JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 18/91

BEFORE: THE HON. MR. JUSTICE ROWE - PRESIDENT
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA

VS.

IVAN KELLY

Ernest Smith for Appellant

Bryan Sykes for the Crown

June 29 and July 22, 1992

ROWE P.:

This is an appeal from a conviction for the murder of Azariah Parkes in the St. Ann Circuit Court, on the 5th February 1991, before Marsh J. and a jury. On June 29 we treated the application for leave to appeal as the hearing of the appeal. After hearing arguments from counsel we allowed the appeal, quashed the conviction, set aside the sentence and ordered a new trial in the interests of justice, at the next term of the St. Ann Circuit Court. We now give our reasons for our decision.

The two main prosecution witnesses were Hilda Parkes and Shirley Hyatt. The deceased, Azariah Parkes, lived with Hilda, his wife, and Shirley Hyatt their grand-daughter, at their home in Muir House, Top Buxton in the parish of St. Ann. Attached to the house was a grocery shop. Like most shop-owners Mr. and Mrs. Parkes had experienced break-ins into the shop on many occasions.

On December 6, 1987 Shirley Hyatt secured the locks on all the doors in the house and retired to bed. Shirley Hyatt testified that at about 12 midnight she heard sounds indicating that the back window of the house, which was towards the kitchen, was being tampered with. Thus alerted she went to awaken Azariah Parkes, the deceased, in order to inform him of what she had heard. The deceased then left his bedroom and went into the hall while Shirley Hyatt returned to her bedroom. While in her room she said she heard a gunshot. She then rushed to open the back door. On doing so she saw some men outside. Miss Hyatt testified that there was brilliant moonshine that night and this helped her to recognize three of the men she saw, one of whom was the accused whom she also knew as "Tulloch". Miss Hyatt claimed that she had known the accused from he was a child. She testified that she rushed out through the back door over to the home of her neighbour. Miss Hyatt stated further that the accused followed her to the gate of the neighbour's house and told her that he had not come to kill her but her "puppa". At this time the witness had turned on her flashlight and she pointed it in the face of the accused who then returned to the Parkes' residence. Shortly after the return of the accused Shirley Hyatt heard two shots. On her return to the house she saw the deceased lying on the floor in between his bedroom and the hall. He appeared to be dead.

Mrs. Hilda Parkes stated that at about 12 midnight her husband, the deceased, awakened her and spoke to her. Mrs. Parkes then said she looked through the window facing the side of the shop. With the help of the brilliant moonlight she was able to see seven men on the road close to the premises. These men proceeded to move around on the premises. Among these seven men she was able to recognize Ivan Kelly and two other men, all three of whom lived at Middle Buxton. Mrs. Parkes testified that she had known Ivan Kelly for many years and that in fact she had last seen him on the Thursday

before the incident. On this night she saw him on two occasions, viz: when she looked through the window and later when the accused entered the house.

The accused gave sworn evidence but did not indicate the details of his alibi in his direct evidence. It was only during cross-examination that it was revealed that he was purportedly with his girlfriend on the night when the incident took place. No supporting evidence was called for this alibi.

The jury found the accused guilty of murder. Mr. Smith argued four Supplementary Grounds:

> "1. [The learned trial judge] failed to adequately deal with the Defence of alibi raised by the Appellant."
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> 2. That the learned trial judge erred in law by failing to direct the jury on the reasons why identification evidence has to be viewed with great caution and in particular failed to tell the jury that honest witnesses can be mistaken but convincing, and that experience has shown that there have been instances of miscarriages of justice because of mistaken identification: pp. 124-125 of the Record.
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> 3. That the learned trial judge misdirected the jury by telling them that "all sane, sober human beings intend the natural and probable consequences of their behaviour": p. 122 of the Record.
>
> 4. That the learned trial judge failed to give adequate and/or proper directions to the jury on the principle of common design.

ALIBI

With regard to this defence the learned trial judge said at pp. 132-133 of the Record:

> " Now, the defence is alibi. ... The accused man says he wasn't there. ... If you believe him or you are not sure whether you should believe him or not, then your verdict has to be not guilty. Why? Because that would mean that the crown would have failed to discharge the burden of proof which rests upon it. However, if you think that Mr. Kelly has been lying, him just come here to tell a lie to get himself out of trouble, you still can't convict him because you think he is lying. ... If you think he is lying what you do, you simply put aside what he is saying, pay no attention to it, you go back to the crown's case and you look at the crown's case and on examination of the crown's case if you are satisfied so that you feel sure, then you can convict him ..."

Mr. Smith argued that the learned trial judge did not assist the jury by indicating to them the significance of an alibi. He further argued that Marsh J. should have indicated to the jury that it was not for the accused to satisfy them that he was not at the scene of the crime but that it was for the prosecution to negative the defence. Further the jury should have been told that if they are not sure of the veracity of the accused's alibi or if they totally disbelieve him, they may still only convict if the prosecution satisfies them that the accused was there. We think that all such matters were made abundantly clear in the directions given by Marsh J. and this is evidenced in the quotation above.

In Archbold's Criminal Pleading, Evidence and Practice, 1992, Vol. 1 at Chapter 4 para. 414 (p. 619) it is stated:

> "The circumstances of individual cases vary infinitely. Very often when a question arises as to whether a defendant has been lying, either to the police or in evidence, a judge will consider it appropriate to advise the jury that the mere fact that he has told lies does not prove guilt because there may be many reasons why a person will lie. However where the veracity of the defendant or the truth of an alibi defence is in issue, the judge is only obliged to give such warning

> "if he refers to the lies as being capable of supporting a visual identification which has been challenged: R. v. Penman [1985] 82 Cr. App. R. 44, C.A., and R. v. Francis [1990] 91 Cr. App. R. 271, C.A. Where the judge does not suggest that a lying alibi corroborates the prosecution identification evidence, it is desirable but not compulsory to give such warning ..."
>
> [Emphasis supplied]

In the case before us there is no indication that the learned trial judge invited the jury to find that the accused was lying or that the learned trial judge suggested that such lies corroborated the prosecution identification evidence. The warning given by the judge was not mandatory but it was given nevertheless as is evidenced by the Record. We think that the directions of Marsh J. on the issue of alibi were therefore correct and satisfactory. [See also R. v. Balvin Mills, S.C.C.A. 221 and 222/88, delivered July 19, 1990 - p. 13].

IDENTIFICATION

Mr. Smith criticized the directions given by Marsh J. with regard to identification. This area now has a plethora of decisions of this Court which all emphasize and reiterate the law laid down in R. v. Turnbull [1977] Q.B. 224. A trial judge is required to give very careful directions in cases where identification is a live issue. In short, whenever the case against the accused depends entirely or substantially on the correctness of visual identification of the accused which the defence claims to be mistaken the judge is required to warn the jury of the need for care and caution before they can convict the accused in reliance on such evidence. The trial judge should then indicate the reasons for the necessity of this warning viz. that honest witnesses can be mistaken

but still convincing and that in the experience of the Courts miscarriages of justice have occurred due to mistaken identification.

It is clear from the summing-up of the learned trial judge that he was aware of the need for special caution when directing a jury on the issue of identification.

On p. 124 of the Record Marsh J. stated:

> "When the crown's case depends upon identification, the jury has to approach the problem with great circumspect. I mean with extreme caution. ... when it comes to identification evidence, ... You have to decide first of all if the witness is speaking the truth, and if the answer to that question is yes, you have to go a further step and decide, all right the witness is speaking the truth but is she reliable."

The learned trial judge then proceeded to illustrate how an honest mistake as to identification can be made, he also indicated that the jury needed to address the issue of lighting - the quality of light with the help of which the witness claimed to be able to distinguish the features of the accused, the length of time during which the witness observed the accused. The learned trial judge evaluated the circumstances in which Mrs. Parkes claimed to have seen the accused. He also evaluated the evidence of Shirley Hyatt.

There is therefore manifest indication of an attempt by Marsh J. to assist the jury as to the manner in which they were to view the evidence in order to conclude whether it was reliable. We note however that he did not explicitly state the strengths and weaknesses of the circumstances in which the identification was made.

The major defect in these directions was that Marsh J. did not inform the jury of the reasons for the need to exercise extreme caution before a jury can convict an accused on identification evidence, nor did he advert their minds to the possibility of miscarriage of justice, or the fact that honest witnesses can be mistaken and yet convincing.

In the instant case we believe that the purported identification was made in fairly good circumstances and as indicated in R. v. Turnbull (supra) at p. 229 the trial judge may leave the jury to assess the value of such identifying evidence "provided always however that an adequate warning has been given about the special need for caution." The reasons for the warning are therefore of paramount importance and a failure to give such a direction will undermine the conviction. [See R. v. Carl Peart, S.C.C.A. 108/88; Scott & Another v. Queen [1989] 2 All E.R. 305 at 314-315].

The witnesses who purported to identify the accused knew him before and the accused did not challenge this fact. This was not a case, in our view, in which a no case submission would have succeeded due to the poor quality of the identification evidence. Consequently we ordered a new trial.