JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 4/97

BEFORE: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.

REGINA vs. ALFRED FLOWERS

Dr. R. Williams for the applicant

Hugh Wildman, Deputy Director of Public Prosecutions, and Anthony Armstrong for the Crown

May 26 and July 14, 1998

PATTERSON, J.A.:

On the 16th January, 1997, the applicant was convicted in the Home Circuit Court of the offence of capital murder and sentenced to death. He now seeks leave to appeal against his conviction.

The relevant facts on which the Crown relied can be summarized as follows: The deceased Douglas Williams, 26 years old, was shot to death at his home at Palmers Cross in Clarendon at about 9:00 p.m. on the 2nd February, 1991, in the presence of his mother Rachel Douglas. He, along with his mother and step-father, Silburn Douglas, had just arrived home by motor car from the supermarket, owned by his step-father, where they all

worked. The deceased and his mother alighted from the motor car at the rear of the house, entered it through the back door to a kitchen, leaving Mr. Douglas seated in the car. Mrs. Douglas said she looked through a door as she went in the house and saw three strange men entering the yard. The applicant was one of those men. He was in front of the other two men and he had a short gun in his hand. One of the men "branched off", but the applicant entered the house through the kitchen door, followed by another man. The deceased pushed his mother into a corner of the kitchen and tackled the intruders. They wrestled for a while and then the applicant fired a first shot which injured the deceased's left hand. They continued wrestling and the applicant fired another shot which hit the deceased in his chest. The deceased retreated, running through the house towards the front. The applicant stood in the kitchen for a while and then he went outside. Mrs. Douglas ran and hid herself in a bathroom. After about four minutes had passed, the applicant entered the bathroom, armed with a knife, and robbed Mrs. Douglas of her bag and watch. He and the other man marched her to her bedroom from which they stole a watch, a sewing machine and a table fan. They were there for about three minutes. Mrs. Douglas said she did not know where the third man was, but she heard a gunshot fire from across the street from her home, and then someone calling persistently from outside, "Chippy, Chippy, come back." The two men left. Mrs. Douglas went in

search of her son and husband. She saw her son lying by the verandah, mortally wounded.

Mr. Douglas said that as he sat in the car, he saw three men running towards the house. Two entered the house by the kitchen door that his wife and the deceased had gone through, and the third man entered a room by another back door. After some time, he heard gunshots, and then one of the men came from the house, pulled him from the car and commenced searching him while asking for money. That man took his wallet and then pushed him to the back door to a bedroom where the applicant was standing with a gun held to the head of his daughter, Melissa. The man that took him from his car pushed him into the bedroom. The applicant threatened to kill Melissa if he did not get money from Mr. Douglas. Mr. Douglas was struck in the head and pushed to the bed by the applicant, still demanding money. After about three minutes the applicant left the room and Mr. Douglas then ran to his neighbour's home across the road. His neighbour had a gun and together they returned to the home. By then the robbers had left. The police were summoned and they removed the deceased's body to the morgue.

Neither Mrs. Douglas nor Mr. Douglas knew the applicant before, but they both testified as to the opportunity they had to observe him and the circumstances in which they came to identify him to the police. About two months after the incident, both witnesses pointed out the applicant from a number of about five men in a prison cell at Lionel Town as one of the

robbers and the person who shot and killed the deceased. The applicant had refused several entreaties of the police to go on a formal identification parade, and so the police placed him among a number of other men in a cell, and had the witnesses in turn view them in the presence of a Justice of the Peace and the sister of the applicant. It was contended that this was not a fair parade.

The prosecution did not rest its case solely on the evidence of visual identification. Mr. Douglas testified that his wallet, which contained about $1,500 in cash, a Canadian bill and personal documents, was taken from him at the time he was pulled from his car and searched. That wallet, the prosecution contended, was found in the possession of the applicant within twelve hours after it was stolen. This is how that came about. The applicant was admitted to the Spanish Town Hospital sometime during the night of the 2nd February, 1991, suffering from gunshot wounds. The prosecution did not lead evidence to show how or when the applicant received his injuries, but the applicant himself said that he had been robbed and shot in bushes near the Spanish Town Railway Station sometime after 7:30 p.m. on the night of the 2nd February. He said he lost consciousness then, and when he regained consciousness he realised he was in a bed on a ward in the Spanish Town Hospital. So he too could not say how or when he arrived at the hospital.

District Constable Donovan Evans said that he took up duties at the Spanish Town Hospital at 8 o'clock on the morning of the 3rd February, 1991, to guard a wounded prisoner. The applicant was then a patient on the same ward as his prisoner. The applicant had a drip attached to his hand. Evans said Detective Inspector Grant visited the hospital and gave him certain instructions, and as a result he commenced paying special attention to the applicant. The applicant told him his name was Alfred Forbes. Detective Corporal Davey arrived at the hospital after Inspector Grant had left, and in the presence of District Constable Evans he questioned the applicant. He searched the person of the applicant and found nothing. He next searched a bedside table beside the applicant's bed and took a wallet from a drawer. Davey opened the wallet, took out the contents, showed it to the applicant and asked him to whom it belonged. The applicant replied saying that it belonged to his uncle. Detective Corporal Davey took possession of the wallet and contents.

The investigating officer was Detective Sergeant Dolphie Graveney of the May Pen Police Station. He said that he received a telephone call at about 9:00 a.m. on the 3rd February, 1991, which caused him to go to the Spanish Town Police Station. He spoke to Detective Corporal Davey and then went to the Spanish Town Hospital. There Davey handed him a wallet. He went to the applicant, who he did not know before, and asked him where he had gotten the wallet. The applicant replied, "Is me uncle own, sar." He

noticed the contents of the wallet and kept it in his possession. About two months after, in the presence of the applicant, Mr. Douglas identified the wallet as the one that was stolen from him on the night of the 2nd February, 1991. It contained his personal documents and the Canadian money bill. The applicant reacted by saying, "Uunoo a go hear wey me tell di court say where me get the wallet."

The prosecution depended on that evidence to establish the doctrine of recent possession, which would bolster the visual identification evidence of Mr. and Mrs. Douglas.

The case for the defence was an alibi. He testified that at the relevant time he was nowhere in Clarendon. He did not know Palmers Cross. He did not shoot or rob anyone that night. That night he had left his home at Newland in St. Catherine at about 7 o'clock, and he travelled by taxi to Spanish Town to purchase bags for his peanut business. He was shot and robbed in Spanish Town, became unconscious and woke up in the Spanish Town Hospital, lying in a bed with pyjamas on. He denied possession of the wallet. It had not been shown to him and he did not tell Detective Corporal Davey or anyone that it belonged to his uncle. He did not know Detective Corporal Davey. He saw Detective Sergeant Graveney on two occasions at the hospital, but he was not shown a wallet by him nor did he tell the Sergeant anything about it. However, when cross-examined about the wallet, this is what transpired:

"Q: And nobody spoke to you about the wallet?

A: Mr., I can't remember.

Q: Evans?

A: Yes, sir.

Q: Yes. Did you see where he got the wallet from?

A: He came in straight to my bed with his left hand in his pocket and took his hand from his pocket and he showed me a billfold asking me if that is what the robber took from me last night, I told him no because I never had a billfold."

He said he did not tell District Constable Evans that his name is Alfred Forbes. He did not go on an identification parade because his "picture" had been taken by the police at the Spanish Town Police Station. At the Lionel Town Police Station two persons came to identify him while he was in a cell with three other persons. Those others were not similar in appearance to him - one was a brown Indian man. Inspector Williams shone a flashlight on him alone, and told the witnesses to look in the cell "if they see the person that they came to point out." A lady was present who said she was a Justice of the Peace, but his sister was not present.

In support of the application for leave to appeal, counsel urged three main grounds. Firstly, he contended that "the directions of the learned trial judge on capital murder were inadequate, his review of the evidence

unbalanced and the defence was not adequately put to the jury." As a consequence, he said "the verdict of guilty of capital murder is unreasonable having regard to the discredited testimony of the sole eyewitness to the shooting."

Counsel's main thrust was based on the evidence of Mrs. Douglas and what he perceived to be a previous inconsistent statement made by her. On the 3rd February, 1991, Mrs. Douglas gave a written statement to the police. At that time, she did not know any of the three men who invaded her home. In that statement she said:

> "Douglas said, 'money nuh', and held on to the one that was up front and both of them started to wrestle - fight. He pushed him out into the store-room, and the other one that was with him fired a shot and it caught Douglas in the palm of his left hand. Douglas became furious and was still fighting them, then one of them pushed him back and fired and it caught him in his chest." [Emphasis mine]

Mrs. Douglas said that was what she told the police and it was true. This may be compared with her evidence, which is as follows:

> "Q. And what next happen?
>
> A. Well, they came in, two of them, that one over there was in front. (Witness points to accused)
>
> Q. He was in front?
>
> A. Yes, sir.
>
> Q. So what did he do?

A. He came in and Douglas turned around. My son and both of them meet at the door and they begin to wrestle with one another." [Emphasis mine]

It seems quite clear that both in her statement to the police and in her evidence before the court, the witness Mrs. Douglas said that two men entered the kitchen and that her son wrestled with them. In the police statement, she did not say what part the applicant played; she did not identify anyone then. However, having identified the applicant at trial, she was asked and she related what the applicant did. She said it was the applicant who had the gun and that he wrestled with the deceased, and it was the applicant who fired both shots at the deceased; the first caught him in his hand and the second in his chest.

We cannot agree with counsel that an inconsistency arose in the testimony of Mrs. Douglas which made it doubtful as to who it was that fired the fatal shot. Undoubtedly, the murder was committed in the course or furtherance of robbery. The post mortem examination revealed that the bullet from the second shot which Mrs. Douglas said the applicant fired and which caught the deceased in his chest, entered at "the left seventh intercostal space which is really below the seventh rib, the space between the seventh and the eight rib on the left side." It penetrated the abdominal cavity, severed the abdominal aorta, and lodged under the skin at the right hip. The doctor concluded that death was due to haemorrhage from

laceration to the abdominal aorta. In our view, there was ample evidence to establish capital murder in the applicant and the learned trial judge properly directed the jury by telling them in his final charge the following:

> "If you are satisfied that the accused man was one of the three men who went there to the Douglas' home on the night of the 2nd of February, 1991, that he was armed with a gun and that he was the person who fired the fatal shot killing the deceased, then it is open to you to convict him for capital murder. If the evidence makes you feel sure that he was with a group of men acting in common design, bearing guns, carrying arms, in pursuance of a robbery and that one of the men shot and killed or that you are not sure whether he was the man who fired that fatal shot, then it is open to you to convict him of the offence of murder."

We find no merit in the first ground of appeal.

The next ground put forward by counsel is as follows:

> "The review of the evidence of visual identification (pages 146-154) was inadequate underlining its strength but omitting important weaknesses."

Counsel contended that the learned trial judge omitted to draw the jury's attention to an inconsistency in the evidence of Mr. Douglas about the circumstances in which he lost his spectacles. The witness testified that his spectacles fell off when the applicant dealt him a blow in the bedroom, but that only impaired his vision "maybe a little" - and he continued by saying, "but I can see without my glasses and I can read without it." When he was cross-examined, he said he wore his spectacles to drive. Then he was asked:

"Q. When the man hit you at the car, your glasses fell?

A. Yes.

Q. When the man at the car hit you, your glasses fell?

A. Yes."

The witness insisted that he "can see pretty good without my glasses."

The learned judge was not unaware of the inconsistency. In reminding the jury of what the witness said in examination-in-chief and under cross-examination, this is what he said:

> "Now, this bit of cross examination is brought into play to see whether he would be able to identify his assailant without glasses. He tells you he sees without glasses, perhaps those of you who wear glasses might wear it for one purpose or another. Some people can't read without their glasses, but some people can see perfectly well without them. It's a matter for you."

We would consider that direction to be adequate to bring home to the jury the inconsistency complained of, leaving them to decide what weight they would place on Mr. Douglas' identification evidence.

A further contention of counsel was that the learned judge omitted to alert the jury to the weakness in the visual identification caused by a discrepancy between the evidence of Mr. Douglas and that of Mrs. Douglas as to the whereabouts of the accused when he was allegedly in the house. Mrs. Douglas testified that after the applicant fired the first shot which

caught the deceased in his hand, he continued wrestling with the deceased. She was asked where were the other two men while this wrestling was taking place. Her answer was, "I did hear them talking to Mr. Douglas in the little girl's bedroom on that side." She continued by saying that the applicant fired another shot which caught the deceased in his chest. The deceased then ran through the house and she hid in a bathroom for about four minutes before the applicant returned and took her out. Mr. Douglas testified that he saw three men enter the house, two went through the kitchen door and the other through a bedroom door, but he did not identify any of those men then. It was Mrs. Douglas who said that the applicant was one of the two men who came in the house through the kitchen entrance, and that the third man "branched off". Mr. Douglas said as he sat in his car, he "heard the shots, a sound like gunshots", coming from in the kitchen. It was sometime after the shots were fired that one of the men came from behind the car, pulled him out, searched him and took his wallet. At that time he saw the applicant at the bedroom door holding a gun to the head of his daughter, Melissa. The man who searched him pushed him towards the bedroom door where the applicant was standing, and then pushed him inside the bedroom. The applicant hit him in the head and pushed him unto the bed. The applicant stood by the door pointing the gun at Mr. Douglas while demanding money. That lasted for about three minutes and then the applicant left.

It is plain, therefore, that Mrs. Douglas did not see when Mr. Douglas was taken to the bedroom. Therefore, when she said that while the applicant was wrestling with the deceased she heard "them talking to Mr. Douglas in the little girl's bedroom on that side", that would not have been the time when Mr. Douglas said the applicant had him in the bedroom. Consequently, the discrepancy complained of did not arise on the evidence, and we need say no more.

In his summing-up, the learned trial judge said:

> "Now, on the question of the wallet you must bear in mind what I told you about the doctrine of recent possession. Now, the possession of articles found on the accused tend to negative alleged mistakes in identification of him by Crown witnesses, so you bear that in mind."

Counsel contended that there was no evidence that the wallet was "found on the accused"; therefore that was a misdirection. The prosecution case was that the wallet was found in the bedside table beside the bed of the applicant, and when it was shown to him he said that it belonged to his uncle. That evidence placed possession of the wallet in the applicant. The jury heard the evidence and we are of the view that the jury were not misled into thinking that the wallet was taken from the actual person of the applicant.

Another contention evolved from the evidence of the doctor who performed the post mortem examination. The doctor said that his external findings were five wounds to the body, all gunshot wounds. The first was to

the left palm, and it penetrated through the forearm with the exit wound on the inner aspect of the forearm. The second wound was to the left upper arm penetrating through the tissues of the upper arm. The third was to the left seventh intercostal space "on the mid axilliary line which is the arm." A bullet was found lodged at the right hip. The fourth wound was burns to the left side of the chest grazing the area. The fifth was similarly a grazing injury to the right shoulder. The doctor was asked in cross-examination the following:

> "Q. Doctor, were the five injuries you described, did you say they were five independent injuries from five incidents?
>
> A. Yes, five gunshots.
>
> Q. It would have been five gunshot wounds?
>
> A. Yes, sir."

Both Mr. and Mrs. Douglas spoke of only two shots being fired, and counsel submitted that the discrepancy between the eyewitness and the medical evidence suggests that the evidence of the eyewitness is questionable. We see no merit in this submission. The doctor's attention was drawn to the number of wounds that he saw on the deceased, and it is quite clear that the answer he gave in cross-examination meant five gunshot wounds. Those wounds are quite consistent with the evidence of the witnesses that only two shots were fired by the applicant at the deceased.

The first, second, fourth and fifth wounds could have been caused by the first shot, and the third wound by the second shot. It was open to the jury to have seen it in that light.

A further contention of counsel was centred on the fairness of the identification parade. There is no doubt that identification was a live issue in this case. The case for the prosecution against the applicant depended to a great extent on the correctness of the identification of the applicant by Mr. and Mrs. Douglas. The defence is saying they were mistaken. There was ample evidence to suggest that the witnesses had enough time to have observed the applicant who they did not know before that night. The light was good, the applicant was in close proximity to the witnesses at different times, with nothing to impede their vision. But since neither Mr. Douglas nor Mrs. Douglas knew the applicant before, an identification parade, properly conducted, would be useful, if the applicant consented. The police were aware of the correct procedure to be adopted. The applicant himself could have requested a parade, but he did not; instead, by his actions, he frustrated the efforts of the police.

Noel Cross, an Inspector of Police, testified that on the 1st March, 1991, he informed the applicant that he intended to conduct an identification parade at 10:00 a.m. on the 2nd March at the Central Police Station in connection with the offence of murder for which the applicant was detained. The applicant was told of his right to have his attorney-at-law, a relative or a

friend attend the parade on his behalf and that two Justices of the Peace would also be in attendance. He requested that his mother be summoned to attend, and the Inspector said she was informed. However, the applicant's mother did not attend on the 2nd March and the applicant refused to go on the parade.

On the 15th March, 1991, the Inspector again informed the applicant of his intention to conduct the parade on the 16th March, and offered him the services of a legal aid attorney-at-law. The applicant said he had an attorney-at-law that would be attending, and that he would contact him; he refused to name him to the Inspector. On the 16th the applicant again refused to go on the parade. The Inspector testified that he said he was not going on any parade. The parade could not be held. Another parade was arranged for the 30th March, and the applicant once more refused to leave his cell, saying he was not going on any parade and "anything want to happen can happen." The Inspector did not arrange for another parade. He denied that the applicant told him that his picture had been taken, and that was one of the reasons why he refused to go on the parade. That was the background leading up to what has been described as the informal identification parade, and what counsel referred to as identification by confrontation. This court has on numerous occasions condemned the practice of confrontation with a view to identification in circumstances where an identification parade would have been the ideal way. But an

identification parade is not the only satisfactory way of identifying a suspect. In *R. v. Trevor Dennis* [1970] 12 J.L.R. 249, the court considered circumstances which would make confrontation permissible. That was a case where the defendant was apprehended shortly after he had allegedly committed a robbery. The police took him back to the house where the complainant, who had not known the defendant before, identified him as the robber. Shelley J.A. said (at p. 250):

> "Perhaps identification on parade is the ideal way of identifying a suspect, but it is not the only satisfactory way. The particular circumstances of a case may well dictate otherwise."

We are of the view that in the particular circumstances of this case, an "informal" parade was a satisfactory way for the police to have proceeded. The witnesses did not know the intruders to their home on that fateful night. It was, therefore, necessary for the witnesses to say whether or not the police had held the alleged murderer. The applicant's repeated refusal to go on a parade made it necessary for the police to employ other means. The question of the weight to be attached to such identification evidence is a matter for the jury. There is no complaint about the general directions of the learned trial judge on the issue of identification; those directions were impeccable. The jury were given specific directions with regard to the informal identification parade. The learned trial judge explained to the jury the significance of a

formal identification parade and then he dealt with the circumstances which gave rise to the informal parade. He continued as follows:

> "Now, in light of those circumstances, you will have to consider whether this was fair to the accused, because you could not say that he refused to attend the identification parade, therefore if he had committed an offence that would be the end of the matter. No, not so.
>
> The object of an identification parade is to test the ability of the witness to pick out from a group of persons if he is present, who the witness has said that he has seen, previously on a specific occasion, and this parade should be fair and you will have to consider whether, in all the circumstances, this informal parade was fair.
>
> The defence is saying that this informal parade was not fair because he was not placed on a regular parade, but as I told you, he objected to that, for whatever reason, he objected to being placed on the parade.
>
> The defence is also saying that there were not sufficient men from which to pick out the accused; that there were scar in the accused face and that the scar should have been masked. But you must recognise that the accused man is not submitting himself to anything like that, he says he is not going on this parade, he is not submitting to it, so the Police Inspector could not be expected to go and place any tape on his face to prevent the witness from seeing the scar, because that would be, in effect, assaulting him. So that is what the Prosecution is saying, all that was open to the Inspector to do, he did.
>
> The defence is also saying that the Inspector pointed this flashlight at the accused only. Now, what did the witnesses tell you? They said no, it was shun (sic) on all the men. That is what Mrs. Douglas tells you and also what Mr. Douglas told you. So it is a question of fact whether you

believe the Douglas' (sic) and the inspector, or whether you believe the accused man himself.

The defence is also saying that there was another man there who was not of the same colour and height. No measurements were taken. Again, Mr. Foreman and your members, this accused man did not subject himself to that so how could the Inspector go and measure him? So, he did what he called his best, and on this question of whether the light was shun (sic) only on the accused, you must bear in mind that even the accused is saying that inside the cell was not dark, you could see.

You will have to ask yourselves, how did the witness - I think it was Mr. Douglas who says that one of the men was of an Indian extract. If the light was only shun (sic) on the accused, how did the witness see the other person? It's a matter for you, when you are considering the credibility of these witnesses, that is to say, the Inspector and these two witnesses who came on the identification parade."

Further on he said:

"I must tell you this, that if a suspect refuses to attend a parade, as is in this case, arrangements may be made to allow the witness or witnesses opportunity to see him in a group of persons or people to test the witness's ability to identify the person whom he said he saw on a previous occasion and this is in effect, the informal parade that I am telling you about.

But Mr. Foreman and your members, here, care should be taken not to direct witness's attention to the suspect, that is to say, the identifying witness should not be assisted in any way in identifying the suspect.

In this case what the defence is saying, is that the Inspector, who was on that parade, assisted the witness by using his flashlight, but of course you

> heard the witness deny that they were assisted. The light was shun (sic) on all the persons there."

Those directions, in our view, were adequate to bring to the jury's attention the importance of identification evidence and the light in which the identification evidence of Mr. and Mrs. Douglas should be viewed, in the particular circumstances of this case.

It should be observed that the prosecution bolstered the visual identification evidence with the doctrine of recent possession, as we have mentioned before. Counsel's final ground of appeal was directed at the learned trial judge's directions on "the presumption arising from recent possession of stolen goods", he said they were inadequate. The learned trial judge gave the jury the classical directions on the doctrine of recent possession, and then he continued by saying:

> "The very next day the wallet was found in his possession and therefore, if you so find, if you accept the evidence that it was so found in his possession, you may draw the inescapable presumption, the inescapable conclusion, the inescapable inference that he was the man who took the wallet from Mr. Douglas, who was engaged in the shooting as the evidence unfolds."

It is the use of words "inescapable" that counsel contended was objectionable. But the applicant did not give any explanation of how he came in possession of the wallet. He denied having possession of it and that it was taken from the drawer of his bedside table, although he said that

Evans did speak to him about it. It is interesting to see what he said about that:

> "He came in straight to my bed with his left hand in his pocket and took his hand from his pocket and he showed me a billfold asking me if that is what the robber took from me last night; I told him no because I never had a billfold."

So that is, at least, an admission that the wallet was shown to him shortly after Mr. Douglas had been robbed of it.

It is quite clear to us that on the facts presented to the jury, and the failure of the applicant to give a credible explanation, the jury would have been justified in inferring that he was one of the robbers that robbed Mr. Douglas and shot the deceased. It was the only reasonable inference to be drawn in the circumstances. We find no merit in this ground.

We are of the view that counsel has not urged any ground that would merit the grant of leave to appeal. The summing-up, taken as a whole, is fair and adequate. In the circumstances, the application for leave to appeal is refused.