C.A. Criminal Law – Murder – [non-capital] – Evidence – Circumstantial evidence – Summing up – whether judge misquoted evidence – whether directions on alibi inadequate – Appeal dismissed. Case referred to R v Turnbull [1976] 3 All ER 549

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 119/93

COR: THE HON MR JUSTICE CAREY, P (AG)
THE HON MR JUSTICE FORTE J A
THE HON MR JUSTICE WOLFE J A

R. v. RAY DIXON

Jack Hines for the Appellant

Miss Kathy Pyke for the Crown

December 12 & 20, 1994

FORTE J A

This is an appeal against conviction of the appellant for non-capital murder in the Home Circuit Court on the 2nd December 1993, when he was sentenced to life imprisonment. The learned trial judge ordered that he should serve a period of twenty-one years imprisonment before being considered for parole. Having heard the submissions of counsel on the 12th December 1994, we dismissed the appeal, confirmed the conviction and sentence and ordered that the sentence commence as of the 2nd March 1994.

The case for the prosecution rested on the evidence of the witness Melbourne Tomlinson, whose evidence formed the basis of circumstantial evidence on which it sought to prove that the appellant murdered the deceased.

Mr. Tomlinson was, on the night of the 13th September 1992 at about 7.30 p.m. standing at the appellant's gate when he saw a man known as Desmond Brown, ride up on a motor-cycle, and meet with the appellant. Both men were engaged in conversation, when the witness saw Desmond Brown take something from his waist and pass it to the appellant. He could not see what it was that passed between the men, nor could he hear the subject of their conversation. The appellant however, placed the item passed to him into his pocket. The appellant, there-

after entered a show-room which was on the property (a show-ground) across the road from the appellant's gate. After he entered, the witness heard "screaming" coming from the show-room and thereafter people came running out, and went in different directions. The appellant then came out of the show-room and had an altercation with another man, after which he went into his house.

He soon emerged from his house, went across the road to the deceased, who was sitting on a wall and "draped him off," and both men began wrestling with each other. The appellant's aunt attempted to part them, at which time the deceased got away from the appellant and ran, but only to be chased by the appellant. They ran in the direction of a bridge. About three to five seconds after they ran, the witness heard two gun-shots, and about two to three minutes afterwards he saw the appellant returning, but he came back on a different road - a road called Premix Road. As he returned, Desmond Brown was again seen to approach him, and on this occasion he was seen by the witness taking something from his pocket and handing it to Desmond Brown who put it into his waist and rode away. He was again unable to see what passed between the two men. The following morning the witness on receiving information from his cousin went to the bridge, in which direction he had seen the deceased and the appellant running, and there he saw the dead body of the deceased.

At a postmortem examination done subsequently the Doctor found the following:

> "On external examination; a 3/8 of an inch in diameter entry wound on the right side of the back. The tract of the wound travels through the skin and underlying tissues to penetrate the mediastrium, (that is the space within the chest containing the heart) with associated perforation of the heart and haemorrhage. It exited from the left of the chest eighteen inches below the top of the head and half an inch from the anterior midline. Death was caused by the gun-shot wounds to the heart and chest."

The entry wound was to the back, a factor which supported the prosecution's theory that the deceased was shot while being chased from behind by the appellant.

In his defence, the appellant in sworn testimony maintained that he was not present at the time of the incident, but was at the relevant time with his young lady. His defence therefore was one of alibi, which raised the issue of visual identification. No complaint has been made before us in relation to the learned trial judge's treatment of that type of evidence in his directions to the jury, and none could reasonably be raised, nor was any complaint made in regard to the sufficiency of the evidence to satisfy the criteria necessary in cases sought to be proved by circumstantial evidence, as was this case.

Mr. Hines, however, contended that the learned trial judge misquoted the evidence to the jury, and in so doing gave undeserved, and incorrect support to the prosecution's case of circumstantial evidence. The passage on which he based this complaint is as follows:

> "And here the prosecution is saying that he is the aggressor throughout, that he chases the man, and when you point a loaded firearm at somebody, your intention must be to kill or to cause serious bodily harm, because a firearm is not intended to be used as a paper weight, it is made to kill."

Mr. Hines argued that in this passage, the learned trial judge left the jury with the impression that the evidence for the prosecution was that the appellant was seen pointing a loaded firearm at the deceased, and consequently this was a misquotation of the evidence which had the effect of giving support to the Crown's case. To give this contention any weight would be to take the passage out of the context of the area of law with which the learned trial judge was then dealing. It is lifted from a passage in which, he was instructing the jury on an ingredient necessary to prove the charge. In the passage complained of,

he was explaining to the jury, that "intent" had to be proven, and was demonstrating the manner in which the prosecution could prove that ingredient in the absence of an expressed intention by an accused. For the benefit of a clearer understanding, the full passage is set out hereunder:

> "Then, fourthly, that he intended to kill or at least to cause grievous bodily harm. Intention has to be proved like any other fact. But as you know, people seldom announce their intention. Very often, as in this case, you have to infer it from what was said and done.
> And here the prosecution is saying that he is the aggressor throughout, that he chases the man, and when you point a loaded firearm at somebody, your intention must be to kill or to cause serious bodily harm, because a firearm is not intended to be used as a paper weight, it is made to kill. But the law says that you must be sure that when the person, if you find this accused when he did the act, that the person intended to kill or to cause serious bodily harm."

Soon after the above directions, the learned trial judge again reminded the jury that no-one had said they saw the killing. He said:

> "Well, you know, nobody has come forward to say they saw when the killing was done. The evidence that you heard says that the dead man was running away. So, when last seen he was being pursued, and not the pursuer. The prosecution is asking you to say from that that the fleeing, plus the fact that the bullet entered from the back, that he was still fleeing, and that there is no question of self defence."

Simply put, the learned trial judge directed the jury that if a person points a loaded firearm at some-one and deliberately fires it at that person, then the reasonable inference would be that the person who did such an act must have intended either to kill or to cause serious bodily injury to that person.

We are unable to find any merit in the contention that the learned trial judge misquoted the evidence in this regard, and consequently this ground must fail.

Mr. Hines also contended in ground 2, that the learned trial judge's direction on alibi was inadequate. The following is in full, the directions on this aspect given by the learned trial judge:

> "Now Members of the Jury, the accused man has given what is called an alibi. He said he was not there. If you believe him you must acquit him. If you are in doubt as to whether he was there you must acquit him because it is for the prosecution to disprove the alibi, not for him to prove that he was elsewhere. But he went into the witness box and gave sworn testimony and you must weigh his evidence in the same way as you weigh the prosecution evidence. You do not hold anything against him because he is the accused person."

In support of this ground, Mr. Hines relied on the following passage in **R. v. Turnbull** [1976] 3 All E. R. 549 at page 553:

> "Care should be taken by the judge when directing the jury about the support for an identification which may be derived from the fact that they have rejected an alibi. False alibis may be put forward for many reasons: an accused, for example, who has only his own truthful evidence to rely on may stupidly fabricate an alibi and get lying witnesses to support it out of fear that his own evidence will not be enough. Further, alibi witnesses can make genuine mistakes about dates and occasions like any other witnesses can. It is only when the jury are satisfied that the **sole** reason for the fabrication was to deceive them and there is no other explanation for its being put forward, that fabrication can provide any support for identification evidence. The jury should be reminded that proving the accused has told lies about where he was at the material time does not by itself prove that he was where the identifying witness says he was."

Counsel's reliance on this passage in the circumstances of this case shows a misunderstanding of what was being addressed by Lord Widgery C J. The learned Chief Justice was dealing with circumstances where a judge instructs a jury to use a rejection of the alibi raised by an accused to support the identification of the accused as advanced by the prosecution. It is in such a context that a judge would be required to remind a jury that an accused who has only his own truthful evidence to rely on, may, stupidly fabricate an alibi and get lying witnesses to support it out of fear that his own evidence will not be enough and further that "it is only when the jury are satisfied that the sole reason for the fabrication was to deceive them and there is no other explanation for its being put forward, that fabrication can provide any support for identification evidence."

In the instant case, the appellant relied on his own testimony and called no witnesses in support of his alibi. It is true to say that the learned trial judge did not, as is usually done, instruct the jury that the fact that they rejected the alibi cannot by itself result in an acceptance of the prosecution's case. He did, however instruct them of the standard of proof required of the prosecution, and the care that should be taken in assessing the quality of the identification given the experience of mistakes being made by convincing witnesses.

In the end, the jury would have understood that they could not convict the appellant unless they were sure that they could rely on the testimony of Melbourne Tomlinson, not only as to its credibility, but also as to its accuracy. For those reasons, this ground also fails.

Mr. Hines also attempted to argue the following ground:

> "The learned trial judge erred in failing to warn the jury (as is required) that where there is material evidence that politics could prove a motive for lying, they should consider the evidence of the identifying witness with great care and caution. (see Regina v. Anthony Wilson S.C.C.A. 128/89 and Regina v. Beck 1982 AER 1 page 807.)"

But he soon came to the conclusion that the transcript revealed no factual basis for advancing this argument, and correctly terminated his submissions in this regard.

In the result the appeal was dismissed and the orders earlier stated, were made by the Court.