JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS: 3, 4 & 5/90

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA VS. DONOVAN ASQUITH
NYRON FISHER
ANTHONY FRASER

Lord Gifford for Fisher and Fraser

Miss Antoinette . Haughton for Asquith

Hugh Wildman for Crown

6th, 7th April & 18th May, 1992

CAREY, J.A.

On the night of the 4th October, 1988, in the sleepy rural village of Airy Castle in the hills of St. Thomas near Bath, the famous spa, a terribly brutal and shocking event occurred; there was a lynching. The victim Rahalia Buchanan a Jamaican who resided in the Bronx, New York and worked for the city of New York having come home on a visit, he decided to take the waters at Bath. Unfortunately, he arrived to find the facility closed, a casualty of Hurricane Gilbert which deprived most if not all the country of electrical services.

Mr. Buchanan reached Airy Castle in the course of that evening and purchased a beer at a tavern between 10:00 to 11:00 p.m. Sometime thereafter, he was chased and set upon by a number of machete and stick-wielding villagers. In the event, he was hacked to death. Some seven villagers were tried for his murder in the St. Thomas Circuit before Clarke, J., and a jury between the 4th and 19th December, 1989. Of that number, these three applicants were convicted and sentenced to death. The reasons or the motives which actuated the participants in this tragedy are altogether unclear.

Hitherto peaceful villagers seemed to have gone berserk and killed a hapless stranger in their midst. There was some suggestion that some of the participants might have thought he was a thief, but the sheer brutality of the killing seems scarcely explicable on that basis.

The Crown's case depended entirely on visual identification evidence of two eye witnesses, Thermutis McPherson and Harold Deans. The deposition of the third, Loretta Reid was read at the trial, but it could not truly be said that it made a significant contribution to the sum of the identification evidence. As would be expected, the grounds of appeal put forward on behalf of all these applicants save one, involved complaints not only as to the quality of that evidence but also challenged the directions of the learned trial judge regarding the issue of visual identification. The remaining ground was critical of his directions regarding the effect of evidence given by "a perjured accomplice."

As we have already indicated, the visual identification evidence was given by three witnesses, Thermutis McPherson referred to as "Miss Rose," Harold Deans and Loretta Reid, whose deposition was read into the record. Perhaps, we should examine first, the evidence of Loretta Reid which can be shortly stated. She operates a bar and grocery at Airy Castle which premises fronts those of Miss Ruth McNeil (referred to in the evidence as Miss Ruth) where the crime occurred. She served the victim a beer at 11:30 p.m. At about 1:00 a.m. she heard stones being thrown and then she saw him run into Miss Ruth's yard and onto her verandah. She did not then recognize him. A number of men, among them, the applicants Myron Fisher and Donovan Asquith chased him there and threw stones at him. She did not speak to the events thereafter but swore that she went in search of a police officer who lived in the neighbourhood. On her return, she heard sounds of "licking and chopping" at Miss Ruth's yard and observed persons on the roadway as well.

There was light from a flashlight where she saw the applicants in her shop but none on the street.

"Miss Rose" gave evidence implicating Donovan Asquith and Nyron Fisher. She saw both applicants chopping the victim with machetes which were brand new which meant that these were blunt, unsharpened implements. Her observations were made from across the roadway. Although she pointed out the distance in court, the learned trial judge did not appear to think that it should be included in the record, which is a matter of regret. For that reason, we have been deprived of the evidence of distances provided by the witness. The witness did however, enter the premises and had a ringside view of the two applicants engaged in the killing of the victim. She said she could touch them. Light was provided by two bottle-torches. While she was there, the injured man begged her for a drink of water. Nyron Fisher's response to the request was to order her not to comply, adding, "let him drink him blood." She remained by the injured man, recovered his diary and told them the name of the victim.
So far as knowledge of these applicants before the incident went, the witness knew each for about 12 years and saw them fairly frequently.

The period of observation was not dealt with in evidence, but from all the circumstances, there can be little doubt that this witness had ample time and opportunity for observing and being able to recognize two persons who were well known to her, each occupied in chopping the victim and in conversing with the witness.

The other witness was Harold Deans. He is a villager of Airy Castle who had gone to purchase groceries and was attracted by the commotion at Miss Ruth's premises. He identified in addition to Donovan Asquith and Nyron Fisher, Donovan Fraser and he did so from the fence of Miss Ruth's yard. Again, this distance was indicated to the jury but forms no part of the record. These applicants were engaged in chopping their victim with machetes. In the case of Asquith, the verb used, was "beating." He confirmed that lighting emanated from two bottle-torches which were placed

within a matter of a couple yards from the attackers. He was at the fence on two occasions when he observed these applicants for a total period of approximately twenty minutes and he sat on a wall across the road from Miss Ruth's yard for another ten minutes. All these were persons with whom he was acquainted over the last five years, at the least.

Lord Gifford in his submissions with respect to the identification evidence of Miss Rose and Mr. Harold Deans endeavoured to demonstrate that conditions in which their identification took place were poor. It was night, he said, and the only available lighting was supplied by two bottle-torches. A general commotion, people moving up and down were terms he used to describe the scene on that night. On any view, he urged, the conditions were so difficult as to be unacceptable. He said that certainly, in the case of the applicant Fraser who was only implicated by Harold Deans, the learned trial judge should have exercised his powers and withdrawn the case against him from the jury.

We cannot agree with these submissions for reasons which follow.

Insofar as the conditions for viewing the applicants were concerned, Miss Rose had the better opportunity of the two witnesses. She went on the verandah of Miss Ruth and came within touching distance of the applicants. She had a ringside view of the tableau being enacted before her eyes. From a position on the opposite side of the road, she had also witnessed the events. Whatever doubts she might have entertained as to the identity (and she never stated that she had any) would have been removed upon nearer scrutiny. The jury as persons from the parish, would have appreciated that Miss Rose would not have left her bed and indeed her house to take a walk on a public road dressed as she was, so as to place herself in a position which would preclude her not only from ascertaining the reason for the commotion but also from ascertaining the persons involved. She was plainly more than

curious to learn what was taking place. She was concerned rather with seeing than hearing about the events.

Bottle-torches plainly do not provide lighting as satisfactory as that from electricity, but it provides light which having regard to the proximity of the viewer, renders it quite possible to recognize persons, especially those previously known to the viewer.

Mr. Deans viewed the same tableau but he viewed it from the fence of Miss Ruth's premises. He also was a curious unlooker. He could have viewed it from Miss Fattie's shop one chain away but he chose to move closer; he went by the fence. It is not too difficult to appreciate that he positioned himself closer to the action so as to allow himself a better view. The actors according to him, were in the limelight: they were but an arm's length from the light source. Doubtless on occasion, his vision would be obscured momentarily by persons in the crowd moving about. It is to be borne in mind however, that the applicants were not engaged in any furtive or clandestine activity. They stood virtually in one position for the purpose of chopping their victim who was lying on the ground completely at their mercy. On the evidence, there was sufficient time for the eye-witnesses to be able to recognize the participants; this was no fleeting glance. The terrible scene took some time to be enacted. There was, as well the deposition evidence of Loretta Reid who identified Donovan Asquith and Myron Fisher. We have to bear in mind that she did not appear before the jury. Nevertheless, the deposition was admitted and the jury were entitled to consider it. These two applicants whom she knew, ran by her shop which was lit by a "shade lamp." She spoke of a flashlight in the group of these applicants and other men. She saw them throwing stones at the victim who was then on the verandah. She was cross-examined at the preliminary examination by one of several counsel who appeared but that had no effect on the evidence she had given in chief.

In our view, despite the quality of the lighting, the witnesses were sufficiently close to the scene and remained there for appreciable times to be able to recognize the participants who took no steps to disguise their presence and were persons very well known to the witnesses.

We come now to consider the credit of these witnesses. First, "Miss Rose." Lord Gifford attacked her credit worthiness on the ground that a witness Annette Small who was called by the Crown, destroyed her credit. He said that this witness gave evidence which was in conflict with Miss Rose. Miss Rose testified that when the injured victim requested water, the applicant Fisher prevented her compliance, saying that the victim should be allowed to drink his own blood. She also spoke of seeing his diary, a camera and a handbag and also pleaded that his life be spared. Annette Small gave an altogether different picture. She asserted that it was Miss Rose who removed the camera from its case, that when the victim requested a drink, it was she who had taunted him by suggesting that he should drink his blood, and it was she who had requested salt of her, but she did not comply. The evidence of Annette Small, if accepted, he argued, demonstrated that Miss Rose was evilly disposed to the victim and in support of the terrible crime. It provided powerful evidence against the applicant Fisher for she was prepared to attribute to him words which Annette Small said, that Miss Rose had used. Lord Gifford suggested she was the principal "cheer-leader."

In our view, there was a clear conflict between Annette Small and Miss Rose which the jury were required to resolve. Plainly, if the jury preferred Annette Small as a witness of truth on the points she made, which were in conflict with Miss Rose, it rendered Miss Rose's testimony quite worthless. That was an issue which the jury were bound to recognize and needed to resolve. The jury were given correct directions on conflicts, and their resolution. Mr. Deans and the deposition evidence of Loretta Reid placed Nyron Fisher on the scene engaged in hostile acts against the victim.

There was no suggestion that Miss Rose carried any animus against Fisher in particular or indeed, against any of the other applicants. What was said was that she was an accomplice. We will deal with this issue hereafter in this judgment.

The evidence of Harold Deans, Lord Gifford argued, was also suspect because he had an interest to serve. The basis for this conclusion lay in the fact that Deans had been arrested as a suspect in this case. Further, it was said, he was a reluctant witness because although a **subpoena** had been served on him to attend as a witness in the preliminary examination, a police officer had to fetch him to court.

The effect of the evidence of Harold Deans on the jury would naturally depend on their reaction to his demeanour. Although it was perfectly true that the witness had been detained by the police, there was no evidence before the jury as to the reasons for his detention. He was not ever charged with any offence. The cross-examination of this witness brought forth nothing adverse to him. The suggestion was that his evidence was untruthful but there never was any suggestion that he was ill-disposed to the applicants. The issue of his having an interest to serve, was really, as we already noted, an argument based on the fact that he had been detained by the police. That interest was purely, in our view, speculative rather than real.

We can dispose of the argument that he was a reluctant witness by pointing out that there was no evidence that a warrant had been ordered for his arrest as a witness nor was it shown that he had refused to attend as a witness voluntarily. The evidence merely shows that for some unknown reason, the police provided transport for the witness to attend the preliminary examination. Reluctance is not, we think, equivalent to unreliability.

We must say something with regard to the submissions made by Lord Gifford with regard to conflicts between Harold Deans and Miss Rose and internal conflicts in the evidence of each. The only

conflict between these witnesses which he identified, was, that while both mentioned Fisher and Asquith as participating in the attack upon the slain man, Miss Rose spoke of a Bunny Williams as another of the attackers, Harold Deans spoke of a Harold Fraser and Joel McFarlane as still others.

There was no evidence that both witnesses witnessed the event at precisely the same time nor even from the same position. It was clear that several persons participated in the crime that night. We can see no reason why this difference between the evidence of these two witnesses leads to an ineluctable conclusion that one or other or both are not to be believed. This solitary example of conflict hardly qualifies as evidence being full of conflict.

As to internal conflicts, it was said that Miss Rose had used the word "chop" at the trial but at the preliminary examination she had used the word "beat."

The applicants had used machetes taken straight from the shop in their attack upon the victim. Both words convey the same idea of striking their victim with a machete. The dictionary meaning of the words may be altogether different but the speaker was using Jamaican English, not English as it is spoken in polite society in England. We ourselves can see no conflict incapable of resolution by the St. Thomas jury. At all events, the learned trial judge gave proper directions in this regard and indeed no complaint had been made against their correctness.

The other illustration regarding internal conflict relates to the statement made by Harold Deans at trial that he had observed the appellants attacking this victim before he went into Loretta Reid's shop but had deposed at the preliminary examination that he went into the shop before the incident. The witness was never asked for any explanation of this difference in his testimony but we would hardly regard this as touching any important aspect of the Crown's case. We do not think that there was much substance in these arguments.

With respect to the learned trial judge's directions on visual identification evidence, Lord Gifford was astute to discover one area of deficiency therein. In sum, he argued that although the trial judge had correctly advised the jury that weaknesses existed in the identification evidence, he failed adequately to isolate them for the benefit of the jury.

We think it is right to pay tribute to the obvious care the learned trial judge brought to bear on an admirable summing-up. Lord Gifford could not himself forbear to commend the summing-up, save for the one deficiency he was able to discover. It was, in our opinion, well structured, balanced and fair. He approached the issue of identification in this way. He discussed with the jury the identification evidence in respect of each of the seven accused persons before the court, pointing out the weaknesses as he saw them. He reminded them of the evidence given by the particular witness as it affected the particular accused.

To illustrate, in regard to the deposition evidence of Loretta Reid as it affected Nyron Fisher, he began in this way:

> " Let us turn now to the accused Nyron Fisher. Remember Fisher is the accused sitting, the third accused from my left, the fifth from your right. We will look at what is said in evidence about Mr. Fisher. I return to the evidence of Loretta Reid, evidence in her deposition, particular reference to Fisher.
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> According to that evidence, Nyron Fisher was one of four men. She said she saw Nyron Fisher throwing stones at the man who had run on to the verandah; he was one of the four men. She knew, she said, Fisher before. Remember I told you about the condition, the condition that existed at the time, having regard to the evidence, you will determine what the conditions were; it is a matter for you as the jury. Was the lighting adequate, even though she knew him before, was the lighting adequate to allow her to make out Fisher?
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> Remember as I told you, when she saw what was happening over Miss Ruth's house, she stood up, she had previously been sitting on the table, she stood up and she said she saw these men,

> "including Fisher, throwing stones at the man; the man went backwards and then went in the house. Do you rely on that evidence; is that evidence upon which you consider you can act; is it evidence you consider to be accurate, having regard to all the circumstances that you find prevailed at that time? Did Loretta Reid have enough time to make out the men who were at the gate, in particular, did she have enough time to make out Fisher?
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> So, if you having taken into account all the factors I have already outlined, you take into account and the caution I have given you to look at identification evidence, the particular weaknesses I have pointed to, if you find that Fisher was there throwing stones, there is evidence - there would then be evidence where you would say that Nyron Fisher was on the scene at the time Culture was there, along with others, throwing stones; that Fisher was also there from that stage. As I say, you bear in mind the fact that it is deposition evidence and the deponent, Loretta Reid, is not here and therefore was not cross-examined; her evidence was not testified; you bear all that in mind."

With respect to the evidence of Miss Rose regarding the same applicant on the matter of complaint he expressed himself thus:

> "... Then, she said she saw Nyron Fisher and another man and she called that man's name, Donovan Asquith. She saw them over the man, the man was lying on the ground and you remember she told you that it was on the verandah that she went. She was standing on the verandah and the men were close to her, she could even touch them, that is the distance that she gave. The men, Nyron Fisher and the other man, were within touching distance of her, yet it was night, as I told you, that is a weakness, and there was no electric light ..."

He dealt also with the evidence of Harold Deans. He reminded them of the distance between Miss Fattie's shop and Miss Ruth's yard which was one chain. The jury would have appreciated that if as the witness stated, he witnessed the event from the fence, it would be obvious that he would be nearer than one chain from the scene of the crime. Distance was not therefore a factor of weakness.

In our view, when the learned trial judge isolated the factor of nighttime during the period after Hurricane Gilbert and that lighting was provided by bottle-torches as the weakness which would affect a satisfactory identification, he was eminently right. for that was the only weakness. The fact that there was a crowd or even a commotion which we interpret to mean, general noise, could not affect in any significant way, the ability to observe the events in which the applicants, on the evidence, participated. There was, it is quite true, evidence that a crowd of up to sixty persons were present but Deans did not appear to have been obstructed for any appreciable period in his view of the applicants. He never admitted being obstructed in his view although we would appreciate that at some time during his observation, some member of the crowd was likely to have done so momentarily.

The direction of the trial judge in this regard cannot be faulted. He put before the jury faithfully and fairly the physical conditions which existed at the time of the crime in relation to each witness and as it affected the particular applicant. He stressed the factor of bottle-torches as the means of lighting. As a means of light, that would be a light source with which they would be quite familiar.

The Crown's case against the applicant Fraser rested wholly on the evidence of a solitary witness, Harold Deans. But this witness knew the applicant for some six years. We have previously discussed the evidence of this witness and need say no more about it except to say that Miss Haughton adopted the arguments of Lord Gifford so far as they were applicable to this applicant.

There was one final attack on the trial judge's summing-up. It is contained in ground 4 and was in the following terms:

> "4. The learned trial judge in his summing-up referred to the evidence of Annette Small, and to Thermutis McPherson's denials, and gave a direction that there was evidence that she was an accomplice; that it was for the jury to find whether or not she was an accomplice; and that if the jury considered that she was, it was dangerous to convict in reliance on her evidence unless it was corroborated (p 597-8). The learned trial judge in so directing appears to have been following the authority of Davies.
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> It is submitted that the learned trial judge erred in not directing the jury that if they accepted the evidence of Annette Small, Thermutis McPherson would not only be an accomplice but also a witness who had lied on oath on material matters. The authority of Davies does not cover the case where a witness is an accomplice but denies on oath that he is such. In such a case the learned judge should direct the jury that a perjured accomplice, if they so find the witness to be, should not be relied on as a witness of truth."

The learned trial judge very fairly gave guidance to the jury with respect to their treatment of the conflict of evidence between two Crown witnesses - Miss Rose and Annette Small. He put it thus at page 598:

> " Now, let me tell you that as judges of the facts, questions of the credibility and reliability of witnesses are matters for you to decide. You saw the witnesses give evidence from the witness box and you must have noticed how each responded to questions in examination-in-chief and under cross-examination. What impression did they make on you? Take for instance, the prosecution witnesses, Thermutis McPherson, Miss Rose, and Harold Deans. Before I deal with their evidence as it affects particular accused persons, let me first of all say something in relation to Mrs. McPherson. A prosecution witness, Annette Small, under cross-examination, said that on the night of 4th October, that while Mr. Buchanan lay on the ground in Miss Ruth's yard, Miss Rose took a camera out of a bag and said to the crowd, in reference to Mr. Buchanan, 'see when them kill man they take him picture.' According to Miss Small, Mr. Buchanan asked Miss Rose for water, whereupon she replied, 'drink you blood, what kind of water you want.' Miss Rose denied that she made any such statement.

> " You remember that under cross-examination, certain questions were put to her in that regard; she denied that she made any such statement as Annette Small asserted from the witness box when Miss Small was giving her evidence, but if those statements were made by Miss Rose, you find that she would be giving encouragement to those who were beating and chopping Mr. Buchanan. So there is evidence that Miss Rose is an accomplice, but that is not the end of the matter; I say that there is evidence, but it is for you members of the jury, to find whether or not she is an accomplice. If you consider on the evidence that she is an accomplice, I must direct you that it is dangerous to convict in reliance on her evidence, unless it is corroborated and if it is not corroborated."

We entertain reservation whether or not Miss Rose could properly be regarded as an accomplice. Howsoever that might be, the trial judge once he concluded that he would leave the issue of accomplice vel non to the jury was obliged to give the warning he did and in the terms he did. The basis for an eventual determination of that issue was the evidence of the contradictory witness Annette Small. If the jury accepted Annette Small's evidence, it made Miss Rose an accomplice. Any evidence which she gave implicating the applicants, would have been dangerous to accept, unless there was corroboration. We would have thought that the reason for the warning is the underlying thought that an accomplice is likely to give untruthful evidence. An accomplice who is called as a witness is accepted to be a suspect witness.

So far as the contradictory evidence between the witnesses went, the result was two witnesses in conflict. The jury would be required to resolve that conflict, and decide which of the two witnesses was credible. From whatever point of view the matter is considered, the Crown had put forward two witnesses who gave conflicting evidence, a situation which the jury were advised how to resolve. We decline to follow Lord Gifford in the creation of a new genus of witness i.e. the perjured accomplice. In our view, the directions which were given to the jury, brought home to them

(i) the fact of conflict (ii) that Annette Small's evidence was capable of showing Miss Rose to be an accomplice (iii) that they had to decide whether or not she was (iv) if she was, the caution applied. It would be plain to any reasonable jury that the conflicting stories were mutually exclusive: they could not both be true.

We see no warrant whatever for the trial judge to direct the jury in terms other than those he used; it was wholly unnecessary to have done so. The summing-up was in all respects full and thorough. To have included the obvious and self-evident would hardly improve it nor assist the jury. It was tailor-made for the circumstances and the issues which arose for the jury's consideration.

In the event, we propose to treat the hearing of the applications for leave as the hearing of the appeals which we dismiss. The convictions are affirmed.