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Sgd. E82

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 173, 175 & 182/88

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

REGINA

VS.

RICKY BURRELL
ALBERT HOSUE
CLIVE THOMAS

Delroy Chuck and Miss Helen Birch for Burrell, Hosue and Thomas

Miss Paula Llewellyn for Crown

July 23, September 24, 1990

ROWE P.:

At a five day trial in the St. James Circuit Court before Langrin J. and a jury, Ricky Burrell was convicted of murder while Albert HoSue and Clive Thomas were each convicted of manslaughter. Leave to appeal on the issue of identification was granted to HoSue and Thomas. These appeals together with the application by Burrell for leave to appeal came on for hearing on July 23. The appeals as well as the application for leave to appeal were dismissed. We set out below in summary our reasons for these decisions.

No reasoned arguments were addressed to us by counsel who appeared for the appellants/applicant. Mr. Chuck frankly admitted that he could not support Burrell's application for leave to appeal nor the appeal of Thomas. But for one matter which he considered insignificant, there was no issue that he could raise in respect of the appellant HoSue. Mr. Chuck conceded that the learned trial judge adequately directed the jury on the main issue in the case, namely, visual identification, and in the light of the positive evidence of three witnesses who identified Burrell and Thomas, and the two witnesses who identified HoSue, he could advance no arguable ground of appeal in their favour.

On the Crown's case, Rick Taylor operated a shop at Black Shop in St. James. Several men including Wilbert Wilson (the deceased) were in that shop at about 11:30 p.m. on July 11, 1987. Suddenly a group of men armed with guns descended upon the shop. The premises were well lit with two fluorescent 60 watt bulbs and light radiated from a nearby street lamp. Mr. Taylor said that he saw the applicant Burrell with two guns one of which he fired at him (Taylor) the bullet hitting him in his left thigh. Burrell next fired at Mr. Wilson (the deceased), jumped on to the shop counter and stole a quantity of goods. The appellant HoSue, said Mr. Taylor, was standing at the shop doorway holding a short gun in his hand and "keeping guard". The appellant Thomas was seen by Mr. Taylor at the doorway holding a short gun in his hand. Mr. Taylor said he knew the applicant Burrell from his youth as they both attended private school and primary school together. In his words: "I know him from him is a youth going to private school and to big school." Albert HoSue he also knew

from school days as they attended the same private school and primary school at the same time. When Mr. Taylor attended Lottery School, the appellant Thomas was a pupil there and they spent approximately two years together at that school.

Mr. Herman Forbes was a patron at Mr. Taylor's shop on the fateful night. He heard shots being fired outside. Then he saw six men approach. He knew two of them - the applicant Burrell and the appellant HoSue. Burrell said:

> "Boy, lay flat, mi, nuh want nuh man look inna mi face, mi a murderer, mi come fe kill",

and then Burrell started to fire shots. He robbed Mr. Forbes of $150.00.

Meanwhile the appellant HoSue, was standing at the doorway, on guard, with a gun in his hand. Mr. Forbes said he knew the applicant Burrell for ten years and the appellant HoSue for a similar period of ten years.

Another of the customers present at Rick Taylor's shop when the robbery and murder occurred was Henry Cunningham. First he heard gunshots outside the building, and he obeyed an order to "go down on your face." When he raised his head he saw the applicant Burrell, whom he had known from school days when they both attended Salters Hill All-Age School, with two guns in his hands, standing on the counter of the shop. At the doorway, he saw the appellant Clive Thomas whom he knew as Calvin, holding a gun in his hand. Mr. Cunningham graphically described how he came to know the appellant Thomas as the questions and answers below will show:

" Q: The person who you say is Calvin, had you known him before?

A: Yes Miss, mi and him go school together, in one class.

Q: What school was this?

A: Salters Hill All-Age School.

Q: And, before that night, how long had you known the person you call Calvin?

A: Many, many years, mi and Calvin ride up and down on my father - go a river go bathe, eat and drink together.

Q: What part of this person you call Calvin did you see that night?

A: From opposite him knee, standing at the doorway outside looking in front of the doorway, like this, mi si from him knee come up back to his face."

Three men all armed with guns held up Mr. Roland Watson about ten chains from Black Shop at about 11:30 p.m. on the night of Saturday July 11, 1987. They robbed and gunbutted him and enquired if the shop at Black Shop was still open. He answered in the affirmative. One of these men was known to him for five years as "Chinaman" and he identified the appellant HoSue as that person. At an identification parade held by Sgt. Evan Johnson on August 7, 1987, Roland Watson in pointing out the appellant HoSue said:

"Mi know this man, him look like one of the men who rob me."

Although at trial Mr. Watson was quite positive that HoSue was indeed one of his assailants, Mr. Chuck rightly, in our view, pointed out that if the evidence of identification rested only on the evidence of Mr. Watson, it would have been

insufficient to go to the jury for their consideration. At best this evidence was mildly corroborative of the testimony of Messrs. Taylor and Forbes who were at the shop in which the lighting was good and the opportunities for observation and recognition were good.

Leave to appeal was granted on the issue of identification due to a passage which appear at p. 242 of the Transcript. Sgt. Winston Wilson was being cross-examined in connection with the identification parade for the applicant Burrell. He gave an answer that the "same men were on all three parades." In granting leave, I had interpreted that sentence to mean that on the identification parades for all three accused men, the same persons were used to make the line-up. It was made clear in argument that that was not so. Three witnesses were separately called on to the identification parade for Burrell, held on September 18, 1987 and on each of the parades the line-up consisted of the same nine men. It was not a case of the three accused men being put on parade on the same day and the same men (non-suspects) being used over and over again in respect of different suspects.

At trial each accused made an unsworn statement. Burrell said he was at his home cooking at the time of the murder and he fell asleep. HoSue said he did not go to Black Shop on that day. Thomas said he did not go to Black Shop on that day and that from he left Orange Hill School in 1981 he has lived in Kingston.

The main direction given by the trial judge to the jury on the issue of identification appears at pages 271 and 272 of the Record and are reproduced below:

"Now Mr. Foreman and members of the jury, this is a case where the case against these accused men depends wholly on the correctness of one or more identifications of the accused men, which the defence is saying that the witnesses were mistaken. I must, therefore, warn you of the special need for caution before convicting in reliance on the correctness of the identification.

The reason for this, is that it is quite possible for a honest witness to make a mistaken identification and a notorious miscarriage of justice has occurred as a result. A mistaken witness can be a convincing one and even a number of apparently convincing witnesses can all be mistaken. You must examine carefully the circumstances in which the identification by each witness was made. How long did he have the accused under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the accused before? If so, how often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police?

Mr. Foreman and members of the jury, I must remind you that the identification of all of these accused men involves recognition. In other words, recognizing men they knew before. This is not a case in which witnesses did not know the accused before and having seen them once, held in their minds certain qualities about these persons and when they saw them again, may be on an identification parade, then they said that, 'It is my opinion,' or 'I believe that this is the man who I had seen.'

This is a case in which all the witnesses have come here to say that they knew all the accused men before. However, mistakes in recognition even of close friends and relatives are sometimes made. This is a matter for you. You have to bear in mind that it is not one witness for the crown, but there are three witnesses which the crown relies on, and the witnesses support each other."

In other passages of the summing-up the trial judge pointed to apparent weaknesses in the identification evidence and directed the jury how to approach such matters. In our view defence counsel's concession that the judge's directions on identification were adequate and satisfactory was justly made. Accordingly we dismissed the appeals and the application for leave to appeal herein.