Judgment 29 of 1978

IN THE PRIVY COUNCIL No. 37 of 1977

ON APPEAL

FROM THE COURT OF APPEAL OF JAMAICA

BETWEEN:

DENNIS REID Appellant

- and -

THE QUEEN Respondent

CASE FOR THE APPELLANT

Record

1. This is an Appeal from a decision of the Court of Appeal of Jamaica respecting an order for a trial de novo. Leave to appeal to the Privy Council was granted by the Court of Appeal on the 13th day of July 1977. Upon granting leave to Appeal, the Court of Appeal certified a number of questions, as to the circumstances under which a new trial might properly be ordered and the principles applicable to consideration thereof, as being raised by the appeal. Final leave to appeal was granted by the Court of Appeal on the 7th day of November 1977. p.172 p.174

2. The Appellant was charged in April, 1975, with the murder of one Fedlan Walsh and after the holding of a preliminary enquiry was committed to stand his trial on that charge. He was tried in the Home Circuit Court, Kingston, before Robotham J. and a jury on the 5th, 6th and 7th of May, 1976. On the final day of the trial he was found guilty as charged and the mandatory sentence of death was imposed. The Appellant appealed to the Court of p.1

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Appeal (Swaby, J.A. (Presiding), Zacca, J.A., and Melville, J.A. (Ag.)) for leave to appeal and his application was heard in January, 1977. On the 11th, March, 1977 the Court of Appeal granted the application for leave to appeal. The hearing of the application was treated as the hearing of the appeal and by a unanimous decision subsequently delivered in its written judgment the Court of Appeal allowed the appeal, quashed the conviction and set aside the sentence. By a majority decision the Court ordered a new trial of the case during the then current session of the Home Circuit Court. No minority judgment was ever delivered

3. (i) The issues arising on this appeal are :

(a) Whether or not the Court of Appeal can properly order a new trial where, as in the instant case, the only evidence implicating the prisoner

(i) has been discredited and/or

(ii) is palpably or manifestly unreliable.

(b) Whether or not a new trial might properly be ordered where, as in the instant case, the real issue in the case is the reliability of the visual identification of a prisoner previously unknown to the identifying witness and the identifying witness was given a description of the prisoner prior to pointing him out on an identity parade.

(c) Whether or not, having regard to the facts and circumstances of the instant case and the principles and considerations applicable to the ordering of new trials, it was proper and reasonable for the Court of Appeal to have ordered that the Appellant be tried de novo.

3. (ii) The relevant statutory authority is set out in the Appendix hereto.

4. Swaby, J.A. delivered the written judgment of the Court of Appeal allowing the appeal and ordering

that the Appellant be tried de novo. Having referred to the fact that the application for leave to appeal had been granted and that the hearing of the said application had been treated as the hearing of the appeal, the judgment records that the decision to allow the appeal, quash the conviction and set aside the sentence was unanimous, but that, by a majority decision, a new trial of the case had been ordered 'in the interest of justice;' that in view of the decision to order a new trial, it was not considered desirable to discuss the evidence in any detail in giving the reasons for their decision.

5. Next, the evidence adduced at the trial is reviewed. At about one o'clock in the morning of April 6, 1975, Walsh's Beach Club, situated along the St. Thomas Road in the parish of St. Andrew, was open for business. On the ground floor of the building there is a bar, a restaurant and a kitchen and, on the premises, what is described as a "drive-in". One Sadie Samuels, a waitress at the club was a witness for the prosecution at the trial, stated that at the hour aforesaid she was sitting beside a table at the door of the restaurant leading out to the drive-in when two men, one armed with a gun and wearing a mask, entered the premises. Pointing the gun at her, the man with the mask approached her saying "don't move." The other man went into the bar without stopping. At some stage while he was with her, the mask fell off his face. She recognized (sic) him as the appellant by light from the club restaurant, bar and kitchen. After a few minutes the appellant went into the bar and she ran into the kitchen. While there she heard gun-shots from the direction of the bar. As she was about leaving the kitchen she was again confronted by the appellant who was armed as before. She recognised him by the aid of the kitchen and restaurant lights which were on. Pointing the gun at her, the Appellant held her by her hand and ordered her to take off her 'pants.' When she had done so he told her to open her legs, but just then someone rushed from the bar into the restaurant, the appellant released her and ran out to the drive-in at the rear of the premises, and she ran upstairs. She did not

p.163 l.33

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see him again that night. When she returned downstairs she saw the body of Fedlan Walsh on the floor. He was dead. Medical evidence
p.164 l.42 was given to the effect that there were three bullet 'entrance' wounds on the body, death being due to shock from haemorrhage within
p.165 l.3 the chest. The appellant was arrested on April 17, 1975 and was identified by Sadie
p.165 l.4 Samuels as the man with the gun at an identification parade held on April 23, 1975. In the absence of evidence as to which of the two men had fired the shots into Mr. Walsh, the Crown had to base its case against the appellant on the doctrine of common design.

6. The judgment then deals with the defence put forward on behalf of the Appellant at the
p.165 trial. The Appellant, in an unsworn statement
ls.13-42 from the dock, stated that, while serving a sentence, he had escaped from prison on February 14, 1975. While in prison he had lost two of his front teeth. He rarely ever left the place where he had been hiding, but on the night of April 17th, 1975, he paid a visit to his mother. On his way back to his place of hiding the taxi in which he was travelling was stopped by the police, he was held and was subsequently placed on an identification parade in connection with a charge of murder. Of the 5 or 6 persons called on the parade only one - whom he believed to be the witness Sadie Samuels - pointed him out, and he was subsequently charged with the murder of Fedlan Walsh. He was not a saint, but he had never killed anyone. The judgment mentions
p.165 l.43 that two witnesses, viz, Dr. Percival Henry and Mr. Uel Gordon, Resident Magistrate for the parish of Portland, who had held the preliminary examination into the charge, had testified on the appellant's behalf, but records no detail of the evidence of either witness

p.165 l.48 7. Next, the judgment lists the 4 Grounds of Appeal argued before the Court, and
p.166 l.31 succinctly, the submissions made respecting the weaknesses in the identification (of the Appellant). In dealing in a general way with the elaboration of those submissions in the court of argument, the judgment makes reference
p.168 l.33 to the fact that R v. Turnbull (1970) 3 AER

p.529 had been cited in support of the Appellant's contention that the summing-up had fallen short of the assistance a trial judge should give to the jury in cases concerned with visual identification. Counsel's submission respecting a specific instance of such failure - in connection with the admission of the witness Sadie Samuels that prior to her attending the identification parade held for the Appellant she had received a description of him - is then dealt with, reference being made to the concession by Counsel for the Crown that "Miss Samuel's evidence regarding the description she got required clarification." p.170 l.43 The Court, however, was of the view that there was merit in the submission: "Bearing in mind that this was a case where visual identification was involved and that the evidence depended entirely upon that of the sole witness, Miss Sadie Samuels, the inconsistencies in her evidence surrounding her ability properly to identify the Appellant required particularly careful directions as to any special weaknesses which appeared in the identification evidence, along the guidelines indicated in these types of cases, now codified in Turnbull's case". The Court was of the view that "it was unfortunate that the 'description' evidence was allowed to remain p.171 l.13 as it was left to the jury, as this Court is unable to say whether Miss Samuels was able to identify the appellant wholly by reason of this prior description she had received, or whether it was wholly from her own powers of observation or a combination of both. At all events the evidence being in the state it was, it appeared incumbent on the ..... judge to assist the jury as to how they should treat this evidence."

8. The Court next observes that had the witness been able (sic) to identify the Appellant other than from her own powers of observation, "serious thought would have had to be given to the 'no case' submission made at the close of the Crown's case." If the contrary was the case, the matter was properly for the jury to determine. p.171 l.25

9. The Court then refers to Miss Samuels' p.171 l.34

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evidence that she had not known the Appellant before the night of April 6 (the occasion of the killing) and observes: "In the circumstances we are unable to see how the jury could have resolved the question of identity of the Appellant so as to be sure because clarification had not been obtained of the witness' answer regarding the description of the Appellant she said she had received. The omission to direct the jury on how that aspect of the evidence on identity should have been resolved was in our view a non-direction amounting to a misdirection which was fatal to the conviction recorded against the Appellant. Accordingly we granted the application for leave to appeal, treated the hearing of the application as the hearing of the appeal and ordered as previously stated."

10. It is respectfully submitted that the Court of Appeal was wrong in ordering that the Appellant be tried de novo. The findings by their Lordships that

(i) 'this Court is unable to say whether Miss Samuels was able to identify the appellant wholly by reason of this prior description she had received, or whether it was wholly from her own powers of observation or a combination of both;'

(ii) 'Had it been that the witness was able to identify the appellant other than from her own powers of observation serious thought would have had to be given to the "no case" submission made at the close of the Crown's case;'

(iii) 'In the circumstances we are unable to see how the jury could have resolved the question of the identity of the appellant so as to be sure because clarification had not been obtained of the witness' answer regarding the description of the appellant she said she had received,'

amounted to the conclusion on the part of their Lordships that

(1) at the close of the prosecution's case the burden of proof in relation to identification of the prisoner had not been discharged and

(2) the verdict of the jury had been unreasonable or could not be supported having regard to the evidence. Their Lordships findings therefore rendered the order for a retrial untenable

11. It is further respectfully submitted that where a Court of Appeal is of the view that for want of clarification of some vital aspect of the evidence given in the court below the verdict cannot be allowed to stand, a trial de novo cannot properly be ordered, since this would be to afford the prosecution a second chance to remedy a fatal defect in the evidence - See R v. Vivian Stephenson S.C.C.A. No. 46/74.

12. It is further respectfully submitted that where identity is the vital issue in a case and there are inconsistencies and/or contradictions in the evidence respecting the ability of the witness(es) properly to identify the perpetrator of the crime or for any other reason that evidence is proved to be unreliable, then, in the absence of other evidence capable of incriminating the prisoner, a Court of Appeal would not be justified in ordering a new trial.

13. It is respectfully submitted that where the real issue in a case is the identify of the perpetrator of the crime charged in the indictment and the witness purporting to identify the prisoner admits under oath that he or she could be mistaken in his or her identification of the prisoner, then, where the appeal is allowed, a Court of Appeal would be wrong in ordering a retrial of the case.

14. It is respectfully submitted that a description of the prisoner given to a witness prior to that witness' attendance at an identification parade renders nugatory any subsequent identification of the prisoner by that witness, and in such circumstances, in the absence of other evidence connecting the

prisoner with commission of the offence charged, the case against the prisoner ought not to be further prosecuted.

15. It is respectfully submitted that no exhaustive guidelines should be laid down respecting the order of a new trial, but that the three major considerations in such matters ought to be:

a) The quality of the evidence: A re-trial ought not be ordered where the evidence upon which the prosecution relied at the previous trial was so discredited or is so manifestly unreliable that no conviction could reasonably or safely be based upon it.

b) The nature of the evidence: A re-trial ought not to be ordered where the evidence at the previous trial fell short of proving a necessary ingredient of the charge laid or of achieving the desired standard of proof.

c) Previous trials for the crime in question: No new trial ought to be ordered where the prisoner has twice before stood in peril of his life or his liberty upon the same charge.

16. It is respectfully submitted that the Court of Appeal erred in ordering that the Appellant be tried de novo, that the said order ought not to stand and the appeal in respect thereof ought to be allowed for the following, among other

R E A S O N S

(1) BECAUSE the conclusions of the Court of Appeal were tantamount to a finding that the Prosecution had failed to discharge its burden of proof in relation to identification of the Appellant and such a finding is anathema an order for a trial de novo, not being in the interest of justice.

(2) BECAUSE the findings of the Court of Appeal amounted to a finding that the jury's verdict was unreasonable and/or

unsafe and/or unsatisfactory, and in such circumstances an order for a new trial cannot be justified.

(3) BECAUSE to order a new trial in the circumstances of this case would be to afford the prosecution the opportunity of adducing further or additional evidence for the purpose of filling gaps in the case against the Appellant, a course patently contra the interests of justice.

(4) BECAUSE the quality of the evidence militated against a conviction reasonably being returned thereon.

(5) BECAUSE the evidence respecting identification of the accused was totally discredited or, alternatively, was manifestly unreliable, and in such circumstances a new trial would not be in the interests of justice.

ROY TAYLOR

APPENDIX

Jamaica Statute

The Judicature (Appellate Jurisdiction) Act (1962)

Section 14(1) The Court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:

Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.

Section 14(2) Subject to the provisions of this Act the Court shall, if they allow an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial at such time and place as the Court may think fit.

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CASES:

R. v. Vivian Stephenson (Unreported) S.C.C.A. No. 46/74 (Jamaica)
R. v. Turnbull et al (1976) 3 AER 549; 63 CAR 132.
R. v. Arthur John Saunders 58 CAR p.248 at 255.
R. v. Curtis Irving, 13 J.L.R. 139.

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