

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 140 of 1991

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE WOLFE, J.A. (Ag.)

REGINA vs. ZEPHANIAH HAMILTON

Leslie L. Cousins for the applicant

Michael Palmer for the Crown

September 21 and October 12, 1992

WRIGHT, J.A.:

This applicant was convicted and sentenced to death on December 4, 1991, in the Saint Catherine Circuit Court before Rowe, C.J. (Ag.) (as he then was) for the murder of Lynval Henry and Robert Bell. He now seeks leave to appeal.

The seven grounds of appeal filed resolve themselves into two substantive grounds because Ground 3, complaining of unfair trial, was withdrawn, and so was Ground 7, complaining about inadequate direction by the trial judge. Grounds 4, 5 and 6 merely supplied the particulars of Ground 1 the purport of which was:

"That the verdict of the jury is unreasonable and cannot be supported having regard to the evidence."

Ground 2 alleges a misdirection by the trial judge.

The facts of the case speak of frightening savagery but are otherwise unremarkable, the live issue being visual identification. Patrick Forbes lives and conducts business as a shopkeeper at High Mount District in the parish of Saint Catherine. There is no electricity in that area. Light for his shop is supplied by a shade lamp.

About 9:30 p.m. on October 13, 1988, Patrick Forbes, Jacksford McDermott and Lynval Henry ("Jah Youth") were seated around a table on the piazza of Mr. Forbes' shop playing a game of dominoes. Mr. Forbes sat near the shop door with his back to the wall of the shop with Jacksford McDermott facing him. Lynval Henry sat to Mr. Forbes' right. Light was provided by a bottle torch on the table. While the game progressed, Robert Bell, a stranger to Mr. Forbes, came along and stood watching the game. Mr. Forbes' head was held down as he paid attention to the game. Suddenly he was jerked up by the sound of a blow to McDermott's head. He looked up to see McDermott falling to the floor of the piazza and two upraised machetes. At the time he did not recognize the machete-wielders who then turned their attention to Lynval Henry and Robert Bell.

McDermott fell on his back and when he looked up he saw the applicant Zephaniah Hamilton whom he had known from childhood days as "Jack" standing over him and he heard the applicant say, "This one die" and then he overturned the table. McDermott was thus enabled to make a hasty escape through the shop and into the dwelling house behind, locking the grill gate to the house as he entered.

Forbes had called out, "Watch out Jah Youth" but not in time to save him. The machete-men attacked both him and Robert Bell both of whom could be heard bawling as they fled the scene. Forbes in his bid to escape had slipped around the corner of the shop into the waiting machete of another intruder who chopped him on his hand. He throw himself to the ground and rolled over several times into a yam field. He had heard foot-steps behind him but when he realised they were headed in a different direction he stopped and in order to avoid detection he divested himself of his light-coloured shirt and pants which he hid.

In the meantime, the men had attempted to gain entrance to the house where McDermott had fled but were dissuaded by the mother of a young baby who told them that he had escaped through a window but the truth was that McDermott was watching them from a vantage point inside. They vented their rage by stoning the house.

After Forbes had lain quiet in the dark for some fifteen minutes and not seeing or hearing any activity he armed himself with two stones and returned stealthily to within eleven yards of the shop - the window and door of which were open. There before his gazing eyes were the applicant and another man whom he did not know inside the shop. The applicant was on the vendor's side of the counter removing bottles from the shelf while the other man was on the customer's side. He watched them for about seven to ten minutes then he hurled a stone against the shop. Alarmed, the intruders fled taking loot including a pan in which silver was kept. The applicant took this pan. No sooner had they gone outside than they met a man coming down the road and he was attacked and cut up. The men made their escape.

Cross-examination of McDermott and Forbes contended that they were both mistaken. Both denied that the man they saw and recognised as the applicant exhibited any bandages.

Detective Brimroy Garwood, then stationed at the Linstead Police Station, testified that about 10:00 p.m. he received a report and visited the scene. A search of the area revealed the body of Lynval Henry about four chains from Forbes' shop in a clump of bushes on the embankment. It bore several machete wounds and was without the left hand which was picked up in the road. The body of Robert Bell with machete wounds to head, back and feet was found in another direction away from Forbes' shop. A trail of blood from the shop led to where Bell's body lay.

On the very next day, October 14, 1988, the officer swore out a warrant for the arrest of the applicant but it was not until March 28, 1989 - over five months later - that he found the applicant and was able to execute the warrant. The applicant said nothing when he was arrested and cautioned in the Spanish Town Hospital.

No medical evidence was available because the laboratory with the relevant records of Dr. Bhatta, who performed the post mortem examination, was destroyed by fire.

The applicant stated his defence in the usual manner, that is, by means of an unsworn statement from the dock, viz:

"My Lord, on the 12th of October, 1988, I was passing through High Mountain District and rush by a group of man, beaten badly and chop up, my Lord, I went to the doctor at Linstead. Rush by a group of man, get several chop to mi body, my Lord and beating. I went to the doctor at Linstead, Dr. Massop, go get stitch and dress on mi left hand and mi right foot and pon mi left hip - wearing bandages. I deh home two to three week, I don't know none of these men, your Honour. I never hear of any of them, I don't know any of these men. I don't kill anyone.

On that night I was down my district, my Lord, Princessfield. Hear shouting when some people come through. I hear them talking say killing 'gwaan' round a High Mountain, while playing domino, my Lord.

I have nothing more to say, my Lord. I don't none of these men. Is not me kill them my Lord."

In a very lucid summing-up lasting fifty-seven minutes the learned Chief Justice (ag.) directed the jury, placing the necessary emphasis on the live issue - visual identification. The jury retired for just three minutes before returning their verdict of guilty.

With regard to Ground 1 of the grounds of appeal, which challenges the quality of the evidence, it was contended that there was no direct evidence to show how the two deceased were

killed at the spot where their bodies were found; that there was no evidence to show that the accused or the other man with him at any time left the shop to the spot where the bodies were found. Accordingly, ran the submission, there was no circumstantial evidence from which it could be presumed that they were the ones who killed the men because the evidence for the prosecution placed the accused and the other man on the piazza of Patrick Forbes' shop and inside the shop and nowhere else.

This ground is obviously misconceived being based on a misunderstanding of the evidence which clearly shows that both Henry and Bell were attacked at the shop and were chased as they tried to make their escape. Furthermore, the uncontroverted evidence was that there was a trail of blood from where Bell's body lay to Forbes' shop.

It was also contended that the quality of evidence going to identity was weakened when in cross-examination Forbes said that he thought it was moonlight. But that evidence was of no effect because he did not purport to have identified anyone by aid of moonlight. He admitted that he did not see who chopped him because behind the shop where he was chopped was dark. Neither did he recognize the applicant when he looked up after hearing the blow to McDermott's head. It was the studied view of the applicant in his shop for some seven to ten minutes which enabled him to identify him. And, indeed, the learned Chief Justice (Ag.) placed the burden for establishing the applicant's identity squarely on the evidence of Forbes. Said he at page 60 of the summing-up:

"It is for the Prosecution to satisfy you through, in this case, the mouth of Mr. Forbes, really, because if you reject Mr. Forbes the whole case goes, that this is the man who was there with the others, wreaking havoc in High Mountain on the 13th of October, 1988."

The down-playing of McDermott's evidence stemmed from the fact that although he had known the applicant from childhood he had not in recent times been seeing him often. He had not even mentioned when was the last time he had seen him. The jury were quite properly directed that McDermott's evidence as to identity would have been weakened by the fact that since his attacker had concluded that he was dead he would not have spent much time in a position to enable McDermott to recognize him. On the other hand, Patrick Forbes had testified that he had first come to know the applicant three months before the incident. He had seen him bathing in a canal in the area and thereafter he had seen him on three other occasions. But even if he had not seen the applicant before that fateful night it would not be unreasonable for the jury to hold that the time he spent watching the applicant in his shop from a distance of eleven yards aided by the lamplight provided sufficient opportunity for him to properly identify him. What cannot be overlooked is that evidence of the identity of the applicant was given to the Police within minutes of the incident. This ground of appeal is totally devoid of any merit.

The complaint about misdirection is as follows:

"That the learned trial judge misquoted to the jury the evidence of Patrick Forbes and misled the jury in believing that it was after he had seen the two men inside his shop - one behind the counter and the other on the customer's side - and frightened them away, that they left his shop and walked up the road - and that it was at this stage he overheard Jan Youth (deceased Linval Henry) bawling out for Murder."

This complaint, too, is patently the result of counsel's misunderstanding of the evidence. The evidence given by the witness as it appears at pages 23 to 24 of the record is as follows:

- "A. After mi lik pon the building the two man run out off the shop.
- Q. Which two man?
- A. Jack and his friend.
- Q. When you saw them running out of the building, did they have anything with them?
- A. Yes, miss.
- Q. What?
- A. Jack have a cheese pan under him hand with silver that I have in the shop and him have a bottle of drinks in his hand.
- Q. Anything else?
- A. Him did have the cutlass and him did have a flashlight.
- Q. What next happened?
- A. Them run up the road. The two of them run up the road. After them running up the road, them see a man coming down.
- Q. They ran up the road and what next happened?
- A. A next man was coming up the road and them run down the man and stab up the man 'through' them feel say it was the man who fling the stone.
- Q. You saw this?
- A. I don't really saw it but I hear it going on.
- Q. Mr. Forbes only tell us what you see. Mr. Forbes you saw them run up the road and did they disappear from your sight?
- A. I did see them head because them up there and I hear a man up there keeping on bawling out."

The direction to the jury is at page 47 of the record and reads:

"He said he had a seven to ten minute observation point but he was listening to hear if anybody else was present and when it occurred to him that only two men were there, he decided to make a distraction so he flung one of the stones on to the building and that caused the two men to leave the shop, and as they walked away from the shop he could now see the side of the man whom he had recognised. He said he could see the tops of the heads of these two men as they went up the road and he heard a bawling also at that time when the men went up the road."

It is patent from the sequence of events that during the time when Patrick Forbes watched the men in his shop he does not mention any bawling until after the men had left the shop and encountered their final victim who managed to escape death despite the injuries inflicted on him. Obviously, both Lynval Henry and Robert Bell had ceased being able to bawl. Nothing in the evidence supports the contention in the ground of appeal. It is clear, therefore, that the misdirection complained of is unreal.

There is no merit in either ground of appeal. Nevertheless, we have ourselves carefully perused the record of the trial and are satisfied that the defence was fairly put to the jury and all the requisite directions with particular reference to visual identification were given. There appears no reason for faulting the summing-up.

Leave to appeal is accordingly refused.