JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS. 136 & 137 OF 1989

BEFORE: THE HON. MR. JUSTICE ROWE - PRESIDENT
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA

VS.

COURTNEY JAMES
DEVON BLAIR

Dorrell Wilcott for the Applicant James

Delroy Chuck for the Applicant Blair

Brian Sykes for the Crown

March 4 and 18, 1991

ROWE P.:

Joseph Boxhill, (the deceased) was an itinerant salesman on his own account who drove throughout the plains of Clarendon in the company of his assistant Manley McLeod, to vend his merchandise from shop to shop, house to house and to the occasional passerby. He was so engaged on the afternoon on November 6, 1987 at about 5 p.m. in the Rhymesbury district of Clarendon. The deceased drove a blue Dodge Avenger motor car operated from the right hand side and seated beside him was McLeod. A man carrying a box in his hand approached the car and motioned it to stop. As the deceased brought the car to a standstill that man asked for Cock Chicken Noodle. McLeod turned away to select the item and in the act of looking up he heard the explosion of a firearm and saw a second man pointing

a short gun directly at the deceased. Next McLeod observed blood "spring" from Mr. Boxhill's chest. He grunted once, slumped sideways over the steering wheel to which he clutched and lay there mortally wounded.

The two men were then beside each other and the gunman demanded money and gun. He said: "Hey boy, whey the gun and the money?" Together both men approached the side of the car where McLeod sat and the gunman placing the gun against McLeod's chest ordered McLeod to take money from the deceased's pocket and hand it to them. McLeod remonstrated: "Look how you kill the man and you want come kill me now." Defiantly, McLeod hit the gun away from his chest only to hear an explosion and to realize that he was shot through his side. The bleeding weakened him and to further demands for money, he rifled the deceased's pockets and handed the cash to the man who had stopped the car. Both men entered the canefields.

Clinton Boxhill, a son of the deceased, visited the scene, observed that his father appeared dead, later saw his dead body at the Johnson Funeral Parlour in Four Paths, and on November 12, 1987 he identified the dead body of his father to the pathologist Dr. Allison, who performed a post-mortem examination. At the trial of the applicants there was no medical evidence of the cause of death.

McLeod identified the applicant Blair as the man who motioned the car to stop, who ordered the Cock Chicken Noodle and to whom the money from the deceased's pocket was handed. McLeod identified the applicant James as the man whom he saw holding the gun at the deceased, the man who made the demands for money and the man who held the gun against his chest. Both men came within touching distance of him and remained on the scene for some fifteen minutes. McLeod who identified James on an identification parade on January 23, 1988 said he had seen James once before

November 6, 1977, and that was some three weeks earlier at the shop of "Massa D" at Rhymesbury, which was the last business place at which the deceased had stopped on the afternoon of his murder. He had not known the applicant Blair previously.

Desmond Daley was the second eye-witness called by the Crown. He testified that he knew the applicant Blair for 6 - 10 years in the Rhymesbury area by the name of Charlie and he knew the applicant James by the name Crook. On November 6, 1987 he saw both men on the Pump Road at Rhymesbury at 4:10 p.m. They were then fifteen chains away from him, one in the road and the other on the canal bank. Charlie carried a carton box to the back of his head leaving his face unobscured. Daley had earlier observed the deceased enter and leave "Massa D's" shop and saw him drive along the Pump Road. Daley heard two explosions which he mistook for exploding tyres. Soon thereafter he observed Charlie, that is the applicant Blair, leaning against the deceased's parked car and behaving as if he was tugging at something in the car. Later on he observed the witness McLeod running from the car, crying for help. Not wishing to get involved, Daley said he ran away. Daley denied suggestions put to him in cross-examination by counsel for the applicant Blair that he had malice against Blair whom he had cheated out of ten bags of cement consigned to him by the Public Works Department for the benefit of Blair while both Blair and himself were engaged in separate contracts to repair canals at Rhymesbury.

Police witnesses testified for the prosecution. In the course of the investigation, the applicant James is alleged to have given an oral and a written statement, under caution, to the police. Detective Sergeant Wilston Bennett said that he attended at the Four Paths Police Station on November 8, 1987 and there in the presence and hearing of the applicant James, one Sergeant Graham said that James was present in Rhymesbury when Mr. Boxhill was shot and killed. To this statement James

responded: "A true sir, a Ribbit do it." James expressed a desire to give a written statement and after the customary cautions were administered, James' statement was recorded. After a trial on the voir dire, Panton J. admitted the statement as a voluntary one. James in that statement gave details of the plan to rob the salesman but sought to place the applicant Blair in the leadership role. James placed himself on the murder scene, accepted responsibility for stopping the car, agreed that he was present when Mr. Boxhill was shot and that he shared in the proceeds of the robbery but did not admit that he fired the firearm.

On November 11, 1967 in continuation of his investigation, Detective Sergeant Bennett spoke to the applicant Blair at the May Pen Police Station. Blair is alleged to have been most anxious to co-operate with the police. When cautioned at the Police Station he declared:

> " '... them say a me kill the man down - the salesman down a Rhymesbury: a Crook do it. Me a ask you fi mek me give you one statement and show you how everything go, and you can carry me before the judge mek me declare myself because a no me kill the man'."

In due course Blair gave a cautioned statement which contained details of the planned robbery, of the steps taken to effect the robbery, of his trick to encourage the salesman to stop and of the shooting which was the act of his accomplice.

Both in the voir dire and again before the jury the voluntariness of the statements of both applicants was challenged by the defence. On behalf of James it was alleged that the police officer presented a pre-written statement to an illiterate accused person who was then in terror of the presence of five armed policemen and who had been severely beaten, kicked to the ground, stood upon by a policeman, and in these circumstances

although he signed, it was a worthless document. In respect of the applicant Blair, the defence allegations were that at the May Pen Police Station the officer wrote a statement without any instruction from the applicant Blair, which Blair refused to sign although the police threatened to murder him. Blair was then taken to Four Paths Police Station where the threats to murder him were repeated. This led Blair to sign the statement. As we said earlier at the end of the voir dire Panton J. ruled the statement of each applicant voluntary and admitted them in evidence.

James' defence was a denial of the charge, a denial that he made a written voluntary statement and an attack upon the integrity of the identification parade. This was the gravamen of his unsworn statement. He called no witnesses.

Blair, too, gave an unsworn statement. He protested his innocence, accused the police of extracting his signature to a written statement through extreme violence including torture and challenged the fairness of the identification parade, alleging that the officer conducting the parade assisted McLeod to identify him.

After a summing-up of just over two hours, the jury found both applicants guilty of murder as charged. Manslaughter had been left to the jury as an alternative verdict in the event that they were satisfied of the presence and participation of one or both of the applicants in the robbery but were unsure of the specific intent to kill or to cause serious injury. By their verdict the jury must have found the requisite intention for murder.

Mr. Wilcott filed and argued five grounds of appeal on behalf of the applicant James. Ground 1 complained about the quality of the identification evidence. Manley McLeod it was said had one brief previous opportunity to see the applicant James three weeks before November 6, 1987 and on that occasion

there was no special reason for remembering him. Further on November 6, McLeod would have made his observation in stressful conditions and in the late afternoon after a downpour which would render the lighting conditions indifferent. It was also contended that the description given to the police immediately after the murder was not compatible with the physical appearance of the applicant James. McLeod had described the gunman as black and smooth of face. James although black had "bumps" on his face. Nevertheless Counsel for James was compelled to concede that "smooth face" is used as the opposite to "bearded face", and not normally to texture of skin. An additional point advanced in support of this ground was that the identification parade was held some seventy-four days after the date of the murder and that this passage of time would impair the ability of the witness to make an accurate identification.

We do not find references to R. v. Keane [1977] 65 Cr. App. R. 247 or R. v. Breslin [1984] 80 Cr. App. R. 226 apposite to the facts and issues in this case. The trial judge who had before him the positive assertion of the witness McLeod to the effect that the deceased's assailants came within touching distance of the witness, spoke to him, and remained in close contact with him in broad day-light for some fifteen minutes, could not properly treat McLeod's evidence as a fleeting glance which would warrant withdrawal of that evidence from the jury's consideration. In so far as Mr. Wilcott complained that the trial judge did not sufficiently explain why the caution was necessary in visual identification cases and that he failed to assess or examine the weaknesses in the identification evidence it is sufficient to refer to a passage in the summation at pp. 401-403:

" Now, he went further and told you that the incident lasted about fifteen minutes from the time Blair waved down the car until they went in the cane-piece and you need to consider that evidence Mr. Foreman and members of the jury, you need to consider it very carefully, because identification is a very crucial issue in this case, it is a crucial issue in this case. The case against the accused rests in part on the correctness of the identification of each accused. The defence is saying that the identification in each accused is mistaken, that is what the defence is saying, this is a case of mistaken identity, you have the wrong men. Indeed learned attorney Mr. Lyn Cook, in his address to you, you will recall, said what he would like the police to do is to go and find the right men. Because he is saying police have brought for trial before you, the wrong men, so I am warning you Mr. Foreman and members of the jury, of this special need for caution on your part before convicting in reliance on the correctness of the identification. The reason for this is that it is quite possible for an honest witness to make a mistaken identification and indeed notorious miscarriages of justice have occurred in some countries of the Commonwealth, some countries of the Commonwealth as a result of mistaken identification and for this reason a mistaken witness can be a convincing one and even a number of apparently convincing witnesses can all be mistaken. So, you need to examine carefully the circumstances in which the identification is made by each witness in this case, that is McLeod and Desmond Daley. You need to examine it, look on, for example, how long they had the individual under observation; how far away, what light. You remember the defence have been suggesting to you that ten to five in Jamaica in Rhymesbury, the light might have been bad, that is what the defence is saying, the light may have been bad. You have to take that into consideration, so McLeod with tears in his eyes, darkness around, at ten to five and so on, may have been mistaken and you bear in mind the distance too, bear in mind the distance because obviously the closer you are,

> "the better it may be to see; the farther you are the more difficult it may be for you to see; these are matters for you to consider. You bear in mind McLeod's evidence as to distance of a foot from the car and you also consider whether there was any impediment to vision.
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> Remember there was cross-examination of Mr. McLeod as to whether in their driving during the day, dust had not settled on the windscreen to make it difficult to view anybody through it. Take all that into consideration. And McLeod went on to tell you that he saw the whole of James, from waist to head, he indicated. When James asked for gun and money, he had bent down and was peeping in the car; saw his face then, it is for you to consider Mr. Foreman and members of the jury, whether McLeod is making this up or whether he is mistaken."

We are entirely satisfied that the trial judge diligently performed his duty to the jury and in the advancement of justice in the above directions. Ground 1 therefore is, in our view unmeritorious.

There was evidence from the prosecution that the applicant James was arrested on November 11, 1987 for the murder of the deceased and that from then on he was from time to time transported from Four Paths to May Pen in connection with the case. The witness McLeod said he attended Court in May Pen from time to time. This led Mr. Wilcott to submit to the jury and to this Court that McLeod had an opportunity to view the applicant James on the occasions when James was taken to Court prior to the identification parade. Although there was no direct evidence that this opportunity did present itself, the trial judge charged the jury at p. 420 of the Record thus:

> "..... there is one area that I should mention before, which I did not mention, and it has to do with the holding of the identification parade after the accused men had been exposed to the public.

> "Now, there appears to be some irregularity there. Indeed, there is some irregularity there, an accused person, a suspect ought not to be exposed to public view after apprehension and before he has been pointed out on a parade. If it is intended to have an identification parade for a person, a suspect, that person should be kept in circumstances where members of the public would not have an opportunity to view. In this case, the evidence is that, the evidence and I think it came from Sergeant Graham, is that the accused men were brought to court on several occasions between apprehension in November and the identification parade in January. That is an irregularity.
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> Now, with that in mind, you have to be very careful in considering the evidence of identification, because although there is no evidence that McLeod saw these men while they were on their way to court, or in court, it is not something that can be ignored and you ought to consider whether McLeod, or Desmond Daley who give evidence of identification, whether the accused men were exposed to them. You have to consider how you are going to deal with their evidence in the light of this irregularity. If you are satisfied that McLeod did not see them during that period, and you have no doubt on that, then you can act on the evidence of identification of the parade as he gave it and the same goes for the witness Daley. But, if you find, or if you find that you are not satisfied, you are not sure about that area, then you ought to resolve any doubt in favour of the accused on that point."

There is no inevitability about a suggestion that a potential witness who attends a busy Court will see the accused persons who come up for remand in custody. Panton J. gave directions which were sufficient to alert the jury to the necessity to take a position on the reliability of the eye-witnesses and to reject their evidence out of hand if the jury were of the view that these witnesses might have had unfair assistance in identifying the applicants. On the state of the evidence this is what he was required to do.

Ground 3 was quite worthless. On the evidence the witness Daley gave a statement to the police two days after the murder and the fact that he was not a witness at the Preliminary Enquiry cannot affect the credibility of the facts contained in that statement. Panton J. gave an adequate direction to the jury about the ability of Daley to recognize anyone at a distance of fifteen chains when he said:

> "He said at that time Blair was about fifteen chains from him when he saw him, and learned attorney for Blake queried how anyone - and learned Counsel for James, too, queried how anyone could see and recognise anybody fifteen chains away. That is a matter, Mr. Foreman and members of the jury, for you to consider, whether Daley really saw them and recognized them or he just saw two figures whom he suspected were they. This is a matter for you to consider."

The trial judge did go on to say that if the jury found McLeod to be a witness of truth as to what he saw happen on the Pump Road that would assist them in their assessment of the credibility of Daley.

Sergeant Hinds who conducted the identification parades for the two applicants in the course of cross-examination expressed the opinion that it was unusual for an identification parade to be held after an accused person was arrested and charged for a specific offence and that if one was done subsequent to the arrest it would indicate uncertainty in the minds of the police as to the identity of the malefactor. Sergeant Hinds had absolutely nothing to do with the investigation of the crime in the instant case and his sole function was to hold the identification parade, upon request, by the investigating officer. His opinion as to the circumstances in which an identification parade could properly be held was irrelevant to any issue in the case, ought not to have been elicited and cannot form the

basis of a complaint that the jury were not asked to speculate upon the reasons for holding an identification parade in January 1988.

Ground 5 complained that:

> "... the circumstances under which the Caution Statement of James was taken by Sgt. Bennett on the morning of November 8, 1987, were such as to render the conditions oppressive: that both the conditions and the circumstances under which the Statements were taken, were such as to sap the will of the appellant - R. v. Clearly [1963] 48 CAR 112."

For the purposes of this submission Mr. Wilcott said he was not relying on any allegation that the applicant James was mal-treated by the police but rather upon the fact that Blair was questioned by the police for two hours twenty-five minutes in a Police Station. That he said was enough to sap the will of the applicant Blair and to render the statement obtained at the end of such questioning involuntary as being unfairly extracted from him.

In our view there was nothing in the prosecution's version of the interrogation which could be termed oppressive. The mere length of the questioning, i.e. some two and a half hours, cannot be said to be inordinately long and would inevitably lead to the making of any statement which would bring relief from his "tormentors."

This was a case in which the applicant James was positively identified by the witness McLeod. Corroborating McLeod was the caution statement of the applicant James. Panton J. invited the jury to reject the evidence contained in the caution statements if they believed that these statements were extracted through force, threats or promise. At page 411 of the Record he said:

> "Then Sergeant Bennett gave evidence and he told you .... that he is a Detective Sergeant at Area Three Headquarters and his duties take him to St. Elizabeth, Manchester and Clarendon. Much has been made of it by learned attorneys for the defence, in that they are putting for your consideration, that Sergeant Bennett is a specialist caution statement taker and that the moment you have any case like that, like this one, he is brought into play and he extracts statements from men in custody to present before jury, judge and jury for consideration. That is what the defence is saying. If you find that Sergeant Bennett in this case extracted any statement, that he used any force, any threat, or made any promise to any of the accused to get them to make the statement, your duty is to ignore the statement and ignore Sergeant Bennett's evidence. If you are not sure about it, ignore his evidence, disregard it, disregard the statement, if you are not sure. Once you have any doubt at all in this case, doubts are to be resolved in favour of the accused."

Crown Counsel by his intervention at p. 423 of the Record considered that the judge's directions on voluntariness were too favourable to the applicants, but the trial judge repeated his stand that wherever there was doubt the benefit thereof should enure to the accused.

The cumulative effect of the evidence of the eye-witness, the caution statement and the directions to the jury lead this Court to the conclusion that there is no merit in any of the grounds of appeal filed and argued by Mr. Wilcott. The application for leave to appeal by the applicant James is refused.

Mr. Chuck who appeared for the applicant Blair did not file any grounds of appeal. He submitted that having read the transcript of evidence and the summing-up and having considered the manner in which the trial judge dealt with the issue of

identification, in the light of the caution statement which was admitted in evidence after strong argumentation by defence counsel, he could find no reason to disturb the judge's finding that the statement was voluntarily made. In the circumstances there was nothing that he could usefully argue.

We share counsel's view. As we said earlier, and now repeat for emphasis, Manley McLeod identified the applicant Blair as the decoy who stopped the deceased and ordered the Cock Chicken Noodle, as the man to whom he handed the money taken from the dead man's pockets and as the man who had been carrying the carton box. Weak though it may be, McLeod's evidence received support from the witness Daley and was powerfully corroborated by the unsworn statement of Blair. Directions by Panton J. on all the relevant issues were clear and helpful to the jury. This application for leave to appeal is therefore refused.