JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 166/80

BEFORE: THE HON. MR. JUSTICE KERR - PRESIDENT, (AG)
THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE ROSS, J.A.

REGINA V. TREVOR ELLIS

Mr. B. Macaulay, Q.C. and Mrs. M. Macaulay for applicant.

Mr. Dennis Maragh for Crown.

July 15 and 16; December 17, 1982

KERR, P. (AG.):

The applicant was convicted on October 3, 1980, of the murder of Kenneth Bogle and was sentenced to death.

On December 21, 1979, the deceased a newspaper delivery man whose route took him to Mandeville was returning to Kingston having visited and left Christiana at about 8:00 p.m. He had as his travelling companion one Florence Morgan of St. Andrew and he was driving his Toyota van, a right-hand drive pick-up with an open back. According to Miss Morgan, who is the sole eye-witness and on whose evidence the case for the prosecution rested, en route at Porus the deceased was stopped by a "Brown man" who requested a drive for himself and two others who then appeared at the side of the pick-up. Deceased agreed and all three boarded the pick-up and sat in the back. She identified the applicant as one of the two men who joined the "Brown man". The deceased drove on and approaching a district known as Green Bottom "Brown man" asked the deceased to stop to allow him to urinate. The deceased continued driving and after the third request according to Miss Morgan she heard gunshots

coming from the back of the pick-up; the deceased then fell below the steering wheel into her lap, the pick-up got out of control, left the road, ran through some bushes and ended up two chains off the road in a common. The head-lights were still on and the three men who had left the pick-up during its uncontrolled career now appeared on the scene. The "Brown man" and the other man held her while the applicant stood by. They took her further in the common and all three in turn raped her, the appellant being the last. They then left her - she put on the clothes she had taken off at their command and walked to a house in the area and from thence she went to the May Pen Police Station and made a report to Detective Nehemiah Channer who accompanied her back to the scene. According to Channer when he got there he found Bogle dead in the car, his pockets had been rifled, the head-lights of the car were broken but the right park-light was still on. The applicant on January 12, was taken into custody by Constable Alphanso Daley and on the 29th idem after the applicant was identified at the parade held at Chapelton by Inspector Lytton Robinson, the applicant was arrested by Channer for murder.

Dr. Samuel Morgan who performed the postmortem examination said the deceased had three punctured wounds, one in the neck, one on the right shoulder near the base of the neck and one in the back in the region of the seventh vertebra. They were bullet wounds. The path of one bullet penetrated the right auricle and lodged in the left ventricle. In his opinion death was due to haemorrhage and shock and was instantaneous.

The defence challenged the identification evidence and the fairness of the identification parade and in addition [and in support] the evidence of the applicant and his witnesses as to alibi which was set up.

In this challenge, first, there was close cross-examination of Morgan as to her ability to identify the applicant having regard to the lighting available, the opportunity for identification and her physical and mental condition at the time. As this aspect of the case has been a subject of a specific complaint, the evidence of identification will be reviewed in due course.

Secondly, it was suggested (but categorically denied) that when the police attended at his home on the early hours of the 12th January to detain him, one Kelso Small took away from a photo album certain photographs including a picture of the applicant. Although the applicant and his mother gave evidence as to the removal of the picture, yet it was never put to any of the crown witnesses concerned with the identification parade or the investigations that any photograph of the applicant was shown to them and thus this line of defence petered out.

Thirdly, it was suggested that Detective Channer had contrived for the witness Morgan to have seen the applicant prior to the date of the identification parade. This was categorically denied by both witnesses. The occasion put to the witness differed materially from that given by the applicant in evidence. However, no complaint was ever made up to, nor at the identification parade where an attorney, a Mr. Bishop attended and watched on behalf of the applicant.

Fourthly, it was suggested that the parade consisted of men different in height and colour from the applicant. The identification parade form which is in the nature of a memorandum recorded the heights of the men on parade; - the two tallest as being six feet one inch and the shortest being five feet ten inches and the applicant being six feet.

The appellant was a "Locksman" with flowing hair. According to Inspector Robinson, all members of the parade wore tams provided by appellant's attorney Bishop. The men were as

similar in appearance as circumstances permitted and that neither Bishop nor the applicant made any complaints about the parade and the applicant signed the form thereby signifying his approval. Surprisingly for the first time at the trial Eunice Ellis gave evidence that she had provided nine tams all black but that Bishop the attorney had used only three of hers and the other six of various colours were provided by Channer although there was no cross-examination of the inspector on this aspect of his evidence.

In his evidence on oath, the applicant said that on the day in question from midday he went to the Marley Gardens football ground and played in a match against a team from Spanish Town. The match began at 2:00 p.m., and he left the field and arrived home at Marley Gardens, St. Catherine at about 7:00 p.m. He was accompanied home by three of his team-mates including Vincent Laidlaw and they remained, with him until about 8:00 p.m. His mother who came in from work did baking that night. He retired to bed about 10:00 p.m. was awakened by his mother at midnight to have some cake, after which he returned to bed and slept until morning. Although it was possible for him to leave during the night without anyone knowing, he never left that night. In his room, slept a small brother on the same bed, and a sister in another bed. He knew nothing about the incident at Green Bottom.

In support of the period at the ball game, he called as his witness Vincent Laidlaw and for the period at home, his mother Eunice Ellis. Applicant's home is about ¼ mile from the playing field. All witnesses were extensively cross-examined by counsel for the prosecution.

The first ground of appeal argued was:

> "2. The learned Trial Judge having given a correct direction as to proof and dis-proof relating to the defence of alibi.

"(a) failed to summarise to the jury the evidence of the accused and his witnesses in respect of his "defence", of alibi and therefore failed to give any assistance to the jury on the issue of alibi, as it arose on the evidence;

(b) totally omitted to direct the jury that they were entitled to consider the whole of the evidence of Alibi and to reject or accept any part of that evidence (the accused and his witnesses) and if any part of the whole of that evidence (the accused and his witnesses) left them in doubt, the crown would not have disproved the alibi and the accused would be entitled to an acquittal."

In elaboration Mr. Macaulay submitted that the evidence of alibi extended well beyond the material time which was between 10:00 p.m. to midnight of the 21st and covered two phases. The trial judge failed to tell the jury that a man who had played football from 2 - 7 p.m. would be unlikely to have a prior arrangement to go out before 10:00 p.m. Further the judge should have asked the jury to consider whether there was any prior knowledge on the part of the applicant on that particular date that Kenneth Bogle was travelling that night. Further and in any event the trial judge failed to review in detail the evidence relating to the alibi and therefore the jury were denied the assistance to which they were entitled.

Finally, in deciding on the credibility of the witnesses as to the material time, a jury would be entitled to consider the credibility of the applicant's evidence as a whole and if they accept it as a whole or even as to a part, it may well be a factor in deciding as to whether the material part could be believed or raised a reasonable doubt.

Having regard to the nature and conduct of the defence, in our view it was neither prudent nor desirable that the trial judge should ask the jury to consider the evidence of the alibi in fragments. If the defence in an endeavour to show continuity of conduct tendered evidence covering a period much wider than the issue demanded then it is to be expected

that the jury would have had to consider the whole of the evidence in their endeavours to assess the credibility of the essential evidence.

With respect to the criticism of the summing-up of the learned trial judge this court is mindful of the sage observation in Walters v. The Queen (1969) 2 W.L.R. page 60 at page 64:

> "There Lordships would deprecate any attempt to lay down some precise formula or to draw fine distinctions between one set of words and another. It is the effect of the summing-up as a whole that matters."

In his directions to the jury on this aspect of the case the learned trial judge said:

> "Before we analyse the evidence, it is important that we consider the defence, because of the simple obvious reason. If you believe the accused person either by himself or together with his supporting witnesses, then, of course, it is an end of the matter. He says he was not there."

and later:

> "The accused gave evidence. He was not bound to do so. When he gives evidence, subjects himself to cross-examination and call witnesses he is entitled to be considered as any other witness in so far as you are hearkening to what he says.
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> He must be given the same fair, impartial consideration and his evidence must be treated the same way. You are not entitled then to say well, being an accused person, it can be expected that when he goes to the witness stand he is bound to be telling lies, because every accused person will lie to get out of a difficult spot. That is wrong, that would preclude accused persons of giving evidence. He gives evidence because he is saying he wants you to hear his side of it and he is entitled to be considered."

and further:

> "If you are a little short of believing him in the sense that you can't make up your minds whether you are to believe him or not then acquit him. Thirdly, if having heard what he said and having considered his evidence in relation to the evidence adduced by him through his mother and Mr. Laidlaw, if having considered all of those you have no doubt in your minds, I would put it to you if you are satisfied and feel sure that what he is saying is absolutely untrue, then your duty is to reject,

> "but when you reject it, remember now - and I repeat - you cannot say because he told untruth he gave evidence which appears incredible that he therefore is guilty. You cannot do so, because remeber he wasn't bound to say anthing, and if he didn't say anything he had just remained where he was, silent, you couldn't find him guilty unless you were satisfied to the point where you feel sure on the basis of the evidence adduced by the crown. Therefore you will ask yourselves why should he be in a worse position because he goes to give evidence, only for you to say I don't believe him and therefore he is guilty?
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> I am trying to explain to you why when you reject his evidence, if you are satisfied to the point where you feel sure that what he is saying is untrue, you will then have to consider the crown's evidence and you will approach it this way by saying, well, I am in the position where the accused has not said anything as to what has happened, so therefore let me look at the crown's case. If he didn't say anything he is not bound to say anything, so therefore you come back to the crown's case."

These directions in so far as they suggest that a positive finding that the evidence for the defence is untrue must be equated to the position as if the appellant had said nothing were unduly favourable to the appellant. In general, the jury could be in no doubt that essential to a finding of guilty was a rejection of the alibi and an acceptance of the crown's case to the extent that they felt sure and, further, if having duly considered the issues they are left in doubt, they should acquit.

In this regard the complaint against the summing-up is ill-founded.

It was conceded by counsel for the crown that the learned trial judge's review of the evidence was not as detailed as that of the prosecution but he submitted that in the instant case the very nature of the alibi must of necessity involve the issue of identification and although there was no detailed review of the evidence the learned trial judge nevertheless put the defence of alibi to the jury in a comprehensive but adequate manner in the following passage:

> "Now, I do not want to go into detail or elaborate as to the evidence of the defence. You have heard submissions, I would say addresses by learned attorney for the defence and by the crown, each exhorting you to consider the evidence in the way presented by them. It is their right. Neither has done anything wrong. You have heard what learned attorney says as to what amounts to discrepancy between the evidence of Ellis and his mother. In considering all these, which you must to determine whether you believe his evidence, you will accept it or you will give him the benefit of the doubt that what he is saying could likely be so. You will bear in mind that like any other witness or witnesses, recollection is really what is called evidence. Recollection of events and in considering how the evidence is recollected or remembered, you will consider the lapse of time from the incident. You will consider also just as it appears to you, the level of education of the person and on those basis you ask yourselves, if there are discrepancies in the evidence between two witnesses, are they really serious discrepancies or are there such discrepancies as you would ordinarily expect to arise where two persons come and tell you of an event. Will they correspond as far as details, every detail? If they were, you would be entitled to find or feel that well, there is something wrong, it could be a fabrication. Equally, if it is something that two persons seeing or experiencing could not ordinarily be expected to forget or to diverge so much, then, of course, you consider that as to whether you can believe one or the other.
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> I am merely indicating these are the factors you consider, but when you have done all those, if you believe the accused or short of believing him in your minds is the feeling that what he is saying could be true that he was at home from about 2 o'clock on the day of the 21st and throughout the night and up to the 22nd, then of course it is not a request from me, it would be a direction that you would be bound to acquit."

We are of the view that although the learned trial judge gave but a concise summary of the evidence in support of the alibi he did advert their attention to the substance of that evidence.

Accordingly, in the light of his careful treatment of the issues and his directions to the jury as to their approach to the evidence of alibi notwithstanding his omission to review in detail that evidence, the issue was nevertheless left for their determination in a clear and easily comprehensible manner. It could not therefore be said that the applicant was denied a

proper consideration of this aspect of the defence.

The third area of complaint was that the verdict is unreasonable having regard to the evidence of identification as given by the witness, Florence Morgan. Further, that in any event "whilst the judge directed the jury as to some of the circumstances which must be taken into account in determining the quality of the evidence he failed to give the cardinal warning that is to say, to alert the jury to approach the evidence of identification with utmost caution as there was a possibility that a single witness was mistaken."

The records reveal that the learned trial judge in a full and careful review of the evidence of identification reminded the jury of the relevant circumstances that would affect the witness' ability to be able to identify the appellant subsequent to the event.

In his summing-up he told the jury:

> "As I have said, since identification is the real issue, the live issue in the case, what you will have to consider is not merely whether to accept her word that she saw three men, you have to consider did she have reasonable opportunity of observing the men, in particular the features of the accused at Porus."

As advocated in R. v. Oliver Whylie, 15 J.L.R. page 163, he then proceeded to identify areas of the evidence bearing on this aspect of the case. These include:

(i) That it was nowhere suggested that she knew him before.

(ii) That it was the "Brown man" who solicited the drive, and it was after the deceased agreed that she saw the appellant and the other man.

(iii) That the van stopped near a bar and that there was a light in the bar which shone on the road.

(iv) That it was about two minutes after the request that the men boarded the pick-up.

(v) That they had travelled for about half-an-hour before the pick-up ran off the road and that during that time from time to time

> she would look back at the men through the glass partition whenever she passed street lights and that she did so about six times.
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> (vi) That although she remembered that "Brown man" was sitting behind the deceased she could not recall exactly where the applicant sat.
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> (vii) That when the van crashed the head-lights were on but that when Channer arrived at 5:00 a.m. only the right park-light was on.
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> (viii) The night was not a moon-light night, and
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> (ix) That during sexual intercourse she was face to face with her assailants.

He then addressed them thus:

> "So, you have to then say, and by way of just bringing them together, between the events at Porus, the event en route from Porus to Green Bottom, the event just when the men were jumping off the van with the head-lights of the van on, and the event in the bush, did she individually or collectively have sufficient opportunity of observing the men and in particular the accused? As I said, bearing in mind the question of lighting, the question of positioning of the persons and the time which elapsed, that is how you have to consider it, because as learned attorney for the defence has rightly said, even there you know somebody, it is a common experience that we make mistake. We see a person and we say, 'hello, Mr. Jones', and when we come near we find it is not Mr. Jones. I am sure it has happened to all of you. Therefore, what they are saying now is further where the person is not one who was known before, was there adequate opportunity?"

Accordingly, in the light of these directions, the complaint concerning the inadequacy of the summing-up is clearly unjustified. In our view there was sufficient evidence to leave the identification of the applicant as an issue for the determination of the jury and the tenor of the summing-up clearly sounded a note on the necessity for scrupulous and anxious care on the part of the jury in the consideration of this evidence and the learned trial judge adverted their attention to the risk of mistaken identification and to the circumstances

which they should take into account in evaluating the evidence of the sole eye-witness.

In view of the complaints concerning the summing-up the hearing of the application has been treated as the hearing of the appeal. For the reasons contained herein the appeal is dismissed, and the conviction and sentence affirmed.