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IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 66/80

BEFORE: The Hon. Mr. Justice Robinson - President
The Hon. Mr. Justice Carberry, J.A.
The Hon. Mr. Justice Carey, J.A. (Ag.)

R. v. LOXLEY SPENCE

Mr. W. Bentley Brown for the Appellant

Mr. D. Hugh for the Crown

17th & 18th December, 1980

Carey J.A. (Ag.)

This is an application for leave to appeal against conviction on a charge of murder which was recorded in the High Court Division of the Gun Court held in Montego Bay on the 20th of March, of this year, before Malcolm J. and a jury.

The facts in this case, shortly stated, were that on August 22, 1978, three employees, Cleveland Hyde, Leon Wilkie and one Dunn, together with their employer the deceased man, Dennis Anglin were at a boxing plant in Mocho, in Saint James, of which the deceased, was the owner or proprietor. Round about 7.30, on that evening, while the four men were at this plant, they were suprized by two men who came up, both being armed with guns. Light was supplied at that plant by an unshaded lamp which was resting on the table around which some of these men were grouped, having a meal. The reason for the arrival of these gentlemen was to rob Mr. Anglin of money which they, undoubtedly, thought he had. The three workers were then ordered to lie on the ground, Mr. Anglin was marched to a room and the workers were blinded folded by being covered with a bit of canvass. Thereafter, the lamp was put out.

Only of those present, a Mr. Cleveland Hyde, who had not been sitting at the table but standing some distance off when the gunmen entered, was able to identify any of the assailants and he identified the applicant at an identification parade held on 3rd November, 1978. The other worker called, failed at the parade to identify the accused as one of the two gunmen, though he purported to make a dock identification.

So far as the opportunity for Hyde's observation went, he had a matter of three minutes, by his own estimation, before the lamp was extinguished, and although he and others who gave evidence in this case, heard sounds and were aware of what was going on, they really could not clearly see what did take place. What, in fact, took place was that Mr. Anglin was marched to his bedroom, apparently in an endeavour to find the money, and when this money was not forthcoming, Mr. Anglin was shot. As far as Mr. Hyde was concerned, the applicant, for most of the time, stood guard over the men lying by the table.

The defence which was raised at the trial was that the applicant was not present when this offence was committed. Although it appeared from the evidence that he and another man were certainly seen in the area of the plant on the day of the murder, both before and after and with a gun, In his long unsworn statement the accused said he was not in the area nor at the boxing plant and did not take part in the murder.

The sole issue before the jury was the correctness of the identification of the accused. In this court that was also the burden of submissions made to us by Mr. Bentley Brown for the applicant. I trust he will acquit me of any discourtesy if I say that there was no merit in the other grounds which he canvassed before us.

As far as the facts went, the opportunity for observation

of the applicant was brief. Lighting came from a kerosene lamp. In so far as distance between this applicant and the witness Hyde went, that was quite close. The evidence of the period for observation and the nature of the lighting was clearly weak, but Hyde was sufficiently observant to have noticed facial scars on the other gunman but not on the accused who had no such mark.

Although learned counsel for the applicant endeavoured to show that the learned trial judge failed adequately, to alert the jury to these weaknesses in the evidence, we are of the view that the learned trial judge, who clearly had in mind the case of R. v. Oliver Whylie (1978) 25 W.I.R. 430 had faithfully and carefully followed the guidelines set out therein. At page 130, of the summing-up, the trial judge said this:

> "I must tell you that you should approach the evidence of identification with the utmost caution as there is always the posibility that a single witness or even several witnesses, Members of the Jury, might be mistaken. A mistake is no less a mistake if made honestly. In every case like this, what matters is the quality of the identification evidence. These may include the opportunity which the witness had of viewing the criminal, was the person known to him before the date of the commission of the crime and if so, for what period and in what circumstances. In this case you heard Mr. Hyde said he didn't know the accused man before. If the person was unknown to the witness, what description, if any, did he give to the police. In this case there was no description given to the police. Another issue, possibly the most important, the physical conditions existing at the time of the viewing of the criminal as to place, light, distances, obstruction, if any, etc. Any special peculiarities of the criminal or any special reason for remembering him; the lapse of time between the date of the crime and the time of identification - this offence was in August, the identification was in November - the conditions under which the identification was made; any special weaknesses, if any, in the identification. Any other evidence which can support the identification evidence."

And then the learned trial judge, between pages 132 and 136, isolated the various factors about which he was guided by R. v. Whylie. At page 133 he said:-

> "So, here we have the first element or one of the elements I mentioned in the identification..."

That was a reference to the lighting. There was thenmentioned the distance, the time lag and the like.

Having regard to the passages I have mentioned and the aspects of identification to which he had adverted, it seems to us, quite clear, that the learned trial judge fairly, adequately and correctly alerted the jury to the caution with which they should approach the question of identification, and he clearly called attention to weaknesses in the prosecution's case.

In the circumstances, the jury, having been properly alerted, we are of the view that the jury came to a verdict to which it was entitled to come and we can find no reason to disagree with it. Fo these reasons, therefore, this application is refused, the conviction and sentence are affirmed.