JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 111 OF 2005

BEFORE: THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE MORRISON, J.A.
THE HON. MISS JUSTICE SMITH, J.A. (Ag.)

EARL REID v REGINA

Delano Harrison, Q.C for the appellant
Miss Paula Llewellyn, Q.C. Director of Public Prosecutions and **Miss Annette Austin, Crown Counsel** for the Crown

May 19, 20, 21 and July 31, 2008

SMITH, J.A.

On the 28th July , 2005, in the Home Circuit Court, the appellant, Earl Reid was convicted of murder. The particulars of the offence were that Earl Reid on the 26th day of November, 2002 in the parish of St. Andrew murdered Andrew Stephens. He was sentenced to life imprisonment. The learned trial judge directed that he should serve a period of 30 years before becoming eligible for parole.

His application for leave to appeal was granted by a single judge in chambers on the 12th December, 2007.

The Prosecution's Case

The prosecution's case was based on the evidence of Mr. Samuel Rankine - a businessman, Detective Inspector Carlos Bell and Acting

Deputy Supt. Michael Phipps. Mr. Rankine testified that on the 26th November, 2002 at about 9:00 a.m. he was standing at the gate of his mother's house on Drews Avenue, Kingston 20. He was waiting on the deceased Andrew Stephens who was working for him. The deceased was across the street from Mr. Rankine's mom's house. Mr. Rankine spoke to the deceased and thereafter started to walk towards his house which was not far from his mother's. When he reached his gate, he heard an explosion. He ran inside his gate, turned around and looked outside. He saw Andrew on the ground and saw the appellant, whom he knew as "Scabby" running away from the scene with a pistol in his hand. He then saw another man "Kitchener" run up to the deceased who was still on the ground. Kitchener who had a gun in his hand fired two shots at the deceased. The appellant and Kitchener ran towards a "gully" and disappeared. Mr. Rankine called the police. The police came and the body was removed to the Kingston Public Hospital.

Detective Inspector Carlos Bell told the court that on the 26th November, 2002 he went to the crime scene. He saw the body of the deceased whom he knew before. He had the body photographed before it was taken to the hospital. Inspector Bell went to the postmortem examination which was done by Dr. Prasad. He saw Dr. Prasad remove a bullet from the body of the deceased. The doctor handed the bullet to

the Inspector. He recorded statements and obtained a warrant for the arrest of "Earl" o/c Scabby.

On the 20th November, 2002, Inspector Bell and other police officers went to Forest District, Wait-a-Bit in Trelawny. He saw the appellant, who attempted to run but was held. The appellant gave his name as "Earl Reid" when asked; he said he was also called "Scabby". Inspector Bell cautioned him and told him he was investigating the murder of Andrew Stephens and that he had information that he (the appellant) was involved. The appellant said:

> "Officer is a wrong thing happen. It should not happen still. A me and 'Kitchener' kill Andrew. Me never want do it but 'Kitchener' a force me fi do it and now de man dem a Drewsland want kill me back fi it, see mi have fi run weh come down ya come hide."

The Inspector asked him why he did not go to the police, he said:

> "Officer me did confuse and nuh know wey fi do"

The officer asked him where was the gun and he said:

> " Mi we gi unno it. Just carry me go a Drews land which part me hide it after the killing."

The appellant was taken to Davidson Terrace in Drews land where he pointed to an old car. The car was searched thoroughly but no gun was found. Deputy Supt. Michael Phipps was among the party of policemen who went to Wait-a-Bit on the 30th November. His evidence as to what took place when the appellant was arrested supports the evidence of

Inspector Bell. He said he made a note of what the appellant said in his notebook which he had with him in court.

On the 5th December 2002, he received a warrant from inspector Bell. He showed the warrant to the appellant and read it to him. He charged him with the murder of Andrew Stephens. The appellant after he was cautioned said:

> "Mr. Phipps mi done tell unno how it go already. Mi leave it up to di Almighty fi help mi, and you see weh you can do fi help me, too".

The Defence

The appellant gave evidence. He told the court that his name is Earl Anthony Reid. He lives at 5B Davidson Drive, Kingston 20. He is a welder. He denied shooting the deceased. He swore that he knew nothing about Stephen's murder. He did not know the deceased. He was visiting his family in Litchfield, Trelawny when he was taken into custody by the police. He had been in Trelawny from the 22nd November, 2002. He testified that when the police picked him up they asked him two questions. They asked him his name. He told them Earl Reid. Then, they asked him where he "come from" and he told them "town". They asked him nothing more and he did not say anything else to them . He made no confession.

He told the Court that he knew Rankine. They lived in the same community. He said that sometime back in 1985, the police asked him

where the brother of Samuel Rankine lived. He pointed to his house. The brother of the witness was killed by the police. Samuel Rankine accused him of causing the death of his brother and threatened to "get back at him".

Mr. Delano Harrison, Q.C. sought and obtained leave to argue the following supplementary grounds of appeal:

"1. In her charge to the jury on the matter of the appellant's alleged confession, the learned trial judge must have confused their collective mind by complicating the questions for their determination by the introduction of the issue of whether that "confession" was made voluntarily or not.

2. The learned trial judge's directions to the jury were, in critical parts, so unbalanced and so unfairly weighted against the Appellant's cause as to deprive him of the substance of a fair trial.

3. The learned trial judge failed to assist the jury in fully and properly assessing the quality of the visual identification evidence, by her omission to highlight the patently significant weaknesses in that evidence.

4. The learned trial judge's directions on the Appellant's alibi defence were inadequate and, all the more particularly in a case where so much turned on Appellant's credibility, insufficient to assist and guide the jury properly."

Ground 1

The complaint in this ground is that the learned judge must have confused the jury by introducing the issue of whether the confession was made voluntarily.

The appellant in his evidence denied making any confession. In such a case the question of voluntariness did not arise for the consideration of the judge and the jury. The simple issue for the jury was whether or not the appellant made the statements which the prosecution was attributing to him.

The learned judge in her direction to the jury said:

> "...the accused (sic) case is that he did not say those words. He did not make this confession and that it has been fabricated. In deciding whether you can safely rely upon the confession you must decide two issues; one did the defendant in fact make the confession? Second, if you are not sure that he did you should ignore it. If you are sure that he did make the confession, are you sure if the confession is true."

Those directions are basically unexceptionable. However, perhaps out of an abundance of caution the learned judge continued:

> "When deciding this, you should have regard to all the circumstances in which it came to be made. Consider whether there were any circumstances which might cast doubt upon its reliability. You should decide whether it was made voluntarily or may have been made as a result of oppression or improper circumstances. You have the evidence of the police, as to what took place there. That there were no threats or

> nothing held out to him. You remember that was the evidence in chief. That was not challenged on cross-examination."

We agree with the learned Queen's Counsel for the appellant that these directions as to voluntariness was wholly unwarranted on the facts of this case. However, we do not agree with counsel's submissions that by virtue of the directions "the jury were put at the risk of arriving at the reliability of the alleged confession and thus guilt, by an incorrect route." We think that the contention of the learned Director of Public Prosecutions that the impugned directions were, if anything, to the advantage of the appellant, is well founded.

In her directions to the jury the judge first observed that the defendant had denied that he made any confessions to the police. The learned judge made it abundantly clear to the jury that they must first decide whether or not they were sure that he had made the confession. If they were sure he made the confession, then and only then should they go on to consider whether or not, they were sure that it was true. It is difficult to see how the introduction of voluntariness in determining whether the confession was true (though not necessary), could in anyway be prejudicial to the appellant. As the learned Director of Public Prosecutions suggested it was open to the jury to conclude that the circumstances of the appellant's arrest might have affected the reliability of the confession. The evidence of the police officers is that when the

group of police officers approached the appellant, he attempted to run and was apprehended. We are clearly of the view that the impugned directions were not capable of creating any risk of injustice.

Ground 2

The complaint in this ground is that the judge's directions were so unbalanced and so unfairly weighted against the appellant's cause as to deprive him of the substance of a fair trial. Learned Queen's Counsel complained that at the end of his review of the prosecution's case, the learned judge did not proceed to review the case for the defence but instead she furnished the jury with directions uninterruptedly dedicated to the prosecution's case.

An examination of the learned judge's summing – up will reveal a particular pattern or style. The learned judge when reviewing the evidence of a particular witness, often digressed to compare the witness' evidence on a particular point with that of another witness called by the opposing side.

When reviewing a witness' evidence she would often interject the arguments of counsel in relation to a particular aspect of the evidence . For example when reviewing Inspector Bell's evidence the judge stated:

> "So continuing Inspector Bell's evidence, he said that on the 30th November 2002, he went to Forest District, Wait-a-Bit in Trelawny and he said when he got there, you remember defence counsel was saying to you the man is not hiding..."

In the above excerpt the learned judge interposed a point which the defence had made. At page 252 of the record the learned judge after concluding her review of the prosecution's case, reminded the jury of the burden and standard of proof and then, summarized the evidence on which the prosecution relied. Thereafter she proceeded to review the appellant's evidence.

During such review, she on a few occasions paused to remind the jury of the prosecution's evidence or argument on that aspect of the defence evidence under review.

On one occasion she referred to those aspects of the prosecution case that the jury should look at when determining whether or not the prosecution had disproved the alibi. Because of the overwhelming prosecution evidence the contrast between the defence and the prosecution's case would inevitably operate against the appellant's interests. This however, does not by itself make the summing up unfair. Every defendant has the right to have his defence faithfully and accurately placed before the jury but he is not entitled to demand that the judge should not contrast his evidence with that of the prosecution. He is not entitled to demand that the judge should not expose any logical deficiencies of his defence to the jury. Although the judge has a duty to review the evidence fairly and accurately this does not mean that she must rehearse it " blandly and uncritically," the judge has no duty to

cloud the merits either by obscuring the strengths of one side or the weaknesses of the other (see ***R v Nelson*** [1997] Cr. L.R. 234 which was cited with approval in ***Gregory Grant v R.*** SCCA No. 29/05 delivered May 4, 2007.) This ground fails.

Ground 3

The complaint is that the learned judge omitted to highlight the patently significant weaknesses in the visual identification evidence and thereby failed to assist the jury in assessing the quality of the evidence.

The sole eyewitness, Mr. Samuel Rankine, testified that he had known the appellant for about 20 years. They grew up in the same community. He knows the appellant's parents and his brothers and sisters. The murder was committed at about 9:00 a.m.; it was a bright morning. When he saw the appellant that morning he was about 46 feet away. Mr. Delano Harrison Q.C. referred to the following bits of evidence as the bases for his criticism.

This is part of Mr. Rankine's examination in chief, at pages 14-15 of the record:

"Q. Now, you said you saw Earl Reid. What part of him did you see?

A. I see him eye make four.

Q. Excuse me?

A. We make four. My eyes seeing him.

Q. When you say ...your eyes made four?

A. Yes sir.

Q. What you mean when you say –
A. I mean I see him face to face. I seen his face and he turn his back and ran off. That is what I mean.

Q. And how long you saw him?

A. I saw him probably about five seconds, something like that. His body for like five seconds running away."

At page 20 the following dialogue took place:

"Q. Now, back to the date of the incident. You said your eyes and the accused man's eyes made four or words to that effect. How long did you see this accused man? You say you saw his face. How long you saw his face?

A. Probably see him face like a minute or two and then he turn his back. So I saw him like five seconds from going away from the scene."

During cross-examination the following took place:

"Q. Oh just so I don't forget, is it your evidence that, it is about a matter of four seconds that you were able to see the face of this person who ran?

A. Pardon me?

Q. Is it your evidence? I mean, is it correct to say that?

A. It is correct to say that I saw his face.

Q. For four seconds.

A. Yes."

Having referred to the above excerpts from the evidence of Mr. Rankine, Mr. Harrison made the following submissions:

> "a) The learned trial judge did not remind the jury of the distinction that witness Rankine had himself made between seeing the offenders "body" for probably about five seconds as against his "face" for "like a minute or two (1 or 2 minutes);
>
> (b) the learned judge made no attempt to assist the jury in resolving this problem of what Rankine must, logically have meant by his 1 or 2 minutes (seeing face) viz-a-viz his 5 seconds (seeing body);
>
> (c) flowing from (b) the learned trial judge failed to highlight for the jury's benefit that merely 1 or 2 seconds (if that was the sense that they made of the 1 or 2 minutes) in the circumstances would most significantly have weakened the witness identification of the Appellant as the offender he swore he saw;
>
> (d) the learned trial judge failed to remind the jury of the material inconsistency in the witness' evidence, namely, that he had seen the offender's face 'for four seconds' and so failed to point out the potential of that inconsistency – unexplained – for further weakening the identification evidence;
>
> e) the learned trial judge's direction that 'he saw him probably about five seconds, <u>something like that'</u> bespeaks an imprecision that, it is respectfully submitted, is far too casual for what was required to assist the jury in setting out the intricacies represented by this area of Mr. Rankine's evidence."

The learned trial judge gave the jury the full **Turnbull** directions on the dangers of visual identification evidence both in general and in the

circumstances of the instant case. After the **Turnbull** directions the judge told the jury:

> "First of all you look at how long Samuel Rankine said he had the person, who he said was the accused, under observation. He said he saw him probably about five seconds, something like that, and remember he showed you, he gave you a thing of how he looked. He said, he was asked if the man was running backwards. Then he said. 'no he not running backway'. Remember he was saying, 'Is like I look, I see the eyes make four and he turned around.' He showed you, Mr. Foreman and members of the jury, I hope you recall when he demonstrated that for you, he said when he saw the person he said was the accused the man was like from that end of the courtroom to round that column there and he showed you and counsel for the accused agreed that it was an estimated 60 metres, matters for you."

According to Mr. Rankine he saw the appellant "face to face" before the appellant turned around and ran. Apparently he demonstrated what took place at the time he saw the appellant for the benefit of the jury. It is true that the judge did not specifically remind the jury of the witness' evidence in chief that he had seen the "body" of the person whom he recognized as the appellant for probably about five seconds and his face for probably a minute or 2, and in cross-examination that he saw his face for four seconds. Although the judge's directions on inconsistencies were correct she did not point out the discrepancies and inconsistencies in the evidence as to the length of time the witness saw the face of the offender.

If the case against the appellant depended wholly on the correctness of Mr. Rankine's identification of him, such omissions would certainly be cause for concern. However the Crown also relied on the confessions of the appellant. In this regard the learned judge told the jury:

> "So the prosecution is saying to you that on these two limbs, one, the identification, if you are not satisfied with the identification of the police (sic) the prosecution is saying, then look at the confession. If you are satisfied with both the confession and the identification, then the evidence, is overwhelming. That is what the prosecution is saying to you, that both together... is overwhelming.
>
> On the other hand, the accused says he never made those statements to the police and that witness could not have seen him on the 26th, since he had gone to Trelawny from the 22nd.

In the circumstances of this case, in our judgment, the failure of the judge to specifically highlight the discrepancy and inconsistencies referred to by counsel for the appellant is not fatal.

Counsel's submissions at (e) are misconceived. The learned judge was faithfully recounting the evidence of the witness when she said he "saw him probably about five seconds, something like that." Those were the exact words of the witness. This ground also fails.

Ground 4

This ground concerns the judge's directions on the appellant's alibi defence. Learned Queen's Counsel promptly withdrew this ground when this court's decision in ***Oneil Roberts and Christopher Wiltshire v R*** SCCA

Nos. 37 and 38/2000 delivered November 15, 2001 was brought to his attention.

For the foregoing reasons the appeal is dismissed. The conviction and sentence are affirmed. The sentence is to commence as of the 28th October, 2005.