JAMAICA

IN THE COURT OF APPEAL.

SUPREME COURT CRIMINAL APPEAL NO. 143/78.

BEFORE: THE HON. MR. JUSTICE ROBINSON - PRESIDENT
THE HON. MR. JUSTICE MELVILLE, J.A.
THE HON. MR. JUSTICE CARBERRY, J.A.

R. V. OLIVER WHYLIE

Mr. B. Macaulay Q.C. & Mrs. M. Macaulay
for the Appellant.

Mr. H. Gayle & Mr. W. Alder for the Crown.

January 30, 31; February 1;
March 17, 18, 20, 21;
April 23, 24, 25; December 17, 1980.

MELVILLE, J.A.

From as far back as the 1st day of June, 1974, one Pauline Thompson, an employee of a betting shop at 207 Spanish Town Road in the parish of St. Andrew, was shot to death in the course of a robbery at the betting shop. The applicant was convicted for murdering her on the 27th of July, 1978 in the Home Circuit Court. This was his third trial before the Circuit Court for this crime and he had also previously been tried for a firearm offence in the Gun Court arising out of this incident. Throughout the various proceedings it appears that a Mr. Rose another employee of the betting shop was the only witness who identified the applicant as the person who had shot Miss Thompson. In the circumstances it was not unnatural that a vigorous and perhaps too lengthy, assault was launched as to the credibility of Mr. Rose.

On the hearing in this Court the first ground of appeal urged was "That the learned trial judge wrongly erred in exercising her discretion by refusing the application of the applicant's Counsel that the jury be discharged, after Crown Counsel had elicited from a

Crown witness, Inspector Samms, that the applicant was a suspect in another offence for which an identification parade was held." What gave rise to this argument was that during the examination of Inspector Samms, the officer who conducted the identification parade, the following dialogue appears (see page 126 of this Transcript):-

"Q. Did you ask him if he was satisfied with the parade?

A: Prior to calling the witness, sir.

Q: And that parade was dismissed?

A: Yes sir.

Q: Did you hold another parade for him?

A: Yes sir.

Q: In respect of this incident?

A: No sir,"

whereupon, in the absence of the jury, Mr. Macaulay applied that the jury be discharged. After a hearing in which it seems to have been accepted on all sides, that the evidence led was prejudicial in that it tended to show that the applicant had been charged with or at least suspected of another offence; the learned trial judge ruled thus: "I do not think I will discharge the jury under the circumstances ..... I should say that no further reference should be made to it in the examination or cross-examination." Consistent with her ruling no mention was made in the summing-up of this incident.

What was urged upon us was that the evidence was inadmissible as irrelevant in the circumstances; that the jury then knew that the applicant had previously been put on trial for this offence - (the Defence introduced the matter when putting previous inconsistences to Mr. Rose) and so it was impossible for him to obtain a fair trial from the jury who would have been hopelessly prejudiced against him having heard that he was a person charged with or suspected of another offence.

The Defence advanced at the trial was an alibi. In support of this the Defence sought to prove that after the shooting incident the applicant was taken from his home by Det. Sgt. Simpson -

the officer who investigated the offence - to the betting shop where he was shown to two Indians, a man and a woman, both of whom, not only denied that he was the man involved in the crime but said that the man who committed the crime had a "big scar on his face." Not only was that so, alleged the Defence, but those two persons also attended at the identification parade on which the applicant was identified by Mr. Rose and had failed to identify him.

On the other hand the Crown contended that the incident of the applicant being taken to the shop and shown to the two Indians never happened; and although it was true that two Indians had attended the identification parade held for the applicant, they had done so not in connection with this incident but in some other unrelated matter.

The Crown argued that this evidence was relevant to an essential issue raised by the Defence and so admissible even if it could be said to indicate the accused had been suspected of another crime. The Crown pointed out that in an earlier passage in the cross-examination of another witness, Detective Sergeant Bevan Simpson the following passage took place: (at pages 106-107 of this Transcript):-

"Q: And at the scene, I am putting it to you, at the scene you sought to get information of the identity of the persons who committed this dastardly crime.

A: Yes, I did try to get information.

Q: And you spoke to several persons?

A: yes.

Q: One of them was an Indian-looking man and an Indian-looking woman?

A: No, sir.

Q: Now tell me, you remember an identification parade was held?

A: Yes, sir.

Q: And an Indian-looking man attended that parade?

A: I was not on the parade.

Q: On the 26th of June you were at the station there?

A: Yes, I was there at the station.

Q: You saw the people who came for the identification parade, didn't you?

A: Will you ask the question again sir?

Q: I am asking you didn't you see the people who came for the I.D. Parade for Oliver Whylie?

A: I did see people come to the station.

HER LADYSHIP: Apart from seeing people come to the station, did you see people connected to the parade come to the station?

A: Yes, I saw them.

Q: Didn't you see an Indian-looking man and an Indian-looking woman?

A: Yes, sir.

Q: And I am putting it to you that at the scene of the crime, when you came back, when you were speaking to the people, you spoke to the Indian man and the Indian woman.

A: No, sir.

Q: And I am putting it further that is why they were brought to the parade.

A: No, sir.

Q: So you don't know why they were there at the station?

A: Yes, I know why.

Q: May I have Exhibit 2, please.

HER LADYSHIP: The portion at page 34?" (Emphasis supplied).

This passage and others at pages 111 and 118 of the Transcript clearly showed that the Defence was suggesting, on the vital issue of identity, that an Indian man and woman who were alleged by the accused to be eye witnesses to the murder had attended the identification parade held in respect of the murder charge and had failed to identify the appellant: very important evidence for the accused - if true.

There can be no doubt, although Mr. Macaulay argued strenuously to the contrary, that when what has been referred to as the 'prejudicial evidence' was introduced it had become a matter of consequence for the jury to decide whether these two Indians had

attended the identification parade in connection with this incident or in connection with some other unrelated matter.

It cannot be denied that the questions put were unfortunately worded. Some such question like "Did the Indian man and woman attend this parade?" would perhaps have elicited the answer the Crown was seeking. Be that as it may, the question for us is firstly, was the evidence admissible in the circumstances? Mr. Macaulay argued that it was not, as it was not within the exception stated in Makin v. Attorney General for New South Wales (1894) A.C. 57 because it was not evidence which could 'rebut a Defence which would otherwise be open to the accused'.

We are unable to agree. At the stage when the evidence was introduced it was clear what the applicant was seeking to set up as part of his defence; that the person who had committed the crime had a large scar on his face and that the two Indians who were alleged to be eye witnesses had failed to identify the applicant as being that person, ergo, Mr. Rose must be mistaken. The Crown was therefore entitled to show that while the Indians had attended the identification parade (and the same persons were used in both parades), it was in connection with another incident. Here an issue was clearly raised and: "If the questions are relevant to an issue, they are in my view admissible, notwithstanding that incidentally they suggested that the appellant has committed an offence," - Jones v. Director of Public Prosecutions (1961) 46 Cr. App. Rep. 129, 183, 184, per Lord Delvin. It is interesting to note that the accused himself at page 166 of the Transcript admitted that there were two such identification parades.

At all events even if we are wrong in the view expressed, one cannot see that the applicant was so greatly prejudiced by the admission of this bit of evidence that substantial injustice would have been done. When he gave evidence, as he did, he could have been attacked as to his character, with the leave of the trial judge of course, as a most vicious assault had been launched on the character of Det. Sgt. Simpson. When the application to discharge the jury was made it was a matter for the discretion of the trial judge and we will not

lightly interfere. R. v. Weaver (1966) 37 Cr. App. Rep. 77; R. v. Palin (1969) 53 Cr. App. Rep. 535.

It was also a matter for the discretion of the trial judge as to whether the wisest course was to say no more about the incident: see Wright (1934) 25 Cr. App. Rep. 35 - R. v. Culling (1964) Cr. Law Rev. 301 and also Suttor (1969) 53 Cr. App. Rep. 504 at 512-513. No miscarriage of justice took place in this case, and this Court prefers to adopt the views and reasoning set out in the cases of Weaver (supra) and Palin.

The next ground of appeal argued was that "The learned trial judge erred in law in dismissing summarily the evidence led by the applicant, of a witness on oath, without testing that evidence against that of the foreman whom she merely questioned from his seat in the jury box." During the course of the summing-up, an allegation was made by the mother of the applicant that during the adjournment she overheard the foreman commenting that the applicant was guilty. This was at the beginning of the day when the summing-up was about to continue. The applicant's mother gave evidence on oath and thereafter, the foreman who was then alone in the jury box, the others having gone to their room, was questioned without any oath being administered to him. The trial judge, in the exercise of her discretion, refused the application to discharge the jury stating quite clearly that she did not accept the evidence of an 'anxious relative.' Mr. Macaulay's complaint was that the juror should have given his explanation on oath also. There seems to be no set procedure as to how a matter of this sort is to be handled. Perhaps an examination on the 'voire dire' ought to be adopted throughout. It is really an inquiry or investigation that the trial judge is undertaking and how it is done is a matter entirely for the discretion of the trial judge providing that the audi alteram partem rule is observed. See for example R. v. Box (1963) 47 Cr. App. Rep. 284: Prime (1973) 57 Cr. App. Rep. 632; Dubarry (1977) 64 Cr. App. Rep. 7. We see no merit in this ground.

There is only one other ground meriting consideration. It was said that the trial judge did not adequately direct the jury on the various discrepancies in the evidence of Mr. Rose. Coupled with this, it was also said that verdict was unreasonable in all the circumstances. Discrepancies there were in Mr. Rose's evidence as was to be expected. This was about the fourth time he was giving evidence in the matter and over a considerable period of time. Additionally his evidence seemed to suggest that he was a person who was barely literate. Against that background it was said that the trial judge should have gone through the various times he had said one thing, and then another, and then back to what he said originally. Indeed a considerable amount of time was spent pointing out the various matters in this Court. It is true that not all were brought to the jury's attention, but no one could have been in any doubt that the Crown's case stood or fell on the credibility of Mr. Rose. This was made abundantly clear to the jury, who must have accepted him as a witness of truth. We think the summing-up was adequate in the circumstances and we see nothing to cause us to interfere with this conviction. In our view there was no miscarriage of justice in this case and even if there had been any small misdirections - and we have found none - we would have applied the proviso: see Section 13(1) of the Judicature (Appellate Jurisdiction) Act. See also the rule in Anderson v. Reginan (1972) A.C. 100 - (1971) 3 All E.R. 768.

The hearing is treated as the hearing of the appeal which is dismissed.

Subject to a few minor changes which we made the above judgment was drafted by Melville, J.A. before he demitted office as a Judge of the Court of Appeal. We fully agree with and hereby endorse it and now deliver it as the judgment of this Court.

ROBINSON - (PRESIDENT).

CARBERRY, J.A.