

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 33/92

COR: THE HON. MR. JUSTICE CAREY, P. (AG.)
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A. (AG.)

R.V. RICHARD HALL

L. Jack Hines for applicant

Lloyd Hibbert, Deputy Director of
Public Prosecutions for Crown

3rd & 12th May, 1993

PATTERSON, J.A. (AG.)

On the 9th March, 1992, in the Circuit Court Division of the Gun Court at Kingston, before Cooke J. and a jury, the applicant, Richard Hall, was convicted for murder and was sentenced to suffer death. He now seeks leave to appeal the conviction and sentence.

The short facts of the case are these: Ruby Woolery and her husband, Charles Woolery, the deceased, were in bed at about 2:00 a.m. on the 8th February, 1991, when they heard the sound of stones falling on the roof of their house and then a door being forced open. The deceased rushed to brace the door, and just then, an explosion was heard and he fell, seriously wounded. The applicant entered the house with a gun and a flashlight in his hand, followed by two other men, who were also armed.

- 2 -

Mrs. Woolery said, she watched them for about half an hour while they thoroughly searched three rooms in the house, and then they left. The deceased was taken to the Spanish Town Hospital and he succumbed to his injuries on the 12th February, 1991.

Mrs. Woolery reported the incident to the police the very morning that it happened, and gave a description of the men who entered her house. She was able to see them by the light from an electric bulb which was burning in her room. She did not know any of the men before that night, but on the 31st July, 1991, she pointed out the applicant on an identification parade. He had been arrested from the 4th March, 1991.

The applicant, in an unsworn statement, stated his defence in two short sentences thus:

"My Lord, I am innocent of this crime. I am innocent my Lord."

The case against the applicant rested wholly on the visual identification of him by Mrs. Woolery alone; there was no other supporting evidence. It was therefore incumbent on the judge to give full and adequate directions to the jury on the crucial issue of visual identification and it is on that aspect of the case that the applicant's complaint is made. He complains that the learned judge "failed to direct the jury fairly and or adequately" on "the singularly, most important and fundamental factor" which he describes as the "physical capacity of the eye-witness to see at all or to see sufficiently acutely" so as not to be mistaken in her identification of the applicant. This complaint is based on the evidence of Mrs. Woolery elicited in cross-examination.

- 3 -

The relevant portion of the transcript is as follows:

Q. "I notice you didn't read the oath this morning, you wear glasses?

A. Yes please, but ..

Q. The reason you couldn't read the oath this morning was because you didn't have on your glasses, is that correct?

A. Can be.

Q. Is that true or not?

A. Yes, because I did, I cannot see without the glasses, on the night the glasses break when they were in the house.

Q. Your glasses broke the night when they were in the house?

A. Yes.

HIS LORDSHIP: So you had your glasses with you at that time?

WITNESS: I don't have any glass.

HIS LORDSHIP: What is that?

WITNESS: My wallet.

Q. But you normally wear the glasses?

A. Yes Sir.

Q. And you couldn't take the oath, you couldn't read it because you didn't have the glasses with you?

A. Yes."

It is plain that the only significance of this evidence is that it proved that the witness was not able to read without her glasses. It is not capable of showing anything else. It is true that the witness was over 60 years of age at the time, but counsel at the trial did not probe further to ascertain whether her vision was so impaired that she needed glasses to be able to see at all times, and certainly the jury should not be invited to speculate on the matter. In light of the

etched in her mind that at a subsequent time she could recollect and recall those features. A matter entirely for you to say whether or not this issue of the glasses adversely affected the correctness of her identification. A matter for you."

In our view, the directions of the learned judge on this issue were fair and adequate, and the jury could have had no doubt as to the significance of the evidence. Accordingly, we find that the complaint is not well-founded.

Counsel for the applicant attacked the summing up on another score. He argued that Mrs. Woolery failed to give in her statement to the police, "a description of the distinctive and unmissable nose and scar which played a decisive role in her identification" of the applicant. This, he said, resulted in a material weakness in the crown's case and he submitted that the learned judge erred in that he merely narrated this fact to the jury without pointing out and explaining the significance of the material weakness.

It is true that the witness attached great importance to the nose of the applicant and to a scar on his face in identifying him. She was asked the question as to what part of the applicant she saw that enabled her to identify him subsequently, and this was her reply:

"Just take a good look at his face with that big wide open cut on his jaw, is like a scar there, but you see how it big, open wide, look at his nose if he could miss you a second time; couldn't miss you; just take a good look and see if he could miss you a second time."

It is also true that in her written statement to the police which was given on the 26th April, 1991, she did not mention anything about the applicant's nose and the scar on

- 6 -

his face. However, we do not attach much significance to that fact, and we do not consider it to be an inherent weakness in the Crown's case. A close examination of the evidence reveals that Mrs. Woolery gave a description of the men to Det. Cpl. Eward O'Neil on the very morning of the incident. This was done orally and was never reduced to writing by the police officer.

On the 4th March, 1991 that police officer along with others, took the applicant into custody. The police officer then went off on sick leave for twenty-eight days, and very shortly after that he went to the police academy for five weeks on a management course. During that time, it appears that further necessary investigations were not pursued with alacrity. It was another police officer who took a written statement from Mrs. Woolery on the 26th April, 1991, almost two months after the applicant had been taken into custody. It is plain that any description of the applicant in that written statement would not have assisted the police in the identification and apprehension of the applicant in particular, though it may have been helpful to test the credibility of the witness. However, the evidence of the oral description was never probed by counsel who appeared at the trial, as it was open for him to do, and consequently, learned counsel candidly admitted that its significance had grown pale and was of little value. Nevertheless, the learned judge thought it best to leave the matter to the jury for their consideration. His directions were couched in the following terms:

"Now Mr. Foreman, the weakness of the identification is further attacked in this way. Under cross-examination she says that she had told the person who

took her written statement about the nose and the scar. Now you recall that this statement was taken sometime toward the end of April. The incident was February. When the statement was put to her there is nothing in this statement pertaining to the description of the accused, relevant to his nose or to the scar.

Now the argument as put by Mr. Manley is as follows: if there was this distinctive nose and the scar, she would have told the police. But it is not in her statement and therefore you can't put any trust in her evidence.

Mr. Foreman and Members of the jury, it's a matter entirely for you. The evidence is before you and the question that you have to answer in this regard is that in spite of that bit of evidence, can you be satisfied so that you feel sure that on the night in question she saw the accused man who had that distinctive nose and the scar as the distinguishing features? A matter entirely for you.

We have carefully considered the evidence in this case and the summing up of the learned judge. The necessity for a most careful consideration of the evidence of Mrs. Woolery and in particular, the warning of the inherent danger in acting on uncorroborated visual identification evidence and the reasons therefor, were carefully explained to the jury. The salient parts of the evidence for the prosecution and the applicant's defence were meticulously reviewed and the significance explained to the jury. The jury could be in no doubt as to the heavy burden placed on the prosecution to prove all the ingredients of the charge of murder. We are quite unable to find any merit in the applicant's application for leave to appeal against conviction and sentence and consequently his application is refused.

~

evidence which clearly showed that she was not wearing glasses when she pointed out the applicant on the identification parade, counsel may well have thought it wise not to pursue the matter any further than he did.

The learned judge was not unaware of the significance of the evidence and this is how he directed the jury on the matter:

"Now Mr. Foreman and members of the jury, there is this aspect of the glasses. This is an aspect which the defence says demonstrates a weakness in the quality of the identification as adduced by the crown. Apparently, Mrs. Woolery wears glasses. She did not have them on at the time of the entry of the men. I believe she said those glasses got broken that night but there is no evidence as to how they came to be broken. Now Mr. Manley noted that when she was asked to read the oath she could not read it and he said that it was because of her glasses, she could not read without her glasses. So the argument is this: if she had defective sight how could she make out somebody. Well Mr. Foreman and members of the jury, neither counsel probed Mrs. Woolery as to the type of glasses which she had. Some people are short sighted, some people like myself, I wear reading glasses. Mr. Foreman wears glasses. I don't know why he wears glasses but the question you have to decide is whether or not the fact that Mrs. Woolery wears glasses and she did not have them on that night, if that factor is so adverse that it detracts from the quality of the identification.

Now she said she saw Hall on the night. She said there was this unforgettable nose and the scar. She even went to the identification parade Mr. Foreman and members of the jury, she had no glasses then either, and she said that she was identifying the person who came first in her house. So, it is a matter for you to say whether or not her non-wearing of glasses on that night is such that would cast doubt on her capacity to have recorded in her mind, because identification is subjected you know Mr. Foreman and members of the jury, it is how the witness perceives if she could have recorded it, to use the language of counsel for the crown, to have it so