JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS: 229 & 241/88

BEFORE: THE HON. MR. JUSTICE CAREY - PRESIDENT (AG.)
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

R. v. MICHAEL McINTOSH
ANTHONY BROWN

Randolph Williams for the applicant McIntosh

Delroy Chuck with Miss Helen Birch for the applicant Brown

Kent Pantry Deputy Director of Public Prosecution for the Crown

7th and 22nd October, 1991

FORTE, J.A.

On the 23rd November, 1988 both applicants were convicted for the murder of Mary-Ann Brown before Ellis J, sitting with a jury in the Home Circuit Court. On the 7th October, 1991 having heard counsel on their behalf, we reserved our decision on the applications for leave to appeal. This now is our decision.

The facts which led to the convictions of the applicants are briefly as follows:

On the morning of the 29th January, 1987 the main prosecution witness, Mrs. Juliette Fields was at her home at Elizabeth Avenue in St. Andrew. Her husband and children had left home at about 8.30 a.m. leaving her in the house with her 83 year old aunt Mary-Ann Brown, who also did the duties of a helper and who was affectionately called "Mama." Also in the house at that time was her aunt-in-law. The house, a two-storey dwelling, had the car-port and washing area on the ground floor. At about

10.00 a.m. that morning the witness Mrs. Fields, had gone downstairs and spoken to "Mama" who was then about to wash the children's uniforms. Having spoken to "Mama" (the deceased), she returned upstairs. About 15 minutes after doing so, she saw two strange men come upstairs. These men gagged and tied her and placed her in her closet after robbing her of her jewellery. Her aunt-in-law was also tied and gagged. While she was in the closet she heard a voice say "That look like our car" and then she did not hear anything else. She remained in the closet for another five minutes or so, before she escaped therefrom, and on seeing no-one she went unto her verandah from where she saw across the road a man whom she knew as Norman. She called to him for assistance and he came into the house. While Norman was there, she saw the same two men come back into the yard, and one of them ordered her "Go back inside". She refused to do so when the same man, whom she subsequently identified as the applicant Brown, said "Go back inside or a going give you three shots in yuh face." The men then rushed in the yard, took two bicycles and rode away. The witness then went to her neighbours and called the police. The police in the person of Det. Sgt. Cassells soon arrived on the scene. On entering the washroom, he saw the body of the deceased (Mama) lying on her back on the floor with a cloth tied around her neck and cloth stuffed in her mouth. She was dead. On the 6th February, 1987 the Sergeant attended a post mortem examination on the body which was performed by the Government Pathologist Dr. Clifford.

Both applicants were subsequently apprehended and placed on identification parades at which they were identified by Mrs. Fields, as the two men who entered her house that fateful morning. When the applicant McIntosh was first seen by Sgt. Cassells, he was told by the Sergeant that he was investigating a murder and

robbery at 1 Elizabeth Avenue upon which he said "me nuh know nothing, mi nuh know what you talking about."

On the 17th March, 1987 in similar circumstances, the applicant Brown responded:

> "A the bwoy Mickey force me to go with him and through mi fraid a him, me go with him. Mi never know sey the old lady would a dead, we only put the cloth in her mouth because she did a mek noise."

In their defence, both applicants gave unsworn statements, each denying any presence at or participation in the murder of the deceased on Elizabeth Avenue on the morning of the 29th January, 1987.

Before us, Mr. Randolph Williams for the applicant McIntosh, contested the propriety of the identification parade. The details of his complaint are adequately set out in the supplemental grounds which he was given leave to argue, and which contained the only complaint made in this application. The grounds are as follows:

> "1 (a) That in the Summing Up the learned trial judge did not properly direct the jury to enable them to determine whether the identification parade by one-way mirror was fairly conducted. He did not tell the jury that the police officer conducting such parade had a statutory duty to select an attorney-at-law to be present where the suspect was not legally represented. He did not tell the jury that the rules prescribed to ensure fairness permit such a parade to proceed in the absence of an attorney-at-law only where there had been a previous postponement due to his failure or inability to attend. He did not direct the jury to the fact that no explanation for these irregularities in the conduct of the parade had been offered by the police officer.
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> (b) The summing up by the learned trial judge did not adequately assist the jury to determine whether or not the I.D. parade was fair. It did not alert the jury to the significance of the rules designed to ensure complete fairness in the conduct of a parade by one-way mirror. In some respects it was confusing:

> "it did not distinguish clearly the validity of the parade which was a question of law for the judge from the fairness of the parade which was a question of fact to be determined by the jury in the light of the guidelines set out in the regulations."

In developing his arguments, Mr. Williams was most concerned with the failure of Sgt. Gauld (the officer conducting the identification parade) to adhere to the rules governing identification parades made under the Jamaica Constabulary Force Act, and in particular the amendment contained in the Jamaica Constabulary Force (Amendment) Rules 1977, as it applies to identification parades using one-way mirrors. These rules in so far as is relevant state:

> "554A One-way Mirrors -
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> Notwithstanding the provisions of Rule 553 one-way mirrors may be used for the purposes of identification parades and on such use a witness shall not be required to touch any person whom he purports to identify. Without prejudice to the generality of the foregoing the following provisions shall apply whenever a one-way mirror is used for the purpose of an identification parade:
>
> (i) An Attorney-at-law subject to sub-paragraph (iii) hereof, and a Justice of the Peace shall be present and both shall be placed in a position to be decided by the officer conducting the parade.
>
> (ii) The Attorney-at-law shall be one chosen by the prisoner so, however, that if the prisoner chooses no particular Attorney-at-law, or if the Attorney-at-law of the prisoner's choice is not available for the parade, the Attorney-at-law shall be either drawn from a Legal Aid Clinic or selected by the officer conducting the parade from among Attorneys-at-law willing to undertake the assignment.

> "(iii) When an Attorney-at-law fails or is unable to attend for an identification parade the identification parade may be postponed once and if on the date set for the postponed parade an Attorney-at-law does not attend but a Justice of the Peace is present the identification parade may be held in the absence of the Attorney-at-law".

What then was the evidence in relation to the identification parade?

Sgt. Gauld conceded that no lawyer or relative of the applicant was present at the parade which was conducted by way of the one-way mirror. However, present on the parade was a Justice of the Peace. Before the parade, he had asked the applicant if he had an attorney or anyone he would like to be present, and the applicant had answered "no". It was then that he summoned the Justice of the Peace, and conducted the parade.

On that evidence Mr. Williams submitted that the identification parade was not held in accordance with Rule 554A (i) and (ii). In those circumstances, he submitted the learned trial judge had a responsibility to "make it clear to the jury that there was a duty on the police to conduct parades according to the rules."

The Court in dealing with a similar complaint in the case of **R. v. Bradley Graham and Randy Lewis** S.C.C.A. Nos: 158 & 159/81 (unreported) delivered on 26th June, 1986 per Rowe P, explained thus at pages 27 - 29:

> "Apart from informing the suspect Lewis that he was entitled to be represented by an Attorney on the parade, the police took no further steps to secure the attendance of one when the suspect said he wished to have his brother on the parade. In the experience of the members of this Court, this is the first appeal in which an argument has been raised on the effect of the absence of an Attorney-at-law from an identification parade conducted with the use of one-way mirrors. The traditional method of conducting identification parades was complemented in 1977 by the introduction

> "of a system whereby the suspect and the identifying witness did not come face to face on the parade. To ensure fairness of the new system the concept contained in Rule 553 (vii) of the 1939 Rules that whenever possible ..... a Justice of the Peace shall be present at the identification parade 'if practicable' was strengthened by making his presence obligatory and by the addition of the requirement for the presence of an Attorney-at-law. The obligation cast upon the police who wish to make use of a one-way mirror has therefore been raised to the level of what Graham-Perkins J.A. called a 'positive duty' in **R. v. Cecil Gibson** (supra) and in the instant case an Attorney-at-law of the choosing of the suspect Lewis or if he failed to nominate one, an Attorney drawn from one of the Legal Aid Clinics or from Attorneys-at-law willing to accept Legal Aid assignments ought to have been invited to attend the parade. Provision is made for the postponement of the parade once, to facilitate the attendance of an Attorney-at-law. No such steps were taken in this case, apparently out of ignorance of the provisions of the 1977 Regulations which had been in force for only 7 months before the parade on July 20, 1978. What the officer in charge of the parade did do was to summon not one, but two, Justices of the Peace to watch the parade. On the face of his actions therefore, he cannot be convicted of acting in callous disregard of the rights of the suspect. Notwithstanding the imperative nature of the language used in Regulation 554A that an Attorney-at-law .... 'shall be present' we decline to interpret this provision to mean that his absence will, in all circumstances, except those provided for in 554A (iii), invalidate the parade and render an identification made thereat a nullity. We think that the Regulations are procedural only and any positive breach will have the effect of weakening the weight to be given to an identification made at such a parade."

The cited case bears some similarity to the instant case in which the Sergeant admitted that this was the first identification parade that he had ever held, and also to the fact of the absence of an Attorney, and the presence of a Justice of the Peace. The case of Graham and Lewis (supra) made it very clear that the Rules are not mandatory, but procedural and that any failure to adhere to any

of the Rules, would go to the weight of the evidence and not to the validity of the parade. What must be the important consideration for the jury is whether in all the circumstances the identification parade was fair, and gave the witness the opportunity to independently and fairly and without any assistance identify his assailant.

In the course of his submissions Mr. Williams intimated that he was not alleging that the parade was unfair but restricted his complaints to the manner in which the learned trial judge directed the jury in respect of the breach of the Rules.

In dealing with this aspect of the case the learned trial judge directed the jury as follows:

> "Now Madam Foreman and members of the jury, there are rules as to the conduct of an identification parade. You must have a lawyer or lawyers and the only time you can have a Justice of the Peace is when the lawyer cannot come and all sort of things."

He then continued to instruct the jury on all the matters that should be adhered to in making sure that the parade is fair, and then he concludes:

> "So your sole objective is to decide whether in all the circumstances the parade was fair.
> A Justice of the Peace was there, for the parish of St. Andrew, and Sgt. Gauld told you that the Justice of the Peace was there to see that the parade was fair: you examine all the circumstances of the parade and if you find that anything unfair about it .... you have to reject it for it would not be a good parade."

Then later in his summation the learned trial judge again said:

> "Madam Foreman and members of the jury, you will have to examine all that Sgt. Gauld told you and you will have to make up your minds whether it was a fair parade. If you think that the parade was unfair, you can't rely on it, the identification wouldn't be any good."

Again dealing with the absence of an Attorney he said:

> " ... This speaks here that if no lawyer is there, then somebody should come from the Legal Aid Clinic, but I am telling you that that of itself that absence of itself, although it is an I.D. parade does not render an I.D. parade unfair. Remember I told you about the decision recently where it was determined to be a directive and not mandatory. Nevertheless, you are to consider all what Mr. Williams and Mr. Bryce asked and suggested on this parade and you are to make up your minds whether the parade was fair."

In our view, the totality of these directions, following as they apparently were, the dicta of Rowe P, in the case of Graham and Lewis (supra), were adequate, and did inform the jury of the requirement of the Rules in relation to the presence of an Attorney, but nevertheless, adverted them to the fact that the obligation on them was first to decide whether or not the parade was fairly held, and thereafter if they concluded that it was not, to reject it.

We are unable therefore to find any merit in the submissions of Mr. Williams.

Mr. Chuck for the applicant Brown indicated to the Court, that a careful and comprehensive review of the transcript revealed to him that there was no ground upon which he could successfully move the Court to grant leave to appeal. He had also consulted with Miss Helen Birch who appeared with him, and her opinion coincided with his. With those opinions we agree. The real issue in this case was one of identification. In the circumstances where the opportunity was good to enable the witness to make an identification of the assailants, the learned trial judge gave the jury careful directions on how to approach the evidence of visual identification. He directed the jury thus:

"Mr. Foreman and members of the jury, the question of identification in this looms large, important. Mr. Williams cited some very important principles, some important cases. There is no doubt that you are to be warned as judges of the facts as to the danger of convicting on visual identification, because some people make mistakes. Mrs. Fields admitted that you can make mistakes and everyone of you know, and so the cases have laid down certain guidelines that you have to look at.

You have to look at the opportunity which a witness had of looking at the accused, whether these persons were known before, if any description of the persons were given, the physical conditions which obtained at the time of the event, the lapse of time between the incident and the identification and any special weaknesses or any weakness in the identification.

Mrs. Fields tells you that she saw these persons for about fifteen to twenty minutes. It is not just a passing glance, she saw them, she didn't know them before, but that was not all, she saw them when she told you that she was frightened, she was frightened and that's a possible weakness because the defence cross-examined to say that she was frightened, and if a person is frightened you can't make a proper identification. It is a matter for you. ...

According to her, the circumstances under which she saw these persons were not in any darkness, no darkness. It was daylight in her house. She admitted to you that she thought it was her gardener - not her gardener - a gardener from next door. That is a possible weakness in the identification and you will have to consider that, but also she told you that not only did she see these men coming up the stairs but when they left and went out again - out and coming back she saw them too. You have to consider that, whether that is sufficient opportunity of her seeing them properly.

Madam Foreman and members of the jury, she gave her evidence and you may say yes, she gave her evidence as to the identification in a straightforward and clear manner but you must also take warning that a convincing witness can be nevertheless mistaken, and it is not the conviction when she gives her testimony as to the identification that you are seeking. What you are seeking is the correctness and certainty of the identification. That is what you are looking for, so take the warning that you have to be careful when you are dealing with visual identification."

These directions correctly and adequately adverted the minds of the jury to all the factors necessary for consideration, in determining whether evidence of visual identification should be acted upon, given the caution that must be exercised in accepting such evidence. The learned trial judge carefully reminded them of the opportunity that the witness had for properly identifying the men, including the fact that it was daylight and that she saw them for a period of 15 - 20 minutes. He also pointed out the weaknesses in the identification e.g. the fact that she admitted to having been frightened when the men were in the house. The jury was therefore well informed, as to the manner in which they should approach this evidence, and in the end came to a conclusion adverse to the applicant.

In any event, there was additional evidence in this case. The statement made by the applicant to Det. Cassells when he was accosted, gave strong support to the evidence of visual identification.

Mr. Chuck was therefore quite correct in not embarking upon a useless cause and adopted the procedure laid down in **R. v. Reynolds** 32 Cr. Appeal Report 39 with which we wholeheartedly agree.

For these reasons the applications are refused.