JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 118/2009

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA

DWAYNE THOMAS v R

Robert Fletcher for the applicant

Mrs Karen Seymour-Johnson and Gavin Stewart for the Crown

8, 11 July 2013 and 20 January 2017

BROOKS JA

[1] Mr Dwayne Thomas was convicted on 13 October 2009 in the Home Circuit Court for the offence of murder. On 19 November 2009, he was sentenced to imprisonment for life and ordered to serve 25 years before being eligible for parole. Being dissatisfied with that result, he applied for permission to appeal against the conviction and sentence. His application was considered by a single judge of this court, but was refused. His renewed application was heard by this court on 8 July 2013 and, on 11 July 2013, it too was refused. Mr Thomas' sentence was then ordered to run from 19 February 2010, in accordance with the practice at that time, that the sentence in the

case of an unsuccessful appeal be commenced three months after the date of the passing of the sentence at first instance. These are the reasons for that refusal. The delay in their delivery is regretted.

The prosecution's case

[2] The essence of the evidence presented by the prosecution at the trial, was that on 16 September 2005, between 12 noon and 1:00 pm, Mr Devon Lewis, a security guard who was posted at section three of the Comprehensive Health Clinic in Kingston saw two men in the process of robbing a man who had been sitting in the waiting room there. That man was later identified as the applicant Mr Thomas. Immediately before they carried out their criminal activity they spoke to another man who had also been sitting in the waiting room.

[3] Mr Thomas had been at the facility since about 7:45 that morning. He was anxious to be treated and was impatient about the long delay. He had, in that regard, spoken to Mr Lewis several times during the course of the morning. The discussions had been at close range and Mr Lewis had ample opportunity to see the man's face. The robbery took place after those several discussions.

[4] Mr Thomas was understandably livid about the robbery. He refused to be placated. He was not interested in any intervention by the police. He and another man, who had been with him in the waiting room, left the facility. After about 20 minutes, they returned. Mr Lewis noticed that Mr Thomas was, at this time, armed with a firearm. He saw the handle of the firearm and the magazine. He said the magazine was

"an automatic pistol magazine". Mr Thomas spoke to Mr Lewis and said that someone had to pay for the wrong that had been done to him.

[5] Mr Lewis left the area. He went to another section of the facility to call the police. Within 45 seconds of leaving section three, he heard an explosion sounding like a gunshot. He immediately looked in the direction of section three and saw Mr Thomas and his companion running away. No one else ran away. Mr Lewis went back to section three and saw the man, to whom the robbers had spoken, sitting on a bench with his head, oozing blood, tilted backward. The man was motionless and appeared dead. A loaded firearm magazine was beside him on the bench. The magazine was similar to the one he had seen on the firearm that Mr Thomas had.

[6] Detective Inspector Clayton Richie was one of the police officers who responded to the call for police assistance. On 16 September 2005, at about 1:40 pm he received a report, and as a result, went to section three of the Comprehensive Health Clinic. There he saw the body of a man on a bench in a sitting position with its head tilted backward. He saw, what appeared to him to be a gunshot wound to the person's head and the left eye was missing. He also saw a spent 9mm shell casing on the floor nearby. There was also a firearm magazine on the bench beside the body. It was for a 9mm firearm, and contained nine live rounds.

[7] Inspector Richie spoke with Mr Lewis and recorded a witness statement from him. In that exercise, Mr Lewis said that the robbery victim was a man of "fair complexion".

[8] The inspector made arrangements for the body that was on the bench to be taken to the morgue at the Kingston Public Hospital, where, in his presence, it was examined by a doctor. On 13 October 2005, Inspector Richie witnessed that a post mortem examination was performed on the same body, at the Spanish Town Hospital morgue. The examination was conducted by Dr Ere Sheshiah. The body was identified to the doctor and the inspector as being that of O'Neil Haye. Dr Sheshiah did not give evidence at the trial.

[9] There was no evidence led by the prosecution as to how Mr Thomas came to be in the custody of the police, but on 10 September 2006, Inspector Richie spoke with him at the Denham Town Police Station. The inspector asked for an identification parade to be held. It was conducted by Sergeant Jeffrey Salmon who was then stationed at that police station.

[10] Sergeant Salmon testified that he was in charge of the identification parade on which Mr Thomas was the suspect. He said the witness was Mr Devon Lewis. The sergeant testified that after Mr Thomas had taken his place on the parade, Mr Lewis was brought in and instructed as to the procedure. He said that Mr Lewis, as he was instructed, walked up and down the aisle looking at the persons on the line-up. The sergeant's evidence in chief, in respect of what occurred, was recorded thus:

> "... He walked up and down and looked and said number three.
>
> HER LADYSHIP: Just one minute.

HER LADYSHIP: Yes?

A. He said number three. Immediately after that he said sorry, sorry, sorry, he said number seven." (Page 112 of the transcript)

[11] It was Mr Thomas who was at position seven, on the line-up of nine men on the parade. Mr Lewis' explanation at the trial for having first said "number three" was that, based on what he had been instructed by the police to do, he started counting one, two, three, but it was when he looked at the number above the man's head, he realised that it was number seven. He said that he realised that he had started counting from the wrong end. Sergeant Salmon denied having given Mr Lewis any instructions concerning counting.

[12] On 23 October 2006, Inspector Richie arrested and charged Mr Thomas for the murder of Mr Haye.

[13] At the trial, Mr Lewis identified Mr Thomas as the victim of the robbery. He said that Mr Thomas was lighter in complexion at the time of the robbery, than he was in court. He surmised that Mr Thomas had been bleaching his skin at the time of the robbery, because he had noticed that "his hand was much more [sic] darker than his face" (page 71 of the transcript).

A submission of no case to answer

[14] At the end of the prosecution's case, counsel for Mr Thomas submitted that there was no case for Mr Thomas to answer. The major points made in that submission was

that, firstly, there was no evidence as to who shot Mr Haye, secondly, that the identification of Mr Thomas on the parade, as the shooter, should not be accepted, and thirdly, that Mr Lewis had described the victim of the robbery as a brown man and that Mr Thomas could never be described as a brown man.

[15] The learned trial judge found that there was a case to answer.

The defence

[16] Mr Thomas made a brief unsworn statement in which he asserted his innocence. He said that he had been wrongfully accused. It appears that he did say something about being at Denham Town, but his actual words were not recorded. There was a suggestion in the submissions in respect of the appeal that what he had said was that he had been detained at the Denham Town Police station for stealing electricity when he was wrongly accused of the offence. The learned trial judge attempted to have him recall his train of thought at the time of his statement, but he did not pursue the point. He called no witnesses.

The directions to the jury

[17] The transcript reveals that after the learned trial judge's directions to the jury they retired for approximately two hours, but returned without having arrived at a unanimous verdict. On the learned trial judge asking the foreman if she could be of assistance, the foreman intimated that they required assistance in respect of "an inference as it relates to the facts" (page 285 of the transcript).

[18] The learned trial judge's response to the foreman was that she was unable to be of assistance in matters relating to the facts, as that was within the province of the jury.

[19] The jury retired a second time, and after 36 minutes, indicated that they had arrived at a unanimous verdict of guilt.

The appeal

[20] Four grounds of appeal were originally filed by Mr Thomas:

> "a) The Learned trial Judge erred in law in overruling the no case submission made on behalf of the accused Dwayne Thomas.
>
> b) The Learned Trial judge erred in law in finding that she could not direct the jury on inference after direction was requested by the Jury.
>
> c) The verdict in this case goes against the weight of the evidence.
>
> d) The verdict was unsafe and [un]reliable in all the circumstances."

[21] At the hearing of the appeal, Mr Fletcher, who appeared for Mr Thomas, argued, ground (b) above, and, with permission, three supplemental grounds, the third of which was a re-formulation of ground (a) above. The grounds were:

> 1. "The learned trial judge's failure to ascertain from the jury what aspect of the inference relating to the facts was proving to be a problem was a non-direction amounting to a critical misdirection in law."
>
> 2. "The learned trial judge failed to assist the jury as to how they ought to treat that aspect of the identification

parade which raised the possibility that the attention of the witness may have been drawn to the suspect, impugning the parade as a tool of identifying the applicant."

3. "The learned trial judge erred in not upholding the no-case submission as far as it spoke to the question of the insufficiency of the evidence of identification."

A further supplemental ground was contained in Mr Fletcher's written submissions. It asserted that the sentence was manifestly excessive. Mr Fletcher did not pursue that ground.

[22] Mr Fletcher argued that ground (d) was justified by the difficulties with the identification parade. He sought and obtained permission to abandon ground (c), as originally filed.

[23] These grounds are assessed individually below. Ground (d) will be assessed as part of the issue concerning the fairness of the identification parade.

The refusal to uphold the no-case submission

[24] Mr Fletcher submitted that the case was unusual because, although it was a case of circumstantial evidence, every aspect of the facts, which formed the bases of the prosecution's case, was founded on direct identification evidence. Hence, learned counsel submitted, the evidence as to Mr Thomas' presence was direct evidence. That evidence, he argued, came from Mr Lewis, whose credibility was severely impacted by the occurrences at the identification parade.

[25] If the evidence of the identification parade were to fall away, learned counsel argued, the prosecution would have been left with only a dock identification, which would have resulted in an acquittal. He argued that Mr Lewis' testimony concerning the identity of the robbery victim was made even more tenuous by the incongruity of the complexion of that victim and Mr Thomas' darker hue.

[26] Mr Fletcher relied, for support in these submissions, on the judgment in **Melody Baugh-Pellinen v R** [2011] JMCA Crim 26. He argued that the prosecution's case, taken at its highest did not allow the jury to draw an inference, beyond reasonable doubt, as to Mr Thomas' guilt.

[27] Mr Fletcher is not on good ground in this argument. The evidence concerning the circumstances in which the shooting took place was such that acquittal or conviction was a matter dependent on the jury's view of that evidence. There was evidence of:

a. Mr Thomas' presence at the scene and his interaction with Mr Lewis;
b. his leaving the premises and returning in possession of a firearm;
c. the type of magazine that the firearm carried;
d. Mr Thomas being the only person who had been seen armed with a firearm at the time;
e. Mr Thomas' indication that someone had to pay for the wrong done to him;

f. Mr Thomas running away from the location immediately after the explosion;

g. the magazine on the floor resembling that which Mr Thomas had; and

h. the spent shell matching the unused rounds in the magazine.

[28] These issues were matters which, if the jury believed Mr Lewis on them, could lead them to properly conclude that Mr Thomas was the robbery victim and that he was the person who fired the fatal shot. There was nothing particularly unusual about the case in this regard. The learned trial judge was right, in accordance with the principles laid down in **R v Galbraith** [1981] 2 All ER 1060, to have rejected the no-case submission and to have called upon Mr Thomas to answer the prosecution's case. The statement in **Melody Baugh-Pellinen v R**, cited by Mr Fletcher, was as follows:

> "[34] In the light of these authorities, it therefore seems to us that the correct approach to the question of whether the learned trial judge ought to have upheld the no case submission in the instant case **is to consider whether the evidence adduced by the prosecution at that stage was such that a reasonable jury, properly directed, would have been entitled to draw the inference of the appellant's guilt beyond reasonable doubt**." (Emphasis supplied)

[29] That principle did not depart from the principle that was set out in **Galbraith**, namely, that where the strength or weakness of the case depended on the view taken

by the jury of the evidence, and one possible view could properly lead to a conviction, then the trial judge should leave the matter to be tried by the jury.

[30] Ground (a) failed for those reasons.

The absence of further directions as to the jury

[31] The transcript reports, at pages 284-286, the relevant exchange between the learned trial judge and the foreman:

> "HER LADYSHIP: If you don't [have a unanimous verdict] I will ask you if there is any hope of your arriving at a unanimous verdict if you are given further time.
>
> MR. FOREMAN: In that case could we have another half an hour?
>
> HER LADYSHIP: You can have all the time you need. Is there a problem as it relates to the law or to the facts?
>
> MR. FOREMAN: No not to the law. To an inference as it relates to the facts.
>
> HER LADYSHIP: If it is in relation to the facts then there is nothing that I can assist you with because that is your province. If it was something that was related to the law then maybe I could assist you with further directions on the law but since you say it is in relation to the facts, because inferences that you are required to draw, would be tantamount to findings of fact and that is your province, so I could not assist you in that department. You said you would like some additional time and if that is so then I will grant that request.
>
> MR. FOREMAN: Yes, ma'am.
>
> HER LADYSHIP: Okay. As I said, you have to give and take, you have to discuss and you have to try to arrive at a verdict. If, however, you cannot and you wish to return

> after you have considered a bit further, then you can let me know. Okay? Thank you, very much."

[32] Mr Fletcher argued that a trial judge, when asked by a jury for assistance, should try to assist the jury in respect of its specific area of difficulty. He argued that the trial judge is not confined to giving assistance in respect of the law only. In any event, he argued, the learned trial judge failed to identify what was the nature of the difficulty that the jury was having and therefore failed in her duty to identify whether or not she could assist.

[33] Learned counsel pointed out that the foreman indicated that the jury's difficulty was with the question of inferences. He submitted that that was an issue of law. The learned trial judge, he submitted, ought to have sought to discover specifically what it was that concerned the jury. He argued that failure to help the jury in those circumstances was an egregious violation of the requirement to assist the jury.

[34] Mr Fletcher relied on **Mears (Byfield) v R** (1993) 42 WIR 284 in support of his submissions in this regard.

[35] Mrs Seymour-Johnson, for the Crown, argued that as the foreman had identified the area of concern to the jury, the learned trial judge was correct in saying that she was unable to give any further assistance in that regard. Learned counsel submitted that the learned trial judge had given clear and ample directions on the issues of circumstantial evidence and inferences. There was, she argued, nothing for the learned trial judge to have added.

[36] In assessing these submissions, it is important to note the guidance given by their Lordships in **Mears v R**. Their Lordships endorsed their earlier stance taken in **Linton Berry v R** (1992) 41 WIR 244 that the jury is entitled to assistance from the trial judge at every stage of the proceedings. That assistance is not limited to law but extends to the facts of the case as well. The portion of the judgment in **Linton Berry v R**, to which their Lordships referred, appears at page 259 of the report of **Linton Berry v R**, and states as follows:

> "The judge ... did not find out what was the problem which had brought the jury back into court and it is therefore impossible to tell whether anything said by the judge resolved the problem or not, because no-one knows what the problem was. Their Lordships have already met this difficulty in some other recent cases. The jury has sought assistance and, once it appears that the problem is one of fact, the judge has not enquired further but has merely given general guidance, as in the present case. **The jury are entitled at any stage to the judge's help on the facts as well as on the law.** To withhold that assistance constitutes an irregularity which may be material depending on the circumstances, since, if the jury return a "Guilty" verdict, one cannot tell whether some misconception or irrelevance has played a part...." (Emphasis supplied)

[37] Based on that learning, the learned trial judge was in error in denying the jury any further direction, merely on the basis that they had a concern about the facts. It is true that the circumstances of this case are somewhat different from those in **Mears v R** and **Linton Berry v R**, in that the particular area of difficulty was identified, that is, the question of inferences. Nonetheless, in order to avoid the speculation as to whether any "misconception or irrelevance played a part" in the deliberations of the jury, the

learned trial judge should have reviewed or repeated her directions concerning inferences.

[38] The learned trial judge had dealt with inferences in her original address to the jury. At pages 216 - 218 of the transcript, she is recorded as saying:

> "Now, in this case, as counsel for the Prosecution told you when she started and in her closing address, she also told you that inferences would be a vital part of the case for the Prosecution. Now, apart from finding the actual facts proving the case, Mr. Foreman and members of the jury, you are entitled to draw reasonable inferences from such facts as you find proved in order to assist you in coming to your decision. Certain matters cannot be proved by direct evidence, that is by eyewitnesses. That is a witness who can say, I saw it happen, or, I heard it happen. Certain matters can only be proved by inferences from any other proven facts, and it is for this reason why you were entitled to draw reasonable inferences. You are entitled to infer from facts proved other facts necessary to complete the elements of guilt, or to establish innocence. **You may draw inferences from proven facts if those inferences are inescapable, but you must not draw an inference unless it is a reasonable one. You must be sure that it is the only inference which may reasonably be drawn** ….
>
> Where evidence is capable of two interpretations, Mr. Foreman and members of the jury, my duty is to point out those possible interpretations to you, leaving you to decide which interpretation you are going to accept, having regard to the rest of the evidence in the case. I cannot direct you as to what facts you are to find, and whatever inferences you draw, these amount to findings of facts. When I leave both interpretations to you you must look over the whole picture and see which one you are going to take, if any. Because you may not agree with either or any of them, so at the end of the day you will have to look at those, take the whole picture and to decide what you accept and what you [sic] what you reject." (Emphasis supplied)

[39] The learned trial judge also gave directions in respect of circumstantial evidence. As part of those directions, she warned against speculation. The directions would have been helpful to the jury. Pages 229 - 231 of the transcript records the following:

> "In some cases such as the present one, there is no direct evidence of the crime available to the Court, and the Prosecution relies on what is called circumstantial evidence to prove the guilt of the accused. That simply means that the Prosecution is relying upon evidence of various circumstances relating to the crime and the accused, which they say, when taken together, leads to the sure conclusion that it was the accused who committed the crime, in this case, the murder. It is not necessary for the evidence to provide a [sic] answer to all the questions raised in the case. You may think it may be an unusual case, in deed [sic], in which a jury says, we now know everything we need to know in this case, but the evidence must lead you to the sure conclusion that the charge which the defendant faces is proved against him. Circumstantial evidence, Mr. Foreman and members of the jury, can be powerful evidence, but, it is important that you examine it with care and caution and consider whether the evidence upon which the Prosecution is relying on in proof of its case is reliable, and whether it does prove guilt. So, you have to look at it with care and caution. Furthermore, before convicting on circumstantial evidence, you should consider whether it reveals any other circumstances which are or may be of sufficient reliability and strength, strength to weaken or destroy the Prosecution's case.
>
> **You should be careful to distinguish between arriving at a conclusion based on reliable circumstantial evidence and what is mere speculation. Speculation in a case amounts to no more than guessing or making up theories without the evidence to support them, and neither the Prosecution or the Defence should do that, because I told you we cannot speculate, we have to arrive at a verdict based on the evidence that you have heard, and you must be satisfied to the extent that you feel sure of the**

> **accused's guilt**, because that is the burden which is placed on the Prosecution and it never shifts." (Emphasis supplied)

[40] The learned trial judge related those directions to the particulars of the case. In respect of Mr Lewis' evidence she said:

> "He may be described as their main witness. You will have to examine his evidence to determine whether or not the various circumstances relating to the murder of Oneil Hay, and this accused which the Prosecution is saying that when taken together, leads to the sure conclusion that it was, in fact, the accused who killed the deceased. So you have to look at all the circumstances together. It's like you are taking a piece of a cross word puzzle and you are putting them, bit by bit, together to get the whole picture, that's what the Prosecution is asking you to do." (Pages 233-234 of the transcript)

[41] Based on those comprehensive directions, it is unlikely that the jury would have turned to speculation or any other improper method of determining the issues with which they had to wrestle. In the circumstances, despite the unfortunate lack of further directions from the learned trial judge, there would have been no miscarriage of justice resulting from that failure.

[42] This ground also failed.

The directions concerning the identification parade

[43] Mr Fletcher also argued that Mr Lewis' evidence concerning the identification parade suggests that there may have been an attempt to have the suspect improperly identified. Learned counsel submitted that if Mr Lewis's testimony is accepted, it means

that the directions given to him at the parade should be considered a breach of the principles of fairness which should govern the parade.

[44] On Mr Fletcher's submission the fact that the suspect was the third person from the end of the parade line, and the witness is instructed to "start from one, two, three", then it may well be that the third person was being singled out to be identified. He argued that neither counsel nor the learned trial judge recognised this breach to the fairness of the parade and for that reason the conviction was tainted. Learned counsel relied on **R v Cecil Gibson** (1975) 13 JLR 207, in support of his submissions on these points.

[45] Mrs Seymour-Johnson countered Mr Fletcher's submission by arguing that there was no evidence that the police or anyone assisted Mr Lewis in identifying the suspect on the parade. Learned counsel pointed to a portion of the summation, which, she argued, demonstrated that the issue was in fact raised as to whether the end the witness started counting from would have determined whether the suspect would have been at number three or number seven in the line-up.

[46] Mrs Seymour-Johnson is correct in her submissions. It does appear from the learned trial judge's summation that the issue of the end of the identification parade, at which the witness started, was not lost on defence counsel. It appears from the summation that defence counsel did raise the point in submissions to the jury. The learned trial judge is recorded, at page 254 of the transcript, as having referred to those submissions, and said in this regard:

> "Now, you recall [Mr Lewis] saying that he had looked along the line of men – having walked up and down, he had looked along the line of men and he started counting from the eastern side 1, 2, 3 and that he called out the number three and then he looked up and saw the number seven. **You remember in Counsel's address to the jury she said if you went from the other side, with the numbers he would have been number seven, which is what was on the numbers, but he started, he is saying, from the eastern side and he would have been number three and you remember now there are nine men on the parade.** So, what Counsel is saying, having started from the incorrect end, you would have had nine, eight, seven, but he is saying from that direction, it would have been number three. Is that a reasonable explanation, Mr. Foreman and members of the jury, or is it that the witness was not sure of who the person was and he made a mistake in identifying the person who he said it was?" (Emphasis supplied)

[47] It is true that these instructions were not given in the context that there should be suspicion cast on the instructions given, but the learned trial judge did give general instructions as to the issue of the fairness of the parade. She said:

> "Now, we come to the question of the identification parade and this is also something that you will have to look at and look at very carefully. Now, the object of the Identification Parade is to test the ability of the witness to pick out from a group the person, if he is present, who the witness says he saw previously on the day of the incident at the Comprehensive Clinic.
>
> Identification parades must be fair and should be seen as fair. Every precaution should be taken to see that they are so and in particular to exclude any suspicion of unfairness or risk of erroneous identification through the witnesses [sic] attention being directed specially to the suspected person instead of equally to all the persons on the parade." (Page 253 of the transcript)

The learned trial judge then went on to relate those instructions to the evidence as to what occurred at the time that Mr Lewis attended the identification parade.

[48] It cannot be said, as was the case in **R v Cecil Gibson**, that there were any clear breaches of procedure or the regulations regarding the conduct of identification parades. It cannot, therefore, be said that the jury was denied their right to be informed of an impropriety so as to consider whether or not there had been unfairness associated with the conduct of that parade. Bearing all these factors in mind, it cannot be said that there was any miscarriage of justice in this regard.

Conclusion

[49] It is for those reasons that the application for permission to appeal against conviction and sentence was refused, as was indicated above.