J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 273/77

BEFORE: The Hon. Mr. Justice Zacca, P. (Ag.)
The Hon. Mr. Justice Robotham, J.A.
The Hon. Mr. Justice Carberry, J.A.

REGINA v. LLOYD AITKENS

Mr. B. Macaulay, Q.C. and Miss K. Bennett for applicant.

Mr. H. Cooke, Jr. for Crown.

13th April, 1978

ZACCA, P. (Ag.):

This is an application on behalf of Lloyd Aitkens. The applicant was convicted in the Home Circuit Court in the High Court Division of the Gun Court, on the 22nd November, 1977, for the murder of Herbert Hint, it being alleged that the applicant murdered him on the 16th July, 1977.

The case for the crown rested on the evidence of a sole eyewitness, Arthur Graham.

In his evidence Mr. Graham stated that at about 6.30 in the morning of the 16th July, 1977, he saw three men at the intersection of Oxford Street and Drummond Street, close up to a van. He said he was at that time seeing the sides of their bodies and faces and that he saw each of these men armed with a gun.

It was Daylight Saving Time. There was also evidence that the street lights were still on and that the lights were bright, but it would appear from the evidence that it was 'daybreak' - according to the witness - and it would seem that even without the lights being on he would have been able to see the men. In other words, it was not as a result of the bright lights or the lights that the witness was able to see these men. It is not disputed that it was 6:30 in the morning, at daybreak, that this incident happened.

The witness went on to say that he heard three explosions coming from the direction where these men were. He said that the men ran down Oxford Street, still having the guns in their hands, and that when he heard the explosions and saw these men he was about 32 feet away from them.

He said that he recognized one of these men as being the applicant, whom he had known for approximately six years prior to that date, and that he knew him by the pet name of "Goat Kid".

The applicant admits to being known by the name of "Goat Kid", and it is not disputed that the applicant knew the witness, Graham, before, but he said he did not see him on that morning at 9 o'clock, which is some hours after the incident.

Well, this witness also stated that after hearing the explosions and the men having run off, he went up to the van and on the ground close to the back of the van he saw a man lying on his back bleeding from his head and the man appeared to be dead.

The evidence disclosed that this man was the deceased, Herbert Hint.

Then at about 9 o'clock that same morning Mr. Graham stated that he was at Percy Street at a spot which was not far from the area where the incident happened, and there again

he said he saw the applicant along with two other men, and that these two other men who were then in the company of the applicant were the same two men whom he had earlier seen along with the applicant on Oxford Street when this shooting took place.

The medical evidence disclosed that the deceased died as a result of a gunshot wound.

When the applicant was arrested on the 18th July, 1977 by Detective Sergennt Campbell, he denied having killed anyone. In his defence, the applicant set up an alibi: He denied having killed anyone; he denied having been at the scene where this shooting took place. In fact, he said that he was at his home that morning. He retired to bed at about midnight the night before, and had not left his home at 11 Percy Street prior to eight o'clock the Monday morning of the 16th - that is the morning when this incident took place. He does admit having gone out to Percy Street at around 9 o'clock that morning - this could be some two and a half hours after the shooting took place.

He called one witness, Wellesley Richards, who described himself as a Home Guard and a Special District Constable attached to the Central Police Station. This witness stated that at around 6:30 a.m. in the morning he witnessed the shooting of the deceased. He said that he knew the applicant prior to that date and that he also knew the deceased.

He said that there were three men present but that the applicant was not one of these three men. So that it appears that the evidence of Arthur Graham and the evidence of Wellesley Richards was very similar with the exception that Graham said that one of the men was the applicant and Richards said that the applicant was not one of the three men.

This was the evidence which was left for the consideration of the jury, and after retiring the jury returned a verdict of guilty of murder against the applicant. The applicant has now appealed against his conviction and on his behalf several grounds of appeal were argued.

Mr. Macaulay, on behalf of the applicant, argued three grounds of appeal and Miss Bennett argued a fourth ground of appeal.

The first ground argued on behalf of the applicant by Mr. Macaulay was to the effect that the learned trial judge's summing-up was unbalanced, in particular, he sought to analyse and examine the evidence of each witness for the prosecution in favour of every point advanced by the prosecution and against any advanced by the defence.

Mr. Macaulay stated that every item of evidence coming from the prosecution witnesses which tended to support the crown's case was not only narrated but it was highlighted in favour of the crown, but whenever evidence was given on behalf of the defence that this evidence was merely narrated but that no comment was made of the evidence in relation to the case for the defence. It is for this reason that Mr. Macaulay submitted that the summing-up was unbalanced and that in addition there were major discrepancies in the evidence as shown in the summing-up, that is, that in the summing-up, the learned trial judge made errors in stating what the evidence was and that this tended to weigh in favour of the credibility of the eyewitness Graham.

Mr. Macaulay referred us to various portions of the evidence and the summing-up in support of his contention, and relied on the case of R. v. Mindel Greene (1975) 13 Jamaica Law Reports at page 35 and at page 38. He also relied on the case of Broadhurst v. R. (1964) 1 All E.R. page 111.

During the course of Mr. Macaulay's arguments we had an opportunity of examining the evidence and also the portions of the summing-up which he complained of, and we are not of the view that the summing-up was in any way unbalanced or was pitched in favour of the witness for the prosecution. We are satisfied that it was a fair and balanced presentation of the evidence and that this ground of appeal fails.

The next ground argued by Mr. Macaulay was to the effect that the learned trial judge's comments when dealing with the defence were extremely strong and heavily directed to a denigration of the evidence for the defence. In this respect, Mr. Macaulay referred us to pages 65 to 67 of the summing-up, where the learned trial judge dealt with the evidence for the defence, and in particular with the evidence of the witness for the defence, Mr. Richards.

We have carefully examined the directions of the judge at these pages and whilst it may be said that the comments were strong, we are satisfied that in the circumstances of this case, such strong comments were warranted and we are of the view that the comments which the judge made were not directed to any denigration of the evidence for the defence. In fact, it cannot be said, in our view, that in giving these directions - the learned trial judge, in any way, forced his views on the jury.

Mr. Macaulay relied on the case of Broadhurst v. R. (1964), 1 All E.R. page 111; at pages 117, letter "H", 118, letter "D" and again at 124, letter "D". He also relied on the R. v. Blackley (1973) 6 W.I.R. page 423, also the case of Mills and Gomes, reported at 6 W.I.R. page 418.

This ground of appeal also failed.

The third ground of appeal argued by Mr. Macaulay was to the effect that the learned trial judge's directions on identification were inadequate and defective in two respects: In that he invited the jury (a) to treat the subsequent identification as evidence supporting the credit of the witness to the material identification in issue, and (b) to look at the accused in the dock, thereby impliedly suggesting to them that the witness could not have made a mistake.

The direction which is complained of by Mr. Macaulay is to be found at page 62, where the learned trial judge states:

We are satisfied that when the judge used the word, "support", in these circumstances, he was not, and did not mean the application of the technical term of corroboration, and we do not agree that the word, in these circumstances, is synonymous with the word, "corroboration".

Insofar as the second part of this submission is concerned - that is that in - again at page 62: The learned trial judge in referring to the evidence of Graham on identification stated:

> " "But you saw the accused; you looked at him yourselves. Look at his height and his built...."

Mr. Macaulay has submitted that there was no description given in the evidence of any of the men who are alleged to have been involved in this shooting, and therefore, to tell the jury to look at the accused was, in fact, revealing his own views to the jury and was attempting to persuade them to accept the poor quality of the identification of the witness, Graham.

It may very well be that the judge, in his remarks, was telling the jury to look at this man to see whether he was a non-descript looking person or as to whether he had any particular characteristics or special features, and to ask themselves whether in those circumstances, looking at him would assist them in saying whether or not this witness might have been mistaken in recognizing the applicant subsequent to having seen him on the morning of the incident. However, we do not know specifically what the judge was really telling the jury here, we can only speculate.

We are satisfied, however, that this was not a comment which would in any way operate adversely against the accused. If he was a non-descript person well that would be the end of the matter. If he was a person of striking appearance then surely this might be something which might very well have assisted the witness in subsequently recognizing the applicant. For these reasons this ground of appeal also fails, and the only remaining ground of appeal for our consideration is the ground argued by Miss Bennett to the effect that 'the verdict was unreasonable and having regard to the evidence, cannot be supported'

It is admitted that in this case there were no serious discrepancies: In fact, Miss Bennett referred us to some discrepancies which she, herself, admitted were very trivial, and we do not feel that these discrepancies could in any way affect the evidence in this case. Indeed, they were extremely trivial discrepancies but the main issue here was the question of identity.

We are satisfied that the directions on identification given by the learned trial judge were adequate - that the jury was adequately warned for the need to be careful in assessing the evidence of identification. In fact, the judge referred to the weakness of the identification of the witness, Graham, and left his evidence for their consideration bearing in mind the evidence of the witness for the defence, Mr. Richards.

As we have pointed out before, the evidence of Graham and the evidence of Richards was, in nearly all material respects, similar, with the exception that Graham said that one of the men was the applicant and that he only had a side view of the applicant's body which included his face: On the other hand, witness for the defence, Mr. Richards, said that the applicant was not one of the three men involved in the shooting and that he had a clear view of the faces of these three men. But these matters were left clearly and adequately for the consideration of the jury.

The judge, as I pointed out, referred to the weakness of the identification but the directions were adequate, proper warnings were given, in particular, as to mistaken identity even where the person knows the person being identified.

In this case the witness, Graham, had an opportunity of seeing this man, if only from a side view: The applicant was someone whom he had known for some six years, known him by the name, "Goat Kid": He had about five minutes to see him; the lighting was good: He was about 32 feet away from the men. All these matters were left for the consideration of the jury.

The jury having considered the evidence returned a verdict of guilty of murder against the applicant.

In our view it cannot be said that the verdict was unreasonable and, having regard to the evidence, cannot be supported.

We are satisfied that the jury was entitled to return the verdict which they did, having regard to the evidence which was left for their consideration.

For all these reasons the application for leave to appeal is refused.

> "Now, is there any other evidence which, perhaps, one could use to support the identification? Well, Mr. Graham told you that after these events at 6:30 he saw the same man the same morning, within three hours - less than three hours. You must say what weight you are going to attach to that evidence. In fact, there is evidence that he recalled how all the men were dressed. He could give some description how the men were dressed and he could say that the accused man was wearing a red pants and had changed it when he saw him subsequently. "

Mr. Macaulay submitted that in using the word, "support", the judge was in fact telling the jury that the witness, Graham having seen the applicant some hours after the incident, was, in fact, corroborating his own evidence: In other words, that the judge was asking the jury to treat the evidence of the witness as evidence to corroborate his own evidence that he had seen him earlier.

Mr. Macaulay relied on the cases of R. v. Elva Sailsman (1963) G.L.R. at page 411; R. v. Lemmard (1975) 13 J.L.R. page 132.

In Lemmard's case it was noted that it was held that in discussing the question of corroboration the judge in that case had used the word, "support", and the Court held that the word "support" could mean corroboration - did in fact mean corroboration in those circumstances. But the facts of that case were such that corroboration was required and it was quite clear that when the judge used the word, "support", he was indeed referring to corroboration. But in the instant case there is no question of corroboration being required, and to suggest that when the judge used the word, "support", in these circumstances - in the circumstances of this intant case, at page 62 - to suggest that he was there referring to corroboration is not, in our view, a reasonable interpretation of his direction.

16a