J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No.179/78

BEFORE: The Hon. Mr. Justice Henry, J.A.
The Hon. Mr. Justice Rowe, J.A. (Ag.)
The Hon. Mr. Justice Wilkie, J.A. (Ag.)

REGINA v. LEROY LOVELL

Berthan Macaulay, Q.C. and Mrs. M. Macaulay for appellant.

C.A. Soares for the Crown.

July 3, 1979 & January 23, 1987

ROWE, P.:

In July 1979, I was acting as a Judge of Appeal. On September 22, 1980, Henry J.A. who presided in this appeal retired from the Court of Appeal and left Jamaica for the U.S.A. Wilkie, J. who acted as a Judge of Appeal from June 26, 1979 to 10th December, 1979, retired from the Supreme Court and went to live in Canada. I first realized that the Presiding Judge had not prepared the Reasons for Judgment in this case in November 1982, and at that time I declined to take the initiative to prepare a judgment. However, I now set out, as nearly as I can, the reasons for the Court's decision.

Lovell was convicted before White J. and a jury in the Home Circuit Court on November 26, 1978, of the murders of Sharon Moore and Errol Gordon and he was

sentenced to death on both counts. His application for leave to appeal was heard on July 3, 1979, and after hearing counsel for the appellant and the Crown, the Court treated the applications for leave to appeal as the hearing of the appeals, allowed the appeal in respect of Count II which dealt with the murder of Errol Gordon and dismissed the appeal in respect of Count I, promising then to put the reasons in writing, at a later date.

On October 30, 1977, Sharon Moore, Errol Gordon, Theresa Bennett, Claudette Brown and it appears others, were sitting on a step at the corner of Beeston Street and Rose Lane in Kingston. Street lights, called sodium lights, had been turned on. The Crown's case was that Theresa Bennett saw three men approaching from a westerly direction and as they came up to the group sitting on the step, one man, whom she identified as the appellant, drew a gun from his back and fired. She heard the explosion, saw Sharon Moore, "pitched like, and she jump up so, and I see she drop". Theresa Bennett said that she ran inside and while there she heard other explosions of gun-fire. Claudette Brown, another witness for the prosecution, heard the gunshots before she observed anything and her testimony was that immediately after she heard the explosion she ran off and then she saw Sharon Moore "get up, run off and drop". After the third explosion, said Claudette Brown, she saw Errol Gordon running, bleeding from his mouth. It appears that Claudette Brown did not at anytime see the face of the man whom she says is the appellant, although she purported to identify him because of his features. Still another

witness Velma Stephenson, gave evidence of the shooting incident but said she could not identify any of the three men whom she saw,one of whom had a gun, yet she was prepared to say and did say in evidence that the appellant was one of the men. Errol Gordon, the deceased referred to in Count II was her brother.

There was medical evidence as to the cause of death. A projectile had entered the left side of the head of Sharon Moore in the occipital region and passed through the right side of the parietal eminence. There was laceration of the brain along the course of the projectile and death was due to shock and haemorrhage. Dr. Ramu said that the course of the projectile was slightly upward from left to right and gave the opinion that if Sharon Moore was sitting on a step, the trajectory of the bullet would depend upon how the firearm was held at the time the shot was fired. Errol Gordon was shot through the mouth. The bullet passed through the heart and in the passage injured the carotid artery. The trajectory was downward, left to right. In each case there was an exit wound and neither bullet was recovered.

The most positive evidence of identification came from the witness Bennett. She said she saw the assailant coming from a westerly direction i.e. from the direction of Oxford Street. He came "near to reach the light" and it is to be recalled that these were sodium vapours, considerably brighter than the street lights which once existed in the Kingston area. She said: "I could see him, I could make him out how him was coming because him was walking to come right on to the light." This was not by any means the first time that she was seeing that

man. Indeed she had been accustomed to see him once or twice daily for a period of six months up to that time, although they had never spoken to each other.

At the close of the case for the prosecution, after hearing submissions from defence attorneys, the learned trial judge called upon the appellant to state his defence on the two counts of the indictment. He gave sworn evidence which amounted to an alibi. He said he lived and in fact grew up in the western Kingston area where the murders were committed but that at the time of the offences he was in Tower Hill some six miles away. The appellant admitted that he passed the female crown witnesses all the while at West Street where they were usually seated on an ice-box but he never really became closely associated with them. He denied all knowledge of the murders and specifically denied being in possession of a firearm and of shooting the two people. He called no supporting witness.

Five grounds of appeal were filed, viz.:

1. The learned trial judge wrongly rejected the submissions on my behalf in respect of the second count in the indictment.

2. The learned trial judge failed to give any warning or adequate warning to the jury about the danger of visual identification.

3. The learned trial judge failed and/or inadequately directed as to the effect of the credibility of a witness when it is shown that the witness has made an inconsistent statement.

4. The verdict of the jury on count II was perverse and on count I was unreasonable, having regard to the evidence.

5. The learned trial judge's comments and interruptions of my counsel, prevented him from adequately presenting my defence.

At the outset of the appeal Mr. Macaulay abandoned ground 2. He argued ground 3 and Mrs. Macaulay argued the remainder of the grounds.

Mr. Macaulay quite correctly submitted that where the issue of identification arises in the course of a criminal trial two questions call for careful directions from the trial judge, firstly, whether or not the witness was, or the witnesses were mistaken and secondly, whether the one or the more are credible witnesses. He made no complaint about the summing-up on the first question but argued that by certain directions and omissions the judge failed to assist the jury adequately on the question of credibility. Claudette Brown, was not by any means the main witness for the prosecution. She had not attended the preliminary examination but the statement which she gave to the police was available to the defence and she was exhaustively cross-examined on its contents in every respect that it had a bearing on her sworn testimony at the trial. At p. 188 of the Record the learned trial judge said:

> "So there is nothing untoward in her not going or being told to go to the preliminary enquiry. The fact of the matter is: Has she come here and given evidence from which you as supreme judges of the facts exercising your exclusive responsibility can say she has spoken the truth and given evidence in such a way that you can say you are reasonably sure, feel sure, of the guilt of the accused."

He continued on p. 189 in dealing with internal conflicts in her evidence:

> "Is she or is she not a reliable witness, especially <u>on this point</u>. You will or you may very well in due course come to the conclusion that you cannot rely on her at all."

When, therefore, Mr. Macaulay complained in reference to what the learned trial judge told the jury at pages 188-189 of the Record, that the judge was putting up the general

credibility of the witness rather than the credibility on a particular point and that, therefore, the jury might be led to think that a witness is overall a good witness and in the process be inclined to pass over inconsistencies, he was, it appears, overlooking the very precise directions given by the learned trial judge, as in the passage quoted above.

Much argument turned upon the precise positions of the victims when they were shot in relation to the assailant or assailants. In one case the bullet travelled slightly upwards and in the other distinctly downwards. No eye-witness purported to say exactly how the firearm was held at the same time of its discharge except that it was pointed in the direction of the group on the step and we have been quite unable to say that the victims, observing the menacing firearm, could not have adopted positions quite different from those in which they were immediately seated before the men came on the scene. We can find no error in the treatment accorded by the learned trial judge on this aspect of the case, as we decline to speculate with defence attorney just how those who idled on the step would have behaved in the presence of an uplifted gun.

There is nothing abnormal in the joining of two counts for murder in the same indictment if both cases arise out of the same incident. However, we were not persuaded that the circumstantial evidence led by the Crown as to how Errol Gordon was wounded, was sufficient to implicate the appellant in his murder and the appeal in respect of Count II was accordingly allowed.

In support of ground 5 that the learned trial judge by his comments and interruptions of counsel for the defence prevented her from adequately presenting the case

for the defence, Mrs. Macaulay referred to some seven passages from the Record. These related to attempts made by defence counsel to cross-examine witnesses as to the contents of their depositions given at the preliminary enquiry. The learned trial judge took the view that the purpose of the cross-examination was to contradict the witness by the writing represented by the deposition and insisted that, if that was the purpose, defence counsel was obliged to follow the procedure established by section 17 of the Evidence Act, viz., that before such contradictory proof could be given, the attention of the witness should be directed to those parts of the writing which are to be used to contradict him. It seems, however, that defence counsel was seeking to confront the witness with particular written material and then to seek to persuade the witness either to accept or reject statements made in the proferred document or to otherwise alter or confirm testimony already given. In R. v. Peter Blake (unreported) S.C.C.A. 122/76, judgment was delivered by Watkins J.A. on October 21, 1977. There the trial judge had declined to permit defence counsel to show to a witness a copy of the Star Newspaper which purported to contain a Release from the Police Information Centre in connection with the arrest of the appellant and to put some questions to him thereafter based on this Newspaper article. The Court held that in appropriate circumstances, this procedure may be followed. I was a member of that Court and for the purposes of this appeal this Court accepted as good law the passage quoted below:-

"Counsel contended before us that this denial by the learned trial judge of his right to cross-examine the witness prejudiced the appellant in that he was deprived of the opportunity of challenging the witness' conduct by a permissible method of confrontation and that the appellant lost the opportunity of persuading the witness to the appellant's view of the facts or alternately to undermine the general credit of the witness either by his demeanour or answers or both in response to the cross-examination that would have followed. It appears from the record that both the learned trial judge and Counsel for the Crown, were mistakenly of the view that Counsel for the appellant was seeking to put to the witness a previous statement that he had given which was contrary, to whatever degree, to the testimony he had given in court, and pursuant to this view were enjoining Defence Counsel to lay the proper evidential basis for such questions. In fact Defence Counsel was seeking to invoke another rule of evidence at common-law of some antiquity and far less commonly met in practice than the one referred to above. Unfortunately Defence Counsel though importuned by the court did not speak on the subject with his usual precision or clarity nor did he seek to ventilate the matter by reference to authoritative cases with the results already adverted to. In Buchall and others v Bullough [1896] 1 Q.B.D. 325, an action for money lent, an insufficiently stamped promissory note purporting to be signed by the defendant and expressed to be given for money lent, was put into the defendant's hands by the plaintiffs' counsel for the purpose of refreshing his memory and obtaining from him, an admission of the loan. It was held that the plaintiffs were entitled to use the note for that purpose notwithstanding the provision of the Stamp Act 1891 that an instrument not duly stamped 'shall not be given in evidence or be available for any purpose whatever.' Regina v Duncombe (172) E.R. 535 was a case of obscene libel. A witness who had proved the buying of the book at the defendant's shop, said in cross-examination that he had left a paper with the defendant on which he the witness wrote something. This paper was placed in the witness' hand and he was asked by Defence Counsel 'Look at that paper and tell me whether you did not order Nos. 3 and 4 of the Magazine, saying that you had No. 2' to which the witness replied 'I did not.' Counsel for the Crown demanded to see the paper but Defence Counsel replied that he had no right to. In his ruling on the matter Denman C.J. said 'I take the distinction to be this, if a paper is put into a witness' hand, and it leads to anything, that is, if anything comes of the questions founded upon it, the opposite counsel has a right to see the paper, and re-examine upon it, but if the thing misses

> "entirely, and nothing comes of it, the opposite counsel has no right to look at it.' In R v Mullarkey [1919] 14 C.A.R. p. 44 it was held that if counsel cross-examines a doctor on the contents of a medical report which the latter has seen but did not make he lets in that report as evidence, providing it is properly identified as referring either to the defendant or the sufferer whose state is the subject of inquiry. In R v Gillespie et al [1967] 51 C.A.R. 172 the defendants were convicted of larceny, falsification of accounts and forgery. The defendants were employed in a shop in the conduct of the business of which certain documents were prepared by them whilst certain other related documents were prepared by others. Both sets of documents were put to the defendants in cross-examination, in relation to the latter of which it was held that 'If a document written by another person is put to a defendant in cross-examination and the defendant accepts what the document purports to record as true, the contents of the document become evidence against him; but if the defendant refuses to accept as true what the document purports to record, its contents cannot be evidence against him.' That what counsel for the appellant sought to do is founded in authority there can be no doubt." (Emphasis supplied)

Defence counsel clearly wanted a free hand to cross-examine the witnesses for the Crown in a manner acceptable to them. It seemed to us, however, that the learned trial judge in the several passages referred to by defence counsel, was merely attempting to ensure that counsel was perfectly fair to the witness, who if literate, was barely so, and in fact the trial judge repeatedly told counsel he was not preventing him from continuing with the cross-examination provided this balance of fairness was maintained. Consequently, we did not find merit in this ground of appeal.

The jury must have accepted the evidence of Theresa Bennett as to her identification of the applicant Lovell. Bennett gave no useful evidence as to the death of Errol Gordon and that in no small measure led the Court to find that there was insufficient evidence to prove Count II of the indictment. As indicated herein we found no merit

in any of the grounds of appeal advanced on behalf of the applicant on Count I and his application for leave to appeal was accordingly dismissed.