JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 61/91

COR: THE HON. MR. JUSTICE CAREY, P. (AG.)
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

REGINA

VS.

CLARENCE OSBOURNE

D. V. Daly, Q.C. for Applicant

Miss Paulette Williams for Crown

October 26 and November 23, 1992

CAREY P. (AG.):

In the Circuit Court Division of the Gun Court held in Kingston on 30th April 1991 before Rowe C.J. (Ag.) sitting with a jury, this applicant was convicted of the murder of Durval McLean by shooting him at close range on the night of 18th May 1990.

The applicant who enjoyed an intimate relationship with one Jasmine Hemmings, believed that the slain man was having an affair with her. Both men were taxi-cab drivers and plied for hire on the same route between St. John's Road and Spanish Town in the parish of St. Catherine. The applicant up to the time of the murder, used a red Lada motor car owned by Samuel Foster, for that purpose.

On the 18th May 1990 at about 5.00 p.m. the victim and a friend Kenneth Stewart beguiled the time by driving to several places, ending up in an area called Bullet Tree in the region of Old Harbour in St. Catherine. McLean, having parked the car by a gate in front of a house, left his friend in the car and went to speak to a young lady, Daughterlyn Kelly. While thus engaged, the cab which the applicant habitually plied, drove up and stopped opposite to McLean's parked car, some 15 feet away. Stewart heard the applicant say: "man, wah yu ah do yah so?" To which the response of McLean was: "ah mi fi ask yu wha yu ah do yah so". There was no visual identification of the applicant. Stewart identified him by his voice and from the fact of a slight stammer which he recognized as being the applicant's. That person in the car then summoned McLean who went up by the driver's door. As he did so, he was shot and fell. The Lada then sped off.

When his friends, Stewart and Miss Kelly, went up to him he threw the ignition key to Stewart beseeching that he be taken to a doctor because "'Tumpa' shot him." 'Tumpa' was the pet-name by which the applicant was called. On the way to the hospital he repeated that 'Tumpa' had shot him and added that he was going to die. He succumbed en route.

The medical evidence showed that he had a gunshot wound at the base of the left side of his neck which showed powder burns. The bullet travelled through the left chest cavity, puncturing the left lung and exited through his back on the left. The medical evidence confirmed the eye-witness account that the victim had been shot at close range.

The applicant, in the usual unsworn statement from the dock, denied the charge.

In our view, the case against the applicant was a powerful one once the jury accepted the following factors: (1) that the car driven to the scene of the crime was one which at the material time would have been in his possession; (2) that he never returned the

ignition key for that car until he reported for work on 19th May when he gave an excuse and that thereafter he never returned to work; (3) the evidence of Mr. Stewart identifying the voice he heard as being the applicant's and (4) finally the utterance of the victim made immediately after the shooting identifying the applicant as the murderer.

Mr. Daly, Q.C. was not unaware of this formidable hurdle and prudently focussed his attack on alleged deficiencies in the summing-up. He charged that in relation to evidence of identification of the applicant the trial judge failed to give either a sufficient warning or the reasons therefor in terms required by R. v. Turnbull [1976] 3 All E.R. 549; R. v. Whylie [1978] 25 W.I.R. 430 as affirmed by the Privy Council in Scott v. R. [1989] 2 W.L.R. 524. The basis of this contention he argued was to be found in the following extract from p. 113 of the summing-up. The learned Chief Justice (Ag.) was there giving directions regarding evidence of a statement made by the slain man very shortly after he had been shot, identifying the applicant as his attacker. He expressed himself thus:

> "The prosecution has brought the third bit of evidence. It says when Mr. McLean was on the ground immediately after he had been shot, he said Tumpa shot him. The rule in relation to that kind of thing is this. Of course, the man is dead, he can't be taken to give evidence. Anything which that person said can't be tested in cross-examination, and Miss Thompson reminded you of it. Now, you the jury will have to consider this: A person who is injured in those circumstances and who calls a name, would he have had an opportunity to concoct a story before he uttered the words? Did he have an opportunity to concoct or distort the story? Did he have that kind of opportunity, a person who is certainly on his way to the hospital considering the prospect of imminent death? From the evidence you have been told by Kelly he was saying, 'If I die ... I am going to die.' Did he have an opportunity in that space of time to concoct a story? If you feel that he had an opportunity, it is possible that he made up the story, he had something against Tumpa, something that has troubled him and he is going to call Tumpa's name, and you think it is unreliable, discard it, naturally. Any evidence which you think is unreliable, discard it. But if you think that there was no opportunity to concoct or distort and, having regard to the circumstances of this particular case, what is said is reliable, then you can act on it ..."

> "Now, the light in that area was not very good because we are told that the light was some forty feet away from the Mini. It would be a bit nearer to where the other car was, from what we have been told, and in these identification cases one has to be very careful, extremely careful, extremely cautious, because people can make mistakes. But what we are told is that the accused and the deceased knew each other for a long period of time and we are told that whoever was in that car, although the windows were tinted, the front window was half-way down and that McLean went right up to the window. Did he have a chance, a good opportunity in those circumstances to see whoever was in the car? And if you think that he had a good opportunity to see, when he called a name you would have to ask yourselves, was he mistaken or did he on the spur of the moment decide to tell a lie? These are matters for your consideration."
>
> [Emphasis supplied]

It was in the context of this passage that Mr. Daly's criticism is to be seen. There was no eye-witness evidence of the identity of the slain man's attacker. No witness gave visual identification evidence in the case. The full warning which the cases cited by Mr. Daly, Q.C. enjoin, was not in our judgment required in the circumstances of the case. Plainly there was no witness whose convincing evidence, the jury would assess. The "convincing witness" was the victim of the attack and he was dead. The jury were obliged to consider the credit of the witnesses who asserted that the victim of the attack had made a statement in which he implicated the appellant. Then, if they accepted that the statement was in fact made, they would then give it such weight as they thought fit. That would depend on considerations of the likelihood of concoction or mistake on the part of the maker of the statement.

The correct approach was adumbrated by Lord Ackner in R. v. Andrews [1987] 1 All E.R. 513 at p. 521 where he said:

> "Where the trial judge has properly directed himself as to the correct approach to the evidence and there is material to entitle him to reach the conclusions which he did reach, then his decision is final, in the sense that it will not be interfered with on appeal. Of course, having ruled the statement admissible the judge must, as the Common Sergeant most certainly did, make it clear to the jury that it is for them to decide what was said and to be sure that the witnesses were not mistaken in what they believed had been said to them. Further, they must be satisfied that the declarant did not concoct or distort to his advantage or the disadvantage of the accused the statement relied on and where there is material to raise the issue, that he was not activated by any malice or ill-will. Further, where there are special features that bear on the possibility of mistake then the jury's attention must be invited to those matters."

We would commend the guidelines contained herein to the attention of trial judges. The fact that the maker of the statement is not available for cross-examination, the possibility of concotion or distortion by him, or the existence of malice against the prisoner were all mentioned by the trial judge. The possibility of mistaken identity was a live issue.

In the instant case however, the learned Chief Justice (Ag.) correctly and in our view adequately invited the jury's attention to that possibility. We have highlighted in the extract where we found that he had fulfilled his duty. Mr. Daly, Q.C. in the course of his arguments was invited to suggest what he thought was appropriate. He said that it was necessary for the judge to add words to the effect that there was the possibility that an honest witness could be mistaken and the fact that the witness was convincing did not minimise the possibility of mistake. We have already indicated that such directions would be wholly inappropriate in the circumstances of the case: indeed, they would be nonsensical. The directions given, were admirably clear, correct and succinct. Nothing said in further elaboration, would have been helpful.

Learned counsel then mounted an attack on another alleged deficiency in the directions. On this occasion, it was the failure of the Chief Justice (Ag.) to warn the jury in terms of R. v. Turnbull (supra) of the dangers of identification by voice. It is to be remembered that one of the Crown witnesses, Kenneth Stewart, who knew the applicant closely for some six years, identified him by his voice at the material time. The witness testified that he knew the applicant's voice well and it had a peculiarity, in that the applicant stammered.

It would seem to us that Mr. Daly, Q.C. is much fascinated by R. v. Turnbull (supra) and considers it more than desirable that the same warning be issued wherever identification evidence forms the basis of the prosecution case, no matter that the identification is not visual identification of the accused. His final ground related to a witness' identification of the car on the scene of the crime as being that used by the applicant in plying for hire.

The reason for the warning in identification cases is that judicial experience has demonstrated occurrences of miscarriages of justice in cases involving visual identification evidence. Thus in Reid v. R. (1989) 3 W.L.R. 771 at p. 775, Lord Ackner could assert:

> "Judicial experience has established that there are certain categories of evidence which are, by their nature, potentially unreliable and in respect of which, in order to avoid the serious danger of wrong convictions, special warnings and directions have to be given to juries. Such categories include the evidence of children who, although old enough to understand the nature of an oath and thus competent to give sworn evidence, may yet be so young that their comprehension of events and of questions put to them, or their powers of expression, may be imperfect. In sexual cases, the victims of the alleged offences may have a variety of motivations, some of which may never have occurred to a jury, for giving false evidence. An accomplice, with a purpose of his own to serve, such as the hope of lenient punishment, may well tend, when giving evidence for the prosecution, to suggest that the entirety or the majority of the blame for the crime should fall upon the accused rather than upon himself. Yet this possibility may

> "again not be apparent to a jury. Accordingly, in such cases where the inherent unreliability of the witness might otherwise escape the jury, the trial judge has to give the appropriate warning and explanation of the special caution required when considering that type of evidence."

By that "type of evidence", the learned Law Lord was referring to visual identification of an accused person. Common-sense suggests that the possibility of mistakes and errors exists in the adduction of any direct evidence, in the sense of evidence of what a witness can perceive with one of his five senses. But that can hardly be a warrant for laying down that a Turnbull type warning is mandatory in every sort of situation where identification of some object capable of linking an accused to the crime or perhaps some attribute or feature of his speech capable of identifying him as a participant, forms part of the prosecution case.

It seems to us that the same dangers or risks inherent in visual identification of an accused do not extend to the areas included in Mr. Daly's submissions. That sort of evidence depends on the credit of the witness and can properly be left on that footing to a jury. This point was discussed by the English Court of Appeal in R. v. Browning [1992] 94 Cr. App. R. 109. There the evidence ~~went~~ requiringa to the description of a motor car and, so the argument ran, related to an identification issue, ~~requiring a~~ warning analogous to that suggested in R. v. Turnbull (supra). The Court held as the headnote correctly records, that:

> "... a Turnbull direction was not required in respect of a motor car because, unless deliberately altered, perhaps by having its colour changed, a car did not change shape, colour or size, whereas a human being's facial expression, bodily position and appearance altered frequently. It was sufficient for the judge to direct the jury, as he did in the present case, first, as to each witness's opportunity to identify the car, secondly, as to each witness's knowledge of different types of cars, and thirdly, as to each witness's recollection of what he had seen rather than what information he might have absorbed from elsewhere."

In his directions, the learned Chief Justice (Ag.) reminded the jury of the evidence given by Mr. Stewart which showed the basis for his opinion and left the matters for their consideration. Thus at p. 107:

> "... Mr. Stewart said, 'I am a mechanic, I am a taxi-driver and I know that particular car.' It is a matter for you as to whether you can accept him as a witness of truth on that aspect of his evidence."

With respect to the recognition of the applicant's voice, the learned trial judge reminded them of the basis for recognition. He pointed to the period both men were acquainted, the nature of their relationship, and the particular speech pattern of the applicant and the opportunities for such knowledge. The learned trial judge expressed himself in these terms at pp. 98-99:

> "So, to get back to Mr. Stewart's evidence, the first thing he tells us is that he knew the accused for a considerable period of time, which he put at about six years. He said he was accustomed to seeing the accused as they drove along plying for hire, and as they waited at the same taxi-stand, presumably, in Spanish Town, for passengers. He said there were times that they were there for as much as half-an-hour, each one trying to fill up, to get a load, as he called it, before taking off, and therefore he said he was accustomed to hearing him talk. They spoke together and he heard him talk. He said the accused had a noticeable peculiarity with his speaking voice, what he called 'a little stammerish', but he repeated, especially during the course of the cross-examination, over and over again, that he knew and was able to recognise the voice of the accused, and he told you the opportunities which he had to gain this knowledge of the accused man's voice."

In our view, the trial judge in the extracts we have cited carried out his duty of explaining the significance of the factors which should guide them in determining the reliability of the witness' evidence on both these points. We think the approach of the trial judge was entirely correct. He was not therefore in error, as Mr. Daly, Q.C. has sought to contend.

Since sentence was imposed, the Offences Against The Person (Amendment) Act (the "Act") has come into force. There are now two categories of murder - viz: capital and non-capital - [see sec. 2 of the Act]. The motive for this crime was sexual jealousy but that fact does not bring it within any of the categories of capital murder which briefly stated, include the murder of a member of the security forces [sec. 2 (a) (i)], a correctional officer [sec. 2 (a) (ii)], judicial officer while acting in the execution of his duty [sec. 2 (a) (iii)], a murder in the course of robbery, burglary, or housebreaking, arson or a sexual offence [sec. 2 (d)], a contract murder [sec. 2 (e)]. Section 7(1) of the Act provides:

> "7. - (1) Subject to the provisions of this section, with effect from the date of commencement of this Act the provisions of the principal Act as amended by this Act shall have effect in relation to persons who at that date are under sentence of death for murder as if this Act were in force at the time when the murder was committed and the provisions of this section shall have effect without prejudice to any appeal which at that date, may be pending in respect of those persons or any right of those persons to appeal."

In the event, we substituted a verdict of guilty of non-capital murder and imposed a sentence of imprisonment for life. By virtue of sec. 3(A)(2) of the Act we further directed that the applicant should serve a period of ten years before becoming eligible for parole. We took the view that such a period should bring home to the applicant that the taking of a human life which results in a conviction for murder, albeit non-capital, remains a very serious crime indeed. The direction with regard to the period to be served before eligibility for parole is not by any means a guarantee that he might not remain in prison for life.

Accordingly, the application for leave to appeal conviction was refused and pursuant to sec. 7 of the Act a conviction for non-capital murder was substituted. We have already stated the sentence imposed and the period to be served prior to eligibility for parole.