IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS: 96 & 97/91

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

R. v. ROHAN RICKETTS
EROLL WILLIAMS

Dennis Daley, Q.C. with Maurice Saunders for Ricketts

Dennis Daley, Q.C. with Rudolph Smellie for Williams

Hugh Wildman for Crown

February 22, 23, 25, 26 &
March 1, 2 & 22, 1993

FORTE, J.A.

On the 31st July 1991, the applicants were convicted in the Home Circuit Court before Patterson J, sitting with a jury, for the murder of Leonard Hall. On the 2nd March 1993, having heard several days of argument, we reserved our decision. We now grant leave to appeal, and treating the hearing of the application as the hearing of the appeal, set out our judgment as hereunder:

Leonard Hall was shot and killed on the 14th June 1990, in a district called Johnson Pen, in Spanish Town, St. Catherine. The postmortem examination revealed that he had been shot by pellets discharged from a shotgun. The pathologist found multiple shotgun pellet wounds on the anterior chest. The pellets were recovered from the chest cavity, and had caused injuries to both lungs. They were associated with massive haemorrhage in both chest cavities. In his opinion death was caused by multiple shot-gun pellet wounds to the chest.

In proof of its case, the prosecution depended, almost totally on the evidence of Fitzroy Blake, who purported to have witnessed the killing. On that night at about 10.20 o'clock, he and the deceased had closed his business place, consisting of a shop and bar, and had proceeded down the lane where the deceased came to his death. Before proceeding into the lane, however, Mr. Blake had seen the appellant Williams standing in the vicinity of his business place. He had known him for a long time as Williams "grew in his hands" suggesting that he knew him from he was a very small child.

As they walked down the lane, the witness had a bag containing money, slung over his shoulder, while Mr. Hall, had a large cassette player in his hands. On reaching about 10 yards from his gate, the witness saw the appellant Ricketts, come from behind the zinc fence which was to the appellant's right. Soon after, another man, known to the witness as "Blacka", came from behind the zinc fence to the left. Both men were armed with shotguns. The sight of these men caused Mr. Blake to stop, but the deceased (Leonard Hall) continued, towards Mr. Blakes's gateway. As "Blacka" came on the scene, he informed Blake that he had come to kill him, and started walking towards him. As he approached, Mr. Blake observed the appellant Williams come out of his (Mr. Blake's) gateway, and that he also was armed with a shotgun. At this time the deceased had arrived in close proximity to both appellants, and was standing with them by the gateway. "Blacka" then, in an effort to make good his expressed intention, fired at Mr. Blake, the shots (pellets) making contact with Mr. Blake's right hand. Nevertheless, the witness walked backwards in an effort to reach to a gateway in the fence, so that he could make good his escape. While he was so doing, Blacka retrieved his (Mr. Blake's) bag, which had fallen to the ground when he was shot. At this time also, the witness saw the appellant Williams shoot the

deceased with his shotgun. Mr. Hall fell, and succumbed to his injuries. Mr. Blake made his escape through the 'side-gate', and ran to his uncle's home, from where he was taken to the Spanish Town Hospital.

Both appellants denied their presence at the scene and each set up an alibi. In addition they called witnesses to (i) challenge the prosecution's evidence of the existence of lighting in the lane at the time and by which Mr. Blake purported to identify the appellants and (ii) testify that on the night of the offence, Mr. Blake admitted to them that he had not known who had shot him, an allegation which Mr. Blake denied.

The issue in the case was therefore one of visual identification. Counsel for the appellants directed their complaints to what they perceived to have been several errors made by the learned trial judge in his summing-up to the jury. These were comprised in seven grounds of appeal, but having regard to our conclusion in respect of ground I, there will be no necessity to address the other grounds in any detail.

Ground I

This concerned the learned trial judge's description of a defence witness as a "pathetic liar" and for clarity is here set out:

> "That the learned trial judge's description of the defence witness, Conroy Williams as a 'pathetic liar' (p. 375) exceeded the bounds of permissible comment and notwithstanding his direction that it was for the jury to say what they thought of his testimony, greatly prejudiced the defence."

The passage in which the learned trial judge so described the witness is as follows:

> "Madam Foreman and members of the jury, You saw that witness, I don't know what view you formed but it is for you to say whether you believe him or not. I have my own views. It seems to me that he was a pathetic liar, but it is not what I think, you are the ones that must say what you make of his testimony."

In advancing his arguments Mr. Daley emphasized the importance of the evidence of this witness, and how material his evidence was to the case of the defence. He categorized the importance of the evidence as follows:

> (a) The witness had testified that soon before the shooting took place, he had seen three men in or in the vicinity of the lane, just standing there and that seeing the men, he became afraid, ran and was actually followed by one of them until he took refuge in a friend's home. None of these men were the appellants, both of whom he knew before, one being his brother:
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> (b) that the lane in which the incident took place was not sufficiently lit to facilitate an identification and in particular, a light on a pole, which the prosecution witness purported to have assisted his identification of the appellants, was not there at the time, but was subsequently put there, and
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> (c) that his brother the appellant Williams, was at home when he came back from the lane, and that they were both together at home watching television, when they heard the shots fired, and ran to the lane to see what was happening.

An examination of the transcript, discloses the accuracy of Mr. Daley's summation of the effectiveness of the witness' evidence, were it accepted by the jury. It is in this context therefore that the complaint, must be considered.

This Court in several cases, have from time to time approved the right of a trial judge to make comments, even strong comments, on the evidence, so long as he makes it clear to the jury that they are under no burden to act upon his views, but must come to a finding of facts, based on their own view of the evidence. There are of course, limits to such comments, and where the comment tends to ridicule the defence, or to suggest that there is some burden on the accused to prove his innocence, or erodes the defence, or is unwarranted on the facts, the judge would have overstepped

the lines of proper judicial comment. (See **R. v. Dave Robinson** S.C.C.A. 146/89 (unreported) delivered 29th April, 1990 per Carey J.A.). The comments must not be such as would inordinately affect the independent assessment by the jury of the evidence which they had heard. (See **R. v. Anthony Sterling** S.C.C.A. 78/86 (unreported) delivered 25th March, 1988 per White, J.A.).

In order to determine whether there was any justification for the trial judge's expressed opinion of the witness, we have scrutinized with care the recorded evidence of the witness, and have found nothing in his testimony to suggest that he contradicted himself, or in any way demonstrated an obvious dislike for the truth. In our view, the opinion of the learned trial judge, based on what appears in the transcript, is unwarranted, and in those circumstances his comment to the jury overstepped the lines of proper judicial comment, and must have had the effect of prejudicing their cases, given the importance that the witness' testimony had, in respect of the defence of both appellants.

Mr. Wildman, attempted to find some justification for the comment, by embarking on an examination of his evidence, as it compared with that of the prosecution witness. He however desisted when it was pointed out that the comment could not have been made on that basis as in every case, in which an accused pleads "not guilty", the evidence for the prosecution and that of the defence would necessarily contradict each other.

He argued also, that the words used in the context in which they were, made it quite clear to the jury, that though that was the opinion of the learned trial judge, it was their opinion that was important, and that they need not accept his opinion of the witness. It is true that the words were said in that context, but in our view the comment having been made in circumstances not supported by the evidence, it would incorrectly leave the jury with

the impression, that there was some sound basis for the judge's opinion, and consequently influence their consideration of the veracity of the witness, thereby depriving them of an independent assessment of the evidence.

Where that is the effect of the comment, it is of no consequence that the learned trial judge, during or thereafter reminds the jury that it is their function to say whether they believe the witness or not. As a result, this ground of appeal must succeed.

Grounds two to seven dealt with varying complaints alleging errors on the part of the learned trial judge in his summation to the jury. There was, however no merit in any of them. We however mention the following:

1. Ground 2 alleged that the learned trial judge made the following statement -

"The lighting as I told you is there."

and alleged that this was a usurpation of the jury's functions of finding facts, and was therefore severely prejudicial to the defence. The context in which this statement was made, however, discloses that the learned trial judge was examining the evidence of the witness Blake, and his testimony of the opportunities he had for correctly identifying the appellants - the words therefore relating to the testimony of the condition of "light" as given by that witness.

2. Some other grounds dealt with were:

(a) the treatment by the learned trial judge, of the issue of visual identification, which in our view was comprehensively dealt with and cannot be faulted.

(b) The treatment of the evidence of the witness Beryl Worrell which the appellants complain was not referred to by the learned trial judge when summing-up the evidence for the defence. This witness had testified that at the hospital she had heard the witness say that he did not know who shot him. It is true that the learned trial judge did not refer to this evidence when summarizing the evidence for the defence, but as was conceded by Mr. Saunders, he dealt with it when he was dealing with the important issue of identification. In our view, this was the correct context in which to remind the jury of that evidence - as he juxtaposed it with that of the prosecution's witness indicating that in determining his veracity, the evidence of his purported statement of inability to recognize his assailant was important.

(c) The alleged failure of the learned trial judge to deal adequately with the issue of whether the prosecution witness was dishonest. Though, we listened patiently to this complaint, this ground was doomed to failure, as counsel himself conceded and even referred to several passages in the summing-up, which made it clear to the jury that the appellants could not be convicted unless they believed the witness Blake, and given the standard of proof, to the extent that they felt sure on his evidence.

(d) That an oral statement made by the Appellant Williams to the police after caution i.e. 'A country and Blacka sah' was prejudicial to the appellant Ricketts (alias 'Country') and should have been excluded from the evidence. An objection was made at the trial, and the learned trial judge having exercised his discretion to admit it, gave the jury the necessary warning that it was not evidence against the appellant Ricketts, and could not be considered in determining his guilt. This was an exercise of a discretion which cannot be faulted, as it was in the maker's favour to show that he immediately denied any participation in the offence and exclusion of the evidence may have adversely affected his case.

Having regard to our finding in respect to ground I, we gave long and serious consideration as to what effect that should have on

the convictions of the appellants and have concluded that they cannot in the circumstance be allowed to stand. The appeals are therefore allowed; the convictions quashed and sentences set aside. We have determined, however, that having regard to the evidence disclosed in the transcript, in the interest of justice, a new trial should be ordered. This we now do, such trial to take place in the next session of the Home Circuit Court.