JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 104 of 1972

BEFORE: The Hon. Mr. Justice Fox J.A. - Presiding.
The Hon. Mr. Justice Edun J.A.
The Hon. Mr. Justice Grannum J.A.(ag.).

R. v. VICTOR WILLIAMS

Mrs. M.E. Forte for the applicant.

Mr. K. Atterbury for the Crown.

2nd, 3rd, 25th May, 1973

EDUN J.A.:

On June 8, 1972 the applicant was convicted of the murder of Sydney Thwaites and was ordered to be detained during Her Majesty's pleasure. He has applied for leave to appeal against that conviction.

The case for the prosecution was that on December 26, 1970 the applicant was seen by Curtis Ricketts at about 11.30 a.m., firing two shots at the deceased, jumping on a bicycle and speeding away from the scene of the crime. The deceased was rushed to the Kingston Public Hospital where an emergency operation was performed. He was suffering from a punctured wound on the left side of the abdomen and it involved a laceration of the left colon. After the operation the deceased was transferred to the University Hospital where there were better facilities for post-operative intensive care. Sydney Thwaites died on December 31. Dr. Persaud who performed the post-mortem examination found a bullet on the left iliac bone. In his opinion death was due to the bullet wound complicated by severe peritonitis, bilateral pneumonia and scepticaemia the causes of which he associated with the bullet.

The applicant, in his defence, said in an unsworn statement that on December 26, he was at a bar in Beeston Street from 7 a.m. He helped Laddie Williams and his girl-friend, Catherine Anderson who operated that bar, to open it. He remained in the bar until the police came. He was taken to the police station and later charged with the murder of Sydney Thwaites. Both Laddie Williams and Catherine Anderson gave evidence which

supported his presence at the bar that morning.

One of the main points advanced by learned attorney for the applicant in this appeal was the admission of evidence of identity which it was submitted was highly prejudicial. The admission of the evidence complained of came about in this way. At the trial, learned attorney for the applicant objected that a deposition made by Sydney Thwaites was inadmissible as an exhibit because there was not full opportunity of cross-examination of the deponent. Constable George Bennett was being examined as to the circumstances in which the deposition was taken before the presiding Resident Magistrate at the court held at the hospital. But before the jury was sent out, and the ruling made upon admissibility of the deposition, the jury heard the following bits of evidence -

"Q. Now, what happened at the hospital?

A. Mr. Thwaites was sworn. The accused was among .... standing among many other persons in civilian clothes.

Q. .....

A. .....

Q. He was sworn, and what happened after that?

A. Mr. Thwaites began his deposition. He pointed to the accused ...

Q. Can you say what happened when he gave his deposition?

A. It was taken down in writing by the Resident Magistrate.

Mrs. Forte. Your Lordship appreciates ...

His Lordship. Mrs. Forte, let me make one thing clear. You specifically asked Mr. Munroe not to lead the witness, and in fairness to you he was not attempting to lead the witness, he was asking him to describe the incidents that took place there. It is unfortunate that it has happened. I look upon this evidence that this witness is giving as purely of a formal nature. I am not convinced in my mind of your interpretation of it. I look upon it as purely introductory evidence in tendering of the exhibit, and then you may object when that time comes; if you wish to renew your arguments, then that is the time to consider it."

The jury were sent out very soon after that incident and then a trial within a trial took place. The learned trial judge eventually ruled that in the taking of the deposition there was full opportunity for cross-examination and the deposition was an admissible document at the trial. However, in the interest of securing a fair trial of the applicant, because of certain unsavoury features which occurred in the taking of the depositions, he

exercised his discretion to exclude the deposition; the prejudicial effect in his view outweighed the probative value despite any warnings he may give to the jury.

In our view, the trial judge was the sole arbiter on that ground to decide what constituted a fair hearing. In this case, the sole question was one of identification and if at the trial the deposition was excluded no reasonable jury could have failed from concluding that the manoeuvre of Thwaites pointing to the applicant had no other purpose but to designate his assailant. The tendering of the deposition had no other purpose but for Sydney Thwaites to identify his assailant and here the evidence was "shut out". But where the manoeuvre or gesture of Sydney Thwaites pointing to the applicant conveyed no other meaning but an identification of the applicant as his assailant the evidence was heard and must have been understood by the jury. If this state of affairs is allowed then we see no purpose in the rule that a trial judge has a judicial discretion to exclude legally admissible evidence where the prejudicial effect of which would, in his opinion, exceed the probative value. When the learned trial judge ruled the withdrawing of the deposition as an exhibit, learned attorney for the applicant did not ask for a discharge of the jury. The case proceeded and no further reference to the deponent's accusation of the applicant was made by attorneys on either side or by the presiding judge.

In R. v. Wright (1934) 25 Cr. A.R. p.35, a witness for the Crown, in the course of being examined-in-chief with regard to his identification of the prisoner, made an isolated statement to the effect that he had seen a photograph of him in the "rogues gallery" at Scotland Yard. No further reference to this statement was made by counsel on either side or by the presiding judge. Held, although such a statement would inevitably convey to the jury the suggestion that the prisoner had been previously convicted or was of bad character, in the circumstances of the case the proviso to section 4 of the Criminal Appeal Act 1907, should be applied and the conviction affirmed.

In the instant case, though the learned trial judge was of the view that the gesture of the deponent Thwaites pointing to the applicant was purely introductory evidence in the tendering of the exhibit yet he said it was unfortunate that it happened and we are of the view that no reasonable jury

would fail to draw the inevitable inference that the deceased had the opportunity of identifying and did so point out his assailant before his death. The question, therefore, arises that upon the rest of the evidence to which no objection was taken, could a reasonable jury, properly directed have failed to convict.

Learned attorney for the applicant submitted further that the only other evidence which tended to identify the applicant was that of Curtis Ricketts and Detective Inspector of Police, Horace Forbes. With respect to Curtis Ricketts she urged that -

1 when he said he saw the applicant for a few fleeting moments, he admitted he was frightened;
2 when he identified the applicant at an identification parade, he was hesitant;
3 he described the applicant as having a scar on the right side of his face whereas there was only a mark over the applicant's right eye and which could not be discernible at the distance the applicant said he was from him on the day of the incident;
4 Ricketts' evidence could not be reconciled with that of Dr. Persaud who said that Thwaites' assailant could not be standing in front of and to the right of him because of the position in which he found the bullet;
5 one Norman Lewis was taken to the identification parade where the applicant was included but he failed to identify the applicant and in fact he pointed out someone else.

With respect to Detective Inspector Forbes who claimed that within two hours of receiving the report of the shooting of Sydney Thwaites he saw the applicant with another man, the applicant handed something over to the other man and they both ran. Forbes claimed he gave chase and then caught the applicant as he was going through the door of a bar at the corner of Beeston Street and Matthews Lane. On the other hand, there was evidence from the defence that the applicant was held in Laddie Williams's bar which was not at the corner of Matthews Lane and Beeston Street. And further, she argued, two witnesses for the defence claimed that the applicant was in Laddie Williams's bar, the whole of that morning.

Learned attorney for the Crown submitted that the weight of the evidence was a matter for the jury and this court can only interfere where the verdict was so against the weight of evidence as to be unreasonable or unsupportable. At the trial, the learned trial judge dealt exhaustively

and fairly with every argument for and against the prosecution and for and against the defence. In our view, there can be no successful complaint on any aspect of the summing-up. The learned trial judge had been extremely favourable to the defence when he iterated that on the question of identity the case rested entirely on the evidence of the witness Curtis Ricketts. "The jury are pre-eminently judges of the facts to be deduced from evidence properly presented to them, and it was not intended by the Criminal Appeal Act nor is it within the functions of a court composed as the Court of Appeal is that such cases should practically be retried before the court - This would lead to a substitution of the opinion of a court of three judges for the verdict of the jury:" Ross on the Court of Criminal Appeal p.89. The jury was justified in relying upon the evidence of Curtis Ricketts.

With respect to the inadvertent admission of prejudicial evidence, its reception may well not call for the discharge of the jury. The failure of attorney to object at the time when it was her duty to do so may have a bearing on the question whether the applicant was really prejudiced. Learned attorneys for both Crown and the applicant may well have considered it best in the interest of a fair hearing to make no reference to such evidence in their addresses. So far as the judge was concerned it was a matter for him to decide what course he would adopt having regard to all the circumstances of the case. "Here again this is completely a question of discretion and one knows from experience the difficulties which persist for judges who deal with such situations. Whatever he does is submitted to be wrong. If he mentions the matter again he is accused of error in referring to it again; if he has not mentioned it again, he is accused of not directing the jury properly." Sachs L.J., in R. v. Weaver (1967) 2 W.L.R. p.1244 at p.1248.

"Where it is established that evidence has been wrongly admitted, the court will quash the conviction unless it holds that the evidence so admitted cannot reasonably be said to have affected the minds of the jury in arriving at their verdict, and they would have or must inevitably have arrived at the same verdict if the evidence had not been admitted:" Archbold's 36th Ed. para. 928. We have examined the facts in the light of all the arguments advanced by learned attorney for the applicant and conclude that there is no justification for holding that the verdict was arrived at

on the consideration by the jury of matters to which they ought not to have had regard. In other words the evidence so wrongfully admitted cannot reasonably be said to have affected the minds of the jury in arriving at their verdict. We hold also that there are no merits in any other points submitted by learned attorney for the defence.

For the reasons given, we treat the application for leave to appeal as an appeal and the hearing of the application as the hearing of the appeal. We apply the proviso to section 13 (1) of the Judicature (Appellate Jurisdiction) Law, 1962 because we consider no miscarriage of justice has actually occurred. The appeal is therefore dismissed, conviction and sentence affirmed.