have convicted.

For these reasons we allowed the appeal, quashed the conviction and entered a verdict of acquittal.