JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 139/93

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.

REGINA vs. LEROY LAMEY

Randolph Williams for the applicant

Herwin Smart for the Crown

October 24 and November 7, 1994

WOLFE, J.A.:

On December 21, 1992, the deceased Dave Lawrence, a young-man aged about 21 years, was literally abducted from the protecting arms of his aunt, Rebecca Bennett, and slaughtered before her very eyes. Arising out of this execution the applicant Leroy Lamey was indicted for the offence of murder and tried before Walker, J., sitting with a jury, in the Home Circuit Court between September 17 and 21, 1993. He was convicted of capital murder and sentenced to suffer death according to law.

In so far as the evidence is concerned, only a brief summary is necessary for purposes of this application. At about 8:00 p.m. on December 21, 1992, the deceased and his aunt, Rebecca Bennett, were in Arnett Gardens speaking to each other when the applicant and another man approached them. The applicant, otherwise called "Ninja", said to the deceased, "I want to talk to you." The deceased responded, "For what?" Whereupon both men brandished guns and "Ninja" ordered the deceased to "come off the wall" where he had been sitting. The deceased jumped from the wall and clutched his aunt who enquired of "Ninja" what he had done. "Ninja's" only response was, "Is man and man

talk, you is a woman, stay out of it." He wrested Dave from her and marched him away followed by his comrade-in-arms. Rebecca Bennett followed closely behind, when the other man advised her to retreat as he would not hesitate to murder her. She rebuffed him in biblical terms, "The blood of Jesus is against you, you can't trouble me."

Dave was placed against a wall and at point blank range he was executed, both men participating in the execution. The execution having been completed both men ran away.

Miss Bennett knew the applicant for between five to six years. The area was well lighted and, if she is to be believed, the merciless killing of her nephew took place before her very eyes. The killers were unmoved by her presence.

The first ground of complaint before us alleged that the learned trial judge's treatment of the critical issue of identification was inadequate in that (a) the jury were never alerted to the fact that evidence of visual identification was particularly subject to mistakes and "that cross-examination was generally unable to test for mistakes in such identification by an apparently honest witness."

In response to this complaint it will be sufficient to set out the directions of the learned trial judge at pages 127-128 of the record:

> "So now, it comes to the critical issue. Everything comes back now to identification. Is he the man; or is he not the man? This is a case, Mr. Foreman and members of the jury, where the case against the defendant, depends wholly on the correctness of one identification of the defendant, which the defence alleged to be mistaken. I must, therefore, warn you of the special need for caution before convicting this defendant in reliance on the correctness of that identification, and I am speaking, of course, of the identification of Rebecca Bennett. The reason for this warning is that it is quite possible for an honest witness to make a mistake in identification, and notorious miscarriages of justice have occurred as a result of this in the past. A mistaken witness can be a convincing witness, and even a

> "number of apparently convincing witnesses can all be mistaken. So, you must examine carefully the circumstances in which the identification of Rebecca Bennett was made."

The passage above clearly brought to the jury's attention the dangers inherent in evidence of visual identification and the real likelihood of a mistake being made. We know of no authority, and none was cited to us, which requires a trial judge to direct a jury "that cross-examination was generally unable to test for mistakes in such identification by an apparently honest witness", neither do we intend to formulate any such principle. In our view, the jury could not have failed to appreciate that caution was required in the assessment of uncorroborated identification evidence before acting upon it.

The second ground of appeal contends that the learned trial judge failed to remind the jury that even in the case of close relatives and friends mistakes of recognition occur while he emphasised the ease and speed of recognition of non-strangers.

While it is true that the judge did not point out that even in the case of close relatives and friends mistakes of recognition could occur, this failure, in our view, is not fatal. We have repeatedly said that what is important is not the incantation of a particular set of words but that it be conveyed to the jury that identification evidence is a special category of evidence and that caution ought to be exercised when dealing with this kind of evidence. As we indicated earlier on, the summing-up could not have failed to so impact on the jury.

In his next assault on the judge's directions on identification, Mr. Williams argued that the judge failed to direct the jury (a) that the failure of the applicant to give sworn testimony and (b) the rejection of his alibi could not support the identification evidence and (c) there was in fact no evidence supporting the identification evidence.

This complaint is entirely without merit. The judge at page 114 of the transcript told the jury that the failure of the applicant to give evidence on oath could not be used against him:

> "Now, while you, Mr. Foreman and members of the jury, have been deprived of the opportunity of hearing his story tested in cross-examination, the one thing that you must not do, is to assume that he is a guilty person only because he has not gone into the witness box and given sworn evidence."

At page 96 of the transcript, in language plain and unambiguous, he told the jury that the success of the crown's case depended entirely upon the testimony of Rebecca Bennett. In addition thereto he directed the jury as follows:

> "He is not required to prove his innocence; there is no duty on this defendant to prove anything at all. The burden or duty of proving the case against him rests on the prosecution throughout and never shifts."

In dealing with the alibi of the applicant the judge said:

> "He has not got to prove to you that he didn't do it. The shoe is on the other foot. It is the prosecution who must prove to you that he was there and he did do it."

All these passages taken together ought to have conveyed to the jury that a rejection of the applicant's alibi did not inevitably lead to his conviction and that in the final analysis the guilt or innocence of the accused had to be determined on the accuracy of Rebecca Bennett's evidence.

Ground 4 requires no treatment by this court as it is no more than a repetition of ground 3(1) which has already been adequately addressed in this judgment.

The fifth ground complains that the judge's analysis of the evidence of identification did not give sufficient attention to its weaknesses.

In **R. v. Turnbull and others** [1976] 63 Cr. App. R. 132, a trial judge is enjoined to remind the jury of any specific weaknesses which had appeared in the identification evidence. It is to be observed that the accent is on "specific". In this case

there were no specific weaknesses in the identification evidence of Rebecca Bennett. Notwithstanding, the learned trial judge carefully reminded the jury of the circumstances under which she purported to identify the applicant. Whilst he did not attach the label "weakness" to any of the circumstances he did point out the pros and cons of each set of circumstance and properly left it to the jury to decide whether each circumstance was a strength or weakness. As to whether a particular circumstance is strength or weakness is a question of fact and therefore a jury function.

In **Michael Rose v. The Queen** P.C.A. 3/93 delivered 10th October, 1994, Lord Lloyd of Berwick, delivering the judgment of the Board, said:

> "Mr. Hooper's main point was that nowhere does the judge list the specific weaknesses in the identification. Now it is true that the judge did not list the weaknesses in numerical order, nor did he use the word 'weakness' when drawing the jury's attention to the points made by the defence. But nothing in **Turnbull**, or in the subsequent cases to which their Lordships were referred, requires the judge to make a 'list' of the weaknesses in the identification evidence, or to use a particular form of words, when referring to those weaknesses. The essential requirement is that all the weaknesses should be properly drawn to the attention of the jury, and critically analysed where this is appropriate."

Finally, it is contended that the summation was more concerned with the credibility of the witness Rebecca Bennett than with the accuracy of her identification. With this complaint we disagree. The judge approached the matter in a commonsense way. He analysed each set of circumstance testified to by the witness then invited the jury to consider whether or not they believed the witness in respect of the factual condition which existed at the time of the identification. For example, if the jury rejected her testimony as to the lighting this would severely affect the accuracy of the identification or if they rejected her evidence that she had known the applicant prior to the night of the incident. Having invited the jury to make a finding in respect of

each of the circumstances, he ultimately invited them to determine whether or not the applicant was the man who shot and killed Dave Lawrence, if they accepted as true the circumstances under which Rebecca Bennett purported to identify him.

We are satisfied that the grounds urged on behalf of the applicant are without merit, consequently the application for leave to appeal is refused.