

GA. CRIMINAL - Murder - Trial - evidence - identification - deposition of dead witnesses: who
have wrongly refused to allow applicant to see case to find evidence of contents
of police station diary - whether "dock identification" of post
availability - whether judge failed to assist jury in assessing
the individual value of deposition. Application for leave
to appeal refused
Case referred to R. v. Jones & White 15 J.L.R. 20 ✓ comp

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS: 104 & 105/88

BEFORE: The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Wright, J.A.
The Hon. Mr. Justice Morgan, J.A.

R. v. OSBOURNE WRIGHT
ERIC HARVEY

Dr. Randolph Williams for Wright

Delroy Chuck for Harvey

Kent Pantry for Crown

October 10 & November 15, 1988

CAMPBELL, J.A.

The applicants were convicted before Theobalds J., by a jury on April 29, 1988 in the Home Circuit Court for the murder of Timothy Clarke and sentenced appropriately.

The murder was on November 2, 1980 and arose in the undermentioned circumstances. Roy Francis, a butcher was in the district of Pepper in the parish of Saint Elizabeth for the purpose of purchasing cows. He was sitting in his van about 6.30 a.m., on a Sunday morning when a motor car in which there were four occupants passed him, turned around and came back alongside his van and stopped. One of its occupants asked him if he had come to purchase cows. On his answering in the affirmative, he was held up, robbed of some \$20,000.00 together with personal items including a Benrus gold watch. Three gentlemen including Mr. White who had been nearby

speaking to Mr. Francis fled the scene. Mr. White testified and positively identified Eric Harvey at an identification parade held about a month later as one of the men who participated in the robbery.

The men who robbed Mr. Francis each had a gun. One of them had a long shot gun. In the course of the robbery, Mr. Stanville Beckford a resident of the district emerged in his car from a minor road onto the main road a little distance from where the van of Mr. Francis was parked. The deceased was a passenger in this car. Three of the men who had robbed Mr. Francis rushed towards the car of Mr. Beckford using the ploy of needing help. On approaching the car, the man whom Mr. Beckford identified in a not too satisfactory manner as Eric Harvey, rushed to the car to drag him therefrom. One of the other two who were a few yards away, urged Harvey to shoot Beckford. He complied by shooting Beckford in the thigh. He Beckford quickly removed himself from the car, ran to a nearby embankment where he fell to the ground and subsequently fainted. However, before he passed out, he recognized Osbourne Wright as one of the two men standing in the road when he was being dragged from his car. He observed that Osbourne Wright, whom he had known for years, had a long shot gun. He saw Wright fire the shot gun at Timothy Clarke who had been endeavouring to escape from the car. While he Beckford was lying on the ground, Wright actually stepped over him still with the long gun in his hand. These three men entered Beckford's car and drove away. The deposition of Detective Sergeant Ashman, deceased, who had investigated the matter was admitted in evidence under Section 34 of the Justices of the Peace Jurisdiction Act. In this deposition Sergeant Ashman disclosed that on November 2, 1980 at about 7 a.m., he was driving from Alligator Pond towards Pepper when he was stopped by a motorist who made a report to him. As a result he proceeded to a parochial road in Prospect district where he saw an Austin car abandoned. This was later identified as that of Stanville Beckford.

Later that day he saw Wright in the cell block at Mandeville Police Station. He identified himself to Wright, informed him of the report which he had received of the complicity of Wright in the murder of Timothy Clarke. Wright responded thus "Mr. Ashman, let me tell you the truth sah, me and Stuffie and Chummie." He informed Ashman that Stuffie was Audley Campbell and Chummie was Eric Harvey and that both of them lived in Old Harbour Bay. On being asked by Ashman where the gun was, he replied "I hide it in a hill at Prospect district." Osbourne Wright, on November 3, 1980, voluntarily accompanied Sergeant Ashman to Prospect district where he pointed out the hiding place of the gun. A loaded 12 gauge shot gun with four live cartridges was retrieved from this hiding place. On November 4, 1980 Wright directed Ashman to the homes of Audley Campbell and Eric Harvey. A Benrus watch was removed from Harvey's hand which Francis identified as his. Sums of moneys in two hundred dollar bundles were recovered from Campbell and Harvey. A sum of money also in two hundred bundles had on November 2, 1980 been recovered from Wright. Campbell and Harvey were taken to the Old Harbour Bay Police station where in their presence and hearing Wright accused them by saying, "Ah the two of them was with me."

The pathologist Dr. Francis who carried out the post mortem examination gave evidence that several shot gun pellets were found in the abdominal cavity and in the viscera and that the deceased died as a result of gunshot injuries to the abdominal viscera. The ballistics expert Assistant Commissioner Daniel Wray testified that, as a result of tests carried out by him on a 12 gauge Mosberg model 500 A.B. shot gun which he received from Sergeant Ashman and which he identified in court, he formed the opinion that it had been fired and that it could have been fired on November 2, 1980.

4.

The applicant gave sworn evidence setting up an alibi. He denied that he spoke the words attributed to him and or conducted himself in the manner stated in the deposition of Sergeant Ashman.

Before us Dr. Williams complained that the learned trial judge "exercised his discretion wrongly" by refusing to allow the applicant to reopen his case for the purpose of tendering evidence of the contents of a police station diary said to be material to the defence. The record disclosed that the learned trial judge, contrary to the criticism levied against him, over-indulged the defence in allowing him to keep his case open while his attorney battled to overcome the prima facie inadmissibility of the contents of the police diary for the purpose for which it was sought to be adduced in evidence. At the stage when the last application was made to introduce a witness to give evidence of the contents of this police diary which was after the close of the addresses by the defence, the patent inadmissibility of the contents thereof had not been overcome. The contents of the Police Station diary could only be used to attack the credibility of Sergeant Ashman and such impeachment had to be done by confronting him with the previous statement allegedly made by him - see R. v. Jones & White 15 J.L.R. 20. This could have been done at the preliminary enquiry but there was then no cross-examination of him nor was he confronted with any previous allegedly inconsistent statement even though the opportunity was given for cross-examination. With Sergeant Ashman's death, impeachment of his credit by this method is lost. Even if the deposition of Sergeant Ashman could be impugned by a previous inconsistent statement proved to be indisputably his, there was in this case, a further difficulty in that there was no evidence that the information allegedly recorded by the proposed witness reputedly on the instruction of Sergeant Ashman, had been examined and approved as correct by the latter. Accordingly, in our view the learned trial judge did not err in refusing the application by the defence to call the witness. We find no merit in this ground of complaint.

Another complaint of Dr. Williams related to what he described as the poor quality of the identification of Osbourne Wright by Roy Francis. The learned trial judge directed the jury that the identification by this witness of Osbourne Wright was a dock identification and that such identification had its dangers and shortcomings. He pointed out to the jury that this dock identification could have been facilitated by the fact that the witness had sometime before seen the applicant at the Mandeville Police Station. We do not discern any fault with the learned trial judge's direction. In any case Osbourne Wright was positively identified by Stanville Beckford as being present on that fateful morning and that it was he who fired the shot gun at Timothy Clarke. This witness had known Osbourne Wright for years. There is no complaint that having regard to the physical conditions this witness would have been unable to recognize Wright. This ground of complaint is equally without merit.

Dr. Williams' next complaint is that the learned trial judge did not adequately assist the jury to assess the evidential value of Sergeant Ashman's deposition bearing in mind that he was not available for the jury to assess his credibility by observing his demeanour under cross-examination. We think the learned trial judge properly alerted the jury to such matters as would assist them in considering whether Sergeant Ashman's deposition appeared credible. He did as he was entitled to do, alert them to the fact that, inconsistent with the applicant's denial in court of everything attributed to him in the deposition of Sergeant Ashman, the latter was not cross-examined on these vital matters at the preliminary hearing. Again we find no merit in this ground of complaint.

Mr. Chuck for Eric Harvey properly conceded that he could not support the application of this applicant he having been identified on an identification parade as being among the men involved in the incident on the morning of November 2, 1980 and he having been found in possession of

6.

of the benrus watch of Mr. Roy Francis.

It was for the above reasons that we on October 10, 1988
refused the application for leave to appeal.