

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL Nos. 70&81/1998

**BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE PANTON, J.A.**

**MARK SANGSTER
RANDALL DIXON
v
REGINA**

**Dennis Daly Q.C. for Randall Dixon
Valerie Neita-Robertson for Mark Sangster
Bryan Sykes Senior Deputy Director of Public Prosecutions
with Simone Wolfe, for the Crown**

September 23 and October 8, 2003

FORTE, P:

The appellants were convicted on the 9th July, 1998 in the Home Circuit Court of the murder on the 18th September, 1996 of Detective Acting Cpl. Phillip Gordon a member of the security forces acting in the execution of his duty. Dixon was convicted of capital murder and sentenced to death. Sangster was, however, convicted of non-capital murder and sentenced to life imprisonment. Their appeals in this Court were dismissed and consequently both applied and were granted special leave to appeal to the Privy Council. On the 7th October, 2002, the Privy

Council heard arguments resulting in an advice to Her Majesty- that the appellants' convictions be quashed. The question of ordering a new trial was reserved, and remitted to this Court for determination.

The case concerned a robbery carried out by a number of men armed with guns at the Western Union office in Spanish Town, St. Catherine. At the time of the robbery, Corporal Gordon, Special Constable Anthony Gayle, Special Constable Valimore Lawman and District Constable Mullings were in the plaza in which the Western Union office is located. Having been alerted by members of a crowd seen running from the direction of the office, the officers took up various positions outside the office. A number of armed men came running from the office, one of whom fired a shot at Constable Lawman from a Uzi submachine gun which he carried. Constable Lawman was hit in the leg and fell down. Another, armed with a 9mm gun fired a shot at and hit Corporal Gordon who died as a result.

The two appellants were subsequently identified by Constable Gayle and Constable Lawman on an identification parade held on the 7th October, 1996. The appellant Sangster was identified as the man who came out of the office carrying the Uzi machine gun. Dixon was identified as the man with the 9mm gun who shot and killed Corporal Gordon. No one else from among the many workers in the Office, was able to identify the appellants as being among the assailants. Miss Sophia Alvaranga,

an employee who had been in the office at the relevant time and the only civilian witness to give evidence at the trial, on attending the parade for Dixon stated specifically "I don't see him". In her evidence she disclosed that four men were involved in the robbery.

Paragraph 10 of their Lordships' opinion speaks to the issues raised before them. It reads:

"The fact that the trial was conducted on the basis that the appellants were among the robbers inside the bank is of importance because of a video recording which forms the basis of the two grounds of appeal on which their Lordships heard argument. In the first the appellants submit that there was a miscarriage of justice in terms of section 14(1) of the Judicature (Appellate Jurisdiction) Act 1962 in that their convictions are unsafe because the prosecution failed to investigate and to disclose to the defence a video recording showing scenes in the office during the robbery. In the second the appellants submit, in the alternative, that there was a miscarriage of justice in that their convictions are unsafe because the video recording is fresh evidence which was not led, and which defence counsel were not in a position to lead, at the trial."

Because of the nature of the issue joined in this appeal, there is no necessity to go into any greater detail of the facts. We have been asked by the Privy Council to determine whether in all the circumstances, the interests of justice demand that a new trial be ordered. In determining this question, however, we must be guided by certain opinions which fell from the learned Law Lords. We refer firstly to the opinion of the Board,

delivered by Lord Rodger of Earlsferry on the 6th November, 2002, and in particular to page 5 para. 11 which reads:

"In the course of the hearing their Lordships had the opportunity to see the video recording. It is in black and white and shows what appear to be a series of still pictures of what are undoubtedly different scenes inside the bank during the robbery. While some of the pictures are somewhat blurred, others are remarkably clear. In particular, some of the pictures show the faces and clothing of men who were in the bank carrying out the robbery. It is common ground that none of the images show either Sangster or Dixon. The best estimate of counsel was that the images showed 4 robbers. In these circumstances Mr. Guthrie QC, for the Director of Public Prosecutions, very frankly conceded that, had they been available, the pictures on the video recording would have been material evidence at the appellants' trial. Their Lordships fully endorse that concession: in a case where the crucial issue was identification and the prosecution were contending that the appellants had been inside the bank, the fact that the appellants were not among the robbers shown in the pictures of the robbery would have been highly material. Indeed, had the video recording been available before and during the trial, the conduct of the trial by both the prosecution and the defence would inevitably have been different."(emphasis mine).

The prosecution's case was based on the identifications made by Constable Gayle and Constable Lawman of the appellants as they exited the office -- giving the clear inference that they and the others were the men who committed the robbery inside the office.

The photographs of the robbers taken inside the office would be crucial evidence in the case. It is admitted that although the investigating officers had seen the videos of the men, and were in fact given copies, this evidence was never revealed either to the prosecutors or the Court during trial or on appeal.

The photographs referred to by their Lordships, it appears, were produced by counsel for the appellant during the appeal process in Her Majesty's Privy Council. The concession made by counsel for the Crown in the Privy Council that none of the images captured in the video shows either Sangster or Dixon gives ~~greater importance~~ to the omission by the investigators to disclose the existence of the videos.

If on the basis of Miss Alvaranga's evidence there were only four robbers, and the images showed four robbers, none of whom was either of the appellants, then it seems pretty clear that these appellants were not among them, bearing in mind also that four men ran from the building.

However, in referring the matter to this Court, their Lordships gave the following reasons at para. 22:

"...their Lordships are satisfied that it is appropriate to remit the question of ordering a new trial to the Court of Appeal. Mr. Dingemans QC advanced various arguments as to why no new trial should be ordered in this case, but they were all arguments that can be advanced before the Court of Appeal which is the body best placed to assess them in the light of the

public interest. In any event some of his submissions were based on criticisms of the police conduct in relation to the video tape. As their Lordships have noted, the history of that matter is disputed. It may be that some at least of the areas of dispute can be resolved by the time of the hearing before the Court of Appeal who will, for that reason also, be better placed to assess the relevant submissions."

In his submissions before us, Mr. Dennis Daly, Q.C. for the appellant, contended that the failure of the investigators to disclose the existence of the videos, amounted in the circumstances, to a material irregularity which should result in a verdict of acquittal being entered. The concession of Counsel for the Crown before the Privy Council that none of the appellants were captured in the images produced by the cameras, must lead to the conclusion that they did not participate in the robbery. Such evidence before the jury would inevitably have led to the acquittal of both appellants.

Mr. Sykes, Senior Deputy Director of Public Prosecutions, contended that the images captured by the camera showed blurred pictures of the men. He sought support from the affidavits of Deputy Supt. Bertram Raymond Lee and Detective Sgt. Robert Jeffrey Thomas.

Sgt. Thomas averred in his affidavit of 20th September, 2003 that he was the investigating officer in this case. On the receipt of a telephone call on the 18th September, 1996, he went to the Western Union office, where the robbery was reported to him by Miss Alvaranga. He saw

cameras in the enclosed area. He again relied on his two previous affidavits given on the 8th June, 2001 and 3rd October, 2002. In his affidavit of 8th June, 2001, he states in para 4 that:

"I never received a video tape recently from anyone, in relation to my investigation of the aforementioned case".

But then in his affidavit of the 3rd October, 2002 he states in para. 5 – 9 as follows:

- "5. That I have examined the Affidavit of Cecil Nicely and was the police officer mentioned in the Affidavit.
6. That the video was viewed in the presence of Mr. Nicely in Kingston.
7. That when it was viewed it was a split screen with cameras being shown at once in black and white with blurred image and hardly visible.
8. That Mr. Nicely said he would have to get it enhanced.
9. That the video was not given to me."

In his affidavit of the 20th September, 2003 Deputy Superintendent Bertram Lee averred as follows:

- "9. I viewed the split screen video with four cameras, and at the time the images from the said camera were so blurred and distorted that I was unable to recognize anyone from these images.
10. Sometime in the year 2001 I was contacted by the Director of Public Prosecutions, Mr. Kent Pantry, Q.C and thereafter viewed in

his presence a VHS tape with enhanced images of the video I viewed earlier.

11. I was told by Mr. Kent Pantry Q.C. and do verily believe that this VHS tape was an enhanced reproduction of the tape which I had viewed the spit screen video along with Detective Sergeant Robert Jeffery Thomas during the investigation of the said case against the appellants."

Two comments are necessary in relation to the content of Mr. Sykes' submissions and of the affidavits:

(1) Before Her Majesty's Privy Council, Counsel for the Crown acting on behalf of the Director of Public Prosecutions, conceded that the images did not show either of the appellants. This in context of their Lordships' opinion that although "some of the pictures are somewhat blurred, others are remarkably clear." At this stage, the Crown having admitted before their Lordships that the photographs were sufficiently clear so as to show the absence of the appellants, cannot now retract from that statement and rely on the fact that the images are blurred.

(2) Both police officers admit to having viewed the video in the earlier stages of the investigation and that the images were blurred. Although Mr. Nicely stated that he would have to get the images enhanced, no effort was made to take them from Mr. Nicely and have them enhanced by the police. In addition, whether the images were blurred or not, it was incumbent on

the investigators to retrieve them as part of the investigations and inform the Director of Public Prosecutions and the defence, perhaps through the prosecutors, of the video's existence. As we have seen, no such action was taken and it was left to the defence counsel to bring them to the attention of the Privy Council.

In our view this was indeed a material irregularity which must result in a lack of confidence in the integrity of the investigation. The fact that none of the employees of the Western Union office could identify the men, and the officers' conduct in relation to the video, must cast uncertainty on the purported identification of the appellants by the two police witnesses. As a result we concluded that a new trial should not be ordered and that verdicts of acquittal be entered in respect of both appellants.

Before leaving this appeal we must make reference to para. 23 of their Lordships' opinion which reads as follows:

"23. Finally, their Lordships are conscious that it is not for them to instruct the police in Jamaica as to the investigation of crime. Nevertheless, the video recording forms a possible starting-point for reopening the investigation of the robbery and murder as a whole, including any involvement of the appellants. The results of that investigation might well be relevant to the Court of Appeal's decision on ordering a new trial, not least because they might have a bearing on the potential prosecution evidence at any new trial. At the hearing before the Board, however, Mr.

Guthrie was unable to say what steps, if any, had been taken so far to reopen the investigation. That is an additional reason why the decision on a retrial should be remitted to the Court of Appeal."

When the matter came before this court on the 22nd July, 2003, the order was that the Director of Public Prosecutions should re-open the case and request further investigation.

Before us Counsel for the Crown provided the Court with further affidavits some of which were referred to earlier in this judgment. Alas, the content did not provide anything that threw any further light on the problems raised as a result of the video photographs. In our view, however, although we have concluded that there should be no retrial, it is still incumbent on the investigators using the video images as a base, to re-open the investigation in an effort to garner evidence that will result in the prosecution of those who were involved in the robbery and murder.

These are the reasons for the order of the Court that verdicts of acquittal be entered in respect of both appellants.