JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 43 & 58/78

BEFORE: THE HON. MR. JUSTICE KERR, J.A. (PRESIDING)
THE HON. MR. JUSTICE ROWE, J.A.
THE HON. MR. JUSTICE CAREY, J.A. (AG.)

REGINA

VS.

NEVILLE BROWN

AND

DANNY BOOTHE

Mr. Berthan Macaulay, Q.C. and
Mrs. M. Macaulay for Brown.

Mr. Berthan Macaulay and Miss Saunders for Boothe.

Mr. Howard Cooke for the Crown.

May 19, 20, 21, 22, 1980; April 3, 1981.

KERR, J.A.

In these applications for leave to appeal from convictions for murder in the Circuit Court Division of the Gun Court in March, 1978, before Allen J. and a jury certain grounds of appeal involved questions of law. Accordingly, the hearing of the applications was treated as of appeals, the appeals were allowed, the convictions quashed and judgments and verdicts of acquittal entered. We now set out herein our reasons for so doing.

The appellants with Patrick Miller, Leonard Rhooms and Noel Carey were jointly indicted for the murder of one Hubert Green. At the end of the Crown's case after hearing submissions the learned trial judge ruled that there was no case to answer in respect of Miller and Rhooms and formal verdicts of acquittal were duly entered by the jury. At the end of the trial the jury entered verdicts of guilty against the appellants and not guilty against Carey.

The deceased Hubert Green was a farmer and shopkeeper. His shop at Mendez in the parish of St. Catherine had two sections - a grocery and a bar and on the seller's side of the bar counter there was internal communication between bar and grocery by an open doorway.

On the night of April 30, 1976, there were in the bar six or seven customers, including the witnesses Collister Skinner, Egerton Cameron, Lee Cameron, and Collin Williams. To this bar at about 11.00 p.m. came four men armed with firearms. The deceased was then reclining on the bar counter.

In the ensuing fifteen minutes, robbery and the murder of Hubert Green were atrociously committed in that bar.

Throughout the trial which lasted four weeks the continuing vital issue was one of identification. The action in the main as described by the witnesses Skinner and Egerton Cameron was that one gunman first entered the bar and went over the counter to where the deceased was and the other three who followed ranged themselves on the customers' side. Skinner and Cameron identified this man as Danny Boothe. Skinner identified the other three men as Carey, Brown and Rhooms. Skinner put two of these on the juke box side of the shop and the third on the other side. Cameron put one on the juke box side of the shop and that one was Brown and two on the other side. According to Skinner the deceased protested when Boothe, the gunman over the counter, robbed the till of cash. The deceased went over the counter to the customers' side - picked up a stool as a shield and moved towards the door to the street; he put down the stool and continued towards the door when a shot rang out and he fell on the piazza and died there. Dr. John Williams who performed the post-mortem found: (i) puncture wound over the left cheek-bone (ii) one-inch long lacerated wound of the left eye-brow, the first of which was consistent with infliction by a bullet. Dissection of the body,

revealed a bullet located in the upper part of the spinal cord between the first and second vertebrae. In his opinion death was caused by rupture of the upper spinal cord resulting in cessation of breathing and the heartbeat. On cross-examination by Mr. Lee Hing he said: "I saw no burns and this would indicate that the bullet was fired at some distance."

After the shooting of the deceased, Mrs. Green came from the grocery and according to Skinner, Boothe put her over the counter where accused Brown "grabbed her in her chest, pointed the gun at her and demanded money." As it appeared to him Skinner that Brown was about to shoot her on his advice she gave him money which she Mrs. Green in evidence said it was $700.00 and which she had had in her brassiere. Skinner said that Boothe robbed him of his watch and Brown of his money. The customers were then ordered to lie face down. While this was going on the door to the street had been closed by one of the gunmen and some of the gunmen then went in the grocery and after some minutes they all left by the main door. Skinner said he heard shots being fired outside and five minutes after he heard a car drive up. The incident in the shop lasted fifteen minutes. Lighting was supplied to the shop by a delco plant. There was a light in the middle of the bar - one on the piazza and light from the juke box - lights in the grocery and flood-lights from 200 watt bulbs outside. Skinner subsequently identified all four men at identification parades.

The evidence in respect to accused Miller was given by Vernon Green and was to the effect that Miller was the driver of a car which drove up just after the shooting and stopped for a short while near the shop. No other person was in the car when it left the scene. In addition to the challenge in cross-examination to the evidence of identification there was no evidence to connect Miller with the incidents inside the shop and he was quite properly acquitted on the judge's directions at the end of the case for the prosecution.

Egerton Cameron also gave a similar description of the action in the bar. He identified Boothe as the man who first came in and went over the counter but placed one of the gunmen on the juke box side and two on the right of the screen as one faces the road. At the identification parade Cameron identified Boothe and Carey as two of the robbers.

Mrs. Green gave evidence of hearing the sound of gun fire while in the grocery and on going to the bar she encountered two gunmen - one of whom was fair and the other dark. The fair one was appellant Danny Boothe, whom however she failed to identify at the identification parade. After she was robbed by one of the gunmen she was asked by Boothe to show her the living room. She said she did not have the key and while Boothe and the other went to the grocery and were searching her leather bag for the key she ran through a side door and down to a "coffee piece."

She pointed out at the identification parade Carey as the other man who robbed her of the money she had in her bosom; Skinner on the other hand said that that person was appellant Brown.

Of the witnesses who attended at the identification parades held on May 16, only Skinner identified Brown.

In addition to the sustained challenge by extensive cross-examination of the witnesses for the prosecution on their evidence of identification, the defence put forward in each case was an alibi.

In respect of appellant Brown, his evidence on oath was to the effect he was at the time a fireman stationed at the Linstead Fire Station. That on the day in question after coming off duty he remained at the Fire Station playing dominoes and cards throughout the night until 1.30 a.m. In support the defence called a number of witnesses including Constable Loutin who gave evidence of being at the Fire Station at Linstead with appellant Brown from 4.00 p.m. to 1.30 a.m. and Patrick Miller the accused who had been acquitted earlier and who stated in evidence that at 1.30 a.m. he drove Brown in his car from the Station to his home - and Cecil Webley, Caleb Walters and Bobby Coombs,

firemen of the Linstead Fire Station who were on duty on the 30th April and who said they saw Neville Brown there at the material time playing cards and dominoes.

Danny Boothe gave evidence on oath to the effect that on the night of the 30th April, 1976 he was at home at 26 Pittsburgh Road, Spanish Town - he never left his home that night. In cross-examination he said he stayed home because he had taken pills for a "wash out." His mother, his cousin, Janet Clarke and his girlfriend, Lorna Brown were at his home that night.

Noel Carey on oath said he was an upholsterer, and at the time lived at Hartshorn District in Clarendon. He worked in Spanish Town. He was standing at a shop at 23 Old Mackie Street, when police came and arrested him on May 30, 1976 at 7.00 p.m. Neville Brown is his brother. He was never at Mendez on the night of the 30th April, 1976. On that night he was at home.

Although in the action described by witnesses Skinner and Cameron, it would seem that the appellants Brown and Boothe were more closely allied being jointly concerned with the robbing of Mrs. Green and Skinner, yet for the purposes of this appeal Mr. Macaulay submitted that the case against Brown should be considered and comparatively analysed with that of Rhooms since the identification of these accused rested on the evidence of Skinner.

Mr. Macaulay argued that Skinner's evidence was so destroyed in cross-examination that in respect of the case against the accused Brown and Rhooms neither should have been called upon to answer. Further, the trial judge's ruling of "no case to answer" in respect of Rhooms was indicative that she found that Skinner had been discredited and his credit being in the circumstances indivisible her ruling in respect of Brown was inconsistent and wrong.

We approve as applicable to a judge sitting with a jury the approach to a submission that "there is no case to answer" as advocated in the Practice Note of Lord Parker, C.J. (1962) 1 All E.R. p. 448:-

> "A submission that there is no case to answer may properly be made and upheld: (a) when there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is manifestly unreliable that no reasonable tribunal could safely convict on it.
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> Apart from these two situations a tribunal should not in general be called on to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If, however, a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer."

Where a submission is based upon the first ground a problem rarely arises as this absence of evidence to prove an essential element in the offence is more often than not self-evident.

It is the second ground which requires a consideration by the trial judge of the reasonable credibility of the evidence for the prosecution. The mere fact that there are inconsistencies in the evidence of a witness or discrepancies between the evidence of one witness and another may not be enough to remove the case from the jury's consideration. Questions of fact and the assessment of evidence are essentially matters for the jury. Therefore, it is only when upon a general consideration of the evidence it can fairly be said that "no reasonable tribunal could safely convict on it" that the trial judge should withdraw a case from the consideration of the jury. This approach would undoubtedly include cases where there is but a "scintilla of evidence."

In the instant case, however, the evidence against the appellant Brown could not with any degree of accuracy be described as "scintilla." The trial judge then, as we are now, was concerned not with the quantum of evidence but the quality of the evidence tendered on behalf of the Crown.

With respect to Skinner's evidence our attention was adverted to a number of unexplained and inexplicable inconsistencies in both his conduct and in his evidence. The following are illustrative:-

(i) (a) At the preliminary examination he said it was the man on the right (Brown) who shot the deceased.

(b) At the trial he said he did not know which of the men shot the deceased.

(ii) (a) Boothe who was the man who came in first was described to the police as black, five feet eight inches in height.

(b) Boothe is in the eyes of all at Court a brown man.

(iii) (a) At the trial he said he knew Rhooms before having travelled with him several times in a taxi cab driven by Rhooms.

(b) He failed to include in his statement to the police this important fact.

(iv) At the preliminary examination he said that of the four men, "the remaining two (i.e. Rhooms and Carey) I am unable to give a thorough description of them in that I did not observe them properly."

Of all the persons in the shop Skinner was the only one who identified Brown at the parade. Apart from the inconsistencies the transcript revealed that he was vague and uncertain concerning the description of the assailants.

Accordingly, if the learned judge found that Skinner's evidence of identification in relation to Rhooms whom he said he knew before was so unreliable as to warrant a ruling of "no case to answer," a fortiori, it ought to be even more unreliable in relation to Brown whom he was seeing that night for the first time.

We are of the view that Skinner was so discredited and his credit being in the circumstances indivisible, it was manifestly inconsistent of the trial judge to rule unfavourably on the no case submission on behalf of Brown while upholding it in respect of Rhooms. In so doing she fell into error.

In passing we are constrained to observe that from the record of the transcript the many witnesses who supported the alibi of the appellant Brown were unshaken in cross-examination and corroborated the appellant in every important material particular.

For Danny Boothe Mr. Macaulay submitted that -

(a) The verdict of the jury was unreasobable that inter alia, it depended on the credibility of the witnesses Collister Skinner and Egerton Cameron. The acquittal of the accused Noel Carey, was also dependent on the credibility of the same witnesses.

(b) The learned trial judge failed to direct the jury that the credibility of these witnesses, in the circumstances, could not be divisible as to the accused Noel Carey and the applicant - see Baksh v. The Queen (1958) A.C. 167; (1958) 2 W.L.R. 607.

He further contended that the evidence against Boothe was materially indistinguishable from that against Carey. Further, and in any event, the obvious weaknesses in the Crown's case were such as to render the verdict unreasonable having regard to the evidence.

We approve the following statement in R. v. Taylor (1977) 25 W.I.R. at p. 489:-

> ".....where two or more persons are jointly charged and the evidence against each is materially indistinguishable then an acquittal of the one and conviction of the other or others is inconsistent in the sense that the conviction is unreasonable or cannot be supported having regard to the evidence.
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> The view as restated in R. v. Durante [1972) 2 All E.R. p. 962] to the effect that on an appellant who pleads inconsistent verdicts lies the burden of satisfying the court that the verdicts cannot stand together has been approved and adopted by this court in a number of cases. The proposition applies not only to verdicts against one person on different charges or counts in an indictment but also to different verdicts in respect of persons jointly charged on the same count."

However, we do not share Mr. Macaulay's view that the evidence against Boothe was so materially indistinguishable from that against Carey as to render the verdicts inconsistent. In the picture protrayed by the evidence of the witnesses for the prosecution Boothe played the leading role, always in the foreground, while Carey

was one of the supporting actors and throughout the incident in the background. In addition there was one undesirable aspect concerning the identification parade in respect of Carey. It transpired that several parades were held on the same day for the suspects and that save in the case of Boothe, some members of the parade for one suspect were used subsequently on the parades for other suspects. Thus at least four of the men on Carey's parade had already been seen by the witnesses on Brown's parade. For this recycling of the members forming the parade the police officer offered as excuse the difficulties of obtaining suitable persons for parades. We are not unmindful of this difficulty especially in a country of people from so mixed ethnic origins. However, one of the principal reasons for the parades is to test the witnesses' ability to identify the accused. The recycling of the members, as was done in the instant case, reduced the effectiveness of the parade as a test of the ability of the witness to identify or recognize the offender and consequently lessens the evidential worth of any identification made under such circumstances.

There were however, glaring weaknesses in the prosecution's case. Mrs. Green with whom it was alleged that Boothe had most to do and who had the best opportunity for subsequent identification was unable to pick him out at the identification parade. The two witnesses who pointed out Boothe at the identification parade were Skinner and Cameron.

Reference has already been made to certain discrepancies between the evidence of Skinner and that of Cameron. It is enough to reiterate here that the description of the appellant given by Skinner to the police was clearly different from the appellant's physical appearance and that Cameron on the other hand admitted that he could give no description to the police of Boothe and in fact only gave a statement after the identification parade.

It is clear from the jury's acquittal of Carey, that they were not satisfied of the identification of Carey by Skinner and

Cameron. Skinner having been discredited and Cameron's inability to describe the appellant before the identification parade would render a verdict of conviction based on such evidence unreasonable.

For these reasons the appeals were allowed and the convictions quashed.