JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS. 91 & 96 of 1993

BEFORE: THE HON. MR. JUSTICE CAREY, P. (Ag.)
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.

REGINA
vs.
LEROY LAMEY
PATRICK ORMSBY

Dennis Morrison, Q.C. for Lamey

Lord Gifford, Q.C. for Ormsby

Miss Carolyn Reid for the Crown

November 7 and 21, 1994

WOLFE, J.A.:

Both applicants were convicted of capital murder in the Home Circuit Court at a sitting of the Circuit Court Division of the Gun Court presided over by Pitter J., sitting with a jury. They were both indicted for the offence of capital murder arising out of the death of Shawn Donaldson. The trial which commenced on October 11, 1993, was concluded on October 13, 1993, with the jury returning a verdict of guilty of capital murder in respect of each applicant. The mandatory sentence of death was imposed.

Miss Reid for the Crown readily conceded that she was unable to support the convictions due to the obvious failure of the learned trial judge to direct the jury on the question of visual identification. In the event, we treated the applications as the hearing of the appeals, allowed the appeals, quashed the convictions and set aside the sentences. However, in the interest of justice we ordered a new trial in the current session of the Home Circuit Court. These are our reasons for so doing.

On July 16, 1992, the deceased and three other men, including the main prosecution witness, were seated on a wall at Thompson Street in Arnett Gardens when the appellants and another man approached them and opened gun fire. When the shooting subsided the deceased was found nursing a gunshot wound. He was taken to the Kingston Public Hospital where he was pronounced dead on arrival. The incident occurred at approximately 9:30 a.m.

Lamey having given evidence on oath and denied participating in the events of July 16, 1992, swore that at the material time he was at home at 28 Second Street with his "baby-mother" Marcia Allen.

Ormsby also gave evidence on oath and like Lamey he denied taking part in the shooting incident. He said at the material time he was at his work place at Ramdial Engineering, Spanish Town Road. Lamey denied that he knew the identifying witness; Ormsby admitted knowing him. Both men, as can be seen from the summary of their sworn testimony, raised alibis.

Pitter J. in his summation to the jury failed to give them the general warning or indeed any warning as is required in cases of visual identification. It is fair to say that the learned judge treated the case as if it were strictly a matter of the credit of the witness Christopher Smikle. With that approach we disagree. The case, as presented clearly, required the learned trial judge to warn the jury of the dangers inherent in evidence of visual identification as well as to give a careful analysis of the circumstances under which the purported identification took place. In R. v. Gerald Cross S.C.C.A. 81/93 (unreported) delivered May 17, 1994, we underscored the necessity for trial judges to take heed and follow carefully the decisions laid down for their guidance by a superior court. A long line of cases dating back from R. v. Turnbull [1977] 1 Q.B. 224 as explained in Scott v. The Queen [1989] 1 A.C. 1242, Reid (Junior) v. The Queen [1990] 1 A.C. 363, Palmer v. R. [1990] 40 W.I.R. 282 and Beckford and others v. Regina [1993] 97 Cr. App. R. 409 have repeatedly said that whenever the case against an accused person depends wholly or

substantially on disputed correctness of one or more visual identifications of the accused person, the judge should warn the jury of the danger of convicting and of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. Further, the judge is also required to explain to the jury the reason for the danger and the special need for caution.

Regrettably the learned trial judge failed to discharge the judicial duty imposed on him by the decisions (supra). This failure was in effect a non-direction which amounts to a misdirection of the jury.

Our attention was drawn to the recent decision of the Privy Council in **Freemantle v. R.** P.C.A. No. 1/93 (unreported) delivered 27th June, 1994, in which their Lordships' Board affirmed the decision of this court where it applied the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act of Jamaica in a case where the trial judge had failed to give the general warning as referred to above. Their Lordships were of the view that the evidence of identification was so overwhelming that it could not be said that the failure to give the general warning resulted in a miscarriage of justice. They regarded the circumstances of that case to be exceptional circumstances in which the proviso could properly be applied. We, however, do not think that in the instant case the exercise of that discretion would be appropriate.

We observed that the jury was left to consider only the question of capital murder. We are of the view that where capital murder is charged, it is incumbent on the trial judge to leave for the consideration of the jury the offence of non-capital murder. This is so because it is a question of fact based on the evidence whether the offence of capital murder has been proved. Failure to prove capital murder would leave it open to the jury to return a verdict of guilty of non-capital murder. In the case under review, it was undoubtedly the province of the jury to decide whether or not the circumstances under which the killing took place

amounted to an act of terrorism as defined by section 2(1)(f) of the Offences against the Person Act.

Finally, it is desirable that an indictment which charges capital murder must so state in the statement of offence and must further set out under what section the charge is being laid. Particulars must also be averred which make the offence capital murder. See the recent decision of this court in S.C.C.A. 106/93 **R. v. Esmond McKain** (unreported) delivered October 31, 1994.