JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 98/90

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

R. V. ROGER JOSEPHS

Dennis Morrison & Paul Ashley for appellant

Miss Cheryl Richards for Crown

8th & 15th February, 1993

CAREY J.A.

In the Circuit Court Division of the Gun Court in Kingston on 13th June, 1990 after a trial which had begun on the 4th June before Chester Orr J and a jury, the applicant was convicted of the murder of Richard Barber and sentenced to death. Another man Clifton Lakeman, who was jointly charged with him, was acquitted.

The circumstances of the killing are sadly, commonplace in this country. The victim was Richard Barber, the proprietor of a restaurant located by a river in Gordon Town, St. Andrew and called "Riversmeet." It was a place for lovers who wished to dine in the cool and privacy of the lower Blue Mountains. On the night of the 21st December 1988 round about 11:30 p.m. the premises were entered by two gunmen who first held up and robbed four female employees, herded them at gun point towards the bar where Barber was seated in the company of an off-duty police officer, Special Constable Curtis Hall. Both men were searched by each of the intruders. While the officer was being searched by one of the gunmen, later identified as this applicant, he was able to pull his revolver and fire at his searcher, who returned the fire hitting the officer. The gunman was himself hit although

that fact was not then appreciated. There was a deal of pandemonium, people running in all directions except for Barber, who was lying against Hall in a pool of blood and Hall himself who was injured.

The police were duly summoned and on their arrival, Barber, fatally shot was sent off in his own car, while the injured officer, Hall, was placed in the police jeep. The police also picked up the applicant within 3/4 chain of the premises. He was found lying on an embankment along the road, injured. He told the police that some boys had shot him. He was however identified by the injured officer as the man who had shot him. The injured persons were taken to the hospital. There a police officer, Sergeant Campbell, removed from the applicant's person a bill-fold containing cash and jewellery, a piece of which was claimed by one of the female employees Clover Christie.

Subsequent to these events, on 14th January 1989, the applicant made a statement under caution to a police officer, Detective Sergeant Wallace who, with commendable propriety, had a Justice of the Peace present, Mr. Oswald Brown. This statement dictated in the name of Daniel Hunter which was the name he gave to the police officer on that occasion, was admitted in evidence by the learned trial judge after holding a voire dire. In that statement he admitted that he had gone to the bar (i.e. the restaurant in Gordon Town) with another man called Michael, that they had held up some girls, forced them to the bar where he was shot by a man, who was in turn shot by him. He said that he was hit in his left breast, that while fleeing the bar he fired another shot but he did not know whether it had hit anyone else. He related that he had fainted and was ignorant of what became of the gun. He added that he was armed with a gun while his colleague was armed with a knife.

To complete the essentials of the prosecution case, the post mortem examination confirmed the death of Richard Barber as

caused by a bullet travelling through the left chest cavity, the third rib, the left lung, grazing the scapula and coming to rest in the back of the chest.

The applicant in his defence, gave an unsworn statement in which he explained that while riding his motor cycle on the road in the Gordon Town area, he was shot and knocked off it unconscious. He was beaten to sign a statement but he had not done so. He denied saying his name was Daniel Hunter.

A number of witnesses was called on behalf of the applicant. We do not think they did his cause much good. He called first, Carlton McDonald, who testified that he had been arrested for the very same crime, viz shooting a police officer in Gordon Town, but had subsequently been released. Jacqueline Powell who has borne him a child, confirmed that she had seen him on the night of the 21st December 1988, at about 11:30 p.m. Marie Richards, who was down to give evidence on behalf of the prosecution, but was made available to the defence, also gave evidence on his behalf. She was the cashier at the bar on the night of the murder. She said she could not see the intruders. In the course of cross-examination, her deposition was put to her to show that she had made statements inconsistent with her evidence before the judge and the jury. The only explanation vouchsafed by her was that, she could not remember what she had said at the preliminary examination.

The case against this applicant was as plain a case as there could be. It was also a very powerful one and the defence witnesses, except for Marie Richards, took his case no further. Her evidence, we think, must have damned him in the face of the jury. The case did not depend wholly or substantially on visual identification evidence. It was supported by evidence of (i) the applicant's possession of recently stolen property (ii) he himself was identified on the spot, so to speak and (iii) he made a confession.

Mr. Morrison filed a solitary ground, which stated:

> "That the learned trial judge failed to give the jury any adequate directions on the dangers inherent in the manner in which the Applicant was first identified by the witness Curtis Hall."

He put his arguments with admirable economy, lucidity and fairness. We are indebted to him, for it was perfectly clear that he was very well aware of the formidable hurdle he faced, and he said all that could properly be said in the face of reality.

We now set out the circumstances in which the witness, Special Constable Hall identified the applicant: Detective Corporal Levene, the police officer who had arrived on the scene after the shooting, having placed his injured colleague in the police vehicle, was about to drive off after switching on his headlights, when he saw the applicant in the near distance. He brought him back to the vehicle and placed him in the rear section and there he was identified by Hall.

Mr. Morrison did not suggest that this identification was in any way improper. It was plainly not the kind of arrangement whereby an investigating officer stage-manages a confrontation between witness and suspect, well knowing that an identification parade should be held. In this case, it was natural that the police officer would have brought the injured man to the police vehicle in order to get him prompt medical attention.

Learned counsel submitted that although no criticism could properly be levelled at the general directions given by the learned trial judge on the issue of identification, he took issue with the fact that the judge instead of highlighting the need for caution with respect to Hall's identification of the applicant, he implied that that issue was somewhat of less importance in the applicant's case, than in the case of the other accused.

The learned trial judge dealt with the matter in this way at pp. 464 - 465:

" Now the next thing we have to do is examine the evidence, but before we do that there is a most important matter which I have to discuss with you, and that is the question of identification. You have heard it said before, and I repeat again, that the most important aspect in this case is the question of identification, and I am under a duty to give you a word of caution, that in cases like this, where the question of guilt depends on the identity of the accused persons, you have to approach the evidence with particular care. You have to be very careful about it, and this applies particularly in the case of the accused man Lakeman. The only evidence against Lakeman is the evidence of the people who said they saw him, that is why I tell you you have to consider him separately. Josephs is alleged to have been found with the lady's chain and he is alleged to have given a statement admitting the offence, but you may not accept either of them, so you have to consider the question of identification very carefully. And why is it that you have to be so careful with identification? Because it has been shown time and time again that people make mistakes in identification. A witness may come here and make an honest mistake he is not lying, he believes he saw that person, he is making an honest mistake, and if an honest mistake is made in a case of this nature the consequences would be tragic. So you have to examine the evidence with care."

In the above extract, the trial judge, far from any failure to highlight the need for caution with regard to the applicant's identification, made it abundantly clear that the question of identification was of equal importance to the case of each accused. A reasonable jury would understand him to be saying that, the fact that as regards this applicant, there was supporting evidence of recently stolen property being found in his possession, and his admission in the cautioned statement, did not minimise the need for caution on this issue. In our opinion, the words - "so you have to consider the question of identification very carefully" provides proof positive that the learned trial judge did not err in the manner complained of.

Later in his summing-up, the learned judge gave the following directions at pp. 465 - 466:

> "... So you have to take into account a most important fact, that if neither of these men were known to the witnesses before, if you can make a mistake with somebody you know, how much more with a stranger. You have to take into account the time, the circumstances under which this identification was made. This was done at night, so if you can make a mistake in broad daylight, think of somebody at night. You have to take into account the state of the light. What was the lighting like? That is why so many questions were asked about the light. You have to take into account how long the incident lasted: were the witnesses in that short space of time able to see the faces of the men so that they could remember them afterwards?
>
> And another thing - most important, very important - what description was given to the police? Because if -- well, a lot of colour was being used - - if I tell you a dark man committed the offence, and we use the same lady, No. 11 juror, and then you see the police bring somebody like her to court, you say, how come, that is not dark. So the description is very important. And the question of long afterwards they identified the person would have to be considered. The question of identification is most important, and particularly in relation to Mr. Lakeman it is most important."

He specifically dealt with the circumstances of Special Constable Hall's identification of this applicant. The trial judge said at p. 472:

> "... What you must consider is this, when Mr. Hall identified him in the jeep did he merely identify him because he saw him there bleeding and said this must be the man? Or was it that Mr. Hall was able to get a good look at his face in the bar so that when he saw him in the jeep - remember he said there were three 'clients' there - he was then able to make out his features?

The trial judge, it is clear, had the guidelines of **R. v. Turnbull** [1976] 63 Cr. App. Rep. 132 and **R. v. Whylie** [1977] 15 J.L.R. 163 in the forefront of his mind.

Another complaint was that he ought to have gone further and placed this direction in the context of the following factors:

(i) the intruders were strangers to Special Constable Hall;

(ii) the duration of the events was short;

(iii) Hall thought the gunman was shot;

(iv) the circumstances of this identification in the jeep;

(v) the defence stance that it was because the applicant was brought to the hospital with gun shot injury, that prompted the identification.

We fear that this complaint is quite unfounded. In dealing with identification, the learned judge specifically dealt with the particular circumstances of the case as we have illustrated. The last citation we made from the summing up completely and effectively destroys the point. Since it must be remembered that the identification evidence was the only evidence against the co-accused, Lakeman, then the learned trial judge, in the proper discharge of his duty to ensure a fair trial, was bound to make the point to the jury, self-evident as it undoubtedly was. In the result, we do not think there is anything in the ground.

As we said at the very beginning of this judgment, learned counsel was not unaware of the formidable hurdle he faced: he argued his case with commendable restraint.

We wish to say finally that the summing-up was in all respects fair, balanced, adequate and correct nor did we consider the trial judge's abdication of responsibility when he refused to order Crown Counsel to hand over to the defence the statement of the witness, Marie Richards, whom the prosecution had made available to the defence, as amounting to such an irregularity as to affect the fairness of the trial in any material respect. It falls far short of anything that unhappily took place in **R. v. Berry** [1992] 3 W.L.R. 153. We must however, observe that

we are at a complete loss to understand what objection either in law or logic there could be, which could preclude Crown Counsel denying the witness' statement to the defence when it was requested. While we can understand the inexperience of Crown Counsel (not being Crown Counsel before us in this application) we do think the trial judge ought to have ordered the statement handed over. We treat the application for leave as the hearing of the appeal which we accordingly dismiss.

The Offences Against the Person (Amendment) Act is now in force and that is the law which we must now apply. Plainly, on the facts of the case, the murder was committed in the course or furtherance of a robbery which brings it within the category of capital murder pursuant to section 2 (1) (d) (i) of the Act. Mr. Morrison did not seek to argue otherwise. Insofar as it is necessary to say so, the sentence is affirmed.