JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 146/88

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

R. v. GARFIELD PEART

Dennis Morrison for applicant

Samuel Bulgin for Crown

February 26 & March 12, 1990

CAREY, J.A.:

The applicant, a juvenile at the time of the commission of the charge of murder preferred against him, was convicted in the Home Circuit Court before Ellis, J., and a jury after a trial between 1st and 2nd June, 1988, and was sentenced on 16th June, 1988 to be detained during the Governor General's pleasure. On 26th February last, we refused the application for leave to appeal and promised to put the reasons for our decision in writing and hand these down at a later date. We now do so.

The case against the applicant rested firstly on the visual identification evidence of the victim's widow to whom he was a perfect stranger but who pointed him out at an identification parade held some three weeks after the murder. The victim, Major John St. Dennis, was shot to death by one of three men who prior to breaking into the St. Dennis' house, fired a number of shots thereat, one of which found its mark in the region of Major St. Dennis' groin. Mrs. St. Dennis identified this applicant as one of the three men who eventually entered her house and robbed her of a number of articles including her wedding ring which she handed, she said, to this applicant. In all, the applicant and his confreres were in that house for approximately two hours. During that time she was marched all over the house while the robbery was carried out.

The prosecution case also rested on other circumstantial evidence which placed the applicant and two other men in the vicinity of the crime shortly after its perpetration. This evidence was provided by two witnesses, viz., Dudley Chambers and Violet McEwan who said they knew the applicant and recognised him. Indeed, a firearm was brought into play by one of the men which resulted in Miss McEwan being shot.

The defence was an alibi, that he knew nothing about the matter and that he was a juvenile of the age of 15 years.

Mr. Morrison in his usual economic style submitted firstly, that the directions of the learned trial judge on the issue of identification were inadequate in that he failed to relate those directions specifically to the evidence in the case and in particular he failed to take

the jury through that evidence with a view to identifying its strengths and weaknesses against the background of his general warning.

Mr. Bulgin responding on behalf of the Crown, submitted that the learned trial judge's directions on the crucial issue were not only adequate but were related to the evidence of Mrs. St. Dennis.

It is plain that the gravamen of Mr. Morrison's submission is the adequacy of the warning given by the trial judge, not the absence of the warning of the dangers inherent in visual identification evidence. The adequacy of the directions will depend on the particular facts and circumstances of the identification issue. In the instant case the applicant was in the house for a considerable length of time. The lighting in the house during the material time was bright. The applicant was in close proximity during her ordeal. These factors were pointed out by the judge who identified the weaknesses in the evidence by adverting to the fact that she did not know the applicant before that night, that she saw him under circumstances of stress. Then the learned trial judge issued a caveat -

> "Even in those circumstances, Mr. Foreman and Members of the Jury, persons can be mistaken, so you have to be careful in examining the evidence on that score, to see if you are satisfied that all the circumstances of good identification in the room was there."

In the concluding section of his directions, he returned to the theme of the possibility of error on the part of Mrs. St. Dennis. He then warned against being impressed by honesty because an honest witness can as well be mistaken. He expressed himself thus at page 93:

> "Remember, though, that when you are talking about identification it is not the impressive testimony of a witness that you are trying to find. It is the truth and the correctness of the identity. Although Mrs. St. Dennis tells you that, 'I am certain this is the person', you still have to examine that in the light of the circumstances of the identification, because identification is crucial. People can make mistakes. So you look at all those circumstances."

In our judgment, the jury could not fail to understand that they had to consider the facts and circumstances of the identification as related by Mrs. St. Dennis. They had to bear in mind also that although she had ample opportunity for observing the applicant having regard to the evidence, nevertheless, her evidence should be viewed with care because honesty should not be confused with accuracy. See **R. v. Cameron** S.C.C.A. 238/88 (Unreported) dated 23rd October, 1989. This ground, therefore, fails.

There were two other grounds filed and argued, which were in the following terms:

> "2) That the learned trial judge erred in law by his invitation to the jury to treat the evidence of identification of the accused after the offence had been committed by Mr. Dudley Chambers and Miss Violet McEwan as evidence which was capable of strengthening the evidence of Mrs. Florence St. Dennis;
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> 3) That the learned trial judge erred in law by failing to caution the jury as to the prejudicial effect of the evidence of Mr. Dudley Chambers and Miss Violet McEwan and to remind them that they were concerned only with the offence of murder."

The basis of these grounds was the following directions of the trial judge, which appear at pages 92 and 93:

> "When you look at the Prosecution's case, remember what I tell you about the things about common design and the circumstantial evidence. When you are examining the piece of circumstantial

> "evidence from Dudley Chambers and McEwan, what they are saying is that, 'Yes, shortly after we saw Roco near to this place.' When you put that and combine it with what Mrs. St. Dennis says, 'Yes, this is the man who was in the house,' they are placing or assisting to place Roco in the premises or in the area and Mrs. St. Dennis is saying, 'Yes, he was one of the men,' common sense will dictate to you or could dictate to you that persons finding themselves so near to this thing could be the persons who did this type or thing to people who they saw on the road, namely, shooting at Dudley and McEwan. This is circumstantial evidence. Remember the circumstantial evidence must propel your thinking to one direction. In this case the circumstantial evidence of Chambers and McEwan will not say that these are the persons by itself, won't tell you that it is the person or Roco was one of the persons in Mrs. St. Dennis' house. You have to look at their evidence in conjunction with what Mrs. St. Dennis says with the identification."

The jury, argued Mr. Morrison, should have been warned that the evidence of Dudley Chambers and Violet McEwan ought not to have been taken into account in deciding whether they could rely on the visual identification evidence of Mrs. St. Dennis. He suggested that the prejudicial effect of their evidence clearly outweighed its probative value. Counsel for the Crown contended for his part that the effect of the trial judge's directions was not to convey the impression that the evidence of the two witnesses strengthened that of the victim's wife. Further, the defence was an alibi. Finally, he pointed to a specific warning in this regard, which the learned trial judge issued. He said at page 88:

> "Remember that when you look at Dudley's evidence that does not say that Rocko is guilty of anything, you know, All Dudley Chambers is saying so far is, 'Yes, I saw him around there'."

That direction, Mr. Bulgin maintained, would have disabused the jury of any prejudicial view of the evidence. It should be pointed out that Mr. Morrison was not unaware of this direction but was of the view that it had been eroded by the later directions set out earlier in this judgment.

We do not, however, think Mr. Morrison's submissions are well founded. The effect of the evidence of Dudley Chambers and Violet McEwan was indeed to corroborate the identification evidence of Mrs. St. Dennis and to negative the defence of alibi put forward by the applicant. The coincidence of the applicant's presence in point of time and place was a matter of significance and relevance. The violent conduct of the applicant when he was seen by the two witnesses, was all part of the circumstantial evidence linking the applicant with the crime. We have not the least doubt that the trial judge's directions were appropriate, clear, and adequate.

For these reasons we refused the application for leave to appeal.