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Judgement Book

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 186/87

BEFORE: The Hon. Mr. Justice Rowe - President
The Hon. Mr. Justice Wright, J.A.
The Hon. Mr. Justice Forte, J.A.

R. v. ROGER BONNER

Mr. Howard Cooke, Jnr., for Applicant

Miss V. Bennett for Crown

18th & 28th July, 1988

FORTE, J.A.

On the 18th July, 1988 having heard arguments of Counsel on both sides, we treated the application for leave to appeal as an appeal, dismissed the appeal, and promised to put our reasons in writing. This we now do.

The appellant was tried and convicted in the Home Circuit Court on the 9th October, 1987, for the murder of Vernon Murdock. The prosecution's case rested on the testimony of Milton Reid, the driver of a Volkswagon mini-bus on that fateful day when Mr. Murdock, the conductor therein was stabbed to death. The case for the crown disclosed that on the 1st June, 1985 at about 10.15 p.m., Mr. Reid who was driving the mini-bus - a public passenger vehicle - brought it to a stop in the vicinity of the National Stadium on Mountain View Avenue in St. Andrew. At this time, three young men entered the bus. None of them was known to the driver. The appellant, was however later identified at an identification Parade by the driver as one of these young men. When they entered, the appellant sat in the middle of the bus and the other men sat to the rear. The bus had a seating capacity of ten with only three rows

of seats. As the bus continued along its route down Mountain View Avenue, the conductor commenced collecting fares. The driver then heard one of the three men say that he was not paying any fare, whereupon the conductor shouted "stop the bus driver, because someone won't pay their fare". Mr. Reid testified that acting on these instructions, he brought the bus to an halt. On looking around he heard the appellant say "How dem conductor boy gwan so? How them boy a gwan so?" He refused to continue, until the fares were paid. However, at that time, one of the men said "alright, we come off this bus" and then the three of them proceeded to come off the bus. In the process, the conductor was pushed off the bus, and stood on the ground right at the door. As the appellant came off the bus, he was heard to say, "Soon jook jook up this brother you know". He then took a knife from his pocket and in the words of the witness Reid 'pushed the knife' into the right side of the conductor's stomach. The three men then ran down Mountain View Avenue. The deceased was thereafter taken to the Kingston Public Hospital, where he was pronounced dead. On the 10th July, 1985, the witness Mr. Reid, attended an Identification Parade at Half-way-tree Police Station, where he identified the applicant as the young man whom he saw stab the deceased.

The appellant gave sworn testimony at the trial and presented a defence of alibi, stating that at the time of the incident he was sleeping in bed at his home at 55 Mountain View Avenue.

Mr. Howard Cooke Jnr., counsel for the appellant filed and argued five supplemental grounds of appeal. In spite of his usual thorough and persuasive arguments, we found no merit in any of them. However there are two grounds of complaint which gave us some concern, one of which related to the evidence of the identification of the appellant and to the learned trial judge's directions thereon, and the other to the learned trial judge's direction on the appellant's defence of alibi.

1. The first concerns the identification of the appellant by the sole eyewitness at the identification parade. He testified that at the identification Parade when he identified the appellant he (the appellant) was the only man on the parade who had a jerri-curl hair-do. On the other hand, Inspector Neville Williams, who conducted the identification parade, maintained throughout his testimony that at the time of the parade, the appellant's hair was cut short, and there was no-one (including the appellant) on the parade who had such an hair-style.

The appellant, testified that on the parade, he had a 'high' jerri-curl hair-style, and that he was the only person on the parade with such an hair-style. Mr. Cooke argued that in those circumstances the learned trial judge should have been more meticulous in directing the jury as to the significance of the jerri-curl i.e. he should have directed them to give serious consideration to whether the appellant was picked out by the witness solely because he was the only man on the parade with jerri-curls.

In dealing with this issue the learned trial judge directed the jury thus:

> "You heard it come up about jerri-curl, and all sort of things, the policeman who held the parade said no jerri-curl man was there, and he didn't tell the accused man that parade must go on irrespective of whether all the people had jerri-curl. If you feel that there was a jerri curled man with outstanding jerri-curls on that parade, and nobody else had it, according to the accused nobody else had it, and was picked out then you have to say the parade wasn't fair."

It is necessary to refer to the verbatim testimony of the mini-bus driver to get a clearer understanding of the learned trial judge's direction. The evidence was as follows:

"Q. When you went on the identification parade did you see any jery curl (sic) people on the parade?

A. Yes sir his hair was.

Q. No just answer my question. First of all, did you see any jerry curl people on the parade?

A. Yes sir.

Q. All right one, more than one?

A. Just one, sir.

Q. Just one.

A. Yes sir.

Q. Who was the jerry curl person on the parade?

A. The accused. "

In his summing-up in an obvious reference to this testimony, the learned trial judge said this:

"True enough, that the witness Reid said that one man was on the parade with jerri curl and the Inspector said no jerri curl man on it, but I must tell you that Mr. Foreman and members of the jury I heard it where the witness Reid said "Yes, his hair was cut down but I still see the ..... and remember the accused man tell you that his jerri-curl was big big up big like ..... ."

Mr. Cooke in his arguments before us conceded that the recorded unfinished statement by the witness referred to above i.e., "Yes sir, his hair was" must have been completed in the words given by the learned trial judge in the above cited passage from the summing-up i.e., "Yes his hair was cut down but I still see the jerri-curl."

On the case for the prosecution therefore, the appellant's jerri-curl hair style was 'cut down', (sic) and not readily discernible whereas the appellant maintained that he had a high jerri-curl which would have been demonstratively obvious to the witness. In our view the learned trial judge's instructions to the jury to treat the identification parade as unfair if they found that the contention of the appellant was correct was

an implied direction to disregard the identification if they so found. In all the circumstances we concluded that the treatment of the issue by the learned trial judge was adequate, and that the jury was properly instructed as to how to approach and consider the evidence in relation to the parade.

In any event this was a case in which the sole eye-witness had ample opportunity to see and observe the assailant in the mini-bus. The bus was small with a capacity to take ten passengers, so that the assailant was always within a few feet of the witness who sat in the driver's seat. At some stages the witness could touch the assailant. At the time of the incident the bus was stationary, underneath a street light, and the interior of the bus was also lit. When asked in cross-examination by counsel for the appellant what he told the police concerning any distinguishing marks in respect of the accused, the following answer and further questions and answers occurred:

> "A. What happen he had a jerry-curl hair and an earring in his ears.
>
> Q. Don't you know plenty people wear jerry curl and earrings?
>
> A. Yes, but only one was on the bus that night.
>
> Q. And that was the distinguishing feature that you recall and you told the police about?
>
> A. Yes sir, and the description of his face."

The evidence also revealed that the witness had opportunity to and did in fact observe other features of the assailant, and not the least important - his face.

It is clear then that the witness was not depending solely on the hair-style of the assailant in order to identify him. In those circumstances, and given the caution of the learned trial judge to the jury to treat the identification parade as unfair in the event that the jury accepted the appellant's evidence in that regard, we are of the view that there was ample evidence upon which the jury could have found as they did and consequently we found no merit in the argument advanced in this respect by Mr. Cooke.

The second ground of complaint with which we now deal concerns the following direction which appear in the summing-up -

> "If you believe the alibi, you look at all the circumstances of the Pro ecution's case, because if it ties up with identification and identification plays an important part in this case, and if a man is elsewhere he could not have been on a mini bus going down Mountain View Avenue at 10.15 and the identification of anybody who was elsewhere to be in that mini bus can't be correct, so you have to consider it carefully."

Mr. Cooke submitted that these directions were wrong in law and in the alternative were confusing. He maintained that the learned trial judge was there indicating to the jury that even if they believed the appellant's alibi, nevertheless they should still look at the prosecution's case to see if it ties up with the identification, and was in effect placing a burden of proof on the appellant.

In our view these directions were unclear, but any misunderstanding that may have been left with the jury as a result was erased by several instructions given to the jury thereafter.

We refer to two of these:

> "(i) If you believe his story here on the alibi then you have to acquit him, and
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> (ii) If you believe the accused as I told you or his story leaves you in any doubt, you have to acquit him. If you disbelieve him, you look at what the crown has put before you with all the discrepancies and all that, and you have to say if on the evidence for the prosecution you are satisfied so that you feel sure as to the guilt of the accused."

Both of these passages occurred subsequent . to the directions complained of, and were clear and easily understood directions as to the effect of a finding of the jury that the appellant's alibi was true, and as to the proper course to pursue if they came to such a finding. At the end of the summing-up, the jury could therefore have had no misunderstanding as to their duty in those circumstances.

For those reasons, we concluded that the appeal should be dismissed and the conviction and sentence affirmed.