Privy Council Appeal No. 11 of 1996

Noel Williams *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, OF THE 24TH FEBRUARY 1997, Delivered the 13th March 1997

Present at the hearing:-

Lord Lloyd of Berwick
Lord Hoffmann
Lord Hope of Craighead
Lord Hutton
Sir Roger Parker

*[Delivered by **Lord Hope of Craighead**]*

This is an appeal from a judgment of the Court of Appeal of Jamaica on 2nd February 1993, by which the appellant's application for leave to appeal against his conviction for murder was dismissed. He had been convicted of the murder and sentenced to death in the trial court in the Home Circuit Court at Kingston on 10th May 1991. In May 1995 the Governor-General of Jamaica commuted the appellant's sentence of death to one of life imprisonment.

At the conclusion of the argument advanced on behalf of the appellant, their Lordships indicated that they did not require to hear the respondent and that they would humbly advise Her Majesty that the appeal should be dismissed, for reasons which they would deliver later. Their Lordships now set out the reasons for the decision which they have reached.

At the trial the Crown's case was based for the most part on the evidence of two off-duty policemen, Constable Seymour Cornwall and Constable Clive Lawrence. They and three other passengers were on a minibus which was travelling towards Kingston at about 10.00 p.m. on 30th January 1990 when it was boarded by two men. One of these men went to the rear of the bus where the two off-duty policemen were seated. He sat down immediately in front of them. The other man stayed in the centre of the bus by the door. The bus stopped to pick up three more passengers, one of whom was the deceased, District Constable Hamlet Williams. When the bus came to a stop at an intersection the two men who had boarded the bus earlier produced guns. They proceeded to rob the bus conductor of his money. A struggle developed, in the course of which Constable Williams was shot dead. The man who shot him stole his service revolver before both robbers left the bus and made good their escape.

Constable Cornwall reported the incident to the CIB Headquarters later that evening. On the following day, 31st January 1990, he received information while he was on beat duty as a result of which he proceeded to the flying squad. Two teams of police officers, including Constable Cornwall, then went in two police cars to the corner of Charles Street and Princess Street, Kingston. When they got there they observed three men sitting on a step in front of a house. Constable Cornwall's evidence was that two of the men were the same two men as had robbed the bus conductor the previous evening. When they became aware of the approach of the police cars two of these men produced guns. Shots were exchanged between them and the police. One of the two men who had been on the bus was killed. The other, whom Constable Cornwall identified as the appellant, was seriously wounded and then arrested. A .38 revolver, four live rounds and two spent shells were in his possession and taken from him by the police.

The Crown case against the appellant at his trial was based solely on the eye witness identification of the two off-duty policemen. There was no evidence that the revolver which was in the appellant's possession when he was arrested was the same weapon as that which had been used to kill Constable Williams on the bus. Only one other person who was on the bus at the time gave evidence. She was Lola Campbell, who had boarded the bus with Constable Williams and had been sitting beside him close to the door, three seats behind the driver, before the robbery. She described the incident but did not at any time identify the appellant as the murderer or say anything about his appearance. The remainder of the evidence in the case for the prosecution was purely formal. None of it went to the issue of identity. The appellant made an unsworn statement from the dock, in which he

denied any knowledge of the murder and attributed his arrest to police harassment.

Constable Cornwall's evidence was that the first time he had seen the man who sat down immediately in front him on the bus was when that man boarded the bus. He was able to see his face as he entered the bus and came towards him. He said that he would be able to recognise him again and then, when invited to do so by prosecution counsel, identified him as the man in the dock. Later in his evidence he said that he had identified the appellant, when he was arrested after the shoot-out at Princess Street, as the man who had robbed the conductor on the bus the night before and killed Constable Williams. Constable Lawrence, who was not present at the shoot-out, also identified the appellant in the dock as one of the two men who had boarded the bus. He said that the appellant had pulled a gun and pointed it at the conductor and shot Constable Williams. This identification, which was clearly a dock identification, was made by him in answer to a question which had been put to him in general terms by prosecuting counsel, as follows:-

"Q. Now, as you proceeded in this bus, did you notice anything?

A. Yes ma'am. On reaching the stoplight at Lyndhurst Road, two men hopped on to the bus; one of them is in the dock.

HIS LORDSHIP: Two men did what?

WITNESS: Hopped on to the bus, one of who is in the dock at the moment.

Q. One of them is where?

A. In the dock."

When he came to review the prosecution evidence in his summing-up, the trial judge told the jury that the central issue against the accused was one of identification. He reminded them that, in the case of Constable Cornwall, the defence case was that he was a tool of a police conspiracy against the appellant, and that in any event the circumstances were such that his identification could not be reliable. He told the jury that if they were to accept the conspiracy theory, Constable Cornwall's evidence would have no value but that, even if they were to reject it, they would still have to look at his identification evidence with care because in identification cases there was a special need for caution. He then gave the appropriate directions, in accordance with the guidelines set out in *Reg. v. Turnbull* [1977] Q.B. 224, about the weaknesses and strengths of the evidence, particularly in regard to opportunity, lighting, whether there were any obstacles in the way and time.

Turning to Constable Lawrence's evidence, the trial judge told the jury that what he had just said about the need for caution in regard to identification evidence applied equally to what this witness had said. But he then went on to comment on the fact that the identification by Constable Lawrence had been a dock identification. He told the jury that this type of evidence was quite undesirable, as the normal procedure was to have arranged an identification parade. He reminded them that no questions had been asked by either side as to why this was not done. He then gave the jury an added warning about the dangers of relying on this kind of identification and told them that they would have to be "very, very careful" in respect of Constable Lawrence's evidence. He did not, however, direct the jury to disregard Constable Lawrence's evidence of identification, nor was he asked to do this by the appellant's counsel.

There was one other aspect of the evidence on which it was necessary for the trial judge to make particular comment in his summing-up. During the re-examination of Constable Cornwall, prosecution counsel asked leave of the court to put questions to the witness about the gun which was recovered from the appellant at the scene of the shoot-out at Princess Street on the day after the robbery. Defence counsel objected, on the ground that nothing that might have been recovered from the appellant on the day after the robbery could be relevant to what had happened the night before. The trial judge allowed the question to be put to the witness. In his ruling he said that he had decided to do this in view of the way in which the defence case had been conducted, as it had been suggested to Constable Cornwall in cross-examination that he had been put up as part of a conspiracy and that he was never present at the shoot-out. He added "... it is the view of this court that questions which Crown Counsel wishes to put are relative to that aspect and that aspect only". In his summing-up, after rehearsing the evidence about the alleged conspiracy, he reminded the jury that the defence had contended that what took place at Princess Street was a cold blooded shoot-out, and that no gun was recovered. He explained that, as that defence had been raised, Crown counsel had sought permission from the court to tender a gun which the prosecution said was the gun taken from the appellant when he was arrested. He said that the appellant had allowed that evidence to be given solely as regards the conspiracy theory. He stressed that it had no relevance to what had happened on the night of the robbery.

In the Court of Appeal the only ground on which the appellant's conviction was challenged was that the trial judge erred in law by admitting evidence about the firearm which it had been alleged was taken from the appellant during the shoot-out. The Court of Appeal rejected this argument. Delivering judgment,

Rowe P. said that the court appreciated the force of the argument that, if the jury became aware that the appellant had a firearm on 31st January, it could be an easy transition for them to infer that he could have had one on the previous night and that that would be highly prejudicial. He went on to say this:-

> "What we do say, however, is that the entire issue of the alleged shoot-out was introduced by the defence, that the defence raised allegations of the grossest misconduct on the part of Constable Cornwall and that in those circumstances and for the purposes of that collateral issue of conspiracy or no conspiracy, the finding of a firearm on the 31st was relevant and was rightly admitted as rebuttal evidence on that issue and that issue alone."

He went on to say that the directions of the trial judge were sufficiently precise to prevent the jury from misapplying the evidence of the production of a firearm to the issue of the identification of the appellant on which the Crown's case rested.

The appeal to their Lordships was presented on a wider basis and it involved a number of grounds. It was maintained that there were various procedural irregularities and that in various respects the trial judge erred in his summing-up. These various grounds of appeal were conveniently gathered together by Mr. Clive Nicholls Q.C. under five principal submissions. The first related to the identification of the appellant by Constable Cornwall. The second related to the identification of the appellant by Constable Lawrence. The third was that the evidence of the shoot-out ought to have been excluded by the trial judge, and in particular that evidence about the gun alleged to have been in the possession of the appellant on that occasion ought not to have been admitted. The fourth was that the trial judge erred in asking questions tending to show that the appellant was facing other criminal proceedings including the possession of a firearm. And the fifth was that the trial judge misdirected the jury on the weight to be given to the appellant's defence that he had been framed by the police.

On the first point, in regard to Constable Cornwall's evidence, it was said that his identification of the appellant ought not to have been admitted and that, in any event, the trial judge failed to give the jury an adequate warning of the dangers accompanying his evidence, including, in particular, the failure to hold an identification parade. Mr. Clive Nicholls accepted that Constable Cornwall's identification of the appellant was not a dock identification properly so called. His evidence was that he had already identified the appellant at the shoot-out, although he was also asked to identify him in court and then did so by

saying that he was in the dock. The criticism which Mr. Clive Nicholls made of this evidence was directed to what happened at the shoot-out and to the absence of any identification parade. He maintained that the identification at the shoot-out amounted to, or was at least capable of amounting to, an improper confrontation of the appellant. He said that Constable Cornwall must have known when he set off to Princess Street that the police had information that the men responsible for the robbery and murder were at Princess Street. There was no evidence that they were engaged on Princess Street in any criminal activity, so the purpose of his going there was to confront the appellant and then arrest him. This was improper, because the appellant had been unknown to this witness before the robbery. The correct practice, as explained in *Reg. v. Hassock* (1977) 15 J.L.R. 135 was for an identification parade to be held. No explanation had been given as to why that practice had been departed from. In the result Constable Cornwall's evidence was so tainted that it should have been held to be inadmissible. Alternatively the trial judge had not done enough in his summing-up to draw attention to the risks which were inherent in an improper confrontation. He should have referred to the practice of holding an identification parade, and to the disadvantages of not doing so, in regard to the reliability of such evidence.

Their Lordships are not persuaded that there is any basis in the evidence for the suggestion that Constable Cornwall's purpose in attending the shoot-out was in any respect an improper one. In *Reg. v. Hassock* three lay witnesses, to whom the appellant was previously unknown, were allowed to see him at the police station with a view to identifying him. There was no identification parade. Melville J.A. (Ag.) said at page 137:-

> "The conclusion cannot be avoided that the police here had embarked on a deliberate course of confronting the applicant with the various witnesses. Not once, not twice but at least on a third occasion this course was pursued. Mere words seem inadequate to condemn behaviour of this kind."

After referring to two previous cases in which the practice of resorting to this method of identification had been condemned in the strongest manner by the court, he went on to say this at page 138:-

> "Although it is always difficult to formulate universal rules in these circumstances, where the facts may vary so infinitely, a prudent rule of thumb would seem to be: where the suspect was well known to the witness before, there may be confrontation. That is, the witness may be asked to confirm that the suspect is the proper person to be held. If the witness did not know the suspect before, then the safe

> course to adopt would be to hold an identification parade, with the proper safeguards, unless of course there are exceptional circumstances."

Their Lordships wish to endorse what was said about the proper practice in that case. They agree that confrontation, if it is to be resorted to at all, should be confined to rare and exceptional circumstances. The essence of the objection is the elementary one, that it is improper for the police to tutor the witnesses. Once a suspect is in their custody he should be kept apart from eye witnesses to the incident. Nothing should be done at that stage which might assist the eye witnesses in their identification of him as the perpetrator. That is why, unless there are exceptional circumstances, he should be shown to them only by means of an identification parade.

In the present case, however, Constable Cornwall was a serving police officer. He went to Princess Street as part of a team, acting on information received, with the purpose of effecting an arrest. The situation was urgent, and the operation was plainly not without risk. There were sound operational reasons, in the public interest, why Constable Cornwall should have been included as a member of that team because he had been an eye witness to the robbery. There was nothing pernicious or underhand in the fact that, at the conclusion of the shoot-out when the appellant was being taken into custody, he identified him as one of the two men involved and as the man who had shot Constable Williams. There was no question of his being tutored with a view to assisting him in his identification of the perpetrator. It would have been wholly artificial for this evidence to have been excluded from consideration by the jury, as the circumstances of the appellant's arrest were plainly relevant to the issue of identification which was the central issue in the Crown's case.

Furthermore, the trial judge was careful to warn the jury about the need for caution in their consideration of this evidence. He did not refer in this context to the practice of holding an identification parade. But there would have been little point in the holding of a parade in his case, as Constable Cornwall was one of the police officers who had effected the arrest. The criticism which was directed at his evidence by the defence was in any event a more fundamental one, namely, that this police officer was involved in a conspiracy. The jury were given ample directions on that matter. Their Lordships are satisfied that the directions which the trial judge gave as to the care with which they should approach his evidence were sufficient in the circumstances.

On the second point, in regard to Constable Lawrence's dock identification, the argument was that this evidence ought not to have been admitted due to the dangers inherent in such a means of identification. It was also said that in any event the directions by the trial judge on this matter were inadequate. Mr. Clive Nicholls maintained that the trial judge should have stopped the constable from identifying the appellant in the dock, although he conceded that it would have been in order for him to have been asked to give a description. It is plain, however, from the passage which their Lordships have quoted from the transcript of the evidence that there was no opportunity for Constable Lawrence's evidence on this matter to be stopped. The witness volunteered his identification of the appellant in answer to two questions, one from prosecuting counsel and the other from the trial judge, neither of which had invited him to identify. Once that evidence was out, it was before the jury. What remained was for the trial judge to deal with the matter in an appropriate manner in his summing-up. In their Lordships' opinion he said all that he could reasonably have been expected to do in the circumstances. He made it plain that this kind of evidence was undesirable, and that the normal and proper practice was to hold an identification parade. In the case of this witness there was no reason to think that that would not have been practicable and, as the trial judge pointed out, there was an absence of any explanation in the evidence as to why that had not been done. In the light of these observations the jury could have been in no doubt about the great care with which they were required to approach this evidence.

On the third point, in regard to the evidence about the shoot-out, the argument went further than that which was presented to the Court of Appeal. Mr. Clive Nicholls said that this whole chapter should have been excluded from the evidence. Any evidence of what had happened at Princess Street should have been confined to the minimum. This should have been done without describing the shoot-out and without reference to the fact that the appellant had had with him a gun.

Their Lordships appreciate the force of the submission that, as the robbery and murder and the shoot-out were two separate incidents and the only charge against the appellant was that of murder, there was a risk of prejudice in the leading of evidence about the shoot-out as part of the evidence at this trial. But, when the risk of prejudice is in issue, it is proper also to have regard to the way in which the defence case was being conducted. The circumstances of the shoot-out were being relied upon by the defence in support of the theory that Constable Cornwall, who was a vital eye witness to the robbery, was involved in a police conspiracy. In these circumstances, especially as no objection had been taken to any of this evidence by defence counsel, the trial

judge cannot reasonably be criticised for allowing the evidence to be led. Here again the proper course, which the trial judge duly followed, was to warn the jury about the way in which they were required to approach this evidence. Their Lordships agree with the Court of Appeal that the directions which he gave were sufficiently precise to prevent the jury from misapplying the evidence about the possession of a firearm at the shoot-out to the issue of identification as to what happened on the bus. They see no reason to take a different view in regard to what the trial judge said in his summing-up about this whole chapter of evidence.

The fourth point relates to questions put by the trial judge to Detective Sergeant Ruddock, who said in evidence that he had visited the appellant in hospital on 3rd February 1990 and charged him there with the murder of Constable Williams, three counts of robbery with aggravation and the illegal possession of a firearm. In response to questions by the trial judge he explained that he had charged the appellant with the illegal possession of a firearm, due to the fact that it was with a firearm that he had committed the murder with which he was being charged. The trial judge then asked him if he was aware that there was another case involving a gun against the appellant at the Gun Court. When the witness answered in the affirmative, the trial judge went on to ask further questions, in response to which the witness said that that gun had been handed to a ballistic expert together with expended bullets which had been handed to him by the doctor who had performed the post mortem on Constable Williams.

Mr. Clive Nicholls said that the questions which were put by the trial judge were irrelevant and prejudicial to the appellant's case, because they were capable of providing corroboration of the accuracy of the identification evidence. Their Lordships take a different view, however, of the purpose and effect of this line of questioning. Evidence had already been admitted by the trial judge to the effect that the appellant was in possession of a gun during the shoot-out prior to his arrest. What was missing from the Crown's case was any evidence to link that gun with the murder which had been committed the previous evening on the bus. One obvious way of linking the gun to the murder was by means of a ballistics examination. The expended bullets could have been compared with the gun which was taken from the appellant at the shoot-out.

Far from tending to support the Crown's case, therefore, this line of questioning seems to their Lordships to have been directed to a potential weakness in it, which might have assisted the defence. When he came to direct the jury on this matter the

trial judge reminded them, after pointing out that this had come not from either counsel but from himself, that there was no evidence connecting the gun which was recovered from the appellant at the shoot-out with the murder. This direction was plainly favourable to the defence case, as it dealt with a matter about which the jury might otherwise have been tempted to speculate. In these circumstances their Lordships do not accept that any prejudice was caused to the appellant by this line of questioning by the trial judge.

The fifth and final point relates to a passage towards the end of the summing-up where the trial judge dealt with the appellant's defence that he was the victim of a conspiracy. It was suggested that he was inviting the jury to speculate when he said, after reminding the jury that if they were to reject the theory they would still have to feel sure of the correctness of the identification evidence:-

> "But you are entitled to ask yourselves, Mr. Foreman and members of the jury, if you reject that conspiracy thesis, why is the accused man putting forward this conspiracy? Is it to mislead you, to draw red herring across the track? Why? When you are answering that question, Mr. Foreman and members of the jury, remember, that sometimes innocent people for whatever reason try to say things and do things and put forward things to bolster their genuine defence and genuine defence here as I understand it is that it was not him. Bear that in mind but still yet ask yourself the question, why? Why he put this, why he is putting forward this conspiracy, why?"

There is force in the criticism that at this point the trial judge was inviting the jury to speculate on matters about which there was no evidence. In order to assess the prejudicial effect of the passage, however, it has to be read in its whole context. The context was one in which the trial judge had repeatedly warned the jury that, even if they were to reject the conspiracy theory, the issue of identification was still before them and that this was the central issue which they had to decide. Their Lordships are not persuaded in these circumstances that they should interfere with the appellant's conviction on this ground. It does not appear that what the trial judge said in this passage was liable to lead to a miscarriage of justice when read in its whole context. If there had been any substance in the contention, this is an argument which their Lordships would have expected to have been developed in the Court of Appeal, as the whole terms of what the trial judge said in his summing-up were before the court.