JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL 142/96

COR: THE HON. MR. JUSTICE FORTE, J.A
THE HON. MR. JUSTICE PATTERSON, J.A
THE HON. MR. JUSTICE BINGHAM, J.A.

REGINA v. CLEMENT DOUGLAS

Dr. Randolph Williams and Delano Harrison for the Appellant

David Fraser for the Crown

24th and 25th March and 22nd June 1998

FORTE, J.A.:

The applicant was tried and convicted in the Home Circuit Court on the 8th November, 1996, for the capital murder of Benjamin Dove and sentenced to death, as prescribed by law. On the 24th and 25th March, 1998, having heard the arguments of counsel, we reserved our decision, which we now record hereunder.

Several grounds of appeals were filed and argued, and having regard to their nature, it is necessary to refer to the facts in summary form. The murder occurred at a time when the deceased, the witness Stafford Dixon and others on 24th March, 1993 about 10:30 p.m. were enjoying fellowship at the home of Mr. Tony Dixon at Sterling Castle in St. Andrew. They were all sitting in the garden, when three men climbed over the wall on the southern side of the property. Two

were armed with guns, while the third had a knife. One of the men with a gun approached Mr. Stafford Dixon, while the one with the knife walked along the wall. The other took up a position behind a lady friend of Mr. Dixon and who had gone to the home with him. The man who approached the witness (Dixon) pointed the gun at him and said "don't touch it man". This was an obvious reference to a gun with which the witness was armed as the witness testified that he was then about to "pull my firearm". This man, later identified as the applicant, then took the gun from the waist of the witness and said "Pussy hole, you a dead tonight". The applicant was about to shoot , when the witness hit his hand that was holding the gun, and "a shot fly out the gun". Thereafter a struggle ensued for the possession of the gun. In the struggle, they fell with the applicant on top of the witness, the gun then pointed to the witness' chest. He shouted to his host "Try come help me nuh man". He did not come, but Mr. Dove (the deceased) came and started hitting the applicant who then started shouting "Shoot the rass - cloth man nuh man. "The witness then heard an explosion. He then heard Dove say "that mother- fucker shot me". He continued his struggle with the applicant, who was still shouting to another man to shoot him. During this struggle the witness heard a sound "Blow" and thereafter felt a "burning" to his head. As a result he released his hold on the hand of the applicant, who then made his escape. Mr. Dixon went to the University Hospital where he saw Mr. Dove lying in the back seat of a car. He was covered in blood, and appeared to the witness to be

dead. The applicant was subsequently identified by the witness Dixon at an identification parade held at the Central Police Station.

There is another area of the evidence which was elevated to importance as a result of the substance of complaints made at this hearing. Det. Cpl. Eric Dawes with a party of eight (8) policemen went at about 5:45 a.m. on the 8th of May, 1993, to premises at 37 Greendale Avenue. Through a window in the house, he observed "two men sitting on a bed each with a gun in hand". The front door of the house was kicked open, and the two men came out of the bedroom. He recognised the applicant whom he had known for about twelve (12) years. He searched the applicant and found a 9 mm automatic pistol in his underwear. Another gun was found in the bath tub. On the gun being found on the applicant, he told the police officer that he had found it.

The connection of this evidence to the murder of Mr. Dove, was contained in the evidence of Det. Sgt. Neville Grant, who had visited the scene on the night of the incident and recovered therefrom one live 9mm round, one 9mm expended cartridge, and two lead fragments of a bullet. Asst. Commissioner Daniel Wray (retired) Ballistic Expert, examined these items and testified that in his opinion the fragment and expended cartridges had been fired from the browning 9mm semi-automatic pistol, he had received from Sgt. Grant, and which Det. Dawes had taken from the applicant. In effect the evidence showed that the gun recovered from the applicant had fired the fragments and expended cartridge found on the scene by Det. Grant.

The applicant in an unsworn statement, stated that his bicycle having broken down, he and his co-worker had gone to the premises from where he was taken into custody by the police, as that premises was a mechanic shop at which he was going to get the bicycle repaired. It was while he was waiting for service, that the police arrived. They searched his friend and himself, put them to lie face down on the ground and handcuffed their hands behind them. The police then searched the house, after which they made no allegation of finding any firearm. He therefore denied that a firearm was taken from him.

The applicant against the background of these facts filed six (6) grounds of appeal .

The first can be easily disposed of, as it relates to a complaint that the evidence did not support a conviction for capital murder. The Crown readily conceded the correctness of this complaint as there was no evidence to ground a conclusion that the deceased came to his death as a result of being shot by the applicant, or that the applicant offered any violence to him as is required by section 2 (2) of the Offences against the Person Act to establish the charge of capital murder. Being in complete agreement with counsel on both sides, we hold that the conviction for capital murder cannot stand.

We now turn to the other complaints, the first of which reads as follows:

> "The learned trial judge failed to direct the jury that, if they found any unexplained inconsistency/ discrepancy on a material issue in the identification evidence of the sole identifying witness Stafford Dixon, then it was open to them to reject the witness' testimony, not merely on the particular issue, but in its entirety."

Before commenting on the validity of this complaint, we need to examine the discrepancies in the evidence upon which Mr. Harrison, counsel for the applicant, based this submission, and the manner in which the learned trial judge dealt with them in his directions to the jury.

Two of these were dealt with as follows :

> "If you find a discrepancy, you bear in mind any explanation given by the witness and you decide whether or not you accept that explanation, and you decide whether or not the discrepancy is material or immaterial. I can think readily of an admitted discrepancy by the eyewitness in the case, where he said that on a previous occasion he never said, or he did say, that the man who attacked him was wearing a cap. At this trial he did not observe any such thing. So you have to decide whether that discrepancy affects the credibility of the witness, Stafford Dixon, or whether you say that that is immaterial to his credibility".

In these words the learned trial judge, would have adhered to the principles which this ground adumbrates, in that the jury were told, not that the discrepancy could affect credibility solely on the point in which the discrepancy exists, but that it could affect his credibility without any qualifications being put thereon.

The other discrepancy to which the learned judge drew the attention of the jury occurred in the following passage of his summing-up.

> "There is also an issue as to whether he described the accused person as black or dark. He said he used both expressions, but he gave an explanation that he was under trauma at the time, having been injured and hurt. You have to say whether you accept that explanation, or you have to say whether, on your own observation of the accused that discrepancy is material or immaterial to

> the issue of guilt or otherwise. If you find that it is immaterial, you may well discard it and say that it does not affect the issue at all.
>
> If, on the other hand, you say that it is material then you can take the view that you cannot accept the particular witness in relation to that particular bit of evidence which he gave in Court".

Then later dealing generally with discrepancies, the learned trial judge said:

> "I should remind you that in relation to discrepancies, proven discrepancies, you cannot accept what was said on a previous occasion and act upon it. The furthest that you can do is to say that this a serious discrepancy and it affects the credibility of the witness in relation to that point, but you cannot go and say, 'I accept what was said, either on a previous occasion, or in a police statement,' and act upon it in relation to your verdict at this trial".

In these last two passages, the learned trial judge limited the effect that discrepancies could have on the witness' credibility to the points in which the discrepancy arose. It has long been settled that depending on the materiality of the discrepancy, the jury could well conclude that the witness' testimony be rejected totally. In support of this ground, counsel for the applicant relied on two cases and particularly the following dicta therein , which I refer to hereunder:

In *Reg v Garth Henriques & Owen Carr* SCCA 97 *Sr* 98/86 delivered March 25, 1988 (unreported) White, J.A. after examining and analysing cases on the point from "our West Indian jurisprudence" had this to say:

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> ... whether the inconsistency is explained or not, the matter of its immateriality or materiality is for the jury. And where the witness gives an explanation accounting for the discrepancy between a previous inconsistent statement and his evidence at the trial, the judge must

> leave it for the jury's determination as a question of fact, in that, it is for them to decide whether the inconsistency, discrepancy or contradiction is of so material a nature, that it goes to the fundaments of the Crown's case resulting in the jury not being able to accept the witness' evidence on that point, and in the long run, maybe, reject him as a witness of truth. The issue of credibility is a matter for the jury. Insubstantial contradictions do not, in any way, or to any extent, cancel the effect of the witness' testimony at the trial".

Then in *R v Delbert Whyte and George Nugent* SCCA 140/84 & 142/84 delivered May 16, 1986 (unreported) where similar directions as in the instant case were given i.e. limiting the effect on the witness' credibility to the point on which the discrepancy exist, Rowe, P. stated:

> "Complaint was levelled at this direction on the ground that it was incomplete. We agree that where a jury finds that there are serious discrepancies or inconsistencies in the testimony of a witness it is open to them not only to disbelieve him on the particular point, but also to reject his evidence in its entirety".

So too must we agree. The passages of the learned trial judge when read together demonstrate that the jury must have been left with the impression that the discrepancies, if they found them to exist, and that they were material, could only have affected the credibility of the witness in so far as the actual discrepancies were concerned, and were not made aware that they could on that basis reject his evidence in its entirety. It was contended that the discrepancies that existed went to the very issue in the case i.e. to the identification of the applicant, and the witness' ability to observe him at the time of the incident so as to be able to

accurately identify him subsequently. Consequently, we must examine the discrepancies adverted to in order to determine the validity of this contention.

The first related to whether the applicant was wearing a cap at the time of the incident, the witness having said on an earlier occasion that he was wearing a cap, and at the trial made no reference to any such head-wear. In that regard, the learned trial judge left it to the jury to decide whether it affected the credibility of the witness, without putting any qualifications on it.

In any event, the following extract from the transcript of the cross examination of the witness demonstrates that the witness insisted that a cap would not have interferred with his vision of the assailant:

> "Q. And the reason why you are changing your story now, is because you know that the fact that the person who had attacked you was wearing cap has interferred with your ability to give a proper identification of that person, that is why you are at this late stage changing your story.
>
> A. The man was lying on me like a man and a female. I could identify the man".

The witness' assertion that even if the man had been wearing a cap it would not have interfered with his ability to observe his face then became a matter which the jury ought to have considered in determining the measure of materiality to ascribe to the discrepancy. In those circumstances, it is fair to conclude that a reasonable jury would not rely on such a discrepancy to reject the witness' testimony in its entirety, but would seek to examine his credibility not so much as to whether a cap was being worn, but as to whether the opportunity existed, even if

a cap was worn by the assailant to see and observe his face, so as to make a subsequent identification.

The second discrepancy brought forward in the submissions of counsel, concerned the fact that on previous occasions, the witness had described his assailant as "black" whereas he subsequently described him as "dark". To begin with in the Jamaican context, there is really no marked distinction between the descriptions "black" and "dark". Indeed persons are sometimes described as "dark black" and "light black" all really meaning that the person is of black complexion.

The witness however, gave an explanation for using a different expression on the previous occasion stating that he was "under trauma at the time, having been injured and hurt". The learned trial judge invited the jury to say whether " on their own observation of the accused they would say the discrepancy was material or not". It was thereafter that he directed that if they found it material, that they could not accept the witness on that point. If the jury had so found, then it would mean that on the directions of the learned trial judge, they could not accept the witness' description of "dark" a factor which could by necessity have affected a fundamental aspect of his identification of the applicant and which would have resulted in a verdict of acquittal. Indeed, significantly the learned trial judge was careful to draw the attention of the jury to this discrepancy, when dealing with the question of identification, and having given them the warning

concerning the caution with which they should approach such evidence. Here is what he said:

> "Another factor which you could consider, and this is important in this case, is any description that was given to the police after the incident. You have heard different versions. I have already pointed out to you the discrepancies in relation to the colour or the appearance in the description given to the police and you have to say whether or not that affects the accuracy of the purported identification by the witness".

Then the learned trial judge again returned to this discrepancy when he later directed the jury as follows:

> "He says that he made the mistake in relation to dark complexion or black. He gives his explanation as he was suffering at the time and in his view the accused man looked dark to him at the time that he observed him. Of course, the previous statement described him as being black.
>
> Well, Mr. Foreman and members of the jury, you have to decide what significance you attach to that discrepancy. You see if you are satisfied on the rest of the evidence of Mr. Dixon, if you believe he is a truthful witness when he said this accused man was the man who attacked him at Sterling Castle, then you may well wish to say that discrepancy in relation to black or dark is of no significance, doesn't affect the credibility of Mr. Dixon at all".

In effect, the learned trial judge in this passage invited the jury to assess the truthfulness of the testimony of the witness in regard to his identification of the applicant and to give the discrepancy no significance if they accepted that his evidence identifying the applicant was truthful. In other words, he was again instructing that they could reject the evidence on that point, but nevertheless find

him credible in respect of the other evidence that he gave. In the context of this case, and the particular discrepancy i.e. as to the complexion 'dark' or 'black' we can find no fault with the approach of the learned trial judge in this regard.

In his second ground of appeal the applicant complained as follows:

> "The learned trial judge failed to highlight certain grave inconsistencies/discrepancies in the identification evidence as factors critically enervating its quality".

A close examination of the summing - up discloses that the learned trial judge dealt with the discrepancies complained of, when he directed the jury on the manner in which they should treat the evidence of visual identification.

1. The first discrepancy complained of again related to the witness' description of the complexion of his assailant. The learned trial judge dealt with that in the already quoted passage (supra) and in the context of the identification evidence.

2. The second relates to the discrepancy as to whether the assailant was wearing a cap. This was dealt with by the learned trial judge as follows:

> "I have already dealt with the admitted discrepancy in relation to black cap, but the witness went on to say he can't remember the clothing otherwise of the accused man.
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> Mr. Dixon said the cap with a peak wouldn't necessarily have obstructed his view, but it depended on the position in which the person was wearing the cap. He said he was not changing his story, nor making up any evidence as he had been face to face with the accused".

3. Another discrepancy relied on in this context related to the position of the witness' hand during the struggle with his assailant and whether or not the

position of his hand would have obstructed his view of the assailant. The learned trial judge however, did draw the jury's attention to this as a matter that ought to be considered in their assessment of the evidence of identification when he directed as follows:

> "There was a further issue into the position of Mr. Dixon's hand. At one time they were said to be up in the air but Mr. Dixon said that would have not been for any time. They were swinging, fighting for this gun and that did not prevent him from making an observation of features of his attacker. When you come to retire, you will have a transcript of the evidence, and as I said, you deal with any discrepancies which in your view, emerge from your examination of that transcript'.

The above cited passages from the judge's summing-up indicate that the jury was reminded of the discrepancies that existed on the evidence, that related to the question of identification, and was adequately instructed how to approach them, and this against the background of the careful directions by the learned trial judge on the question of visual identification. In the event, we hold that there is no merit in this ground.

One other ground calls for consideration. It reads:

> "The learned trial judge failed to assist the jury as to how to approach circumstantial evidence as it affected the firearm found by the police in the applicant's possession, which from the ballistic evidence, they were entitled to find was supportive of the identification evidence.
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> The learned trial judge's failure in this connection was a non-direction amounting to a misdirection , which might well have deprived the applicant of a chance of acquittal fairly open to him".

This ground relates to the evidence of the police officer who testified that he had taken the exhibited gun from the underwear of the applicant. He had gone to the house where he had first seen the applicant and another man sitting on the bed each with gun in hand. On entering the house, he met both men departing, but searched the applicant and found the gun in his underwear. A search of the house resulted in the finding of another gun, not relevant to this case. The gun taken from the applicant when matched by the forensic expert with fragments of bullet, and expended cartridge found on the scene turned out to have been the gun from which the latter were fired. The learned trial judge, therefore invited the jury to use that evidence, if they accepted it, in support of the identification evidence. He directed the jury thus:-

> "Another limb of the prosecution's case is that in a matter of few months after the incident this accused man was found in possession of a firearm which, if you accept the evidence of the expert, is the firearm which discharged those fragments of bullet and cartridge case which were found on the scene on the very night in question. That's the effect of Detective Grant's evidence. So putting all those different features together the prosecution is urging on you that the identification evidence is strong and that you should accept it and use it in arriving at your verdict".

Counsel for the applicant argued that the learned trial judge should have directed the jury on the law as it related to circumstantial evidence, given the fact that the Crown relied upon the evidence of the finding of the gun on the applicant to support the visual identification of the applicant. It appears from the transcript

that at the trial counsel for the Crown invited the learned judge to give such a direction to the jury. The transcript discloses the following dialogue:

> "MR. WILDMAN: Your Lordship could tell the jury what they consider is the accuracy of his identification along with his truthfulness alone, but truthfulness and accuracy, that he is not mistaken about the identity. And secondly, in relation to the question of the finding of the gun on the accused, your Lordship may consider giving specific directions on the question of circumstantial evidence. They must be satisfied that the evidence points to one direction only, and it is inconsistent with any other rational conclusion.
>
> HIS LORDSHIP: I had given all - and in fact, I dealt with the first one that you raised and I did not think that a specific direction in relation to circumstantial evidence could be justified in this case".

Thereafter the learned trial judge did not accede to the suggestion of counsel for the Crown - Mr. Wildman.

In our view the learned trial judge was correct. The evidence relating to the gun was one piece of evidence from which the jury could properly draw the inference, that the applicant was on the scene of the incident. Earlier in his summing-up, the learned trial judge dealt with the question of inferences as follows:

> "So having found the facts to the level that you are sure about them, as I told you in relation to the issue of intention you are entitled to draw what is known as reasonable inferences from the proven facts.
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> The facts first of all, have to be proven and the inferences which you draw have to be both reasonable and quite inescapable. That principle applies to evidence both for the prosecution and for the defence...".

In the cited passage, the jury were informed that they could draw inferences from proven facts. In our view such a direction was sufficient to inform the jury, how to approach the evidence concerning the gun, in their determination of the case. In our view circumstantial evidence was not relevant to this case as it was not a case, where the prosecution relied on several pieces of evidence in order to form the whole picture of guilt which in effect is the nature of circumstantial evidence. That this is so is reflected in the judgment of this Court in the case of ***Reg v Everton Morrison*** SCCA 92/91 delivered on February 22, 1993 (unreported) in which Carey, J.A., in delivering the judgment of the Court sets out, what is expected in a judge's direction to the jury. He stated:

> "We desire to say that it should be clearly stated to the jury that, circumstantial evidence consists of the inferences to be drawn from surrounding circumstances, there being an absence of direct evidence. The jury should be told (i) that if on an examination of all the surrounding circumstances, they find such a series of undesigned and unexpected coincidences, that as reasonable persons, their judgment is compelled to one conclusion; (ii) that all the circumstances relied on, must point in one direction and one-direction only, (iii) that if that evidence falls short of that standard, if it leaves gaps, if it is consistent with something else, then the test is not satisfied. What they must find, is an array of circumstances which point only to one conclusion and to all reasonable minds that conclusion only. The facts must be inconsistent with any other rational conclusion".

In the instant case there was no "array of circumstances", but only one piece of evidence which concerned the recovery of the gun. The learned trial judge was therefore correct in leaving the evidence to the jury purely on the basis of allowing

them to draw any reasonable and inescapable inference which flowed therefrom. That being so, this ground of appeal must also fail.

There was also argument advanced re the learned judge's directions concerning matching of the applicant's accent with that allegedly used by the assailant but that was a matter not seriously advanced before us. The following passage in the summing-up gave rise to this complaint

> "The prosecution is urging on you, not that it is voice identification but that if you accept the tone in which the witness used those words and you match it with the accused man's tone from the dock then you might well wish to say there is some resemblance. It is a matter for you to say. You are the judges of the facts but Mr. Dixon went on to describe it as an American voice".

The applicant complains that in those words the learned trial judge left this i.e the tone of the voice as an aspect of identification of the applicant.

The learned trial judge, however had earlier directed the jury, while dealing in detail with the circumstances in relation to the opportunity for identification, specifically withdrew for the jury's consideration the question of voice identification as a factor. He stated as follows:

> "The question of voice identification did not arise in this case. Indeed counsel for the defence (sic) although they did deal thoroughly with it, also did concede that there was no voice identification in this case".

The reference to the defence in the cited passage, appear to be a mistake, as it would more likely be the prosecution who would be making such a concession. In this passage, the learned trial judge stated quite categorically that there was no question of identification of voice in this case, and merely to subsequently reiterate

the attempts by the prosecution to make it so in his latter passage, would not in our view remove from the jury's mind his earlier direction especially bearing in mind his prefacing the latter passage by reminding them that the prosecution was not saying that it was voice identification. In the end, the effect of the later direction was to relate the manner in which the applicant apparently spoke from the dock with the witness' description of how his assailant spoke i.e. with an American accent. Though it would be incorrect for the jury to bolster the identification by the accent of the applicant, given the specific direction by the learned trial judge that there was in fact no voice identification in the case, we do not find that any unfairness or prejudice to the applicant resulted therefrom. As a result, and for the reasons heretofore stated, the application for leave to appeal is granted. The application iS treated as hearing of the appeal. The appeal is allowed, the conviction quashed and the sentence set aside. We however for the stated reasons substitute a verdict of guilty of non-capital murder, and in obedience to the law, the appellant is sentenced to life imprisonment.

Having regard to our conclusion, the Court will at a later date, hear submissions from counsel as to what period should be served by the appellant, before he becomes eligible for parole.