JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 40/91

BEFORE: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A. (AG.)

R. v. ERROL HYLTON

Applicant unrepresented

Miss Paulette Williams for the Crown

22nd October & 11th November, 1991

BINGHAM, J.A. (AG.):

On the 4th April, 1991, in the Clarendon Circuit Court held at May Pen, the applicant was convicted for arson committed on 21st August, 1990. He was sentenced to a term of imprisonment of ten years at hard labour.

The facts of this case are these. The complainant Wayne Anderson and one Lorna lived together in a one room dwelling house at Raymonds District, Hayes in Clarendon. Prior to this relationship, Lorna had been friendly with the applicant. That relationship came to an end sometime before, just when it is unclear.

On 21st August, 1990 about 8:45 p.m. Lorna and the complainant after locking up the house, went out. They left a shade lamp turned down on a table in the room. They left to attend a wake in the same district where they lived.

When they reached a distance of about a quarter of a mile from the house, they were accosted by the applicant who reported to the complainant that "his girlfriend (Lorna) was selling goods in May Pen." They walked off and the applicant, in a fit of temper then said "I must kill one of oono. If I don't kill one of oono a go burn down you house."

The complainant and Lorna continued on their way to the "dead yard" about a mile from his home. While there one W Worrel Fearon came and spoke to the complainant which conversation caused him to then leave the "dead yard" and go in the direction of his house.

When the complainant was about a quarter of a mile away from the home, he saw fire coming from the direction of the premises. He then observed the roof of his house ablaze. The contents were also on fire. They were both destroyed. The lamp which had been left on a table was now seen resting on the bed.

Worrel Fearon had left his home around 9:30 p.m. on his way to attend the wake. On his way, he saw and recognized the applicant whom he had known before for about one year, coming out of the complainant's yard about one chain from the house. He described the applicant as "coming out fast." Fearon also knew of the previous, as well as the present relationship between the applicant, the complainant and Lorna.

A report was made by the complainant to the Hayes Police the following morning.

The applicant was subsequently arrested on a warrant on 21st October, 1990. Upon arrest, he said nothing.

The applicant gave sworn evidence in his defence. He admitted to living in the Raymonds area for six months prior to the incident. He was engaged as a Hawker and Peddlar, an occupation which took him to other parishes. His defence amounted to an alibi. He testified to being in Brown's Town, St. Ann engaged in selling

on the day of the incident. He denied being in the area when the incident occurred.

The learned trial judge left the case to the jury on the basis of circumstantial evidence. This was further buttressed by the evidence of visual identification of the complainant and the witness Worrel Fearon. In this regard, the learned trial judge's direction on the law was structured in a manner which heeded the guidelines laid down in **R. v. Oliver Whylie** [1977] 15 J.L.R. 163; [1977] 25 W.I.R. 430 and subsequent dicta from this Court as well as the recent decisions of the Privy Council in **Junior Reid & Ors. v. the Queen** [1989] 3 W.L.R. 771 and **Scott & Ors. v. the Queen** [1989] 2 W.L.R. 924. A proper direction as to how to deal with the alibi defence raised by the applicant was also left for their consideration.

The alibi defence, however, challenges the purported identification by the complainant and Worrel Fearon who in differing circumstances said they had seen the applicant on the night of the incident.

There can be no doubt that the issue of identification was crucial to the Crown's case. In dealing with this issue, the learned trial judge said at pp. 6 - 8 of the record:

> " Now the importance of identification is very crucial in every case, and the reason why this is so is that naturally, if a mistake is made in identification and you believe or you accept the testimony of a witness who is in fact making a mistake, the consequences as far as an accused person is concerned could be lethal. You believe a man because he looks honest and he looks reliable, but he is making a mistake. So for this reason you have to be very careful in assessing what is called the cogency of the quality of identification evidence.
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> Another reason why this is important is because we live in a mixed society and people do resemble one another. Some of you may have had the experience of somebody calling to you on the street calling you by a name that you know not of and even when you say it is not me that person says it is you man, I know you, so this is why identification evidence is important. In this case there are

"certain factors with which I can assist you in assessing the quality of the identification evidence. Naturally, if there is bright light in an area at the time of a purported identification, there is less likelihood of an error because if it is daylight you can see and not make a mistake. If on the other hand there is dark night, there is a possibility of an error. Well the evidence in this case, if you accept it, it is a matter for you was that it was bright moonlight. The evidence of Mr. Fearon is that he at about 9:30 p.m. on the 21st of August, was going to a dead yard when he saw flame coming out of the top of Mr. Anderson's house and coming from in that premises he says he saw this accused man, but he said it was bright moonlight and that is how he made him out. He said he saw him plain and he saw the whole of his body, from his head come down to his feet.

Another factor that is important in assessing identification evidence, this is a commonsense approach, if you know a person you are less likely to make a mistake than if it is a stranger. You see, if it is a stranger, then you have never seen that face before, you don't know that person, even with bright moonlight you could be making a mistake, but when you know somebody, the possibility or likelihood of error is less.

Further on he also said (p. 8):

" You also have the evidence of the complainant, Mr. Anderson, he says that on the night in question he was on the way to the dead yard when the accused man, whom he had known prior to that time, called to him and said, 'I want to talk to you.' The complainant said he stopped and they began to talk, the accused speaking about his girlfriend - the same Lorna. Incidentally, this Lorna is the person who the accused man says he never know, he certainly never had any relationship with her. So, if you believe, Mr. Anderson, when he says that that was the subject of the conversation then you would say that you can't believe, you don't believe this accused man when he says he don't know anybody name Lorna and had no relationship with her at this time."

Earlier in dealing with the alibi defence the learned trial judge had said (pp. 4 - 5):

> " Now Mr. Foreman and members of the jury, the defence that is being put forward by this accused person is what is known in law as an alibi. An alibi is very easy to understand because what an accused person who uses that as a defence is saying is that I could not have burnt down the house of this complainant at Raymonds on the night in question because I was in Brown's Town. A person cannot be in two places at one time, so that is what an alibi is.
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> The interesting thing about an alibi is that the party who is putting it forward as a defence does not in law assume the obligation of proving it; it is the business of the prosecution to disprove it and show you that an alibi could not apply."

Following upon these directions, the jury after retiring for twelve minutes came to a unanimous verdict of guilty. In so doing, they accepted the Crown's case and rejected the alibi put forward by the applicant.

Having ourselves carefully examined the record, we can find no ground for disturbing the verdict to which they came.

On the question of sentence, although the term of ten years at hard labour may appear somewhat excessive, when examined against the antecedents of the applicant, we can find no justifiable basis for interfering with the sentence that was imposed. Needless to say the nature of the offence when taken together with the applicant's previous record merited condign punishment.

It was for these reasons that we refused the application for leave to appeal and affirmed the conviction and sentence.

The sentence will commence from 4th July, 1991.