JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 22/89

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

R. v MARCO CLARKE

Delroy Chuck & Helen Birch for Applicant

Cheryl Richards for Crown

4th & 18th November, 1991

GORDON, J.A.

On 26th January, 1989 the applicant was convicted before Chester Orr, J sitting with a jury in the Circuit Court Division of the Gun Court in the Home Circuit Court, for the murder of Randolph Scott and Yvonne Stewart on the 14th day of March 1989. The facts which the jury had to consider may be briefly stated.

About 11.40 on the night of Monday 14th March 1988 retired Deputy Commissioner of Police Luther Hylton was at his business place at 20 Windward Road, Kingston. The premises housed a bar and present in the bar were Randolph Scott, Beverley Williams, Yvonne Stewart and Elizabeth Bembridge among others. As Mr. Hylton sat at the counter he heard someone say "Gunman". He looked towards the entrance door to the main road and saw a man approaching him in the bar with a .38 revolver in his hand. When the gunman was within reach the witness held the gun across the barrel and a struggle ensued for possession of the gun. During the struggle someone shouted a warning and Mr. Hylton looked and saw another man with a gun aimed at him. He chucked away the one with whom he grappled, took up a stool and

waived it protectively warding off this second gunman. Several shots were discharged from the guns. One hit the stool in Mr. Hylton's hand and another went through his left palm. When the noise subsided and the smoke cleared, the gunmen had disappeared and three persons lay stricken on the floor. Mrs. Yvonne Stewart and Mr. Randolph Scott fatally and Miss Bembridge seriously shot in both thighs.

Mr. Hylton had observed the features of the second gunman for some seven minutes as he sought to defend himself from the onslaught. Miss Williams also saw this man's features clearly and each described him to the police who responded to the summons. This gunman was identified at an identification parade on 29th March 1988 as the applicant.

Det. Sgt. Calvin Benjamin visited the scene of the murder on the night of the 14th March 1988 and commenced investigations. On 18th March 1989 accompanied by Gwendolyn Campbell, the mother of the applicant, he and other policemen went to Salt Spring in St. James to a house indicated by Miss Campbell. She identified herself and was admitted along with Det. Sgt. Benjamin and others. The applicant was seen prostrate on a bed. He was taken outside and cautioned by Det. Sgt. Benjamin when he was about to speak. After being cautioned, he said "Officer, me never want shoot, but the security did want tek whey me friend gun and me a fi defend him." The applicant continued "Let me tell you what happened down deh sah." He was taken to Area 1 Headquarters and there in the presence of his mother, Det. Sgt. Benjamin told Superintendent Walker that the applicant wished to make a statement. To Superintendent Walker the applicant gave a cautioned statement witnessed by his mother and he was taken to Kingston with his mother by Det. Sgt. Benjamin. On 29th March 1988, after the identification parade the applicant was charged with the murder committed on 14th March 1988. After caution he said "Me never want

shoot, but a Linton cause me fi do it."

The applicant in his defence denied involvement in the commission of the crime. He said he was in the vicinity of the bar when the sounds of gunshots attracted his attention. He saw others running to the bar and he saw two or three guys run from the bar and away. He went in the bar with the crowd and looked at the injured persons. He later heard that his name was being called by Det. Sgt. Benjamin so he went to Salt Spring in St. James. He denied making any admissions to Det. Sgt. Benjamin and he testified that the cautioned statement admitted in evidence on the voire dire was signed by him after he was severely beaten with guns in his head and threatened. The contents, he declared, he did not provide.

Dr. Jephthah Ford called by the defence testified that he examined the applicant on 22nd March 1988 four days after his arrest, and he found:

> "He was alert and co-operative. He was atebrile. He was not having a fever. Mucus membrane was pink and he was obviously distressed. Of significance, his face was swollen, not really tender. He had a mild puffiness below his eyes. He had multiple healing abrasions across his entire back, There was mild tenderness at the abrasions sites, mild tenderness of his skull, otherwise no abnormality was detected, and I gave him analgesics."

In cross-examination the doctor said that if the applicant had been beaten in the head by six men with firearms for a sustained period, depending on the severity of the beatings he would have expected to find him with some injuries, not just mild tenderness.

Mr. Chuck submitted that he had examined the transcript and although he had some concerns about the confession statement given he could find no grounds to impeach the ruling of the learned trial judge. The jury, he found, had been properly directed on how to approach the cautioned statement. Two eyewitnesses pointed out the

applicant on identification parades and when accosted by Det. Sgt. Benjamin in Montego Bay his admission amounted to an indication that he was on the scene and participated in the crime. His admissions were fatal to his case and supported the Crown's case. Mr. Chuck continuing said he had consulted with Miss Birch who shared his opinion and together they visited the applicant in prison to acquaint him with their concerns. The applicant had been informed that they did not think there was anything meritorious that could be urged to impeach the learned trial judge's decision. They had complied with the applicant's instructions to try and had done just that.

Miss Richards said her only concern was at the failure of the prosecution to provide the defence with the description of the applicant given to the police by the witness Beverley Williams. This lapse on the part of the prosecution however was saved, she submitted, by the fact that the defence had the description given by Mr. Hylton, who also identified the applicant, and by the admissions made by the applicant. Fortified with these she stood firmly behind the result.

We have considered with care the submissions of counsel and scanned the transcript in our effort to ensure that justice is done. The concern of Miss Richards is well-founded. The need for directions on the fallability of visual identification is recognized and expressed in judgments of this court in **R. v. Oliver Whylie** [1978] 25 W.I.R. 430, of the Court of Appeal in England in **R. V. Turnbull & Others** [1977] 1 Q.B. 224 and in the Privy Council in **Junior Reid and Others v. The Queen** [1989] 3 W.L.R. 771 and other cases. We in Jamaica have no recorded case of mistaken identification but we accept that directions should be given in accordance with the above cases. In **Oliver Whylie** recognition was given the fact that we have a great mixture of races.

Our Motto "out of many one people" records this fact. Indeed 90% of our population of 2.5 million is classified black or negroid but of that 90% probably less than 10% is of pure blood. We recognize shades of black hence in this case the terms "brown," "fair skinned," "dark," "very dark," "black," "light," "lighter," descriptive of skin colour, were used. These are but some of the terms used and understood in this context by everyone in our society. The colour of hair and eyes is hardly ever of significance, the former is without exception always black and the latter, dark-brown. Consequent on the decision in **Junior Reid** it is desirable that the description of the suspect given by the witness to the police should be made available to the defence. The duty of the prosecution to comply with this directive especially when there is disparity between the description and the accused is stated in **Junior Reid** (supra).

The failure of the Crown to provide the defence with the description given by Miss Williams must be taken to mean that counsel, acting with integrity, did not find that the circumstances warranted the disclosure. Mr. Dennis, Crown Counsel was aware of his duty. The witness was not asked about the description she gave to the police. This matter did not arise from examination or cross-examination of this witness but from submissions made to the learned trial judge. Counsel in making this request was acting in reliance on this statement at page 22 of the judgment in **R. v. Bradley Graham & Randy Lewis** S.C.C.A. 158 & 159/81 delivered in this court on 26th June 1986 (unreported) -

> "... We believe, however, that descriptions once given should be available to counsel on both sides at trial and that a witness should be encouraged to refresh his memory from his statement as to the description he had previously given."
> per Rowe, P.

The evidence on which the prosecution relied was that of Mr. Hylton and Miss Williams as to identification, and the description given by Mr. Hylton was disclosed, coupled with admissions made to Det. Sgt. Benjamin and the cautioned statement given to Superintendent Walker. The prosecution could indeed have been presented on the evidence of identification coupled with the admissions. The cautioned statement was a bonus.

The learned trial judge carefully examined the evidence of the events leading up to the recording of the statement, then he gave the jury these directions:

> "Now, how are you going to prove this alleged confession? You must decide Mr. Foreman, Members of the Jury, matter for you whether or not the accused man dictated the statement. If you find that the statement was concocted by the police and the accused was beaten and forced to sign it, then of course, you reject it, it is not his statement. If you are in doubt as to whether or not that occurred, you reject the statement, and when I say doubt, I mean a reasonable doubt, not a flimsy, fanciful doubt. If, of course, you find that the accused man did dictate the statement, then you have to go on to consider the circumstances in which he did so, and in considering those circumstances you decide what weight, if any, you are going to attach to the statement. Was he beaten, did he give the statement as a result of the beating, because a man can be beaten and still speak the truth.
> On the other hand, he can be beaten and then decide to tell a lie to escape further beating, that is human nature. So you will have to take into account, you will have to decide, you heard the evidence on both sides, you will have to decide whether or not in all the circumstances, whether or not he did dictate the statement, if he did so, under what circumstances, and whether or not you are going to attach any weight to it."

The prosecution saw fit to add to the evidence of identification and the admissions, the confession. The directions given by the learned trial judge were fair, clear and adequate. Having perused the record of trial we agree with the views expressed by Mr. Chuck. We are mindful of the fact that in adopting the course he has taken, Mr. Chuck must have been guided by the decisions in **R. v. Frederick William Reynolds** [1948] 32 Cr. App. R. 39 and **R. v. B. R. v. H** [1966] 3 All E.R. 496. We are satisfied that there is no meritorious ground that counsel can advance and for these reasons the application is refused.