JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS: 5 & 6/95

COR: THE HON. MR. JUSTICE RATTRAY, PRESIDENT
THE HON. MR. JUSTICE FORTE, J A
THE HON. MR. JUSTICE WOLFE, J A

ALPHANSO TRACEY
ANDREW DOWNER v. Reginam

Randolph Williams for appellant Tracey

Terrence Williams for appellant Downer

Hugh Wildman, Deputy Director of Public Prosecutions,
and **Miss Valerie Stephens** for Crown

26th, 27th February & 27th May, 1996

FORTE J A

The applicants were convicted in the Home Circuit Court on the 21st December, 1994 for the offence of capital murder, and were accordingly sentenced to death. On the 26th and 27th of February 1996, we heard arguments of counsel and thereafter took time to give consideration as to how the application should be determined. What follows are our conclusions, and the reasons therefor.

At the trial the prosecution relied mainly, if not solely on the evidence of Christian Riley, who himself was shot in the incident which resulted in the death of Kenneth McNeil on the 4th March 1991. The witness, a Security Officer employed to the Guardsman security company, was on that day in the company of his colleague, the deceased Kenneth McNeil both of whom were on duty assigned to picking up data

from Banks in the Corporate Area i.e. parts of the parish of Saint Andrew and Kingston. They had started their shift at 5.17 a.m. that morning, in an unmarked Mitsubishi van which was driven by McNeil. At about 6.05 a.m. they arrived at the Century National Bank situated at the corner of Port Royal and Duke Street in Kingston. Riley collected the papers while "McNeil covered me in order to alert me as to what was going on. McNeil did this while out of the van."

At this time, the witness observed a man on a bicycle riding west along Port Royal Street. He had earlier seen the man, when they were coming down East Street, travelling to the bank. He was then riding against the one-way regulation, going up East Street. On Port Royal Street this man on the bicycle got up off the saddle of the bicycle and began pedalling the bicycle "fast down King Street". The guards became suspicious but nevertheless circled and came back onto Port Royal Street, stopping at the corner of Port Royal Street and Temple Lane at the rear of the Jamaica Citizens Bank. At this time McNeil spoke to a co-worker on his CB radio. Both guards were armed with firearm and ammunition which had been issued to them by their company. After stopping, the witness alighted from the van, went to the Jamaica Citizens Bank on Port Royal Street and commenced opening "the box" which was on the sidewalk of the building and which presumably held the bags for which they had come. At this time McNeil was out of the van, on the driver's side "walking". The witness who at this time had his firearm in his hand, took two bags from the box, one at a time and put them in the van through the door which he had left open when he alighted from the van. He was about to go back to the box, when he saw a white Honda Accord motor car driving slowly at about 10-20 m.p.h. coming along Port Royal Street. There was no other vehicle on the road at that time, apart from this white car, and the van. By this time it was about 6:10 - 6:15 a.m. On seeing the car, the witness stopped what he was doing,

and began to observe the car. Having earlier seen the man on the bicycle and now seeing the car, the witness became very suspicious and started moving closer to the van. The car stopped alongside the van facing in the same direction as the van. Riley ran to the front of the van, while McNeil remained where he was, which, now placed him between the van and the car. Riley nevertheless took note of the licence plate of the car, which he testified to be 1292 AH. Inside the vehicle he could see four men - two in the front and two in the rear. He could see two of the men from their chest up to their heads. These two were the man in the front passenger seat, and the other man sitting behind him in the rear of the vehicle, both on the left hand side. At this time, the witness saw McNeil approaching the rear of the van. Seconds after the car stopped the rear left door of the car was opened and then the witness heard a gunshot coming from the car. He fired two shots at the car in response.

McNeil ran to where the witness was on the other side of the van. Thereafter a "barrage" of shots came from the car. During this, Riley was shot in his shoulder and responded by firing four more shots which exhausted his supply. Consequently, he ran eastwardly on Port Royal Street and while doing so heard gunshots. On reaching Temple Lane, he was shot twice, once in his back and the other in his left arm. He fell to the ground, but nevertheless turned towards where the "attack" was still taking place and saw McNeil still at the side of the van calling out for the bank security guard. Two men alighted from the car, one from the front of the car, who went to the front of the van and one from the back, who went to the back of the van. Both men were armed with guns - tall guns like M16. Mr. McNeil was now on the sidewalk between both men - he was "sandwiched" by both men. The men pointed their firearm towards Mr. McNeil and the witness then heard another barrage of shots fired at Mr. McNeil, and then he never saw Mr. McNeil again. The witness then turned away his head and sometime

after he heard the car drive off. He laid there until the police and his co-workers arrived on the scene and he was taken to the Kingston Public Hospital where he was admitted as a patient. He remained there for two days, and was then transferred to the Medical Associates Hospital where he remained as a patient for three weeks. At identification parades held on the 10th June, 1991, the witness Riley identified both applicants, as the two men he saw on the scene and who "sandwiched" Mr. McNeil. The applicant Downer he identified as the man who left the front of the car from the passenger side and went to the front of the van, and Tracey, as the man who came from the back of the car and went around the back of the van.

On the morning of the incident, responding to a transmission on the police radio, Det. Cpl. Dadrick Henry in the company of another police officer proceeded to the scene where they arrived at about 6.25 a.m. There he saw the van, and the body of the deceased Kenneth McNeil lying on the road at the back of the van. There was a wound to his forehead and a large wound to the back of his head. A side door of the van was open and the Detective, having looked inside the van, discovered that it was empty. The bags earlier put there by Mr. Riley were no longer there. A section of the van had been "shot up". From the scene seventeen M16 cartridges and seven 9mm casings were recovered. Later that morning, the Detective Corporal discovered the white Honda Accord with licence plate number 1292 AH on Marcus Garvey Drive. There were bullet holes in it as also blood stains on the seats. Two 9mm casings and fragments of a spent bullet were also found therein.

On the 30th April 1991, acting upon information Detective Henry went to Building D on Chang Avenue in Tivoli Gardens, where he saw the applicant Downer, and took him into custody. At that time the applicant had a plaster about 6 - 10 inches long on the lower section of his abdomen, and a smaller plaster to his side. He had

"saline tubes on a needle in one of his hands with a plaster holding it in place." The tube was attached to a bottle of saline drip. He was eventually taken to the Kingston Public Hospital. The applicant Tracey was taken into custody by the Detective Corporal on the 4th May, 1991 when he was observed by the Detective to be acting suspiciously while seated in the rear of a Morris Marina motor car at the corner of Mark Lane and Barry Street.

Both men gave unsworn statements in their defence. The applicant Tracey recited how he came to be in custody having been taken from a cab. He stated that while he was in custody he was asked about the murder and he told the police that he didn't know anything about it. He then stated as follows:

> "On the 10th of June 1991 around 2.30, I was on a parade at the Central Lock-up where I was pointed out by someone who told me to turn sideways, backways, then point me out. I didnt get a fair I. D. parade and I am innocent, Your Honour. I don't know anything about this crime."

The applicant Downer, in his unsworn statement denied any knowledge of the crime. He explained his injuries by relating that he had been held up by two gunmen on Orange Street when they demanded money, he ran off and they shot him. He thereafter found himself at his uncle's home where the police came and took him into custody. He maintained that the police questioned him about the murder and he told them that he knew nothing about it, then he said:

> "Before, the Camera-man take my photograph whole heap of time, sit down, stand up, behind, and dem bring me in the glass house and ask me if is not me name Andrew Downer and I say, 'Yes,' and him photograph me sit down, stand up, sit down, then dem bring me to Kingston Public Hospital. Up there Mr. Riley saw me sit down on the bench."

The Application of Alphanso Tracey

Dr. Randolph Williams counsel for this applicant, argued one ground of appeal which reads as follows:

> "There was real risk of prejudice and the applicant was denied the substance of a fair trial in that the learned judge heard:
>
> (a) The application of the prosecution to amend the indictment to include additional particulars of capital murder and gave reasons for his judgment in the presence of the jury.
>
> (b) The no case submission by the defence and gave his judgment that there was a case to answer, in the presence of the jury."

In respect of (a) there is no rule that on an application for amendment of an indictment, the jury should be asked to leave the Court; though it could be envisaged that in exceptional circumstances, where it can be reasonably foreseen that some matter highly prejudicial to the accused may be aired, a trial judge would exercise his discretion to have the application made in their absence. Having said that however it is difficult to imagine such circumstances even arising. Certainly, in the instant case, there is no basis for contending that there was any risk of prejudice, or indeed that any prejudice to the applicants arose during the application for the amendment.

The application arose in this way. The original indictment charged the applicants with capital murder "in the course and furtherance of terrorism." After the evidence of the main witness Riley, counsel for the Crown applied for an amendment as follows:

> "...having heard the evidence in full and in toto of the witness Riley, m'lord which was in substance what was in the deposition but there was more detail, I am going to ask

> formally in an abundance of caution for an amendment in the particulars to read also ... and in the course and furtherance of a robbery because to my mind, m'lord, my interpretation of the Act suggests that the particular section Section 2(A) 2(E) 2(D) [sic] which in furtherance of a robbery it is evidential."

Counsel then addressed the learned trial judge as to any possible prejudice that may occur to the applicants as a result of the amendment, and thereafter sought to distinguish the case of **R v Devon Simpson** SCCA 105/92 in which this Court allowed an appeal in which at the trial, an amendment to an indictment which originally charged non-capital murder, was allowed so as to charge the accused for capital murder.

Significantly counsel ended her application with the following words:

> "I am just asking for the amendment in an abundance of caution because the jurors are judges of the facts and it would be for them to decide whether the scenario falls in the course or furtherance of a robbery or in the course or furtherance of an act of terrorism or both."

Thereafter there was nothing said by counsel and indeed no attempt was made at this hearing to point out any specific passage, which could be said to have had any prejudicial effect on the case of either applicant. Nor did the ruling of the learned trial judge disclose any material which could be said to be prejudicial. He ruled as follows:

> "I have listened the arguments - interesting. I put some points out for ruling. I can make the ruling now: One, the court finds that this is not a new charge which is being sought to be made by the amendment. It is an amendment seeking to state evidential material to support the capital charge.
>
> Secondly, the amendment sought is clearly within section 6 subsection 1 of the Indictments Act.

> Thirdly, I accept that Simpson is good law, good law let me repeat, but I hold that the decision does not impair the discretion contained in section 6(1) of the Indictments Act.
>
> Fourthly, I hold that the amendment would not prejudice the defence in any way.
>
> I say no more at this stage, but that is my ruling and I will allow the amendment sought."

In those circumstances, we find great difficulty in coming to the conclusion asked for by the applicant in relation to this complaint, and on the contrary find that it has no merit.

We turn now to the allegation of error made in (b) above.

The learned trial judge heard the no case submissions in the presence of the jury. Counsel for the other applicant Downer, at the time of the submission stated that he had no objection to the jury remaining during the submissions. This practice had developed in Jamaica but has recently been declared wrong practice in the case of **Rupert Crosdale v. The Queen** Privy Council appeal 13/94 delivered on the 6th April, 1995. Lord Steyn in delivering the judgment of the Board states as follows:

> "... there are substantial reasons why in the interests of an effective and fair determination of the issue whether the defendant has a case to answer the jury should be asked to withdraw. If the jury do not withdraw, there is a risk that they will be influenced by what they hear ... The foundation of this practice is to protect the interests of the defendant. It cannot be left to a general discretion of the judge to decide in which cases the jury should be asked to withdraw since it is impossible to predict in advance when a risk of prejudice will arise. ... For these reasons Their Lordships' response is that irrespective of

> whether the defence ask for the jury to withdraw or not the judge should invite the jury to withdraw during submissions that a defendant does not have a case to answer. All the jury need to be told is that a legal matter has arisen on which the ruling of the judge is sought. Any contrary practice in Jamaica ought to be discontinued."

In respect of the judgment of the learned trial judge on the no case submission, this is what Lord Steyn said:

> "In order to avoid any risk of prejudice to the defendant the jury should not be present during the course of the judgment or be told what the judge's reasons were."

The Board, though accepting that the practice of making the submission in the presence of the jury is an irregularity, nevertheless recognized that such an irregularity would only be fatal to the conviction if there was in fact "any significant risk of prejudice" resulting from the irregularity. (Lord Steyn at page 9)

The question in this case is whether there was in the circumstances of the case any such risk of prejudice.

An examination of the submissions made by counsel in the no case submission, reveals that nothing was said which could have created any substantial risk of prejudice to the applicants. It is understandable then, that counsel was unable to point to any passage in the relevant arguments which was capable of having any such effect. Significantly too, the learned trial judge delivered his ruling though incorrectly in the presence of the jury, in a manner consistent with the principle stated in the **Crosdale** case (supra). He was correctly succint and to the point:

> "The ruling is cases to be answered Lord Gifford and Mr. Morris."

There is really, no merit in this ground of appeal. Counsel, though filing other grounds, did not pursue them in the argument, and consequently the result of this application must be adverse to the applicant Tracey.

Andrew Downer

Counsel for this applicant was granted leave to argue eight supplementary grounds, only two of which need be addressed. The first reads as follows:

> "The learned trial judge directions in the way the jury ought to treat evidence of visual identification were unfair; diluted, improper and confusing."

In argument, while conceding that all the legal requirements in directing the jury on the issue of visual identification had been met, Mr. Terrence Williams, nevertheless contended that the learned trial judge by making certain comments had the effect of diluting the earlier directions and may have resulted in confusing the jury. The particular passage of the summing-up complained of related to counsel for the applicant's contention before the jury that there was a weakness in the identification of the applicants because the witness Riley was in a state of panic and distress, and that he was shot and unable to concentrate fully, given that he did not know the men before the incident.

What follows is the passage of the learned trial judge's summing-up upon which counsel for the applicant based his complaint:

> "... you may think that being shot in the circumstances could leave the image of these men indelibly imprinted on his mind. It is a matter for you. All these things you have to take into consideration because if you take this to its logical end - you have not got to take it from me but I am putting it to you - any person who is shot in criminal circumstances, all the criminal would have to do is to shoot him and gone, safe in the

> knowledge that he could not be identified. It is a matter for you; you are judges of the fact. Put yourselves in the circumstances and see if this is correct, this thing about identification and all that is correct. Nobody could be identified in a case where there was a robbery, and there was shooting and all that. Couldn't be. It is a matter for you, though. Remember, however, he told us that he was frightened, so you have to balance all these things."

However, in the paragraph which immediately precedes this passage the learned trial judge did direct the jury that they ought to consider weaknesses in the identification, and reminded them that this very issue had been 'advocated' as such a weakness. He said:

> "You have to consider weaknesses in the identification. Weaknesses in the identification here which have been advocated to you are that Mr. Riley who is the identifying witness was in a state of panic and distress; he was shot, he was unable to concentrate fully; did not know these people before. Those are the weaknesses in the identification. You also heard that he was lying down and he couldn't look behind, but he showed you how that was done and you will make up your minds whether that is possible. You have to consider all these things to see if the visual identification was proper."

In this passage the learned trial judge pointed out to the jury, the aspects of the identification which the defence contended were weaknesses, and invited the jury to consider them in that light in determining the accuracy of the identification.

It is correct that in his comments in the passage complained of, the learned trial judge gave another view to the question whether being shot, would affect the victim's ability to correctly identify his assailant, but these comments were well within the

boundaries allowed, and did not in any way enforce his opinion in such a way that could be unfair or prejudicial to the applicant's defence. Nevertheless, in the end the learned trial judge reminded the jury that it was a matter for their decision. He ended this passage as follows:

> "It is a matter for you though. Remember however he told us that he was frightened so you have to balance all these things." [Emphasis added]

Again, he returned to the subject in the following passage which makes it clear that the jury would have understood that there was a weakness:

> "He said he was frightened, but you must consider whether fright in that sense means that he was frightened to the extent that he could not properly identify persons. Of course, when you see M-16 barking around you, let's be reasonable - you don't have to take it from me -M-16 barking around you, of course you are going to be frightened and it is because you are frightened you can't identify? Then all these people would get away; perpetrators of crime in such circumstances would get away. That does not say that you must not be careful in considering the identification evidence, because that is a weakness. He said he was frightened. He heard McNeil calling out to the bank security guard but nobody came."

There were two other aspects which counsel for the applicant, complained were weaknesses in the identification and which the learned trial judge did not point out to the jury. The first related to the fact that in his description of his assailants to the police, the witness had said that the men were the same height but during his testimony when both applicants were asked to stand he conceded that there was approximately two inches difference in their heights. In our view, having regard to the minimal

difference in height, and the witness maintaining that as he had "no tape measure," he had only to estimate the height, this could not be classified as a weakness in the identification which necessitated any directions by the learned trial judge.

The other complaint made was the allegation that the learned trial judge did not address the jury on the lapse of three months, which took place before the identification was held and which it is alleged was a weakness in the identification.

The learned trial judge referred to the lapse of time in the following passage:

> "I put it to you because persons - Lord Gifford put that to you, the length of time that the parade was held after. Ask yourselves the question: could the parade have been held earlier than that? Does it do any violence to the fairness of that parade? Matter for you but that is so."

Though he did not specifically indicate to the jury that the lapse of time between the incident and the identification parade was a matter to be considered in determining the accuracy of the identification, he did remind them that counsel for the accused had addressed them on it, and consequently in our view it must have been a matter foremost in the minds of the jury.

In the event, we find no merit in this ground of appeal.

The second, recorded as ground 7 reads as follows:

> "The learned trial judge ought to have upheld the submission of insufficient evidence."

At the trial counsel for this applicant made a no case submission on the basis of the now well known dicta of Lord Widgery C.J. in **Regina v. Turnbull** [1977] 1 Q.B. 224 which was approved by the Judicial Committee of the Privy council in the Jamaican

case of **Junior Reid v. The Queen** [1990] 1 A.C. 363. The words of Lord Widgery C.J. appears at page 380 of the report of the **Turnbull** case (supra) as follows:

> "When in the judgment of the trial judge, the quality of the identifying evidence is poor, for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."

Before us, Mr. Williams repeated those arguments, contending that the circumstances of the identification of the applicants amounted either to a "fleeting glance" or a "longer observation made in difficult conditions."

The witness Riley testified to having had two opportunities to observe his assailant, the first was at the time when the car drove up and he saw the two persons sitting therein, the one in the front passenger seat being this applicant. The second opportunity he said, was after he had been shot, and was lying on the ground.

In respect of the first, counsel argued correctly that the witness said he could not see the men clearly while they were seated in the car, and also added that if he had managed to escape at that time, he would have had difficulty in identifying them subsequently. Nevertheless it was substantially upon the circumstances that existed as to the second opportunity that counsel for the Crown relied in advancing that the learned trial judge was correct in leaving the case for the jury's decision. That evidence revealed that:

> (i) the witness had the assailant under observation for approximately 30 seconds i.e. after he had left the car up until he was seen firing the shots at the deceased;

> (ii) the witness was at a distance of about 15 - 18 yards from the assailant at that time;
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> (iii) the vision was clear the sun having already risen at that time of the morning;
>
> (iv) at the time of this observation, the witness was wounded, lying on the ground, but with his head turned in the direction of where the action was taking place."

In our view, given the duration of time, the clear unobstructed and uninterrupted vision, and the distance from which the observation took place, this did not amount either to a "fleeting glance or a longer observation made in difficult conditions," and consequently we find that the learned trial judge was correct in ruling that there was a case to go to the jury. The circumstances of the identification were matters which called for the consideration of the jury, after the required directions in accordance with the case of **Junior Reid** (supra) had been given to them. These in our view were adequately dealt with by the learned trial judge and consequently this appeal must fail. It should be noted also, that in the case of this applicant, there was some other evidence, which though by itself, would be of little if any value, may have given some support to the identification by the witness Riley. The evidence under reference is the evidence of the police officer Det. Cpl. Dadrick Henry who found a car with the licence number testified to by Riley, with gun shot damage, blood stains and expended cartridges on the road not far from the applicant's home. In addition the applicant was found injured in the bathroom of the house with a saline drip, attached to him.

In the event the applications for leave to appeal are granted, the hearing of the applications are treated as the hearing of the appeals and for the reasons set out above, the appeals are dismissed and the convictions and sentences are affirmed.