

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS: 22 & 23/91

COR: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

R. v. ROY McLEAN o/c FABIAN KING
LINDEN WILSON

Delroy Chuck for McLean

Enoch Blake for Wilson

Caroline Reid for Crown

28th September & 10th November, 1992

GORDON, J.A.

The appellants were convicted in the Gun Court by Reckord, J for the offences of illegal possession of firearms and two counts of robbery with aggravation on the 8th February, 1991. The trial of this case commenced on the 18th September, 1990 and there were seven trial days. The case was presented by four Crown Counsel who did duty in this period. On 28th September, 1992 we allowed the appeals quashed the convictions set aside the sentences imposed and entered verdicts of acquittal. The reasons for this decision we now give as promised.

The charges arose out of incidents which occurred on the morning of the 22nd April, 1990 at Fraser's Content in the parish of St. Catherine. Miss Fay Daley and her boyfriend Michael Francis were awakened from slumber by loud kicks which smashed in the bedroom door. One masked man entered and held them at gunpoint. Miss Daley was ordered to lie on the bed and cover her head with a towel given to her by another masked gunman. The first masked man held his gun on Francis who was made to lie on the ground. There

was a third intruder who remained in the shadows on the verandah he was not masked but he wore a blonde wig. The men robbed from Miss Daley, household appliances jewellery and cash.

Francis' sister Kismeth Russell and her boyfriend Anthony Williamson occupied a room adjoining Miss Daley's. Their privacy was also invaded and they were robbed of appliances, jewellery and cash. They were thereafter herded into Miss Daley's room and the intruders left. The entire incident lasted about 30 minutes. In the course of the robbery Francis was taken from the room to the verandah and beaten and he escaped and returned to the bedroom. Shots were fired through a window of the house as the gunmen left.

There was one solitary lamp on a piece of furniture in Miss Daley's room. Miss Daley was unable to recognize any of the robbers although she knew both appellants. Mr. Francis an ex-constable was also unable to recognize anyone although he looked on from his position on the floor and when he was taken on to the verandah he saw the intruders. These witnesses said the lamp was turned down low and it was dark on the verandah.

Kismeth Russell and Anthony Williamson on the other hand said they recognized the appellants as two of the intruders. The appellant Wilson was masked and in Miss Daley's room while the appellant McLean remained throughout on the verandah. He wore the wig.

The appellant McLean in an unsworn statement alleged he knew nothing of the charges and attributed the posture of the prosecution witnesses Russell and Williamson to ill-will occasioned by political differences.

Wilson denied involvement in the commission of the crime. He told of political differences and a confrontation he had with Russell. This he said prompted the preferment of the charges.

Mr. Chuck for Roy McLean made submissions on the sole ground of appeal he filed viz:

"The Learned Trial Judge failed to deal adequately with the sole issue of visual identification. The failure to identify and assess the serious discrepancies in evidence amounts to a misdirection and impeaches the verdict."

Mr. Blake for Wilson relied on two grounds of appeal thus:

"The Learned Trial Judge erred in Law by convicting the Appellant in the absence of reliable evidence of identification.

The Learned Trial Judge failed totally to consider evidence as it relates to the appellant Linden Wilson separately and individually but chose instead to 'lump' the two together resulting in an injustice to Linden Wilson."

The sole issue in the case was identification and on the prosecution's case it was clear that all the witnesses knew the appellants but only two purported to identify them under conditions that were common to all. The evidence had to be carefully scrutinized and there was the need for the learned trial judge to exercise caution and indicate in his reasoned judgment that the negative factors had been given due consideration.

Miss Daley and Mr. Francis agreed that the lamp in their room was turned down low that being the only light available, it made identification of the robbers difficult. The robbers who entered the room were fully masked save for their eyes and although they spoke, their voices were strange. There was evidence that Miss Daley knew Wilson and was familiar with his voice. She said the voices she heard were strange.

Miss Daley and Mr. Francis said the person with the wig never entered the room but remained on the verandah where it was dark. Mr. Francis said he was unsure whether this bewigged person was male or female but he would hazard a guess that he was masculine.

It follows that the crucial issue of identification fell to be resolved on the evidence of Miss Russell and Anthony Williamson. Having been ushered into the dimly lit room of Miss Daley, who identified no one in that room Miss Russell purported to have identified Wilson - a feat rendered doubly difficult by the poor light and the mask worn by the person so identified. She also claimed to have identified the person dressed in the wig as the appellant McLean who, it was agreed, was always on the verandah in the dark. Anthony Williamson sought to corroborate Miss Russell's identification but his evidence was discredited in cross-examination.

Mr. Chuck laid great emphasis on the evidence of the witness Francis who said -

"The verandah was dark, outside in the yard was dark ... I was unable to see the faces of the men because it was dark."

He also submitted that the learned trial judge rejected the evidence of Williamson at page 191 of the transcript and rehabilitated him at pages 194 and 195 in these passages:

"It was my view that when the witness Williamson testified he had demonstrated some doubt and uncertainty as to the person he was looking at. Finally, that this matter of identification was so fundamental it ought not to form the basis of a conviction."

and at page 195 he said:

"I accept the evidence given by Miss Russell and Mr. Williamson saying these two young men in the dock were two of the men who came to their house that night and robbed them, armed with a gun."

Mr. Chuck and Mr. Blake complained that the learned trial judge glossed over discrepancies and although there were major discrepancies in the evidence he said at page 194:

"I have considered the discrepancies that have arisen but I find that they are no major discrepancies, people were moving about in the room, this was no play that was taking place where the people were standing up together, ..."

The major discrepancy in the case lay in the fact that the witnesses Daley and Francis had the appellants in view for a period of 30 minutes and failed to identify them in the dim light of a lamp turned down. Russell and Williamson who were brought into the light in the room identified both appellants; Wilson in the room and McLean on the verandah where it was admittedly dark. The learned trial judge failed to resolve this discrepancy.

This case required a careful analysis of the evidence given against each accused separately and the circumstances under which the identification was made. The only factor in favour of identification is that the appellants were known to Russell and Williamson before. Against this must be weighed:

- (1) That the lighting was poor, as already explained.
- (2) Daley and Francis also knew the appellants and failed to identify them by sight or by voice.
- (3) The appellants were disguised, McLean by a wig and Wilson by a mask.
- (4) The intruders were moving about quite a lot as the learned trial judge found.
- (5) Williamson was discredited.
- (6) There was evidence that there had been conflict based on politics between Russell and the appellants, thus giving rise to the suggestion of bias.

The single judge who gave leave to appeal observed:

"The sole issue in the case, one of visual identification. Serious discrepancies in evidence of identifying witnesses. Summing-up does not adequately address these issues."

We agree entirely with these observations.

The learned trial judge acknowledged that the sole issue was identification but he failed to adhere to the guidelines on the assessment of visual identification evidence established in R. v. Turnbull [1976] 3 All E.R. 549 and emphasized in Scott & Ors. v. The Queen [1989] 2 W.L.R. 924 and Junior Reid & Ors V. The Queen [1989] 3 W.L.R. 771. Had he applied the principles established in these and other cases he ought to have concluded that the identification evidence falls short of the required standard. The evidence of Russell is irreconcilable with that of Daley and Francis. This rendered Russell's evidence weak and being uncorroborated and unsupported by any other evidence, it must be rejected.

For these reasons we allowed the appeals as stated earlier.