Judgement Book

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 63, 80, 81/91

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE WOLFE, J.A. (Ag.)

REGINA
vs.
MARK SUTHERLAND
IVAN WHYTE
LEROY McLEAN

Mark Sutherland and Ivan Whyte unrepresented

Alvin Mundell for appellant McLean

Michael Palmer for the Crown

September 22 and October 12, 1992

WRIGHT, J.A.:

In refusing the applications of Mark Sutherland and Ivan Whyte for leave to appeal the single judge gave the following reason:

> "The sole issue in the case was that of visual identification. In his summation the Learned Trial Judge adequately dealt with that issue and the jury decided the issue against the applicants. The verdict cannot be properly disturbed."

Having reviewed the records ourselves we see no reason to disagree with that conclusion. These applications are, therefore, refused. The facts will appear as the appeal of McLean is dealt with. The sentences of Sutherland and Whyte are ordered to commence on 2nd October, 1991.

Leroy McLean

Based on the verdict returned by the jury, leave to appeal was granted to this applicant. A brief account will suffice.

The three applicants were tried before Ellis, J. and a jury in the Saint Thomas Circuit Court on July 1 - 3, 1991, on an indictment containing three counts. The first count charged all three applicants with Robbery with Aggravation; the second count charged McLean with Rape and the third count charged Sutherland with Rape.

At about 1:30 during the early morning of November 6, 1991, Gloria Paul, a shopkeeper, who lives at Hillside in the parish of Saint Thomas, along with her four children, was disturbed by the smashing of her room door and thereupon she switched on the light in her room only to be confronted by a man who was subsequently identified as the applicant Whyte. He was then about five feet from her and was armed with a machete. He promptly demanded money and jewellery. She gave him two chains and he helped himself to about six hundred dollars ($600) from a box on a dresser.

At his command she opened the living room door and went out onto the verandah where she saw two men one of whom was subsequently identified by her daughter Pauline Gray as Sutherland who was armed with a knife. Miss Gray was aided in her identification of Sutherland, whom she did not know before, by the light from the bedroom. She had also been alerted by sounds on the outside and had switched on lights. The men held the family hostage going from room to room collecting jewellery, cash, electrical appliances and groceries.

Eventually Sutherland, according to Pauline Gray, grabbed her sister D.R. by the hair and dragged her from the room where they were all gathered. The evidence of D.R. is that as she reached the door a man standing there, whom Pauline said she saw but whose face she could not see, took her from Sutherland and raped her. D.R. did not see the face of that man but she said he was McLean. No one else but Sutherland was present during this act of rape. Sutherland

then proceeded to rape her but unfortunately for him he was seen in the act by Pauline and her mother as they were taken through that room. Whyte, who appeared to be the ring-leader, ordered Miss Paul to open the shop after which McLean entered the shop and took out goods which were passed to Sutherland who packed them in bags.

It was shortly after 3:00 a.m. when it was realised that the men had departed. Clearly they had spent a considerable time on the premises.

At identification parades held for each of the men on separate dates the applicant Sutherland was identified by Gloria Paul, Paulette Gray and D.R.; Whyte was identified only by Pauline Gray. Although Gloria Paul was the first to see him and spent the longest time with him she did not identify him. She identified him in the dock. McLean was identified by Gloria Paul alone.

After a summing-up which dealt adequately with the live issue of visual identification the jury returned, having retired for thirty-eight minutes, with verdicts of guilty against Sutherland and Whyte as charged but as regards McLean their verdicts were delivered thus:

"REGISTRAR: Do you find the accused Leroy McLean, guilty or not guilty of count 1 of this indictment which charges him with aggravation?

MADAM FOREMAN: He is guilty. The identification is poor, but he is guilty.

REGISTRAR: Members of the jury, you say the accused, Leroy McLean, is guilty of count 1 of this indictment and so say all of you?

MADAM FOREMAN: Yes.

REGISTRAR: Do you find the accused, Leroy McLean, guilty or not guilty of count 11 of this indictment which charges him with rape?

MADAM FOREMAN: He is guilty.

"REGISTRAR: Members of the jury, you say you find the accused, Leroy McLean, guilty of count 11 of this indictment and so say all of you?

MADAM FOREMAN: Yes."

The trial judge then intervened (p. 45):

"HIS LORDSHIP: Mr. Mundell?

MR. MUNDELL: May it please you m'Lord, before you take the antecedents or call upon the men, I wish to make a submission for the accused, Leroy McLean, being discharged from the charges against him, indictment against him.

HIS LORDSHIP: Yes.

MR. MUNDELL: Madam Foreman, on the question of identification...

HIS LORDSHIP: Yes, Mr. Mundell.

MR. MUNDELL: ... and Madam Foreman says that the identification is poor, but he is guilty.

HIS LORDSHIP: Very well.

MR. MUNDELL: So, that is an inconsistency.

HIS LORDSHIP: No, I have to accept it, I cannot accept a plea... you are taking a plea in what, arrest of judgment?

MR. MUNDELL: Yes, Your Honour.

HIS LORDSHIP: Then I cannot accede to that. That is for elsewhere.

MR. MUNDELL: As your Lordship pleases."

The single ground of appeal filed reads:

> "The verdict of the jury is inconsistent in that the Foreman said, 'He is guilty. The identification is poor, but he is guilty.'
>
> In the circumstances of this case where the issue was one of identification the jury not being satisfied with the identification of McLean the verdict should have been one of 'Not guilty'."

Mr. Mundell submitted that it is clear from the verdict that the jury were not satisfied that McLean had been properly identified, that is, the prosecution had not discharged the burden of proof by presenting credible evidence to make them feel sure.

Mr. Palmer sought to have an order for re-trial on the basis that the verdict was ambiguous and that consequently the intention of the jury was not known.

Clearly the convictions cannot stand. Although the verdict on Count II was given without any embellishment it was nonetheless affected by what the jury had to say about the evidence. The verdict on Count 1 against the appellant is impeached by the finding regarding the evidence. But we think the jury had good reason for the caveat placed against the evidence as far as this appellant was concerned. They must have had difficulty reconciling Gloria Paul's identification of the appellant with her inability to identify Whyte who was by far the most prominent of the intruders and with whom she spent the greater period in circumstances which should have facilitated his identification.

It is patent that the trial judge felt himself obliged to accept the verdict and made short shrift of counsel's endeavour to have the issue addressed. What, then, should the trial judge have done?

Authority prescribes that where a single verdict is ambiguous or two verdicts are inconsistent or the verdict is one which cannot, on the indictment or in the circumstances, be lawfully returned the judge is entitled, unless the jury insist, to refuse to accept the first verdict and ask the jury to re-consider the matter and if they change their verdict to record only the second verdict: R. v. Harris (1964) Crim. L.R. 54; R. v. Walters & Walters (1971) 12 J.L.R. 448. So here is authority contradicting the view apparently held by the trial judge that he had no option but to record the verdict of guilty. On the other hand, this is not, in our view, the sort of situation in which the jury should be asked to re-consider their verdict. Had they said that as regards this appellant they had some difficulty in sorting

out the evidence relating to identification the trial judge's duty would then be to carefully place before them the relevant evidence in an effort to assist them resolve their problem. From what the jury said it is clear that the prosecution had failed to make them feel sure by cogent evidence that the appellant was guilty. It would be wrong to give any further direction calculated to obtaining a better view of the evidence. Poor evidence of identification is not cogent evidence. The jury are not required to give a reason for their verdict but where, as here, they gave a reason which demonstrates that a guilty verdict could not properly be returned it was the duty of the judge to direct them that having regard to what they had found the proper verdict was one of not guilty. It is significant that they said nothing about the quality of the evidence regarding the other two accused persons. Obviously, the doubt they entertained about the appellant's guilt was such that they felt obliged to disclose it.

The jury had been given proper directions on the burden of proof, the standard of proof and the resolution of doubt. Nevertheless, they were reluctant to acquit where they obviously encountered doubt. Accordingly, the matter fell back into the hands of the trial judge to give the precise directions which flowed inevitably from what they had found and in keeping with his own directions. Poor evidence has been discredited as acceptable basis for a guilty verdict so there could be no doubt as to the course which the trial judge ought to take. Guidance is afforded by the decision in R. v. Turnbull (1976) 3 W.L.R. 445; 120 S.J. 486; 63 Cr. App. R. 132 at 138:

> "When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."

The verdict of the jury places the case of this appellant squarely within the above cited provision.

Conclusion

The applications of Mark Sutherland and Ivan Whyte are refused. Their sentences are ordered to commence on the 2nd day of October, 1991.

The appeal of Leroy McLean is allowed. The conviction is quashed, the sentence set aside and a verdict of acquittal entered.