JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 29/84

BEFORE: The Hon. President
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice White, J.A.

R. v. OLIVER THOMPSON

Richard Small and Miss Dorothy Gordon for appellant

Mrs. M. Smith for Crown

May 8, 9;& June 3, 1986

ROWE, P.:

Simon Thomas, his wife Loretta and a number of their children lived in a 3 bedroom house at Red Ground, Cavaliers, in St. Andrew. Adjoining the house was a grocery shop, which Mr. Thomas, a contractor and builder, had added during his ten years of residence in the house. A gully was nearby. Two eave lights provided illumination outside. One electric bulb was to the rear of the building and the other to the front, shone across the gully. Louvre windows in this house were made of glass.

On the night of April 24, 1982, Mr. Thomas and his wife retired to bed, while the younger members of the family sat up watching television. Sometime after midnight Mr. Thomas' step-son gave him some information which caused Mr. Thomas to leave his room, to turn off the inside lights, and to make a survey of the living room, kitchen and the children's room. While this was going on the only light

inside the house was that from the television. Mr. Thomas said that the light from outside shone in the house. After his survey, Mr. Thomas re-entered the children's room which is situated to the back of the house, in time to hear a loud banging on the back door of that room. The door was flung open. Mr. Thomas braced himself against the door and with a show of bravado called "Boy bring me iron come." The response from outside was a flow of indecent language, a loud explosion, and Mr. Thomas felt a burning sensation to his left side. Realizing that he had been shot, Mr. Thomas encouraged his wife who had by then joined him, to return to her room and he retreated towards the living room. To repeat his language, Mr. Thomas said that:

> "I removed to the hall door, going towards the living room and I saw two men approach the back step, coming into the house."

He said that these two men were 12-14 feet away from him, one in front and one behind. Mr. Thomas was asked what he did when he saw the men and he answered:

> "After I tek a peep and see them, I run through - the boy dem already open the grill door."

He said further that the children who were watching television, escaped ahead of him, and he went first into the gully and thence to a neighbour's house. While Mr. Thomas was in the gully he recognized his wife's voice as she cried out in distress. Then followed the final sound from the direction of his house which was the explosion from a firearm.

Mr. Thomas said he was able to see the men before he ran away for "roughly about three minutes." He was asked whether there was anything that night to prevent him from seeing the face of the man whom he identified as the appellant Oliver Thompson properly and he answered:

> "What he had on it never cover his face that much."

Later that night, Mr. Thomas returned to his home to find his wife lying dead behind her house. Her head hung over the gully and only a retaining wall prevented her from falling headlong over. She had been shot over the left side of the forehead just above the eye-brow, the bullet passing through the base of the skull and the brain and exiting in the back of the neck on the right side behind the ear. Mr. Thomas said he was in a state of shock. He went to the Stony Hill police station and made a report that thieves had set his house on fire, and asked to be taken to the hospital. He said further that the police interviewed him at the hospital and upon his discharge some 9 days later, he gave an official statement to Sgt. Daley.

Mr. Thomas attended an identification parade on June 2, 1982, and identified the appellant Oliver Thompson as the man who had the gun on the night of April 24, 1982, when the assault was made upon his house.

Oliver Thompson, the appellant herein, was placed on trial for the murder of Mrs. Thomas. Gordon J. and a jury heard the case between the 23rd and 28th February, 1984, and the jury brought in a verdict of guilty of murder against him.

Mr. Richard Small who led the defence team on appeal did not appear at the trial. He felt constrained to apply to the Court to exercise its powers under section 28 (a) of the Judicature (Appellate Jurisdiction) Act to order the production of the statements given by Simon Thomas, and by the police officer Vincent Pitter who conducted an identification parade on June 2, 1982, and the deposition of one Donna Nelson, a resident in the Thomas household, which was given in the preliminary examination in the case of R. v. Winston Hutchinson and Oliver Thompson. The Court considered that the issue of identification was so crucial in the circumstances of this

case, that if it could be shown that the evidence elicited at trial was inconsistent with the information contained in the statements or in the depositions, the Court was entitled to look at those earlier documents, and accordingly acceded to the application of Mr. Small, and ordered their production.

At the very outset of his arguments, Mr. Small urged that the learned trial judge wrongly permitted counsel for the crown to elicit evidence from the witness Vincent Pitter that a person not called to testify at trial had identified the appellant on an identification parade, and that having permitted this inadmissible evidence, the learned trial judge failed to warn the jury to discard this evidence when considering the critical issue of identification. In any event, he said, the evidence so elicited was untrue. A perusal of the statement given by Sergeant Pitter of what transpired on the identification parade on June 2, 1982, showed that "the witness Simon Thomas was the second of four witnesses called" on the parade and the statement made no mention of any other witness identifying the appellant. Donna Nelson's deposition taken on August 11, 1982, disclosed that she identified Winston Hutchinson on an identification parade on May 27, 1982. In cross-examination by Mrs. Hines, Donna Nelson said:

> "I went to Constant Spring Police Station on three occasions. I went to three parades. I pointed out somebody in one of the parades. I never saw anybody who was at my house on the night at the two other parades."

It seems beyond doubt that Donna Nelson was saying that she did not identify the appellant, Oliver Thompson on any of the identification parades to which she was called.

The record discloses that near the end of the examination in-chief of the witness Sgt. Pitter, counsel for the crown asked:

"Q: Now, Inspector, did any other witness come to that parade for Oliver Thompson?

A: Yes, ma'am.

Q: Did any other witness identify Oliver Thompson?

A: Yes, ma'am."

Defence counsel was not prepared to leave the matter there. He probed in cross-examination as to who this other witness could be, and challenged thus:

Q: And Donna Nelson, I take it, did not identify Thompson, this man? I am putting it to you that she did not identify him. You don't remember or what is it?

A: She identified him."

Donna Nelson was not called as a witness at the trial, therefore what she did at the identification parade was inadmissible. In addition, in this case, the evidence led was demonstrably untrue as has been shown herein, in that Donna Nelson had not identified the appellant on any identification parade.

The learned trial judge ignored this evidence in his summing-up. In our view, this is not a case in which inadmissible evidence prejudicial to the accused was inadvertently introduced through an impetuous witness. It was deliberately elicited and could have the effect of influencing the jury that more than one member of the household had identified the appellant.

Mr. Small submitted that where a case rests solely on visual identification there is a duty on the prosecution to make a full disclosure to the defence as to the circumstances leading to identification, and if there has been an identification parade to provide the defence with the names of all the witnesses who were called on to the parade and of what

each witness said or did on that parade. In response to this submission, we express the opinion that the prosecution has no duty to hand the police statements to the defence, but we need not refer to authority to say that a prosecutor has a duty to disclose to the defence the fact that there is a material departure, between the instructions contained in the statements and the evidence given by a particular witness whenever that phenomenon occurs.

Identification parades have become an extremely important device in the investigation of crime in Jamaica. Whatever happens on such parades should be faithfully recorded by the officers conducting those parades and it is imperative that all the forms used on each parade should be included in the prosecutor's instructions. Indeed, in our view, it should become the universal practice for all identification parade forms to be available at trial in the hands of the police officer who conducted the parade, so that he can refresh his memory from those documents and not be left, in this important area of the police investigations and this equally essential feature of the prosecution, to rely only upon his memory. We think too that when witnesses called on a parade have failed to identify the suspect, that is a possible weakness in the identification evidence of which the jury should be specifically reminded.

As will become clearer later, Mr. Thomas had not accused the appellant of the crime at the earliest opportunity when he reported to the Stony Hill police, nor when he was interviewed by an acting corporal of police at the Kingston Public Hospital two days later, that is on April 26. Any challenge to the credibility of Mr. Thomas, if he stood alone, on the question of identification, would have a greater chance of success than if he had the support of a witness.

We think, therefore, that there is substance in Mr. Small's submission that when crown counsel introduced the inadmissible evidence in relation to some other unknown person having identified the appellant, the learned trial judge ought to have instructed the jury instantaneously to disregard that evidence. Having failed to do so at that time, he was under the clear duty in the summing-up to give specific directions to the jury to exclude such evidence from their consideration.

The court of trial was not aware that Mr. Thomas had given two written statements to the police and the learned trial judge reminded the jury that when Mr. Thomas:

> "..... was in hospital the police came and spoke with him and he told them he did not know who had come to his house. His life had been threatened. This came out in cross-examination. When he returned home he said he gave one statement and one statement only; that was to Detective Inspector Daley. That was the official statement he gave to Mr. Daley - confidential statement."

But Mr. Thomas did give a five page statement to an acting corporal on April 26. In it he is reported as saying:

> "One of the men had a short black gun in his hand. He is of black complexion, about 5 feet 5 inches tall, of slim built, about 19-22 years old, and was wearing a hat on his head and wearing tall sleeves black shirt and pants."

He went on to describe the other man and finally he said:

> "If I should see any of the two men again I will be able to identify them clearly."

The appellant was taken into custody on April 28, 1982, and the identification parade for him was held five weeks later on June 2, 1982. On the 6th May, while the appellant was in custody, Mr. Thomas gave a second statement, which he called his "official statement", to Sgt. Daley who, incidentally, was not called as a witness at trial. In this statement, Mr. Thomas

said he recognized one of the intruders to be the appellant. This is what he said in the statement:

> "I realise I was shot. I stop bracing the door which flew open and I saw two men entered the room through the said door. The light inside the bedroom was on. When I heard the voice saying 'Boy wey di ..... you a do.' I recognized the voice to be that of Oliver Thompson of Pinto, who is known to me from he was a child. His father is Arthur Thompson otherwise called ..... and his mother Miss Verona. I am accustomed to see him around in the District. He was one of the two men who entered the bedroom immediately after the door was opened and he was holding a flashlight in his left hand and a revolver in his right. I was further able to recognize him as the light in the room was on."

Mr. Small submitted that the second statement gave no explanation for the naming of Oliver Thompson then and not earlier, and the second statement was so prepared that one was not alerted to the existence of an earlier statement. In those circumstances, said he, the credibility of the witness Thomas could be seriously questioned, and had all that information been available at trial the jury might have taken a different view of the credibility of the witness Thomas. We have already said that there is no general duty on the prosecution to hand to the defence the police statements but in this case the existence of the earlier statement and its contents ought to have been disclosed to the defence.

We have pondered upon the necessity for the holding of an identification parade when the witness assures the police that the perpetrator of the crime is well-known to him over a period of many years. It is curious that on the parade it took the witness Thomas 3-4 minutes to identify the appellant. He walked the line twice and only identified him on the third occasion. This prompted Mr. Small to submit, that the identification parade was, at best, a farce, and that the jury ought to have been invited to say that

what occurred on the parade on June 2, 1982, was no test of the witness' ability to identify the appellant. We think that the learned trial judge rather than directing the jury as he did on page 155 of the record that:

> "He went on the parade, looked along the line and identified Oliver Thompson. Now, you may very well ask why an identification parade was held when Oliver Thompson was known by the witness Thomas. You see, it is the police who determine whether or not an identification parade should be held and when they determine this they do not consult with the witness ....."

he ought to have told them that identification on a parade in the circumstances of this case could have no special significance whatsoever. The explanation given above might be factually accurate and might account for the decision to hold an identification parade, but it is certainly unusual for the police to decide to hold an identification parade for a suspect whom they know is well-known to the witness. On the other hand, one is left to speculate that there could have been some improper purpose for the holding of the parade, and for the masquerade of the witness walking the line on three occasions before making the identification in circumstances in which he said he knew the suspect as well as he said he did.

Ground one was argued by Miss Gordon and in support of this ground she submitted that the directions of the learned trial judge on identification were inadequate, in that;

(a) he failed to alert the jury to vital aspects of the evidence related to identification;

(b) he misquoted aspects of the evidence on the crucial issue of identification and as a result misdirected the jury.

In the course of his evidence, Mr. Thomas said that the light from outside shone in the house. Then he said later that the electric bulb at the back wasn't far off from the back door of the children's room and, "I could see right through. With the television light going through, I could see." Still later he answered the trial judge in this manner:

> "Q: If you are at the back of the house - standing here looking at the back of the house, which side is the light?
>
> A: If I am standing at the back of the house, I can't see the light. I can't see the bulb itself."

The cross-examination continued and the witness was asked and he answered as below:

> "Q: Which part is this electric bulb which you say is on the back of the house?
>
> A: On the eave of the house, to the right. You can see right across the gully ..... if you stand at the direct back of the house you only see the shining over the gully."

The learned trial judge told the jury that the evidence of Mr. Thomas was "that the light from outside was bright - light from the eave and light from the television", and he substantially repeated this statement more than once. If the light to the back of the premises was turned on as Mr.Thomas said, was it so positioned that it illuminated the back of the house or was it directed into the gully? When Mr. Thomas spoke of being able to see right through on account of the "television light going through", was he there saying that that was the only light which assisted him to make the identification?

The case was never left to the jury on the alternative basis that the only light assisting Mr. Thomas' line of vision was that from the television, and to compound the situation the judge told the jury that when Mr. Thomas was alerted that something was amiss and left his room, he

"turned on" the lights in the house whereas the evidence was the very opposite. This misquotation of the evidence could have confused the jury as to the amount of light available to assist in the recognition of the intruders.

It was of importance for the jury to determine the length of time that the witness had to observe the assailant. Mr. Thomas said: "After I take a peep and see them, I run through." From this statement it could be inferred that the recognition was instantaneous and that Mr. Thomas withdrew immediately thereafter. Another possible inference is that the intruders were not fully visible to him as otherwise, there would have been no necessity for him to have used the term "peep." Side by side with Mr. Thomas' account of taking a "peep" and then "running through", is the assertion by him that he observed the men for roughly about three minutes. The two things just do not hang together and this is the kind of inconsistency in a witness' testimony which should be seen as a possible weakness in the identification evidence and to be highlighted before the jury. Instead the learned trial judge focussed upon the three minutes as the period of observation, which gave an unbalanced view of the evidence.

Our attention was drawn to the fact that the learned trial judge failed to direct the jury on the effect which a partial covering of the intruder's face could have upon the witness' ability to make a true identification. Mr. Thomas had been asked by crown counsel if there was anything that could have prevented him from seeing the face of the man whom he had identified as Oliver Thompson, and he had answered obliquely that, "What he had on never cover his face that 'much'." What is "much" in those circumstances

was inexplicably not explored, but what is unchallenged is that there was some head-covering being worn by the appellant and about this the summing-up is completely silent.

In our view, these several defects in the summing-up on the issue of identification amounted to a mis-direction affecting the correctness of the verdict.

A Mr. Gordon was called by the defence. He was known to Mr. Thomas, but it seems Mr. Thomas had a low opinion of Mr. Gordon whom he described as a man who smokes, drinks and makes noise. Mr. Gordon gave evidence that after Mr. Thomas was discharged from hospital he visited Mr. Thomas, and enquired if Mr. Thomas knew who had shot his wife and Mr. Thomas had replied:

> "The man dem shoot me, did have on mask and dem go round and go round a Nelson yard?"

Mr. Gordon also spoke of a domino game on the night of the murder and that he had heard the voice of the appellant at the place where the game was being played. The learned trial judge commented to the jury that Mr. Gordon did not know what happened at the domino game between 10 p.m. and 3 a.m. and that "he was not of any assistance to any of us really."

On the issue of alibi, Mr. Gordon was probably of no assistance, but what of his evidence of the admission made to him by Mr. Thomas that the men were masked? Was this to be explained away on the basis that Mr. Thomas was being tight-lipped through fear? Mr. Thomas did not say so. He denied having the conversation with Mr. Gordon, and therefore, it was a question for the jury to determine if Mr. Gordon gave a truthful account of the conversation with Mr. Thomas, and, if so, what effect would his evidence have upon the credibility of Mr. Thomas. It is common ground that

Mr. Thomas did not name the appellant until May 6, 1982. If in the interval between the 26th March and May 6, Mr. Thomas had said he was unable to identify anyone because the attackers were masked, this would be evidence going directly to his credibility and undermining the case for the Crown. As the learned trial judge omitted to direct the jury upon the possible importance of the evidence of Mr. Gordon we are of the view that the defence was not presented in a fair and balanced manner.

Other grounds of appeal were argued but we think that they are variations on the theme of the issue of identification and do not require elaboration.

What was said in R. v. Oliver Whylie [1978] 15 J.L.R. 163; 25 W.I.R. 430; as to the duty of the trial judge to explain to the jury the significance of the strengths and weaknesses in identification evidence, has been repeated with approval dozens of times, and as recently as May 5, 1986, by Carberry J.A. in R. v. Roy Dennis, S.C.C.A. 125/84 at p.34. Trial judges are not bound to any form of words but they have a duty to recount the evidence with accuracy, to present the defence fully and fairly, and to have regard to the decisions of this Court when directing the jury on the issue of visual identification.

At the conclusion of the arguments on May 9, for the reasons contained herein, we treated the hearing of the application as the hearing of the appeal, allowed the appeal, quashed the conviction, set aside the sentence and entered a judgment and verdict of acquittal.