

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 113/89

BEFORE: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE GORDON, J.A (AG.)

REGINA v. JUNIOR CLARKE

Mr. Maurice Frankson for Appellant

Miss Carol Malcolm for Crown

20th May and 4th June, 1991

FORTE, J.A.

The appellant was convicted of the offence of murder in the Home Circuit Court, on the 13th July, 1989.

On the 20th May, 1991, we granted leave to appeal, treated the hearing of the application as the hearing of the appeal. The appeal was allowed, the conviction quashed, the sentence set aside and a verdict of acquittal entered. The reasons for so doing, we now reduce to writing.

His conviction arose out of the death of Alexander Hamilton who was shot and killed on the 1st February, 1988 as he returned home in Swain Spring, St. Andrew with his son and other members of his household. As was the custom, his son, the sole eye-witness in the case, left the others in the vehicle, opened the door and went into the house, in order to turn on the lights. As he did so, he observed a man in the bedroom hiding behind a curtain. He called to his father telling him to drive away, then ran to another bedroom only to be confronted by two other men - both of whom were armed with guns. They pushed him on his back, turned on the lights and searched him asking him for his firearms. Having questioned him they took him to the dining room; at which time he heard the motor of his father's vehicle returning - it having been driven off when he had

earlier sounded the warning. One of the men - identified in Court as the applicant - went to the kitchen window and came back saying that the witness' father had indeed returned and that he was armed with a "long gun". The father - the deceased - was then shouting asking if the witness was all right. Having robbed him, and the sound of another vehicle being heard the men left him lying on the floor and departed. Soon after he heard a "barrage of gun-shots". He hurried outside where he saw about three men 'over' the deceased - about fifteen yards from where he stood. The deceased was then on the ground on his bottom leaning against a wall. The men standing over him all had guns and were then taking away the deceased's gun. The witness shouted at them to drop their guns - this while he had a piece of stick in his hand. The men opened fire at him causing him to retreat into the house wherein he locked himself. In doing so, he had dropped the keys for the padlock on the outside and consequently remained imprisoned therein after the men had gone and until help came. Even while he was locked in and the deceased remained injured on the outside he was still calling asking if his son was all right, and telling him that he (the deceased) was 'shot all over'. Eventually, when he was let out by some persons who came on the scene, the attackers had long fled, and his father had 'multiple gunshot wounds from his face right down'. His father never recovered from those injuries, and in fact died while doctors at the University Hospital were treating him.

As the defence contended that the applicant was not present at the scene, the main issue in the case was the visual identification of the applicant by the witness. This identification took place at an Identification Parade held on the 23rd February, 1988 some three weeks after the offence. It is this identification and the directions of the learned trial judge in relation thereto, that forms the major complaint of

the appellant in this appeal.

In this regard, Attorney for the appellant argued inter alia the following grounds:

1. That the Learned Trial Judge erred in Law when he failed to direct the Jury that they should give little, if any, weight to the identification of the Appellant in the dock by the sole eye witness.
2. That the Learned Trial Judge erred in Law when he directed the Jury that they could find the Appellant guilty of murder even if they found that the conduct of the Identification Parade was unfair if they believed that the witness had made a positive identification on the said Identification Parade.
5. That the Jury should have been told that if they accepted the evidence of Sergeant Johnson, then Christopher Hamilton's identification at the parade was unsatisfactory hence they could attach little weight to his identification in Court.
6. That the Learned Trial Judge was under a duty to direct the Jury as to the dangers inherent in an identification from the dock during the course of evidence and in failing so to do the Learned Trial Judge misdirected the Jury and in so doing deprived the appellant of a fair chance of acquittal.
9. That the verdict is unreasonable and cannot be supported by the evidence."

The cogency of these grounds can only be ascertained on an examination of the evidence upon which the jury was asked to determine the accuracy of the identification of the applicant by the sole eye-witness.

In establishing the opportunity for identification, the witness was examined by Crown Counsel and gave the following answers:

Page 21. "Q. When you ran outside and saw the men over your father could you make out the men there clearly?

A. Yes, because they were ~~crossed~~ in full black and I could see the attire, full black. I couldn't see their faces clearly.

Q. Let us go back briefly to the bedroom incident. You said when they pounced on you and you were on your back one of them turned on a light?

A. Yes.

Q. And you could see their faces?

A. Yes."

Crown Counsel then proceeded to establish through the witness that he had a period of four minutes during which he had the opportunity to observe the applicant. Then he continued:-

"Q.how far was he from you?

A. A foot over me. They were right over me searching me.

Q. Was there anything which impeded your vision of his face?

A. Yes, he had put the gun to my head and said he was going to shoot me, I couldn't forget his face after that.

Q.What part of his face could you see?

A. Like I am looking at you now it's just his face. He was looking straight at me."

This evidence indicates that though the witness could not see clearly the face of the men as they stood over the deceased, he had the opportunity to see the applicant's face while he was inside the house, and so vividly that he could not forget it after that.

When he was cross-examined as to the occurrences at the identification parade the following evidence was disclosed:

"Q. Mr. Hamilton, on the 20th of February last year when you attended an identification parade at the Constant Spring Police Station, you will agree with me that you identified four men?

A. No, I did not.

Q. On that identification parade, however, you pointed out to the person who was standing in position number one?

.....

A. I don't remember the numbers but I did not identify anybody else but the accused.

Q. Please, please. You recall none of the numbers?

A. I recall that the accused man was number four.

.....

A. Yes. I asked for four men's voices to speak.

Q. Yes. And the four men that you asked to speak were men on the parade in positions other than position number four?

A. Yes.

.....

Q. You had been on that parade for at least twenty minutes before you asked for these four men to speak?

A. I don't know the exact time It could have been about twenty minutes.

Q. You were, however, contemplating one other person on the parade because he used to work for you?

A. Yes.

Q. And that was Simpson?

A. Yes.

.....

Q. Mr. Hamilton, on the 23rd February last year when you attended the identification parade in Constant Spring Police Station on which parade you pointed out the accused man, you told Sergeant Johnson, the police officer who conducted the parade that numbers one, two, three and five look like them?

A. Yes sir."

In re-examination the witness sought to advance an explanation per a question by Crown Counsel.

"Q. Why did you refer to four men on the parade and ask to hear their voices?

A. Because when I went into the parade first, I was not certain - I did not understand

Q. Speak loudly.

A. When I went into the parade I did not understand that I was supposed to only pick out one man. So I was trying to, as I said, the other four men, I was trying to link him up with the other man, but when the Superintendent in charge of the investigation told me I was supposed to pick out one, I then picked out number four because I was already certain of him."

Against this, is the evidence of Sergeant Johnson who conducted the identification parade:

Page 122. "Q. What did you say to Christopher

A. I asked him what he was there for.

Q. And what did he reply?

A. He said he was there to point out the men who shot and killed his father.

"Q. And did you tell him anything?

A. Yes, I told him to walk along the line of men, and if he sees any of them he should point him out.

Q. Now, tell us what happened after that?

A. Well, he did walk along the line and after about twenty minutes he came back to me and said number one, three, and eight look like them. I told him that there is supposed to be only one of the four men on the parade.

Q. You told him what, what did you tell him? Please tell us what you told him?

A. I told him that he is to only look for one of the four men. Not all four, to look for one."

This answer formed the basis of a complaint by defence counsel of impropriety in the conduct of the parade, as the applicant then occupied the number four position in the line, the allegation being that the reference to the number by the Sergeant was an indication to the witness the position occupied by the applicant. Significantly, the evidence discloses that only three persons were present on the night of the incident.

However, the questioning continued as follows:

Page 123. "Q. After that did he do anything?

A. Yes, sir, he looked for another couple of minutes, I am not too certain the number of minutes, I record the number of minutes he looked for, then he came back to me and said number four.

Q. Who occupied that position?

A. Mr. Clarke."

In cross-examination, however, the witness admitted after his deposition taken at the Preliminary Enquiry was put to him,

that in fact the witness Hamilton had actually said after looking at the men on parade for twenty minutes that four men, that is, numbers one, two, three and five 'looked like them'. Also in cross-examination, he stated that after he allowed the witness to look along the line again, he did so for about ten minutes before identifying the applicant.

Against that factual background Mr. Frankson developed his grounds by contending that the identification was unreliable, and in any event having regard to the conduct of the witness at the identification parade, it was incumbent on the learned trial judge to emphasize to the jury the relevant factors that tended to diminish the cogency of the identification parade. This he said was of extreme importance in a case where the case against the applicant rested entirely on the evidence of this sole eye-witness, and having regard to the settled principle that evidence of visual identification must be approached with caution and an awareness of the dangers inherent in acting upon such evidence.

Mr. Frankson criticizes strongly the further directions given to the jury, after they had retired, and returned to seek assistance from the learned trial judge. He contends that the following dialogue, contains a misdirection by the learned trial judge which taken together with the manner of the identification by the witness must result in a reversal of the verdict.

When the jury returned, the following took place:

"REGISTRAR: Mr. Foreman, please stand. Mr. Foreman and Members of the Jury, have you arrived at a verdict?

FOREMAN: No. We would like to have some clarification, My Lord.

HIS LORDSHIP: Yes, Mr. Foreman?

FOREMAN: The main issue for us on which we wish some guidance from you, sir is, should we find that the identification parade was unfairly carried out, how should we proceed in this matter. Should we pass a not guilty verdict or in other

words what impact does it have on the verdict that we should pass. We need some clarification on this.

HIS LORDSHIP: Now, as I told you earlier on the whole purpose of the identification parade is to test the witness' ability to recognise the person or persons who he said perpetrated the crime. That is to say, whether Mr. Hamilton was able to, on the 23rd of February to properly identify the accused. Now, if you find that the identification parade was unfairly held, it would mean that you wouldn't be certain whether Mr. Hamilton in his quest to point out the accused was not assisted in some way or the other.

Now, he should in no way be assisted to. If you find that what the sergeant said to him was in some way assisting him in identifying the accused then it means you would be left in a state of doubt and you would have to resolve that doubt in favour of the accused man. And if you resolve that doubt in his favour it means you would have to acquit him. Again, if you find that the parade was unfairly held, but you have no doubt at all that Mr. Hamilton says the accused man is the person that was there, then it would be opened to you on that belief to say whether he is guilty or not guilty of the offence. (Emphasis supplied)

Now are you clear on it?"

Mr. Frankson's contention that if the identification parade was found to be unfairly held, particularly in circumstances where the witness may have been assisted by the sergeant conducting the parade, then the identification would be of no weight, is in our opinion an unanswerable one. It was quite incorrect for the learned trial judge to suggest to the jury that even in those circumstances they could rely on the evidence of identification by Mr. Hamilton and more so merely on the fact that Mr. Hamilton "says the accused man is the person that was there".

This in our view was a fatal misdirection and given as it were against the background of the witness' demonstration of uncertainty at the identification parade, and the juror's obvious indication of an acceptance of an unfair identification parade, the conviction could not stand. The evidence of identification was patently uncertain, and though we disagree with the contention that the learned trial judge did not sufficiently emphasize the dangers of acting upon the evidence, and did not point out the weaknesses in respect to the identification parade, we nevertheless accept the contention that his later direction erased all that he had said before. In any event, we would have had no option but to hold that the identification was most unreliable and consequently of no value and could not support the verdict.

For those reasons the appeal was allowed.