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 RESPONDENT

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1. This is an appeal from a judgment of the Court of Appeal of Jamaica (Swaby, Zacca JJ.A. and Melville J.A. (Acting)) allowing the appeal and quashing the conviction and setting aside the sentence imposed on the Appellant. Additionally by a majority the Court of Appeal ordered a new trial in the interests of justice. pp.163-171

2. The Appellant was tried on an indictment for the murder of Fedlan Walsh in the Circuit Court Division of the Gun Court during the period 5th to 7th May, 1976 by Mr. Justice Robotham and a jury and at the conclusion of the trial the Appellant was sentenced to suffer death as authorised by law. pp. 1-158

3. The Appellant appealed to the Court of Appeal and the main thrust of his complaint may be conveniently summarised thus:- pp.158-162

(a) That the principal Crown witness Miss Sadie Samuels was so discredited after cross-examination that the trial judge should have acceded to the submission of no case to answer.

(b) That the failure of the trial judge to give directions as to whether the witness was influenced by a description of the accused which she heard after the night of the incident amounted to a misdirection in law.

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pp.163 1.26

4. It is submitted that the majority decision of the Court of Appeal of March 11th, 1977 that the order for a new trial was made for the reason, that in so far as (3b) was concerned with the failure of counsel for the crown to clarify the matter and the fact that the trial judge had a duty in law to put questions to the witness made for lack of clarity and rendered the summing up defective. It is also fair to say that counsel for the defence did not specifically suggest to the crown witness that the prior description she heard assisted her in picking out the appellant on the Identification Parade.

5. The Court of Appeal certified four points which effectively raise two issues of law, namely:-

(i) whether the majority decision of the Court of Appeal was correct in law in so far as that decision implicitly rejected the appellant's contention that the trial judge was wrong in law to rule that there was a case to answer on the ground that the Crown witness was not discredited so as to be unreliable.

(ii) whether if in the instant case there was evidence of identification and there was an inadequate direction amounting to a misdirection by the trial judge on a specific weakness in the identification testimony, the discretionary power of the Court of Appeal was correctly exercised in ordering a new trial.

pp.139 11.39
146 11.30

6. The Respondent respectfully contends that the trial judge's careful and fair summing-up to the jury in which he directed the jury how to treat contradictions in the testimony of the principal eye-witness cannot be faulted.

pp.153 1.34

7. The Respondent contends that in the circumstances the trial judge correctly ruled that there was a case to answer and that furthermore the Court of Appeal's decision on a majority affirming the trial judge's ruling on this point ought not to be properly raised before Your Lordships' Board in view of the principles laid down - Re Dillet /1887/ 12 App. Cases 459 at 462, approved in Nirmal Son of Chandar Bali v. The Queen et al Unreported P.C. Appeal No. 46 of 1970.

pp.163 11.30
32

8. The Respondent respectfully advert Your Lordships' Board to a passage in the judgment of the Court of Appeal where cognisant of the danger involved in commenting on the evidence

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in this case the Court said, "In view, however of the order for a new trial we consider it undesirable to discuss the evidence in any detail in giving these reasons," and Your Lordships' Board is adverted to a similar passage in Ross v. The Queen [1957] A.C. 208 at 223 where Viscount Simonds said, "..... as in their opinion the appeal ought to be dismissed and they have humbly advised Her Majesty, so that the Appellant will in due course be re-tried, they think it undesirable to say anything which may in any way prejudice his trial." Against this background the Respondent respectfully submits that Your Lordships' should decline to answer question 1 as certified by the Court of Appeal which reads thus - pp.172 11.30-34

(1) Whether or not the Court of Appeal can properly order a new trial where the only evidence implicating the prisoner -

(a) has been discredited and/or

(b) is palpably or manifestly unreliable.

9. With regard to the fourth question certified by the Court of Appeal which reads:- p. 173 11.11-14

"What are the principles which should apply in considering whether or not a new trial should be ordered,"

the Respondent would respectfully contend that the Privy Council has already illustrated the circumstances when a new trial should not be ordered - see Nirmal's Case supra at p.7. It would be undesirable to set out principles which would tend to restrict the ample powers conferred by section 14(2) of the Judicature (Appellate Jurisdiction) Act which specifically states that a new trial may be ordered in the interests of justice

10. The material facts of the case are adequately summarised in the judgment of the Court of Appeal and are as follows - p. 163 1.33 p. 165 1.46

At about 1 a.m. on 6th April, 1975 Miss Sadie Samuels, the sole eye- witness for the Crown, while working at Walsh's Beach Club saw two men, one of whom was armed with a gun and masked entered the club. The masked gun man held her up

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and she recognised his face by the lights in the club, restaurant and bar when his mask fell off. He then left her for a while and then went into the bar.

He returned to her later that morning for a second time and she subsequently picked him out at an identification parade.

The Appellant left the scene and the body of Fedlan Walsh was found lying on the floor. A post-mortem examination revealed that he suffered death from one of the three bullet wounds inflicted on him that morning.

11. At the trial it emerged from cross-examination by the defence that the appellant was an escaped convict and he gave an unsworn statement from the dock which amounted to an alibi.

12. Concerning the identification, the sole eye-witness Sadie Samuels picked out the accused at an Identification Parade on 24th
pp.100-103 of April, 1975 and the record discloses that when she was recalled she testified that she heard a description of the appellant given on the radio sometime between 19th February and the 24th April.

pp.100-103 13. It is fair to say that when the witness Sadie Samuels was recalled neither counsel for the crown nor the trial judge sought to elicit from her if the description she heard over the radio assisted her in any way in picking out the accused on the Identification Parade. It is also pertinent to point out that the defence never suggested to Sadie Samuels that she was assisted by any description she may have heard when she first testified. The matter of publishing the description came about when it was first put to Inspector Sweeny by the defence and when he agreed that there was publication the crown applied to recall Sadie Samuels. It does not appear that counsel for the defence supported this application and although she was cross-examined by the defence on her recall it was never specifically put to her by the defence that she was assisted in picking out the accused on the Identification Parade by what she had heard.

14. Notwithstanding the way the case developed at this critical point the Court of

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Appeal in a generous concession to counsel for the defence stated that -

"The gravemen of defence counsel's complaint in this regard was that the judge apart from merely repeating the evidence of the witness that she had obtained a description of the appellant up where she was living, before attending the identification parade, no questions had been put by the court, in the interest of justice, (Crown Counsel having failed to re-examine the witness with this in view), in order to ascertain whether the description of the appellant she had received had enabled her to point the appellant on the identification parade and that in the absence of any such questions or directions the learned trial judge had not assisted the jury on how they should deal with her identification of the appellant in the state of her evidence on this aspect of the identification of the appellant. In the circumstances it could not be said that the appellant had been properly identified on Miss Samuels' evidence or that he had a fair trial. Learned Counsel for the Crown while conceding that Miss Samuels' evidence regarding the description she got required clarification said that the appellant would have suffered no injustice having regard to the learned judge's general directions. pp.170-171

We were, however, of the view that there was merit in appellant's Counsel's 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 guideline indicated in these types of cases, now codified in Turnbull's Case. It was unfortunate that the "description" evidence was allowed to remain 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

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prior description she had received, or whether it was wholly from her own powers of observation or a combination of both."

15. The Respondent submits that it would have been desirable if either counsel for the crown or the trial judge had made a more strenuous effort to have the identification issue clarified at this point and that in any event it is the duty of the trial judge 'to deal specifically with all matters relating to identification' see Arthurs v. Attorney General for North Ireland 55 Cr. App. Reports p. 168, and this principle has been followed in Jamaica - see R. v. Oliver Whylie Unreported Supreme Court Criminal Appeal 140/76, where the Court held that '..... the principle that a summing-up which does not deal specifically having regard to the facts of the particular case with all matters relating to the strength and weakness of the identification evidence is unlikely to be adequate.'

16. It is submitted that the Court of Appeal accurately interpreted the identification evidence and that in adjudging that there was need for a specific direction on the issue it follows that it was within the competency of the Court of Appeal to order a new trial. It is submitted that as the discretionary power of the Court of Appeal was correctly exercised then it is not open to the appellant to contend that the order for re-trial be set aside because Your Lordships' might be persuaded to take a different view of the evidence.

p. 171 11.25-48

17. In view of the foregoing the Respondent respectfully contends that points (2) and (3) certified by the Court of Appeal as -

p. 172

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

'(3) Whether or not in the instant case it was proper and reasonable to order a new trial,'

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should be answered in the affirmative as the failure of the trial judge to properly direct the jury is a proper ground on which to order a new trial.

18. Further it is respectfully contended that the identification evidence if it were unaided by the description over the radio, subject to the correct directions being given, is capable of sustaining a good conviction. In acknowledging this, the Court of Appeal said, 'If however, the identification turned out to be from the witness' own observation then the matter was one properly to be left for the determination of the jury.' p. 171 11.30-34

19. The Respondent therefore respectfully submits that the order of the Court of Appeal ordering a new trial be affirmed, that the appeal ought to be dismissed for the following among other -

REASONS

(1) BECAUSE it was the duty of the Crown or the trial judge to clarify what may have been a specific weakness in the identification evidence during the course of the trial.

(2) BECAUSE even if there was no clarification of what may have been a specific weakness in the identification evidence it was the duty of the trial judge to give specific directions thereto.

(3) BECAUSE in the instant case the Court of Appeal correctly exercised the discretion conferred on it to order a new trial in the interests of justice.

(4) BECAUSE in the circumstances of this case the Court of Appeal having correctly exercised its discretion to order a new trial in the interests of justice the appellant had no further ground on which to appeal against that part of the judgment which ordered a new trial.

IAN X. FORTE.

HENDERSON DOWNER.

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