JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS. 24 & 25 OF 1988

BEFORE: THE HON. MR. JUSTICE CAREY, PRESIDENT (AG.)
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA

VS.

ANDREW PEART
GARFIELD PEART

F.M.G. Phipps, Q.C. for Andrew Peart

Gayle Nelson for Garfield Peart

Kent Pantry and Brian Sykes for Crown

September 23 and October 18, 1988

CAREY P. (AG.):

We now give our reasons as promised, for refusing these applications for leave to appeal convictions for murder in the Home Circuit Court on 26th January last, before Orr J. sitting with a jury.

Mr. Phipps who appeared on behalf of Andrew Peart conceded that he had examined the summation of the learned trial judge but was quite unable to find any grounds on which it could be successfully impugned. He thought that the evidence of the chief witness for the Crown, Lowell Walsh, was cause for some concern in light of the discrepancies contained therein and accordingly he would rely on the submissions of Mr. Nelson who appeared for the applicant, Garfield Peart, in so far as they could prove

helpful to his client.

We granted leave to counsel for Garfield Peart to argue two grounds of appeal which are interrelated, stated in the following terms:

(1) The verdict was unreasonable and/or cannot be supported having regard to the evidence.

(2) The learned trial judge wrongly failed to uphold no case submission made on behalf of Garfield Peart.

The burden of his arguments was that the evidence of Lowell Walsh had been thoroughly discredited when regard was had to the several discrepancies which he brought to our attention. He was critical also of the quality of the identification evidence.

We can now detail the evidence adduced in the trial. As we have stated earlier, the prosecution case rested wholly on the visual identification of the applicants by a sole eye-witness, Lowell Walsh, who at the time of the trial was 15 years old; a tenth grader in school.

It was his evidence that at about 9:00 p.m. on 24th June, 1986 he was among a group of persons on Text Lane, Kingston, who were engaged in watching a game of Bingo which was in progress. Among these persons was the slain man Derrick Griffiths, known to his friends as "Bowla". He noticed when the applicant Andrew Peart came up, called away Griffiths and engaged him in a conversation. The upshot of all this, was that Walsh, one Horace (who was not called as a witness) and Griffiths all left the game in the company of the applicant Andrew Peart to the applicant's home at 26 Wildman Street in Kingston. They all entered these premises. He noticed that the other applicant, Garfield Peart, was seated on a chair with his hands folded in his lap. At this stage, another man suddenly emerged. He was armed with a firearm. "Don't move", he commanded. Whereupon Andrew Peart rushed to grapple Griffiths in order to force him to the ground. Two other men, one of whom was armed with a gun also appeared. Garfield Peart was seen with a gun which he used to "jook" Griffiths on some part of his

body. The witness and his friend ran to a "passage". We were not altogether clear what was meant by "passage". When counsel for the prosecution referred to the passage as a room, the witness corrected him by saying that he ran "not into a room, a passage". While there, he heard the sound of gun shots which came from the area from which he had run and a voice saying, "make sure him dead". Then he heard further gun shots.

The applicant Andrew Peart then came by this passage, and was heard to ask where the boys were (a reference to the witness and his friend, Horace). These two were lying one on the other on the ground. Their hiding place was discovered by the gang of men which included Garfield Peart. Andrew Peart requested some cord. Eventually Andrew bound the witness, hand and foot, with strips of electric wire.

Walsh reminded the applicant Andrew Peart that both his mother and sister were known to Peart. But the applicant denied any such knowledge. He then begged to be released but to that entreaty the applicant gave the reply courteous that he should stop his noise before he killed him too. "You think them man joke fe kill? Them serious." The witness was placed in a room by Garfield where a gun-man was set to guard him.

The witness also related another episode in which Garfield was shot down by some person, and Andrew stabbed another man. These persons were strangers to the witness. During these occurrences he observed that Garfield had a gun in his hand. Thereafter the applicant left Walsh and this allowed him to escape.

The witness testified as to his knowledge of the applicants. With respect to Andrew, he said he knew him "from a little boy growing up and him used to come to my sister and my mother". As to Garfield Peart, who was Andrew's brother, he swore that he knew him at the same time he knew Andrew.

Police Officers arrived on the scene of the crime at about 10:00 p.m. They had heard gun shots which attracted them to 26 Wildman Street, as also a large crowd which gathered. The yard was in darkness and with light from a tilly-lamp and a flashlight they were able to find the body of Derrick Griffiths in a kitchen under a table. Face and abdomen were in a bloody condition with what appeared to be gun shot wound in the latter area of the body. No medical evidence was adduced at the trial, but there was evidence that at the post-mortem examination carried out on the body at the Kingston Public Hospital Morgue on 27th June a .38 expended bullet retrieved from the body was handed to the police by Dr. Clifford. A number of .38 cartridge cases were retrieved in the premises. When the police officer investigating the crime interviewed the applicant Andrew, he was told that he was returning from the cinema with his girlfriend when he heard gun shots coming from his yard. The applicant also related that having learnt of the death of Griffiths, he was scared to return home. The other applicant was not apprehended until 5th March 1987.

Andrew made an unsworn statement. He said that his girl-friend and himself were in each other's company up to 11 o'clock on the night in question. On his way home he learnt that gun-men had killed a man in his sister's yard and given notice of their intention to kill him as well. He did not kill Griffiths whom he hardly knew. Nor had he participated in bringing about his death. He was being framed for the reason that a man had died in premises he frequents. He ended by saying that "the little boy was a direct liar".

The other applicant used his right to make an unsworn statement. On the material date he had gone by his baby's mother at 26 Wildman Street: he himself lives elsewhere. He went to the cinema, watched the first show and while he waited for the start of the second show, he received an urgent message from his baby's mother, who, he understood, was outside the cinema. She gave him to understand that a

shooting had taken place at her house. He further told the jury of the circumstances of his arrest.

With regard to Griffiths whom he referred to as "Bowla" he was only a face. He had no quarrel with or reason to kill him. Nor would he kill a man in premises he frequents everyday. He denied being on friendly terms with Lowell Walsh's mother or sister; he did not even know them. He called a couple of witnesses. The first Claudette Brown confirmed his statement that he had attended the cinema, that he had received a message and all had left to the scene of the crime. The second witness called on his behalf, Pamela Walker, is the girlfriend of Garfield Peart. She confirmed that he went to the cinema. Later she heard the sound of gun shots, went to investigate and learnt a boy had been shot.

The gravamen of Mr. Gayle Nelson's arguments as we observed before was that the credibility of the sole eye-witness for the Crown had been severely impugned. He gave twelve examples which should have demonstrated to the learned trial judge that his no case submission should have succeeded. These examples were also prayed in aid, to buttress the submissions on the general ground i.e. the verdict was unreasonable and could not be supported having regard to the evidence. We propose to list the "respects" in which learned counsel, sought to show that the witness' credit was "entirely destroyed" or "severely impugned."

We would observe that the occurrence of discrepancies in the evidence of a witness, cannot by themselves lead to the inevitable conclusion that the witness' credit is destroyed or severly impugned. It will always depend on the materiality of the discrepancies. Counsel's job is hardly done if he is merely content to isolate the incidents of discrepancies which may often occur in testimony.

Mr. Nelson was requested to collate the discrepancies he enumerated under some head of materiality to the case. But we do not think he was successful in his endeavours to do so. Never-the-less we intend to

examine the "respects in which he suggested the witness' credit was entirely destroyed or severely impugned".

> "(i) As to whether he (i.e. Walsh) had run only to the passage or into the room."

In the course of his examination, the witness said that after a number of men descended upon Derrick Griffiths, he and his friend ran into a passage. Counsel for the Crown inadvertently introduced "the room" as the place where the witness had taken refuge (see p. 12) but the witness emphatically denied that he ran into a room. At page 13 the following colloquy appears:

> " Q: He left this man, he ran into a room?
>
> A: Not into a room, a passage.
>
> Q: A passage?"

It must have been clear by this time to everyone including counsel for the Crown, that the witness had run not into a room but into a passage. The witness also gave evidence that after he was tied up, he was taken to a room.

The cross-examination of this witness by Mr. Nelson occupies some thirty-two pages of the transcript and in the main was directed to contraditions in his evidence given before Orr J. and the jury and that to the Resident Magistrate as examining magistrate. It was put to the witness by defence counsel that he had deposed before the Resident Magistrate, that the room into which he ran was in darkness. He admitted making that statement. In answer to the Court, he said that it was true the room was in darkness and claimed that he did not run into the room. Indeed he insisted despite pressure from Mr. Nelson that he never ran into any room, he ran into a passage.

Whether the witness ran into a room or a passage, was not a fact material to any aspect of the proof of the crime. The events in proof of the crime itself had occurred before he took refuge in flight. If discrepancy there be, it could only, we think, be regarded as peripheral.

> "(ii) As to whether he had run in before the shooting started, when it started, or some time after it started.
>
> (iii) As to whether Walsh ran in first or Horace (who was not called) ran in first.
>
> (iv) As to whether
>
> (a) It was Walsh who lay on top of Horace;
>
> (b) Horace on top of Walsh; or
>
> (c) Horace lay against a wall, and Walsh beside him.
>
> .....
>
> (vi) As to whether a corner Walsh said Horace was lying in (with Walsh beside him) was in the room or in the passage."

It was not the Crown's case that the witness had observed the shooting down of Griffiths. The witness' story was that Andrew summoned the victim to the killing ground where an armed Garfield awaited him; that Andrew held him, thereafter Garfield jabbed him with his firearm, and a number of men, some with firearms emerged from ambush. At this point he made off.

The rest is inference. We were quite unable in combing the transcript to discover what responses by the witness could lead to the view that in this regard, this evidence had been destroyed or severely impugned.

The materiality of which of the two boys first left the scene of violence and mayhem taking place at night is, in our view, of the order of

zero for reasons which have already been adumbrated. Howsoever the boys may have lain in their fright after observing what Lowell Walsh testified he had observed, or whatsoever may have been the ordering of their going, does not touch on the issue of identification which was the crucial issue in the case.

> "(v) As to whether everywhere in the yard was dark or there was moonlight."

Identification was, of course, the issue and accordingly questions with respect to lighting and the opportunity for such identification would be highly material.

The Crown led no evidence whatever as to the nature of the lighting on the premises from the sole eye-witness at the time of the crime. Crown counsel led evidence as to the proximity of the witness to Garfield on the occasions the applicant spoke to him and the fact that the witness knew the applicant a long period of time. He did attempt to show that light from a bar was able to illuminate the premises but the witness thought otherwise. On the Crown's case there was no light.

During the course of his cross-examination by counsel for Andrew Peart, the witness was asked a question in this form at p. 32:

> "And everywhere inside the yard was dark, that is true?"

From previous questions, it was being suggested to the witness that he had made such a statement at the preliminary enquiry. Seeing that the witness had said naught to the contrary before the learned trial judge and jury, we do not think that the suggestion should have been allowed. The witness responded - "moonlight was shining inside." Not unnaturally, counsel for the defence then put the previous inconsistent statement to the witness who admitted having so stated. Later the witness also admitted that it was true that there was no light in the room and everything inside the yard was dark.

When it was Mr. Nelson's turn to cross-examine the witness on behalf of the applicant, Garfield Peart, he also thought it necessary to repeat what had already taken place. The result of his endeavour was that the witness acknowledged that the passage was not brighter than the lawn: it was just as dark as the room.

In considering the question of lighting, the only evidence which the jury had before them was that the incident took place in darkness. The witness said so at the preliminary examination. It is not altogether clear to what question the witness was responding when he volunteered that "moonlight was shining inside." Be that as it may, he is recorded as so stating. No cross-examination was directed to elicit the reason for the statement or the reason for the disparity.

When he was re-examined he was confronted by this internal inconsistency and asked first which of the statements was true, and secondly, why he had spoken as he had. To the first, he said the moonlight was really shining in the yard and to the second he vouchsafed the curious answer - "I didn't remember everything about the statement.

We cannot gauge the effect of that re-examination. But the jury were not likely we think, to find that there was any moonlight which assisted the witness to identify Garfield Peart. That discrepancy would not by itself wholly destroy the witness' credit but his evidence as to the lighting conditions would be unreliable or suspect.

"(vii) As to whether Walsh did or did not speak with Detective Corporal Louis Brown in the street after coming out of the premises (pp. 53; 73; 91; 101/2; 105; 111).

(viii) As to whether Walsh told untruth

(a) only at the Preliminary Enquiry; or

(b) also at the trial.

"(ix) As to whether Walsh remembered better at the Trial than at the Preliminary Enquiry, p. 62."

The above represented suggestions put to test the witness' credit. But we were not able to appreciate how it was being said that his responses showed that his credit was destroyed or severely impugned. It was for the jury having seen and heard the witness, to make up their minds in the light of the learned trial judge's directions, whether the witness impressed them as capable of belief on his oath. No one has sought to challenge his directions in that regard and we agree that he went to great pains to point out all the discrepancies in the evidence of the witness. Moreover, we are of opinion that these suggestions were impermissible as amounting to arguments to be placed before the jury and not questions for the witness' opinion. We do not, however, criticize the learned trial judge for his indulgence, having regard to the nature of the trial.

" (x) As to whether Detective Corporal Louis Brown had told Walsh that he heard a 'sound' that if the accused men were sentenced 'man' will do him things."

(xii) As to whether it is true as Walsh says (p. 73) that he doesn't know if any police came to Wildman Street, which is contrary to what Detective Corporal Brown says at p. 111."

These were conflicts in the evidence between Walsh and the police officer which the jury would be required to resolve. The disparity was a reflection on the memory of Walsh, as well as, of the police officer. We heard no arguments or reasons helpful to appreciate why the credit of Walsh should be regarded as impugned or destroyed by a conflict which did not touch or concern a material aspect of the case.

"(xi) As to whether Walsh had known Garfield Peart since knowing himself or since 1981 - p. 68/9."

The witness said he knew the applicants from he knew himself. He also said he had seen them from 1981; this latter in his deposition. This hardly ranks as a conspicuous example of a discrepancy. Indeed counsel after some timely advice from the learned trial judge who intimated that he was not stopping him, called a halt to that line of questioning and proceeded to another point.

Our analysis of the discrepancies which Mr. Nelson has brought to our attention does not in our view, lead to the result for which he contended before us. We have already noted that the cross-examination largely was confined to isolating discrepancies between evidence at the preliminary examination and evidence at trial. We do not think a defence is likely to succeed when it depends on such a base. Cross-examination as to previous inconsistent statement can be but one shot in the armoury of counsel. We have said enough to show that the grounds argued on behalf of the applicant Garfield Peart must fail.

In our judgment, there was evidence fit to be left to the jury that both applicants were involved in the murder of Derrick Griffiths. Andrew's role was to lure him to an ambush and secure him so that his brother Garfield and other unknown men could shoot him. The critical issue before the jury related to the identification evidence and the credibility of the sole eye-witness. The Crown relied on the intimate knowledge of the applicants by Walsh. There was adequate lighting for the purposes of recognizing first, Andrew Peart, who came to the Bingo game to summon the victim. Both applicants were in close proximity to the witness for some period of time. Andrew was responsible for trussing up the witness while Garfield was present. Then a further incident occurred in which both applicants played some part. These events, despite the absence of any artificial lighting, provided an opportunity for recognizing and identifying the applicants. The

jury were entitled on the evidence before them to reject the alibi defence and the suggested motive for "framing" the applicants. Neither applicant could deny their frequenting Wildman Street, a location in the area of Text Lane where Walsh lived. We can find no reason to interfere with the verdict of the jury which was justified on the facts.