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... Appellate, conviction ... sentence ...
... 1/15/93

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 128/93

**BEFORE: THE HON. MR. JUSTICE RATTRAY, PRESIDENT
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.**

R. V. MALCOLM HIGGINSON

Maurice Saunders for the Applicant

Dennis Morrison, Q.C. for the Crown

February 14 and July 5, 1995

RATTRAY P.:

On the 14th February 1995 we allowed the appeal of the applicant Malcolm Higginson, quashed the conviction on the charges of illegal possession of firearm and robbery with aggravation and set aside the sentence imposed, and we then promised to give our reasons in writing. We do so now.

On the 21st April 1993, Mrs. Lisa Packer was at 12:30 in the afternoon sitting in the driver's seat of her motorcar, a grey Daihatsu Charade, parked on the Campus of the University of the West Indies. She saw a hand enter the

left hand door and pull up the door lock. A man pointed a gun at her and ordered her into the passenger's seat. Another man pushed her over into the passenger's seat. One man got into the driver's seat and three men along with the gunman got into the back seat. They drove off the Campus commanding her to take them to her home. She directed them to her mother's home at 38 Stephenson Avenue. Her mother was there with a gentleman and another lady. The men entered and ransacked the house. While this was happening a Mr. Steer came to the house. They left in her motor car taking with them a television set and other items.

That same afternoon she saw her car damaged at the Constant Spring Police Station. It had been found by the police at the intersection of Wickham and Acadia Avenues with the television set and other articles taken from Stephenson Avenue still in the car.

At about 1:20 p.m. on that same day, 21st of April, 1993, Miss Jacqueline Chacko went to visit her sister Miss Norma Phillips on Wickham Avenue off Roseberry Drive. She was driving her Suzuki Fronte motor car. She was held up at the gate of the premises by four men, one with a gun, and her car taken and driven away. The proceedings at the gate were observed by her sister Miss Norma Phillips from inside the house.

Some days later at the request of the police Miss Chacko attended the Papine Police Station to identify her car and there she saw the applicant Malcolm Higgingson.

Her examination-in-chief at the trial elicited the following:

"Q: The other accused man Malcolm Higgingson who you said was present when you identified your motorcar had you ever seen him before that day you identified your motor vehicle?

A: His colouring looks like the person, I couldn't positively say that was the person that day."

This was after she had identified a co-accused Kevin Smith as the man with the gun.

When Miss Chacko identified her car to the police on the night of the 27th of April, the police took three men, the applicant, Kevin Smith the co-accused and another suspect from inside the police station to where she was outside and asked her to identify her car before them. Having done so, she was asked whether any of these men were the ones who had taken her car. Miss Phillips was also present. In cross-examination counsel for the accused asked:

"Q: ... when the police asked you whether these persons were the ones who had taken your car, did you say no?

A: No, I did not say no, I was very angry when I saw the condition

" of my car and I looked at the three people. I did not recognise the one who held the gun. I saw a very short fellow, this gentleman here to the left-hand side [meaning Higgingson] and a very tall fellow.

Q: So when you were asked at Papine ...

A: I said all three of you took my car. I was so angry when I saw the condition of my car."

When asked whether her sister (Norma Phillips) was present at Papine Police Station and heard when she made the statement that: "all three of you took my car". She answered:

"A: I am sure she was present, whether she heard I don't know; if she was in conversation with anybody else, I don't know."

She was further cross-examined:

"MR. SAUNDERS: Miss Chacko, on one of the parades that you went to, the identification parade that is, in Half-Way-Tree, can you say whether Mr. Higgingson was on anyone of them?

"A: He was on one of the identification parades. I did not point him out because he was not the person who held the gun on me."

Miss Norma Phillips, the sister of Miss Chacko, gave evidence of seeing at her gate looking from inside her house

her sister with three young fellows who were acting agitatedly and excitedly. She did not see any of the fellows with a gun, although her sister said so. When asked what happened to the car she replied:

"A: They drove it off. I didn't see what happened after the gentlemen went into the car but I saw when they left the car about, I would say about three minutes later because he could not find the gear and he could not move the car from the gate."

About one week later she saw the car at the Police Station at Papine. She told the Court:

"Q And when you saw the car did you see anyone else there when you saw your sister's car?

A: I looked at the car and while I was actually examining her car one of the officers who was present asked me to look inside a room from the car park to see if I could identify any of the fellows who were inside.

MR. SMART: Did you look inside the room?

A: I did.

Q: Did you see anyone there?

A: I was able to point out positively one fellow who was there.

Q: Do you see that person here today?

A: He is here today, yes.

"Q: Could you point to him?

A: (Pointing to dock) gentleman
in the white shirt sitting there.

MR. SMART: The witness pointed to the accused
Higgingson, M'Lord.

Q: When you pointed to him what did
you point to him as?

A: I pointed to him as the driver."

About three weeks later at Half-Way-Tree Police Station she identified the accused Higgingson at an identification parade. The man she identified (Higgingson) was one of the men she saw in the room at the police station at Papine. He was the man who was trying the car door at her gate. In her statement however given to the police at the time she had said: "... the one that was trying the car door I could not see his face but he was dressed in full white."

On the identification parade she did point out a person as the man with the gun but it turned out that this identification was wrong. At the Papine Police Station the men she had seen in the room were brought out into the Station yard. She was asked if these men were the men who robbed Miss Chacko. She pointed out Mr. Higgingson as the man who drove the car away.

Detective Corporal Walton Herd found Mrs. Packer's Daihatsu motor car abandoned with right tyres blown out at the intersection of Wickham and Acadia Avenue about two-

and-a-half chains away from 17 Wickham Avenue and about one-and-a-half miles away from Stephenson Avenue, the home of Mrs. Packer's mother. He took the car to the Constant Spring Police Station.

On the 27th April 1993 Constable Probyn Forbes along with an observer was on car patrol duty along Old Hope Road in the vicinity of Jamaica College when he saw a white Suzuki Fronte motor car pull over to the side of the road. Two men came out and opened the bonnet of the car. He stopped to offer assistance and saw a third man behind the steering wheel of the car. The driver was the co-accused Kevin Smith. His observer spoke to them. The car drove off and continued driving in a jerking manner towards Papine. Constable Forbes decided to stop the car. As a result of what Kevin Smith told him he went up to Papine Square and the applicant Malcolm Higgingson was pointed out to him as the person who had given him, Kevin Smith, the car. The applicant denied that he had given Kevin Smith the car. The applicant was taken to Papine Police Station. At Papine Station later he brought out Kevin Smith, the other person in the car, who was not charged, and the applicant from inside the Police Station out into the police compound where Jacqueline Chacko was. She identified the car as belonging to her and then pointing to the applicant and Kevin Smith said:

"It is them two hold me up and rob me and took away mi car."

They said they knew nothing about it. Jacqueline Chacko's documents were found in the car.

On the 22nd of May 1993 Sergeant Henry McIntosh conducted identification parades at the Half-Way-Tree Police Station. The applicant stood in number six position in the line. Miss Norma Phillips "walked up and down and she called out 6, 3, 8." The applicant was in the no. 6 position. In cross-examination by counsel, Mr. Maurice Saunders, the police officer said that he made clear to her that she could only call out one number. Shown the identification parade form which she had signed it was recorded there that the numbers called out by Miss Phillips were numbers 6, 9 and 3. None of the other persons attending the parade for the purposes of identifying anyone called out the number under which the applicant was standing.

The trial judge rejected a no-case submission made by Counsel for the applicant.

The defence consisted of an unsworn statement denying any involvement in the robberies involving Mrs. Lisa Packer and Miss Jacqueline Chacko. The applicant also called character evidence.

Indeed there was no shred of evidence which could possibly link the applicant to the robbery involving

Mrs. Packer. She identified no one. Although as the trial judge commented in the directions which he gave himself "she had the opportunity of seeing them from the University Campus to Stephenson Avenue."

It is difficult to see how the trial judge arrived at his conclusions connecting the applicant with the robbery of Mrs. Packer. He relied on the fact that "the car of Packer was found two-and-a-half chains from where the robbery of Chacko's car was effected."

The trial judge made the linkage between the accused and Packer's robbery as follows:

"The broad day light robbery where people can be seen suggests that nothing impeded proper view of the persons who committed the robbery. The persons who robbed were not known before and Lisa Packer failed to identify anybody at all. The second circumstance of the robbery which says that the persons were not known before is a possible weakness in the light of the fact that the robberies were reported soon after, at least the robbery at Wickham Avenue was reported soon after the event. The third element or circumstances where Miss Packer failed to identify anybody, she having been in the vehicle with the men for some-time is another weakness but people fail to identify for many many reasons and particularly in this case I looked at Lisa Packer and Lisa Packer would not even look at the

"accused men in the dock up there and I make bold to say that what is happening today to witnesses who identify, I am not surprised that Lisa Packer refused to identify anybody. It is not that she wouldn't identify but she wouldn't even look at them and I say for those reasons, that possible weakness dissipates into nothingness."

It is not in my view permissible for the trial judge to conjure up an explanation, as he did, as to why Lisa Packer did not identify anyone; to label it as a refusal, and to establish it as the foundation of an identification which was never made.

In dealing with the question of the police allowing the witnesses Jacqueline Chacko and Norma Phillips to view the accused men at the Papine Police Station prior to the holding of identification parades the trial judge correctly labelled this as confrontation, "and that quite rightly was attacked as being wrong." He however contended that "when it is viewed in the circumstances of the case it is not a confrontation which does violence to the identification."

He relied on the Judgment of Lewis J.A. in **R. v. Gilbert**, 7 W.I.R. p. 54, where the learned judge of Appeal said at p. 56:

"Where it appears, as it must have appeared clearly in this case, that the evidence against the suspected person

"is going to depend to a great extent upon identification, there is a distinct duty upon the police to take every care to see that the witness who is going to identify that person is not brought into proximity with him before the identification parade is held.

The court has had to consider, therefore, whether having regard to the most unsatisfactory nature of the evidence relating to identification, this conviction can be sustained. It is only fair to say that the defects in the evidence relating to identification to which I have referred, were fairly drawn to the attention of the jury by the learned trial judge. Moreover, as learned counsel for the crown has pointed out, the case for the crown, although it depended to a great extent on identification, also depended upon the doctrine of recent possession; and the court has come to the conclusion that there was sufficient evidence on that score to allow this conviction to be sustained."

In fact the passage in the judgment of Lewis J.A. in **Gilbert** does not in anyway assist in nullifying the effect of the confrontation in the instant case in respect of the applicant as the applicant was not found in possession of Miss Chacko's motor car. It was his co-accused who was found in possession of the car and any lies found to be

told in relation thereto would have been by the co-accused and not the applicant.

In dealing with identification by a witness following a confrontation between the witness and the appellant arranged by the police, Archer J. delivering the judgment of the Federal Supreme Court Criminal Appellate Jurisdiction in **Ramroop v. R.** [1960] 2 W.I.R. 259 at p. 262 described the police action as "deplorable" and continued:

"Justice demanded the most scrupulous care to avoid the employment of an unfair method of identification, and the method adopted not only deprived the identification of any corroborative or confirmatory value whatever but must have had a prejudicial effect on the trial."

The trial judge found established by circumstantial evidence that the people who robbed Mrs. Packer and stole her car were the very people who robbed Miss Chacko. He arrived at that conclusion in this manner:

"So what we find here? The car of Lisa Packer robbed with the contents of her house, was found at Wickham Avenue, a mile from Stephenson Avenue wrecked, can't drive. Jacqueline Chacko said that when she locked her car she saw four men running towards her car. The policeman said the wrecked car was two to two-and-a-half chains from 17 Wickham Avenue. The circumstantial evidence there is

"that the people who drove the car from Stephenson Avenue were the ones who robbed Jacqueline Chacko and why I say so, if a car is wrecked two and-a-half chains and that car was involved in a robbery and you went to make your escape and you wrecked the car two-and-a-half chains where you see a woman parking her car, of course you are going to run down there to get her car from her to make the escape and I hold that the persons who robbed Jacqueline Chacko were the persons who robbed Lisa Packer."

In my view the reasoning of the trial judge in this regard is convoluted. Any conclusion to that effect fails to meet the requirements of circumstantial evidence which in the very words of the trial judge - "must point to one conclusion to the exclusion of any other rational conclusion ... must be exclusive, pointing to one conclusion only." On the question of circumstantial evidence the learned trial judge got the principle right. However his application of the principle went completely astray when he concluded that the principle could apply in the manner in which he sought to apply it.

With respect to the charges arising from the incident concerning the robbery of Jacqueline Chacko, the applicant was not identified on the parade by Miss Chacko and the identification by Miss Phillips, uncertain in any event

since three numbers were called out, is nullified by the confrontation manoeuvred by the police witness at Papine Police Station.

The trial judge failed to examine the evidence against each accused separately and lumped them together as is evidenced by his final findings:

"I also find that on the identification of Chacko and Phillips, Kevin Smith and Malcolm Higgingson, on the 21st day of April, 1993 were involved in the robbery of Packer's Daihatsu motorcar. I find that the identification of Chacko and Phillips bolstered by the concept, doctrine of recent possession and the circumstantial evidence points to Kevin Smith and Malcolm Higgingson being involved in the robbery of Jacqueline Chacko's motorcar."

An accused person is entitled to have the evidence in respect of his involvement in a criminal offence carefully analysed with regard to identification, separately and apart from evidence involving his co-accused and the consideration by the Learned Trial Judge of the identification evidence in respect of the applicant did not in my view receive this careful and discriminating assessment.

The pointing out of the applicant by the witnesses at the identification parade was tainted by the earlier confrontation at Papine Police Station and the linkage

between the earlier robbery of Lisa Packer with the robbery of Jacqueline Chacko was tenuous if not indeed non-existent.

For these reasons we allowed the appeal, quashed the conviction and set aside the sentence.

Cases referred to

- ① R. v. Gilbert 7 W. 1. R. 24
- ② Ramsook v R [1960] 2 W. 1. R. 259.