IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS. 62, 63 of 1992

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.

REGINA
vs.
VERNON SMELLIE
AND
EUSTACE HANSON

Ralston Williams for the Crown

Jack Hines for the applicants

March 21 and June 6, 1994

WOLFE, J.A.:

Both applicants were indicted in the Circuit Court Division of the Gun Court on two counts of murder, arising out of the deaths of Junior Cummings and Garfield Coke on the 16th day of September, 1990, in the parish of Westmoreland. They were tried before Cooke, J., sitting with a jury. At the close of the case for the prosecution the learned judge upheld a submission of no case to answer in respect of count 1 of the indictment, which relates to the death of Junior Cummings, on the basis that the prosecution had failed to adduce any evidence which linked the applicants with the death of Junior Cummings. A verdict of not guilty was duly entered against both applicants eventually.

So, for purposes of this appeal, we are concerned only with the verdict of guilty returned against both applicants in respect of count 2 of the indictment touching upon the death of Garfield Coke. As a consequence of the foregoing we need refer only to the evidence relevant to count 2 of the indictment.

In this regard, Dwight Crooks, a witness for the prosecution, describes an incident which took place in his field on the 16th day of September, 1990, whilst he was in his hut. Both applicants arrived at the hut at approximately 5:00 p.m. and Smellie enquired as to the whereabouts of Denver. He received certain information concerning Denver but was informed that Denver's brother, the deceased Junior Cummings, would be returning to the hut shortly. After a wait of about half an hour Junior returned. Both applicants left the hut along with Junior. Sometime after their departure gunshots were heard, both applicants were seen running down a track each armed with a firearm. The applicant Smellie was heard to say that Junior had "licked shots after him" whereupon the deceased Garfield Coke said, "What you sey Junior sey or what you sey Junior do?", words to that effect. Smellie then said, "What you looking at me fah boy" and then shot Garfield Coke. Coke having been shot, both applicants, who are brothers, ran off in the direction of their home.

Michael Fraser, another eyewitness, supported the testimony of Crooks in every material particular. Both applicants were known to Crooks and Fraser prior to the date of the alleged incident.

The applicant Hanson was apprehended by citizens and taken to a shop where Fraser and Crooks identified him as one of the men who participated in the fatal shooting of Garfield Coke. The applicant Smellie was taken into custody subsequently. Both Crooks and Fraser also identified Hanson at an identification parade held on October 13, 1990.

Crooks was summoned to an identification parade on October 17, 1990, but failed to point out Smellie, a man whom he purported to know before. As a consequence, the learned trial judge in his summation to the jury directed them to disregard completely the identification evidence of Crooks in relation to both Hanson and Smellie. The Crown's case as

to identification of the applicant Hanson was left to the jury solely on the basis of Fraser's evidence that he knew the applicant before and had seen him along with Smellie at the time when Coke was shot and that he Hanson, like Smellie, was armed with a gun.

In respect of Smellie, he was identified by Fraser on the 30th day of October, 1990, at what Cooke, J. referred to as an "informal parade". What occurred was this: Smellie refused to stand on an identification parade which he had been previously informed would have been held on that day. He armed himself with his slop pail and threatened to empty it on any one who attempted to make him stand on the parade. In the circumstances, whilst he was in his cell along with other persons he was pointed out by Fraser in the presence of Mrs. Joyce Campbell, a Justice of the Peace, and Detective Acting Corporal Gardener.

Dr. Patricia Ann Sinclair, a registered medical practitioner and pathologist attached to the Government Medical Laboratory, performed the post mortem examination on the body of Garfield Coke on September 28, 1990, and confirmed that death was due to a gunshot injury. The entire left side of the brain was destroyed. A deformed lead grey coloured portion of a bullet measuring 9mm at the base was found in the lacerated brain tissues.

The defence of each applicant was that of alibi. Each said he was not involved in the fatal shooting of the deceased and that he was not in the bush at Lennon, Bigwoods at the material time.

Three grounds of appeal were filed and argued on behalf of each of the applicants. Grounds 1 and 2 were identical in terms, in respect of each applicant.

Ground 1:

> "That the learned trial Judge's directions on the crucial matter of Identification were inadequate in that he failed:
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> (a) To direct the jury that in cases of recognition mistakes in recognition

" even of close relatives and friends are sometimes made and;

(b) to point out to the jury a special material weakness of the identification evidence which was that the witnesses never informed the Police that they knew the applicant before nor gave any description to the Police."

With respect to (a) above, we refer to the directions of the learned trial judge appearing at pages 122 to 123 of the transcript:

> "Now, this is a case where the case against both accused, depend wholly on the correctness of the identification evidence which the crown has put before you. I must therefore warn you of the special need for caution before convicting either accused in reliance on the evidence of identification. This is because it is possible for an honest witness to make a mistaken identification. There have been wrongful convictions in the past, as a result of such mistake, and an apparently convincing witness can be mistaken. So can a number of apparently convincing witness. Those are my general directions to you in law.
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> Now, in respect of the evidence of identification as given by Crooks, that was the first witness called, it may well be that you will find his evidence far, far from convincing. He told you how he had seen Smellie three times the previous week. That is the week preceding the Sunday before the shooting. He told you how he talked with them. He conversed, he got up and he sat down, how he saw them coming off the hill. Yet, a month later, on the 17th of October, he pointed out the wrong person on the parade. He said the reason for so doing, was that he was nervous."

It is patently clear that the learned trial judge in making reference to Crook's failure to identify Smellie on the parade held on October 17, 1990, a man whom he had known before and a witness whose testimony he had invited them to disregard as to identification, was bringing home to the mind of the jury that even a witness or witnesses who purport to know someone prior to an incident could be mistaken in their recognition of such a person. In **Anthony Ashwood et al vs. The Queen** (unreported) P.C. Appeal No. 31/91 delivered April 29, 1993, Lord Lowry, delivering the opinion of the Board, emphasised:

> "...that when a general warning on identification evidence has to be given, it is the principle which is paramount and not a precise verbal formula. The essential need is to convey to the jury in clear terms how careful they must be when considering evidence of identification and how easy it is for an honest witness to make a mistake, even when purporting to recognize some one who is already known to him."

We are satisfied that directions set out above adequately meet the requirements stated by Lord Lowry.

As to paragraph (b) of this ground, it is premised on the basis of speculation. There is not one jot or tittle of evidence to support this complaint. Indeed, this matter was never canvassed at the trial. More particularly in the case of Hanson the witnesses would not have had a chance to tell the police that they knew Hanson or give a description of him as Hanson was apprehended by citizens and brought to the witnesses at the shop prior to any report being made to the police.

This ground, therefore, fails in that it lacks merit.

Ground 2:

> "That the learned trial judge's specific direction as to how they should treat the evidence against or given by the Applicant (see beginning of last paragraph of page 155 to end of first paragraph of page 156) was incomplete and as a consequence must have conveyed to the Jury the incorrect legal position in that he failed to also direct them that not only should they treat the evidence against or for each applicant separately but that they can on that evidence acquit one applicant and convict the other."

With all respect to learned counsel for the applicants, this ground is wholly misconceived. The evidence relied on by the Crown in respect of each accused was identification evidence. The learned judge dealt with the evidence against each separately pointing out to the jury such evidence as existed against each. The alibi evidence of each accused was also pointed out to the jury separately. There was absolutely no chance of the jury using the evidence against one applicant to convict the other. It must be borne in mind that a summing-up is not a recitation.

A summing-up must be tailored to accord with the evidence and with the way in which the case is presented at the trial.

This ground also fails as lacking in merit.

Ground 3 (Smellie):

The complaint in this ground is that the identification evidence against the applicant was weak and ought to have been withdrawn from the consideration of the jury for the following reasons:

(i) the witness Crooks failed to identify him on the identification parade even though he stated that he knew him before;

(ii) that both Crooks and Fraser failed to inform the police that they knew the applicant before nor did they give any description to them in circumstances where it was the most natural and obvious thing to do;

(iii) the so-called informal parade in which the witness Fraser identified the applicant did not as the learned trial judge admits (see page 130) follow the guidelines and would not have been said to be fair;

(iv) the difficult circumstances in which the identification was made.

The learned trial judge expressly, and in language which was capable of being understood by a Jamaican jury, directed the jury to completely disregard the evidence of Dwight Crooks as to identification. Crooks' failure to identify Smellie could not, per se, impeach the identification of Smellie by Fraser. We have already shown that the trial judge highlighted the failure of Crooks to identify Smellie in an effort to alert the jury as to the possibility of a witness or witnesses who purport to know some one, being mistaken as to the identity of that person. It must be borne in mind that Smellie's complicity in the crime was left to the jury on the basis of Fraser's evidence and in this regard, Cooke, J. gave the jury full and adequate directions.

With respect to number (ii) we have treated this in dealing with ground 1(b).

Finally, we are clearly of the opinion that there was absolutely nothing wrong with the procedure used to identify the applicant after he had refused to stand on the parade. The guidelines referred to by counsel anticipate a situation in which the suspect voluntarily submits himself to stand on a parade. In the circumstances of this case, if Sergeant Barrett and Michael Fraser are to be believed, there was no other course open to the officer but to do a group identification. Significantly, the English Police and Criminal Evidence Act 1984 Code D 2 4 of the codes of practice approved by the Home Secretary recommends the very procedure followed by Sergeant Barrett in this case. See para. 14-4 43rd Edition of Archbold, Criminal Pleading Evidence and Practice.

We cannot agree with counsel's observation that the circumstances of the identification were difficult so as to make it unsafe to leave the issue to the jury. This was not a fleeting glance case and it must be borne in mind that Fraser knew the applicant before. Fraser said he viewed the applicants from a stooping position in the bush. The time of day was approximately 5:15 p.m. He saw the applicants approaching him from some distance coming down the hill. The men passed within a yard from where he was positioned. As they were passing him he looked at them. Further, he is recorded as saying:

> "I saw the whole of him sir. Every part of them I saw. I see him face, back. I see every part of him face, every part, foot and back, every where of them."

For what it is worth, the witness also said that he viewed the men for half an hour.

A judge is only required to withdraw the case from the jury "when in his judgment the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult circumstances" per Lord Widgery, C.J. in **R. v. Turnbull** [1977] 1 Q.B. 224. Cooke, J., and we agree with him, obviously formed the view that the circumstances of the identification could not be categorised as poor,

thus warranting its withdrawal from the consideration of the jury.

Ground 3 (Hanson):

> "That the evidence of identification against the applicant was weak in that:
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> (i) in the very words of the learned trial judge the identification of him by the witnesses Crooks and Fraser on the 13th October 1990 was of no value at all and should not be given any weight by the jury (see page 128)
>
> (ii) that both Crooks and Fraser failed to inform the police that they knew the applicant before nor did they give any description to them in circumstances where it was the most natural and obvious thing to do
>
> (iii) the evidence of identification against the applicant could not be said to have gone beyond confrontation identification.
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> In the light of all the above and the difficult circumstances in which the identification was made the case against him should be withdrawn from the jury."

We have already referred to the circumstances under which the applicants were viewed by the identifying witnesses. Having examined the circumstances, we have concluded that they could not be categorised as difficult. The issue as to whether or not Hanson was implicated was not left to be determined on the basis of the identification of him by the witnesses on the parade which was held on the 13th October, 1990. The judge in unmistakable terms directed the jury to disregard that evidence, having himself concluded that it was useless. It is difficult to understand the complaint that in so holding, the identification evidence was weakened to the point which required withdrawal of the issue from the jury. The submission looses sight of the fact that the issue was really one of recognition. Fraser, upon whose testimony the complicity of the applicant was to be established, knew him prior to the incident. The judge was clearly of the view that Fraser, having identified the applicant immediately following the incident, the subsequent identification parade was of no assistance

in determining the accuracy of Fraser's identification of the applicant. The judge in so holding ought not to be understood as conceding that the identification evidence was weak.

The complaint concerning the failure of the witnesses to inform the police that they knew the applicant before or to give any description to the police has already been addressed in this judgment and we find it unnecessary, even for the purpose of emphasis, to repeat what has already been said.

Paragraph (iii) of the ground was abandoned.

We are firmly of the view that the learned trial judge was eminently correct in leaving the issue of identification of the applicant to be resolved by the jury. The quality of the identification evidence required it.

For the reasons set out herein, we refused the applications for leave to appeal.

The circumstances under which the execution of Coke took place constrain us to classify the killing as non-capital murder in accordance with section 2(3) of the Offences against the Person Act. In the result, we have set aside the sentences of death imposed by the court below and substituted therefor sentences of life imprisonment in respect of each accused. Pursuant to section 3A(2), we recommend that the applicant Smellie who fired the fatal shot should serve a period of twenty-five years before becoming eligible for parole and in the case of Hanson that he serve a period of twenty years before eligibility for parole, he having played the minor role in the commission of the offence.

Cases referred to

(1) Anthony Ashwood Hall vs. The Queen (unreported) P.C. Appeal No. 31/91 delivered April 29, 1993.

(2) R v Turnbull [1977] 1 Q.B. 224