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IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 79, 80, 81 OF 1973

BEFORE: The Hon. Mr. Justice Graham-Perkins, J.A.
The Hon. Mr. Justice Swaby, J.A.
The Hon. Mr. Justice Robinson, J.A. (Ag.)

REGINA vs. NORMAN WRIGHT
DONALD HORSHAM
DORREL GRAHAM

Mr. H. Hamilton for Wright.
Mr. H. Edwards, Q.C. for Horsham.
Mr. R. Small for Graham.
Mr. B. Macaulay, Q.C. and Mr. R. Stewart for the Crown.

June 13, 14, 17, 19, 1974.

GRAHAM-PERKINS, J.A.:

The applicants Wright, Horsham and Graham, together with Derrick Foster, were convicted on six counts of an indictment as follows: The first count charged that all the applicants and Foster took and drove away a motor car without the owner's consent. The second and third counts charged robbery with aggravation. The fourth and fifth counts charged shooting with intent and wounding with intent respectively. The sixth count charged shooting with intent. A seventh count charged Graham alone with illegal possession of a firearm. With regard to this latter count the jury, quite unaccountably as will later appear, returned a verdict of not guilty. Foster has not approached the Court for leave to appeal against any of his convictions.

The several charges arose in the following circumstances. On July 21, 1972 at about 11.00 a.m. a Mr. Keith McIntyre parked his Hillman motor car on Church Street in Kingston. Having securely locked the doors he left it there. Approximately twenty-five minutes later that car with

several young men arrived at the Allman Town Post Office (count 1). Two of these men - later identified as Foster and Horsham - were seen to leave the rear of that car and enter the building. A third man came from the front passenger seat and approached the building in which a robbery was committed (counts 2 and 3). These men were armed. Later that morning four men were seen in a gully by a District Constable Jones about three-quarters of a mile from the Post Office. Jones observed these men at two different points in the gully. Thereafter a Corporal Parke chased four men. This chase started from a part of the same gully some distance from the second point at which four men were seen by Constable Jones. This chase led from the gully into Emmett Park and into the grounds of St. George's College. It continued along Emerald Road, across South Camp Road and into premises occupied by a church. From there it led into a gully from which the men went into premises No. 1c Glenmore Road. From here three of the men crossed Glenmore Road and entered premises opposite. The fourth man,identified as Graham, continued along Glenmore Road and being chased by Cpl. Parke. According to this officer, when he had reached a distance of ten yards from Graham, the latter spun around, pointed a revolver at him and fired one shot. He returned fire hitting Graham on his ankle. Graham fell and the revolver fell from his hand. The corporal picked up the revolver and asked Graham if he had a licence for it. On Graham's failure to reply Cpl. Parke charged him with being in illegal possession of a firearm (count 7) and, along with the other applicants and Foster, with shooting with intent (count 6). As observed earlier Graham was found not guilty of illegal possession of the firearm recovered by Cpl. Parke. He was, however, found guilty with the others of shooting with intent at the corporal.

A Constable Johnson saw Cpl. Parke chasing five men - not four, be it observed., as Cpl. Parke testified. Of these five men he was able to identify Foster and Graham. He saw Foster in a yard on Glenmore Road opposite to No. 1c. It was here that Foster fired several shots at him. One of these resulted in a wound to his side. This evidence by Const. Johnson related to counts 4 and 5.

Neither Graham nor Wright was identified as being among the men who were seen to arrive in the car at the Post Office, nor among those seen to enter that building. There was no evidence that Graham was one of the four men seen by Const. Jones in the gully three-quarters of a mile from the Post Office. Nor was there any evidence that the men chased by Cpl. Parke were the same men seen earlier by Const. Jones. What seems to be fairly clear, however, is that Horsham was among the men seen in the gully by Const. Jones.

At the close of the submissions advanced by Mr. Edwards on behalf of Horsham - and these necessarily covered most, if not all, of the arguments that would have been advanced by Messers. Hamilton and Small on behalf of Wright and Graham respectively - we asked Mr. Macaulay whether he intended to support the convictions of Wright and Graham or not. Mr. Macaulay, quite properly in our view, took the stand that he could not support the convictions of Wright and Graham on counts one to six and no more need be said about them. We are concerned, therefore, with the propriety of the convictions of Horsham. The substantial complaints made by Mr. Edwards relate to the circumstances surrounding the identification of Horsham as one of the persons seen to enter the Post Office, and the failure of the learned trial judge to deal adequately with those circumstances in his directions to the jury. There was another complaint advanced by Mr. Edwards. This was to the effect that there was no evidence that Horsham was a party to the taking and driving away of Mr. McIntyre's motor car. In our view there was certainly a sufficiency of evidence from which a reasonable jury could conclude that Horsham was a party to the taking of this car and we regard this complaint as entirely without merit. Yet another complaint questioned the conviction of Horsham on those counts in which he was charged with shooting with intent. We will return to this later in this judgment.

We proceed now to an examination of the circumstances surrounding the identification of Horsham and the treatment thereof by Rowe, J. A Miss Simmonds, a postal clerk, saw a car "filled with some young men" drive

up to the side of the Post Office. She saw a man with a gun come from that car and approach the door of the building. She ran and hid. She could not identify this man. Cynthia Sinclair, another postal clerk, saw a man enter the post office. This man had a gun. She said she had a good look at him, and would be able to identify him but "has not seen him since". Theodora Green saw two men with guns come to the side door of the post office. She opened the door and one man entered. A man ordered her to give him "the money" and she did so. It is not clear whether this was a third man or one of the two came to the door. She accompanied this man to the vault of the post office. She heard the sound of sirens and he ran to the door and left the post office. Like Sinclair, she had not seen any of those men since. Rev. Softley, a gentleman who had gone to the post office on business, was held from behind by ome of the men who entered the building through the front. He could not, however, identify this man because this man wore dark shades and "a cap well over his face".

Gladwyn Brown was the one person who claimed to identify Horsham. She had gone to the post office on business and was standing at the side of the building when she saw a car drive up beside her and come to a stop. She saw two men come from this car through the right rear door. A third man came from the car through the left front door. This man had a gun. He went to the side door and spoke to a lady, probably Theodora Green. The other two men went to the front of the post office and entered the building and she was able to see their faces through the side door. She then went to the front of the building and was able to see that these two men then had guns and were forcing an old woman and a young woman to lie on the floor. She went to a police station and made a report after which she went to her home. Some ten to fifteen minutes after reaching her home she returned to the post office where she heard something. She went back to the police station and gave a written statement. She was then asked if she "would come and identify the men". On the occasion of this second visit to the station she had already heard that the police had caught some men who were said to be engaged in the robbery at the post office. It is far from clear how this evidence came to be given. It seems probable

however, that it would have been elicited in cross-examination in an effort to ascertain the state of mind of the witness shortly before she identified Horsham at the station. Be that as it may she saw Foster and Horsham at the station. They were handcuffed. She identified them as the two men who came from the car through the right rear door and enter the post office. Throughout a most rigorous cross-examination she insisted that there was no question of her being mistaken.

Mr. Edwards argued that the total effect of the evidence of Sinclair and Green was that the men they had seen in the post office were not among the men in the dock at the trial. This followed from the assertion, at a time when the men in the dock were within their view, that they had not, since the robbery, seen the men who had entered the post office. It followed further, according to Mr. Edwards, that Gladwyn Brown's evidence was not fairly capable of establishing beyond a reasonable doubt that Horsham was one of the men involved in the robbery. The trial judge had failed to focus the attention of the jury on this vital aspect of the evidence of Sinclair and Green. He had failed, too, to juxtapose the evidence of Sinclair, Green and Softley with that of Brown, and to direct the jury's attention to the very favourable inferences to which the evidence of Sinclair, Green and Softley gave rise. Nowhere in his summing-up, Mr. Edwards complained, did the trial judge tell the jury what the evidence of Sinclair, Green and Softley should be regarded as establishing in favour of Horsham. Those witnesses had by far the superior opportunity of observing the robbers as against the opportunity which Brown claimed to have. Because of that superior opportunity and because Sinclair and Green had asserted at the trial that they had not seen the robbers since July 21, 1972, the inevitable consequence was that any finding by the jury that Horsham was one of the robbers remained unsupported by the evidence. In the view of this Court these complaints are for the most part without substance. This Court has said, certainly more than once, that questions of identification are essentially matters of fact to be determined by a jury and that each case must be resolved on the basis of

its own particular circumstances. It would be quite undesirable, and, indeed, impossible, to lay down any formula involving the juxtaposition of evidence, or prescribing the method of examination of evidence, by a trial judge. It certainly cannot be said in this case that the summing-up did not deal specifically with all the matters relating to the issue of identification, This Court is of the firm view that the trial judge was scrupulously careful to alert the jury to anything and everything concerning that issue that could be said to be in favour of the accused. He certainly reminded the jury of the importance of the evidence of Sinclair and Green. After reviewing the evidence of those witnesses the judge said:

> "So that you have Miss Sinclair and Miss Theodora Green saying that of the men whom they had seen enter the post office, they have not seen them since."

This Court is quite unable to conclude that the jury must have failed, as Mr. Edwards contends, to appreciate that the trial judge was, in the passage just quoted, sounding a very definite warning to them of the crucial implications arising from the evidence of those two witnesses. In several passages of the summing-up Rowe, J., sought to bring home to the jury the necessity to be satisfied, so that they felt sure, that Gladwyn Brown had not made an error in her identification of Horsham and Foster. Near the end of his summing-up he said:

> "The position then Mr. Foreman and members of the jury is this. Having given full weight to what the prosecution's witnesses have told you and what the defence witnesses have told you, having given proper consideration and value to what every single witness has said, weighing everybody's evidence in the same scale, are you satisfied by the evidence brought by the prosecution as to the identity of these accused? I will tell you this, that in everyday life it is possible for you or for me, or for anybody in this Court to make a mistake in relation to identification. When a person looks at another and says 'this is the person', it

is always possible for you or I to make a mistake. It is therefore necessary for you to examine the evidence carefully - where a person has had a good opportunity to observe someone; where in your opinion as a jury you are satisfied that this person has the mental ability to retain the image of this person in his mind; where you think that this person has the ability to recall; and if you are satisfied that when the person stands there and tells you from the witness box that 'I am satisfied that so-and-so is the particular person' and you have no doubt about it, then in those circumstances you can say that identification is established. Then applying those principles and bearing in mind what I told you earlier about the circumstances of the identification at the police station, that there was no parade, that when the men were seen at the police station they were already in handcuffs, and Gladwyn Brown had heard something, if notwithstanding all this you are satisfied with her identification of the accused Foster and you are sure that he was one of the men at the post office, then it will be open to you to find Foster, on her evidence alone, guilty ... As I said, depending on what inference you will draw, if you are satisfied that you have scrupulously examined the evidence of Gladwyn Brown, that she is making no mistake at all when she says that Horsham is one of the persons she saw get out of that car and go to the front of the building ... well it will be open to you on her evidence alone to convict Horsham on counts 1, 2 and 3."

In R. v. Long (1973) 57 C.A.R. 871 Lawton, L.J., delivering the judgement of the English Court of Appeal said, at pp. 877-8:

"In our judgment, the law does not require a judge in this kind of case to give a specific warning about the dangers of convicting on visual identification; still less does it require him to use any particular form of words. In these

cases, as in all, a judge should sum up in a manner which will make it clear to the jury what the issues are and what is the evidence relevant to these issues. Above all he must be fair; and in cases in which guilt turns upon visual identification by one or more witnesses it is likely that the summing-up would not be fair if it failed to point out the circumstances in which such identification was made and the weaknesses in it. Reference to the circumstances will usually require the judge to deal with such important matters as the length of time the witness had for seeing who was doing what is alleged, the position he was in, his distance from the accused and the quality of the light. If the witness has made mistakes on the identification parade or at any other relevant time, fairness requires that the jury should be remined of them. Above all the jury must be left in no doubt that before convicting they must be sure that the visual identification is correct. This can be done in many ways. Often a direction along the lines given by Kingswell Moore, J., in The People v. Casey No. 2 (1963) I.R. 33 may be appropriate. The trial judge is in the most advantageous position to decide what kind of direction is best suited for the case which he is trying. This Court will not interfere with the exercise of his discretion in this respect unless there is good reason for thinking either that the jury may not have appreciated that they had to be sure about the accuracy and reliability of the visual identification before convicting or that the summing-up was unfair."

These observations were made in a case in which the issue as to indentification and guilt depended on the visual identification by witnesses who did not know the defendant. We respectfully adopt these observations as reflecting the proper approach of an appellant court to a summing-up when complaint is made of a trial judge's treatment of evidence concerning the issue of identification in a case, such as the present one in which,

as in Long's case (supra), that issue has to be resolved with reference to the evidence of witnesses to whom an accused was not previously known. It is to be observed that the dicta in Long's case are also in accord with those of Lord Morris in Arthurs v. Attorney General for Northern Ireland (1971) 55 C.A.R. 161.

This Court finds absolutely no fault with the summing-up of Rowe, J., on the issue of the identification of Horsham in relation to counts 1, 2 and 3.

We turn finally to counts 4, 5 and 6. The problem, so far as counts 4 and 5 are concerned, is whether it can be said that at the time when Foster shot at, and wounded, Const. Johnson, Horsham was acting in concert with Foster. It is clear that in order to make a person a principal in the second degree there must be a community of purpose with those actually committing the felony charged at the time that the felony is committed. It is not, of course, essential that there should have been a prior agreement in express terms as to the part to be played by the principal in the first degree. The aider and abettor will be held answerable for anything done in pursuance of the joint enterprise which the evidence demonstrates to have been within his contemplation. But it is equally important that the aider and abettor should be shown to be present at the commission of the felony. The word "present" has always enjoyed a somewhat liberal interpretation as cases such as R. v. Betts & Ridley (1930) 22 C.A.R. 148, show. It has been extended to include "constructive presence" and, as current authority shows, the true principle is that so long as "the accomplice is participating by rendering aid, assistance or even mere encouragement to the actual perpetrator at the very time when the latter is effecting the criminal purpose, no matter how far away from the spot he may be, then he is certainly aiding and abetting it and will be a principal in the second degree." See also Wilcox v. Jeffrey (1951) 1 A.E.R. 464; R. v. Allen (1963) 3 W.L.R. 677. See also Russell on Crime Volume 1, 12th Edn. at pp. 128-150.

If, therefore, the evidence does not disclose, either directly or inferentially, that the aider and abettor was present at the commission of the felony, or "did some act, at the time in aid which shows that he was present aiding and assisting, or that he was one of the same party, in the same pursuit, and under the same expectation of mutual defence and support with those who did the fact, he cannot be convicted". See, for example, R. v. White & Richardson (1806) R.& R. 99.

In our view the evidence in this case did not disclose that Horsham was in any sense present aiding and assisting Foster in shooting at and wounding Const. Johnson. Indeed, for all one knows, Horsham may have gone his own separate way some considerable time before Foster fired any shots at Johnson. Nowhere in the summing-up was the jury alerted to this situation. On the contrary, the summing-up assumed Horsham's presence at all material times. In these circumstances we are constrained to hold that the conviction of Horsham on counts 4 and 5 cannot be upheld. The foregoing considerations apply with equal force to count 6 in which Graham was alleged to have shot at Cpl. Parke.

In the result the application for leave to appeal by Horsham in respect of counts 1, 2 and 3 is dismissed. The convictions and sentences thereon are affirmed. With regard to counts 4, 5 and 6 the application is treated as the appeal, and is allowed. The convictions and sentences on these counts are, accordingly, set aside. So far as Wright and Graham are concerned their applications concerning counts 1 to 6 are treated as appeals, and are allowed. Their convictions and sentences are set aside.