CA CRIMINAL LAW - Murder

Whether trial judge wrongly overruled the submission of no case on applicant's behalf — whether identification parade held under irregular circumstances in that witness assisted to identify the suspect on parade — whether any "evidence of circumstances of arrest of JAMAICA the applicant or of any description given of the alleged killer/s".

Leave to appeal refused.

IN THE COURT OF APPEAL

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SUPREME COURT CRIMINAL APPEAL NO. 188/86

BEFORE: The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Downer, J.A.

Cases refered to
R v Gibson 13. J.L.R 207
R v Graham & Lewis (unreported) Governor-Generals Reference dated 26th June 1986

REGINA vs. WILBERT DALEY

Michael Clarke for Applicant

Miss Yvette Sibble for the Crown

27th June & 13th July, 1988

CAREY, J.A.:

The applicant Wilbert Daley was found guilty of the murder of Beryl Smith in the St. Elizabeth Circuit Court held in Black River on 25th November, 1986 before McKain, J., sitting with a jury and sentenced to death. At the conclusion of the submissions from Mr. Clarke on 27th June, we intimated that we would put in writing our reasons for refusing the application for leave to appeal against the conviction. This we now do.

The indictment charged that the applicant murdered Beryl Smith on the 25th October, 1985 and the facts and circumstances which gave rise to the charge may be shortly stated: At about 2 a.m., on the morning of 17th September, 1985 Mr. Kenneth Smith and his wife Beryl who reside at Brighton in St. Elizabeth, were awakened by their dog. Mr. Smith switched on a light to see two men approaching his house. He

hailed them but there was no response. These men went to the rear of the house from where he heard "the sound of a gun." He next realized a window had been broken in. He also saw a hand pushed through the window and a voice demanding that he "pass the money." The persons left from that part of the house and when he moved from his vantage point he noticed that a light had been switched on and that two men were now in the house, both armed with guns. He recognized one of these men whom he knew before but not by his name. This man he subsequently identified at an identification parade, as being this applicant.

His wife had just begun to say something to him when the applicant came up to her, gunbutted her and then shot her in her stomach. After this, the men ransacked the house and removed several items. Mr. Smith said that the second man whom he had not known previously, suggested that the key for the shop should be collected and the shop opened so that he could get some more money. While they were going towards the shop, he managed to slip away. The medical evidence confirmed that the slain woman had received a gun shot wound to the right side of the abdomen. The cause of death was stated to be septicaemia and broncho-pneumonia which were the complications of the abdominal injuries.

The applicant, in accord with the forensic practice of this jurisdiction, made an unsworn statement from the dock, in which he complained that the officer investigating the case, Detective Sergeant Ashman had assisted the witness Smith to identify him on the parade. So far as the killing of Mrs. Smith went, he knew nothing of the matter.

Mr. Clarke argued a number of points before us with which we must now deal. First, he complained that the learned trial judge wrongly over-ruled the submission of no case on the applicant's behalf. The burden of the complaint was that the light was poor, the time for observation "fleeting" and the existence of conditions of fright and fear. [Grounds 1-2]

The sole eye-witness, the widower of the slain woman, was closely examined and cross-examined on the matter of the lighting conditions existing before and at the time of the crime. Mr. Smith's evidence regarding lighting was as follows: (pages 6-7)

"Q. You hear anything?

A. When I go 'round I see somebody in the house. I see light put on and when I look I see the two man in the house.

Q. You heard them?

A. I heard them and I see them.

Q. You said something about lights. What were you saying about lights?

A. I said I saw light in the house."

Somewhat later in the examination-in-chief of this witness, counsel for the Crown posed the following questions to elicit the answers as indicated below: (page 11)

"Q. Now, did you know how the light got on?

A. I don't know how it got on. I only see the light in the room when them come in the room.

Q. And up to the time the other man tek you out, was light inside the room?

A. When I run out and hide the light still in there.

Q. So, for the half hour that you had seen this man, he was always in the light?

A. Yes, in the light."

Counsel for the defence in an endeavour to show how unreliable the witness was, put to him that at the preliminary enquiry, he had stated (page 18) - "None of the people I saw that night had any mask, I could see their faces. The light was bright." The witness did not demur. We would doubt whether that statement amounted to a contradiction of anything which the witness had told the jury. Earlier, the witness did state that the evidence he gave at the preliminary

examination was true, which would make that earlier statement evidence in the case on the question of quality of the available lighting. It seems to us that this ploy of counsel was very likely to strengthen the credit-worthiness of the witness.

Cross-examination as to the lighting, in our view, did nothing to alter, modify or destroy anything said by the witness in chief. He emphasized or reiterated that the men were in the room in which there was light. They left that room into a hall and advanced to the room where the witness was standing with his wife:

> "Q. When they come into the hall, that is where the shooting take place?
>
> A. When they come into the hall, them turn in that room where we stand, light was there."

The other question which would arise on the broader issue of identification, was how close the witness was to the applicant at the time the murder took place. The evidence was that at that point in time, the victim was standing by a partition near to the bathroom while her husband was at the other side of the passage. He said she was beside him. We would think that the applicant was in close proximity to the witness.

Mr. Smith stoutly maintained that the applicant remained in the house for half an hour but it did not appear that represented the period during which observation was possible. Indeed, when it was put to him specifically that he had no opportunity of seeing the applicant, he replied thus (at page 26):

> "She got the shot and the lick in her head before they take me out of the house."

But he had also said that not only had he seen the applicant in the lighted room, but the applicant came up to him beside his wife.

In refusing to accede to the submission of no case to answer, we are not in the least doubt that the learned trial judge acted correctly.

There was evidence which we have endeavoured to detail, to demonstrate that cross-examination, far from discrediting the witness, assured that the witness would be believed on his oath. The evidence amounted to this, that the applicant was one of two armed men who brazenly broke into the house of this unfortunate couple; switched on the light in one of the rooms into which they had entered; that the applicant came in close proximity to the witness and murdered the witness' wife who was standing by his side. That although there was no light bulb in the area where the crime was committed, light from the room from which the men emerged, entered the room where the witness stood. It was not that the location was in darkness but the light at that spot was necessarily not as bright as the room in which the bulb was situated. This was not a "fleeting glance" situation. There is no evidence consistent with that conclusion. What is not precisely stated and in the circumstances, any estimate of time, would be, at best, an educated guess. From what the witness stated occurred that morning, we can say that there was adequate time for the witness to observe this applicant whom he knew before as someone who had grown up in the district. Finally, we would note that as to terror, the witness, albeit an elderly man, responded thus to questions from defence counsel at page 25:

"Q. You were terrified, weren't you?

A. Yes, sir. I was ignorant when the man them come in.

Q. You were frightful?

A. Yes, for me nu 'fraid."

We understood the witness to be saying that he experienced a fright but he was no craven coward. The evidence supported his assertion, for after the shooting, when he was marched off to the shop at gun point, he had managed to escape these gunmen.

Learned counsel, Mr. Clarke sought support for his arguments in the opinion of the learned trial judge that there were serious

weaknesses in the prosecution case on the issue of identification. With respect to those observations in her directions, we can only observe that she was especially generous. But all that was in the applicant's favour, and we do not think particularly helpful in this Court when the jury plainly disagreed with the learned judge's comment. As must by now be plain from the summary of the evidence set out earlier, we do not share the pessimistic view of the learned trial judge. With all respect to her, and in spite of the startling reluctance on the part of the prosecution to display thoroughness in adducing evidence, we think there was ample evidence fit to be left to the jury on this issue and the jury on that evidence were at liberty to return a verdict adverse to the applicant if they accepted it. They did. We can find no ground for dissent.

Another argument put forward by Mr. Clarke, was, that the identification parade was held under irregular circumstances. We understood counsel to be saying that because there was some conflicting evidence as to the presence of the investigating officer (since deceased) on the identification parade, the parade was vitiated and the evidence thereof, of the value of zero. We found that while the eye-witness admitted that the investigating officer was on the parade, the police officer in charge of its conduct stated in evidence that while the officer was on the compound, he was not on the parade.

But, what we found odd was this, defence counsel, who was also present at the parade, did not suggest to the police officer that the investigating officer was on the parade. For the first time, the applicant in his statement from the dock, said that the officer had indicated on his fingers where the suspect stood in the line-up. We found it difficult to accept that any attorney-at-law, alive to his responsibilities to his client, and who had witnessed such an event, could fail either to apply to the Court to be allowed to withdraw so as to give evidence on that matter, or omit to cross-examine to it.

So the real complaint was that the witness had been assisted to identify the suspect on the parade. But in the event, that was not established.

We came to the conclusion that the evidence did not show that there was any impropriety which would require the trial judge to direct the jury on its effect on the identification parade. See R. v. Gibson 13 J.L.R. 207. We would add that the presence on an identification parade of the officer in charge of the investigation, if proved, would require some direction from the trial judge. Regulation 553 of the rules governing identification parades made under the Jamaica Constabulary Force Act as amended by the relevant rules 1877 requires that every precaution shall be taken in arranging for personal identification to exclude any suspicion of unfairness or risk of erroneous identification through the witness' attention being directed to the suspected person in particular. The rules do not in terms forbid the presence of that officer, but we think it would give solid cause for the suspicion of unfairness to arise if that was the fact. "Nothing should be done or left undone to impinge on the absolute fairness of that parade," per Graham-Perkins, J.A., in R. v. Cecil Gibson (supra) at page 204. His presence would affect the weight of the evidence with respect to the identification parade; it would not vitiate the parade. See R. v. Graham & Lewis (unreported) Governor-General's Reference dated 26th June, 1986.

It was also urged that "there was no evidence of the circumstances of the arrest of the applicant or of any description given of the alleged killer/s." We set out this ground to dispose of it summarily.

There was no evidence led by the prosecution regarding the arrest of the applicant. Presumably, Detective Sergeant Ashman, the investigating officer, did, but he died before trial of the case. But we cannot see how this omission can be considered a defect in the prosecution case, for the Crown is not called upon in proof of a charge of

murder or indeed of any crime, to establish how an accused comes before the Court. But the jury were not in ignorance on this point, the applicant himself supplied the missing element.

As to the absence of any description of the applicant, the witness was never asked by defence counsel to state the description he gave the police of the murderer. In evidence-in-chief, he said he knew the applicant by face but not by name. Crown counsel would be in breach of the hearsay rule to adduce evidence of any description given by him to the police. We note that it is defence counsel who properly can ask this sort of question for its purpose is to test whether the description given by the witness to the police, accords with the accused who is physically present in Court for the jury's examination. "It is one of the factors which would assist the jury to determine the quality and cogency of the identification," per Rowe, P., in R. v. Graham & Lewis (supra).

We have examined the transcript with care, and taken heed of the submissions of counsel, but we are clear that the grounds put forward, cannot succeed and for the reasons we have given, we refused leave to appeal as we stated at the beginning of this judgment.