JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO; 75/98

BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE PANTON, J.A. (Ag.)

R. v. ONIEL WILLIAMS

Ian Wilkinson for Applicant

Mrs. Vivene Hall-Brevert for the Crown

3rd May & 6th July, 1999

RATTRAY, P:

Miss Michelle Rhone, a school teacher lived with her daughter and her common law husband, the father of her child, one Ainsworth McBean in the parish of Saint Andrew.

On the 15th February 1992 at about 8.00 a.m. she heard a knocking on her door. On going out to see who it was, she discovered that it was a man who had done some work on her air-conditioning unit. They spoke. Ainsworth also came out to speak with him and she left them and went inside. She then went to pick up her daughter who was at the back of the yard. The young man had asked Ainsworth for a glass of water before she left. On her return Ainsworth was getting the water from the fridge. She then saw another man there pointing a gun at Ainsworth. She did not know him before. The man with the gun demanded money from Ainsworth, who told him that he had no money. He then pointed the gun in her direction - and he said "to give him all the money or he would shoot us." Ainsworth told him to leave them alone. The man

pointed the gun at Ainsworth's head, Ainsworth turned from the fridge to step into the living room and she heard an explosion and saw him fall on the floor. He had been shot in his head. The man then pointed the gun on Miss Rhone and told her to give him all the money in the house. Miss Rhone stepped into the bedroom and heard another explosion. She pulled out a drawer of her bedside table and the contents spilled out on the floor. The young man who had worked on the air-conditioning unit grabbed up some money which had fallen from the drawer. The man with the gun insisted that she should give him money, and she told him she didn't have any. In her words - "They hesitated for a moment and then they both ran out of the house." The money stolen was about $3,000. Ainsworth died as a result of the gunshot injuries which he had received. She identified the applicant at an identification parade on the 15th of November, 1993 as the man who had shot Ainsworth.

On her evidence when she first saw the applicant he was about 10 feet away from her but when he came into the kitchen he was at a distance of about 3 feet. She had a frontal view of him. She was asked -

> "Q. Now can you recall about how long the incident lasted from the time you entered the kitchen to the time when you saw Ainsworth fall?
>
> A. It could be about 5 minutes or so.
>
> Q. About 5 minutes.
>
> A. Yes."

During the five minutes in the kitchen she was always able to see the man with the gun. The lighting which was both artificial light as well as natural light was good. When he was outside the house, she saw him for about 1 minute side-

ways. In the bedroom he was "maybe 3 feet away" from her. She saw him fully. She could not remember how long the man was in the bedroom before he left. She called the police, and gave a description of the man to the police. When next she saw him it was on the identification parade held at the Half-Way-Tree Police Station on the 15th of November, 1993. She could not remember under which number the man stood at the parade when she identified him. In cross-examination she stated that on the fatal day it was the first time she was seeing the applicant, and never again saw him until the occasion of the identification parade.

The other man present on the occasion was one George McFarlane who was arrested and convicted of the murder within a few months of the incident.

The witness maintained that she made no mistake as to the identity of the applicant. She was asked in cross-examination:

> "Q. Have you ever mistaken a stranger for someone you know, have it ever happen to you, gone up to someone and say hello so and so and it turned out to be someone different? Have it ever happen to you?
>
> A. Yes sir."

She however maintained that she had not made a mistake in her identification of the applicant. She was frightened and was at all times holding on to her daughter. Her daughter was two (2) years old at the time of the incident. She was terrified and her daughter was screaming. She was asked:

> "Q. You were trying to deal with the situation, you were under attack?
>
> A. Pardon?

> Q. You were trying to deal with the gunman?
>
> A. Yes, I try to deal with everything that was present.
>
> Q. And as best you could you were trying to comfort your daughter?
>
> A. Yes, as well as to get the two men out of my house.
>
> Q. And get them out of your house I'm sure?
>
> A. Yes."

She gave the police a more detailed description of McFarlane, the other man rather than the applicant. She told the police "the man who shot Ainsworth is about twenty-three years, tough looking, about 5 foot 6 inches tall, of dark complexion but not as dark as the apprentice, medium built and his haircut is of the conservative type and he was wearing aqua blue T-shirt and dark trousers." Looking at the applicant in court she admitted that he appeared to be about 5 foot 8 inches.

The gunman's hair was cut in the same manner as the applicant's hair was in court. She further said:

> "Q. Now, just dealing with your description of the gunman's appearance, his face, you will agree with me that he has no particular feature which stood out, no distinguishing features?
>
> A. No, I would also agree with you."

The first sighting was for a moment, maybe a few seconds. For some of the time when she was in the kitchen, the gunman's face was not fully to her. She was trying to comfort her daughter who was screaming. She could not remember how long the incident in the bedroom lasted but it was possibly longer than a minute or two. She stated - "I was not studying anybody's features but I know what I saw and my description is accurate as to what I saw, the person I saw." The man with the gun had no distinguishing facial features, nothing abnormal or out of the ordinary.

On the identification parade she recognized him by general appearance. Asked by the judge:

> "Q. ... what features if any did you use from did you use from your memory to form the general appearance?
>
> A. In fact it was his forehead and the hairline."

It is to be noted that no police statement was taken from Michelle Rhone until after the holding of the identification parade. We therefore do not have the benefit of a record made at the time of the description which she gave of the gunman. Furthermore, the police did not dust for fingerprints when they attended the murder scene.

When Sergeant Wallace told the applicant that he was investigating the case of murder his reply was "a so the police them tell me, when them carry me come here, but me no know anything about no murder." On his arrest and being told that he had been identified by Miss Rhone, he said - "it must be the police, lawyer and police mek up the case."

On the identification parade the applicant was represented by Mr. Arthur Kitchin, Attorney-at-law. There was a deviation from the normal practice in that Mr. Kitchin, who was the applicant's attorney saw in what position he was in the line at the identification parade was sent by the officer, who held the parade to bring in the witness.

The evidence of Sergeant Pounall given at a previous trial of the applicant was admitted in the trial under section 31 (1)(a) of the Evidence (Amendment) Act and read into the Record because he had since died. Sergeant Pounall had been asked by the court:

> "Q. Well I want to ask you this question what was to stop Mr. Kitchin from telling the witness that the man was standing in number 2 position?
>
> A. Because he was a suspect's attorney sir.
>
> Q. That was the only thing but otherwise there would be nothing to stop him, you agree with me?
>
> A. No, sir there is nothing to stop him."

The judge in the first trial was obviously concerned about this practice where the attorney of the suspect is sent to call the identifying witness with the attorney knowing in what position the suspect was standing. However it would not be expected that the suspect's attorney would pass on information detrimental to his client.

A no case submission made by counsel for the applicant was refused by the judge. It rested upon the following bases: (I) The difficult conditions under which the original observations were made including the circumstances of

terror which affected the witness Miss Rhone; (2) the brevity of the time during which the incident lasted; (3) the fact that the gunman was a stranger and had never before been seen; (4) the lapse of 21 months between the occurrence and the identification of the applicant; (5) the lack of any extraordinary features of the gunman which could assist in the identification. (6) the admission by the witness that she did not study the features of the gunman so as to retain these features in her mind; (7) the estimated height of 5 feet 6 inches, as against the height of the applicant of about 5 feet 8 inches.

The trial judge having ruled against the no case submission the applicant made an unsworn statement from the dock. He gave his height as 5 feet 8 inches and said "I can't remember where I was on that day ... but one thing for sure I didn't kill anybody. I didn't kill Mr. Ainsworth McBean. My occupation, I am a construction worker. I live at 13 1/2 Grants Pen Avenue , I have one kid, one child to support, m'Lord. I didn't go to 25 Rochester Avenue, I didn't kill Mr. McBean m'Lord."

The trial judge in his summing up pointed out to the jury:

> "And she said the accused has no distinguishing features, none. And then she told us she was not looking on the face of the man who shot her husband. ... And during cross-examination, we discovered that it was not all of the time, whatever time you make that they were in the kitchen, remember she is saying five minutes, counsel said one to two. You do not tell me what time you make it, but, she is saying that it was not all the time that they were in the kitchen, that she could see the face of the accused man or the gunman. When I say accused, she is saying that the accused man is the gunman.
>
> So, she is saying that it is not all the time that she could see his face, only sometimes. She said that

> sometimes she would see him sideways or his back was to her. But, we did not get an estimate of how much of that time, she saw his face. What she is saying is that, she did not estimate the time, she did not put it that way. She said she don't know if the incident in the kitchen is as long or longer than that of the bedroom. But, you, Madam Foreman and members of the jury, will determine that."

The judge noted that the applicant had said "A Mr. Kitchin and the policeman dem mek it up," after he was pointed out on the identification parade. He further commented:

> "And you were told that Mr. Kitchin, represented the accused or the suspect, he was then. And as I have said I am not making any big comment about the conduct of the parade, but from that day and later, when he was arrested the accused man appeared, and I am choosing my words, appeared to have had some misgivings because he referred to police and the lawyer, but you saw Miss Rhone and she said she was told to go there and she was called and there was no suggestion that she had been assisted in any way in coming to her identification of the accused man."

It is clear that the trial judge was aware of the weaknesses of the identification evidence.

Counsel for the applicant has rested his application upon two grounds:

1) The Trial Judge erred in not withdrawing the case from the jury on the no-case submission made at the end of the Crown's case.

2) The failure of the Trial Judge to direct the jury adequately in respect of the identification evidence and the factors adversely affecting the quality or strength, or contributing to the weakness of the visual identification.

In ***R. v. Turnbull*** [1976] 3 All E.R. 549 Lord Widgery, C.J. in delivering the judgment of the Court of Appeal (England) said at page 553:

> "When in the judgment of the trial judge the quality of the identifying evidence is poor as for example when it depends solely on a fleeting glance or on a larger observation made in difficult conditions the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to the correctness of the identification. "

And further at page 554 he said:

> "... so much depends on the quality of the evidence in each case. Quality is what matters in the end."

In ***Evans (Kenneth) v. R*** [1991] 39 W.I.R. 290 Lord Acknor in the Privy Council stated at page 292:

> "Doubtless because of the serious problems experienced in Jamaica due to the escalating violence, coupled with intimidation, indeed the suspected murder, of potential witnesses, some reservations had been expressed in the past by the Court of Appeal of Jamaica about the desirability of fully applying the ***Turnbull*** guidelines. In the relatively recent appeals in ***Reid, Dennis and Whylie v. R*** [1989] 37 W.I.R. 346 at 353, 354 their Lordships referred to those reservations as expressed in ***R. v. Graham and Lewis*** [1986] (unreported), and confirmed that the guidelines as laid down in ***R. v. Turnbull*** apply with full force and effect to criminal proceedings in Jamaica including in particular the direction of Lord Widgery, C.J. set out above."

The passage just cited from ***Turnbull*** is what had been set out.

The weaknesses in the identification pointed out by counsel for the applicant at the trial when a no case submission was made and as listed earlier in this judgment were germane to a determination of whether the case should have been withdrawn from the jury by the trial judge. Furthermore, the fact that there is no recorded description given by the witness at the time of the incident and a statement was taken from her only after the identification parade twenty-one months later would categorise the quality of the identification evidence in this case as being poor. A verdict of guilty in these circumstances must be regarded as unsafe and unsatisfactory.

As Lord Denning, L.J. stated in ***Bater v. Bater*** [1951] P. 35 at page 36:

> "In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. As Best C.J. and many other great judges have said - 'in proportion as the crime is enormous so ought the proof be clear'."

Whilst the abovementioned citation does not vary the standard of proof it is relevant to the judge's duty to determine whether the case should be withdrawn from the jury.

In the circumstances therefore I would treat the application for leave to appeal as the hearing of the appeal which is allowed. The conviction and sentence in the Supreme Court is set aside and a judgment and verdict of acquittal entered.