

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 58 & 64/96

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.

REGINA
vs.
DONOVAN PATRICK
LEROY COX

C. J. Mitchell for Donovan Patrick

D. V. Daly, Q.C. and Maurice Saunders for Leroy Cox

Kent Pantry, Q.C. and Miss Lisa Palmer for the Crown

March 10, 11, 12, 13 and 21, 1997

BINGHAM, J.A.:

On 9th May, 1996, following a trial in the Circuit Court Division of the Gun Court held in Kingston lasting from April 29 to May 8, before Ellis J and a jury, the two appellants were convicted of capital murder arising out of the death of Garfield Grey on 8th March, 1994, and sentenced to death.

Although some twenty-three grounds of appeal were filed in respect of the appellant Leroy Cox and three in respect of the appellant Donovan Patrick, leave was granted for counsel to argue eleven and three grounds respectively. Of the grounds filed by Mr. Saunders for Leroy Cox in argument, four of these

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grounds were found to be devoid of any merit and call for no further consideration in this judgment.

The facts may at this stage be summarised: Babsy Grey lives at the family home at 12 Donmair Avenue, St. Andrew, a volatile area known as "Black Ants Lane". On 7th March, 1994, she encountered the appellant Donovan Patrick known to her as "Prento". He promised her to "get even with Garfield (the deceased) for having dissed him."

On the following day Garfield Grey visited the family home. His visit did not pass unnoticed. Donovan Patrick, true to his word, and accompanied by another man identified to be the appellant Leroy Cox, arrived at the Greys' family home. Both were armed with short guns. They announced their appearance by discharging a shot while at the front of the premises. Garfield who was then by a window to the front of the house ran to the back of the premises. The appellants entered the yard and gave chase in the direction that Garfield had run. Their chase led to a wall at the rear of the premises where they searched the area without locating the deceased.

They then proceeded to the house where they went first to a back room occupied by the deceased's father. Shots were fired into this room. The deceased who was in the room then jumped over a partition to another room situated to the front of the house and took cover underneath a bed in that room. The two gunmen then went around the house to this front room at which stage the appellant Cox lifted up the bed in this room and the appellants fired shots from their firearms until the magazines were emptied of bullets. They then

reloaded and proceeded to discharge their weapons under the bed and destroying some figurines in the room. This latter conduct on their part forms a ground of complaint which is common to both applications as it relates to the validity of the convictions of capital murder. This complaint will be left for consideration later in the judgment.

Having completed their task, the gunmen then left the premises. The deceased seriously injured from bullet wounds attempted to rise but fell back to the floor mortally wounded. He later succumbed to his injuries at the Kingston Public Hospital.

A post mortem examination was performed on his body on 20th April 1994, some 52 days after his death. The doctor observed three gunshot entry wounds to the body of the deceased, to the top of the left shoulder, the left side of the neck and to the right buttock. The doctor opined that the cause of death was due to shock, haemorrhage the result of the serious injuries caused by the bullets from the firearms.

The investigating officer Detective Corporal Norman Smith came to the scene of the killing the following day and a report was made to him. He collected statements from witnesses and recovered 9mm spent shell and warheads (bullets) from the rooms where shots had been fired. He also observed the areas of the premises where the shooting had taken place.

On 29th July, 1994, following a raid in the Black Ants Lane/Donmair areas the appellant Leroy Cox was taken into custody along with other persons and detained at the Constant Spring Police Station. He was later identified there by

the witness Babsy Grey, (a sister of the deceased), from groups of persons who she saw picked up on the raid, as one of the gunmen who took part in the shooting of the deceased, and accordingly arrested on a warrant for the murder of Garfield Grey.

On 29th September, 1994, the appellant Donovan Patrick, commonly known to all three eyewitnesses as "Preto", was picked up by the police at a club in St. Andrew. He was taken to the Gun Court Remand Centre where he was arrested on a warrant charging him for the murder of Garfield Grey.

Both appellants gave sworn evidence in which each raised an alibi in their defence. Cox testified to being on his farm in St. Mary and Patrick gave evidence of doing construction work at his father's home in Hanover. They called no witnesses in support of their alibis.

The appeal of Leroy Cox

Mr. Daly, Q.C. argued Grounds 20-23.

Ground 20

The complaint here related to the subsequent identification of the appellant Cox by the witness Babsy Grey at the Constant Spring Police Station following the raid in the Black Ants Lane/Donmair area on 29th July, 1994. She testified to witnessing the raid and seeing persons picked up by the police which group included Cox. As a result she telephoned the investigating officer Detective Corporal Smith at the Constant Spring Police Station. He invited her to the station, (no doubt in an effort to see whether she could identify anyone). Having gone to the Constant Spring Police Station, she saw Cox among a group

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of persons taken up on the raid in the C.I.B. office. She then made a report to Corporal Smith which led to Leroy Cox being arrested on a warrant for the murder of Garfield Grey.

Mr. Daly, Q.C. submitted that the circumstances leading up to the identification of the appellant Leroy Cox amounted to confrontation on the officer's part rendering the evidence of the identification by Babsy Grey at the Constant Spring Police Station of little or no value whatsoever. As the evidence revealed that from the information available to the officer no names were given by the witnesses to the killing but aliases, an identification parade ought to have been arranged so as to test the ability of the witnesses to recognise and point out the persons who took part in the shooting on 8th March, 1994. As this course was not taken, the learned trial judge ought to have told the jury to disregard this evidence.

Counsel relied in support on **Regina v. Leroy Hassock** [1977] 15 J.L.R. 135.

Mr. Pantry, Q.C. for the Crown submitted that as the witness Babsy Grey was the one who was following the raid, contacted the officer and then went to the police station on her own volition, this did not amount to confrontation. With this latter submission, we are in agreement. Confrontation, as the facts in **Hassock** so clearly shows, means the bringing of a suspect or an accused person face to face with the witness against him. It is further of some significance that the appellant Cox in his sworn testimony made no mention of being confronted with Babsy Grey at the police station.

Side by side with this complaint was the contention by Mr. Daly, Q.C. that as the witness Babsy Grey in her written statement to the police had not given any names or aliases, referring to Leroy Cox, this also made the holding of an identification parade necessary.

In her statement, Miss Grey had described the person whom she later identified as the appellant Cox as "the other man" who took part in the killing along with "Prento" (Donovan Patrick). This complaint would have had some currency had the circumstances of the raid and the subsequent identification by the witness not occurred. In the light of this evidence, as well as the witnesses' testimony of having seen the appellant Cox before the incident regularly over a period of three to four years, the matter was in our view properly left to the jury as a credibility issue for their determination.

This ground, therefore, fails.

Ground 21

This complaint dealt with the manner in which the learned trial judge dealt with the discrepancies in the evidence of the prosecution witnesses Saunia, Harold and Babsy Grey. Such as they were arose mainly in relation to the case against the appellant Leroy Cox. Although Saunia Grey, from her evidence had the greater opportunity for observing and identifying the two assailants identified as the appellants, while recognising Donovan Patrick whom she had known for about 17 years, she testified to seeing the other man with the appellant Donovan Patrick for the first time on the 8th March, 1994, the day of the incident. Harold and Babsy Grey, however, testified to knowing the

appellant Leroy Cox before as "Chris" and "Esso" and identified him in court at the trial as being one and the same person going by these aliases. Singled out for challenging the adequacy of the directions of the learned judge were:

1. The period that the witness Harold Grey testified to seeing the appellant Leroy Cox prior to the incident when compared with his account given in his statement.
2. The evidence of Babsy Grey at the trial as to knowing Cox before the incident for three to four years by the name "Esso" while omitting to make mention of his name or alias in her statement to the police.

Such discrepancies as adverted to above and as they were went to the credit of the witnesses. The learned trial judge in treating them in this manner gave what, in our view, were clear directions aimed at assisting the jury to resolving the discrepancies, conflicts and inconsistencies such as they were in the evidence. His directions commenced at page 394 of the transcript. He said:

"Members of the jury, in a trial such as this, you will always find inconsistencies and discrepancies, or if you want to call them that, contradictions in the evidence given by witnesses. These discrepancies or inconsistencies or contradictions may be between one witness and another witness, or between what a particular witness has said on one occasion and what the witness says here. These discrepancies or inconsistencies, members of the jury, arise on cross-examination, the prime object of which ought to be a testing of the credit of witnesses. When a discrepancy is shown, it may be in your consideration so grave, that you think it erodes the credibility of a witness, to the extent that you can't believe him or her at all. If you so think, members of the jury, it is your duty to reject that witness' testimony entirely, or

in an area where you think his or her credit has been seriously affected.

On the other hand, your consideration of a discrepancy or inconsistency may show that it is slight. It does not go to the core or to the pith and substance of the case, or an issue in the case, or it does not affect the witness' credibility. If you so find, you may ignore the discrepancy or inconsistency. When you are considering discrepancies and inconsistencies, members of the jury, you are also to consider any explanation given for the discrepancy or inconsistency. If the explanation given by the witness is reasonable, that may lead you to treat the discrepancy as slight, or if you think the explanation is unreasonable, that may lead you to say that the discrepancy is serious." [Emphasis supplied]

The underlined words are of importance in relation to the evidence of Babsy Grey when confronted with her statement on cross-examination at the trial as to why there was no mention of the appellant as "Esso". Her explanation was that she was not asked by the police officer taking the statement as to what name she knew "the other man" with "Prento" (Donovan Patrick) as.

Such further directions which followed in this area were what may properly be regarded as the standard directions to be found in any criminal trial presided over by a judge sitting with a jury. Having examined the directions, we find that they were fair and adequate, having regard to the evidence adduced at the trial. This was a murder in which three occupants of a dwelling house witnessed the killing of their brother, carried out in broad daylight by two men armed with semi-automatic weapons who made no attempt to disguise their identity from their onlookers as they sought to carry out the murder.

We observe that on an examination of the record most of counsel's time in cross-examination of the eyewitnesses was spent on eliciting what may be properly regarded as peripheral matters having nothing to do with the material issues in the case. Such discrepancies as arose during this exercise went towards the creditworthiness of the witnesses for which the learned judge's directions were more than adequate.

Ground 23

The complaint in this area as well as Grounds 1 and 2 in relation to the complaint for the appellant Donovan Patrick may conveniently be considered together focussing as they did on the crucial issue of visual identification in the case. The authorities commencing with *R. v. Turnbull* [1977] 1 Q.B. 224; [1976] 3 All E.R. 549; [1976] 3 W.L.R. 445, and as revisited in *Junior Reid v. The Queen* [1990] A.C. 363 have laid down what amounts to clear guidelines which if not adhered to by the presiding judge will result in a conviction based on visual identification being quashed.

The complaints in relation to both appellants were directed at the inadequacy of the directions on visual identification both in relation to the warning given to the jury as well as to a failure on the judge's part in assisting the jury as to how to deal with the weaknesses in the identification evidence.

Of the three persons who testified to witnessing the killing of the deceased, two of them, Harold and Babsy Grey, gave evidence as to knowing both appellants prior to the incident. Saunia Grey, in her account, related seeing the other man for the first time on the day of the incident. Although as

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regards the other two witnesses, their purported identification was in the nature of a recognition this did not lessen the obvious need for what was a duty on the part of the trial judge to give clear directions aimed at assisting the jury to resolve this crucial question.

Having carefully examined the summation, we are firmly of the view that the learned judge, in his directions given to the jury, sought faithfully to adhere to the guidelines laid down by the authorities. His directions commenced at page 411 of the transcript. He first posed what was the crucial question to be determined in the case, then said:

"Now, who did this act which caused the death of Garfield Grey? The prosecution said the two accused men acting together are responsible. The prosecution says so because ... these men were identified as the persons who were present at 12 Donmair Avenue on the 8th of March, 1994. Now, the prosecution is relying here, among other things, on the correctness of the identification. From that, members of the jury, you will see - or I will tell you, that the case therefore against each defendant depends wholly and substantially on the correctness of a visual identification. That identification, members of the jury, each accused person has challenged to be mistaken ... I must therefore warn you, members of the jury, of a special need for caution when you are dealing with visual identification before you may convict in reliance on such identification. The reason for the warning, members of the jury, is that it is quite possible for honest witnesses to make mistakes in identification and miscarriages of justice have occurred because of that. A mistaken witness can be a convincing witness and even a number of convincing witnesses may be mistaken."
[Emphasis supplied]

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The underlined directions answered any complaint raised by counsel with respect to any possible inadequacy in the warning given to the jury and the reasons for it.

As to the factors which when present went towards supporting the quality of the identity evidence again there was no lack of assistance given to the jury.

In his directions at page 412, the learned judge there expressed himself in the following manner:

"You ask and look at the evidence which says how long has the person or persons who are identified been known to the identifying witness or witnesses. Secondly, you ask or consider from the evidence how long was the persons identified under the observation of the witness. You consider the circumstances under which the identification was made. That of necessity includes your considering the circumstances of light, what time, was there any impediment to the view of the witness who is identifying. You have to consider also how long before the incident - if the person was known to the witness how long before the incident was the person identified seen by the identifying witness. You also consider how long a time elapsed before a report of the person who was seen was made to the police or other authorities. ...

Side by side with those elements, members of the jury, you are constrained also to consider any possible weakness in the identification."

Having given clear directions as to how the jury were to deal with discrepancies in the evidence, the judge was not obliged to isolate and single out for special treatment every iota of evidence falling into this category. The case dependent as it was wholly on the purported identification of each of the appellants by the eyewitness, such weaknesses as they were, however, it was

incumbent upon the learned trial judge to identify and to give such assistance to the jury to enable them to determine the correctness or otherwise of the identification.

In approaching this matter, the learned trial judge singled out for the jury's attention the stressful circumstances of the occasion which was a factor common to the identification of both appellants. While commenting upon this as a possible weakness, he correctly left it to the jury for consideration as also being a factor which may have left a lasting and indelible impression on the minds of the witnesses in making a positive identification of the two gunmen.

Other areas of complaint directed at the testimony of the eyewitnesses were properly left to the jury to be considered as being in the nature of discrepancies going to the credit of the witnesses. Under this head would have fallen the evidence of Harold Grey that he had seen the appellant Cox whom he knew as "Chris" on two or three occasions prior to the shooting. Also to be considered was Babsy Grey's failure to provide the names by which she knew Cox. The judge's observations made, with respect to the directions on discrepancies, apply with equal force to this complaint. When the circumstances of the identification are looked at, however, the matter resolved itself as a credibility issue to be left for the determination of the jury. Although the situation existing at the time of the incident must have been frightening, having regard to the manner in which the killers went about their task, the witnesses had more than an ample opportunity for positively identifying them.

Accordingly, we find that there is no valid basis for interfering with the conviction.

The complaint as to capital murder

As previously mentioned, this ground of complaint is common to both appellants.

It is the contention of Mr. Daly, Q.C. that the conduct of the appellant Leroy Cox did not amount to a murder committed in the course or furtherance of an act of terrorism so as to come within the ambit of section 2(1)(f) of the Offences against the Person Act (as amended). The conduct of the gunmen, when looked at, showed a primary intention to kill Garfield Grey and their conduct on the day of the incident was of such a nature as to establish that the killing of Garfield Grey was their sole aim and no other.

Mr. Mitchell for Donovan Patrick adopted the arguments advanced by Mr. Daly Q.C. in support of Leroy Cox.

Mr. Pantry, Q.C. in contending for capital murder cited the unreported decision of **Leroy Lamey v. R.** in Privy Council Appeal 56/95 delivered on 20th May, 1996. There their Lordships Board said that what is called for to establish guilt on a charge of capital murder, would be something more than the mere frightening of the victim or occasional bystanders. Terrorism requiring as it does a double intent on the part of the assailants, the secondary intent being an act calculated to create a state of fear in the minds of the bystanders. All the circumstances must be taken together.

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The facts in the case revealed that having sought out and shot Garfield Grey, the killers turned their gun on articles in the house (figurines) and fired shots destroying them. This later conduct on their part, he argued, provided the secondary intent calculated to cause fear in the minds of the occupants of the Grey household sufficient to satisfy section 2(1)(f) of the Act.

We do not agree with Mr. Pantry's submissions.

Given the evidence adduced at the trial, we are of the view that it did not go far enough to establish a clear and equivocal act on the part of the appellants calculated to drive fear into the minds of the occupants at 12 Donmair Avenue. The appellants came to the premises, their sole intent and purpose being, to seek out and kill the deceased by shooting him to death. Having achieved their stated purpose they retreated from the scene. Their conduct may have resulted in fear being created in the minds of the occupants. It could equally have been the result of pent-up anger on their part, the result of a possible feud existing between themselves and the deceased. However much one may abhor and condemn their actions, there is no evidence pointing unequivocally to any conduct on their part aimed at harming or threatening harm or violence towards any other member of the Grey household.

We find that there is merit in this complaint. In the result, the convictions for capital murder cannot stand and convictions for non-capital murder are therefor substituted.

Conclusion

Having regard to the questions of law raised during the arguments, the applications for leave to appeal are treated as the hearing of the appeals which are allowed and the verdicts of capital murder and sentences of death are set aside. A verdict of non-capital murder is substituted in each case and each is sentenced to imprisonment for life.

The Court is now to hear from counsel as to that part of the sentence in respect of which the Court has a discretion in fixing the period to be served before parole can be considered in respect of each appellant.