JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 15/79

BEFORE: The Hon. Mr. Justice Henry, J.A.
The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice Rowe, J.A. (Ag.)

REGINA

v.

JOSEPH BAKER

Mr. W. Bentley Brown for Applicant

Mrs. Z. Holness of the office of Director of Public Prosecutions for the Crown

June 14,15, July 27, 1979

ROWE J.A. (Ag.)

Lena Thompson was employed to the Public Works Department at Half-Way-Tree. At the age of 31 years, she was an industrious and trustworthy woman. Her fiancé Nemrod Hardy operated a gas station at the intersection of Spanish Town Road and Waltham Park Road and on February 5, 1978 he entrusted her with the task of opening the gas station for business. And so it was that at 7:00 a.m. on the fateful Sunday, Miss Thompson and Harold Hardy opened the doors of the office at the gas station, unlocked the pumps and began selling petrol. Patronage was excellent and by 7:30 a.m. much gas had been sold and money collected. A man entered the office at about 7:30 a.m. and asked for a tin of oil. Both Miss Thompson and Harold Hardy told him that they had oil for $1.60 per tin but none for $1.30 per tin. The man said the oil at $1.60 per tin was too strong for his car but the businesslike

Miss Thompson endeavoured to persuade him that the higher priced oil was the better one. A customer drove up to the gas pump and Harold Hardy left the office and went to attend to him. Hardy paid no further attention to the man and Miss Thompson. At about 8:00 a.m. Hardy heard an explosion as of a gun shot comming from the office. He looked and saw the same man who had been asking for the oil run from the office with a black gun in his hand. When Hardy entered the office he saw Miss Thompson lying on the floor bleeding to death. He summoned help and she was taken to the Kingston Public Hospital where she was pronounced dead. Dr. Louis Dawson performed the postmorten examination on the body of Lena Thompson and found that a bullet had entered the right side of her skull leaving a hole 3/4" by 1", from which fractures radiated forwards, backwards and to the right, that the bullet travelled through the brain and came to rest to the back part of the skull close to the bone on the left side of the back of the skull. Death was due to the gun shot wound to the skull.

A report was made to the police and Harold Hardy was interviewed. He described the man who was with the deceased in the office and who he saw running therefrom after the explosion with a black gun in his hand, as a little taller than himself, with clean face, stout and hair-cut. The applicant was taken into custody by the police on February 7, 1978 and on February 20 an Identification Parade was conducted by Sgt. Edward Powell at Hunts Bay Police Station. Hardy identified the applicant on the Parade as the person who, inter alia, ran from the office of the gas station on the morning of Sunday February 5 at about 8:00 a.m. with the black gun in his hand. According to Sgt. Powell at the moment of pointing out the applicant, the witness Hardy said, "This one".

The applicant was convicted in a two day trial before Parnell J. and a jury of the murder of Lena Thompson and was sentenced to death. He was represented at the trial by Mr. Patrick Atkinson, a competent and experienced attorney-at-law. From his conviction he now appeals to this court and Mr. Brown argued five main grounds of appeal. Ground numbered four, complained that the Learned trial judge misdirected the jury by telling them that the motive was robbery. There was no evidence that any money had been actually stolen or even demanded. The judge, however, in explaining to the jury that no duty lay on the Crown to prove motive, used his vast experience of trial courts to remind them that if a man shoots a cashier who has money in her hands and might be expected to have money elsewhere in the business premises, a possible motive is robbery and the inference remains notwithstanding that the would-be robber flees without executing the robbery. There is no merit in this ground. Neither is there any substance in the third ground to the effect that the learned trial judge sought to disparage the defence and the gallant efforts of defence counsel while rehabilitating and gilding the evidence of prosecution witness Hardy and further that the summing-up was akin to a second prosecution speech. In our view the judge's comments were lucid, relevant and illuminating.

Ground 1 was couched in many words but can be conveniently summarised thus:-

> "The sole identifying witness was in doubt as to the correctness of his identification of the applicant in that he said under cross-examination "I pointed him out.....as looking like the man"."

and to the judge "I am making no mistake".

This is of greater significance as the gunman was a stranger to the witness who had only seven minutes within which to observe him. Consequently defence attorney submitted, the judge ought to have withdrawn the case from the jury.

Mr. Brown relied upon the decision in R v. Edward Harvey (1 75) 13 J.L.R. '42, where Graham-Perkins J.A. said:

> "From the moment McDonald admitted in cross-examination that when he pointed to the applicant (on an identification parade) he could have said "This could be the one", the jury could quite legitimately have taken the view that they could place no reliance on his purported identification on the parade. Indeed we agree with Mr. Macaulay that if that was all the evidence before the jury the learned chief justice would have been perfectly well justified in upholding a no-case submission."

R. v. Edward Harvey is an oft-cited case in support of the most varied propositions. We do not think, however, that it has any relevance to the facts of this case. No question was put to the witness Hardy to elicit what if anything, he said at the time of pointing out the applicant on the identification parade. Sgt. Powell who conducted the parade testified that Hardy pointed to the applicant and said "this one." The experienced attorney who appeared for the defence did not challenge the accuracy of the witness' recollection and what is more when the defence was called upon the applicant made no reference whatever to what transpired on the parade. Such questions as were put to the witness Hardy relating to the uncertainty of identification were confined to answers which he is alleged to have given at the preliminary examination.

Counsel for the Crown strongly criticised the decision is Edward Harvey and invited the Court to say it was wrongly decided in the light

of the decision in R. v. Osbourne and Virtue (1973) 1 All E.R. 649 which was not cited in Harvey's case. In a relevant case the Court of Appeal may well have to consider the correctness of the decision in so far as it relates to the circumstances in which a police officer may refer to his notes made at the time of the identification parade in order to assist the court of trial as to what actually transpired on that parade. In the present case the officer spoke from memory and the question of refreshing of the memory did not arise.

The quality of the identification is a question of fact and will vary from case to case. A mere assertion by a witness as to the identity of an offender is unlikely to be a sufficient basis on which to found a conviction. This might be the case where the alleged offender was not known to the witness and he had only a fleeting glance of the person. This might also be the case where the witness made his observation at night without the benefit of light or where the distance between the observer and the observed was so great that the observer could at best form only a very hazy picture of the observed. If the judge, at the conclusion of the case for the prosecution, is clearly of the view that the identification evidence is so poor that a jury properly directed might not return a verdict of guilty, then it would be his duty to withdraw the case from the jury. The judge must determine if there is sufficient evidence, which if believed, could on proper directions in law lead to a conviction but he need not be satisfied that such evidence would necessarily lead to conviction. His duty in relation to identification evidence cases to determine whether there is a case to answer or not is neither higher nor lower, than when he is trying any other criminal case.

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What was said in R. v. Turnbull (1976) 3 All E. R. 549 at p. 553 should not be taken to mean that whenever the defence challenges the evidence of identification of a sole witness or several witnesses and categorise that evidence as poor, the judge has a duty to uphold the no-case submission.

The trial judge was not here dealing with a "fleeting glance" circumstance. The witness swore that he observed the applicant for at least seven minutes in broad day-light and at a time when he was not undergoing any special stress. The witness was most deliberate in his approach on the identification parade. One-way mirrors are now in use in Jamaica on identification parades. The witness Hardy was separated from the men on parade by this mirror so that he could see the men but would himself remain unseen. There were 9 men in the line-up and the witness was seen to inspect the whole line for about 5 minutes. The he asked that each man on parade be made to speak and each said something about the divinity of Ras Tafari. The words used by the men on the parade were quite different from those alleged to have been used by the gunman who entered the gas station office and asked about the price of engine oil. After the men had spoken the witness spent about a further ten minutes surveying the line-up before he made the positive identification. However, it must be emphasized that the time given by the witnesses was an estimate.

It is the duty of the police officer who is called upon to conduct an identification parade to note anything of significance that transpires on that parade, vide Regulation 553 (viii) of the Constabulary Force Rules 1939. It would seem a prudent and commendable practice to record the time when a witness enters upon the parade and the time when

he makes his identification.

It must be remembered that even in the witness box the witness took his time in answering questions. The learned trial judge thought he was not an impulsive individual. We were much pressed to say that if a witness took as long as seventeen and a half minutes to make an identification, that by itself showed such a level of uncertainity in the mind of the witness that no reasonable jury should be asked to act upon that identification. What might appear to be an unduly long time to one mind might not be so considered by another. A witness who is called upon to point the finger might very well be sure within a very short time that the offender is indeed on the parade, but the timid or unduly cautious person might go through a further process of deciding whether it is in his best interest to make the identification. How much time should these mental processes take? In our view whether or not the time taken by a witness to make the identification in any given set of circumstances is indicative of uncertainity is a matter for the jury. The trial judge in the instant case quite properly rejected the no case submission and when he came to sum up he put the issue before the jury in clear and careful language thus:

> "You can look at that bit of evidence Mr. Foreman and members of the jury, in two ways, the length of time that was taken ... it a case where the witness had his doubts why he took that time? Or was he trying to be certain in his own mind, that he made no mistake? Was it a piece of guess work on his part?"

The jury had heard the speech of counsel for the defence, they had seen the witness in examination-in-chief and under cross-examination and they had a clear direction from the learned trial judge. There is no merit in this ground of appeal.

In view of the impreciseness and generality of the submissions by which Mr. Brown criticized the judge's summing-up in relation to Harvey's evidence on the important issue of identification, the Court invited him to consider whether there was any material inconsistency in the evidence of the witness Hardy and if so whether the learned trial

judge gave any directions as to how the jury ought to approach such inconsistency.

It is instructive to recall the questions and answers which were given by the witness Hardy in cross-examination on page 16 of the Record. He was asked by Mr. Atkinson.

> "Q. I am putting it to you that when you pointed out this young man on the parade you merely pointed him out as resembling the man who you saw at the station.
>
> A. No sir, I point him out as the same man I saw."

On the same page 16:

> "Q. Did you ever say before sir, "I pointed out the accused as looking like the man; I am making no mistake"
>
> A. I am making no mistake sir;
>
> Q. Did you ever say before "I pointed out the accused as looking like the man?
>
> A. No sir;"

The comment which leaps to the mind here is the difference between the two questions quoted above. In the last of the qustions the second sentence "I am making no mistake" was omitted. If the two sentences formed part of the same thought, then the omission of the second sentence would have changed the entire meaning which the witness intended to convey by the evidence he had earlier given.

The witness' deposition was shown to him and Mr. Atkinson began to truncate the passage as he had earlier done by putting the first sentence only to the witness. The judge intervened and suggested that Mr. Atkinson could not stop at the first sentence. To be fair to the witness he should include the second sentence: "I am making no mistake".

The question was then put by the judge thus:-

"You see there "I pointed out the accused as looking like the man. I am making no mistake". Did you tell the judge (at the preliminary examination) that?

A. Yes sir."

It was Mr. Atkinson's contention before the learned trial judge that the answers as recorded in the deposition, which incidentially was not tendered in evidence, did not accurately reflect what had occurred at the preliminary examination. This series of questions and answers are illustrative:

Mr. Atkinson:- p. 18 of the record.

"Q. Let me put in context as I recall exactly. I put it to you you merely pointed him out at the parade as resembling the man and you said yes, you remembered that?

A. Yes.

Q. And also after that I also put to you what you said you are not making any mistake about what you are saying and you said no you are not making any mistake and then after that the Judge, when I sit down and finish, the judge up there asked you if you were sure that the man in court, the accused man, was in the gas station with the gun and run out after the explosion and you said yes. That is how the whole thing went?

A. No".

The witness in clear terms denied the sequence put by Mr. Atkinson. It is somwhat difficult for me to follow the question but the witness seemed to have understood it and he did not accept the suggestion. There was therefore no evidence before the learned trial judge that the witness did not say in one coherent thought: "I pointed him out on the parade as resembling the man. I am making no mistake". Those two sentences taken together can to reasonable minds have but one meaning namely, I have looked at the resemblance between this accused

and the man who came to the gas station. I say he is the same person and of this I am making no mistake. The learned trial judge placed this matter before the jury in the following way:

> "Mr. Foreman and members of the Jury in cross-examination the witness was asked and the depositions were shown to him whether at the preliminary enquiry at the Gun Court, Camp Road, if he did not say, "I pointed out the accused as looking like the man. I am making no mistake. And he said to that:
>
> "I did say I pointed out the accused as looking like the man and I am making no mistake."
>
> So what do you mean "I pointed out the accused as looking like the man? It is not the accused as looking like the man" "I pointed out the man as the accused looking like the man, I am not making no mistake". That is positive that he is the man."

It was contended by Mr. Brown that the judge's comment, that "that is positive that he is the man" had the effect of withdrawing from the jury the construction which they ought to place upon the witness' evidence and was himself supplying the meaning. The paragraph opened with the words "So what do you mean." There the judge was clearly inviting the jury to come to their own conclusion as to how to interpret that piece of evidence which followed and his comment at the end is no more that a rhetorical question. Accordingly there is no real inconsistency in the evidence of the witness Hardy which would call for any specific direction to the jury as to its resolution.

For the reasons set out herein the application for leave to appeal is treated as the hearing of the appeal and the appeal is dismissed.