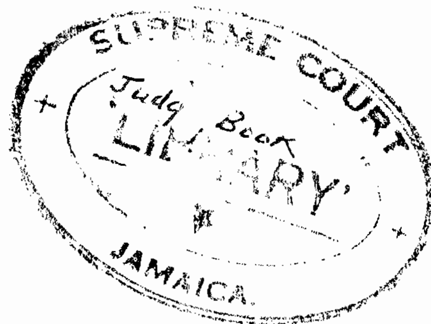

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 136/83

BEFORE: The Hon. Mr. Justice Rowe - President
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Ross, J.A.

R. v. THOMAS PALMER

C.D. Morrison and Mrs. Donna Scott Moorasingh for Appellant

Miss Vinette Grant for Crown

April 23 & May 5, 1986

PRESIDENT

The applicant, Thomas Palmer was convicted before Harrison J., (Ag.) and a jury in the Home Circuit Court for the murder of Burchell Craddock. At the conclusion of the hearing of the application for leave to appeal we refused the application and as promised we now reduce our reasons into writing.

Burchell Craddock, the deceased, lived in a remote Village called Bowden in St. Andrew. Miss Kinghorne operated a beer joint in that Village and on the night of Friday July 9, 1982 there were a number of men on those premises playing dominoes and partaking of beer. At a time variously described as 12:15 a.m., 2:30 a.m., 3 a.m., while some 9 men were in the beer joint, they were attacked. District Constable Lyndon Bogle was shot, requiring hospitalization for 8 days. The deceased who was in the domino room ran outside and was seen holding on to the front of his chest. He ran to a mango tree and was found there later that morning dead, suffering from a gunshot wound over the midline of the body in the sternal region. A bullet passed through the sternum, the left and right side of the heart,

the seventh left intercostal space and lodged in the muscles of the back on the left side.

The sole issue at trial was identification. Electric lights were not available at Bowden. Illumination in the beer joint was from a gas lamp, while in the domino room the only light was from a quart bottle torch. Play had proceeded for several hours with the aid of this light and the inference is that there was sufficient light for the men to read the dominoes.

Two persons present in the domino room gave evidence. District Constable Bogle said because of something one Lincoln Jarrett had said to him, he was on the alert. At about 12.15 a.m., he heard footsteps approaching from the rear of the building. He turned to face the door and saw the applicant standing in the centre of the door-way pointing a gun straight at the left section of his face. Bogle said he ducked and turned towards the front door still in that bent position, when he heard two firearm explosions coming from the direction of the applicant. Outside, Bogle felt a burning sensation to his shoulder, neck and back and discovered that he was bleeding from all three places. He went to the Kingston Public Hospital and was hospitalized for 8 days. During examination-in-chief Bogle testified that he observed the features of the applicant for 1½ minutes and he was aided by the light from the bottle torch as well as by moonlight. He had known the applicant for some fourteen years as the applicant had grown up in Bowden with his grandmother who was also known to the District Constable. To demonstrate how well the applicant was known to Mr. Bogle, he said that at times he was accustomed to see the applicant four times a day. It came out in cross-examination that the period of time during which Bogle was able to see the face of the applicant was not 1½ minutes but a few seconds, and in that time Bogle said he was looking straight at the applicant.

His Lordship, the trial judge, directed some questions to District Constable Bogle. From the answers given there arose two grounds of appeal, all to the effect that the jury ought to have been discharged at that stage and a new trial ordered. An answer given to the learned trial judge was that the witness had seen the applicant in the custody of two policemen in 1975 or 1976. Another answer was that in April 1982 the District Constable saw the applicant and called to him, then the applicant backed away and pushed his hand in his waist as if was taking out a weapon, whereupon the District Constable fired two shots at him. The applicant, he said, escaped into nearby bushes. We will return to this aspect of the case later.

Trevor Dixon, a Security Guard, was on his way home in the village of Bowden at about 9 - 10 p.m., on the night of October 9, 1982. He travelled with a bottle lamp as the moon had not yet come over the horizon. On the way he met three men, one of whom was the applicant, a few chains from Miss Kinghorne's beer joint in Bowden. He went to his house and at about 2.30 a.m., he heard two explosions of the nature of gunshots.

Nehemiah Scott was in the domino room watching the game. He saw the deceased in a corner of the room and at about 3 a.m., Scott said he heard "Bow - bow" as two gunshots were fired. He ran outside, collided with another patron in his scramble for the door, jumped over a bank ½ chain from the building and as he righted himself he saw the deceased running ahead of him holding his chest. He saw the deceased stop under the tree where he was found dead next morning.

The defence was extremely short. In an unsworn statement, the applicant said that at the time of the incident he was not in that area at any time. He was at Price Lane, Kingston and he knows nothing about the incident.

Ground one of the Supplemental Grounds of Appeal complained that the learned trial judge erred in law in that he failed to inform the applicant of his right and to invite him through his counsel to apply to have the jury discharged and the trial recommenced before a new jury, upon the inadvertent disclosure to the jury pursuant to questions asked by the trial judge himself, of evidence severley prejudicial to the applicant. Lawton L.J. in a famous dictum in R. v. Sparrow (1973) 57 Cr. App. R. 352 at 363 remarked:

> "The judge is more than a mere referee who takes no part in the trial save to intervene when a rule of procedure or evidence is broken."

However, this dictum is not a license for the trial judge to embark upon a line of examination not opened up by counsel for the crown or for the defence.

In the 41st edition of Archbold Criminal Pleading, Evidence and Practice, para. 4 - 366, a number of English decisions are reviewed as to how a trial judge ought to exercise his discretion when evidence of the defendant's bad character is inadvertently referred to in evidence. The prevailing view there expressed is that a Court of Appeal will be slow to interfere with the discretion of a trial judge whether or not to discharge a jury in any particular case. This Court had occasion to consider the question in some detail in R. v. Earl Pratt & Ivan Morgan S.C.C.A. 14 and 16 of 1979 (unreported) in which the judgment of the Court was delivered by White J.A. on December 24, 1984. As happened in the instant case, the learned trial judge asked some questions of a witness, and he then elicited answers that the deceased and a friend had previously shot one of their own friends. This was potentially damaging to the defence as their line was partly to the effect that it was improbable that the accused would shoot

his friend. That witness also told the judge of threats to his life and of the fear that he was undergoing.

After an over-night adjournment the learned trial judge invited counsel for the defence to address him as to whether the jury ought to be discharged and a new trial ordered. He considered the arguments and ruled that the case should continue. Convictions for murder were recorded and on appeal it was contended that the accused were irrevocably prejudiced by evidence which had damaging and devastating effect. At page 12 of the judgment, White J.A. said:

> "With the assistance of the attorneys for the appellant and the Crown, this Court made a critical analysis of the context of the circumstances of this case. In passing, two things should be clearly reiterated. For one, the trial judge has a discretion whether to continue the trial despite the prejudicial and inadmissible evidence. Secondly, having decided to continue the trial, the judge has a discretion how to deal with the prejudicial statement. He may either ignore it or comment on it in his summing-up. If he adopts the latter course, it is incumbent on him to deal with it fairly and even- handedly. ...."
>
> "The critical analysis was along the three lines laid down at p. 83 in Weaver (1968) 51 Cr. App. R. 77 which were:
>
> (a) the nature of what was admitted into evidence;
>
> (b) the circumstances in which it was admitted, and
>
> (c) what in the light of the circumstances as a whole was the correct course? The consideration of these must be in the light of the over-all enquiry as to whether, the accused had a fair trial notwithstanding the prejudicial remark. ...."

Having completed his questioning of the witness Bogle, the learned trial judge turned to counsel for the defence and said:

"Just a minute, yes, Mr. Manning, anything on that?"

and counsel answered:

"No, M'Lord."

In his argument before us, Mr. Morrison said that it was not enough for the trial judge to issue the usual invitation to counsel to further cross-examine the witness or to address him, but he should have gone further and directed counsel's mind to the prejudicial evidence elicited through the judge's questioning, and, as Parnell J. did in R. v. Pratt & Morgan (supra), give counsel the specific opportunity to address him as to the manner in which the Court's discretion ought to be exercised. Mr. Morrison frankly conceded that he could find no authority more direct than R. v. Pratt & Morgan (supra) in this regard. We commend Parnell J., for the procedure he then adopted, but we do not believe that there is any invariable duty on a trial judge when prejudicial evidence as to an accused's character is inadvertently introduced into evidence through questions asked by the Court, to invite defence counsel to address him on whether to stop the trial or to proceed. The interest of justice might require this to be done in most cases where an accused is un-represented but not otherwise. A clear and definite opportunity was presented to defence counsel in the instant case either to cross-examine, or to deal in any other way, with the evidence which is said to be prejudicial and he declined to do either.

In the course of his summing-up, Harrison J., (Ag.) treated separately the two pieces of evidence given in answer to his questions by District Constable Bogle. At page 120 of the Record he said:

> "Now, District Constable went on, he was asked by me and he said that before December of 1981 the last time he had seen the accused man was 1975 or 1976, and he was seen, when he saw him then it was on the Bowden Hill Road and the accused was being taken by two policemen. Now that is evidence that is not something that you must use in the consideration of this case, the fact that he was being taken by two policemen in 1975, 1976, does not affect the proof of this case. You must dismiss it from your minds. It is not material to this case."

Mr. Morrison admitted that this was an appropriate direction, if it be held that in the court's discretion it was proper for the trial to continue. However, he submitted that where a trial judge elects to deal with inadvertent prejudicial evidence in the summing up, the situation calls for the most careful directions pointing out specifically to the jury that this evidence was inadvertently elicited in answer to questions by the Court, that it formed no part of the prosecution's case and should be entirely disregarded. He complained that the jury were told on more than one occasion that the incident of the shooting at the applicant in April, 1982 could form a motive for the shooting in July, 1982, and said even if that evidence could have some probative value the directions of the trial judge did not adequately permit the jury to distinguish between evidence having the effect of proving motive and evidence which merely went to show that the accused was a person of evil disposition.

This is how Harrison J., (Ag.) put the matter to the jury:

> "Mr. Bogle also said that in April of 1982, that is the same year as the year of the incident in July that he saw the accused, and the accused when Mr. Bogle saw him he, Mr. Bogle called to the accused and the accused put his hand in his waist as if he was going to fire a shot and he, Mr. Bogle, pulled his firearm and fired two shots at him and he then ran. Here again is evidence that the prosecution is giving you to say that this is an occasion on which the accused was also seen by Mr. Bogle. Now, you must not use that also to say that the accused man is a person of malicious disposition. You don't use that evidence of the police officer firing a shot -

> "well, counsel for the defence when he was viewing this bit of evidence, well he was seeking to say that - he counsel for the accused had asked Mr. Bogle if he had anything against the accused man and Bogle said, no, but still yet, this is what counsel for the accused is saying, Mr. Bogle tells you that he had fired two shots at him so it means that he must have had something against him. Furthermore this is a bit of evidence that the prosecution asks you to say that, if you accept it, it could be that this could be a motive for the reason why the accused man on the night of the 18th of July, 1982, is pointing a gun at the District Constable in the room and firing a shot at him. This is a matter for you as to how you accept it, because the defence is asking you to say: well, this shows that the District Constable had malice against the accused man even though he said he had nothing at all against him, he fired two shots and it shows he must be maliciously disposed towards him. That is not necessarily so.

We think that Harrison J., grasped the significance of the incident in April 1982 and placed it fairly before the jury. It is apparent from the summing up that both the prosecution and the defence addressed him on the inferences to be drawn from that incident and consequently it is incorrect to say that at the end of the day, the April, 1982 incident formed no part of the prosecution's case.

In support of Ground 4, Mr. Morrison argued that on a number of occasions the learned trial judge made reference to District Constable Bogle being on the look-out and although at some points the judge did not say that the District Constable was on the look-out that night for the applicant, he submitted that the cumulative effect of those directions to the jury suggested to them that Bogle's evidence of identification was the more credible as he was expecting to see the applicant on that night.

Very early in the trial Bogle was asked if he had been told something by his sub-officer and he answered that as a result he was on the look-out. Quite properly the learned trial judge did not permit the witness to answer the further question which sought to enquire if he was looking for anybody in particular. Later the District Constable said Lincoln Jarrett had told him something and that too caused him to be on the look-out. At page 114 of the Record in recounting the evidence to the jury the learned trial judge said:

> "You heard Mr. Bogle ...... and he told you that sometime in April 1982 he received certain information, and as a result of that information he spoke to the Sub-Officer at the station, and thereafter he was on the look-out; he was looking for the accused man."

There was no direct evidence that the District Constable was looking for the applicant. What the learned trial judge studiously avoided in the morning, he introduced in the afternoon. It was an error. However, we do not think that the jury were in any way misled by that error in the evidence. Indeed they had been invited by the defence to say that the District Constable was so obsessed with the applicant that whoever he saw on that night, he would say it was the applicant.

The final ground argued, complained of the insufficiency of the directions to the jury on identification both in the summing up and after retirement when the jury returned for further directions. Mr. Morrison said that the strength of the Crown's case on identification rested on the considerable period of time that the applicant was known to the witness Bogle but he found weaknesses in the identification evidence viz, the period of only a few seconds in which the recognition had been made, the indifferent nature of the lighting available and the stressful conditions involving excitement and fright.

At pages 127 - 128 of the Record, the learned trial judge gave explicit directions on the issue of visual identification and focussed twice on the importance of the length of the time of observation. He said:

> "127. As I said to you, the focal point of issue in this case is one of identification, and you must approach the question of identity with great caution, remembering that a person can make a mistake as to identity of someone. Remembering that even though the person may be well-known, you can well make a mistake. On the other hand, if you find that D.C. Bogle was not mistaken, that he did in fact see the accused man, the accused man was before that rear door at the time when he said he saw him, inspite of the fact that the time element may have been short when he said he saw him, it is for you to say whether or not you accept the evidence of Mr. Bogle or reject it. Because if you find the time in which he had to observe the face of the person at the door was not sufficient for him to say what it was, it means the prosecution would not have satisfied you of the charge against him, then it would be your duty to acquit him or if you are in doubt it would be your duty to acquit him. (emphasis added)

> "128. If that is the circumstances in which he said he saw him, you also consider the time available to Mr. Bogle to have seen him, from the time he turned to when he ducked was about one and half minutes and he was looking at the accused man's face, his chest, his hand and whole of the accused man he was looking at. And then in cross-examination he said he saw the accused man's face a few seconds, then he told you, you view it whether you find that time sufficient or reliable. If you do not, then you are in duty bound to acquit the man because it means the identification would not have been satisfactorily proven to you by the prosecution." (emphasis added)

The judge went on to give the jury the usual directions that they should endeavour to arrive at a unanimous verdict and sent them back for further consideration. They returned 1 hour 8 minutes later with a verdict of guilty of murder.

Mr. Morrison submitted that what the jury were asking for and ought to have been given were directions how they should approach the area of the identification evidence that was causing the difficulty. This was, he said, a case in which the trial judge had placed the issue of identification as the focal one for their determination and once it emerged that some members of the jury were worried about a critical element, the trial judge ought to have told the jury that there is need for caution in approaching identificttion evidence and to resolve any doubts in favour of the applicant.

The learned trial judge had told the jury that if they did not think that seeing a man's face for a few seconds was either a time sufficient or reliable within which to make a positive identification, they were in duty bound to acquit him because it meant that the identification would not have been satisfactorily proven by the prosecution. In our view there was absolutely no further assistance that he could have rendered to the jury and that he prudently reminded them that all questions of fact were for them.

We warmly commend Mr. Morrison for the lucidity of his arguments. However, the points raised by him did not move us to grant leave to appeal in the instant case.

These last directions were given within a few minutes of the conclusion of the summing up. The jury retired at 1.05 p.m. At 1.47 p.m., they returned without having arrived at a verdict. The following diologue ensued:

"His Lordship: Allright, well, is there any area in which, Mr. Foreman, you need some assistance that I could help you with?

Foreman: Yes, Your Worship. At the time when they say they saw the accused, the witnesses said they saw him, to me ....

His Lordship: No, no.

Foreman: Or to some of us, to some of us, right, I don't think it is time enough to really ....

His Lordship: Just a minute. I want to know whether or not there is any area of the law, not the area of facts, is there any area of the law which you think I could assist you by any further direction, the law.

Foreman: May be, because certain things about the law which we don't ....

His Lordship: From what I have told you so far as to the law involved in the charge and the law as to how you should apply it to the charge, is there any area of the law that you do not really appreciate or you wish any further directions?

Foreman: There is no area about that for me really ....

His Lordship: So, it is a question of the facts that you are considering?

Foreman: Yes, the facts.

His Lordship: Allright, just take a seat a while. Let me tell you this that as far as the facts are concerned that is a matter purely for you. ...."