

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No: 114/90

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

R. v. NIGEL LEWIS

Application for leave to appeal

Terrence Williams for Crown

9th October & 4th November, 1991

GORDON, J.A.

On 7th October, 1991 when this application was first mentioned Mr. Paul Ashley sought and obtained an adjournment to 9th October, 1991 in order to be instructed. On the 9th we were informed that Mr. Ashley did not appear for the applicant. We refused the application and as promised then we now record our reasons.

On 11th May, 1990 in the early evening Mr. Boswell Channer, his wife Mina and a friend Miss Jenny Parchment were returning from Ocho Rios to their home at Treasure Beach in St. Elizabeth. The Channers had taken a load of fish in Mr. Channer's van for sale on the North Coast and at Spur Tree in Manchester. Mr. Channer, the driver, stopped the van at a petrol station to have a punctured tyre repaired. The occupants of the van observed a blue Lada motor car with 3 men parked near the petrol station but did not then consider its presence significant. When Mr. Channer and his party resumed their journey they were closely followed by the Lada motor car which on Mr. Channer's evidence "tail-gated" him down Spur Tree to Pepper in St. Elizabeth. At Pepper the Lada pulled alongside Mr. Channer's van and an occupant pointed a gun at Mr. Channer and

ordered him to stop. He obeyed. The Lada also stopped and 2 men alighted from it. At gun point Mr. Channer was robbed of the contents of his wallet and over \$6,000 he had obtained from the sale of fish. While the robbery was in progress the driver of the Lada motor car drove a little way ahead of the parked van, stopped and looking back kept watch on the proceedings by the van. On the evidence of the witnesses about four motor cars passed during the robbery and their headlights shone on the driver's face as he looked on and they were thus able to recognize his features. Mr. Channer said he recognized him as one Gregory whom he had often seen and had a drink with occasionally in the town of Santa Cruz.

The robbery completed, the robbers drove away and the victims continued their journey to the Santa Cruz Police Station where they made a report. They supplied the police with the licence number of the Lada motor car. Immediately on receipt of the report Cpl. Michael Scott left the police station and went into the town of Santa Cruz leaving the complainants at the police station. He returned to the police station shortly after with the Lada motor car and three men including the applicant. The applicant was identified by the victims as the driver of the Lada motor car involved in the robbery. The applicant denied being the driver of the car. He was searched in the victims' presence and money amounting to \$1,100 in notes was found on him. This money the victims suspected was part of the sum robbed as it reeked of the smell of fish ... raw. The applicant was arrested and charged and when cautioned he said "The man with the gun a the first time me see him sah."

Mr. George Dove and his son Everton drove a blue Lada motor car lettered and numbered 7059 AO from Montego Bay to the home of the applicant's father at Brae's River in St. Elizabeth on 11th May, 1990. There at about 11.00 a.m. he loaned the car to the

applicant for him to perform an errand. Mr. Dove said the applicant did not return with the car until about 8.00 p.m. and when he did he had 2 men with him one of whom was armed with a firearm. After he remonstrated with the applicant he took the keys and with the applicant and his son in the motor car he drove to Santa Cruz. There he was stopped by Cpl. Scott and they were all taken to the Police Station about 8.30 p.m.

Cpl. Michael Scott was on patrol in Santa Cruz at about 5.00 p.m. that day when he saw the applicant driving the blue Lada motor car. They stopped and conversed for a while then they parted. When he heard the report of the Channers he went out looking for the applicant and the car he had seen him driving earlier in the day and came upon the Doves and the applicant in the car.

In an unsworn statement the applicant said he got the motor car from the Doves "to do some business". He then made contact with Byron and Mike Slew and gave them the motor car on loan at 5.30 p.m. They should have returned the motor car at 6.00 p.m. but did not do so until 8.00 p.m. He was annoyed and in that state he took the car to Mr. Dove who invited him to accompany them to Santa Cruz where they were intercepted by the police. He said Cpl. Scott said he wanted to catch his father but failing that his son would be a good victim. He was taken to the police station and there Cpl. Scott urged the witness to say he was the robber.

The three grounds of appeal filed were:

- "1. The learned trial judge erred in that he ought to have upheld the No Case Submission based on
 - (a) the confrontation of the suspects with the complainants at the Santa Cruz Police Station; and
 - (b) the unreliability of the witnesses for the prosecution.

- "2. The verdict is unreasonable and cannot be supported by the evidence.
3. The learned trial judge erred in failing to warn himself of the dangers of acting on the uncorroborated evidence of the witness George Dove either on the basis that there was evidence from which the Court might infer that he was an accomplice or on the basis that he was a witness who had an interest to serve."

Mr. Williams for the Crown submitted that there was no merit in the grounds filed. The learned trial judge properly rejected the submission of no case to answer. The incident at the police station in which the applicant was identified as the driver of the car did not amount to a confrontation and the applicant's reliance on R. v. Hassock 15 J.L.R. 135 was misconceived.

At the conclusion of the prosecution's case the evidence against the applicant was that he had been in possession of the car from about 11.00 a.m. to 8.30 p.m. He was seen driving this car in Santa Cruz about 5.00 p.m. by Cpl. Scott who spoke to him. The said car was involved in the robbery at Pepper, which is on the main road between Santa Cruz and Mandeville, sometime after 5.00 p.m. and before 8.00 p.m. The applicant drove the car to Mr. Dove at Brae's River some 5 miles from Pepper about 8.00 p.m. and with him were 2 men one of whom had a firearm.

This circumstantial evidence bolstered the identification evidence of the witnesses at the police station. The identification of applicant by the witnesses was not a confrontation as contended by the ground of appeal filed. Cpl. Scott on receiving the report from the witnesses and the description of the motor car went out immediately on investigation. He knew the car having seen it earlier that day and he knew the driver. His quick return to the police station with the applicant and the Doves and the identification of the applicant was spontaneous. The circumstances did not afford an opportunity for the holding of an identification parade. In Hassock

(supra) the police arranged a confrontation between the applicant and the witnesses who had been summoned to the police station where the applicant was held in custody. This was deliberate and the conviction based on this identification evidence was quashed. In Hassock's case the applicant was unknown to the witnesses before the crime was committed. In this case the applicant was known to Mr. Channer by the name Gregory.

The learned trial judge in his summation carefully analysed the evidence and with great particularity examined the identification evidence applying the correct principles in his analysis. The applicant himself in his statement provided material which absolved Mr. Dove from complicity in the crime. On his statement Mr. Dove was not in possession of the car at the material time, indeed he had been without the car from 11.00 a.m. to 8.30 p.m. Ground 3 of the grounds of appeal was therefore misconceived.

The evidence against the applicant was strong, the learned trial judge's assessment was fair and in our view there is no merit in any of the grounds of appeal filed.