JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 127/95

COR: THE HON MR JUSTICE CAREY, J A
THE HON MR JUSTICE PATTERSON JA
THE HON MR JUSTICE BINGHAM J A (AG.)

R V DALTON REYNOLDS

Lord Gifford, Q C for appellant

Miss Audrey Clarke and Miss Valerie Stephens for the Crown

10th & 24th June, 1996

BINGHAM, J A (AG)

The appellant was tried and convicted in the Home Circuit Court on an Indictment for the offence of non-capital murder arising out of the death of one Carl Simpson on 14th February, 1993. The hearing lasted from 23rd to 25th August, 1995. He was sentenced to imprisonment for life and the learned trial judge specified that he should serve a period of twenty years before becoming eligible for parole.

Before us, having heard the arguments of learned counsel, we treated the application for leave to appeal as the hearing of the appeal and allowed the appeal, quashed the conviction and set aside the sentence. In the interest of justice a new trial was ordered to take place at the ensuing session of the Home Circuit Court.

Having regard to the decision to which we came and the order made, the merits of the appeal will not be explored in any detail. Our reasons for the course taken by us were as follows:

The arrest and subsequent trial of the appellant resulted from an incident at Blackwood Terrace in Saint Andrew. During this incident the deceased was surrounded and chopped to death by some five men armed with machetes. The allegations were that the appellant was one of these men who took part in this incident.

At the trial the Crown called five witnesses, including two eye-witnesses, in proof of the charge and the appellant in his defence gave evidence on oath in advancing an alibi and four witnesses were called by the defence in support thereof. It is common ground that at least one of these witnesses, Devon Gordon was present during the incident in which the deceased met his death.

Before us, learned counsel for the appellant sought and obtained leave to argue the following supplementary grounds of appeal:

> "1. The learned Judge misdirected the Jury in saying that the eye witness Owen Richards was 'a very impressive witness' 'at his ease right from the outset', 'a completely and reliable witness in relation to the important aspects of this case.'
>
> In so commenting on the witness the learned Judge erred in law in that:
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> a) he nullified the effect of the warning which he was required to give, and did give, that an honest and convincing witness may be mistaken.
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> b) he exceeded the bounds of permissible comment and trespassed upon the function of the Jury;
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> 2. The learned Judge failed to deal fairly as between the two eye-witnesses who were called for the Prosecution and

> the three eye witnesses who were called for the Defence; namely Devon Gordon, Anthony Stephenson and Winston Boyd. The learned Judge erroneously described the Defence Witnesses as alibi witnesses, and commented adversely upon them for not going to the police and for making statements at a late stage. It is submitted that where eye witnesses were testifying for both sides a balanced and even handed summing up was required."

In the light of the conclusion we reached, in relation to the first ground there is no need for us to go into the merits of ground 2. In his summation having given what amounted to clear directions on the law applicable to the facts of the case and gone on to set out the case advanced by both sides, the learned trial judge said:

> "Now Madam Foreman and members of the jury, you might wish to consider Mr. Richards as a very impressive witness. Indeed this has been conceded even by the defence. The defence may have used a word other than 'impressive', but certainly the defence regarded him as a very good witness."

Having summarised the witness' account of the chopping incident the learned trial judge went on to say in relation to this witness that:

> "I formed the impression, it's for you to say whether you agree, Madam Foreman and Members of the Jury, that Mr. Owen Richards was a completely reliable witness in relation to the important aspects of this case." [Emphasis added]

In the light of the above directions we understood the learned judge to be telling the jury that he was putting forward this witness as one whose testimony was credible and upon whom they could place reliance in coming to their verdict.

These directions followed earlier directions by the learned judge in which he having correctly identified the crucial issue in the case as visual identification and in dealing with that issue had said:

> "Now, Madam Foreman and Members of the Jury, you readily appreciate that the question of identification is a live issue in this case. The reason why this is so is that the prosecution witnesses are saying that this accused man was present and took part in the assault and chopping of the deceased, whereas the defence is saying, I wasn't there it wasn't me. So that identification is a live issue. Now, whenever this occurs it is my duty to remind you of the importance of identification evidence. The reason why this is so, Madam Foreman and Members of the Jury, is that we live in a mixed society. People do resemble one another. A perfectly honest witness can make a mistake about a person's identity and when confronted with the possibility of error that same witness will hold on to his identification, sometimes with lethal consequences if indeed he is mistaken." [Emphasis added]

The moot question for us therefore was as to whether the comments made in relation to the Crown witness Owen Richards went too far. Taken in the context in which they were made they certainly would have had the effect of eroding and negating the earlier direction as to the approach to be adopted by the jury in relation to the crucial issue of visual identification.

Learned counsel for the appellant submitted that the comments in relation to the witness Owen Richards went beyond the bounds of what could properly be regarded as permissible comment. He relied in support on the following authorities:

(1) **R. v. Walter James** Frampton 12 Cr.App .R. 202

(2) **Reginam v Iroeghn** The Times 2nd August, 1988

(3) **Mears v. Reginam** 97 Cr.App. R 239 at 243.

The principle to be extracted from these cases is the need for the approach of a trial judge in a summing up to be impartial and fair, leaving the determination of the issues of fact for the jury to arrive at. We find that there is merit in this ground of complaint and the submissions advanced in support. When the summing-up is examined as a whole we find that the comments of the learned trial judge in relation to the witness Richards went much too far. The learned judge was doing nothing less than putting his stamp of approval upon this witness as credible and reliable and someone whose testimony the jury should accept. In this regard he fell into error as his comments amounted to an usurpation of the role and function of the jury.

Having formed this view of the summing-up, this was sufficient to dispose of the matter. In parting with this case we would refer to **Mears** (supra) and the dictum of Lord Lane in delivering the advice of the Board of the Privy Council whose words we would regard as apposite and equally instructive. He said at page 243:

> "Their Lordships realise that the judge's task in this type of trial is never an easy one. He must of course remain impartial; but at the same time the evidence may point strongly to the guilt of the defendant: the judge may often feel that he has to supplement deficiencies in the performance of the prosecution or defence in order to maintain a proper balance between the two sides in adversarial proceedings. It is all too easy for a Court thereafter to criticise a judge who may have fallen into error for this reason.
> However, if the system is trial by jury then the decision must be that of the jury and not of the judge using the jury as something akin to a vehicle for his own views." [Emphasis added]