

C.A. Criminal case
bias - whether judge is biased - judge noted on identification, which is not sufficient evidence inadequate - whether judge made statements which showed bias against applicant - whether verdict unreasonable and cannot be supported having regard to the evidence. Application for leave to appeal refused. Case referred to R. Turnbull [1975] 3 All ER 549
JAMAICA
IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 22/95

BEFORE; THE HON JUSTICE CAREY, JA
THE HON JUSTICE GORDON, JA
THE HON JUSTICE PATTERSON, JA

O'Neil Williams vs. R

Everton Bird for applicant

Hugh Wildman for Crown

October 9, November 20, 1995

GORDON, JA

On January 31, 1995, the applicant was convicted in the Home Circuit Court of the murder of Ainsworth McBean on 15th February, 1992, in the parish of St. Andrew. The indictment charged capital murder in that the offence was committed in the course or furtherance of robbery and Walker J. imposed the sentence authorised by law. The applicant now seeks leave to appeal against conviction and sentence.

The case for the prosecution was based mainly on the evidence of Miss Michelle Rhone, the common law wife of the deceased, who lived with him in their home in Rochester Avenue, St. Andrew. The only child of the union, then two years old, lived with them. Miss Rhone said that at about 8:30 a.m. on the 15th February, 1992, one George McFarlane came to the home and spoke with the deceased for about one hour and he left. The deceased went to the bedroom to rest and she repaired to the washroom where she remained between 10:a.m. and 11:a.m. When responding to a call at the front door, she saw McFarlane who insisted he

had to speak with the deceased. She reluctantly undertook to disturb her husband's rest and in the act of turning from McFarlane, she saw the applicant some 8 feet away to the side of the house. She went and spoke to the deceased who went to McFarlane while she went to the kitchen. She heard McFarlane ask the deceased for a glass of water and she went into the back yard and collected her daughter. She was away for at most two minutes and on returning to the kitchen she saw three persons therein; the deceased, McFarlane and the applicant who was holding a gun pointed at the deceased. The applicant asked deceased for money and deceased replied he had none. The request was repeated and the response of the deceased was the same. The applicant then shifted the aim of the gun and now directed it on her as she stood a few feet away with her infant daughter in her arms. The deceased spoke to the applicant telling him to leave her alone. The applicant turned, pointed the gun at the deceased's forehead and shot him. The deceased fell mortally wounded and bleeding. The applicant having displayed how he dealt with resistance to his will, at gunpoint asked her for money, all they had in the house, and she stepped over the body of the fallen victim and led the applicant and McFarlane to the bedroom. The infant in her arms was squirming and noisy, she was frightened but she went to the night-table and pulled out the drawer with money. In her nervous state, the drawer fell to the ground spilling its contents and money \$3,000.00. The applicant and McFarlane took up the money (spilled on the floor) and demanded more. She told them there was no more and after a momentary hesitation they left. The applicant was in the house for about half an hour she said, and she had him in her view for not less than fifteen minutes of that time; of the five to seven

minutes they were in the kitchen, she had the applicant in full view. On 15th November 1993, one year and nine months later Miss Rhone identified the applicant on an identification parade held at the police station at Half Way Tree. At the identification parade the applicant was represented by his attorney- at- law Mr. Arthur Kitchen.

The defence of the applicant contained in his statement from the dock is:

"Members of the jury, I would like to say on that day I can't remember where I was on that day but one thing for sure, I did not kill anybody, my Lord."

The grounds of appeal were as follows:

"1. On the evidence adduced by the Prosecution there was no sufficient opportunity on the part of MICHELLE RHONE to view or see the person she purported to have seen on the 15th day of February, 1992 to allow her to be able to correctly identify such person on an identification parade held some nineteen months later.

2. The learned trial judge erred on the facts and was wrong in law in that, while he advised the jury of weaknesses or possible weaknesses in the identification evidence caused by the lapse of time between the incident and the identification parade, he failed to advise them that the fact that the prosecution has not produced any real evidence of the description of the assailants given by the alleged eyewitness Michelle Rhone to the police at the time of the incident or as soon thereafter as was reasonably practicable, constituted or could be seen as a major weakness in the prosecution's case.

3. Furthermore, the learned trial judge in dealing with the issue of the description allegedly given by Michelle Rhone to someone unknown in authority erred in law in his summing-up to the jury by placing the onus of proving or disproving the description allegedly given to the police by Michelle Rhone on the Defence even while admitting that the prosecution had left the judge, jury and defence, if not itself, in ignorance of what description was given of the assailants in her statement, and to whom such alleged description was given.

4. The learned trial judge made certain comments in the course of his summing-up which exceeded the limits of legitimate judicial comment and thereby put forward to the jury an unfair and unbalanced picture of the facts in regard to a critical area of the identification evidence with the result that the jury were misled by being invited to consider an interpretation of the evidence with regard to identification which was inconsistent with preceding vive voce evidence given at the trial.

...

6. The learned trial judge during the trial and summing-up made certain comments and asked certain questions and omitted in his summing-up to highlight important aspects of the evidence relating to the critical issue of identification which if highlighted would enure to the benefit of the Defendant which in sum showed a bias against the Defendant who was thereby deprived of the opportunity of a fair trial.

7. The evidence given by Michell Rhone that she gave a description of the assailants to the police on or around February, 15th, 1992 was obtained in answer to leading questions from the Counsel for the Crown and the conviction ought to be quashed as a result.

...

9. The verdict was unreasonable and cannot be supported having regard to the evidence."

The focus of the applicant's submissions on appeal was the issue of identification. There was no corroboration of the sole eye witness' evidence and the holding of the identification parade some twenty one months after the incident were, the defence submitted, weaknesses in the prosecution case. This, Mr. Bird urged, the learned trial judge failed to bring to the jury's attention. This was the substance of ground 1. We will deal with this ground later. In grounds 2, 3 and 7, the applicant complained that there was no evidence of the description Miss Rhone said she had given of the applicant to the police. In ground 7 Mr. Bird submitted that the

evidence of description of the applicant was elicited by a leading question thus:

Q. And you gave the police a description of the two men who came into your house

A. Yes

Crown Counsel did not pursue the matter further but Learned Counsel for the defence who is very experienced in criminal trials cross examined the witness Miss Rhone in this manner:

"Q. And the next time you are telling us, Miss Rhone, that you are quite certain that this gentleman, O'Neil Williams, is that man, that is what you are telling us.

A. Yes, sir.

Q. Quite certain?

A. I said yes

Q. You see Miss Rhone, I am putting it to you that you cannot be sure, or certain that O'Neil Williams, sitting in the dock, is that man that you say was the man with the gun, that is what we are putting to you. What is your response?

A. (No answer)

Q. You must answer the question

A. I am saying he is the one that I saw

Q. You will agree with me, Miss Rhone, that the man that you saw at your home on the 15th of February, has no significant features, no peculiarities or anything like that?

A. None that I can...

Q. None that you can remember?

...

A. I am saying none that I saw."

No objection was taken to the question asked by Crown Counsel and the subsequent cross examination took the

matter no further. There is no burden on the prosecution to adduce evidence of the description of the assailant given to the police by a witness. Miss Rhone testified that she gave a description and the defence did not seek to embark on cross examination to elicit details of the description given. Indeed the evidence of the witness in cross examination is that the applicant is of unremarkable features and in his directions to the jury the learned trial judge directed their attention to this fact. Lack of a description does not make the case against the applicant weak but is a factor for the jury's consideration. There is no merit in these grounds.

We now turn to address grounds 1,2, 4 and 6 which overlap in areas. Identification was the central issue and the judge in a careful and comprehensive summing up gave full directions on the evidence adduced by the crown emphasizing the weaknesses in the identification evidence. Mindful of the decision in R.v. Turnbull[1976] 3 All ER 549 and subsequent opinions of their Lordships of the Privy Council, he cautioned the jury in strict compliance with the decided cases. He then directed their deliberations to aspects of the evidence and the questions they ought to seek to have answered.

"How long did she (Miss Rhone) have this defendant under observation?"

"Do we think that she had enough time to be able to see this man, probably enough so as to be able to identify him again at a later date?"

"At what distance did she see him?"

"In what light did she see him?"

"Was her observation of him impeded in any way?"

"Had Miss Rhone ever seen this defendant before that day.?"

As he posed the questions, he discussed the evidence indicating areas favourable to the applicant in a balanced exposition.

He continued;

(p.97) "Another question you could ask yourself, did she recognise him by any special or peculiar physical features. Was there any distinguishing feature about him that she would recognise right away. Well, she said no, she told you, and you see the defendant, you have been looking at him for more than a day, you see he is just an ordinary Jamaican young man. You look at him you don't see anything special about him, no big ears, or twisted nose or scars, or cross eyes, he (P98) doesn't seem to have any deformity that one can, that is apparent to the next person. So she admitted, Miss Rhone did, that there was nothing, no special or peculiar physical features. She didn't pick him out by any distinguishing features. So what she is saying, it seems to me, is that she just remembered the face although there weren't any special marks.

Another question you could ask yourself, I suggest to you, is, what period of time elapsed between that day, the 15th of February, 1992, when she first saw him and her subsequent identification of him on the 15th of November, 1993. Now, that is a year and nine months. So, she sees a man for the first time on the 15th of February, 1992, and she doesn't see him again until one year and nine months after. Now, that is a long time, Members of the Jury, you may think so. It seems to me that this is, would be one of the weaknesses in the identification evidence of Miss Rhone, or this is one of the possible weaknesses of her identification evidence.

You see, time dims the memory of some people, the longer the time is the more you tend to forget; the shorter the time the better you can remember. You may think that a long time will dim the image of a person in the mind of another. Some people may forget, the memories of some people may be dimmed by time, others with a better memory may be able to (P99) recall just the same the face of a man that he or she had seen a long time ago. People are different. So the effect of a lapse of time on one person may not be the same as it is on another person. You know, you hear the saying sometimes, 'I will never forget that face until I go to my grave,

somebody says I will never forget that face no matter how long I live.' Other people will forget faces over a period of time.

So, how did Miss Rhone strike you. You watched her when she gave evidence. She had an awful experience that day. She told you it was frightening and she was frightened. And she told you that she stood up in that kitchen and saw Mr McBean shot before her very eyes. And she saw the face of the man who shot Mr. McBean. Do you believe that she had remembered that face correctly one year and nine months after she went on to a parade and she pointed out this man and she said that is the man. Did she strike you as a person who had the capacity to retain the image of that man that she saw in her house on the 15th of February, 1992, or do you think that she might be making a mistake, although honestly making a mistake.

She is sure she is not making a mistake, she told you so. She said that is the, she told you quietly, she is soft spoken as you must have gathered, and she told you quietly and calmly 'I am not making a mistake when I say (p100) that the defendant is the man who shot Ainsworth. I am quite certain that the defendant is the man. He is the man I saw.' So you have to decide whether that great lapse of time causes you to have any doubts in your mind as to the accuracy of Miss Rhone's identification. If you have a reasonable doubt in your minds as to her accuracy your verdict must be not guilty. Because the defendant must get the benefit of that doubt.

(p101) And in fact, if there are any other questions that you, members of the jury, feel you must ask yourselves in relation to this question of identification, feel free to do so, talk about it, ask yourselves all the questions that you think are relevant to this aspect of the matter and then you come up with a decision."[emphasis supplied]

We have extracted this long passage to indicate the care the learned trial judge took in placing the issues fairly before the jury indicating the weakness in the identification evidence in his endeavour to ensure that justice was done to the applicant.

The applicant complained in ground 4 that passages emphasised [on pages 98 and 99] were unfair and unbalanced and Mr. Bird submitted they tended to inflame the jury. In ground 6 he charged the learned trial judge made comments and asked questions which showed bias against the applicant. He however failed to indicate with particularity the offending passages and referred generally to pages 38 and 39 of the transcript.

The cross examination of Miss Rhone ended in this manner(p.38)

"Q... You see Miss Rhone, although you have had a very bad experience, I must suggest to you that you cannot be certain so long afterwards that this man, O'Neil Williams, was the man who shot Ainsworth, that is the suggestion, What is your response?

A: I am certain he was the one."

The judge then asked the witness:

"Is it possible that you could be making a mistake when you say that this accused man is the man you saw shoot Ainsworth.?"

A: No, M'Lord., I am not making a mistake."

We have extracted the above passages and have provided emphasis in the lines we consider he may contemplate as the offending areas.

We have scanned the summing up with care and our examination of the record, including all the extracts above, confirms our view that the charges are baseless. The grounds of appeal are wholly unmeritorious.

Neither grounds 5 or 9 were pursued and ground 8 was abandoned.

There was undoubtedly evidence fit for the jury's consideration in this case. Miss Rhone admitted that the experience through which she lived as she witnessed the wanton execution of her paramour while wrestling to contain a restive infant in her arms was truly horrific. She testified to the details of her ordeal and firmly asserted her certainty as to the identity of the executioner. There is no challenge of the Crown's presentation that this was murder committed in the course or furtherance of robbery which makes it a capital offence. The summation of the learned trial judge was delivered fairly and with clarity. The application for leave to appeal is accordingly refused.