JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 142/90

BEFORE: THE HON. MR. JUSTICE ROWE, P.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

REGINA vs. WINSTON BLACKWOOD

C. Dennis Morrison for the appellant

Bryan Sykes for the Crown

March 2 and April 1, 1992

WRIGHT, J.A.:

At a sitting of the Home Circuit Court on October 3, 1990, before Panton, J. and a jury, this appellant was convicted and sentenced to death for the murder of William Spencer on the 13th day of March, 1981, in the parish of Clarendon. We treated the hearing of his application for leave to appeal as the hearing of the appeal which we allowed. Accordingly, we quashed the conviction, set aside the sentence and entered a verdict of acquittal. As promised, we set out hereunder our reasons.

Sixty-seven year old William Spencer was gunned down in the presence of his wife Mary Spencer and one Victor Smith at about 5:00 p.m. on March 13, 1981, on the Spring Plain main road in Clarendon while they were returning home from vending goods at Farquhar Beach in the said parish. Formerly a shop-keeper in Manchester, Mr. Spencer had responded to the harrassment by frequent breakings of his shop by taking to the road in his land-rover selling his goods at the beach and from house to house. In a settled routine they traversed that route to and fro three times per week - Mondays, Wednesdays and Fridays -

passing through Milk River, Pass side, Barber River, Tweedside, Spring Plain - arriving at the ill-fated site regularly about 5:00 p.m.

Travelling along a portion of Mr. Spencer's route, but starting from Water Lane, was Daniel Thompson who twice weekly over a period of two years drove a bread-van from Water Lane to Manchester and back and would on those occasions meet Mr. Spencer. The final meeting was to be Friday March 13, 1981. He was to be the prosecution's main witness in a case depending largely on circumstantial evidence.

As Mr. Thompson journeyed home from Manchester along the Spring Plain main road and while approaching a bend in the road he came upon two men on his left hand. They were standing by the side of the road with two logs by their feet. The bread-van was a left-hand drive and he passed them within three feet travelling at a speed of some 20 miles per hour because of the rocky nature of the road surface. As the men stood they faced across the road. The men, he said, were Danny Dread, known to him for twenty years, and this appellant whom he had known by face only for four months and whom he saw almost every day he made his trip along that route. Mr. Thompson rounded the bend and then entered upon a straight stretch of road which extended for about a half mile up to another bend. About five chains from the spot where he passed these men he met Mr. Spencer's land-rover in which were Mrs. Spencer and another person besides Mr. Spencer. It was no small shock to Mr. Thompson when within minutes thereafter when he had reached at Springfield, some five miles away, a car driven by one Mr. Sunanan arrived with the dead body of Mr. Spencer on the way to the Lionel Town Hospital.

It was Mrs. Spencer's cruel fate to witness her husband being murdered close by her and not to be able to identify his killers. Her evidence was that after passing the bread-van and while approaching the bend she heard her husband say, "Watch the

bwoy blocking the road on me." She looked ahead and saw two fellows standing on the right hand side of the road. The road was blocked with "two huge pieces of block about eight feet in length." Her husband stopped the vehicle a few yards from the obstruction and the two fellows emerged from the little bush at the roadside demanding money. "Give me the money, give me the money" was the demand. Mr. Spencer responded, "I don't have any money. Is not you block the road.. Pull the block man, pull the block." He had by then alighted from the vehicle and was standing beside the driver's door. She could not see their faces because they were masked but she described them thus:

> "One of them tall and dark and the other one not so dark, but cool complexion; as old time people say sambo colour."

She had at her feet a cheese pan with silver. The balance of the money was in a bag. She offered both the pan and the bag and one of the fellows took them. She had grabbed a machete and jumped from the van but the machete fell from her hand and was taken up by "the clear skin one" who raised it at her. In the meantime, she heard an explosion and when she looked she saw her husband falling to the ground. Victor Smith was pleading for his life because a gun was trained on him. After the fellows had ransacked the vehicle they ran off towards the riverside and disappeared. Soon after Mr. Sunanan arrived and picked up Mr. Spencer who was then bleeding through his mouth and carried him off to the Lionel Town Hospital. At the trial, over nine years later, she could not assist on the issue of the identity of her husband's killers. The only other evidence adduced by the prosecution pointing to the presence of the appellant in the area on that day was that of a Winston Reid. He stated that about 4:00 p.m. that day, that is, about one hour before the killing, he had seen the appellant whom he had known for about twenty years and a man known to him as "Danny Prep" walking across his property. They were about six

chains away when he called to them and they ran away but though he trailed them for about ten minutes he could not say where they were around 5:00 p.m. nor did he say how near his property was to the scene of the killing. Accordingly, this evidence is ruled out as being valueless on the crucial issue of identification.

The medical evidence supplied by Dr. Rao Gudapati disclosed that there were multiple punctured wounds on the front of the chest, mostly around the sternum; the vital organs of the chest sustained penetrating puncture wounds from gunshot pellets several of which were recovered from the body. Death was due to shock and haemorrhage due to injury to the heart.

Detective Sergeant Allison Walker, then stationed at the Lionel Town Police Station, visited the scene of the murder shortly after 5:00 p.m., saw the road partially blocked by the two logs and collected eight gunshot pellets at the scene.

Actual investigation of the crime was undertaken by Detective Assistant Superintendent Levi Campbell who visited the scene at 5:00 p.m. From information received he had warrants of arrest issued for Ronald Anderson otherwise called 'Danny Prep' who was arrested not long after the charge arose and the appellant Winston Blackwood who was not arrested until March 26, 1983, after the holding of an identification parade on which Mrs. Spencer failed to identify him. The witness Daniel Thompson, on whose evidence the prosecution relied heavily, did not attend the identification parade because he was then recuperating from a surgical operation. Accordingly, he did not have the opportunity to confront the appellant until the time of the Preliminary Examination when he identified him in the dock.

At the close of the case for the prosecution, a submission of no case to answer having been over-ruled the appellant made an unsworn statement as follows:

> "My Lord, I don't know nothing about the case you hear sah. Me is a tailor man and me get plenty work fi mi living, sah, me nuh have no time fi rob. More time me tek sick and dem way deh and more time me go and come. Me nuh have no time sah, me work hard fi mi living, so mi nuh have no time. Plus, the man who give evidence them nuh know mi and mi nuh know them, you hear, sah. Me nuh alias man, me not an alias. Me work hard fi mi living up there sah, me nuh have no time fi rob. Me nuh have no time fi handle gun, from me born mi nuh handle gun, me nuh shoot nobody, me nuh commit no crime, my Lord, so me ah beg you, me nuh know nothing about this something, sah."

In that brief statement he denied any involvement in the crime and challenged his identification as well as the opportunity of his identification by the two witnesses who purported to have identified him on that day.

The crucial issues in the prosecution case were common design, circumstantial evidence and the all-important issue of visual identification. After a summing-up which lasted one hour and nineteen minutes in which those issues were dealt with the jury retired for one hour and twenty-nine minutes and then returned to report that they were not agreed on a verdict. The usual enquiry by the trial judge revealed that "there is a doubt" on "one small area" namely description. The learned trial judge then gave the following further directions at pages 203 to 205 of the record:

> "Now, in relation to this question of the description, the witness Winston Reid referred to the accused being of dark complexion and a person whom he knew before, and that Danny Prop being darker than the accused. That is the evidence from Winston Reid. The evidence from Mrs. Spencer in relation to the two men, because remember she did not see their faces, is that one man was tall and dark, whereas the other one had a sambo colour, cool complexion. Now, you will remember I mentioned to you that apparently this sambo colour, cool complexion according to Mrs. Spencer, would be somebody of a lighter complexion, rather than being dark. And that person would be of a lighter complexion. So, her evidence is

"that one man was tall and dark and the other one was apparently of a lighter complexion.

Now, the witness Thompson who testified in relation to description, he said he gave a description to Superintendent Troupe, and that in relation to the other man, he said that he was dreadlocks. And in relation to this accused he was not dreadlocks. That is the only description that Thompson is supposed to have given to the police. That is the only evidence that we have of a description in relation to the accused. That is, that he was not a dreadlocks. And you bear in mind the comments that have been made in relation to that, to the effect that that is really not a description.

Now, I think I have repeated the evidence that has been given so far as description is concerned. Reid is saying he knew the person, knew the accused, and you will remember I mentioned his evidence, you will remember his evidence about distance that he was from the person. And you will remember Thompson's evidence that he had seen this person before, he doesn't know his name, and you remember his evidence as to the distance the person was from him.

Now, Madam Foreman and Members of the Jury, so far as, and I have to deal with it, so far as the question of doubt is concerned, you say you have arrived at certain findings of fact. I am not seeking to know what those findings are now. Indeed I won't ask you at any time what those findings of fact are.

You mention that there is an area of doubt. It is my duty to say to you that wherever there are doubts, wherever there are doubts, doubts, if they exist, have to be in favour of the accused. If they exist, they have to be resolved in favour of the accused.

You remember that identification is the major area of the case. You remind yourselves of the directions I gave you in relation to identification.

If you are sure on the question of identification, the evidence of identification, if you are sure that these two witnesses, particularly Daniel Thompson is speaking the truth, and are not mistaken, then that is the only time that you will be in a position to return a verdict of guilty. If you are not sure about the evidence as to identification, you have doubts about it, then you are obliged to say not guilty in those circumstances."

After retiring for a further fifty-nine minutes the jury returned with a unanimous verdict of guilty.

Five grounds of appeal were filed. Ground 5, which complains that the verdict is unreasonable and cannot be supported having regard to the evidence, was treated as an alternative to Ground 1, which condemns the failure of the trial judge to accept the submission that there was no case to answer. Mr. Morrison submitted that the evidence led by the prosecution did not disclose a prima facie case against the appellant because the evidence of Daniel Thompson, who was the only witness who purported to place the appellant at the scene at the relevant time, was such that he could have had only a fleeting glance of the person whom he purported to identify as the appellant. The result was that the evidence was of such a tenuous character that the trial judge ought to have taken the view that no prima facie case had been made out. For support he cited R. v. Galbraith (1981) 2 All E.R. 1060; R. v. Stafford Chin S.C.C.A. 101/87 (unreported) delivered 21st September, 1987.

For the Crown, Mr. Sykes responded that the submission of "no case" had been properly over-ruled because in a case relying on circumstantial evidence once primary facts are established, it is for the jury, after a proper direction, to say what inferences may properly be drawn and whether the Crown has satisfied the requirement for the proof of guilt. As a statement of principle one could not fault that submission but here the crucial issue is whether the essential primary facts were indeed established. In this regard, the evidence of Daniel Thompson would be of no more value than the evidence of Winston Reid, whose evidence could not in any way connect the appellant with the commission of the crime, if the factors which go to the proper identification of the appellant by him are impeachable. Mr. Sykes' approach was to essay to identify some nine factors in the prosecution case which he submitted

answered the challenge in the first ground of appeal but in our opinion the only relevant factors are those affecting Mr. Thompson's ability to recognize the person whom he claimed was the appellant. His evidence was that the nature of the road surface obliged him to travel at no more than 20 miles per hour as he passed the men standing by the roadside and that he had to be observing the road generally as he travelled. But it was made clear in cross-examination that he did not have the men in view while approaching them and inasmuch as he only saw their faces in the act of passing them while carefully choosing his path among the rocks on the road he could at the highest have only a fleeting glance of their faces which would have been accomplished in a fraction of a second. Add to this disability the fact that he did not attend an identification parade and only identified him for the first time in the dock at the Preliminary Examination which was held more than two years after the murder and it is not difficult to appreciate that the issue of identification which depended solely on his evidence was at the highest unsatisfactory.

In R. v. Galbraith (supra) Lord Lane, C.J., dealing with the question of a "no case" submission at page 1061, stated the law thus:

> "How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability,

> "or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

It is clear that the case falls within the principle stated at 2(a) (supra). There is considerable merit in this ground sufficient to dispose of the appeal. We will, nevertheless, consider the other grounds of appeal.

Ground 2 is as follows:

> "2. That the learned trial judge erred in law in:
>
> a) Permitting the prosecution to lead evidence from Det. Sgt. Levi Campbell to the effect that within five days of the offence he was looking for the accused and another man in particular, as a result of which he obtained a warrant of arrest (pages 59 - 65 of the transcript) and/or
>
> b) Failing to give the jury any or any adequate directions as to the potential effect of that evidence and as to how they should approach it (page 196)."

The mischief with which this complaint deals arose in a rather subtle manner. Daniel Thompson, as the evidence shows, is the only prosecution witness who purported to identify the appellant in circumstances which could give rise to the inference that he was one of the killers. But, as he testified, he had only seen the appellant over a period of four months as he, the witness, traversed the area in his bread-van. He did not know his name and so could not have named him to the police. Crown Counsel elicited from Detective Assistant Superintendent Levi Campbell that on March 18, that is five days after the murder, he was looking for two persons viz. Ronald Anderson otherwise called 'Danny Prep' and Winston Blackwood. No witness called by the prosecution testified to having supplied those names to the police. Accordingly, the evidence complained of was patently hearsay and ought not to have been allowed. And

the danger passed without being recognized because in his summing-up the trial judge repeated the evidence without any comment let alone a direction to disregard such evidence as being hearsay. Indeed, had he recognized it at all he may well have ruled differently on the "no case" submission.

The problem with this sort of evidence is not novel. It was remarked on by Lord Devlin as being among the customary devices of counsel in Glinski v. McIver (1962) A.C. 726 at pages 780 to 781:

> "The defendant's case is that from then on his actions were governed by the advice he received from Mr. Melville, a solicitor in the legal department at Scotland Yard, and from the counsel whom Mr. McIville instructed. No suggestion of malice or bad faith is made against either solicitor or counsel. Since the defendant's state of mind was in issue, evidence of what he was told by the solicitor and counsel would in the ordinary way have been admissible. But it was thought, rightly or wrongly, that privilege would be claimed, either Crown privilege or the client's privilege that protects communication between himself and his legal advisers, to prevent the disclosure of what passed between the defendant and solicitor and counsel. So the customary devices were employed which are popularly supposed, though I do not understand why, to evade objections of inadmissibility based on hearsay or privilege or the like. The first consists in not asking what was said in a conversation or written in a document but in asking what the conversation or document was about; it is apparently thought that what would be objectionable if fully exposed is permissible if decently veiled. So Mr. Melville was not asked to produce his written instructions to counsel but was asked without objection whether they did not include a request for advice 'on the Glinski aspect of the matter.' The other device is to ask by means of 'Yes' or 'No' questions what was done. (Just answer 'Yes' or 'No': Did you go to see counsel? Do not tell us what he said but as a result of it did you do something? What did you do?) This device is commonly defended on the ground that counsel is asking only about what was done and not about what was said. But in truth what was done is relevant only

> "because from it there can be inferred something about what was said. Such evidence seems to me to be clearly objectionable. If there is nothing in it, it is irrelevant; if there is something in it, what there is in it is inadmissible."

We were not constrained to accept Mr. Syke's submission that the evidence had no prejudicial effect and that it was admissible on the basis that it went to the state of mind of the officer in obtaining the warrant of arrest in which circumstances no specific direction was required. So far as obtaining the warrant was concerned he was only acting on the information he had received and he did not have to decide its truthfulness. Hearsay is hearsay whether fully exposed or thinly veiled. It was sufficiently veiled here to have avoided detection but it is nonetheless objectionable.

It is correct, as Ground 3 complains, that the trial judge failed to point out to the jury that Daniel Thompson's identification of the appellant was in effect a dock identification and to give them appropriate directions as to the dangers inherent in such an identification. At page 190 of the record the trial judge did alert the jury to the fact that it was some two years after the incident that for the first time the witness Daniel Thompson pointed out the appellant at the Preliminary Examination but further than that he did not go.

Because of the inference which a witness may draw from the fact that because the accused is in the dock he must be the culprit, it is generally undesirable that a witness should be allowed to identify the accused for the first time in the dock and this should be avoided if possible. But although that fact will affect the cogency of the evidence it does not render it valueless. See **R. v. Cartwright** (1914) 10 C.A.R. 219. In that case four witnesses identified the accused some fifteen days after the event. It was held that it would have been desirable if an identification parade had been held but there was other

support for that evidence which was accepted. Then, too, an accused may refuse to take part in an identification parade thus leaving the witnesses no option but to identify him in the dock: **R. v. John** (1973) Crim. L.R. 113.

In the instant case, the circumstances which led to the dock identification were not due to any fault on the part of the prosecution but having regard particularly to the lapse of time before the dock identification took place and the fact that the witness did not know the appellant by name, it was eminently desirable that the trial judge should have warned the jury on the dangers inherent in dock identification.

As the record shows, the jury, after retiring for one hour, still required further assistance on the description of the appellant. Ground 4 contends that:

> "4. That the learned trial judge erred in law in not directing the jury when they requested further directions with regard to the question of the description of the accused man by the witnesses Winston Reid and Daniel Thompson (page 202), that the inability of the latter to provide a fuller description than that the accused 'was not a dreadlocks' was a factor that they should bear in mind in considering whether he could in fact properly identify the accused (page 204 - 205)."

In cross-examination, Daniel Thompson had been asked what was the description given by him to Superintendent Troupe to whom he had given his statement to which he had replied:

> "One of them Danny Dread was locks and the other man wasn't locks."

That, he confirmed, was the extent of the description of the appellant that "he was not locks." Mr. Sykes at first contended that the trial judge's response to the jury's request was adequate but capitulated by conceding that the weakness identified required specific aid. None was given although the need was manifest because the description given would fit all men except those who had locks.

It follows that there was merit in all the grounds of appeal argued accounting for the conclusion to which we came.