JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 77 & 78/95

COR: THE HON MR JUSTICE CAREY J A
THE HON MR JUSTICE FORTE J A
THE HON MR JUSTICE GORDON J A

JEROME TUCKER
LINTON THOMPSON
V
REGINAM

Earl Witter for Tucker

No appearance for Thompson

Miss Carolyn Reid for the Crown

29th, 30th, 31st January & 26th February 1996

FORTE J A

The applicants were convicted in the High Court Division of the Gun Court on the 31st May, 1995, for the non-capital murder of Barbara Stewart on the 19th May, 1992. They were as is required by law, sentenced to life imprisonment. The learned trial judge however recommended that both should not become eligible for parole until they have served a period of eighteen years imprisonment.

On the 31st January, 1996 having heard the arguments of counsel, we refused leave to appeal and ordered that the sentences should commence on the 31st August, 1995. As promised we now put our reasons in writing.

The facts relied on by the prosecution were clear and simple. Barbara Stewart, on the morning of the 19th May, 1992 at about 7.00 a.m. was in her room, ironing her clothes, when the door was "kicked in" by a man known to the witnesses as "Garfield" who subsequently entered the room, and fired three shots at her killing her. The prosecution relied on three witnesses, two of whom purported to identify the two applicants, as having entered the yard with "Garfield," each armed with a firearm, and who stood guard while Garfield committed this dastardly act, and thereafter departed in his company. The other witness, was Kaneisha Barrett, the daughter of the deceased who was in the room when "Garfield" entered, and was a witness to the shooting of her mother. After her mother was shot, she ran from the room and in doing so she saw two men standing on either side of her mother's room door both armed with guns. One of these men she identified as "Kirkal" (the applicant Thompson) whom she had known for a period of two weeks before the incident.

The Crown also relied on the evidence of Rosemarie Kelly and Natasha Baker for the identification of the two applicants, whom it was alleged were there that morning acting with "Garfield" in the commission of the offence.

As the gravamen of the complaints in the appeal relates to the evidence of these two witnesses it is necessary to refer in some detail to their testimony.

Rosemary Kelly lived on the premises, and at the relevant time was in a bathroom which is a separate building situated thereon. It is made of concrete walls, with a wooden door to the front. While she was in the bathroom, she heard "talking" coming from the fence which was close to the rear of the bathroom. She looked through a split in the door about one inch wide and it was through this space, that she observed four men coming through a hole in the fence. She identified the applicants as two of these men. The applicant Tucker whom she knew as Romeo passed close by

the door through which she was making her observation and took up position to the side of the bathroom. The applicant Thompson whom she knew as "Kirkal" took up position to the side of the deceased's room-door. Both men were armed with guns. She also recognized "Garfield" who while the applicants stood in their "positions" kicked in the door of the deceased's room, and entered the house with gun in hand. Thereafter she heard three gun shots in Barbara Stewart's house, and shortly after that, the men left the premises together.

The other witness was Natasha Baker, who was in her room on the premises. Having heard the gun-shots, she looked through her window and saw both applicants whom she knew before. The applicant Tucker, known to her as Romeo was standing by the side of the bathroom, and the applicant Thompson known to her as Kirkal was standing by the side of Barbara Stewart's room-door. Both men were armed with guns. After the shooting, she also saw the two applicants leave the premises in the company of "Garfield".

Both applicants denied being present and participating in the offence, the applicant Tucker doing so in an unsworn statement, and the applicant Thompson giving sworn testimony.

Before us, Mr. Witter counsel for the applicant Tucker filed and argued seven grounds of appeal, but in the end, was constrained to concede that only one called for any serious consideration. That ground is:

> "The learned trial judge erred in law in rejecting the submission of no case to answer made at the close of the prosecution's case. The quality of the evidence of visual identification by recognition adduced up to that time was not good. On the contrary, it was poor."

He thereafter set out reasons for his contention that the identification was poor. It is necessary to determine the merits of the following complaints made in this ground:

> "(i) The inescapable and/or irresistible inference reasonably to be drawn from the failure of the investigating/arresting officer, Detective Inspector Ivanhoe Thompson, to cause a warrant of arrest to be issued for the Applicant, was that the purported recognition of the Applicant as a co-actor in the slaying of the deceased BARBARA STEWART, by the 'I see' (sic) witnesses, NATASHA BAKER AND ROSEMARIE KELLY, was in all the circumstances, wholly unreliable; not merely that they had failed to implicate him as such, by name, when first they were interviewed by Inspector Thompson;
>
> (ii) the evidence of the witnesses BAKER and KELLY showed that they were afforded no more than fleeting glances or, observation of the assailants for a not significantly longer period, but under difficult, frightening and stressful conditions;
>
> ...
>
> (viii) The prosecution sought to establish a fundamental ingredient of the offence charged, nexus, by classic dock identification, in circumstances which plainly required or at least made it highly desirable, that an identification parade be held for the Applicant;".

We now consider each contention as it relates to the complaint that at the end of the Crown's case a prima facie case had not been made out.

1. **Failure to issue a warrant for the Applicant Tucker**

The basis for this complaint arose out of the evidence of Inspector Thompson, who testified that having visited the venue of the slaying on the morning of the incident

and having interviewed the witnesses Natasha Baker and Rosemary Kelly and others he issued warrants for three persons only i.e. "Garfield", "Dock" and "Kirkal."

Mr. Witter submitted, as was contended at the trial, that the only reasonable and inescapable inference to be drawn from that, is that the two witnesses did not give the name of Romeo (the applicant Tucker) to the officer on that morning. In his testimony, however, the officer maintained that he issued warrants for those three persons, because he had written information in respect of them. It was his practice not to issue warrants for the arrest of persons based purely on oral information. As strange as this may seem on the face of it, experience of the behavioural pattern of prosecution witnesses in the past changing their stories after action is taken upon it by police officers, may well offer some justifcation for the officer's practice in these matters.

The evidence also disclosed that both witnesses agreed that they spoke to the police on the morning of the incident, but both denied giving written statements on that day. The witness Kelly did not give a statement until September of that year because she was in the country. The witness Baker gave a written statement on the 10th June 1992. Significantly, though there was no evidence that he was arrested on a warrant, the applicant Tucker was arrested in June 1992, on a date subsequent to the date on which the witness Baker gave a written statement.

The matter therefore became a question of fact for the jury to decide whether the name of Romeo was given to the detective on the morning of the incident by the witnesses, because if it was given then no valid complaint could be made. In our view there was evidence upon which the jury could have come to that conclusion and the learned trial judge was therefore correct in leaving the issue for their deliberations. There is therefore no validity in this complaint.

2. Was the Identification based on a fleeting glance?

The incident occurred at 7 a.m., when in this country in the month of May, the sun has already risen, giving rise to 'day light'. There was no evidence, that the day was overcast or that any type of weather existed to interfere with visibility. It is necessary however to look at the evidence as it related to the opportunity for identification which presented itself to the witnesses.

(I) Rosemarie Kelly - Applicant Tucker

This was the witness who made her observation through the "split" in the bathroom door.

She saw the applicant Tucker (Romeo) when he entered the premises. On his passing the door through which she was looking and coming as close as an arm's length from her, she had a side-view of him for the duration of four seconds, and when he was leaving the premises she was able to observe his face for another period of four seconds. The distance at which he was from her at that stage was pointed out in court as from "the witness box to the table in front of the jury box," a distance which we cannot now ascertain, but can assume to be a short distance. The appellant Tucker had been known to the witness for four years, during which she saw him everyday. He would sometimes visit her aunt's house. She had in fact seen him the day before the incident.

This was a recognition case in which, the length of time for observation need not be as long as in a case where the assailant was unknown to the witness at the time

of the offence. In our view, having regard to the state of light and the fact that the applicant Tucker was known to the witness for four years, and also the proximity in which he was viewed by the witness, the period of eight seconds was sufficient time for observation so that an accurate identification could be later made. The issue was therefore clearly one for the jury's determination.

Applicant Thompson

This witness viewed the applicant Thompson, under the same conditions as she viewed the applicant Tucker i.e. through the "split" in the bathroom door, and in the same lighting condition. She knew the applicant by the name of "Kirkal", for four years prior to the incident. She testified that she saw "Kirkal" when he entered the premises through the fence and at that time she had a side-view of him for three seconds. She however saw all of him including his face when he was leaving the premises, and at that time viewed him for three seconds. She therefore saw him for a total of six seconds. Mr. Witter argued that that length of time was not sufficient to allow for an identification which could be relied upon and contended that it was no more than a fleeting glance, which took place in difficult conditions, that is to say, the view through a mere "split" in the door and at a time when the witness was under stress. We cannot agree. This applicant was known to the witness for a period of 4 years during which, she testified, she was accustomed to seeing him almost every day, and had in fact seen him a few days before the incident. He too, would visit the premises where the deceased kept dances. In those circumstances, where the applicant was well known to the witness where the lighting was obviously good at 7.00 o'clock in the morning, and with the suspect being in close proximity to the witness, the duration of six seconds, in our opinion was sufficient to leave the issue for the determination of the jury, who

would make that determination on the basis of the warning which the learned trial judge would be obliged to give them, as to the dangers of relying on visual identification.

We found no merit in Mr. Witter's contention that the witness was under stress, as there was no evidence that she was in any danger at the time, nor indeed that the men even knew that she was in the bathroom. In respect to the width of vision through the door, this was ideally a matter for the jury to determine, after assessing the demeanour and content of the witness' testimony. There really is no merit in this contention.

(2) Natasha Baker

Applicant Tucker

This witness viewed the incident by looking through a clear glass louvre window, which was partly open. She did so after she had heard the sound of gunshots. On looking through the window she saw this applicant, whom she had known as "Romeo" standing by the side of the bathroom. She purported to have observed the face of "Romeo" for some fifteen seconds. He was known to the witness for two years prior to the incident. This, in our view, were not circumstances of a fleeting glance, and clearly the learned trial judge was correct in leaving the issue for the jury's determination.

Applicant Thompson

The conditions were the same except for the fact that the period for recognition was shorter, in that the witness testified that she observed his face for about ten seconds, which again in our view, given the circumstances, would be sufficient time to make a reliable identification, and consequently the matter was correctly left with the jury for determination. This contention also fails.

(3) Keneisha Barrett

This witness purported to identify "Garfield" and one other of the assailants. As she rushed from her mother's room right after the shooting, she saw an armed man, identified subsequently as the applicant Thompson (whom she knew as Kirkal) standing at the side of the deceased's room. She saw his face for a total of a "few seconds" which was "timed" by the Court and was established to be five seconds. She had seen him for a period of two weeks before the incident, and had last seen him a few days before.

For the same reason that applies to the testimony of Kelly and Baker. We are of the view that this evidence did not disclose a "fleeting glance". Accordingly the learned trial judge was correct in leaving it for the consideration of the jury.

Dock identification

It was disclosed, in the evidence that the first face to face identification made of both applicants by the witnesses was in Court, after they had been charged. No identification parade was held to determine whether the men arrested were in fact the men about whom the witnesses spoke in their statements.

Mr. Witter contended that given the fact that the men were described by aliases i.e. Romeo and Kirkal, by the witnesses, an identification parade ought to have been held and that the learned trial judge should have ruled not only that it was manifestly desirable that such a parade should have been held to test the ability of the witnesses to identify the applicant independently but that the failure to do so was fatal. Alternatively, he submitted, the omission to hold an identification parade so weakened

the evidence of the identification, that it made that evidence an unreliable basis for asking the jury to consider the evidence.

In **Carl Brissett v. The Queen** Privy Council Appeal 50/93 delivered on the 29th November 1994 Lord Griffiths delivering the opinion of their Lordships Board, addressed the question of dock identification thus:

> "It is well established that although a judge has a discretion as to whether or not to allow a dock identification he should as an almost invariable rule refuse to allow an accused to be identified by a witness for the first time when he is in the dock: see **R. v. Cartwright** (1914) 10 Cr. App. R. 219 and **R. v. Fergus** (1992) Crim. L.R. 363 The reason for this is that the very presence of the accused in the dock will suggest to the witness that it is the person who committed the crime."

In the instant case, the applicants were previously known to all the witnesses who identified them in Court. Though known to the witnesses by aliases, they were well known, at least to the witnesses Kelly and Baker, and no purpose would really have been served in the holding of an identification parade. Det. Insp. Thompson, in respect to the applicant Tucker, testified that he knew of only one "Romeo" in the area, and in any event the applicant admitted that he was called by that name. The applicant Thompson, however though admitting that he was known as "Kirk", never admitted to the name Kirkal. In those circumstances it cannot be successfully contended that it was the mere presence of the applicants in the dock, that led the witnesses to identify them as the persons involved in the crime. Consequently, the learned trial judge exercised his discretion correctly in allowing the evidence of identification, and as a result leaving that issue for resolution by the jury.

We also considered, the cumulative effect of these complaints, but as each by itself is without weight, so too are they when considered together. The evidence of identification as it stood at the end of the prosecution's case was capable of attaining the required standard of proof, and consequently the learned trial judge was correct in ruling that a prima facie case had been made out. This ground of appeal fails.

It may however be appropriate to indicate that the learned trial judge in his summing-up gave the necessary warning on the issue of visual identification, the reasons therefor and the requirement for caution in acting upon such evidence. On this issue, the directions were fair and comprehensive, and in fact dealt in detail with the complaints made in this appeal and earlier discussed in this judgment, all of which were presented in a manner very favourable to the applicants. In the end, the jury returned verdicts adverse to the applicants. We see no reason to disagree. We therefore refused the applications for leave to appeal, and ordered that the sentences commence on the 31st August, 1995.