

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 135/90

BEFORE: THE HON. MR. JUSTICE CAREY - PRESIDENT (AG.)
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

R. v. NEVILLE WHYTE

Delroy Chuck for Applicant

Miss Paula Llewellyn for Crown

28th October & 4th November, 1991

GORDON, J.A.

On 2nd May, 1990 the applicant was convicted for the murder of Neville Thompson before Patterson J, sitting with a jury in the Clarendon Circuit Court. On 28th October, 1991 having heard submissions we reserved our decision on the application for leave to appeal the conviction.

The facts on which the prosecution relied are as follows:

Mr. Ernest Reid shared a one room house at Bath House in Westmoreland with the deceased Neville Thompson. They slept in separate beds. On the night of the 9th April, 1986, they retired to bed about 10.00 o'clock. Mr. Reid was awakened by an explosion which sounded like a gun-shot. He sat up in bed and saw the deceased going likewise. The deceased got off the bed and walked towards the door and the witness heard another explosion. He saw the deceased fall on the floor. This explosion had come from a window on the left as the deceased walked towards the door. The witness saw what he described as a gun-shot wound to the left breast of the deceased. He concluded that Neville Thompson died as he displayed no signs of life.

Mr. Reid went outside through the back door of the house and he was felled by two blows delivered from behind at the same time a voice enquired "Where you running"? He recognized the voice to be that of the applicant whom he knew for 2 - 3 years. They had passed occasionally on the road and exchanged greetings. The voice continued "a herb and money we want tonight, else a pure dead body 'or ...!" While on the ground, he recognized the applicant standing about 4½ feet before him with a flashlight and a short gun in his hands. He recognized the applicant by the light of the moon and by that of the flashlight which was switched on. The witness returned to his room and the applicant came to the open window with the flashlight which he shone all over the room. At that stage the applicant pushed his head in the room through the window. In the room on a stool, there was a lantern. This lantern was burning and had been left burning at the time the witness retired to bed. By the aid of this lamp and the light of the flashlight the witness said he saw the features of the applicant clearly.

Using the flashlight, the applicant indicated a barrel which he claimed contained "Herb" and ordered the witness to pass it to him. The witness complied pushing the barrel through the window. The applicant next identified a basket thus, "see a basket there, the herb inside it." At his request, the witness delivered the basket to him through the window. The applicant then ran away. Mr. Reid went to the Little London Police Station and reported the incident.

Det. Constable Donovan Lewis saw the body of the deceased at the Savanna-la-mar Hospital. He observed what he described, from his experience, as a gunshot wound to the left breast. He then went to the home of Mr. Reid, searched the room and found a spent .38 bullet. This bullet he submitted to the Ballistic Expert for examination. He obtained warrants for the arrest of the applicant on that date, 10th April, 1966.

On the 18th May, 1986 at 7:00 a.m. Cpl. Harpaul Haynes on road-block duty at Porus in Manchester stopped a minibus proceeding from Mandeville to Kingston. The passengers were searched and the applicant who was a passenger was found with a .38 revolver concealed in his underwear (brief). This revolver was examined by the Ballistic Expert and the test revealed that the bullet found by Constable Lewis in the home of the deceased was discharged through the barrel of said revolver.

The applicant's defence was an alibi. He claimed he lived in Delve Land, a district which is near Bath House. He left Delve Land in 1985 to reside in Kingston and thereafter he returned periodically to visit his grandmother. He was in Kingston at the time the deceased died. He stated that his visits to his grandmother were at regular 3 weekly or monthly intervals. He knew the district of Bath House. He passed through it often and was polite in greeting people he met and passed on the streets. He said he had never seen or spoken to Reid. He was returning from a visit to his grandmother when he was accosted by the police. Nothing was found on him, but abandoned on the bus was a bag in which the police found the gun and they placed possession on him. He was beaten to admit it was his but he refused to do so. Another man who ran from the bus was captured and he was charged jointly with him. He did not know this man before.

Mr. Chuck urged two grounds of appeal namely:

1. The learned trial judge erred in law in failing to leave all the relevant and material facts affecting the issue of identification.
2. The learned trial judge wrongly directed the jury that the applicant had to give an explanation as to how he came into possession of the gun thereby inadvertently shifting the burden of proof."

On ground I Mr. Chuck submitted that the learned trial judge left some material for consideration of the jury but the most important bits he omitted. He sought to rely on two passages of the evidence. The first passage begins at page 36 of the transcript in cross-examination:

"Q. You told the police that you recognized Neville by his voice, didn't you Mr. Reid?

A. Yes, sir.

Q. In fact, it was only by his voice that you had recognized him; you told the police Mr. Lewis it was only by his voice that you recognized him. Don't just stare at me like that, you can answer me.

A. I told him by voice, but when I see him I know him.

Q. I am not talking about the fact that you know him, I am just dealing with what you told the police, that you only recognized him by his voice, then we will move on to what you are talking about. Do you agree with me that is what you told the police?

A. Don't remember sir.

Q. You didn't say that a while ago? You can't remember if you told the police that you only recognized him by his voice, that is what you said? For my purpose, could you repeat that, is that what you said, you cannot remember if you told the police?

A. When?

Q. At the time of the incident Mr. Reid, the time of giving the statement. You just staring at me, could you answer me; do you understand me?

A. About what sir?

Q. You want time to think about it? I asked you whether or not you didn't tell the police that you only recognized Neville by his voice, that is all I am asking.

"A. What do you call recognize sir?

Q. You knew his voice before and you heard it that that is why you know him, is him, must be him, make out his voice. You nod your head but the Jury want to hear, you don't nod your head, say it that we can hear you.

A. I answer you say; what you said?

Q. When you nodded what you mean, yes?

HIS LORDSHIP: Mr. Reid

WITNESS: Sir ..

HIS LORDSHIP: Answer the question, please.

WITNESS: I ask him what him say sir.

HIS LORDSHIP: Mr. Usim, ask the question again please.

Q. You told the police that you make him out by him voice, only by his voice, isn't that what you told ..

HIS LORDSHIP: The operative word being only Mr. Usim.

MR. USIM: Your Lordship has read me, absolutely correct, the operative word, only by his voice.

Q. Isn't that **what** you told the police in your statement?

A. I could have told him that, yes sir.

Q. Try and co-operate with me.

A. You trying to tell me things that I don't know.

The second passage at page 144:

"Q. Mr. Reid, when you were in Savanna-la-mar I keep on mentioning it because you said it before - didn't you say in Savanna-la-mar court Mr. Ernest Reid, that you never had any discussion or talking with this man when you gave evidence before the jury like that?

A. I don't remember that I said it, sir.

"Q. Why you said a while ago that you used to talk to him and now you say you don't remember. It is either you remember or you don't remember.

HIS LORDSHIP: Mr. Usim, you remember the question you asked the witness.

MR. USIM: Have you ever had any discussion with the accused.

A. What you mean by discussion, sir.

Q. Have you ever talked to the accused? A. Yes sir. That is what I can recall I asked."

Mr. Chuck submitted that the witness' evidence was that he recognized the applicant only by his voice and if he "never had a discussion with him, the question is how could he have recognized him by voice" Reid's evidence under cross-examination, he submitted, was a matter of some concern.

The witness Ernest Reid was, in our view a simple rustic farmer who had some difficulty grappling with the language of the defence attorney-at-law. The witness spoke in the language of the ordinary man and the jurors all from the rural area had much in common with him. The evidence of this witness is that he first recognized his assailant by voice and subsequently this identification was confirmed when he saw his features. The learned trial judge impressed on the jury the duty of the prosecution to satisfy them on the issue of identification in his summation. He said this at page 118:

"Mr. Foreman and members of the jury, as I told you, what the witness is saying in this case is that he recognized this man, not only because he saw his face but also because of his voice, and from the evidence you may gather that what he is saying is that he recognized the voice before he recognized the face. You will have to consider whether he was mistaken as to the voice that he said he recognized and having been mistaken by putting a face

"to that voice and that is why he said it was this man. Because, I don't think it was ever suggested to the witness Reid that he was telling a deliberate lie on this man. What was put to him was that he was mistaken - honestly mistaken. Nevertheless, and as I said a honest witness can be mistaken without knowing that he is mistaken."

These are but some of the directions the jury received in this regard. The learned trial judge carefully analysed the evidence for the prosecution and the defence and dealt with the issue of identification with meticulous care following closely the guidelines in ~~the recent~~ case of R. v. Junior Reid et al [1989] 3 W.L.R. 771. He prefaced his review of the evidence by saying -

"Now, I shall not be reading back all the evidence to you, because I am sure it is quite fresh in your memory, but I shall be reminding you of such evidence as I think may help you, but you are to remember that you are to take into account anything omitted by me with which you consider important and you are to ignore, if you think fit to do so, any view of the facts which I may express, or which you may think I hold. I shall be making such comments as I think necessary, or as I think may be of assistance to you, but you are clearly to understand that any commenting or giving you my opinion on the facts, does not relieve you of your responsibility to form your own views."

We are not persuaded that there is any merit in the submissions of Mr. Chuck. We find the summing up very fair. For these reasons the first ground of appeal fails.

In the second ground of appeal, Mr. Chuck impugned this passage of the summing up at pages 129 - 130 of the transcript -

" ... You may infer that the accused had knowledge of what happened that night; that he was there and that he killed the deceased, if you are satisfied that the accused was in possession of the firearm, and that it was that firearm which fired that bullet which was found in the house and that this accused man has offered no explanation to account for his possession; or if you are satisfied

"that any explanation given by him, which is consistent with innocent is untrue. If the explanation leaves you in reasonable doubt, then Mr. Foreman and Members of the Jury, you should disregard this bit of evidence, all these bits of evidence that I have pointed out to you entirely, because they cannot assist you in identifying this man. If you accept his evidence that he was never in possession of the firearm, or you are left in reasonable doubt as to whether or not he was in possession, again you will have to disregard this bit of evidence coming from the prosecution, it cannot assist you in identifying the accused man."

Mr. Chuck submitted that in this passage the learned trial judge indicated that an explanation must be forthcoming from the applicant to account for his possession of the gun. In this regard he said the jury were told that there is a duty on the applicant to give an explanation. This duty was an evidential burden which, he submitted, was unduly unkind to the applicant.

It was the Crown's case that the applicant was found with this gun which was linked, by the expended bullet found at the scene of the crime, with the commission of the crime. If the jury accepted the evidence that the applicant was found with the gun concealed on his person, then it is conceivable that the jury would expect an explanation for his possession. In this situation, his possession of the gun placed on him an evidential burden akin to that in recent possession as it applies in larceny. In his charge to the jury, the learned trial judge had left the prosecution's case as it was presented. The prosecution relied on the direct evidence of the witness Ernest Reid bolstered by the circumstantial evidence stemming from the discovery of the gun on the applicant. The learned trial judge did not shirk his responsibility to be scrupulously fair to the applicant. The passage impugned forms but a part of the total summing up on this aspect of the case. The directions continued thus:

"... But, even if you should find that he was in possession of the firearm you will have to consider whether having regard to the circumstances, his possession can be said to be a continuing one. That is, whether he had it in his possession from that night until that day. In this regard you will have to decide whether a firearm is of such a nature that it passes from hand to hand readily because you will realise that if that is so, then the accused may not have been in possession of it at the relevant time and if he was not in possession of it at the relevant time then again these bits of evidence - the circumstantial evidence would be of no use. It could not assist you on the question of identity. It could not avail the prosecution.

The relevant period I am speaking about in this case Mr. Foreman and members of the jury, is between the night of the 9th April, 1986, and 10th April, 1986, the night when Mr. Thompson died and the night when the Detective said he found the revolver on that accused man. Now, from a rough calculation I make that to be about 30 days, all over five weeks. You will have to say that a revolver is such a thing that it can pass from hand to hand and that the accused man did not have it at the relevant time. It is for you to say as a matter of fact, whether his possession on the 18th of May, 1986, can lead you to the inference of his possession on the night of the 9th of April, 1986."

There the learned trial judge alerted the jury to the factors that had to be carefully assessed by them in determining the inferences to be drawn from the fact of the applicant's possession of the firearm. This exposition was delivered with clarity and it was left for them to determine what inference they should draw.

The learned trial judge's summation was flawless, if he erred it was in being unduly kind to the applicant. The prosecution presented a very strong case which the defence denied. The learned trial judge's charge to the jury was full and balanced and we find the second ground of appeal, like the first, is unmeritorious.

The application for leave to appeal is refused.