CA. CRIMINAL LAW — Murder — Common design — Defence alibi — Whether judge's directions on identification adequate — whether judge's direction on discrepancies correct — whether judge's directions prejudicial to accused — Application for leave to appeal against conviction refused

JAMAICA

No case referred to

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS. 52, 53, 54 & 55/85

COR: The Hon. Mr. Justice Rowe, President
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice White, J.A.

REGINA v. Osbourne Flemming
Junior Johnson
Conliff Wilks
Anthony Robinson

Mr. Dennis Morrison for Flemming

Mr. Lowell Marcus for Johnson

Mr. Ram Hetram for Wilks

Mrs. Valerie Neita-Wilson for Robinson

Miss Jennifer Straw for Crown

2nd & 10th April, 1987

CAREY, J.A.:

On 29th April, 1985 after a trial in the Home Circuit Court before Walker J., and a jury these applicants were convicted of the murder of Simeon Howell and sentence of death was imposed.

No points of merit were argued before us and indeed in the case of the applicant Robinson, learned counsel candidly acknowledged that there was no point of substance which she could argue. We, nevertheless, promised to put in writing our reasons for refusing their applications, because, it is now the practise of this Court to do so in all murder cases.

The Crown's case in brief was that in the early morning of 1st May, 1983 a number of marauders, for the persons involved in this raid could not be otherwise described, broke into a building occupied by the slain man and his family, and used by him as a shop and the

family residence. They robbed the occupants, and one of their number fatally shot and killed Mr. Howell, who was the proprietor. These four applicants were identified by Monica Matthews, the common-law wife of the proprietor. Another witness, Eva Howell, the elder daughter, identified Anthony Johnson also as being present. The actual shooting took place in the shop portion of the premises, and was witnessed by Eva Howell, who said that after she had been awakened by the door of the house being kicked in, she went to her father's room and awakened him. A younger sister, Denise, her father and herself, all ran into the shop where they hid behind a deep-freeze unit. The light was switched on and the applicant Johnson who was armed with a firearm ordered her father out. "Hey bwoy, come out here come give we the money" - was the peremptory and contemptuous command. Mr. Howell was a man of 52 years. He came out of hiding with his machete in his hand, and chopped at Johnson. She could not say whether any blow landed, but at the same time as Simeon Howell strove valiantly to defend his family and himself, another man described as "a short dark man" came between Johnson and Howell, and pointed a long gun at the latter. A struggle ensued and thereafter she heard the sound of a gun shot inside the shop. Then silence. Shortly after, she said she heard the sound of different voices, as well as that of her step-mother, Monica Matthews, saying "Lawd Jesus Christ, don't shoot me". None of these applicants was identified as the person who actually fired and killed Simeon Howell.

Monica Matthews who also was awakened, jumped out of bed, and spoke with Eva, who went off to awaken her father. She opened the door into the shop and the others fled there. She herself ran into Howell's room where she hid herself. While there, some men ran into the shop. Thereafter she heard a chopping sound, doubtless the sound of her common-law husband chopping at Johnson, followed by an explosion.

At this point, she endeavoured to escape by running outside through the bashed-in door. Before she could however make a clear get-away, she was grabbed not more than 5 or 6 feet from the doorway. She identified the applicant Wilks as the man who held her. "Gal, whey yuh a run go? Put yuh face a grung, gal". She did as she was bid. But no sooner had she gone to the ground that she was yanked up, and forced through the door at gun point, and into the living room. There she saw five (5) other men. Her counting must have been awry. She named the applicants Anthony Robinson, Junior Johnson and Flemming. There was another man, with the nickname "Russian", but he was never arrested in connection with his participation in these events. He was armed with what was described as "a long gun". "Russian", it was, who was demanding that she hand over the money. But eventually all the others joined in pressing her to go and look for the money.

She went into her bedroom, and trooping behind her were the applicants and "Russian". She opened the wardrobe. She handed over money which she found therein. Thereafter all the men made off. But her ordeal, as indeed that of her step-daughters, was not yet ended. Upon departure of their assailants, she called the girls and all ran to the other end of the building and into the street. They were all still dressed in nighties. By an unfinished building on the opposite side of the street, she saw another group of men. One of their number put a gun to her head demanding money. She told them she had already given money to those men who had come into her premises, whereupon she was allowed to pass.

Later in the morning, Monica Matthews returned to the shop after she had been given some information, and there she found her common-law husband lying on the floor in a pool of blood. He was dead.

She said she knew all of these applicants over some time. She knew them not by their given names, but by quaint pseudonyms. The applicant Junior Johnson was called "Sprout": she knew him for a year

before the incident. The applicant Anthony Robinson was "Crucial": she knew him also for a year. The applicant Conlift Wilks referred to as "Squirrell" was known to her for 5 - 6 years, and this fact was acknowledged by him when he gave evidence in his defence. So far as the applicant Osbourne Flemming was concerned, although she knew him for about a year, she did not know his name. Her step-daughter knew him as "Fire" but of course, she did not state that she saw him on the night of the offence. Monica Matthews learnt his name on the night of the incident and communicated this to the police.

The police who visited the scene after these events, removed spent M16 shells from the premises, and an M16 bullet was removed from the body of Simeon Howell at a post-mortem examination.

All the applicants in their defence put forward an alibi. The Crown's case plainly rested on the basis of common design and it was not suggested that the learned trial judge's directions in this respect could be faulted. It was frankly conceded by Mr. Morrison, and endorsed by counsel who appeared before us for the other applicants, that the only live issue was that of identification. He did not seek to impugn the learned trial judge's directions in that regard which were undoubtedly lucid, fair and more than adequate.

But he did suggest, happily in his usual economical style, that the circumstances surrounding the identification of Flemming by the witness Monica Matthews was altogether different from those with respect to the other applicants and therefore called for a different approach. He directed our attention to the fact that in respect to this applicant, the witness did not know his name at the time of the incident but learned his nickname thereafter and told the police. The witness was allowed to be recalled and in the course of re-examination gave evidence as to the circumstances in which she learnt the applicant's name. She said she found out that the applicant's name was "Fire," and she included it in her statement to the police. Her informant was a neighbour whom she admitted was not present at the time of the offence.

We went through with learned counsel, the directions of the learned trial judge in this respect and it is only necessary to advert to the following directions which begin thus at page 295:

> "In the case of Flemming, his case is slightly different from the other three when it comes to identification, because what she is saying is, 'I know him but I didn't know his name. It was after I went and spoke to a neighbour that a neighbour told me that his name was Fire and I went and told the police I now know the name; it is Fire.' And you have to decide whether that neighbour supplied her only with a name which she fitted to a face which she knew already or whether that neighbour gave her the name of a man who she was not able to recognize and didn't know before and she in turn went and told the police that man is one of the men because the neighbour told her so. So is that how it went? Because if she did not know the accused, Flemming, if you believe she did not know him before, did not know him by face, did not know him by name and that it was a neighbour who told her to go and call his name in connection with this incident, then you would have to find Flemming not guilty of this charge of murder, because it would mean that somebody told her to go and name this man when she herself was not able to identify him as one of the men, and that is not permissible. That person was not there when the incident happened, so that person could not tell who did it to be able to say Fire was one of them."

The learned judge continued in that vein for another page or so. That extract is, in our view, sufficient to dispose of the point of complaint. We would wish to add that this witness gave evidence of her knowledge of the applicant over some time. The circumstances in which she observed him in her house on 1st May did not differ from that of the other applicants, and no one has sought to suggest that that evidence was other than cogent evidence. The supplying of the nickname by another person who was not present, by itself cannot, in our view, lessen the cogency of her evidence that she knew him before and recognized him as one of those involved in the events of that night. There was evidence from her step-daughter Eva, that the applicant is known as "Fire". It was a matter for the jury if they believed the step-mother's evidence as to the manner in which she ascertained the name "Fire." Plainly, the very fault that is being found with the directions, is non-existent. There really is no merit in the point.

Mr. Marcus was allowed to argue 3 grounds of appeal, 2 of which complained that in the light of a discrepancy between the two main witnesses for the Crown, Monica Matthews and Eva Howell, as to whether there were two light switches or one light switch, the learned trial judge was wrong in his directions that they could reject one or other: he should have told them that it was open to them to disbelieve both.

As to this, we need say little. The learned judge was, at this point of his summing-up, directing the jury how they should deal with discrepancies and inconsistencies. He did so correctly. Ha gave some examples of such a discrepancy or inconsistency. The argument put forward appeared to be saying that the inconsistency related to whether or not light was in the shop at the time Mr. Howell was shot. But there was no question on the evidence that the light must have been switched on to enable the two men to find the hidden occupants of the house. In the circumstances, the discrepancy must have been peripheral. We are not in the least doubt but that the learned trial judge was correct in his directions, for commonsense would dictate that one of the witnesses must have been mistaken as to the number of switches present in the shop or the room. We are not persuaded that these grounds can succeed.

Finally, he alluded to page 264 where the learned trial judge said this:

> "Let's face it Mr. Foreman and Members of the Jury, as intelligent people, if men go in to rob, if men go in-to a shop looking for money, because if you believe the evidence from the Prosecution, that was the purpose of going there, for money, how are they going to find money in the darkness? You would think that they have to use light at some stage if they are looking for money. How are they going to find money in the darkness? You would think that they have to use light at some stage if they are looking for money. How are you going to find money in the darkness? And you may think, if you believe the evidence for the Prosecution, that when they went into that shop that morning they were looking for the boss man because he would know where the money is. Who would know where the money is better than the man who runs the business and who was the man who ran the business? Simeon Howell. And you may think that they were looking for him and in order to find him they turned on the light. How else could they find him? And if you believe the evidence of Eva Howell that one of the men in the shop said, "Hey,

> "boy", speaking to Mr. Howell while he was hiding behind the freezer one man said, 'Hey, boy, come out here come give me the money,' how did that man see Mr. Howell, because it was only one boy in there, only one male in the shop at that time, if you believe the evidence of the Prosecution. Mr. Howell was the only male to whom reference could be made as 'boy'. The other two persons were women, Eva and Denise. How would that man have seen him behind the freezer if the light wasn't on? You ask yourselves these questions. And the same light, if you find that the light was on, the same light that they used, that that man used to see Mr. Howell, Eva could have used to see somebody too, that same roof light, that same shop light. So you decide."

Learned counsel complained that this was wholly speculative and highly prejudicial to the applicant's defence since -

> "..... such a strong charge to the Jury, which went to the very vital issue of Visual Identification, must have highly prejudiced the mind of Jury, thereby fettering the mind of the Jury and hindering them in coming to a fair conclusion."

It is enough to state the point to demonstrate that it is totally devoid of merit.

So far as the applicant Wilks was concerned, Mr. Hetram was content to accept Mr. Marcus' arguments but the rest of his submissions, were not, with respect, particularly helpful. We agreed with Miss Straw who was requested to assist the Court as to whether she was able to discover any defects in the summing-up, that the summing-up of the learned trial judge was fair and detailed and took into account all relevant points which were considered and/could not be faulted. In our view, the evidence was overwhelming and we could find no reason to disturb the finding of guilt as returned by the jury.

In the result, we refused their applications for leave to appeal against conviction.