

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 152/82

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

R. v. ROBERT GIBBS
DAVID BRYAN

Mr. D. V. Daly for the Appellant Gibbs

Mr. Delroy Chuck for the Appellant Bryan

Miss Diana Harrison for the Crown

January 16 and 17, 1984

ROWE J.A.

Robert Gibbs and David Bryan were convicted in the Home Circuit Court on the 14th of December, 1982, before Orr J., and a jury for that they on the 27th of August, 1981, in the parish of St. Catherine, murdered Lucal Barnes. Arising from those convictions are two applications which have been heard before us yesterday and today.

The prosecution's case at the trial was that Mr. Lucal Barnes operated a crown and anchor game, and it was his practice to go to public places where dances were being held and there he practised his game. He had an assistant sometimes referred to as a 'confederate', one Dalton Anderson. Mr. Anderson did not call himself a 'confederate'. He said he was the one who 'punta' the game. It was also Mr. Barnes' practice to take along with him his two daughters, Diana Harrison and Marjorie Barnes. What was of concern at the trial was a game which he conducted at a place called Tavern Hill in St. Catherine on the night of the 27th of August, 1981. The evidence for the prosecution was that Mr. Barnes along with his assistant and his two daughters went to this dance at Tavern Hill at about 9.0 o'clock the night, and that the game continued until somewhere around 11.30 to mid-night. Mr. Barnes packed up his game and along with Mr. Anderson and his two daughters, left on foot for their home. They had to pass a place called Scandal Corner. Scandal Corner, it appears was about a half mile away from where the crown and anchor game was being played at Tavern

Hill, and according to the witnesses, it would take about a half an hour to walk from Tavern Hill to Scandal Corner. They were approaching a shop run by one Miss Polly when, the witnesses for the prosecution say they heard foot-steps coming behind, as if persons were walking very fast, and so they stopped, and Mr. Barnes was in the act of lighting a bottle lamp, when two men came upon them. Prior to the men coming up, the witnesses had seen Miss Polly, who was to the front of her shop, holding a bottle lamp and packing up some bananas. In that shop there was also a bottle lamp. When the two men approached Mr. Barnes and the witnesses for the prosecution, Anderson, Diana Harrison and Marjorie Barnes, the evidence is that one man held on to Mr. Barnes, and said: "Gun man, don't move! Mr. Barnes had a cutlass in his hand, which he lifted up and said: "This is cutlass!", and immediately afterwards the witnesses heard the report as if a firearm had been discharged. Mr. Anderson held on to Mr. Barnes and together with the two young girls they ran into Miss Polly's shop. When they got into the shop Mr. Barnes fell to the floor. Before they had a chance to examine him properly, they heard the voices of men threatening to shoot them all, saying: "We come to kill off the whole a oonu tonight." And so Mr. Anderson, the two young girls and Miss Polly ran into her bedroom and hid themselves. After some while they came back into the shop and they saw the body of Mr. Barnes partly in the shop and partly on the piazza. His pockets were turned out and he appeared to be dead. He was bleeding from a gun shot wound to his chest.

The police were summoned and they began investigations. A post mortem examination was held on the 2nd of September by Dr. Richards, and he found, on external examination a gun shot wound to the left side of the middle chest over the area of the heart, and he found, on internal examination that the cavity of the chest was filled with blood and there was a rupture of the heart at the apex. He recovered the bullet from the chest cavity, which he handed over to the police. He was of the opinion that Mr. Lucal Barnes came to his death by virtue of a gun-shot wound to the left chest which ruptured the heart, and from shock and haemorrhage.

Who did the prosecution say were the two men who attacked Mr Barnes on that night? The evidence led in relation to the applicant, David Bryan, came from Mr. Dalton Anderson and from Marjorie Barnes. Mr Anderson said that during the course of the crown and anchor game at Tavern Hill, there was a man standing by who was playing, and that man was the applicant, Bryan. He said he particularly remembered Bryan because there was an occasion when Bryan placed a ten dollar note on the board, that when he lost he said it was not ten dollars he intended to have bet but one dollar. This led to some argument between Mr Barnes and the applicant, Bryan. Mr. Barnes eventually yielded and they played until Bryan had no money left. Nevertheless, he stood by and watched until the game was finished. Mr. Anderson pointed out Bryan in the dock during the trial as that person who was at the crown and anchor game, and as one of the men who held up Mr. Barnes at Scandal Corner that same night.

Now, Mr. Anderson did not go on an identification parade, and there was no explanation as to why he did not do so.

The other witness who identified Bryan was Marjorie Barnes, a girl of thirteen years of age at the time. Although she was present at the crown and anchor game she said she did not see Bryan at the dance nor did she see him at the game. She went to an identification parade and she pointed him out on that parade as one of the men who was present at Scandal Corner and held up and shot Mr. Barnes. Her evidence, however, was that Bryan was the person who had the gun. There was some evidence coming from Marjorie Barnes that the investigating officer, Corporal Clacken, was present at the police station where the identification parade was held; that he was standing outside the door of the parade, but she said he could not see into the passage where the parade was actually held.

There is other evidence in the case coming from Mr. Anderson and from Diana Harrison that the person whom they saw with the gun at Scandal Corner was not the applicant, Bryan, but the applicant Gibbs. There was also evidence from other police officers that Corporal Clacken was not at all present on the occasion that the identification parade was held for Bryan.

In relation to the applicant, Gibbs, the evidence connecting him with the murder came from Mr. Anderson who said he had known Gibbs from he was a boy. He knew the district from which he came and he knew him by the nickname of "Second". He said he had seen him about three weeks before the incident. Marjorie Barnes, said Gibbs was one of the persons present, and on the 1st of September she went to the hospital at Linstead, having heard something, and she saw Gibbs in a bed in the hospital, recognized him as one of the persons who held up and shot her father, and went off and made a report to the police.

Diana Harrison went to a parade on the 18th of September and pointed out Gibbs on that parade as one of the persons who had held up and shot her father on the night of the 29th of August.

The defence of Bryan is that at the time of the murder he was in prison. He was in the lock-ups at Riversdale from 11.00 o'clock on the night of the 29th of August, and therefore it was quite impossible for him to have been associated with the murder committed at Scandal Corner after 12.00 o'clock or around 12.00 o'clock on that same night.

For Gibbs, the defence was that he was in the Riversdale area on his way to his home, and he too was in the Riversdale lock-ups or certainly in the custody of the police shortly after 12.15 a.m., on that same night and consequently could not have been the person who was holding up and shooting Mr. Barnes at Scandal Corner.

The evidence coming from the several witnesses is that the distance between Scandal Corner and Riversdale was somewhere between ten and fourteen miles by road, and one witness said if a short-cut was used it would be about six miles.

The grounds argued on behalf of the applicant, Bryan were firstly, that by reason of the unsatisfactory nature of the evidence of identification, the verdict is unreasonable and cannot be supported having regard to the evidence. Counsel pointed out the weakness of the dock identification made by Dalton Anderson. He pointed to the possibility, the very strong possibility, he said, that Marjorie Barnes was in error when she identified Bryan, firstly, when she said that Bryan was the man with the gun, which was contrary to the evidence of

the other two witnesses for the prosecution who were saying it was a different man. He pointed to the fact that she was a reasonably young girl at the time; that she had not testified to having seen Bryan at the crown and anchor game; he pointed to the fact that Diana Harrison, a witness for the prosecution, who had gone on the parade on which Bryan was a suspect, was unable to identify Bryan; he pointed to the fact that Dalton Anderson had not gone on any parade, and all in all he said that the evidence of identification of Bryan was so weak that the crown could not rely upon it to prove its case beyond a reasonable doubt. He referred further to the fact that together with this weakness of the prosecution's case of identification was the evidence from the defence through an Acting Corporal Wilson who received Bryan into custody at Riversdale Police Station and who wrote in the diary that he received him at 11.00 o'clock that night. Mr. Chuck submitted that although the Corporal said in evidence that he could not be positive as to the exact time, because on that night he had no clock in the station and he did not consult any time piece, it would be unreasonable to conclude that his guess was several hours wrong. He said that the likely impossibility of Bryan being at Scandal Corner after mid-night and being at Riversdale around 11.00 o'clock or thereabouts pointed to the fact that the identification by Marjorie Barnes was wholly unsatisfactory and would make any verdict based thereon unreasonable and ought not to be allowed to stand.

With these submissions this court agrees, and it will treat the application of Bryan as the hearing of the appeal, it will allow the appeal and enter a verdict of acquittal in relation to the applicant, Bryan.

In relation to the applicant, Gibbs, it was argued that the verdict was unreasonable having regard to the evidence. Mr. Daly argued that the fact of an identification parade does not exclude error on the part of the witnesses. He referred to the quality of the lighting at the time of the incident which the witnesses say was at best by a dull lamp and, therefore, he said that that could have led to error. He referred to the fact that there was some controversy about the presence or absence of a street light to assist

the witnesses to identify the applicant, Gibbs, and he said that generally the nature of the light which was in his view, poor, decreased the possibility of accurate identification and increased the possibility of error.. What he referred to as a factor which left an unhealthy taste in relation to the applicant, Gibbs, was the fact and circumstances relating to his arrest. Gibbs as well as Bryan were taken into custody at the Riversdale Police Station. The evidence of Corporal Wilson was that firstly, Bryan was taken to the station during the course of the night. He said he had been sleeping, he was awakened and citizens handed him Bryan and made a report to him. Because he had no clock, he said he made an entry in the diary and he entered the time as 11.30 p.m., but he could not say whether it was a correct time because it was not measured by reference to any time-piece. He said about an hour and a half later on he received some information and he left the station on investigations, and at about four minutes after he had left the station he took Gibbs into custody from the hands of irate citizens. He said he returned to the station and there was an entry made of 2.15 a.m., He said he remained at the station for about two hours, and then it was day light, and at that time he took Gibbs to the hospital. Now, clearly, if his estimates of time in relation to the "hour and a half" after Bryan was brought to the station, to the "four minutes" when having left the station he found Gibbs and to the "two hours" after he had taken Bryan into the station were all consistent estimates then he must have made a mistake somewhere as three hours and thirty four minutes after 11.30 p.m., could not take one up to day light. These estimates of time led support to the prosecution's submissions that the times given by Acting Corporal Wilson were wholly guesses which cannot provide any accurate or reliable basis for judging the time at which he took the applicant, Gibbs, into custody.

We are mindful of the submissions made by Mr. Daly as to the possible weaknesses in the identification evidence of Mr. Anderson and of the two daughters of the deceased, but in our view, the evidence of identification was so positive, and the opportunity for observation of the applicant, Gibbs, was

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sufficiently reliable to warrant a verdict as returned by the jury. We cannot say that in those circumstances the verdict was unreasonable and cannot be sustained. In his case, therefore, the application will be refused and the conviction and sentence will be affirmed.

In the event, therefore, the application of Bryan is treated as the hearing of the appeal and the appeal is allowed. The application of Gibbs is refused.