JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 7 & 8/96

BEFORE: **THE HON. MR. JUSTICE FORTE, J.A.**
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.

R. V. **SAMUEL LINDSAY**
HENRY McKOY

Jack Hines for McKoy

Delano Harrison with Mrs. Valerie Neita-Robertson for appellant Lindsay

Kent Pantry, Q.C. with Miss Dawn Eaton for Crown

November 25, 26, 27 & December 20, 1996

FORTE, J.A.

The appellants were tried and convicted on the 15th January, 1996 in the Home Circuit Court for the capital murder of Richard Forbes and Suzette Brown, and in accordance with the law, sentenced to death. Having heard arguments of counsel over a period of three days, we reserved our decision. As a result of the issues raised, leave to appeal is granted and the hearing of the application is treated as the hearing of the appeal.

In proof of its case the Crown relied substantially upon the evidence of Cecil Markland, who at the relevant time lived with his

pregnant girl-friend Suzette Brown at the same premises where the deceased Richard Forbes resided. On the occasion of the incident, Mr. Markland had returned home with Suzette at about 12 midnight, turned on the light and proceeded to make tea for Suzette while she lay in bed. Richard Forbes was in his room at the time. It was then that the witness (Markland) heard a "gun cranking" then thereafter heard a male voice saying "Open up, police". Immediately thereafter, the door was kicked in, and he ran with Suzette into the kitchen. He took refuge under a table, but because she was pregnant with child, Suzette could not do likewise. From this vantage point, the witness saw both appellants enter the room and kitchen, and went directly into the room of the deceased Forbes. He had known both appellants before - Lindsay who was called Sammy Dread for about twenty years - "from he was a little boy" and McKoy who was called Rosco for more than five years. Both appellants were from Goldsmith Villa, and in respect of McKoy - he used to play football and marbles with him and in fact used to ride his bicycle. Both men passed 12 feet from him on their way to the room in which Forbes was. After they had entered Forbes' room, he heard explosions and a voice saying "Come on boy". He knew the voice and recognized it to be that of the appellant Lindsay who said "Get up boy, come out." Thereafter the appellants came back into the kitchen, and were on their way to the

door "they had kicked off" when Suzette said "Sammy is me Suzette, dont kill me". Subsequent events showed that Suzette was inviting death, because both men returned each armed with a gun to the kitchen, where the appellant Lindsay put the gun to Suzette's neck and shot her, and then to her belly, and shot her again, causing her to fall to the floor in front of where the witness hid under the table.

She thereafter got up and struggled into Forbes' room. Both appellants then turned their attention to the witness Markland. The appellant Lindsay came to the table and "jook" him in his face with a gun. Markland held onto the gun, and a struggle ensued between Lindsay and himself. The appellant McKoy then shot him in his back, and he consequently released the gun to Lindsay, who then shot him in his chest, and thereafter shot him three more times, one near his penis and two near his navel. He ran into Forbes' room, pursued by both appellants McKoy then shot him causing him to fall on the floor and then Lindsay shot him in his back. He shut his eyes and pretended to be dead. Before this he had been trying to get under the closet to hide, but alas he could not do so because "Dave" who apparently also lived in the house was already hiding there. Having closed his eyes he heard Lindsay say "The boy dead?" and McKoy replying "Yes de p...y-h..e dead." Thereafter both men left. Suzette and Forbes were then groaning. He wrapped

himself with a sheet and went to his cousin's home from where he was taken to the University Police Station and then to the University Hospital where he was admitted. When the police subsequently arrived at the scene the bodies of Suzette Brown and Richard Forbes were found lying in the room in pools of blood. Both bodies had gunshot wounds.

Subsequently, when the post-mortem examinations were done the body of Suzette Brown was found to have two gunshot wounds -

> "(1) An entry would to the right cheek, seven inches below the top of the head and about two inches from the mid-line. It went through the facial bones to the right cheek and travelled from right to left and existed at the top of the head.
>
> (2) An entry wound to the right abdomen which perforated the bowel and other organs before exiting in the right side of the back.

Both injuries were surrounded by an area of gun-powder leading the doctor to opine that they were "close range shots." There was also a two and a half inch grazing laceration under the neck which could have been caused by a blunt force. Death was due to multiple gunshot wounds.

The body of Richard Forbes was found to have five gunshot wounds, all of which were described by the doctor who concluded that death was caused by multiple gunshot wounds.

All the wounds were surrounded by gun powder burns - there was blackening, burning and tatooing of the skin - which led the doctor to conclude that the muzzle of the gun when fired would have been within twenty-four inches from the surface of the body.

Both appellants were arrested on warrants dated 10th June, 1993. Lindsay was so arrested on the 10th June, 1993 when he attended at the August Town Police Station and spoke to Det. Warren saying:

> "Mr. Warren me hear them a call up mi name in a de killing".

After he was cautioned he said:

> "Me no know anything about it."

The appellant McKoy was arrested on the warrant on the 26th June, 1993 when he was brought to the August Town Police Station by the police. After he was cautioned, he gave no statement.

In his defence the appellant Lindsay in his sworn testimony set up an alibi. On the day of 9th June, 1993, he and the appellant McKoy worked all day on his house at Goldsmith Villa. The mother of his child was also present with him when he retired to bed at 7.00 p.m. McKoy had worked

with him all day, until 5.00 o'clock when they ate dinner, and he (Lindsay) thereafter retired to bed. At the relevant time he was at home. In addition, he gave evidence of a positive motive of the witness Markland to implicate him in the murder. In May 1993, he was with the appellant McKoy at Bryce Hill Road, when on seeing Markland, he held him to take him to the police as he was wanted by the police for house breaking. Markland told him (Lindsay) that it was not him, and the appellant McKoy boxed him. He released Markland, but having been released Markland said to him "You come to August Town build house and you have to run leave it." He told Markland, that he was lucky he had his work to do otherwise he would not have let him go. Further he stated that while he was in custody on this charge at the General Penitentiary, Markland visited him there and told him that if he gave him thirty thousand dollars he would "done with the matter" and would not come to Court as he knew it was not Lindsay who had committed the murder. He, of course, refused the offer as he was not guilty of the crime. The witness Markland had denied these allegations when he was cross-examined by counsel for Lindsay. The appellant Lindsay also called a witness Spl. Cons. Bailey who was on the application of the defence treated as an hostile witness. In his evidence, however, he spoke of the witness Markland making a report to Cpl. Lawrence in his presence that he had been shot by five gun

men. The witness Markland, denied ever reporting that five gun men had "shot up the house," the only suggestion that had been put to him in cross-examination. He however earned the disfavour of counsel for the defence, when he testified that Markland had mentioned the name Sammy Dread, on the very night of the incident, at a time when he was at the hospital.

The appellant McKoy made an unsworn statement in which he denied his presence at the commission of the crime, or any participation therein. On the 23rd June, 1993 he was riding his bicycle, when he saw Mr. Markland and said to him "Mr. Markland I hear you calling mi name". He went to Markland's yard where he saw an open van and some police officers who accused him of killing Suzette Brown. He denied the allegation, but was nevertheless taken into custody, arrested and charged with the offences.

The complaints made by counsel for both appellants can be encapsuled in the following:

> (i) the learned trial judge failed to direct the jury in respect of the evidence of visual identification, in accordance with the guidelines laid down in ***Regina v. Turnbull*** [1976] 63 Cr. App. Rep. 132;
>
> (ii) the directions of the learned trial judge in respect to the defence of Alibi were inadequate.

Ground 1 - Visual Identification

A good starting point in considering this ground of appeal is to examine the directions given by the learned trial judge. These are as follows:

> "Now an important aspect of this case is one of identification, and you have to approach the evidence of identification very carefully, with caution. Because persons can make mistakes even though they may sound very convincing to you when they give their evidence. But it does not necessarily mean that you cannot act on the evidence if you accept that the visual identification of the particular witness is one that you can rely on and it's one that you find credible and is one that you can believe.
> Now, in this case it's not just a matter of identification, that is, Mr. Markland seeing these persons and subsequently saying that he is that person. In this case it's a matter of what you call recognition, in that he said 'I know them before' and he is saying 'I recognize them as the persons who came into that room that night and committed these offences in that house.' So, in the light of the fact that it's a matter of him saying that 'I recognised these persons as the persons that I know before, 'you still examine it carefully because the defence is challenging that there was light in the room at the time. So you must be satisfied that the evidence that he is giving you is one that you can rely

> on, that it's credible evidence, and that he is not mistaken in saying that he recognised the persons who he said he saw there, and you must be satisfied that the witness is one whose evidence you can rely on and he is not making a mistake. Once you accept his evidence and you are satisfied that he is a credible witness then you may act on the evidence that he has given you.
>
> What Mr. Markland has said to you is that he recognised these persons and you may find that recognition evidence is more reliable than you knew somebody before and you had seen them and you said well that is the person as distinct from somebody who you are seeing for the first time and later on you have to point him out and say this is the person who came there. But you can make mistakes even when you say you recognise a friend or you recognise a relative. But if you are satisfied and you accept that he is speaking the truth then you may rely on his evidence and you can act on it in the circumstances of the prosecution's case."

Both counsel for the appellants contended firstly that the learned trial judge failed to direct the jury as to the reasons for caution to be exercised in visual identification evidence, and maintained that that omission was a fatal flaw. The reason of course to which counsel referred, was that miscarriages of justice have occurred in the past, because of the mistaken identification of an accused, by an honest witness. That such a

consideration is not applicable in Jamaica was settled by the Judicial Committee of Her Majesty's Privy Council when Lord Nolan in delivering the opinion of the Board in ***Desmond Amore v. The Queen*** [1994] 1 W.I.R. 547 at page 554 after reference to such a dicta in ***Junior Reid*** [1990] 1 A.C. 363 stated:

> "The closing words reflect the fact that in England and Ireland wrong convictions have indeed been known to occur as a result of mistaken identification evidence. But it was accepted by Mr. Kuldip Singh that there is no record of any similar occurrence in Jamaica. The point was touched upon in the later case. ***Daley v. The Queen*** [1994] A.C. 117, 121, where Mr. James Guthrie, who represented the Crown both in that case and this, is quoted as stating in argument that:
>
> > 'There is no history in Jamaica, as there is in England, of well publicised miscarriages of justice resulting from erroneous identification, and it would not assist a jury in Jamaica to tell them that that has happened elsewhere.'
>
> Mr. Guthrie told their Lordships that the statement thus attributed to him reflected what was said by Zacca C.J. (who was sitting as a member of their Lordships' Board) during the course of the hearing. In these circumstances their Lordships are satisfied that the judge cannot be criticised for making no reference to experience of injustice in other cases as a result of mistaken

> identification. Such a reference would have been unnecessary and unhelpful."

The omission of the learned trial judge in the instant case would consequently be in accordance with the above dicta of their Lordship's Board and accordingly there is no merit in this complaint.

Another complaint made is that the learned trial judge failed to direct the jury that "an honest witness may be convincing but mistaken."

What the learned trial judge said was as follows:

> "Now an important aspect of this case is one of identification, and you have to approach the evidence of identification very carefully, with caution. Because persons can make mistakes even though they may sound very convincing to you when they give their evidence."

In ***Amore v. The Queen*** (supra) where similar directions as in the instant case were given to the jury and similar complaint made as a result their Lordships per Lord Nolan stated:

> "In warning the jury that a mistaken witness might be a convincing witness ... the judge was following precisely the language of the ***Turnbull*** judgment [1977] Q.B. 224, 228."

For ease of reference the words of the dicta in the ***Turnbull*** case to which their Lordships referred read as follows:

> "In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken." [Emphasis added]

The learned trial judge in using those words to the jury was being faithful, though not in exact terms, to the dicta of the ***Turnbull*** case. In the event we find no merit in this complaint.

Thirdly, counsel also complained about the following two passages which are contained in the already cited passages but which for convenience are repeated here:

> (i) Page 276 - "Once you accept his evidence and you are satisfied that he is a credible witness then you may act on the evidence that he has given you."

> (ii) Page 277 - "But if you are satisfied and you accept that he is speaking the truth you may rely on his evidence and you can act on it in the circumstances of the prosecution's case."

On the face of those words, read out of context, it would appear that the learned trial judge was directing the jury that once they found

the witness to be a credible (i.e. truthful) witness then on that alone they could come to an adverse decision, without any regard to whether he may be mistaken. However read in context, no such conclusion could reasonably be arrived at.

Immediately before the passage detailed in paragraph (i) above, appear the following words which is repeated here for convenience: (Page 276) -

> "So you must be satisfied that the evidence that he is giving you is one that you can rely on, that it's credible evidence, and that he is not mistaken in saying that he recognized the persons who he said he saw there, and you must be satisfied that the witness is one whose evidence you can rely on and he is not making a mistake."

The totality of those passages demonstrates that the learned trial judge rather than disregarding the possibility of a mistake, was in keeping with proper principles emphasising to the jury that they had to be sure that the witness was not mistaken. So that when he went on immediately to say "Once you accept his evidence" the learned trial judge must have meant and the jury must have understood, that once they were satisfied that the wintess was not mistaken, and that he was credible - then they may act upon his evidence.

Similarly, the words preceeding those in paragraph (ii) above put the latter words into proper context, and demonstrate quite clearly that the learned trial judge, was not taking away from the jury the question whether the witness was mistaken. Here is what he said immediately before the words in paragraph (ii):

> "What Mr. Markland has said to you is that he recognised these persons and you may find that recognition evidence is more reliable when you knew somebody before and you had seen them and you said well that is the person as distinct from somebody who you are seeing for the first time and later on you have to point him out and say this is the person who came there. <u>But you can make mistakes even when you say you recognise a friend or you recognise a relative."</u> [Emphasis added]

So that when the learned trial judge states "But if you are satisfied" given the above words he must have been referring to the jury being satisfied that the witness was not mistaken, and accordingly if in those circumstances they found he was speaking the truth, then it would be proper for them to act upon his evidence. This analysis, must be seen against the background of allegations made by the defence, that the witness had a motive for lying as to the presence and participation of the appellants at the commission of the crime, and that he had admitted to

the appellant Lindsay that he knew that he (Lindsay) was not implicated in its commission. In these circumstances the jury would be left with two important issues, firstly whether the witness was a credible witness, and secondly whether he was mistaken. The learned trial judge consequently had the responsibility of focusing their attention on these two issues which in our opinion he did fairly and adequately and as a result we can find no fault in the directions, which formed the subject of this complaint. We conclude therefore, that though the directions as to visual identification did not follow any strict formula, the jury were directed adequately as to the cautious approach necessary before acting upon the evidence of visual identification which is unsupported by any other evidence and as a result this ground fails.

Before leaving this ground, however, counsel during the argument, contended that the learned trial judge did not adequately deal with what he described as a weakness in the identification evidence. This "weakness" relates to an allegation by Spl. Cons. Bailey who was called for the defence, (and treated as hostile), that the witness Markland reported to Cpl. Lawrence in his presence that he was shot by five gunmen. When the witness Markland was cross-examined, however, it was never put to him that he had reported to the police that he had been shot by five gunmen. What was in fact put to him is that he had

told Spl. Cons. Bailey that it was "five gunmen who shoot up the house in August Town in which you were." To this question he answered "No" and the matter was taken no further.

In determining the validity of counsel's contention in this regard, it must be considered also against the background of the allegation of the defence that the witness had a motive in implicating both applicants and was in fact carrying out a threat which he had issued on the occasion when he was held by them in relation to a burglary which he was alleged to have committed. In those circumstances, the purported inconsistency in his account as to the number of men who came to his home, would go more so to his credibility rather than the accuracy of his identification of the appellant. The learned trial judge treated it, quite correctly in our view as a matter which should be considered in determining the credibility of the witness. Indeed after he had correctly directed the jury how to deal with discrepancies, he immediately pointed out to them "certain inaccuracies in the evidence of the witness Markland" and invited them to say whether those "inconsistencies were major inconsistencies that go to the root of what you are asked to find."

In outlining the "inaccuracies" he itemized among others the following:

> "He also was challenged in respect of a report he had made to the police in that he reported that five gunmen had attacked him. He said, he was

> challenged, said so to Special Constable Bailey, Special Constable Bailey says that he was told about shooting by five gunmen, Mr. Markland says that he didn't tell the police that."

Then, having reviewed with the jury several inconsistencies he concludes:

> "Those are the areas that I have pointed out to you. If there are any other areas that you recall then you examine it along with those and say whether you find them as major discrepancies going to the root of what you are asked to find, and how you will view the witness in that respect, if they do not affect the main core of what you are asked to find."

In the end, the jury must have fully understood that if they found that the witness had in fact reported that he was shot by five gunmen that would have been a discrepancy which would have affected his credibility as a witness. Their ultimate finding clearly demonstrates that in the jury's opinion, was a matter which did not affect his credibility preferring his account given in testimony and his denial of Spl. Cpl. Bailey's account: which of course was the account of a witness treated as hostile by the defence, and, the value of whose evidence would be consequently negligible. We cannot therefore find it possible to agree with the contention of counsel for the appellants in this regard.

ALIBI

We turn now to the complaint that the directions of the learned trial judge on the issue of alibi were inadequate. Here is what the learned trial judge said:

> "Now, there is no burden on either accused to prove anything to you to establish the alibi by itself, the prosecution must disprove the alibi to you, prove to you that they were there where the prosecution said they were to commit the offence, and that they were not elsewhere at the time as they are saying they were. So there is no burden on them to prove anything to you, it is the prosecution who must prove to you their guilt. The prosecution must prove to you that they were there and not elsewhere as they said they were."

Then having examined the evidence of the appellant Lindsay, the learned trial judge directed the jury thus:

> "Alright, Mr. Foreman and members of the jury, that is the evidence that you heard from Mr. Lindsay and his witnesss. There is no burden on him to prove anything to you. If you are satisfied that he has been successful in proving his case to you then you find him not guilty. If you are not sure as to whether or not you believe him then you should, if you are in doubt, find him not guilty. Because in this case the prosecution would not have proved their case to you. You would then go back and

> examine the prosecution's case along with what he has said and if that satisfies you, then you have to convict him on that charge."

And then, having summarized the unsworn statement of the appellant McKoy he directed thus:

> "If you believe what he is saying that he is innocent and he was not there, you find him not guilty. If you are not sure whether to believe him or not, that is, you are in doubt, equally you will find him not guilty. If you do not believe you cannot convict because you do not believe, you still go back and examine the prosecution's case and if from that examination you are satisfied to the extent that you feel sure of his guilt then you have a duty to convict him as he is charged."

In our view, those directions were adequate, and would leave the jury with a clear understanding of how to approach the evidence of alibi in respect of the appellant Lindsay, and the content of the unsworn statement of the appellant McKoy. Counsel nevertheless complained that the learned trial judge ought to have specifically told the jury that a rejection of the alibi did not corroborate the evidence of visual identification. We are unable to agree that the learned trial judge had any such responsibility. He in fact told the jury that a rejection of the alibi could not result by itself in conviction of the appellants, and directed

them that having regard to the burden of proof, they would still have to look at the prosecution's case and if having done so they were sure that the appellants were the assailants, then only in those circumstances could they arrive at an adverse verdict. Having been given those directions, the jury could never have been left with a belief that in rejecting the alibi, they were thereby finding support for the visual identification of the appellants by the witness Markland. This conclusion is in keeping with the dicta of Lord Nolan in ***Nigel Coley v. The Queen*** Privy Council Appeal No: 49/93 delivered on the 26th July, 1995 where directions given by the learned trial judge were in similar terms to the directions given in the instant case. In delivering the opinion of the Board Lord Nolan stated:

> "Their Lordships regard this as a perfectly adequate direction upon the point. No doubt it would have been possible for the judge to deal with the matter more fully but that would not necessarily have been in the interests of the appellant. It would have been open to the judge, if he was so minded, to say that while an innocent person might put forward a false alibi out of stupidity or fear, the deliberate fabrication of an alibi, if it can be established beyond doubt, might properly be counted against the appellant."

In the event we find that this complaint is also unsustainable.

For the above reasons, the appeal is dismissed and the convictions and sentences are affirmed.