JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 106/88

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (Ag.)

REGINA

VS.

JOHNATHAN SMITH

Mr. Delroy Chuck for appellant

Miss Carol Malcolm for the Crown

June 5 and 29, 1989

MORGAN, J.A.:

The appellant was found guilty on an indictment containing two counts that of illegal possession of a fire-arm and shooting with intent and sentenced to three and five years respectively at the Gun Court Division of the Clarendon Circuit Court on the 29th April, 1988. He was jointly charged with one Patrick Simpson who was discharged at the end of the prosecution's case on a no case submission.

On June 5, 1989 this appeal by leave of a single judge on grounds 1, 3 & 4 of the filed grounds of appeal was heard and after hearing submissions on his behalf by Mr. Chuck we allowed the appeal, quashed the convictions, set aside the sentences and ordered that verdicts of acquittal be entered. We promised to put our reasons in writing. This we now do.

The charges arose in this manner. Mr. Pusey, a farmer, owned two farms or "grounds" as he called them, at Teak Pen Forest in Clarendon. On the upper ground he built a hut made of wattle, zinc and thrash. On the 28th November, 1986 at about 9 a.m., along with two young men Courtney Walters and Robert Walker, he was working in the lower of the grounds when Robert left but shortly hurried back with some information. As a result Pusey walked uphill for about two chains towards his top "ground" and there he saw three men. One ran away. The other two, he said, were the appellant Smith and Simpson. Both had guns. He continued up and when he was about 60-70 feet away he called out "What happen". The appellant, whom he knew before, replied using indecent language. He then heard "boom" as both men fired. He fell flat on his belly. The other man aimed his gun at him so he ran, barefeet, far into the bushes injuring his feet. When about six chains away he heard the crackling of fire and from those sounds he concluded, which he later found to be correct, that his hut was on fire.

Pusey went to the road, Detective Walker came in a police car and he gave the name of the appellant to Detective Walker who took the witness to the May Pen Hospital where he was treated.

The witness Courtney Walters was unable to identify anyone as when he was walking with Pusey he saw only a gun and a hand over the top of the hut. He was frightened and he ran, and while running he heard an explosion.

On the 3rd January, 1987, Detective Walker arrested and charged the appellant Smith who after caution said "A no me fire the shot - a Siley".

The appellant in his defence denied the allegations and set up an alibi. He said he was a craft worker and on that day he was at home making baskets to take into

Kingston to sell on the following day - a Saturday.

The grounds which constrained the single judge to grant leave were:

> "1. The evidence of the witness Pusey was replete with contradictions and which were of such a nature as to render his evidence unsatisfactory and unreliable and to such an extent that it was unsafe and or unreasonable to have called upon the accused.
>
> 3. A verdict of guilty against me and not guilty against my co-accused Simpson would seem to be glaringly inconsistent because the court could not reasonable find that Pusey was unreliable in relation to Simpson but reliable in relation to me in respect to the same context of events where Pusey said we both had guns and endangered him.
>
> 4. The evidence in its full comprehension ought to have left the learned trial judge in state of doubt."

The central issue in this case was one of visual identification and the Crown's concern was to show that the witness had a good opportunity to view the attacker. In this regard the quality of the evidence of the witness was of paramount importance.

It was interesting to see how Mr. Pusey's evidence unfolded. In his examination-in-chief he said he recognised the men when 60-70 feet away. When ½ chain away Smith was hiding his face as he rested the gun over the top of the hut. This he clarified by saying "masking his face". Being urged further, he said he saw his face because the appellant had one eye and that what he saw was his hand on top of the hut.

The learned trial judge saw the confusion and no doubt thought he would clarify it, thus the following dialogue ensued:

"HIS LORDSHIP: So when was it that you were able to see Mr. Smith's face? When did you see his face?

WITNESS: A see'm face.

HIS LORDSHIP: You said he was stooping down.

WITNESS: Yeah.

HIS LORDSHIP: And holding the gun over the hut.

WITNESS: Yes, sir.

HIS LORDSHIP: Could you see his face at that time?

WITNESS: Y'rannah, please, a saw a part of him face, y'rannah, please. A saw only one of him eye like this, peeping up like this."

Crown Counsel then took over the examination but, no doubt feeling quite abashed, showed his frustration in his next question:

"Q: When him talk to you, man, when he used the bad-word to you, what part of his face you saw?

A: I don't see'm face that time; a only looking into the gun."

Crown Counsel concluded with the witness. But the difficulty to understand if and when he saw the face of the appellant was still apparent to defence counsel who sought further clarification. Pusey then said he was coming through the foliage of yam sticks and banana trees and what he was seeing was not so clear so he continued up about a chain and saw the men through the wattle of the hut dodging behind the hut. Then came this:

"Q: So from the moment you see Mikey (Simpson) or Johnathan Smith, from the first time your eyes put on him he have his gun out?

A: My eyes never put on Johnathan Smith, my eyes put on the gun and one of him eye peeping up like this."

Later Pusey was questioned about the appellant pulling his gun from his waist and this is how he chose to reply:

> "Well the first go up me go up, when the first see me see, me never see him face, me see the gun over the hut top like this, (indicates), me never see him face. ....."

His last exchange on this issue was:

> "Q: ... All during the time that Smith was supposed to be at your ground he was stooping down behind the hut?
>
> A: Yes, he was stooping down".

It is apparent to us that the witness hazarded a guess as to who the person was but it is not the business of the Court to find out if his guess was correct but for Pusey to satisfy the Court to the extent that it felt sure who the person was. He was consistent throughout that what in fact he saw was a hand, a gun, a right eye and that fraction of the face which included that eye and was not covered by the gun. On that evidence, in our view, there was no opportunity which afforded itself for Pusey to have seen a face so as to enable him to identify his attacker.

Additionally, the witness said that the appellant was peeping through the right eye as he was blind in the left eye. It was revealed by the appellant, however, that he had a bad right eye; that being so the appellant could not have been peeping from the right eye. It follows then that the manner in which the gun was held, as related by the witness and the peeping done, would not have been consistent with a good right eye as the appellant wrongly asserted; a factor which would be adverse to recognition.

Mr. Chuck submitted that a principal contradiction was as to the clothing being worn by the appellant. He pointed out that at first the witness said that the appellant was wearing a brown striped pants, immediately after

in answer to a question he retracted that statement and said he was referring to Simpson and not to Smith; that he did not know what Smith was wearing as he did not see "it" and later in cross-examination he said that it was a grey pants with white pin stripes.

This inconsistency was a further factor which posited to the unreliability of the witness and strengthened Mr. Chuck's submission that the admission by Crown counsel, in reply to the no case submission, as to the unreliability of the witness should extend to his unreliability as to the voice identification.

The learned trial judge adverted to the voice which Pusey said he heard and recognised. This he accepted as being supportive evidence only. He also alluded to the statement the appellant made to the police which was considered as an admission of his presence, but these factors alone are not sufficient in a case where the witness has given evidence which does not support the contention that he saw.

We have concluded that the witness was wholly unreliable and accede to the submission of Mr. Chuck that the learned trial judge should have upheld the no case submission in respect of the appellant.

Mr. Chuck's final submission was that the learned trial judge did not warn himself of the dangers of visual identification evidence. The latest authority for that proposition is to be found in the decision of the Privy Council in Barnes et al vs. The Queen and Scott et al vs. The Queen Nos. 2 of 1987 and 32 of 1986 (consolidated) at page 14 which states that where there is uncorroborated identification evidence -

> "there must be a strict insistence upon a judge giving a clear warning of the danger of mistaken identification which the jury must consider before arriving at their verdict and that it would only be in the most exceptional circumstances that a conviction based on uncorroborated identification evidence should be sustained in the absence of such a warning."

This dictum, therefore, is apposite to deposition evidence which has its deficiencies, for example, the witness not being available for cross-examination or observation as to his demeanour. In those cases, the absence of corroborative evidence and a warning, would be a fatal flaw which would inevitably lead to an acquittal. In any other case the rule in R. v. Oliver Whylie (1977) 15 J.L.R. 163, remains, that is, that there should be a clear warning of the dangers of mistaken identification when the issue in the case is that of visual identification. The absence of such a warning will then generally be regarded as fatal. We have looked at the summation, we find nothing to indicate that the learned trial judge warned himself of this particular danger.

Be that as it may, the case is one of visual identification and rested solely on the opportunity of the witness to see the person. There fell for special consideration, therefore, one of the chief features as adumbrated in R. v. Whylie (supra), that is, the opportunity to view his attacker.

In our view, the learned trial judge failed to give sufficient weight to the weakness of the identification evidence which ought at least to have left him in doubt, a doubt which would support our conclusion that the verdict was unreasonable and not supported by the evidence.

Cases referred to
(1) Barnett et al vs The Queen and D. Scott Hall vs The Queen Nos. 2 of 1957 and 31 of 1956 (consolidated) (Privy Council Decision)
(2) R v Oliver Whylie (1977) 15 J.L.R 163.