JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 84/91

COR: THE HON. MR. JUSTICE CAREY, P. (AG.)
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

REGINA

VS.

PRINCE MCLUNE

Ian Ramsay, Lloyd McFarlane and
Mrs. J. Samuels-Brown for Appellant

Lancelot Clarke for Crown

November 17, 18, 19 and 26, 1992

CAREY P. (AG.):

In the Circuit Court Division of the Gun Court held in Kingston on 12th July 1991 before Reid J. and a jury, the appellant was convicted of the murder of one Junior Watson who was shot and killed on 1st July 1989. On the 19th instant having heard submissions, we treated the hearing of the application for leave as the hearing of the appeal which we allowed. We quashed the conviction, set aside the sentence and in the interests of justice, ordered that a new trial should be held in the ensuing session of the Circuit Court Division of the Gun Court. The reasons which we promised, now follow.

The facts need be stated in the merest outline having regard to the conclusion at which we arrived. Two gunmen in the early morning of 1st July 1989 held up and robbed persons at or in the vicinity of a shop in Brooksland, St. Thomas where a dance was in progress. The victim, who happened to be present at the shop at the material time was pulled from the shop and ordered to lie on the ground. At some

time that morning he was shot by one of the gunmen. Two witnesses identified the appellant as being one of the assailants at an identification parade held approximately three months later. The appellant gave evidence on oath. His defence essentially, was that he was framed by the investigating officer, and he had not in fact committed the crime.

A plethora of grounds of appeal were filed but we proposed to deal only with that ground which we found, had merit, viz. ground No. 10. It was in this wise:

> "10. That the Learned Trial Judge erred in directing the Jury on P. 262 of the Summing-Up that the Appellant at the Identification Parade did not protest the conduct of the parade on the ground that the witnesses had seen him in the lock-ups prior to the parade.
>
> That it is submitted that this was a serious misdirection of fact as the Appellant gave sworn testimony that he had protested specifically on that ground (See P. 200 of the Transcript).
>
> Whereby the Appellant's chances of acquittal were greatly diminished."

During the course of the cross-examination of the Crown's witnesses as to visual identification, Joy Anderson and Christene Young, it was put to them both that they had been afforded a sight of the suspect prior to the identification parade to facilitate easy identification. This they had denied. The appellant maintained that position when he gave evidence in his defence. At the end of his cross-examination, there was no evidence that he had protested the propriety of the identification parade while it was being held. However, the trial judge himself subjected the appellant to a very close examination as to whether he had made any protest. That exercise is recorded between pp. 194-205 of the transcript which began at 2:56 p.m. and ended shortly before 3:20 p.m. We give a part of that examination below (pp. 199-202):

"Q: So, what you didn't like about the the whole parade, tell me everything you didn't like about the parade?

A: Because I go on a parade for what I don't know about.

Q: Anything else?

A: And from me don't know anything about an incident, I mustn't go on any parade.

Q: Anything else?

A: No, sir.

Q: When the first witness came, the one that said that you said she fat though, you remember the witness, Miss Anderson?

A: Yes, sir.

Q: Did you recognize her?

A: I recognize her the day before.

Q: When she came on the line-up of men. did you recognize her?

A: Yes, sir.

Q: What? After she walk up and down or same as she come on the parade?

A: From she come on the parade.

Q: You realize it's somebody you have seen before?

A: Yes, sir.

Q: How did you feel about it?

A: I don't feel pleased about it.

Q: And somebody told her to point you out? Then you never said to anybody, 'How this lady can point me out and yesterday she come and see me?'

A: I say that.

Q: You said that?

A: Yes, sir.

Q: But unless I am mistaken, it's the first time that we are hearing about this.

A: Yes, sir. I said that.

Q: Who you said that to? Who was there? Sergeant Preddie, Sergeant Ellis and the J.P. You tell them that this lady cannot point you out?

"A: Yes. I tell him that I saw that lady before and Sergeant Ellis how come she come on the parade?

Q: And you said that right there where she was, and she could hear?

A: She was standing there at the cell. Is when she was leaving that I said it. Is when she point on me and leaving for a next witness to come in.

Q: After she point on you, what did she do?

A: She walk away.

Q: They never made her sign anything? You never saw her stop before she leave?

A: No. I never see she stop.

Q: She just pointed and walk straight out?

A: The police said the next witness about to come so she can leave.

HIS LORDSHIP : There is no evidence that the parade form was signed.

MRS. McINTOSH-BRICE: They were not available to the defence, my Lord. I asked my friend for it. They are not in the file. I don't know if they were at the previous trial. They were never available my Lord, that shouldn't be.

Q: So, could she hear when you made the accusation that she had seen you the day before?

A: She could but I don't know if she hear.

Q: But, I think, it's the first time we are hearing this, now. Did you talk it in this trial? It is the first to my recollection that he is saying that in the presence of the witness he made the accusation that she had viewed him the previous day at the grill after she purported to identify him.

You thought that was an important thing, that here is a witness who come and point you out when in fact she had a chance of seeing you the day before. You thought that that was a serious matter?

A: Yes, sir. It is a serious matter.

Q: Did you tell your attorney about that?

A: Yes, sir.

" Q: What about the second witness? Did you recognize her when she came in on the parade?

A: Yes, sir.

Q: That as somebody who was at the grill the day before?

A: Yes, sir.

Q: And did you say anything then?

A: Yes, sir. I repeat the same words. "

When the learned trial judge came to sum up to the jury, it seems clear to us, that he made no note of his own examination and had forgotten that the appellant had stated in the clearest possible terms that he did protest the propriety of the parade while on the parade. He is recorded as giving these directions at p. 202:

" ... but he said that he still maintains that the two ladies and a next policeman were with Ellis on the Friday when Ellis took the accused on the parade. He didn't protest the continuation of the parade after Miss Anderson had pointed him out.

When asked by Mr. Proudie if he was satisfied he said he couldn't be satisfied with these things that he didn't know about. And of course, you are asked to consider in deciding whether or not these ladies viewed him, would he, a man of, he is born in 1963, wouldn't he not articulate, judging by the impression that you have of him, would he not articulate to say that 'These ladies saw me the day before; how can they point me out?' That is what the crown is suggesting that had he been seen by the ladies and having recognised them as persons whom he had seen, he surely would have brought this to the attention of someone on the parade. It's all a matter for you, Mr. Foreman and your members."

This was a serious misdirection because in our opinion, the defence was inaccurately and unfairly put to the jury. The fact that the appellant, far from remaining silent and acquiescing in a properly conducted identification parade, was objecting to its unfairness formed the basis of the defence. To misstate that position prejudiced the appellant's case and deprived the jury of considering his defence in its true light. We entirely agree with Mr. Ramsay that the appellant's chances of acquittal were greatly diminished. We were of opinion that that was enough to dispose of the appeal in favour of the appellant.

We did not think that we should seek to apply the proviso in the circumstances of this case where the miscarriage was caused by a misdirection affecting the defence. That must result, we thought, in the appeal being allowed. In the interests of justice, however, we concluded that a new trial should be ordered. There was evidence which was fit to be left to a jury for its consideration. It is in the interest of the Jamaican people that crimes involving the use of firearms be tried. It is in the interest of the appellant that the question of his guilt be not left as something which must remain undecided because the judge was held to have erred: Reid v. R. [1978] 27 W.I.R. 254; R. v. Berry (unreported) 21st September 1992.