JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 45/89

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

REGINA

VS.

LEROY BARRETT

Bert Samuels for Applicant

Miss Carol Malcolm for Crown

May 28 and July 16, 1990

ROWE P.:

Patricia Lunah was murdered during the night of December 23, 1987 while she was sitting on a settee in her living-room at Flat 19 Building 2 Majestic Gardens, watching television. She was shot through the forehead. Dr. Clifford described the path which the bullet travelled to be through the skin, the bone underneath which is part of the skull, perforated the brain inside and lodged between the occipital scalp and the bone. Death was due to haemorrhage and shock associated with the bullet wound. At a two day trial in March 1989, the applicant was convicted in the Home Circuit Court for the murder of Patricia Lunah and sentenced to death. We treated his application for leave to appeal as the hearing of the appeal

which we dismissed for the reasons set out hereunder.

Two daughters of the deceased who lived with her at Majestic Gardens gave evidence for the prosecution. The applicant, they said, came to live in their home as the common-law husband of their mother. She was 37 years old and they estimated that the applicant was little more than 20 years old. This disparity in age caused the daughters to be unsupportive of the relationship. On their evidence there was a quarrel between the deceased and the applicant, and some two to three weeks prior to her death the applicant removed from their house. One pair of pants was the only personal possession which he inadvertently left behind.

Dorothy Wright, aged 21 years was asleep at about midnight on December 23, 1987. She was awakened by an explosion and she went to the living-room to investigate. She saw her mother sitting on the settee in the living-room with her head slanted in an unnatural position. A man was standing in the room beside the settee. Dorothy Wright went close to her mother and observed blood coming from her forehead. Then she turned and looked at the man whom she recognized to be the applicant. He had a gun in his hand. She reacted. In her words:

> "Then a really took a good look at him to see if it was really him that killed my mother. So when shock and frightful a scream out and cried for help and he ran."

Dorothy was positive in her identification of the applicant. There was an electric light bulb burning in the ceiling and the television light was shining. She had, she said, opportunity to see the entire body of the applicant before he ran from the room.

Maxine Wright who knew the applicant for 3-4 years, lived in the house with her mother while the applicant also lived there. She had been watching television with her mother until she left to go to the shop. On the return journey she said she heard an explosion coming from the direction of her building. She looked and saw the applicant running from the direction of the building on which she lived. He carried a firearm in his hand. When the applicant reached up to her he paused momentarily and spoke to her saying: "A just shoot you mother." Then he continued running. Street lights illuminated the place where the applicant met her and she was able to observe his whole structure from his head and face to his feet.

A report was made to Det. Acting Corporal Farquharson who promptly obtained a warrant for the applicant's arrest. It was not until April 8, 1988 that the police officer, acting upon information, led a party of policemen to a section of Hagley Park Road where the officer saw the applicant and took him into custody. On the prosecution's case the applicant was seen in an open lot; he was accosted by Det. Acting Corporal Farquharson who identified himself as a police officer and after caution, told the applicant that he was investigating a case of murder against the applicant. Thereupon it is alleged, the applicant said:

> "Officer, a didn't mean to kill her sir, because anything a want she give it to me."

From Hagley Park Road the applicant was first taken to his home and thereafter to the Hunts Bay Police Station where he was arrested for the murder of Patricia Lunah. Upon caution he is alleged to have repeated:

"Officer, a never mean to
kill her sir."

There was a spirited challenge to the admission of these alleged statements into evidence. At the request of defence counsel the Court embarked on a trial within a trial to ascertain the voluntariness or otherwise of these statements. This course was later aborted at the request of defence attorney. Issue was taken on appeal as to the directions to the jury touching these alleged statements.

The defence consisted of evidence from the applicant and from his mother. In essence the applicant put forward that he was living with the deceased up to the time of her death but had attended a dance on the night of the murder in company of another woman. When he returned to Majestic Gardens the deceased had already been wounded and had been taken off to the hospital. He was ejected on the following day by the daughters who themselves left the area. He denied making the statements attributed to him by the police and added that he had denied knowledge of the killing at all times. In his evidence the applicant said he was assaulted by the police on Hagley Park Road, and again at his home in his mother's presence. His mother corroborated him as to events at his home and denied that she heard him make an admission at the police station.

Mr. Samuels filed and argued six grounds of appeal. He complained that the trial judge failed to direct the jury that the two witnesses Maxine and Dorothy Wright, being daughters of the deceased might have had an interest to serve, and that he failed to issue the requisite warning to the jury. Mr. Samuels could not articulate the nature of the interest to serve beyond saying that the daughters admitted their dislike for the applicant because of the inequality of his

yoke with their mother. Although he did not issue any warning to the jury the learned trial judge did remind them of the defence's contention and left the issue of fact as to the creditworthiness of the two daughters for the jury's determination. At pages 89-90 of the Record he directed:

> ".... Both daughters say he had moved out of the house and, of course, both daughters disapproved of the relationship between their mother and this youngster.
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> ..... She (Dorothy) said any child of her age would disapprove of the relationship between this young man and her mother. The Defence is saying that because both these ladies, which they had admitted, disapproved of the relationship they had a reason to lie and that they are lying when they say it was the accused man they saw. So you have to take that into account in deciding whether you can accept these two ladies as witnesses of truth because the Crown's case depends to a very large extent on their evidence."

If a witness was a participant in the crime charged (an accomplice) or if on the facts it was unclear whether or not he was such a participant (accomplice vel non) the trial judge is obliged to give a warning to the jury of the danger of acting upon such evidence unless it is corroborated. Where it is alleged by the defence that the witness has an interest to serve, but it is not suggested that he was in any way a participant in the crime charged, there is no duty on the trial judge to give an accomplice warning. The Court of Appeal in England reviewed a number of well-known decisions in this area of the law in R. v. Beck [1982] 74 Cr. App. R. 221. In that case defence counsel had submitted that even though there was no material to suggest any involvement of the witness in the crime, if he had a "substantial interest" of his own

for giving false evidence, then the accomplice direction must be given. Of this submission, Ackner L.J. (as he then was) said at p. 227:

> "We cannot accept this contention. In many trials today, the burden upon the trial judge of the summing-up is a heavy one. It would be a totally unjustifiable addition to require him, not only fairly to put before the jury the defence's contention that a witness was suspect, because he had an axe to grind, but also to evaluate the weight of that axe and oblige him, where the weight is 'substantial', to give an accomplice warning with the appropriate direction as to the meaning of corroboration together with the identification of the potential corroborative material."

After considering the facts of that case, the decision in R. v. Prater [1960] 44 Cr. App. R. 83, and a passage which then appeared at para. 1425a of Archbold, Ackner L.J. concluded at p. 228:

> "While we in no way wish to detract from the obligation upon a judge to advise a jury to proceed with caution where there is material to suggest that a witness's evidence may be tainted by an improper motive, and the strength of that advice must vary according to the facts of the case, we cannot accept that there is any obligation to give the accomplice warning with all that entails, when it is common ground that there is no basis for suggesting that the witness is a participant or in any way involved in the crime the subject matter of the trial."

It seems to us that the learned trial judge properly reminded the jury of the stance adopted by the defence towards the deceased's daughters and the reason for it and he charged the jury to take those criticisms into account when evaluating the credit of the witnesses. That was all that he was required in law to do and the challenge of Mr. Samuels consequently fails.

Grounds 4 and 5 concerned the manner in which the trial judge dealt with the alibi defence. It is to be recalled that the applicant said that he and a girl were at a dance at a place called "Chin Anniversary" from 8:30 p.m. to 1 a.m. and that when he returned to Majestic Gardens he got news of the shooting of Miss Lunah. It was submitted that the trial judge did not point out to the jury that if they disbelieved the alibi that would not be sufficient to convict the applicant as the prosecution had the obligation to prove its case until the jury felt sure even where the alibi was rejected. Ground 5 specifically raised the issue that the judge failed to direct the jury that even if they found that the accused told lies as to his whereabouts at the time of the shooting that would not by itself prove that he was at the place where the identifying daughters said he was.

Twice in his summing-up, the trial judge adverted to the manner in which the jury should approach the alibi of the applicant. Towards the end of the summing-up and just before he reminded the jury of the pith of the defence evidence, the trial judge said:

> "Now the accused man gave evidence on oath and he called a witness. Now you remember I told you that he hasn't got to prove anything. He had a choice. If he wanted he could have stayed there and said

> "nothing but he elected to give sworn evidence and he has called his mother as a witness. So you have to give this evidence the same careful examination and care that you attach to the evidence for the Prosecution witnesses. Not because he is an accused man you are going to say you don't believe him. Even if you don't believe what himself and his mother told you, you cannot convict him on that account. You still have to go back and examine the Crown's case in the light of the directions that I gave you, identification and things like that, to say whether or not the Prosecution has satisfied you so that you feel sure of his guilt."

When in the passage quoted above the trial judge told the jury that they could not convict the applicant on the ground that they disbelieved his evidence it must have been clear to them that if they found that he was telling lies that alone would not be a basis for conviction.

Earlier at page 87 of the Record, the learned trial judge is reported as directing the jury that:

> "Now in this case the accused man's defence is an alibi, 'I was not there.' That is his defence. He hasn't got to prove that he was not the person who shot this lady. The prosecution must satisfy you that he was the person who committed the offence."

In his general directions which immediately preceded the above directions the jury had been correctly told that the burden of proving the guilt of the accused lay on the prosecution and that there was no burden on the accused (applicant) to prove anything. No complaint has been made of his directions on the standard of proof.

It has become so customary, that we had come to regard it as the invariable rule, for the trial judge to expressly tell the jury that although the alibi has been raised up by the defence there is no burden on the defence to prove the alibi.

Rather there was a burden on the prosecution to negative the alibi and if at the end of the day the jury either believed the alibi defence or were in doubt about its authenticity, the prosecution would have failed to discharge its burden of proof. This very simple direction covers the entire field whenever alibi defence is raised. But that is not to say that in all cases where the direction is less full than that suggested above there is a misdirection. What the cases show is that the jury should not be left in any doubt as to where the burden of proof lies. In R. v. Wood [1968] 52 Cr. App. R. p. 74 in the judgment of the Lord Chief Justice, the true rule applicable to alibi defences is:

> "It is said, as I understand it, in the first instance, that it is a rule of law that when an alibi is raised a particular direction should be given to the jury in regard to the burden of proof, and that in every case when an alibi is raised the judge should tell the jury, quite apart from the general direction on burden and standard of proof, that it is for the prosecution to negative the alibi. In the opinion of this Court, there is no such general rule of law. Quite clearly if there is any danger of the jury thinking that an alibi, because it is called a defence, raises some burden on the defence to establish it, then clearly it is the duty of the judge to give a specific direction to the jury in regard to how they should approach the alibi.
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> In the opinion of this Court, there was no danger here of the jury thinking that there was any burden on the defence. Indeed at the outset in his general direction the judge made it clear, as it seems to this Court, that at no time would a stage be reached when any burden was put on the defence, because, having said that the obligation lies on the Crown to prove the defence's guilt, he continued: 'That means that when you consider the whole picture, the whole of the evidence, unless you are fully satisfied that a particular charge has been proved, then he is entitled to be acquitted'."

We are of the view that when the two passages to which reference has been made herein are read together, it was placed unequivocally before the jury that the prosecution had an obligation to negative the alibi before a verdict of guilty could be returned against the applicant.

Mr. Samuels reserved the fire of his challenge for his criticisms of the directions on identification. Chester Orr J. directed the jury thus:

> "Now before I go into detail I have to tell you that as regard these two ladies I have to give you a warning and the warning is this, that when a witness comes to Court and says that I saw X do this, when the Crown depends on the visual identification, I am duty bound to give you a word of warning, and the reason is this that because people make mistakes in life. It may have happened to you that you have mistaken, it may be a good friend, somebody else for a good friend. You may have seen somebody downtown, for instance, who you thought was a very good friend of yours who you know well and when you met that friend later on and you said to them, 'I saw you downtown the other day,' and the friend looks at you with a blank stare and says, me, I was in Miami or Montego Bay or something like that, and then you are prepared to come to Court and say that you saw your friend. So that is a question of mistake. So that is why you have to approach the evidence with caution.
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> More reason is this that the witness may be lying. The Defence is saying that these two witnesses have disapproved of the relationship therefore they are lying. That is why you have to approach their evidence with caution."

A direction of this nature was criticized - Junior Reid, Roy Dennis and Oliver Whylie v. R.; Errol Reece et al v. R., Privy Council Appeals Nos. 14, 15, 16/88 and 7/89 reported at [1989] 3 W.L.R. 771. Lord Ackner who delivered the opinion of the Board in disposing of the appeal of Oliver Whylie said:

> "Now it is clear that the first warning set out above is a warning in general terms applicable to all witnesses, and the second warning adds very little to the first. What the judge failed to do was to explain that visual evidence of identification is a category of evidence, which experience has shown is particularly vulnerable to error, errors in particular by honest and impressive witnesses and that this has been known to result in wrong convictions. Accordingly identification evidence has to be treated with very special care."

It is absolutely necessary that trial judges within our jurisdiction must take the most careful note of the decisions of the Privy Council on the issue of visual identification evidence. This kind of evidence must be placed in a special category and rendered special treatment. It is insufficient to rely on a warning as to personal experiences of jurors in mistakenly identifying strangers or old friends. More comprehensive directions must be given. Jurors should be told that where the prosecution's case is supported wholly or substantially by uncorroborated evidence of visual identification they should approach the case with the greatest caution because there are certain inherent, grave and serious risks associated with visual identification evidence. These grave risks are that experience inside the Courts has shown that persons have been wrongly identified by honest, respectable, responsible and positive witnesses who had ample opportunities for observation and who made strong impressions in the witness box. However positive the witness, there is the strong possibility that he might be mistaken for any number of reasons. Consequently if their verdict is to be one of guilty based on evidence of visual identification they must distinguish between the apparent honestly of the witness and the accuracy of the evidence which

he gives. After this general warning the judge might call to mind personal experiences of jurors to re-inforce the dangers of acting upon uncorroborated visual identification evidence. Judges at trial might very well adopt a practice of directing jurors from prepared statements on this aspect of the law.

Another essential feature of the summing-up must relate to the circumstances of the visual identification and all weaknesses in the evidence of identification must be specifically brought to the jury's attention.

In the instant case the evidence of visual identification although of a particularly strong character, did not stand uncorroborated. We must call to mind that in a well lit room, the deceased's grown daughter saw a man with the "smoking gun" whom she said she recognized as the applicant. He had lived in this house for months as the paramour of her mother and it is fair to infer that she saw him on a daily basis. The chances of mistake on her part as to the identity of the applicant in those circumstances were particularly thin, nevertheless as we have said before the warning given by the trial judge did not meet the test as laid down in Junior Reid's case. There was evidence from the investigating police officer which was capable of providing powerful corroboration of the eye-witness evidence. When the applicant was told that the police were investigating a crime of murder against him, he replied after caution:

> "Officer, a didn't mean to kill her sir, because anything a want she give it to me."

If the jury believed that he used these words and repeated them in substance upon arrest, they could find that the statement amounted to independent testimony which strengthened the visual identification evidence. We think that this case is very similar to that of Delroy Quelch, one of the applicants in Errol Reece et al v. The Queen [1989] 3 W.L.R. 771 and that the applicant's conviction should be upheld.

For the reasons herein we treated the hearing of the application as the hearing of the appeal and we dismissed the appeal.