**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NO. 15/88**

**BEFORE:** **THE HON. MR. JUSTICE RATTRAY, P.**
**THE HON. MR. JUSTICE GORDON, J.A.**
***THE HON. MR.* JUSTICE HARRISON, J.A.**

***REGINA vs.* ANTHONY LEWIS**

**Maurice Saunders for appellant/petitioner**

**Carrington Mahoney for Crown**

**May 12, 13, 14, 15 and July 31, 1997**

**HARRISON, J.A.:**

The appellant was convicted in the Circuit Court Division of the Gun Court in Kingston on the 19th day of January, 1988, for the murder of Calvin Jennings on the 24th day of April, 1986, and sentenced to death. His application for leave to appeal was heard on the 20th day of December, 1988, by the Court of Appeal and dismissed. On the 11th day of February, 1997, his case was reviewed under the provisions of the Offences against the Person (Amendment) Act, 1992, by a Judge of Appeal and re-classified as non-capital murder and the appellant sentenced to imprisonment for life, and to serve 20 years before he is eligible for parole.

This matter was heard by this court having been referred by the Governor-General in the exercise of his powers under section 29(1)(a) of the Judicature (Appellate Jurisdiction) Act. The appellant has filed several grounds of appeal in addition to

a motion to adduce fresh evidence for the consideration of this court.

The facts of this case are as stated hereunder:

On Thursday the 24th day of April, 1986, at about 4:15 p.m. prosecution witness Doreen Valentine was standing with the deceased, Calvin Jennings, and a third person at the corner of Ramsay Road and Maxfield Avenue, in the parish of St. Andrew, when Anthony Rainford, another prosecution witness, who had just left a domino game nearby came up and spoke to them and left. Thereafter two men whom Miss Valentine knew before came up, whereupon the deceased said to them, "Cool nuh boss." The appellant, known as "Ticky" was one of these two men; each pulled a gun and fired shots at the deceased. Miss Valentine, fired at, fell to the ground. The men ran off. Rainford, hearing the shots, returned around the corner of the road and saw the appellant from a side view, fire a shot at the deceased and along with the other man whom he knew as "Pleasure" run off. Rainford called to the appellant, "Ticky you kill my friend." The appellant, then twenty feet away, spun around and facing Rainford, said, "You a go dead too" and ran off. Rainford saw the deceased lying with blood on his neck. He took Miss Valentine to the Trench Town and to the Denham Town Police Stations and then to the Kingston Public Hospital; he there saw the deceased and spoke to him. One Detective Sergeant Clifton Getton got a report at the Denham Town Police Station at about 5:00 p.m. and went to Ramsay Road, saw a crowd and spoke to some persons and then went to the Kingston Public Hospital where he

saw the body of the deceased. He collected statements and on the 25th day of April, 1986, he obtained a warrant for the arrest of the appellant Lewis.

The witness Rainford, who was nineteen years of age at the time of the trial, knew the appellant since he, the witness, was fourteen years old and they used to sell sweets together. He knew that the appellant lived at Gordon Lane "beside Ramsay Road", and had last seen him the Monday before the incident.

On the 16th day of May, 1986, three weeks and a few days after the shooting, a police officer, Acting Corporal Kenneth Stewart, was conducting a random checking of motor vehicles along Mountain View Avenue, in front of the Excelsior High School, and stopped a mini-bus. He heard and saw one Constable Graham, another of his police officers involved in the exercise, say to the appellant, "Boy, leave the bag alone boy." The appellant in the mini-bus was holding onto the strap of a bag hanging around his neck and attempting to lift the strap over his head. The appellant was taken off the bus with the bag and asked by Acting Corporal Stewart what was in the bag and on answering, "Nothing officer", Constable Graham searched the appellant and in the bag he found one .38 revolver and three .38 cartridges. Asked if he had a licence the appellant said, "A no fe me own sah."

Dr. Ramesh Bhatt who conducted a post mortem examination on the body of the deceased, observed four firearm entry wounds and removed two bullets from the body of Calvin Jennings and handed them to Detective Sergeant Getton who took them to the

ballistics expert, Assistant Commissioner Daniel Wray. On examining and testing the said two bullets as well as the .38 revolver found with the appellant, Assistant Commissioner Wray found that both bullets were fired from the said firearm.

The appellant made an unsworn statement from the dock, denying the charge, stating that he had been at work at "Port Road and the intersection of Hope Road" with "Razzi and Fuzzi" and then he left and went to the airport and did not hear of the killing until "approximately 'bout 7:30 going up to 8:00" in the night while at his girlfriend's yard. Her sister told him.

The prosecution's case was accordingly based principally on the identification evidence of the eyewitness Rainford along with the evidence of the possession by the appellant of the weapon which, on the ballistic expert's evidence, was used to commit the offence.

The first ground of appeal argued was in substance a complaint that the learned trial judge failed to direct the jury on the special need for caution in examining identification evidence, its vulnerability to mistake and the reasons, failed to stress the risk of the honest mistaken witness and undermined his direction therein by leaving it to the jury to decide whether the witness Rainford and Miss Valentine were lying.

Counsel for the appellant was alluding to the well-known guidelines in cases depending on visual identification as laid down in ***R. v. Turnbull*** [1977] Q.B. 224, and specifically the observations in ***R. v. Dickson*** [1983] 1 V.R. 227, at page 231,

quoted in ***Reid, Dennis & Whylie v. R.*** [1989] 37 W.I.R. 346, namely:

> ...Jurors, who, unlike trial lawyers, have not given thought to the way in which evidence of visual identification depends on the witness receiving recording and recalling accurately a fairly subjective impression on the mind, are unlikely to be aware of the extent of the risk that honest and convincing witnesses may be mistaken... The best way of explaining and bringing home to the jury the extent of this risk is by explaining the reasons for there being the risk and that it is essential to distinguish between honesty and accuracy and not assume the latter because of belief in the former."

In addition, he was referring to the dictum of Lord Ackner in ***Palmer v. R.*** [1992] 40 W.I.R. 282 of the necessity to tell the jury that:

> ...visual identification is a class of evidence that is particularly vulnerable to mistake, and the reasons for that vulnerability..."

and that:

> ...honest witnesses can well give inaccurate but convincing evidence."

On an examination of the summing-up of the learned trial judge, he told the jury:

> "Now, as I told you the chief issue in this case is identification and it is my duty to warn you that in a case where the prosecution depends on visual identification to prove their case, I have to give you a warning and that is that you have to examine the evidence of identification with a great deal of care, and the reason for this is simply this that human nature is such that people make mistakes, honest mistakes. You have heard the addresses, and I suppose it has happened to some of you already where you have mistaken one person for the other.

> In some instances persons whom you know very well, you may be down town and you see your good friend there, and when you greet him some days afterwards you say I wonder what you were doing down town on Saturday, and the person looks on you and say, 'I wasn't down town, I was in Montego Bay'. In that case this is an honest mistake and this is somebody whom you know very well, so you have to examine the evidence very carefully."

The said judge then pointed out the weakness in the evidence of the witness Miss Valentine, being a dock identification and continued:

> "Now, when you are going to examine the identification these are matters you have to take into consideration. As I said before, whether or not the person was known to you; the time of day this thing took place, how long the incident lasted, the circumstances under which the person was able to make the identification, for instance, if it's somebody three feet away from you; if you are going to be able to make out features at say fifteen yards and things like that. These are all matters you have to take into consideration. As I have told you, the question of identification is most important, but here of course, the Crown has two witnesses, so even if you are not sure about Miss Valentine, if you feel satisfied so you feel sure that Mr. Rainford made no mistake, then of course you are entitled to convict, because when the Crown puts forward witnesses, we are not saying that you must accept anyone of them, because everybody, witnesses are people; you can believe one and reject the rest."

and continuing, emphasized the weakness:

> ...this thing happened quickly. He came up, spoke to them, fired, and she was very frightened and she threw herself on the ground. In those few minutes or seconds, was she able to see and make out this man's face?"

and again:

> "You have to look at all the circumstances, as I said, bearing in mind the weaknesses in her evidence, that she did not go on an identification parade and point out this gentleman; the first time she saw him was in the dock at the Gun Court, ...some eight or nine months afterwards. You must say whether over that period of time she would have carried the memory of that man's features, ...or was it that because she saw him in the dock at the Gun Court, that's why she says it was he...
>
> ...Mr. Rainford, ...is in a different position. He knew the accused man before.
>
> ...Now he is in a better position than Miss Valentine. He says from he was fourteen years old he knew the accused man; ...two of them used to go and sell sweetie in the seventies,... He says he saw his face while he was running, ...he saw the side of his face, but ...that when the accused man told him about, 'Yuh a go dead to,' the accused had spun around... You must say whether in those circumstances he could then make out this man whom he had known..."

The learned trial judge, several times later in the summing-up, dealt again with the matter of visual identification and the nature of the evidence of the witness Rainford, and said:

> "If you are in doubt about it, then the prosecution would not have proved their case. But if you are satisfied that you feel sure that Mr. Rainford is not making a mistake, then, of course, the crown would have proven their case."

A trial judge is not under a duty to adopt any specific format in directing a jury on evidence in identification cases, Mills ***v. R.*** [1995] 3 All E.R. 865, as long as he explains clearly to them the salient points and issues arising, the law

applicable and their functions. The cumulative effect of the direction of the learned trial judge in this case was that he correctly directed the jury on their proper approach to visual identification, the disadvantage of dock identification, general weaknesses and the issue of honest mistake. We find no merit in this ground.

The second ground of appeal posited a failure of the learned trial judge to direct the jury adequately on the proper manner to evaluate the appellant's defence of alibi; in particular, if they found it to be false or disbelieved it, that did not support the evidence of identification.

Having properly directed the jury that the burden of proof is on the prosecution and to the extent that they felt sure of the appellant's guilt, he went on to say of the defence of alibi:

> "As I told you, his defence is, 'I wasn't there', an alibi. He doesn't have to prove where he was that day, the Crown must satisfy you that he was one of the men who shot the deceased. If you believe him when he says he was at his workplace the Crown has not proved their case. If you are in doubt, similarly, the Crown has not proved its case, you would have to acquit."

The appellant made an unsworn statement. The learned trial judge reminded the jury of its contents, and that "it doesn't have the same value as sworn evidence" and instructed them to take it into account in deciding "whether or not the prosecution has proved its case against this man", and said to the jury:

> "That's his defence. I wasn't there... That is his statement ...you look at

> everything taking into account his statement, look at all the evidence and ask yourselves are you satisfied so you feel sure that he was one of the men who shot Mr. Jennings that afternoon."

There was no duty on the learned trial judge to give any directions on the alibi evidence of the nature complained of by counsel for the appellant. The headnote in *Mills v. R.* (Supra) reads:

> "Where the accused was entitled to make an unsworn statement and did so raising an alibi defence, the trial judge was not required to give any directions to the jury about the possible impact of the rejection of the alibi on the identification evidence, but should merely tell the jury to accord to the accused's unsworn statement such weight as they considered it deserved. Accordingly, the judge's failure to give a direction that rejection of the alibi did not by itself support the identification evidence was not a misdirection."

The trial judge's treatment of the defence of alibi in the instant case was more than generous; this ground also fails.

Grounds 3 and 4 may be considered together. Counsel for the appellant complained that, in the presence of the jury, during the course of submission in law as to the admissibility of evidence, the learned judge permitted counsel for the crown to read aloud the headnote of a reported case. In addition, he permitted evidence to be led of the fact of a conversation between the witness Rainford and the deceased after the shooting, and accordingly it was unfair and highly prejudicial to the appellant.

The transcript of the evidence, shows that the witness Rainford said that the deceased told him something. The trial judge in his summation confirms this in his recounting of Rainford's evidence:

> "...he saw the deceased later at the Kingston Public Hospital and he spoke to him."

No evidence was led of the contents of the conversation. In that respect, that evidence of the fact of the conversation is admissible and is in no manner prejudicial. Furthermore, there is no practice nor proven principle, as a general rule, that legal submissions, involving the reading of the facts and ruling in a reported case must be made in the absence of the jury. The attempt by counsel to rely on the case of ***Crosdale v. R.*** [1995] 46 W.I.R. 278, which concerns no case submissions is inappropriate. No prejudice arose in either instance; both these grounds are without any merit.

Ground 5 complains that the learned trial judge improperly admitted the evidence of the fact that the appellant ran when he was seen by the police, subsequent to the event thereby, imputing and prejudicing the defence with such inadmissible hearsay evidence.

The transcript of evidence, reveals that prosecution witness District Constable Everton Adlam, who was stationed at the Trench Town Police Station on the 24th day of April, 1986, went to the scene of the shooting on that day and got certain information, while in the company of Detective Sergeant Getton who on the 25th April, 1986, obtained a warrant for the arrest

of the appellant. He, Adlam, saw the appellant on the following day, the 25th, while he the witness was travelling in a motor car at Rockfort in the parish of Kingston. The appellant, was standing on a shop piazza. The car was stopped and while it was being turned around the appellant looked in the witness' direction and ran. The witness Adlam had known the appellant as "Ticki-Ticki" for five years before the incident. Subsequently on the 5th day of June, 1986, Adlam pointed out the appellant to Detective Sergeant Getton at the Denham Town Police Station as "Ticki-Ticki". We regard this evidence of the sighting of the appellant and his departure from the piazza at Rockfort as admissible; it confirms the early identification of the appellant with the incident of the shooting. This ground is also without merit.

Ground 6 was not pursued.

Grounds 7, 8 and 9 complain of the failure of the prosecution at the trial to disclose to the appellant written statements of witnesses Doreen Valentine Anthony Rainford and District Constable Adlam, respectively, revealing discrepancies between their evidence at the trial and the said statements, and that these were material irregularities resulting in an unfair trial and a miscarriage of justice.

The evidence of witness Rainford, as it concerns ground 7, reveals that he said he saw the appellant "firing the shot on Collie (deceased)" and the appellant said to him, "Bwoy you a go dead too." Neither of these statements was contained in his statement given to the police on the 24th day of August, 1986,

although he named the appellant therein as seeing him running with a gun in his hand. This was a discrepancy, attracting the criticism of recent concoction. It does not, however, conflict with the evidence given. These were details elicited in the viva voce evidence of the witness which were not challenged as recent concoction at the trial. In the course of examination and cross-examination, more details are elicited from a witness than are contained in his statement or deposition. There is no evidence that the testimony of this witness "departed significantly" from his deposition. We do not regard it as a material discrepancy.

In respect of ground 8, the prosecution witness, Miss Valentine, stated in evidence that it was the first that she was seeing the appellant, on the day of the shooting, whereas in her statement to the police dated the 24th day of August, 1986, she said, "...one Ticky also approached and pulled a gun and both of them began firing shots." This witness did not identify the appellant other than in a dock identification. Again, we agree that this is a discrepancy, but in all the circumstances, not a material discrepancy.

The complaint in ground 9 is that there is a material discrepancy between the evidence of the witness Adlam at the trial and his statement given on the 4th day of June, 1986, on the one hand, and the absence of evidence from prosecution witness Detective Sergeant Getton on the other hand, that the names of the assailants were obtained when they both went to the scene on the day of the shooting.

The evidence of the witness Rainford is that shortly after the shooting at about 4:15 p.m., he went to the Trench Town Police Station and then to the Denham Town Police Station and made reports at both police stations. Detective Sergeant Getton and others from the Denham Town Police Station went to the scene of the shooting at Ramsay Road where they were at 4:50 p.m. when the prosecution witness Adlam arrived and, as disclosed in his statement, "received some information that "Picky' and `Pleasure' were the ones who shot the deceased."

We find that there is no discrepancy disclosed as arising in respect of this latter complaint.

The obligation placed on the prosecution to disclose to the defence the statements of witnesses, in circumstances where discrepancies arise, is based on the concept that the accused must be afforded a fair trial, as far as humanly possible.

Lord Lowry, giving the opinion of the Board in ***Berry*** **v.** ***R.*** [1992] 41 W.I.R. 244, said at page 253:

> ...if a Crown witness' evidence is intended to depart significantly from his deposition and to be based on his statement to the police, it is the duty of the Crown to give the defence a copy of that statement in advance of the hearing."

The prosecution's case against this appellant rested both on the identification evidence and the fact that the appellant was found in possession of the firearm from which the fatal bullets were fired. In all the circumstances, we find that despite the discrepancies existing and the non-disclosure of statements these discrepancies were not material ones, and

cumulatively there was no miscarriage of justice. This ground of appeal also fails.

In ground 10, the appellant complained that the learned trial judge erred when he failed to understand that when the appellant said that he had no reason to kill the deceased who was his friend he was "merely showing" that he had no motive and therefore could not have been one of the assailants.

When the learned trial judge in his directions told the jury:

> "...there is no burden on the prosecution to prove a motive; if the prosecution can ...then there is evidence they can bring to you to say, well the accused has a motive for so doing, and of course if there is no motive, that is something you can say, well he is not likely to have done it..."

he thereby dealt properly with the question of motive. He was quite generous to the appellant in his manner of dealing with this question and it would be quite wrong to put on the statement the interpretation contended for by the appellant. There is absolutely no merit in this ground.

Ground 11 complains that the learned trial judge failed to adequately direct the jury as to the essential elements of the offence of murder. The learned trial judge said:

> ...the offence of murder is committed when somebody intentionally and deliberately kills another person..."

We agree that this direction was quite terse and lacking in details. However, on the facts of this case and the medical and ballistic evidence, we find that it was adequate; this ground also fails.

Ground 12 was not expanded on, because of the subsequent motion argued before us.

By a motion dated the 25th day of February, 1997, the appellant applied for leave to adduce fresh evidence, namely, the evidence contained in the affidavits of Robert Hamilton, Devon Anderson and Donovan Atkinson dated the 25th, 26th and 25th days of February, 1997, respectively, to support the defence of alibi and in disproof of the identification evidence of the prosecution witnesses.

In order to be able to grant such leave, this court must be satisfied that, (i) the evidence sought to be introduced at this stage is admissible, (ii) is in fact "fresh evidence", in that it was not available to the defence at the trial and, (iii) it is credible.

Both potential witnesses, Robert Hamilton and Devon Anderson, claim to have been present at Ramsay Road on the day of the shooting.

Robert Hamilton, in his affidavit dated the 25th day of February, 1997, stated:

> ...when I saw the men they were about two to two and one-half chains away from me. I was not able to identify these men as I could not see the full front of the faces. I only saw parts off (sic) their faces from an angle or from the side as they ran... But I feel confident and positive that Anthony Lewis was not one of those three men... none of them moved (their bodies) like Anthony Lewis...".

and in a previous affidavit dated the 31st day of March, 1992, he said:

> ...I was not able to identify these men as I could not see their faces. I am of

> the opinion that Anthony Lewis was not among the three men... I formed this opinion as... he is not the same build as the men who ran away."

In his affidavit dated the 25th day of February, 1997, he stated:

> ...before the trial... of Anthony Lewis I visited the office of Mr. Delroy Chuck, the Attorney-at-Law who represented Anthony Lewis at his trial. ...I did not go to Mr. Chuck's office for the purpose of giving a statement as I did not know that the information which I had at the time could possibly be evidence or be used to help in the case, and so I had not told Mr. Chuck about what I had seen at the incident on the 24th April, 1986 and neither had I told him that I had come to give a statement."

and in his affidavit dated the 31st day of March, 1992:

> ...before the trial... of Anthony Lewis I visited the office of Mr. Delroy Chuck.. I told Mr. Chuck that I had come to give him a statement about what I knew but I did not want to give evidence in court... (because) I was afraid... because of the reputation in my community of the police officer in charge of the case... 'Eva'... as a bad man or a killer." [Emphasis added]

Devon Anderson, in his affidavit of the 26th day of February, 1997, also stated that he went to Mr. Chuck's office before the trial, but not with the intention to be a witness because of fear of "Eva", and that he did not tell Mr. Chuck that he saw the men running from the scene. "Mr. Chuck's main concern was to contact and interview the witness who could say where he was at the time of the incident on the 24th day of April, 1986"; that on the day of the shooting he saw three men running away, he saw them "from the side and from the back" and

so "...could not discern their faces clearly"; that one of them resembled one "Pleasure" - but he was "sure... that Anthony Lewis... was not one of those two men. Anthony Lewis was thin whereas those men were thick in body."

In his affidavit dated the 6th day of April, 1992, Devon Anderson stated that he went to Mr. Chuck's office before the trial and told him that he had come to give a statement "about what I knew...", but he was afraid of the police officer "Eva" and that on the 24th day of April, 1986, when he saw the three men running "it was the first time I was seeing these men... I could not discern their faces"; that the appellant who was thin in body was not one of the men, who were thickly built.

This court is of the view that evidence of the potential witnesses Hamilton and Anderson is not credible and clearly designed to deceive. These said witnesses, who maintained that they were at the scene of the shooting, intimated that they were not averse to committing perjury; they were prepared:

> ...(to) give on appeal, fresh evidence, if it was allowed, to support his alibi."

The witness Donovan Atkinson also called "Razzi", in his affidavit dated the 25th day of February, 1997, stated:

> (1) that on the day of the shooting the appellant was working with him, at the corner of Old Hope Road and Tom Redcam Avenue working and the appellant was with him
>
> (2) at about 4:30 p.m. a "pot man passed by" and told them about the shooting.
>
> (3) that they worked until about 5:30 p.m., "we left them and went home. The three of us... me Anthony Lewis and Fuzzie (we) lived in the same area."

The appellant in his unsworn statement said:

> (1) that on the said day he was working at the intersection of Hope Road with "Razzi" and "Fuzzi".
>
> (2) that he left work and went to the airport, met the mother of his baby's mother and took her to his yard and then went to his baby's mother's yard.
>
> (3) he reached the latter yard "bout 7:30 going up to 8:00" and was told by his baby's mother's sister that "Pleasure kill a man round Trench Town."

We agree with counsel for the Crown that it is clear that the appellant does not agree that at 4:30 p.m., the time that the "pot man" announced the killing which occurred at about 4:15 p.m., that he was present with "Razzi" and "Fuzzi". Neither does he agree that he was in Atkinson's company on the way home, but had gone to the airport and first heard about the shooting, later between 7:30 p.m. to 8:00 p.m.

For the above reasons, we are of the view that the prospective fresh evidence contained in statements which bear similar features, in that they contain numerous hearsay statements and identical recitals in several paragraphs, cannot be described as "fresh evidence" and is by no means credible. The application is refused.

The motion is accordingly dismissed.

The appeal is dismissed. His Excellency the Governor-General will be advised of our decision.