

C.A. Criminal Law - Murder - Conviction for non-capital murder - I don't know whether fleeting glance case - whether judge should have withdrawn case from jury - Summing up - whether judge failed to point out specific weaknesses in terms of identification evidence - whether identification must be made by Appeal (DEPOSED) JAMAICA [Cases referred to p 11 (end)]

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 18/93

BEFORE: THE HON. MR. JUSTICE RATTRAY, PRESIDENT
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE FORTE, J.A.

R. V. GODFREY RODNEY

Lord Gifford, Q.C. for Applicant

Hugh Wildman for the Crown

July 25, 26 and December 20, 1994

RATTRAY P.:

On the 10th February 1993, the applicant Godfrey Rodney was convicted of the offence of Non-Capital Murder in the Home Circuit Court and sentenced to Life Imprisonment with an order being made that he should not be eligible for parole until he had served fifteen years of the sentence.

The evidence produced by the prosecution was that on the 2nd of June 1992, the deceased Leopold Williams operated a bar on premises 2 Burke Road, Kingston. Assisting him in the bar was his commonlaw wife Leonora Coke. Miss Coke's evidence was that at about 2:00 p.m. that day the deceased whom she called "Bigga" was sitting on an old fridge which was on the piazza outside the door of the bar. One of "Bigga's" friends, "Brother Roy", came into the bar to the counter where she was serving and asked her to serve him a malta for "Bigga" and brandy for himself. After serving the drinks she saw the applicant whom she knew as Patrick "fly from the back of the yard" to the bar. He made a sudden stop, pulled a gun from his waist and shot the deceased.

She called out "Patrick, Patrick, what 'Bigga' have done that you kill him?" After he fired a second shot Patrick ran off saying: "Yes big bwoy informer, is a so big bwoy sit down and hold shot in a him pussy." He ran off clicking the gun but no further shot was fired.

She reported the matter to the police at the Hunts Bay Police Station. On the 10th of June she identified the body of the deceased at a post-mortem examination. On the 20th August she went first to the Hunts Bay Police Station and then to the Kingston Public Hospital where she saw the applicant lying in a hospital bed on his belly and pointed him out to a police officer.

Since the main focus of this application is in respect of the identification of the applicant as the person who shot and killed Leopold Williams and the Judge's treatment of the evidence in that regard, it is necessary to look closely at all the relevant evidence.

Miss Coke's evidence was that she was inside the bar at the counter at the time of the incident. "Bigga" was outside sitting on the fridge on the piazza which faced the counter and in front of the doorway. The distance between herself and "Bigga" was about five to six feet. She saw Patrick's whole face. She knew him before. He was no stranger. He grew up with the boys in the area and she had known him for over five years: "I see him plenty, plenty, whole heap of times". She had seen him only the day before "with a gun in his hand across the road." She had served him several times in that bar. The incident occurred in broad daylight - "middle day sun hot." He lived at Unity Lane some distance from the bar - about a five minutes walk. The incident happened quickly. The bar was about 10 ft. to 12 ft. long and about 5 ft. to 6 ft. wide. Below the counter of the bar there is a fridge. Brother Roy was on a stool speaking to "Bigga" when "Bigga" got shot. As "Bigga" got shot, Brother Roy dropped his glass and ran. She refuted the suggestion that at the time "Bigga"

was shot - she was "busy in the fridge down inside the bar and did not see what happened."

The investigating policeman Detective Sergeant Derrick Baugh admitted taking a statement from one Roy Taylor whom we now know to be the same Brother Roy mentioned by Miss Coke. The statement was collected after the preliminary examination and given to Crown Counsel on the day of the trial February 10, 1993, i.e. eight months after the incident but Roy Taylor was not called as a witness for the Crown. The Crown closed its case after the evidence of Dr. Royston Clifford in respect of the post-mortem examination. The cause of death was due to two gun shot wounds. The applicant gave sworn evidence on his own behalf. He denied knowing the witness Miss Coke, ever going to buy anything at the bar or walking up and down Burke Road and frequenting the area. He denied committing the offence. On the day in question and the time alleged in respect of the shooting of the deceased he was downtown selling cosmetics, cologne, shampoo, lotion and things like those. He came home at about 4:30 to 5:00 p.m. He knew the deceased Leopold Williams - "but not to talk to." He had seen him at the bus stop sometimes on Spanish Town Road. When he returned from downtown he heard people talking about the murder. He realised that it was the person whom he had seen before at the bus stop, who had been shot. He denied living at Unity Lane and ever having a gun. Unity Lane is the next corner from where he lives. He is not called Patrick and has never been so called.

The Defence called as witness Roy Taylor, the Brother Roy mentioned by Miss Coke who was in fact a friend of the deceased. His version of the incident conflicted with Miss Coke's. From his version Miss Coke whom he called Millie would not have been in a position to see the assailant. He positioned her inside the bar where the fridge was while he was at the doorway facing "Bigga" who was seated on the old fridge. Those were their relative positions when he heard an explosion behind his back "and I duck."

He ran into the bar being very frightened. He could not say whether there was one or two explosions. After hearing no further explosions he came out and saw "Bigga" lying down. He jumped on his bicycle and rode away. With reference to the fridge by which he placed Miss Coke he said that if you bend your back looking into the fridge you cannot see outside. What is significant about that statement is that it is not evidence but an expression of opinion by the witness who either did not or could not get himself to state as a fact that Miss Coke had her head in the fridge. There was therefore no evidence that that was so. The witness said that at the time of the explosion he did not see Millie leaning on the counter looking outside. When he ducked and ran inside the premises she was inside "the kitchen part."

It became clear in cross-examination that at the time "Bigga" was shot he the witness was facing "Bigga" with his back to the door of the premises with his attention focussed on "Bigga". In order to determine whether or not he could see where Millie was when the shot was fired, he was cross-examined as follows:

- "Q: So when the shots were fired, you were looking at 'Bigga'?
- A: When I hear the explosion, I run into 'Bigga' place, my face was in front of us.
- Q: You were focussing on 'Bigga'?
- A: Yes.
- Q: And after the shots were fired now, you are saying, what is the next thing you did?
- A: After the shots finish fire?
- Q: Yes.
- A: I come out the building and run away.
- Q: After the first shot fired, what you did?
- A: Run inside the place where the kitchen and bar is, in the business place.

"Q: So Mr. Taylor, when the shot was fired, you are not in a position to say where anybody else was?

A: I never see anyone.

Q: You are not in a position to say where anyone was?

A: No.

HIS LORDSHIP: I don't understand, where nobody else was?

Q: At the time the shots were fired Mr. Taylor, you couldn't say where Miss Coke was?

A: I know she was inside, that is where I leave her."

He then continued to accentuate that at the time the shots were fired he was looking at "Bigga" and that was where his focus was. He however continued:

"Q: So, at the time the shots were fired, you couldn't say where Miss Coke was?

A: When the shot was fired Miss Coke was in the kitchen with the knife.

Q: Did you see her?

A: Same place I go back and see her.

Q: When the shots were fired?

A: She was cooking, peeling her food in the kitchen part said place, someone else was inside the place.

Q: You are not in a position to see her in the kitchen?

A: I am telling you where I was.

Q: You are not in a position to see her in the kitchen?

A: I am telling you where I was. If you see the place you will know that I am speaking the truth."

In describing the position of the kitchen in relation to the bar, he said "yes and the bar is one big place and it part off", then when asked by His Lordship:

" ... is there anything that part off the kitchen from the place where they sell drinks, the liquor?

WITNESS: Only the counter, a flat counter like a table that they put plates and pots on, just a flat table where they put plates and pots on, just like the counter of the bar."

In attempting further clarification, His Lordship asked:

" Are we saying sir, that from where you lean up at the corner of whatever you were having, that you saw 'Bigga's' lady cooking?

WITNESS: Yes your honour.

HIS LORDSHIP: What you say, you saw her cooking, you say?

WITNESS: Yes, sir."

Although the incident happened on the 2nd of June, he did not give a statement until the 29th of October.

The thrust of the submissions by Lord Gifford Q.C. on behalf of the applicant in respect of Mr. Taylor's evidence is that if Millie (Leonora Coke) had been in the kitchen at the time of the shooting she could not see who shot the deceased. An examination of Mr. Taylor's evidence does not, however, demonstrate that he was so maintaining at any time. He did not see who shot the deceased because the explosion came from behind his back. He could not say where Millie was at the time of the shooting as he only saw her after running inside after he heard the explosions. He has not said that even from the kitchen she could not see outside where the shooting took place.

Lord Gifford submitted that this was a classic example of a "fleeting glance" case and should therefore have been withdrawn from the jury by the learned Trial Judge.

On Leonora Coke's evidence this was a "recognition" case. She had known the applicant for a long time. She had seen him often in the area. She saw him "fly from the back of the yard," pulled a gun from his waist and fired the two shots. The incident took place in broad daylight. She called out his name. She heard him speak after he had fired the shots as he ran away. The viewing time therefore was adequate for her to make a proper identification.

Indeed, the learned Trial Judge in his summing-up dealt very carefully with this aspect of the matter:

"As I have already said, the central issue in this case is one of identification. Whether or not you can rely on the evidence of Leonora Coke, so that you feel satisfied so that you feel sure that the accused was the person who fired the fatal shot. You therefore, members of the jury, have to subject Leonora Coke's evidence to the closest scrutiny. She said she knew him from some five years previously. So it is not a case where she was seeing, according to her, the person who fired the shot for the first time. This is more a case of or can be properly called, a case of recognition."

He then proceeded to give the Turnbull caution in respect of the common experience of mistakes being made in terms of identification or recognition even in relation to close friends and relatives; the fact that honest witnesses can be mistaken and that a convincing witness can nevertheless be mistaken. He went further to say that there have been cases:

"... where honest and convincing witnesses have made mistakes in respect of identification, which have resulted in miscarriage of justice."

And he continued:

"Hence, the caution which I now direct you to exercise in the scrutiny which you must put on the evidence of Leonora Coke. My advice to you is to analyse the evidence of Leonora Coke, from two perspectives. The first perspective is this. Did Leonora Coke have adequate opportunity to recognise the accused? That is one."

He continued:

"Now, if you say that she had the opportunity, that is not the end of the question. The next one to ask yourselves, the follow-up question, can I rely on her? Is she somebody who I can put my complete reliance to the requisite standard that I am satisfied so that I feel sure?"

He reviewed carefully the elements in relation to opportunity making relevant comparisons between Leonora Coke's evidence and that of Roy Taylor. He scrutinised her evidence in relation to opportunity - lighting, sufficiency of time within which to discern the features of the person who shot the deceased and all the other features of her evidence affecting her ability to recognise the applicant.

Lord Gifford, Q.C. has further submitted that the Judge in these circumstances had a duty to point out to the jury the specific weaknesses in terms of the identification evidence. In Turnbull [1976] 63 Cr.App.R. 132 at p. 142, the Lord Chief Justice said:

"Further the Learned Trial Judge gave the jury no help about the quality of the identification of the appellant which in our view was meagre in the extreme."

In Peter Paul Kean [1977] 65 Cr.App.R. 247 at p. 248

Scarman L.J. stated:

"It would be wrong to interpret or apply Turnbull inflexibly. It imposes no rigid pattern, establishes no catechism which a Judge in his summing-up must answer if a verdict of guilty is to stand. The principle is the special need for caution when the issue turns on evidence of visual identification. The practice has to be a careful summing-up which not only contains a warning but also exposes to the jury the weaknesses and dangers of identification evidence, both in general and in the circumstances of the particular case."

The learned Trial Judge gave the appropriate caution. He carefully reviewed the identification evidence. He presented fairly the evidence on both sides, that of Leonora Coke and Roy Taylor and left it to the jury to determine whether there was adequate opportunity for Leonora Coke to identify the gunman. He accentuated that she claimed to see Patrick "flash from round the back" and said: "I think she is assuming here that he is coming from the back. Perhaps it would coincide with Taylor's evidence that there was an open space beside the bar."

In dealing further with Leonora Coke's evidence he said:

"Now, she said, I think more than once, that she was leaning on the bar from the outside because she wanted to see what was happening. Now, Mr. Foreman and members of the jury, why would somebody be leaning on a bar to see what was happening unless she was anticipating that something was going to happen?

Is she fixing herself there now conveniently, bearing in mind what it is Roy Taylor is saying, that she was either in the kitchen or she had her head in the fridge, because it was a low-down fridge."

He further continued:

"Now, you saw where she positioned Leopold, and where she positioned the accused man when he is supposed to have fired the gun. They were, as far as I can recall, fairly close."

"Now, you remember the doctor's evidence that there was no gunpowder deposition, and he told you that if the gun was fired between eighteen to twenty-four inches, I think that is the evidence, there would have been gunpowder deposition. It is for you to say whether or not where she positioned Leopold while she was giving her evidence, while she was demonstrating where she positioned Leopold, and the person who fired the gun whether she was merely estimating or she was doing it accurately, and if she was doing it accurately, it is for you to determine whether or not the doctor would not have found gunpowder deposition.

All these matters are entirely for you."

The learned Trial Judge therefore left for the jury's consideration, without using the word 'weaknesses' specific areas in her evidence which could be considered to be weaknesses making such comments as he thought fit to assist them in considering the evidence as a whole to determine the facts. For this reason therefore, Lord Gifford's complaint in this regard did not find favour with us. Neither could we conclude that this was a "fleeting glance" case which should have been withdrawn from the jury.

Lord Gifford further submitted that the absence of the holding of an identification parade and the fact that the applicant was identified in a hospital bed made the identification unsatisfactory and was a factor which should have led the Judge to withdraw the case from the jury. We cannot agree with this submission. Firstly, as we have said this was a recognition case. As was pointed out by Lord Lowry in Wayne Watt v. The Queen, Privy Council Appeal No. 25 of 1992 (unreported) from the Court of Appeal of Jamaica:

"It is true that an identification parade in a recognition case is of strictly limited value."

The witness knew the applicant, saw him afterwards in a hospital bed and pointed him out as the person who had fired the gun which killed the deceased.

The defence in calling Roy Taylor as a witness was challenging Leonora Coke's evidence as to her ability to identify the applicant as the person who fired the gun. It is clear that the challenge failed.

The jury accepted her evidence and in so doing rejected the evidence of Roy Taylor. As we have said before Roy Taylor's evidence did not render unacceptable Leonora Coke's evidence on the critical issue of the identification.

In the circumstances we treat the application for leave to appeal as the hearing of the appeal and the appeal is dismissed.

Cases referred to

- ① *Tumbull [1976] 63 Cr App R 132*
- ② *Peter Paul Kean [1977] 65 Cr App R 247.*
- ③ *Wayne Wall & The Queen [1977] 65 Cr App R 247. No 25 of 1992*
(unpublished) Court of Appeal of Jamaica
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