IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 18/92

BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A. (AG.)

REGINA

VS.

KEITH MCKNIGHT

Lord Gifford, Q.C. for Applicant

Lloyd Hibbert and Herwin Smart for Crown

October 13 and 14, 1993 and March 3, 1994

RATTRAY P.:

On the 23rd of March, 1991, a report was received by the police at the Rollington Town Police Station. As a result a party of policemen comprising Constable Winston Edwards, Constable Gillings and Constable Richard Wallace was despatched to premises 18 Windward Road, Kingston, otherwise called 'Bower Bank'. The police party was armed. These premises are a housing scheme. The senior constable in charge of the party was Constable Winston Edwards. The members of the party separated in different directions around a house in the scheme. Constable Edwards gave evidence that he heard two explosions sounding like gunshots coming from the section of the house to which Constable Richard Wallace had been deployed. Constable Edwards crouched and went into the direction in which Constable Wallace had gone. He came in view of Constable Wallace lying on the ground when he was about ten to eleven yards away from him. There was a man standing over the prostrate form of Constable Wallace. This man had a hand gun in his right hand and a M-16 in his left. The man fired two shots towards Constable Wallace

then lying on the ground. The man was dressed in a black shirt and dark pants. Constable Edwards had known the man for approximately three to four weeks and had seen him about a week before at that same address when he went there on enquiries. He had seen this man approximately six times and before that day had spoken to him on three occasions. He knew the man as 'Busta'. He called out to the man by the name 'Busta'. The man fired a shot at him. He was hit by the bullet in his left shoulder and neck and he fell to the ground. The man was the applicant Keith McKnight. Whilst he was on the ground the man fired several shots at the wounded Constable Edwards. However these shots did not hit the target. He was on the ground for about three minutes when the applicant was firing at him. He clearly recognised the applicant as the man who had fired the shots at the prostrate Constable Wallace and who also fired shots at him. He did not fire back at the man as he was frightened and nervous. In a crouching position the applicant walked backwards through a fence still holding both guns in his hands. The constable called for assistance. A crowd had gathered and two ladies came to his assistance and took him to the police jeep. A gentleman volunteered to drive him in the police jeep to the Kingston Public Hospital where he was admitted bleeding from the injury to his shoulder and neck. He had handed over his firearms to one of the civilians who came to his assistance. He gave the Report of the incident including the identification of the assailant to one Detective Sergeant Thomas. He next saw the applicant in the dock at the Gun Court.

Detective Sergeant Robert Thomas visited the scene of the shooting later that morning and recovered seven 9 mm. spent shells, eight M-16 spent shells and three pieces of a fragment of bullet, in an area of the premises where there was blood on the ground. The Sergeant later saw Constable Edwards at the Kingston Public Hospital bleeding from wounds to his left shoulder and neck and received from him certain information. He then visited the Kingston

Public Hospital Morgue where he saw the dead body of Constable Richard Wallace. The body had gunshot wounds to the neck, shoulder and back. He continued his investigation and prepared a warrant for the arrest of the applicant described as 'Busta'. He executed the warrant on the 5th of April, 1991, and arrested the applicant for the murder of Constable Wallace. After being arrested and charged for the murder of Constable Wallace and given the usual caution, the applicant said: "A so people seh". At the time of the execution of the warrant the applicant Keith McKnight admitted that he was called 'Busta'.

Constable Courtney Gillings, a member of the police party, gave evidence in support of Constable Edwards as to attending the premises and the dispersal of the members of the police party to different sections of the yard on different sides of the house. In this manoeuvre he met up with Constable Wallace coming towards him, both of them checking the premises. He then heard gunshots and saw Constable Wallace fall. He ran back to the side of the house from which he had come. He then heard a further barrage of gunshots. These were coming from the same area where Constable Wallace was. He ran through the gate and sought assistance from policemen in a jeep but did not get it. He stopped another jeep. In the course of seeking assistance he saw the jeep in which he had come to 'Bower Bank' going westerly and so he travelled in the jeep he had stopped to the Kingston Public Hospital where Constable Wallace had been taken. It is clear that Constable Gillings was so frightened at the barrage of gunshots which he had heard and the fact that Constable Wallace had been shot that he hurriedly left the scene. He did not see who shot Constable Wallace and he did not remain to see who fired this barrage of gunshots.

The applicant gave sworn evidence denying his presence at the scene on the occasion of the shooting of Constable Wallace. He was on the date alleged at Red Hills Road at the home of one Miss Dorris where he worked as a gardener.

After the summing-up by the trial Judge the jury returned a guilty verdict.

The grounds of appeal criticize the trial Judge's summing-up in three areas:

(1) The issue of identification.

(2) Failing to enquire into a specific problem which the jury had when after retiring for the first time to consider their verdict they returned for further direction from the trial Judge.

(3) That the conviction was unsafe and unjust in all the circumstances.

In dealing with the issue of identification which was the crucial issue in the case the trial Judge used an analogy as follows:

> "... the laws says you must approach evidence of visual identification with great caution. The law is not saying that you the judges of fact cannot found a conviction after evidence of visual identification because that would be asinine. If you say you cannot convict anybody on visual identification that would be asinine. The law is just saying, approach it cautiously. Let me illustrate that: You are going to Ocho Rios to spend the week end and you leave from Kingston with your spouse and children, and when you get to the Flat Bridge which is always a dangerous area to travel you see a big road sign: **PROCEED WITH CAUTION, ROADWORK AHEAD.** You have been warned but the sign doesn't say to turn back because of the road block and you can't pass. It says proceed with caution, so having seen that, now, what you do, you start to exercise great care: going around the corners you blow your horn; you will cut down your speed; you become very careful and in that manner proceed to Ocho Rios to enjoy your week end. Well, this is what the law is saying you must do in relation to identification evidence. You have been warned about the dangers of it; you must look at it carefully, examine it, analyse it, and then if at the end of the day you say you feel sure that Constable Edwards is speaking the truth, not only that, you also feel sure

> "that this man, this accused man, is the man he saw, if that is your state of mind after you have examined the evidence, then in those circumstances it would be open to you to act upon it and to convict. So that is how you approach it."

Learned Queen's Counsel for the applicant had described this analogy as "dangerously false". He maintained that there is no desired destination in the analysis of identification evidence. It is clear to me that the Learned Trial Judge was telling the jury by use of illustration that they could convict on identification evidence if they felt sure at the end of their deliberations and heeding such warnings as had been given to them, that the person identified was the person who committed the crime. The destination is the concluding point of the journey after a careful consideration of the evidence i.e. a destination of innocence or a destination of guilt bearing in mind such direction as was given in terms of the burden of proof and the quality of evidence required to establish guilt.

Reliance was placed by defence counsel on the judgment of Forte J.A. in Devon Laidlay, Everton Allen and Anthony Whyte, Supreme Court Criminal Appeals Nos. 83, 85 & 86/91, in which the same Queen's Counsel made a submission in respect to the same analogy by the same trial Judge in this case. Learned Queen's Counsel in that case argued:

> "That the analogy could have been understood by the jury to mean that having exercised caution, they were bound to convict the appellants."

The Court of Appeal did not agree "with the interpretation advanced by Lord Gifford Q.C.", however the judgment continues:

> "it does demonstrate that the use of any analogy in cases of visual identification can result in misleading the jury as to the approach to be taken in assessing the evidence. ... Trial Judges should therefore refrain from creating analogies so as to attempt

> "to bring an easier understanding to jurors, as such an approach may well mislead the jury, in the manner advanced here by learned counsel for the appellants".

I regard this comment of the Court as cautionary rather than prohibitive. The Learned Trial Judge in this case gave all the required directions to the jury on identification evidence which was not so in the case of Devon Laidley et al. Indeed the judgment of the Court of Appeal in that case rested upon the insufficiency of the direction on identification evidence rather than the use of the analogy. In this case the jury having been given the proper directions on identification evidence could not have been misled by the analogy. To put defence counsel's submission at its highest the use of the analogy could only have been regarded as superfluous.

There wereseveral factors upon which the prosecution relied to establish that Constable Edwards was in a position to make a proper identification. The incident took place in broad daylight, the applicant was known to Constable Edwards prior to the incident, and there was opportunity in terms of the length of the viewing of the applicant by Constable Edwards on the particular occasion for him to make a positive identification.

Learned Counsel for the applicant has made two complaints in this regard:

(1) That the Learned Trial Judge invited the jury to measure five seconds on their watches.

(2) That he failed to direct them on one specific weakness i.e. the state of terror in which the witness, Constable Edwards was apparently placed.

The Learned Trial Judge in his summing-up reminded the jury fully of the circumstances that existed, particularly with regard to Constable Edwards at the time he claimed to recognize the applicant as the person who had shot at his colleague and then afterwards shot and wounded him, Constable Edwards. He described

the terror and reminded the jury of the evidence of the witness that: "He was nervous and frightened". He even referred to the effect it must have had on the witness, a policeman, to cause the witness to give his Uzi sub-machine gun to a civilian. He told the jury:

> "A man who takes his big, heavy sub-machine gun and give it to a civilian to go and deliver to police - and this is a comment I make - the man is, is it not consistent with what the man said that, 'I was frightened and nervous'."

The jury therefore would have been properly alerted to a consideration of this "terror" in determining whether the witness was in a position positively to identify the applicant. The evidence of the witness was that whilst the applicant was standing over Constable Wallace he saw his face for approximately five seconds, and that he later observed him for about three minutes. The Learned Trial Judge in his direction to the jury told them that they could check the length of five seconds on their watches when they retired. I can find no misdirection in the trial Judge making such a suggestion. Neither can I find that there was any omission in his direction to the jury in reminding them of the circumstances under which the identification was made. There is no authority to support a principle that an identification parade is required when the witness recognizes the perpetrator of the act because of his prior knowledge of that person as was the case in this application.

In his cross-examination of the witness Constable Edwards at the trial, counsel for the defence, Mr. Barry Frankson after establishing that the witness had been a member of the police for over seventeen years asked the question:

> "Up to that date have you ever had to discharge a firearm at anyone?"

He wished an answer in order to test the credit of the witness: "in so far as his explanation to the Court why he was unable to discharge his firearm".

The Learned Trial Judge refused to allow the witness to answer the question. Whilst in my view there was nothing improper in the question for the purpose of exploring the credit of the witness, a failure to permit the question could not be a valid ground of appeal. If his answer was yes, the questioning would most likely have been directed to finding out why then was he nervous and frightened. To attempt to establish that the witness was indeed not nervous or frightened would have strenghtened the witness' identification of the applicant in that he would be more likely to properly identify him if he was not in what has been described as a state of terror. That certainly could not be to the applicant's advantage. If the answer was no, it would take the matter no further.

Learned counsel for the applicant sought to rely on two cases - the Judgment of Lord Widgery in Alfred Leggett, Anthony Farmer and Roy Hircock [1968] 53 Cr. App. R. p. 51 and Donald Walter Matthews and Royston Maurice Matthews [1983] 76 Cr. App. R. p. 23. These cases however deal with the effect of the conduct of the trial Judge during the trial which (a) positively and actively obstructs counsel in the doing of his work or (b) by way of frequent interruptions or interventions divert counsel away from the main thrust of his legitimate questioning thus resulting in unsafe and unsatisfactory verdicts. Quite apart from the fact that the criterion in Jamaica is not whether the verdict is unsafe or unsatisfactory but that there was a miscarriage of justice, it cannot be said that a disallowance of this question could fall within the principles set out in the cases cited or could result in any miscarriage of justice.

After the jury had retired for some time they returned to inform the Court through the Foreman that they had not all agreed on the verdict. The following took place between the trial Judge and the jury:

> "**HIS LORDSHIP:** Mr. Foreman and members of the jury, it is obvious that you have a problem. Now, does the problem lie in the area of the evidence or the law? Find out from your colleagues what the area of difficulty is. Just say whether it is the evidence or the law, nothing more.
>
> **FOREMAN:** It's the evidence, m'Lord.
>
> **HIS LORDSHIP:** Alright. The evidence is entirely your province. It is your province. The most, as a Judge, I can do is to review the evidence for you, put before you the comments made by Counsel and any comments made by me and I have told you how you deal with those comments. I cannot tell you or none of us can tell you what you are to find. You have seen the witnesses and you must make up your minds about what you believe and what you disbelieve".

He then went on to state that the issue in the case was one of identity and expanded reminding them what he had previously directed them as to Constable Edwards' evidence and the burden of proof.

The gravamen of the complaint is that the Learned Trial Judge should have sought to discover in relation to the evidence what was the specific problem in order to give the jury some assistance in this regard. The authority cited for this proposition is Berry v. R. [1992] 3 A.E.R. p. 881. Lord Lowry's judgment at p. 894 reads as follows:

> "The jury are entitled at any stage to the judge's help on the facts as well as on the law. To withhold that assistance constitutes an irregularity which may be material depending on the circumtances, since, if the jury return a guilty verdict, one cannot tell whether some misconception or irrelevance has played a part. If the judge fears that the foreman may unwittingly say something harmful, he should obtain the query from him in writing, read it, let counsel see it and then give openly such direction as he sees fit. If he has decided not to read out the query as it was written, he must ensure that it becomes part of the record. Failure to clear up a problem which is or may be legal will usually be fatal, unless the facts admit of only one answer, because it will mean that the jury may not have understood their legal duty. The effect of failure to resolve a factual problem will vary with the circumstances, but their Lordships need not decide how in this case they would have viewed such failure, seen in isolation".

What is important is to determine the materiality or otherwise of this irregularity. The sole issue was identity. The Learned Trial Judge without reciting in detail the evidence which existed as to identity nevertheless gave sufficient further directions for the jury to be reminded of what the evidence was and to come to a conclusion on this issue. It cannot therefore be said that in this case the failure to find out from the jury the specific problem as it related to the evidence could or did lead to a miscarriage of justice.

The application for leave to appeal therefore fails. The hearing of the application is treated as the hearing of the appeal, the appeal is dismissed and the conviction and sentence affirmed.

CLASSIFICATION

Under Section 2(1)(a)(i) of the Offences Against the Person (Amendment) Act this crime is properly classified as capital murder carrying the sentence of death.

Cases referred to
1) Devon Laidley et al SC Crim App 83, 85 & 88/91
2) Alfred Leggett et al (1968) 53 Cr App R 51.
3) Donald Walker Matthews et al (1983) 78 Cr App R 23
4) R v R (1992) 3 All ER 881