

JAMAICA

J. Book

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 87, 155, 156, 157/76

BEFORE: The Hon. Mr. Justice Zacca, J.A. (Presiding).
The Hon. Mr. Justice Henry, J.A.
The Hon. Mr. Justice Robotham, J.A. (ag.).

R. v. William March
Michael Lawrence
Anthony Grant
Anthony Bailey

Dennis Daley and Feisal Mohammed for applicant March.
E.R. Delisser and D. Harrison for applicant Lawrence.
A.G. Gilman for applicant Grant.
Mrs. Marva McIntosh for applicant Bailey.
Glen Andrade for the Crown.

April 27, 28, 29; May 13, 1977

ZACCA, J.A.:

On May 13, 1977 we dismissed these applications for leave to appeal. We promised to put our reasons in writing. This we now do.

The four applicants were convicted in the Home Circuit Court on May 12, 1976 for the murder of Roderick Arthur Lewis on March 13, 1975.

The case for the Crown rested solely on the evidence of the only eye-witness Albert Johnson. He described himself as a hustler at the Coronation Market where he transported the loads of persons coming to the market from the Country. On March 13, 1975, Johnson was outside the Coronation Market at about 10 a.m. He was by the Darling Street gate of the market, where goods were being unloaded from a Country bus. He saw four men come up, one of whom took up a bag. He called to that person to put it back and it was put back. The men then moved along the Spanish Town Road towards the Coronation Market. He also moved likewise as he had a load by the market and having seen the man take up the bag, he went to watch the goods. He leaned on an electric pole watching the men walking on the sidewalk. The four men went up to a sky juice man who had a cart in the road by the sidewalk in front of one of the market gates. One of the men took a bottle of syrup from the cart and dropped it on the ground breaking it. Another of the men pulled a big knife from his waist and stabbed after the sky juice man who jumped back. The other three men chucked the sky juice man into the knife and one of them said "Stab him

again Star." The man with the knife then stabbed the sky juice man. The sky juice man then went across the street and fell on the other side of the street by a bus stop directly across from the market gate. Johnson stated that there was nothing in front of him to block his view when the stabbing was taking place.

There were two other light poles between himself and where the stabbing took place and there was a stop light by the furthest of these two light poles. There was also a market gate by this light pole and the stabbing took place in front of this market gate. He said that there were about four or five persons on the sidewalk between himself and the market gate. When the sky juice man was stabbed he was backing away from the market side of the road going across the road to the other side. The witness indicated that the deceased received the stab wound in the left side of his chest and this is where the Doctor stated that he saw a wound.

Albert Johnson also stated that when the deceased was stabbed the man who stabbed him pulled out the knife and a piece of it broke off and flew up into the air and the men ran past him down Darling Street. Whilst the men were running he saw the man who had pulled out the knife wiping the knife with a piece of newspaper. The witness said that he knew the four men prior to that day. He had seen them by the market all the while, night and day and he knew them by name. When the police arrived he assisted the police in placing the deceased's body in the car. This was confirmed by the police. At the trial he identified the applicant March as the man who had the knife and the other three applicants as the three men who chucked the deceased into the knife. He pointed out the applicants Grant and Bailey to the police. However the next time he was seeing the applicants March and Lawrence was at the Preliminary Enquiry in Court. He had given the names of the men to the police.

This then was the evidence of Albert Johnson as he gave his evidence in chief. However in view of submissions made on behalf of the applicants it will be necessary to examine his evidence under cross examination in some detail in so far as it affects his credibility as a witness of truth. It may be more convenient to deal with this when we come to consider the grounds of appeal which were argued on behalf of

the applicants.

Another witness for the Crown, Dr. John Martin stated that he performed a Post Mortem Examination on the body of the deceased Roderick Arthur Lewis. He saw a stab wound, five inches deep. The wound entered the pericardium and incised the aorta. It was his opinion that the deceased died from shock and haemorrhage due to a stab wound of the aorta.

Detective Corporal Popeton Watkins testified that he went to the scene of the stabbing where he saw the deceased lying on his back with a stab wound to the left side of his chest. Beside the deceased, on the ground to the left side of the deceased he found a knife broken in two pieces. He described this knife as being about 7" in length. This knife was not tendered in evidence nor was any evidence given as to the findings of the Government Analyst although the knife was sent to him for examination. It appears that the Crown was nevertheless offering the jury this evidence of the finding of the knife for their consideration that this was the knife which inflicted the injury to the deceased. Det. Watkins also stated that he knew the applicant March by the name "Big Boy"; the applicant Lawrence by the name "T.V." and the applicant Bailey by the name "I.I."

Several grounds of appeal were argued on behalf of the four applicants, one of which was common to all four applicants. This ground of appeal was "The Verdict is Unreasonable and cannot be supported having regard to the evidence". Under this head the Attorneys for the applicants drew attention to numerous aspects of the evidence of Albert Johnson which they submitted were contradictory, inconsistent and therefore unsatisfactory:

- (1) The way in which the applicant March was dressed at the time of the alleged stabbing.

The witness Albert Johnson at first stated that the applicant March had on a shirt. He then admitted that at the Preliminary Enquiry he had stated that the applicant March did not have on a shirt and the evidence which he had given at the Preliminary Enquiry was the truth. When he said that the applicant had on a shirt, he meant that he saw him wearing a shirt at the police station. However he later admitted that he had not gone to the station, nor had he seen

the applicant at the station.

(2) Where the incident took place

Attempts were made by the witness Albert Johnson in giving his evidence to bring the incident more closely to where he was standing to enable him to say that he was able to see the incident clearly.

(3) The number of persons between the witness and the incident

The witness stated that when the incident took place there were about four or five persons between himself and where the incident took place. He later admitted that at the Preliminary Enquiry he had stated that there were 'many' persons between himself and the incident and that this was the truth.

(4) Applicant March running away with a piece of the knife

Albert Johnson stated that after the stabbing he saw the knife break and a piece flew in the air.

The applicant March ran past him and he saw him wiping a piece of the knife with a newspaper.

The evidence of Det. Watkins was to the effect that he found a knife broken in two pieces by the body of the deceased. It was left for the jury's consideration as to whether the two pieces of knife found by the deceased's body was the knife which was used to inflict the injury. It appears that the jury were satisfied that the two pieces of knife was in fact the knife which was used to inflict the injury. This is borne out by an answer which the jury gave to the Learned Chief Justice on his enquiring whether he could further assist them. At page 217 of the transcript the following question and answer appear:

His Lordship: Now, without indicating any member of the Jury or anything like that, will you tell me what assistance you think I can give?

A.: Well, we would like to know why the fingerprint wasn't taken on the knife to see whether the accused actually did it.

If therefore the knife consisted only of the two pieces found by the body then the evidence of the witness that he saw the applicant with a piece of the knife would be contradictory and therefore would affect the credibility of the witness. Would this finding of the knife by the body of the deceased also indicate that the deceased was stabbed at the spot where the body was found and not in the middle of the road as was suggested

by the eye-witness? It was submitted that this would again discredit the witness Albert Johnson. There was no evidence that any of the applicants followed the deceased across the road to where he finally fell.

(5) Albert Johnson's previous knowledge of the applicants

The witness contradicted himself by at first saying that he knew some of the applicants by a "nick name" but later admitted that he did not know any of the applicants by name or nick name prior to the stabbing. Whilst stating that he had seen the applicants by the market on occasions prior to the stabbing and knew them by their faces, he failed to give any description of any of the men to the police, nor did he give any names or nick names to them.

It is therefore submitted that the evidence of the witness as to his knowing the applicants prior to the stabbing was so unreliable that it was unreasonable for the jury to find that he knew them prior to the stabbing and therefore the jury ought to have rejected his evidence as to identity.

(6) Albert Johnson's account of the breaking of the bottle of syrup

The witness first stated that it was applicant Bailey who had broken the bottle of syrup. He afterwards stated that it was the applicant Lawrence who had broken the bottle of syrup. The deposition of the witness taken at the Preliminary Enquiry was tendered in evidence. It disclosed that at the Preliminary Enquiry he had stated that he did not know which one of the applicants had broken the bottle.

Admittedly there were contradictions and inconsistencies in the evidence of Albert Johnson but this Court will only interfere with the verdict of the jury, where any questions of facts are involved, if the verdict is shown to be obviously and palpably wrong. R. v. Joseph Lao S.C.C.A. 50/73, November 16, 1973, R. v. Hancock, 1913-8 C.A.R. 193, R. v. Michael Bernard S.C.C.A. 26/73, November 2, 1973.

Where however the sole witness for the prosecution has been so completely discredited by reason of admitted untruths and blatant and unexplained contradictions and inconsistencies as to render his evidence so manifestly unreliable that no reasonable tribunal could safely act on it, a trial judge will be well justified in not leaving the case to the jury. See R. v. Curtis Irving, 13 J.L.R. 139.

These were all matters which were put before the jury, I have no doubt, with force by the learned attorneys who appeared for the defence and equally favourably to the applicants by the learned Chief Justice in his summing-up. No complaint has been made of the summing-up as it relates to these contradictions and inconsistencies. Indeed the learned Chief Justice dealt with these matters in his usual accurate, full and fair manner. The jury having heard the evidence of Albert Johnson and the summing-up of the learned Chief Justice came to the conclusion that they believed the witness and if they believed him they were entitled to convict all the applicants and they did convict. This Court cannot say that the verdicts to which they came were unreasonable and could not be supported by the evidence.

Another ground of appeal argued on behalf of the applicants March and Lawrence was to the effect that the applicants were identified by the witness Albert Johnson for the first time subsequent to the incident at a time when they were in the dock at the Preliminary Enquiry. It was submitted that where a witness states that he knew the applicant by face prior to the incident, but does not give any names or descriptions to the police of the persons who are alleged to have committed the killing, and subsequently the police arrest the applicants in connection with the killing, they ought to hold an Identification Parade with respect to these applicants. It was further submitted that in the absence of the holding of such an Identification Parade and the witness subsequently identifying the applicants in the dock at the Preliminary Enquiry, this would be tantamount to a Dock Identification. In such a situation the learned Chief Justice ought to have directed the jury that the identification of the applicants in the dock at the Preliminary Enquiry and the Trial were Dock Identifications and of no value. In the absence of any other evidence the case against the applicants March and Lawrence should have been taken away from the jury.

It is to be observed that no such application or submission was made to the learned Chief Justice at the trial.

It is true that the witness Albert Johnson stated that he did not give the names or descriptions of the alleged killers to the police. However he stated that he knew them by their faces and had seen them prior to the

incident around the market. The next time he was seeing the applicants after the incident was in the dock at the Preliminary Enquiry and at the Trial when he identified them.

It is necessary to see how the learned Chief Justice dealt with this matter in his summing-up to the jury. At pages 175-176 of the transcript he told the jury:

"Now let me tell you something else, members of the Jury, this one witness has been brought; now, you may not convict any of these accused unless you believe him that he knew each of them before. The reason for that is this, it is clear from what he said that it is not because of any names that he called to the police why these men were arrested; so he said. He said he didn't call any names to the police, so he said. So if the police go and pick up some people now, and bring them to Court and put a witness in the witness box for the first time to point them out, then that is a very unsatisfactory state of affairs because people will be inclined to say, well, now, if they didn't do it, the police wouldn't arrest them, so, therefore, because the police arrest them and they are in the dock I will have to say is them for it must be them. Well, we don't regard that as being satisfactory and so, if you are not satisfied that the witness knew those four accused and knew them well before, even though perhaps he didn't know their names, if he didn't know them at all, and you have the situation where he is confronted with them in Court for the first time to identify them, then that's quite unsatisfactory. It is not safe to rely on a witness' evidence in those circumstances and you would have to acquit the accused."

At page 193 he said:

"Well if you think that is so, if you think that the accused were taken in custody not by that Constable and that the Constable has come to perjure himself and if you think that the whole thing is a conspiracy then, of course, you can't convict a person on that, but, as I said the accused were taken in custody on information apparently, other than Mr. Johnson's evidence so unless you feel sure that he knew them before and he knew them well you would be obliged to acquit them all because it wouldn't be satisfactory to have come and identified them just in the witness box.

Well, he said that he knew all four of them, four. He said he knew them. He said "They inside the market there day and night". This is how he said he knows them. He sees

them there inside the market day and night and, apparently, from what he says, he usually sees them in a group."

Again at page 213 the learned Chief Justice told the jury:

"If, however, taking all those matters into account you feel sure not only that the deceased was murdered but that Mr. Johnson witnessed it and if you feel sure that he has positively identified each of these accused as the person who did it based on his recollection of what he saw at the time and not because he went into court and saw the accused in the dock, if you feel sure about that then, of course, it is open to you to convict each of the accused whom you are considering for this charge of murder."

We are satisfied that the directions of the learned Chief Justice which he gave the jury in this matter were adequate and correct. To hold that an identification in Court under these circumstances where the witness stated that he knew the applicants before the incident, is tantamount to a Dock Identification, would be a new concept of the rules relating to Dock Identification.

It was for the jury to say whether on the evidence before them they were satisfied that the witness knew the applicants prior to the incident and whether his identification of them in Court was based on his having seen them prior to as well as at the time of the incident.

We cannot therefore hold that the identification of the applicants in Court amounted to a dock identification. The learned Chief Justice, therefore, quite properly left the matter of identification of the applicants March and Lawrence for the due consideration of the Jury.

It may be that the holding of an Identification Parade by the police with respect to the applicants March and Lawrence in the circumstances of this case may have contributed to proper police investigations but in our view the non-holding of such a parade, in the circumstances of this case does not make the identification in Court a Dock Identification.

A further ground of appeal argued on behalf of the applicants March and Lawrence was to the effect that the witness Albert Johnson gave evidence which was prejudicial to the applicants and that the learned Chief Justice ought to have discharged the jury or at the very least warned them as to the possible effect of such evidence.

At page 68 of the transcript the following questions and answers appear:

Q: You say yes, a few weeks - it is a few weeks you had been seeing him. Is that your answer?

His Lordship: About how long?

A: I see him a good time. From him come on there I see him.

His Lordship: Yes, about how long is that?

A: I never keep the time, you know, your honour, please, because I is a man like this: I just ... from I hustle my food I just go back ah mi yard. I dont stay on the street bounce with them because meanwhile I there hustling them will come on there and them will take weh anything and I will hear man call them name. Further I dont know them, sir.

At page 80 of the transcript the following questions and answers appear:

Mr. Delisser: Are you uncomfortable? Is anything wrong? Are you quite comfortable?

A: Anytime me leave today me nah come back.

His Lordship: But we are going to have you tomorrow. Other people must ask you questions. Is that the one you call 'T.V.'?

A: Yes Sir.

His Lordship: You call him so?

A: Yes, Sir. Sometimes I call him 'Mawgaman,' sir. Sometimes he tek weh the people things, he run down the lane and I call him 'Mawgaman'.

Again at page 85 of the transcript the following question and answer appear:

Q: Now, well how come you are telling us today that you knew these names before the incident?

A: After the friend them come threaten me many times at my home - see where them bus up mi head here (indicating)

It was submitted on behalf of the applicants that the statements of the witness suggested that the applicants were persons who had committed larceny and also associated with persons of bad character.

It is to be observed that no application was made to the learned trial judge for the jury to be discharged nor did the trial judge give any warning or make any reference to these statements.

Whilst the trial judge has a discretion to discharge a jury or to give a warning even in the absence of any application being made on behalf of the applicants, it may be that the judge decided that the best course to adopt was not to refer to the statements. It was not likely that the jury would think that the applicants could be guilty of murder because it was being suggested that the applicants were persons who had committed larceny or associated with persons of bad character. There was no evidence that any of the applicants had been charged or convicted for any other offence. We are of the view that the learned trial judge exercised his discretion correctly in not referring to the evidence as such a reference may only have tended to increase the risk of prejudice by drawing attention to it and it was best to ignore it. We do not believe that the evidence, such as it was, could have had any prejudicial effect on the minds of the Jury who were asked to give their verdict on a charge of Murder.

By reason of the above we hold that the grounds of appeal all failed and for these reasons we refused the applications for leave to appeal with respect to all four applicants.