JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 10/90

BEFORE: THE HON. MR. JUSTICE CAREY, P (AG.)
THE HON. MR. JUSTICE FORTE, J.A
THE HON. MR. JUSTICE BINGHAM, J.A (AG.)

REGINA v. NIGEL NEIL

Mr. Delroy Chuck with Ms. Helen Birch for Appellant

Ms. Carolyn Reid for the Crown

23rd and 29th July, 1991

FORTE, J.A

On the 15th January, 1990, in the Home Circuit Court the applicant was convicted and sentenced to death for the murder of Slater Kilburn. He now applies to this Court for leave to appeal his conviction.

The facts are briefly as follows:-

At about 8:30 p.m on Saturday the 27th February, 1988, Kilburn and Keith Williams were walking along Ebony Road in the parish of St. Andrew, when Williams saw three men approaching them from the other direction. These men were walking side by side. When he first saw the men, they were about a chain away. He recognized all three men as persons he had known before. One of them he recognized as the applicant, whom he knew by the name 'Yellowman', and another as Gladstone Champagnie who was known as 'Rough' and who was jointly charged with the applicant. As the men approached, the applicant was seen to pull a gun from his waist, and point it towards the witness and the deceased. There was then an explosion like a gunshot and Williams for his

own safety, ran away jumping several fences, until he felt he was a safe distance away. He, however, returned to the scene shortly after to see his friend, the deceased, lying on the ground, on his face and to all appearances, dead. Kilburn was in fact dead, and his body was subsequently taken to the morgue by the police. At a postmortem examination done 110 hours after death, the pathologist found that death was due to a gunshot wound to the chest.

These were the simple facts upon which the prosecution rested its case, except for the disclosure of an incident which occurred the previous night, and upon which the prosecution relied to establish a motive for killing. These two gentlemen, the deceased and the witness, Williams, had been on Joshua Edwards Avenue on the night before when on passing the house of the man called 'Rough' (that is, Champagnie) the applicant who was then present, joined with 'Rough' in accusing the deceased of being an informer, and stating that he had just come from prison and 'him a go dead because him a informer'.

The applicant, in his defence, maintained that he was not present on the scene on the night of the murder, alleging that he was home with his "baby mother" and his daughter at the relevant time. He was supported in his alibi by his father who testified that the applicant was at home at the time of the incident.

This therefore challenged the identification by the witness, Williams, and made that the real issue in the case. There was, however, evidence that the witness had known the applicant for fifteen years, that there was adequate lighting (two street lights between the applicant and the witness) in the area of the shooting, that the applicant was a chain less five feet from the witness who saw him at the time for a period

of 'less than half of a minute'. The learned trial judge left this issue to the jury, giving them correct directions, as to how to approach the evidence. He said (page 212):-

> "I must warn you that where the evidence upon which you are asked to convict an accused man is identification evidence then I must warn you that you must approach it with great caution because of the inherent dangers which exist in visual identification. There are proved cases where persons have mistakenly, honestly but mistakenly made identification, positive identification which have turned out to be wrong. In your own experience you might have experienced the situation where you see a person, you believe that is a person that you know and when now you are about to greet that person you realise that the person is not who you thought he or she was. Much to your amazement. So I cannot over stress the warning that you proceed with caution in dealing with this whole question of identification."

and again at page 214 -

> Mr. Chuck quite rightly pointed out that people look like people. You have to take that factor into consideration, that in Jamaica people do look like people. The world over people look like people. You have to take into consideration the fact as to whether or not Mr. Williams knew the accused man before. There is no contest that Mr. Williams knew him before and Mr. Williams says, "I knew him for fifteen years." You take into consideration the lighting. It is not challenged that there was light in the area. The distance between them, the unimpeded view. There is no challenge that the distance was about five feet less than a chain and he said he saw him, crucial thing, for less than half a minute. You have to say was that time adequate, sufficient time for him to see the accused man, a man who he had known before and for

> him to be left in a state of mind that you can say yes, you feel sure.
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> What you have to do is you have to look into the nature and the quality of the evidence which has been adduced in relation to this identification. The nature and the quality of it, saying to yourself has it made you feel sure that this is the man."

The defence, however, did not challenge the identification evidence on the basis that the witness was mistaken. The applicant maintained that quite apart from being mistaken, the witness, Williams, was indulging in deliberate falsehood, in identifying him as the assailant. He called witnesses to establish, that the witness had been soliciting before the trial, payment for forbearing from testifying at the trial that the applicant was the person who shot the deceased. In addition, a witness was called who testified that Williams had confessed to him that he did not know it was the applicant who shot the deceased but that he was being forced by his friends to testify to that effect. These were all questions of fact for the jury, which along with the evidence of his alibi were adequately left to the jury by the learned trial judge and indeed there has been no complaint before us in that regard.

The complaint before us rested on one ground filed and argued by Mr. Chuck for the applicant. It reads:-

> "1(a). The learned trial judge erred in Law and wrongly exercised his discretion when he admitted the statement of the applicant's co-accused who said:-
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> "Officer, a nuh me, a Yellow man" p.90
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> In support thereof:
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> i. The said statement is highly prejudicial and outweighs its probative value.

ii. The applicant was not present when the co-accused made the statement to rebut it.

iii. The jury is left to believe that, if it is not the co-accused, then it must be the applicant.

iv. The said statement could not have been admitted if the applicant was being tried alone.

1(b). The Learned Trial Judge's direction to the jury that they should disabuse themselves of the statement since Champagnie (the co-accused) is no longer in the case does not vitiate and negative the prejudicial effect of it on the applicant. p.202."

This evidence was admitted during the prosecution's case at a time when the man called 'Rough', that is, Champagnie was a co-accused in the case. He was, however, formally acquitted after a successful no-case submission was made at the end of the Crown's case. At the time of the admission of the statement therefore, it was relevant to the case of Champagnie, and indeed was evidence showing that Champagnie, at the time of his arrest and caution denied any participation in the offence. It was therefore admissible evidence. The learned trial judge before admitting it, enquired of counsel for Champagnie whether he was objecting to the admission of the statement and though initially stating an objection, when challenged for the basis of that objection, he conceded that he had none, and withdrew his objection. The learned trial judge, however, on the face of objection by counsel for the applicant ruled the statement admissible, and exercised his discretion to admit it stating that adequate warning to the jury in his summing-up would be sufficient to protect against any possible prejudice to the applicant. He made real his intention, when leaving the case to the jury in these words:-

"You will recall that when he told you about the arrest of the other accused man Champagnie and cautioned

> Champagnie, Champagnie said, "officer, ah nuh mi, ah Yellowman." Well, you cannot use what Champagnie said against this accused man, so disabuse your minds of it. That piece of evidence was admitted into the case while Champagnie was an accused man in the case. Now that Champagnie is out of the case it has no value. So treat it as if it were never said. Disabuse your mind of (sic) the completely. As far as you are concerned the only evidence before you when the accused man is arrested or when the arrest took place is what the accused man said "ah nuh me, officer."

The evidence, was evidence that was highly favourable to the co-accused, and in those circumstances the learned trial judge could hardly have exercised his discretion to exclude it.

In the case of Regina v. Dennis Lobban S.C.C.A 148/88 delivered on 4th June, 1990 (unreported) in dealing with circumstances where the trial judge refused to edit a statement of a co-accused which purportedly implicated the applicant, this Court per Carey, J.A., in approving the learned trial judge's ruling stated:-

> "In the case where one co-accused makes statements implicating his co-accused, we are not aware of any rule requiring a trial judge to edit such a statement. Indeed, in our judgment, it would be wholly unfair to the maker of the statement who would be entitled to have the statement in its entirety placed before the jury. A trial judge has an undoubted duty to ensure a fair trial but that cannot mean fair to one, and unfair to a co-accused. His responsibility is to both."

Indeed the duty of the learned trial judge in such cases, is in the words of Carey J.A., in the Lobban case (supra) "conveniently set out" in the headnote in R. v. Gunewardene 35 Cr. App. R.80 -

> "Where a prisoner has made a statement implicating a co-accused who is tried jointly with him, it is the duty of the Judge to impress on the jury that the statement is not evidence against the co-

> prisoner and must be entirely disregarded for that purpose; but counsel for the prosecution, in putting in the statement, is not under any duty to select certain passages and leave out others."

Though the above cited dicta relate to the editing of statements made implicating a co-accused, the principles stated therein apply with equal force to the present circumstances.

In our view the learned trial judge discharged his responsibility with commendable fairness in the above cited passage from his summation. Contrary to the contention of counsel for the applicant, the directions in this regard were sufficient to vitiate any prejudice that the admission of the statement may have had, the underlying effect being that the statement was not evidence at all in the case against the applicant, and that the jury must disabuse their minds of it.

We conclude therefore that this was a case in which the statement objected to, was admissible in respect to the case against the co-accused, and in the circumstances, the learned trial judge was correct in admitting it into evidence. His directions in respect of the statement were faultless and discharged the responsibility placed upon him. There s therefore no merit in this ground of appeal.

This was a case in which the applicant was identified in circumstances which provided good opportunity for the witness to recognise him especially having regard to the fact that he had known him for fifteen years. The allegations of dishonesty in the witness, Williams, were all denied by him and the jury having been properly directed, rejected those allegations as well as the alibi. In the end, the jury convicted the applicant on evidence which in our view was strong evidence against him.

For the reasons stated herein, the application for leave to appeal is accordingly refused and the conviction and sentence are affirmed.