JAMAICA

IN THE COURT OF APPEAL

CRIMINAL APPEAL No. 140/76

BEFORE: The Hon. President.
The Hon. Mr. Justice Watkins, J.A.
The Hon. Mr. Justice Rowe, J.A.(Ag.).

REGINA vs. OLIVER WHYLIE

Berthan Macaulay Q.C. and W.B. Brown for the applicant.

A. Soares for the Crown.

25th, 26th, 27th April, 13th July, 1977

ROWE, J.A.(Ag.):

On the completion of the arguments we allowed the appeal, quashed the conviction, set aside the sentence, ordered that in the interests of justice there should be a new trial and promised to put our detailed reasons in writing. This we now proceed to do.

Pauline Thompson, a 17 year old young woman, employed as a betting shop clerk was at work on the 1st June, 1974 in the Golden Horse Betting Shop, 207 Spanish Town Road. Similarly employed was Raphael Rose. The two young people were on the seller's side of the counter and at about noon they were in the act of checking the day's sale when two men entered the betting shop. One was armed with a gun which he pointed at the shop assistants and demanded money in these terms, "Don't move. Don't talk. Give all the money you have". The two intruders came to the seller's side of the counter and possessed themselves of the cash then in the drawers. He, who was armed with the gun, dealt Mr. Rose a blow in the head with the weapon and Mr. Rose fell to the ground. While in the prone position Mr. Rose heard an explosion as of a gun and his female colleague Pauline Thompson fell on top of him mortally wounded. Dr. Kumu who performed the post mortem examination found that she had been shot just above the outer side of the right eye. He removed the bullet which he found imbedded in the substance of the brain.

It was the testimony of Mr. Rose, upon whom the Crown's Case depended, that he identified the accused at an identification parade held at the Hunts Bay Police Station on the 26th June 1974. Mr. Rose did not know the applicant before the 1st June 1974. At the trial Mr. Rose said that the gunman was in the betting shop for about five minutes, that the gunman came to within touching distance of him, estimated to be about three yards, and that he looked in the gunman's face for about a minute. Mr. Rose said that he was frightened during the incident and that he kept his eyes on the gun up to the time that he was gun-butted. Both Mr. Rose and the police officer who conducted the identification parade said that Mr. Rose made a positive identification by touching the accused and saying, "This is the man".

The defence raised was that of an alibi. In addition the defence challenged the quality of the identification evidence in three separate ways. Firstly, it was suggested to the witness Rose that he was present at the C.I.D. office of the Hunts Bay Police Station on the 2nd June 1974 (the day after the killing) with Detective Sergeant Simpson, the investigating officer, when the applicant was brought into that office and questioned. Mr. Rose emphatically denied the suggestion. Secondly, it was suggested to Mr. Rose that he saw Det. Sgt. Simpson on the identification parade and that they both talked about the case. To this suggestion the witness said "yes". Later on in his evidence he said that on the day of the parade he saw and spoke to Det. Sgt. Simpson in the office some time before the parade was held. Mr. Simpson denied seeing and speaking to the witness Rose on the 26th June and further denied being on the identification parade. Thirdly, it was suggested that two persons described as an Indian man and an Indian woman were also called on the parade in relation to the instant case but both failed to identify the accused. The police officer who conducted the identification parade admitted the attendance of these two persons on the parade but said they were there not in connection with the instant case.

In his sworn evidence the accused gave an account of his movements throughout the first day of June, 1974 in which he said he was at his home at the time of the killing and shooting and he denied that

any part in these incidents. The accused swore that he saw the witness Rose in the C.I.D. office at Hunts Bay on the 2nd June and he gave evidence supporting the suggestions which had been made in cross-examination in relation to the "Indian" man and woman.

These being the questions of fact, the learned trial judge quite properly told the jury in the beginning of the summing-up that the important issue in the case was the question of identity. He went on to say,

> "I would like to emphasize for your consideration that the proper identification of the accused has been raised in this case and I must ask you to bear in mind that where the proper identification of the accused is important as appears from the evidence on this charge of murder, you may find that the accused was not properly identified, in which case you must find him not guilty of any offence. Any doubt that the accused was properly identified, or that there is a mistake must be resolved in his favour and he must be acquitted".

Next the learned trial judge recounted the evidence of the witness Rose on the issue of identification and ended that portion of his summing-up saying:-

> "Any doubt, Mr. Foreman and members of the jury, must be resolved in his favour. You might think that the identity was not sufficient; if you find that, acquit".

There was one important piece of evidence that the learned trial judge omitted to place before the jury as he dealt with this issue of identification. The jury were not reminded that the accused said the witness Rose had been present at the Hunts Bay Police Station on the 2nd June 1974, in the C.I.D. office when he was being questioned by Detective Sergeant Simpson and had had that early opportunity to view him.

The applicant's eighth ground of appeal was a complaint that the learned trial judge's directions on identification were inadequate. It is because we found merit in that complaint that we allowed the appeal.

It has been observed in recent years that in a very large number of serious criminal cases tried in the Circuit Court the critical issue has been the identification of the accused person. When this is so of identification is a live issue in the case, it is the clear and [illegible] duty of the trial judge to [illegible] mind with the utmost care

to that issue and to give the jury full assistance on how to approach that important question.

Another noticeable feature of many of these serious criminal cases is that the only evidence connecting the accused with the crime comes from one or more witnesses who say they were present and saw the accused commit the crime. Felons are wont to pounce upon their victims, rob them or rape them or shoot them, and disappear without leaving greeting cards or fingerprints, or other physical symbols of their identities. The investigators who come along in their wake and in the end, the prosecutors who present the cases before judge and jury must do the best they can with the persons who claim to be eye-witnesses and who afterwards identify one or more persons as the perpetrator(s) of the crime.

It is common knowledge that more than two million people inhabit Jamaica and that there is a rich mixture of all the races in this population. There is therefore always the possibility that one person may bear a marked similarity or resemblance to another in any given geographical area. The further possibility exists that an honest and prudent person may make a mistake in visually identifying another.

Where, therefore in a criminal case the evidence for the prosecution connecting the accused to the crime rests wholly or substantially on the visual identification of one or more witnesses and the defence challenges the correctness of that identification, the trial judge should alert the jury to approach the evidence of identification with the utmost caution as there is always the possibility that a single witness or several witnesses might be mistaken. A mistake is no less a mistake if it is made honestly. Although it is the experience of human beings that many honest people are quick to admit their mistakes as soon as they become aware of them, it is also possible that a perfectly honest witness who makes a positive identification might be mistaken and not be aware of his mistake.

In every such case what matters is the quality of the identification evidence.

The judge should direct the jury that in order for them to determine the quality and cogency of the identification they should have

full regard to all the circumstances surrounding the identification. These may include:-

(a) the opportunity which the witness had of viewing the criminal;
(b) was the person known to him before the date of the commission of the crime and if so for what period and in what circumstances,
(c) if the person was unknown to the witness, what description, if any, did he give to the police;
(d) the physical conditions existing at the time of the viewing of the criminal as to place, light, distances, obstructions, etc.;
(e) any special peculiarities of the criminal or any special reason for remembering him;
(f) the lapse of time between the date of the crime and the time of identification;
(g) the conditions under which the identification was made;
(h) any special weaknesses in the identification evidence;
(i) any other evidence which can support the identification evidence.

It is of importance that the trial judge should not consider his duty fulfilled, merely by a faithful narration of the evidence on these matters. He should explain to the jury the significance of these matters, enlightening with his wisdom and experience what might otherwise be dark and impenetrable.

We have considered the decisions in the cases of -

Arthurs vs. Atty. Gen. for Northern Ireland (1971) 55 Cr. App. Reports, 161
Turnbull v. R. (1976) 63 Cr. App. Reports 132
Percy Gregory v. R. S.C.C.A. 133/71
R. v. Desmond Bailey S.C.C.A. 176/73
Dennis Dale v. R. S.C.C.A. 17/72 and from these cases we extract the principle that a summing-up which does not deal specifically, having regard to the facts of the particular case, with all matters relating to the strength and the weaknesses of the identification evidence is unlikely to be fair and adequate. Whether or not a specific warning was given to the jury on the dangers of visual identification is one of the factors to be taken into consideration in determining the fairness and the adequacy of a summing-up.

In the instant case the learned trial judge did not warn the jury in general terms that there was the danger of a mistake in visual identification, he did not tell the jury any of the reasons why such danger can arise and most important of all he did not tell the jury how to approach the identification evidence of the witness Rose if they believed or were in doubt about the incident of the 2nd June 1974 in the C.I.D. office at Hunts Bay, in respect of which the accused gave evidence. Due to this non-direction we do not consider the summing-up to be fair and adequate.

Ground 4 of the appellant's grounds of appeal, gives rise to another matter of general importance. We will set out that ground fully.

> "The learned trial judge did not fully emphasize the defence of the denial of the actus reus, and alibi, and may well have eroded the full force and effect of the applicant's defence. Rather by his lengthy and detailed directions to the jury on provocation, self defence, accident and justifiable homicide, he may not only have led the jury to concentrate on those defences on the assumption that the applicant was the doer of the act, but leaving such defences to the jury, may have tended to hinder them in reaching a true verdict".

To the list of defences mentioned in the fourth ground of appeal should be added, manslaughter, arising from reckless conduct, because the learned trial judge found it necessary to deal fully with that defence also.

The principle which has been affirmed and re-affirmed and which should be ever present to the judge's mind is that a summing-up is not intended to be merely an academic dissertation upon the law. It must have reference to the way in which each case has been conducted at the trial: R. v. Hampton (1909) 2 Cr. App. Reports 274, and it must be regarded in the light of the conduct of the trial and the questions which have been raised by counsel for the prosecution and for the defence respectively: R. v. Immer (1917) 13 Cr. App. Reports, 22 at p.24. In other words a summing-up should be related to the issues which arise from the evidence given at the trial.

It is therefore the duty of the trial judge to leave for the consideration of the jury all such defences as arise directly, or by

inference from the evidence given in the case whether or not the accused specifically relies upon that defence. Where, the defence relied upon would, if successful, lead to a clean acquittal, the trial judge, realising that it might be tactically imprudent for the defence to invite the jury to consider as an alternative an offence of lesser gravity than the one charged, should be assiduous in putting the other possible defences having regard to the evidence. See Bullard v. R. (1957) A.C. 635; R. v. Porritt (1961) 1 W.L.R. 1372.

Winn L.J. dealt with this question admirably in R. v. Kachikwu (1968) 52 Cr. App. Reports 538. In that case the accused said he did not do the act which resulted in injury to the complainant and there being no other evidence to ground self defence, the trial judge correctly and understandably did not leave the issue of self defence for the jury's consideration. After they had retired for some time the jury returned and asked a rather involved question which was misunderstood by the trial judge and consequently he did not apply his mind to the question which the jury wanted him to help them to resolve. At page 543 Winn L.J. said:-

> "It is asking much of judges and other tribunals of trial of criminal charges to require that they should always have in mind possible answers, possible excuses in law which have not been relied upon by defending counsel or even, as has happened in some cases, have been expressly disclaimed by defending counsel. Nevertheless it is perfectly clear that this Court has always regarded it as the duty of the judge of trial to ensure that he himself looks for and sees any such possible answers and refers to them in summing-up to the jury and takes care to ensure that the jury's verdict rests upon their having in fact excluded any of those excusatory circumstances".

We think that if in a charge of murder the trial judge has given due ear to the submissions of counsel for the prosecution and for the defence, and has himself combed the evidence, if he finds no evidence to support a defence of justifiable homicide he should tell the jury so in a single short sentence. If he finds no evidence to support the defence of self-defence or the defence of provocation he should tell the jury so in a single short sentence. A judge should be courageous enough and practical enough to deal with and only with the live issues in the case

being tried before him.

In D.P.P. v. Leary Walker (1974) 1 W.L.R. 1090 at p. 1095 Lord Salmon gave a reminder that the invitation to the jury to consider unnecessary defences, could tend to confuse and hinder them in reaching a true verdict. Although there was not a scintilla of evidence to ground self-defence, the Court of Appeal of Jamaica had held that the trial judge should have left self-defence to the jury in the Walker case. Lord Salmon in giving the advice of the Privy Council, on an appeal by the Crown, said:-

> "The judge would be quite wrong to do so (i.e. to leave the defence of self-defence) because any verdict of manslaughter on the ground of self-defence would be perverse; there would be nothing to support it".

We think, that armed robbers, having descended upon Mr. Rose and Miss Thompson, having robbed them of money, having struck Mr. Rose to the ground with the weapon and then a single shot having been discharged which killed Miss Thompson, there was no room for the fanciful defences which the trial judge invited the jury to consider. All these so-called defences gave the accused additional chances of acquittal but as it does not appear from their verdict that the jury were in fact confused, we concluded that this ground of appeal fails.

We are of the view that in the interests of justice there should be a new trial in this case, such trial to take place during the current session of the Home Circuit Court.

Rowe J.A.(Ag)

Edward Blair P.

L.H. Robotham J.A.