

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 122/88

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.  
THE HON. MR. JUSTICE CAMPBELL, J.A.  
THE HON. MISS JUSTICE MORGAN, J.A.

R. v. NORMAN LOWE

Mr. Norman Manley for applicant

Mr. Hugh Wildman for the Crown

April 24, 1989

CAREY, J.A.:

In the Home Circuit Court on 26th of May, 1988, the applicant was convicted for the offence of murder and sentenced to death. He now applies for leave to appeal that conviction.

Having regard to the conclusion at which we have arrived, it is wholly unnecessary to set out the facts of the case in other than the merest outline. On the 12th of March, 1987 in the early hours of the morning, Rosaline Fuller who lived with the slain man, heard her door being kicked in; three men armed with guns, machetes and one with a flashlight came in. Insofar as this applicant was concerned, it was alleged that he had a gun and a machete. The light was ordered to be switched on; the slain man, Michael Johnson, was tied up, trussed up, the applicant sentenced him to death and the men proceeded to chop him all over his body. Really, he was butchered.

Before us this morning, the short point taken by Mr. Manley was that the learned trial judge failed to warn the jury to approach the evidence of identification with the utmost caution and indeed used words

which amounted to a positive misdirection. At page 187 of the record the learned trial judge expressed himself in this way: Before I set out what was said, for completion we should note that the applicant was tried with another man named Durant English who was acquitted at the trial. To continue what we set out to say, the learned trial judge said this:

"The identification of Lowe is different. Before I leave English, remember that Mavis Johnson is positive as to her identification of English, Super Irie, quite positive, but it is not the positive statement of Mavis Johnson you are testing, you know. It's the correctness of her identification. That is what is crucial, because a positive witness, I warned you about this, you have to be careful, a positive witness who says, 'Yes, I identified,' can be mistaken. So you have to look at it carefully in the context of what I have told you. All these things you have to look at.

If you are in any doubt as to the correctness of the identification, that doubt has to be resolved in favour of the accused."

We would note in passing that although the learned trial judge appears to have thought that he had given some warning as to how a jury ought to properly treat visual identification, he had not in fact done so and this is the only extract we have found in the summing-up where he may be said to have given some warning as to the caution with which a jury ought properly to view identification evidence. He then continued:

"The accused Lowe, his identification is in a different light. It is one of recognition, because a parade was held and on this parade she recognised the person who was in her house and who chopped her commonlaw husband or helped to do it. She recognised him. It's one of recognition. You have to still ask though how could she have seen him to recognise him after. You have to look at all the circumstances. Lighting was there, but she tells you that light was in the bedroom. He was there for about half an hour and she saw him over her with a gun and he was the one who said, 'All a you gwine dead tonight.' and she pointed him out. An identification parade has to be held fairly. If there is any unfairness the parade is not good."

And the learned judge then went on to deal with a parade and then concluded

with these words:

"You will have to make up your minds, is there any genuineness as to this? This is the identification of Lowe."

In our view, this was a positive misdirection, because it conveyed the clear impression to the jury that in recognition cases, one did not have to exercise any caution whatsoever in viewing evidence of identification. In any event, it was also incorrect to tell the jury that this was a case of "recognition" because that was contrary to the facts. In this case, this witness had stated quite positively that she did not know the accused prior to the night of this incident. That misdirection, in our view, is fatal and must result in the quashing of the conviction which we now do.

In the result, the application for leave to appeal will be treated as the hearing of the appeal; the appeal is allowed, the conviction quashed and the sentence set aside and in the interest of justice, the Court orders that a new trial should be had.