JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 105/92

COR: THE HON MR JUSTICE CAREY J A
THE HON MR JUSTICE WRIGHT J A
THE HON MR JUSTICE WOLFE J A

REGINA VS DEVON SIMPSON

Lord Gifford Q C & Maurice Manning for applicant

Miss Carol Malcolm & Miss Audrey Clarke for Crown

13th, 14th, 15th April & 9th May 1994

CAREY J A

On 6th November 1992 after a trial which had begun in the Circuit Court Division of the Gun Court on 27th October before Paul Harrison J and a jury, the applicant was convicted of the capital murder of Cecil Cockett and Donovan Cockett and sentenced to death. Although counsel for the Crown (not counsel who appeared before us) assured the trial judge that the murders were non-capital, she did at a later stage of the trial apply, pursuant to directions of her superiors, for an amendment to charge capital murder. This procedure has been made a ground of appeal with which we must deal hereafter.

The facts and circumstances which were quite straightforward, showed, as Lord Gifford Q C accepted, that the applicant made a dreadful attack on the Cockett family which resulted in the deaths of the father, Cecil and his son Donovan and a shot which missed its mark being fired at another family member. This attack followed upon threats to wipe out the family, issued by the applicant shortly before this incident. all the eye-witnesses were members of the Cockett family, viz. George Cockett a son of Cecil, another George Cockett, a nephew and Simon Cockett also a nephew of Cecil Cockett. All confirmed that the applicant

went to Cecil Cockett's shop where he shot father and son and demanded to know - "where is the next one."

This was a recognition case in which all three witnesses stated that they knew the applicant prior to the murder for approximately six months and the applicant acknowledged that fact. The lighting, so far as it went, although it could by no means be regarded as ideal, was certainly adequate to allow for reasonable identification.

All the witnesses had ample time to observe the applicant as he stood in the roadway and fired into the Cockett's shop in which there was a lighted lamp, went up to a window of the shop, and thus closer to one of the witnesses (George Cockett (the construction worker)). At one stage he was even observed to re-load his firearm. Plainly, this was not a fleeting glance case. It is right to point out that Lord Gifford Q C did not attempt to challenge the verdict on the footing that it was unreasonable or could not be supported having regard to the evidence.

So far as the defence went, the applicant as is customary in this jurisdiction, made an unsworn statement in which he denied responsibility for the shooting deaths of members of the Cockett family. He suggested that there was malicious feeling towards him on the part of the family who seemed to think he was an informer.

We can therefore say that there certainly existed a strong case against this applicant once the jury accepted the witnesses as truthful.

The challenge mounted against conviction was on other grounds. First, it was said that an application made to discharge the jury should have been heard in their absence. Next, it was urged that the directions of the learned trial judge on identification, albeit a model in many respects, contained a fundamental flaw in that, he did not direct the jury that mistakes in recognition are sometimes made. Further his warning as to the

caution with which identification evidence should be approached, was diluted by his comment that "it was more likely that they (the witnesses) would observe and recognize him if they see him subsequently as distinct if they were seeing him the first time." Finally, it was argued that the applicant was never in fact arraigned for the offence of capital murder and should not therefore have been convicted or sentenced for that offence. Alternatively, the trial judge erred in permitting the indictment to be amended so as to charge capital murder.

As a matter of convenience, we will deal first with Lord Gifford's submissions on the issue of identification. Is it necessary always to direct the jury that mistakes in recognition are sometimes made, and in the absence of such a direction, is an appellate court constrained to allow the appeal?

The law is now well settled that it is only in exceptional cases that an appeal against conviction based on uncorroborated identification evidence will be sustained in the absence of a warning on the inherent dangers of such evidence. **Junior Reid v The Queen** [1990] 1 A C 363. A judge is required to:

(i) warn the jury of the dangers of convicting on uncorroborated identification;

(ii) point out the reasons why the warning is necessary bearing in mind the Australian case of **R v Dickson** [1983] 1 V R 227.

On the basis of **Michael Beckford & Ors. v The Queen** (unreported P C 23/92 delivered 1st April 1993, a trial judge is required to give the general warning even in recognition cases. As was stated in the judgment of the Privy Council at p. 8:

> "The first question for the jury is whether the witness is honest. If the answer to that question is yes, the next question is the same as that which must be asked concerning every honest witness who purports to make an identification, namely, is he right or could he be mistaken?"

It seems to us that what the authorities make clear is that the judge is not required to invoke any incantation or resort to a precise verbal formula. The judge is not a human tape-recorder, who when activated plays the appropriate tape. In the United States of America the directions to a jury have been reduced to a formula which the trial judge and the attorney agree from a compilation of directions and which the judge duly incants to the jury. Even in the United Kingdom the Judicial Studies Board has a compilation of directions but so far as we know, no judge is constrained to follow them: they are guidelines, models if you will.

The summing-up has to be custom built, tailor-made to suit the jury which is determining the guilt or innocence of the accused. The jury must at the end of the day, be made alert to the dangers of <u>mistaken identification</u> whether of a stranger or an acquaintance, a friend, or a relative. We emphasize mistaken identification because it seems to us that when the judge warns a jury of the dangers of convicting solely on visual identification evidence, he is not excluding recognition evidence. If it were not so, the warning would be entirely otiose. But of course, the directions in this regard in any summing-up must be viewed as a whole to ensure that the warning is given and the reasons therefor clear.

In the instant case, the learned trial judge did give the required warning and stated the reasons for the warning. At p. 474, he expressed himself in this way:

> " Now the prosecution base its case on the evidence of these eye-witnesses, and eye-witness acounts are what you have in this case and it is what you have to use, but I have to warn you that this eye-witness account which is called visual identification, what a witness said he saw, has to be treated with very great caution - extreme caution, when you are examining it and that is because judicial experience has shown that sometimes people are convicted on the mistaken identification of an eye-witness, a

> man said I saw, and in some cases it has been proven that even honest witnesses can be mistaken. That is they honestly believe that they saw what they say they saw when it is not so. So you approach it with extreme caution because a witness may say something quite convincingly to you in the witness-box but he may be mistaken. And, several witnesses can also be mistaken, so you examine evidence very carefully seeing that it is visual identification. But, even though it is visual identification, if you believe that the witness is speaking the truth or the witnesses are speaking the truth, then you can act on their evidence and say what you find."

The complaint levelled in respect of these directions is that the trial judge did not say mistakes in recognition cases are sometimes made. We think that these directions were tailored to the facts and circumstances of the case the jury were called upon to hear. By the use of the words "the prosecution based its case on the evidence of these eyewitnesses" - followed by the warning, a reasonable jury in this country could not fail to understand but that the eyewitnesses in the case before them could be mistaken. The jury would recall (and indeed were reminded by the trial judge) that these eyewitnesses all said they had seen the applicant over a period of approximately six months. They were therefore concerned with a recognition case. As we understand the authorities, the judge is not bound to tell the jury expressly that mistakes are sometimes made in a special type of case called "recognition cases" but he is obliged to bring home to them the fact that mistakes are made in identification evidence cases and the reason for the susceptibility of that category of evidence to error. In the context of this case, we cannot agree that there was any failure whatsoever in the respect identified by Lord Gifford Q C.

Learned Queen's counsel identified at p. 475 what he described as another defect which he said blunted the trial judge's warning on the dangers of identification. The impugned statement appears in the directions which we quote:

> " Now, in examining the evidence of visual identification you look at what you have been told, what was the state of the lighting, was the accused man known by these witnesses before because you might find that if the accused man was known or had been seen by these witnesses before, it is more than likely that they would observe and recognise him if they see him subsequently as distinct if they were seeing him the first time. So you look and see if the witnesses had been accustomed to seeing the accused before and how often to decide whether they would have recognised him when they saw him that night. You also examine what opportunity they had to observe, what time they had to observe him and the circumstances under which they said they viewed the accused as well as the distance that he is alleged to have been away from them when they say they saw him. So these are matters that you put together to say whether the visual account - the eye-witness account of these witnesses, whether these accounts are accounts that you have to accept to decide whether the witnesses are speaking the truth."

A summing up is the spoken word; it is not an essay which a jury reads at its leisure. What is important, is its effect. In the extract, it is plain that the trial judge was laying before the jury the different considerations on which a determination of the accuracy of the eyewitnesses could be made. The observation that - "it is more than likely that they would recognize him if they see him subsequently as distinct if they were seeing him the first time," accords with commonsense. We think it is fair comment. But the matter did not end on that note for the judge then charged the jury to - "look and see if the witnesses had been accustomed to seeing the accused before and how often to decide whether they would have recognized him when they saw him that night." The underlying thought is the need for caution. Far from diluting the warning which he had correctly given, the learned trial judge, as it seems to us, was maintaining the need for caution having regard to the circumstances of the specific case before the jury. The jury were not being over-burdened with

all the learning on identification evidence in the several cases since **Junior Reid** (supra). They were told, as was correct, so much of the law as would enable them to appreciate the particular issue which arose for their consideration. We think, contrary to what was urged before us, that the comment was valid and cannot be faulted.

We turn now to deal with those grounds which are critical of rulings made by the trial judge in the course of the trial. The first relates to an application for the jury to be discharged made by defence counsel at the trial that the jury be absent during the hearing of the application. Lord Gifford Q C submitted that this amounted to a material irregularity because there was a serious risk of prejudice to the fair trial of the applicant. The jury, he argued, in listening to the attempt to unseat them, might take an adverse view of the applicant for reasons unrelated to the evidence. He submitted that notwithstanding that the ground of the application to discharge the jury was wholly unmeritorious, the fact that it was being made in their presence, did not detract from the possibility of prejudice to the applicant.

The matter arose in this way. During the course of the Crown's case, Crown counsel adduced evidence from a police officer, Detective Sergeant Cecil Thompson that he prepared warrants of arrest on information for the applicant's arrest for the charges before the court and for shooting with intent at Simon Cockett and illegal possession of firearm. Facts with regard to all three charges had previously been adduced at the trial as part of the Crown's case. No objection had been taken to the adduction of such evidence and indeed no objection could have been taken. The evidence was both relevant and admissible being an intrinsic part of the circumstances of the charge of murder. Objection was however taken to the tender of the warrants for the arrest of the applicant on the ground that the evidence was irrelevant. The learned trial judge acceded to that clearly

preposterous objection and ruled that the warrants could not be tendered. Lord Gifford Q C accepts that the objection was entirely unmeritorious.

Subsequent to this event, defence counsel intimated to the trial judge that she wished to make an application under section 45(2) of the Jury Act which enables a judge to discharge the jury - "...for (other) cause deemed sufficient by the judge..." on the ground that prejudicial evidence was placed before the jury. Perhaps it might be useful to recite what counsel said (p. 313):

> "My Lord, I wish to make certain submissions to Your Lordship before the witness goes in the witness-box, following the questions put to officer Thompson and the answers given yesterday during the morning session by Crown counsel relating to the warrants which were issued for the arrest of the accused man, which warrants were clearly stated by me in my objections to be unrelated and irrelevant to the charges before this court. I am making an application under Section 45 Sub-Section 2 of the Jury Act, before I go further My Lord."

This application was coupled with a request that the application should be made in the absence of the jury on the footing that:

> "... were the jury to hear all the details of my submission it would tip the scales against the defendant in their consideration of this matter because in detailing my submission I would have to go over what happened yesterday and mention full details of what occurred already."

The trial judge's sensible retort was that whatever had occurred previously, the jury had already heard. Despite that response, defence counsel maintained her application. The judge declined to hear her in the absence of the jury.

We can say at once that during the incident which gave rise to this application, the foreman had re-assured the judge that the jury had heard nothing. That should have been an end of the matter. There plainly was nothing prejudicial placed before

the jury and even if that so-called prejudicial evidence had been heard, it was in point of law, relevant and admissible as we have previously indicated. For reasons which are quite unclear to us, the trial judge did hear the application. He should, properly, have refused to entertain the application. The result of that was that defence counsel was allowed to give evidence of what she said was prejudicial evidence. At p. 318:

> "MRS. MACAULAY: Yes, My Lord, Crown Counsel stated in this court that the man had a gun in his hand and had been charged with Illegal Possession of Firearm. This statement was made loudly and boldly and if My Lord wishes I would ask to subpoena the lady who was sitting behind defence counsel to come and give evidence in this court. In fact, I would also ask that the stenographer be subpoenead to give evidence of what she heard."

The prejudicial evidence thus amounted to this, that counsel for the Crown had said that the man had a gun and had been charged with illegal possession of firearm. But that was in fact the evidence which had been led by the prosecution.

It is now said by Lord Gifford Q C that the application to unseat the jury based on that wholly unmeritorious ground prejudiced the jury and made the trial unfair. We cannot agree. Rather we think that the jury would feel a deal of sympathy for the accused who was burdened by such a legal adviser. The trial judge had a discretion whether or not he would hear the application in the presence of the jury. The question is not whether any member of this Court would have exercised it differently but whether it can be said, he exercised it wrongly. Has it led to an unfair trial?

There are occasions where the defence makes an application to discharge a jury on the basis that some person has been seen talking to a member or members of the jury. The judge must

necessarily hold an enquiry and the jury are well aware that the application is to unseat them. There can be no inflexible rule of general application that once an application is made to discharge a jury, that it must be made in their absence. The exercise of that discretion must depend on all the circumstances of the case. In this case, no prejudice could have been occasioned to the jury by what was regarded as prejudicial evidence and any application made on that basis for the jury to be discharged could hardly result in any prejudice to the applicant. No member of the jury was being accused of any impropriety, falsely or otherwise. It is reasonable to ask on what foundation does any likelihood of bias or prejudice rest.

It would be quite wrong for an accused person to create circumstances for an unmeritorious application and then to argue in this Court that he was prejudiced because the judge chose to hear that unmeritorious application for the discharge of the jury in their hearing. We do not suggest that this occurred in the instant case but we cannot accept that a party should benefit from absurdity. We cannot perceive any unfairness or prejudice to the applicant in the jury having heard the submissions.

We pass then to the final ground on the issue of capital-murder which, we think, is of some substance.

Lord Gifford Q C divided this ground like Caesar's Gaul into three parts. He said, the procedure was all wrong. He submitted that the conviction for capital murder cannot stand seeing that the applicant was not arraigned on the charge of capital murder. He further said that the effect of section 2(4) of the Offences against the Person Act is that the indictment, as originally put to the applicant, should charge capital-murder if a conviction for capital murder is to be recorded.

We do not think there is anything of substance in these submissions. A judge is empowered to grant an amendment to <u>any</u> indictment at any stage of trial. Section 6(1) of the

Indictments Act provides as follows:

> "6.—(1) Where, before trial, or at any stage of a trial, it appears to the Court that the indictment is defective, the Court shall make such order for the amendment of the indictment as the Court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice, and may make such order as to the payment of any costs incurred owing to the necessity for amendment as the Court thinks fit."

Nothing in the amendments to the Offences against the Person Act preclude a judge from granting amendments to an indictment under the Act. No provisions against amendments are to be seen in the amending Act. It is really a matter for the exercise of a discretion given under section 6(1) of the Indictments Act.

The second limb of his argument was that the learned trial judge wrongly exercised his discretion because it was oppressive to face the applicant for the first time with the capital charge at such a late stage in his trial. He put his argument in this way. There was no new matter revealed by the evidence which would justify the prosecution in saying that the basis for the capital charge only became apparent at that stage. Indeed, he argued, counsel for the Crown informed the court that she was acting on instructions in making the application. Both on principle and on authority it was a wrong exercise of discretion. As a matter of common humanity the applicant should be informed that he was on trial for a capital offence at the outset and should not be faced without good reason with the late introduction of a capital charge: it gave the appearance of unfairness. He relied on R v Radley 58 Cr App R 394 where the headnote sufficiently sets out the law:

> " There is no rule of law which precludes the amendment of an indictment after arraignment, either by addition of a new count or otherwise. The amendment of an indictment during the course of a trial is, however, likely to prejudice a defendant. The longer the interval

> between arraignment and amendment, the more likely it is that injustice will be caused, and it is always essential to consider with great care whether the defendant will be prejudiced thereby."

For the Crown, Miss Malcolm contended that the learned trial judge had properly exercised his discretion. There was evidence to support the amendment to the indictment which was therefore defective.

We have no hesitation in saying that although the trial judge had the power to amend the indictment he exercised his discretion wrongly. The amendment sought in this case altered the charge to the more serious charge of capital murder and was made on the fifth day of a trial which lasted 6 days. En passant, we note that after the amendment was granted, the applicant was arraigned on the original indictment and not as he should have been, on the indictment as amended. In actual fact, therefore, the trial continued on the original indictment. It must be rare indeed when an amendment to an indictment is sought to aver a more serious charge. Usually it is sought and made where the new charge is of less or of equal seriousness. As was stated in **Radley** (supra) "... an amendment of an indictment during the course of a trial is likely to prejudice an accused person. The longer the interval between arraignment and amendment the more likely it is that injustice will be caused,..." per Lord Widgery at p. 403. If we are right as regards the typical sort of amendment, then the instant amendment, a fortiori made injustice inevitable.

We do not accept the argument that the amendment did not affect the defence of alibi. In our view, defence counsel was at liberty to cross-examine the witnesses for the prosecution on the issue of terrorism which the amendment had introduced. Lord Gifford Q C suggested that counsel on mature reflection might have wished to develop lines of cross-examination relevant to that issue, and therefore the amendment was a potential prejudice.

In the light of what we have adumbrated, the conclusion seems to us irresistible that the amendment was a manifest injustice to the applicant.

That conclusion makes it wholly unnecessary for us to consider whether there were facts which amounted to terrorism within the meaning of section 2(1)(f) of the Offences against the Person Act as amended. The result is that the convictions for capital murder cannot be allowed to stand and in substitution convictions for non-capital murder are substituted.

This brings us to the question of sentence in the case of multiple murders. Section 3(b) of the Offences against the Person (Amendment) Act 1992 deals with the matter in the following terms:

> " (1A) Subject to subsection (5) of section 3B, a person who is convicted of non-capital murder shall be sentenced to death if before that conviction he has—
>
> (a) whether before or after the date of commencement of the Offences against the Person (Amendment) Act, 1992, been convicted in Jamaica of another murder done on a different occasion; or
>
> (b) been convicted of another murder done on the same occasion."

It would seem to us that this provision contemplates two different situations. First, where a person who has a previous conviction of non-capital murder, is again convicted of non-capital murder, such a person attracts sentence of death. Second, where a person has been convicted of another murder done on the same occasion. Mr. Manning who made submissions on this aspect of the appeal submitted that section 3B(5) of the Act imposed a condition precedent to the death sentence being imposed. That section is as follows:

> "(5) A person referred to in subsection (1A) of section 3 shall not by virtue of that subsection be sentenced to death by reason of a previous conviction for murder unless—

(a) at least seven days before the trial notice is given to him that it is intended to prove the previous conviction; and

(b) before he is sentenced, his previous conviction for murder is admitted by him or is found to be proven by the trial Judge."

He argued that since the condition was not fulfilled, sentence of death cannot be imposed.

We do not think that can be right. Parliament having enacted sub-section (1A)(b), i.e. "been convicted of another murder done on the same occasion," must be deemed to be aware that if more than one murder is committed on the same occasion, those murders will provide material for different counts in the same indictment. The result would be one trial. To allow separate trials in order to give notice as required by the subsection, can only be regarded as oppressive. On the true construction of the subsection, the condition as to notice does not apply to the second situation which we identified as sub-section (1A)(b). Mr. Manning suggested that there was a lacuna in the provision. In our opinion, no lacuna exists. The purpose of the conditions imposed by section 3B(5) is to give notice that the prosecution intends to adduce evidence of his previous conviction, so that the accused may challenge it if he is so advised. In the situation contemplated by sub-section (1A)(b) an accused person would certainly be aware or would be advised by his counsel that he is amenable to the sentencing provisions in the Act.

In the result, we think that a judge would be entitled to impose sentence of death where an accused who has a previous conviction for non-capital murder, is again convicted for non-capital murder or where he is convicted on an indictment charging multiple murders.

For all these reasons, the application for leave to appeal is treated as the hearing of the appeal. The appeal is allowed and the convictions for capital murder are set aside

and convictions for non-capital murder substituted. Pursuant to section 3(1A)(b) of the Offences against the Person Act the sentence imposed is maintained.