

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS: 63, 64 & 65/86

BEFORE: The Hon. Mr. Justice Rowe - President
The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Wright, J.A.

R. v. MICHAEL BECKFORD
JUNIOR BIRCH
JOEL SHAW

Delroy Chuck for Applicants Beckford & Shaw

L. Green for Applicant Birch

Ms. J. Strawe & Mrs. Lorna Errar-Gayle for the Crown

February 15 & March 7, 1988

CAMPBELL, J.A.

On July 23, 1985 Leonard Reid was shot and killed on the Cheltenham/Brighton main road which passes through the district of Clifton in the parish of Saint Elizabeth. He had gone there as was his habit for the past four years to purchase pimento. The time was about 8.30 a.m., on a Tuesday. The sole eye-witness produced by the crown was one Alvin Bell who lives in Brighton but had travelled to and was at his escallion farm situate on a hill in the district of Clifton overlooking the Cheltenham/Brighton main road.

His evidence is that he had reached his farm about 8. a.m. About half-an-hour thereafter he heard two-gun-shot explosions coming from the direction of the Cheltenham/Brighton main road. He ran down the hill from his farm to a position in some bushes about eight chains from, but still overlooking this main road. From this position he observed all three applicants. Beckford was holding the deceased by his waist at the back of the deceased's van which was parked in the banking abutting the road. Beckford released his hold of the deceased who fell on his back and did not get up. Birch and Shaw were standing at the back of the van. Each was armed with a short gun which was being

held with the mouth pointing to the ground. After Beckford released his hold of the deceased he and the other two searched the van, both the front and the rear. The van is an open back one with tarpaulin cover which was raised in the course of the search.

On completion of their search, Birch ran from the van onto a track in standing wood leading to a gully and disappeared. He was followed by Beckford and Shaw who however having travelled about two chains, returned to the van and again searched the back of it. They then travelled back on to the track and disappeared from sight. Regarding the opportunity which this witness had of observing the applicants, he said that from his position in the bushes he could see the main road plainly, the van was in front of him on the banking of the road about eight chains away. He could see the faces of the applicants while they were by the van and also when they ran onto the track, because they came to within two chains of where he was and crossed his line of vision. From the time when he first set eyes on them until they finally disappeared was about half-an-hour. He had known Beckford whose nickname was "Don" for about a year. He was accustomed to seeing him in Brighton sometimes night and day for a week, sometimes not at all. He had known Birch who was nicknamed "Scoopy" from birth. He and Birch were born in Clifton district and grew up there. He knew where Birch lived. He was used to seeing him night and day. He knew Shaw from the latter was a little boy. Shaw had come to live beside him for over five years and bore the nickname of "Weedy."

After the applicants had disappeared, he returned to his farm and from there he proceeded to the home of his Aunt Muriel nearby where he told her what he admitted was an untruth namely that the police had shot "Scoopy" down on the mainroad. He explained the reason for this untruth that as the applicants had disappeared and were at large he was afraid to say what he really saw. From his aunt, he proceeded home to Brighton. Thereafter he joined a crowd which he saw out on the road at Brighton and from there he returned to the scene of the incident which he had earlier witnessed. He saw a crowd with many policemen including one

Detective Sergeant Ashman who subsequently died prior to the date of trial. He observed the prostrate body of Leonard Reid where he had seen him fall. He was in the act of returning home when he heard people calling him to return. He returned and was taken soon after by Detective Sergeant Ashman to New Market Police Station where he was invited by Ashman to tell what he saw. He gave a statement on that very day. In this statement he mentioned the names of Junior, Joel and Michael as the persons involved. He attended two identification parades in November and December, 1985. On the first parade he pointed out Shaw and on the second he pointed out Beckford and Birch.

The cross-examination of this witness proceeded on the basis that he knew the applicants but that he was telling deliberate falsehood on them either through being a compulsive and inveterate liar or alternatively he was imagining things because of his susceptibility to mental aberrations since the time that he had been an inmate of Bellevue mental Hospital. On behalf of Beckford and Birch, Mr. Campbell repeatedly suggested to the witness that he was a liar. The undermentioned excerpts from the cross-examination highlight this fact:

"Q. You couldn't talk anything more, so you just tell your auntie a big lie. Let me put it this way, that you are a liar, and you come here to tell the court a pack of lies.

A. Me sah? A truth me a speak, sah,

Q. You don't seem to know the difference between a lie and truth. Do you know the difference between the truth and telling lies?

A. Yes sir.

Q. And what you told your auntie you don't call that a lie?

A. Yes, sir, you could call that a lie that part. A just give him that to hold, your honour, and go.

"Q. A saying that just like how you chopping and changing your evidence now, is a tissue of lies you telling the court, that is why you shifting from left to the right.

A. A don't hear this thing, your honour please. I take mi two eyes and see. Nobody tell me. I take mi two eyes and see. A middle day, people all 'bout a bu'n bush, scatter all 'bout a look after them animal.

Q. You are a marvellous liar.

A. Me is not a liar. I see what happen, sir.

Q. So the next day you up in the hill, you heard gunshot?

A. Yes, sir, me heard.

Q. And you run go tell your aunt say the police shoot Scoopy, because you come to that conclusion because you didn't know?

A. See. See it.

Q. That is why you went and tell Scoopy (?) that you never see a thing; you just lying.

A. Me was there, sir, me was there. Me see; no one tell me. Me take mi two eyeball and see.

Q. And I am suggesting that it is really a very grave lie that you have come here to tell on these young men.

A. Me nah tell no lie on them."

In relation to Shaw, the cross-examination by Mr. Smith highlighted the fact that the witness had been an inmate of Bellevue mental hospital. This the witness admitted, saying it was more than ten years ago. He was cross-examined for the purpose of eliciting that as late as 1983 he had displayed "strange behaviour - aberrant behaviour." He was asked pointedly whether he had "got off his head" at a place called

Maggotty and smashed up a business place just about two years before the incident which he said he witnessed. The witness denied this. The cross-examination thereafter proceeded thus:

"Q. Mr. Bell, just let me suggest to you, you see, that when you tell this court that you saw the accused Shaw that morning, in the company of these other men, with a gun in his hand, that that is not true.

A. Is true, sir. yes, sir.

Q. Suggest to you that it is either a calculated lie, springing from whatever motive.....

A. Not lie, sir, is true, sir.

Q. From whatever motive, or it is a figment of your imagination?

A. What, sir?

His Lordship: Do you understand what that means?

A. No, sir, a don't understand at all. No, sir, a don't understand at all.

His Lordship: Alright, break it down.

Q. Either you are deliberately lying or you are so confused you don't know what you talking about.

A. Me confused, sir?

Q. Yes.

A. No, sir. A know what I am talking about."

There was in addition to the evidence of Alvin Bell the evidence of Detective Corporal Howell who said that acting on the instructions of Detective Sergeant Ashman who had detained Shaw on the day following the incident and had later released him, he had proceeded to Springvale District in the parish of Saint Elizabeth where he saw and apprehended Shaw on October 14, 1985. Shaw having been cautioned said "Officer, dem did hold me already, and a company me follow." Detective Acting Corporal Manley Maxam also gave evidence that on October 15, 1985 he heard Detective Sergeant Ashman inform Shaw of the latter's alleged complicity with Beckford and Birch in the murder of Leonard Reid. This was in the presence of

Beckford and Birch. The applicant Shaw after caution said "A just company me follow." This witness also gave evidence that on October 10, 1985 he heard Detective Sergeant Ashman Inform Beckford of his complicity with Shaw and Birch in the murder of Leonard Reid. This applicant after caution said "Me one nah take the rap, sir."

The applicants each made an unsworn statement. Beckford's unsworn statement so far as is relevant is that -

"I only know that I owe Mr. Bell two hundred dollars, m'lord and that is why him must be telling a lie on me, mi lord. I don't know anything about it, and that is all, mi lord. I know nothing about it."

Beckford made no attempt to deny the statement attributed to him by Detective Acting Corporal Maxam.

The applicant Birch in his statement spoke of incidents subsequent to the time of the shooting namely that he heard that the witness Bell whom he described as Mass Alvin had been raising an alarm that he Birch alias Scoopy had been shot by police down the road. He met Bell on the road and enquired of him why he was raising that alarm to which Bell replied that he Bell was "over him herb bush and him hear shot a fire, whole heap a shot." He was taken into custody in October but he knows nothing about the incident for which he was taken into custody.

The applicant Shaw in his statement mentioned hearing an alarm that 'Scoopy' had been shot by the police and subsequently an alarm that it was not Scoopy but rather "the pimento man dem shoot down by Clifton." He was taken into custody on July 24, released on August 5 and arrested on October 14, 1985. He gave no evidence in denial of the statement attributed to him by Detective Corporal Howell and Detective Acting Corporal Maxam.

He concluded his statement by saying "I don't know anything about this, m'lord and Mr. Bell is telling an untruth on me."

After a careful and detailed summing up by the learned judge the jury found the applicants guilty of murder and they were each sentenced to death. Against their conviction they applied for leave to appeal on three original grounds and on an additional ground in a supplementary ground of appeal filed on February 10, 1988. Leave to argue the additional ground was granted and the original grounds which were vague and totally without merit were abandoned.

The additional ground of appeal reads as follows:

"That the Learned Trial Judge failed to direct the jury on the law of identification, in particular he omitted to warn the jury of the dangers of mistaken identification especially in the peculiar circumstances of the case."

Before us Mr. Delroy Chuck submitted that the learned trial judge was under a duty to alert the jury to approach the evidence of identification with the utmost caution including the warning of the dangers of mistaken identification. This he said was reiterated and made mandatory by the decision of this court in R. v. Bradley Graham & Randy Lewis S.C.C.A. 158 and 159/81 handed down on June 26, 1986.

The learned trial judge admittedly did not give any general or specific warning, nor did he state in abstract general terms the principle of law relative to the issue of visual identification stated in R. v. Oliver Whyllie (1978) 25 W.L.R. 430 15 J.L.R. 163. This is however a far cry from saying he did not alert the jury to the fact that the issue of identification was critical, albeit being challenged on the aspect of credibility. It is equally a far cry from saying that he did not highlight in concrete terms, based on the evidence, the factors which were critical in determining whether Alvin Bell the sole eye witness ought to be believed. He highlighted the distance that Alvin Bell was from the applicants, the fact that it was broad daylight, the time within which the applicants were observed, the position in which they respectively were when observed and the fact that they were well known to Alvin Bell which in fact the applicants impliedly admitted. The learned judge near the end of his summation said:

"Alvin Bell has given evidence in this case which suggests that these three men are responsible for the death of Mr. Reid. They say they know nothing about it. You have to decide where the truth lies, whether Mr. Alvin Bell is speaking the truth on these three men, If you believe the evidence of Mr. Bell that he knew them well, if you believe that he had sufficient opportunity to see them that morning, and you believe that he did see them that morning, if you believe he is not making a mistake or telling lies, when he said he saw them, if you believe he is a sober, sane man and he was sober and sane that morning, he is not a mad man, if you believe all that, then it is open to you to say that these are the men who caused the death of Mr. Reid."

The failure by the learned trial judge to give any general warning on the dangers of visual identification is not in the circumstance of this case fatal because it did not in any way render the summing up unfair or inadequate. The case was not one of visual identification in the strict sense. It was one of identification by recognition of persons well known to the eye witness. R. v. Bradley Graham & Randy Lewis expressly provided that "In the recognition cases where the accused is said to be well known to the witness for an extended period the true test might be that of credibility rather than of an honest witness making a positive yet mistaken identity." The aspect of the identification evidence which was under challenge was not based on the possibility of mistake based on objective factors such as lighting, proximity, obstruction of view, time within which observation is made, or that the persons observed were strangers to the witness. The challenge was that whoever he may have seen that morning, he is telling a deliberate lie either from unknown motive, or through uncured mental illness, when he said it was the applicants or any of them whom he saw that morning. The learned trial judge in his summation highlighted and repeatedly directed the attention of the jury to these matters.

Thus the learned trial judge summed up to the jury as follows:

"The defence is saying that Mr. Alvin Bell is not a reasonable person. Mr. Alvin Bell has been mentally ill and still is mentally ill. The defence is saying Mr. Bell's evidence is all made up, manufactured, not true and you shouldn't believe him. The defence is saying that they can't give you any motive why Mr. Bell should come and tell you deliberate lies on anyone of these three men. One of them has told you, that is the accused Beckford, that a possible motive for Mr. Bell lying on him, is that he owes Mr. Bell two hundred dollars for ganja that he bought sometime ago, and he says, that is the accused Beckford, that may be the reason why Mr. Bell has made up this lie against him to implicate him on this charge of murder, because he owed him two hundred dollars and hasn't paid him. Well, that was put to Mr. Bell when he was giving evidence, and you remember his answer. Mr. Bell said that is a big lie, not only a lie but a big lie and you have to decide whether it is a lie or not, but the defence is saying, quite apart from that motive, Mr. Bell's evidence is a figment of imagination, things he has made up in his mind to come to tell you twelve jurors in this case. You must decide whether that is true or not."

Again he directed the jury thus:

"Mr. Alvin Bell has contradicted himself on more than one occasion in this case and as I go through the evidence, I will point them out to you. The defence is saying you can't believe him; Mr. Bell is a man who says one thing now and other things at other times, how can you believe such a man. The defence is saying he does that because he is mentally unstable, he is not sane and sober like you and me, he is mentally ill, so you can't believe him, and that is why he says one thing now and other things at other times, you decide whether you are prepared to accept his explanations for the mistakes that he has made and whether you are prepared to rely upon him, notwithstanding the fact that he has made those mistakes; notwithstanding the fact that he has contradicted himself on those occasions."

And finally the learned judge having reviewed in very minute details the evidence of Mr. Bell, highlighting the contradictions therein with the explanation of the witness, concluded thus:

"That was Mr. Bell's evidence, and he certainly, in so far as the prosecution's case is concerned, is the most important witness in this case. Well, you saw him, you decide whether you were listening to a mad man talking, or somebody who has a mental problem, you decide whether he was a sane man on the day of the incident and whether he saw what he says he saw. You will remember how he gave his evidence. You saw his demeanour in the witness box, and you judge that for yourselves, because the defence is saying that what he has told you in so far as it implicates these three accused men in the killing of Mr. Reid, is a total fabrication, something he has made up in his warped confused mind. The defence is saying that up to today he is still mentally unstable, he may not be mad, but that he is mentally unstable."

The summing up of the learned trial judge on identification was correctly tailored to the circumstances of the case before him, it did not ~~transgress~~ the principle of R. v. Oliver Whyllie (supra) as further developed in R. v. Bradley Graham & Randy Lewis (supra)

It was for the above reasons that we refused the application for leave to appeal on February 15, 1988.