JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS. 70 & 81/98

COR. THE HON. MR. JUSTICE FORTE P.
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

REGINA v MARK SANGSTER
RANDALL DIXON

Earl Witter and **Miss Elham Bogle** for the applicant Mark Sangster

C. J. Mitchell for the applicant Randolph Dixon

Bryan Sykes, Deputy Director of Public Prosecutions
and Miss Grace Henry for the Crown

January 24, 25 and March 23, 2000

WALKER J.A.

On July 9, 1998 at a trial held in the Home Circuit Court, Kingston the applicants, Mark Sangster and Randall Dixon, who were jointly charged with the capital murder of Phillip Gordon, were convicted of non-capital murder and capital murder, respectively. On the same date Sangster was sentenced to imprisonment for life with a recommendation that he should not be considered eligible for parole before serving a period of imprisonment of 30 years and Dixon was sentenced to death.

The main point which arises in these applications for leave to appeal is concerned with the quality of the identification evidence. The submissions mounted on behalf of each of the applicants were that the evidence was so poor that the trial judge should have withdrawn the case from the jury and directed an acquittal at the close of the prosecution's case.

As regards both applicants evidence of identification came from two witnesses, namely Anthony Gayle and Valimore Lawman. The witness Gayle, then a Constable in the Island Special Constabulary Force said that on September 18, 1996, in company with Det. Cpl. Phillip Gordon, Spl. Cpl. Lawman and District Constable Mullings, he travelled in a vehicle to a hairdressing parlour in Spanish Town. While there they were alerted to a robbery which was taking place at the office of Western Union located in a nearby plaza. The quartet of them immediately rushed to the scene. The time of day was about 11:30 a.m. He and Gordon went to the side of the building while the other two officers went in the direction of a passageway. At the side of the building he and Gordon stooped down , Gordon in front of him. While in this position he saw a man, whom he later identified as the applicant, Sangster, emerge through the entrance door of the building. Sangster was carrying a bag over his shoulder and a firearm resembling a UZI sub-machine gun in his hand. Sangster came towards him and, when about 8ft away, suddenly turned back in the direction where Lawman and Mullings had gone. As Sangster approached him he took a good look at Sangster's face for a brief period of 3-5 seconds.

Shortly afterwards he heard gunshots being fired whereupon he and Gordon ran to the back of the building where again they stooped down. Then he saw another man, whom he subsequently identified as the applicant Dixon, come from the back of the Western Union building. Dixon, who was then armed with a 9mm pistol, turned the corner of the building and fired at Gordon who fired back at Dixon before falling to the ground. Dixon was then about 20ft away from the witness and his face was clearly visible for about 3-7 seconds at this time. He later discovered that Gordon had been fatally shot.

The witness, Valimore Lawman, deposed to having gone to the scene of the incident in the company of his colleagues as hereinbefore described. Having been spoken to by a security officer who was present on the scene he took up a position at the main entrance to the building which housed the Western Union office. From that position he saw a man carrying a bag and a UZI sub-machine gun come from the building. This man he subsequently identified as the applicant, Sangster. In exiting the building Sangster was preceded by a woman carrying a baby and followed by two men, one of whom on a later date he identified as the applicant Dixon. At this time Dixon was armed with a gun and wearing headgear which he described as a hat seemingly made of cloth. He was, himself, armed and fired one shot at the men after which Sangster turned around and opened fire at him. He was shot in the left leg and fell to the ground where he lay on his stomach. He observed Sangster for a period of about 1 ½ minutes during the incident. Of Dixon the witness said "I could see him clearly,

his face, his whole body." He observed Dixon's face for a period of about 1 minute at a distance of a little more that ½ chain (a distance pointed out in court and apparently agreed by all) during the gunfire.

Both witnesses identified both applicants at identification parades held in respect of Sangster on October 7, 1996, and for Dixon on October, 16,1996.

At the close of the case for the prosecution the trial judge rejected a submission made on behalf of each applicant that there was no case to answer.

On their part the applicants gave evidence each relying on a defence of alibi.

The first submission made on behalf of Sangster, and the only submission advanced on behalf of Dixon, is that the trial judge ought to have withdrawn the case from the jury on the basis that the identification evidence was of poor quality. In this regard both Miss Bogle for Sangster and Mr. Mitchell for Dixon placed great reliance on the authority of *Junior Reid v R* [1990] 1 A.C. 363. In that case it was held that where the quality of identification evidence was considered by the trial judge to be poor and there was no other evidence to support the identification, the trial judge should withdraw the case from the jury at the end of the prosecution's case and direct an acquittal of the defendant. Having reviewed the facts of the case, Lord Ackner speaking for their Lordships of the Privy Council said (at page 392):

> "As the facts ... clearly demonstrate, the quality of the identifying evidence was indeed poor. In each case it depended solely on a fleeting glance made in

> difficult circumstances. The witness was lying flat on his front frightened for his life and trying to hide from the very men he subsequently purported to identify. *Reece* and *Taylor* formed part of a large group of seven men in all and there was no special reasons to concentrate on them, since neither was armed whereas others were. Both men ran past the witness, and all seven men in the group were complete strangers to Corporal Chambers. In their Lordships' view this was a classic case where the uncorroborated identifying evidence was so poor, depending solely on fleeting glances and further made in difficult conditions, that the judge should have withdrawn the case from the jury at the end of the prosecution evidence and directed an acquittal."

In his argument Mr. Sykes for the Crown referred us to the case of *Tyler* and *Others* [1993] 96 C.R. App.R 332, a decision of the English Court of Appeal. In *Tyler* in treating with the quality of the identification evidence adduced by the prosecution Farquharson L.J had this to say (at page 339):

> "There can be a good identification even when the conditions are difficult. The fact that two witnesses are observing the same event does not, so to speak, merge their evidence into one. There are still two separate and independent identifications, provided they are honestly made, as the jury must have accepted they were. In those circumstances, the fact that their observation was made from the same place does not prevent the identification by one being supported by the other. Putting it shortly, an identification of a suspect by two different witnesses carried more weight than one. If there had been only one witness to the incident, the position may have been different, given the circumstances, but with the evidence of two available to him, the judge was not under a duty to withdraw the case from the jury."

As will be readily appreciated from the passage of Lord Ackner's judgment quoted above, the factual situation in *Junior Reid* bears some resemblance to that of the present case. For one thing in the present case there can be no gainsaying the fact that the identification of both applicants, who, hitherto, had been unknown to the witnesses was made in difficult circumstances. However, Lord Ackner's observations must not be interpreted as implying that a reliable identification can never be achieved in difficult circumstances. Common sense dictates otherwise. Circumstances alter cases and it is quite possible for a perfectly reliable identification to be made under difficult circumstances. Here the witnesses Gayle and Lawman were law enforcement officers who, having been alerted, went to the scene of a crime for the obvious purpose of identifying and apprehending the criminals involved. It could reasonably be inferred that in keeping with their training and in order to achieve their objective, they would have paid particular attention to armed men who were present on the scene. It was against such a background that the identification evidence of these two witnesses fell to be evaluated. But we think that *Junior Reid* is distinguishable from the present case in a most important respect. The distinction lies in the fact that whereas in *Junior Reid* the identifying evidence was uncorroborated, in the present case there was such corroboration once the jury accepted, as obviously they did, the evidence of Gayle and Lawman.

Furthermore, it is our view that Lawman's evidence, standing on its own, sufficed to establish a prima facie case against both applicants. We conclude, therefore, that the trial judge was clearly right not to have withdrawn the case of either applicant from the jury.

On behalf of the applicant, Sangster, further arguments were advanced on a ground which reads:

> "The learned trial judge was manifestly wrong when he directed the Jury that police officers are much more capable of identifying accused men as there are no exceptions to the rule in *Junior Reid vs Regina."*

In this regard complaint was taken against the following passage of the judge's summing up:

> " Honest police officers are more likely to be more reliable than the usual general public. They may be trained and less likely to have their observation and recollection affected by the excitement of the situation. This is in effect a commonsense approach. So you might well think that these are police officers, they were told of something happening. A robbery is taking place, so therefore they will be more alert because they know that they would have to identify the persons coming. They will have to identify persons committing offences so that it might very well be that they might pay greater attention to identifying those persons whom they say committed offences, and as I said, it is a commonsense approach."

In *Tyler's* case (supra) a somewhat similar direction was given to the jury by the trial judge. It reads thus:

> "You are all entitled, if you think fit, to take into account that the witnesses by whom it is said the identifications were made were police officers in this

> case. On principle, all witnesses are obviously subject to the same rules when it comes to assessing and weighing their evidence. In dealing with any particular identification, you are entitled to take into account that it might be more likely that a police officer's evidence would be perhaps more reliable than that of a witness who was, if I may use the phrase, an ordinary member of the public. A non-police witness. The basis on which that might rest would be that you might feel that anyone who has been involved in the criminal justice system who happens to witness an incident is possibly likely to have a greater appreciation of the importance of identification and accordingly to look for some particular identifying feature."

Criticism was made of this direction on the ground that the judge was not entitled to make any comment suggesting that a police officer's observation of an incident was superior to that of anybody else. Further, it was submitted that such a comment could only properly be made when the powers of observation of the police officer can be related to the facts of the identification. This criticism did not find favour with the court, Farquharson, L.J. in his judgment observing at page 343:

> "The training of police officers to carry out their duties when a riot is taking place and to observe what is happening around them is a point which can properly be made in the restrained way the judge expressed it."

On this aspect of the matter assistance is also to be found in *Junior Reid v R* (supra) where Lord Ackner said :

> "Although the judge stressed that the witness was a police officer, and suggested that his ability to identify people could well be greater than that of an

> ordinary member of the public, experience has undoubtedly shown that police identification can be just as unreliable and is not therefore to be excepted from the now well established need for the appropriate warnings."

In the present case the comments of the trial judge must be seen and evaluated in their proper context. Immediately preceding the impugned passage in his summing up this is what the judge said:

> "Now, bearing in mind the dangers of visual identification you will have to ask yourselves, are we certain that each of the identifying witnesses is making no mistake when they say it was the accused man they saw coming from the Western Union building armed with guns and fired shots which killed Corporal Gordon and shots which injured Special Constable Lawman, because even if Constable Gayle and Special Constable Lawman are certain in their minds that they are making no mistake it is you the jury, who have to be satisfied that they are making no such mistake. I must remind you that whilst all witnesses are subjected to the same rules, you the jury, in assessing reliability, are entitled to take account of the reasons given for a positive identification. An identifying witness who happens to be involved in the criminal justice system, is likely to have a greater appreciation of the importance of identification and so do look for some identifying features."

Viewed contextually we are of opinion that the judge's comments are unexceptionable and do no violence to Lord Ackner's dicta in *Reid*. Indeed, as seen above the judge expressly reminded the jury in terms that "all witnesses are subjected to the same rules" following exactly the observations of Lord Lane

C.J. in Ramsden [1991] Crim.L.R. 295 (at page 7), a decision to which he had been referred on the no-case submissions addressed to him.

The final ground which was argued on behalf of the applicant, Sangster reads as follows:

> "The learned trial judge failed to assist the jury as to how to deal with the discrepancy between the witness testimony that the witness who had the most opportunity to observe the accused men Sophia Alvaranga described them differently as wearing peaked caps and dark glasses in contrast to the Police Officers who purported to identify them as not wearing caps or dark glasses."

We mention this ground only to say that we found no merit in it. The witness Sophia Alvaranga did not purport to identify either of the applicants. They were both identified independently of her. She witnessed the robbery that took place inside the Western Union building where she was present. That robbery preceded the shooting incident which took place outside the building and in which Det. Cpl. Gordon was fatally shot. She did not witness the latter incident and so would have been quite unable to say whether or not having left the building the robbers were divested of any accessories that they were wearing while carrying out the robbery inside the building.

Finally, before parting with this matter we would comment on two pieces of evidence to which reference was made by Miss Bogle. During the examination - in - chief of the witness, Lawman, the following questions by prosecuting counsel and answers by the witness were permitted by the court:

"Q. Now, we had stopped , sir, at the place where you said while the Security Guard was talking to you a man and a woman came out, the woman with the baby, the man followed and then the Security Guard said something, and I was about to ask you what he said when my learned friend took the objection. What did the Security Guard say to you, if anything?"

A. "See one of the man deh officer."

And later on:

Q. "Now, when this third person came out, did anyone say anything?

A. Yes, madam

Q. Who said what?

A. The Security Guard said, "See the next one deh officer."

Miss Bogle submitted that these questions and answers were permitted by the judge in breach of the hearsay rule and were, as such, inadmissible in evidence. With this submission we entirely agree, and would note that the security guard to whom reference was made was not called as a witness in the case. However, Lawman's evidence was wholly visual. It pertained to the identities of the two men whom he said he saw shoot the deceased and himself and was not founded on anything that the security guard said to him.

Accordingly, the evidence complained of, though clearly inadmissible, did not affect the integrity of the identification evidence of Lawman.

In the result these applications are refused and the convictions and sentences affirmed. In respect of Sangster, his sentence is to commence on October 9, 1998.