JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS: 56, 57 & 58/95

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

REGINA

V.

KEVIN GEDDES
DEON McTAGGART
DAVE SEWELL

Miss. Janet Nosworthy for Geddes

Lord Gifford, Q.C. & Hugh Wilson for McTaggart & Sewell

Ralston Williams for Crown

15th, 16th & 31st July, 1996

CAREY, J A

At a trial in the Circuit Court Division of the Gun Court held in Kingston over four working days before Panton J and a jury, these applicants were convicted, as to McTaggart and Sewell of capital murder and as to Geddes of non-capital murder. Sentence of death was passed on the first two, while the third was sentenced to life imprisonment with eligibility for parole in 25 years. The Record which has been produced is as to be expected quite voluminous but the facts fall within a rather narrow compass and may be related quite shortly.

On the 11th June 1993 at about 9.20 a.m. Mr. Errol Cann, the proprietor of Candon Enterprises Ltd, Spanish Town in St. Catherine was shot to death in an ambush set up on Old Market Street as he was enroute by car to the bank to lodge proceeds of sales. At the time, the car was being driven by Dorothy Shim, who testified as to the circumstances of this quite callous and brutal murder. She was not able however to identify the assailants, an aspect of the evidence supplied by a young man, David Morris aged 14 years at the time of these events. According to Mrs. Shim, as she drove along the roadway, she was compelled to slow and eventually halt when she noticed a little boy trying to get a cart out of the path of the car. It was when the car was stopped that Mr. Cann was shot by a man armed with what was described as a pump rifle. The glass on the passenger side where Mr. Cann sat, was shattered by the blast and pellets eventually removed, lodged in his chest. He received multiple wounds to the upper and mid chest region of his body. Another man jumped onto the car as Mrs. Shim accelerated away from the scene and headed towards the hospital. This man fired several shots into the car and eventually fell off. She finally reached the hospital.

Morris gave evidence that while walking home he was kidnapped at gun point by McTaggart, Geddes and another man, and that McTaggart threatened to execute him because his mother was an informer. The men compelled him to push a hand-cart to a place called Upper New Nursery. There he was kept in a one room house until 10.00 a.m. the following morning when he was placed in the back of a van with the hand-cart and two other men and driven to Market Street. There he was required to push the cart by a palm tree on the same street and abandon it. He was then dismissed but he positioned himself near the hand-cart. Later McTaggart alighted as did Sewell from a car which drove up. Sewell was carrying a brown paper shopping

bag. Geddes began pushing the hand cart he had left across the road at a time when another car was approaching. This forced that car to stop, whereupon Sewell fished out a pump rifle from the bag, another man exposed his firearm while McTaggart removed a knife from his waist. Sewell went to the passenger side, used some disgusting and threatening language, pointed the gun at Mr. Cann and shot him. The car accelerated, McTaggart leaped onto the car but fell off. Thereafter all the participants fled. The medical evidence confirmed death from multiple gunshot wounds to the chest.

Subsequently at an identification parade held in a cell block, Morris pointed out Sewell as one of the assailants. With respect to McTaggart, Morris gave evidence that he knew him over a 4 year period before the night he was abducted and he explained that they had played football together. He was accustomed to seeing him frequently. In regard to Geddes, called Tushan or Tishan, he knew him for about eight months and like McTaggart he saw him frequently.

In his defence, Sewell put forward an alibi and called a number of witnesses in support.

At an identification parade on which Sewell was supposedly the suspect and Morris the witness, evidence was led by the prosecution to show that Sewell had switched places with another person on the parade and indeed was not present on the parade. In those circumstances, Morris identified no one on that parade. The police arranged another parade on which Sewell was identified by Morris. An attorney at law was called by Sewell to confirm that he was in fact on the parade. This incident provoked a ground of appeal with which we will deal hereafter.

Both McTaggart and Geddes put forward alibis in their defence. Geddes who gave evidence on oath called his aunt to support his story: McTaggart made an unsworn statement.

The appeal of Dave Sewell

Lord Gifford Q.C., as his main ground of appeal, argued that the learned trial judge failed in his summing up to make any reference whatsoever to witnesses Seymour Stewart an experienced attorney at law and Christopher Baker who both testified that the appellant was present on an identification parade at which the main prosecution witness David Morris failed to identify the appellant. The effect of this failure was that the case for the defence was neither fairly nor adequately dealt with by the trial judge.

At page 800 this aspect of the defence was put to the jury in this way:

> "Defence is saying to you, Madam Foreman and Members of the Jury, that this is not something that is capable of belief, because how could Sergeant Watkis be conducting a parade for a particular suspect and how could he be so incompetent to allow Christopher Baker or any other person for that matter, to present himself and say that he is David Sewell. And you will remember learned Attorney-at-law Mr. Morris, in his own dramatic way, in his address to you yesterday saying on that point that if it is so, he should perhaps pack his bags and leave the country.
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> Well, Madam Foreman - and I am here almost following Mr. Morris' footstep in referring to Madam Foreman as Mr. Foreman - Madam Foreman and Members of the Jury, you are Jamaicans, you have to assess the situation and you decide whether it is so that Baker substituted himself for Sewell. Whether competence or otherwise is involved, you decide that. However, I should point out to you that the mere fact that someone is standing in for another on a parade, that fact alone

> does not point to guilt, and you shouldn't view it that the person is guilty by that mere fact."

Just prior to those directions, he had set out the prosecution version in this manner (pp. 799-800):

> "And then Hopeton Watkis, he told you that he held a parade at the Central Police Station and that Morris who was the witness on that parade said he didn't see any of them on that parade, anybody who he recognize as being involved in the killing on that parade.
>
> Sergeant Watkis said the parade should have been held for Dave Sewell, otherwise called Dave 'Eighteen', but as events turned out, it was not held for him as someone else pretended that he was Dave Sewell and that person, according to the prosecution, is Christopher Baker. And you will recall that later there was a situation where Inspector Grant, the investigating officer, was informed and he it was who showed Sergeant Watkis who the real Dave Sewell was, and that in the presence of the accused man Sewell, Christopher Baker is supposed to have said, 'a told you it wouldn't work', or words to that effect."

In our view, there is substance in these submissions by learned Queen's Counsel. The manner in which the trial judge dealt with the defence glossed over the significance of the fact that the appellant had given evidence on oath, had called a witness; an attorney-at-law who confirmed his evidence. We do not think it could fairly be said that that witness was destroyed by cross-examination. By failing to refer to the witness by name or even that he had given evidence was likely to convey the impression that that evidence was not worthy of consideration. In the same way that the names and the evidence of the prosecution witnesses in that connection were mentioned, so too should the names and the evidence of the defence witnesses be mentioned. In that way the jury would be provided with a balanced picture of the rival positions.

We appreciate that the case took a number of days and this very experienced judge might well have thought to lessen the burden on the jury by making his summing up as brief as possible. Laudable though that concern for the jurors might be, we would like to say that it is even more salutary to assist them in their arduous task by giving fair and balanced directions.

In our view the appellant was denied the fair trial to which he was entitled and obliges this Court to intervene by quashing the conviction and setting aside the sentence. At the end of this judgment, we will deal with the disposition of this case.

The application of Deon McTaggart

Lord Gifford Q.C., put his argument in this way. He said that the failure of the trial judge to direct the jury fairly and adequately in relation to the identification parade evidence meant that the jury were without assistance in considering an issue which affected the integrity of the witness Morris. Unfairness which would warrant interference in the conviction of Sewell spills over into the case against McTaggart and a fresh jury should be asked to consider the integrity of Morris in relation to McTaggart. The issues of fact in relation to Sewell's identification parade evidence include an issue as to the honesty of Inspector Grant who had given damning evidence against this applicant i.e. Baker saying to the applicant - "I told you it would not work" when the truth about the fake parade was discovered. This witness had also given other evidence implicating this applicant when he testified that when the applicant was detained - he had said - "ah no me alone kill him." Had the jury received the assistance they ought regarding the two versions of the parade they might well have decided that they preferred the evidence of the defence. They might have come to question the honesty

of Inspector Grant and might not wish to rely on the evidence of the verbal admission. He reminded us that McTaggart had denied participating in the crime.

The jury were required to consider the evidence against each of the applicants and to make up their minds whether they were satisfied so that they felt sure that the case against each was proved. It is of course perfectly true that the same witnesses were giving evidence against each of the applicants and the jury could have been in no doubt that the credit of each witness was crucial. The evidence regarding the identification parade where it was alleged that Baker switched places with Sewell plainly affected only Sewell. The directions in that regard given by the trial judge affected only Sewell. Any deficiencies in those directions, in our view, it would seem to follow affects Sewell and no one else.

The weight to be accorded to the evidence of the police officer implicating McTaggart, was a matter for the jury. We are quite unable to appreciate how the shortcoming of the judge in regard to an issue relating to Sewell, could remotely prejudice McTaggart.

The case against McTaggart as indeed against the others, depended on the jury's acceptance of the word of Morris. It was suggested that the verdict was unreasonable inter alia because of the omission to hold an identification parade for this applicant. On the prosecution side this was a recognition case, the witness knew the applicant prior to these events and accordingly it would have been a sleeveless errand to mount an identification parade. Although there was some suggestion to a police witness Det. Inspector Errol Grant that some informal parade had been held at which Morris was coerced into identifying the applicant, nothing came of it because McTaggart gave no evidence nor did his statement have any bearing on that matter.

We have previously called attention to a statement made by McTaggart on being arrested which was capable of amounting to an admission - "ah no me alone kill him." The jury were required to make up their minds regarding the creditworthiness of the police officer. Did Morris speak truly of the applicant's participation ? Did the police officer speak truly as to the words put in the mouth of the applicant? The jury by their verdict must have accepted either or both as witnesses of truth. In the context of this case the jury must have accepted Morris as a witness of truth, that notwithstanding the warning of the trial judge that he might be a witness with an interest to serve and therefore one whose evidence called for the most careful scrutiny.

Praying in aid a ground intended to be urged on behalf of Sewell, Lord Gifford Q.C., complained, not with much enthusiasm, that the directions on identification were in the circumstances inadequate and that the jury were not told that mistakes can be made in recognition cases.

The learned trial judge at page 788 gave the following directions on this issue:

> "Learned Attorneys, Mr. Morris and Mr. Marcus, have specifically, in their addresses to you, said that there has been mistaken identification. Their cases rest on the correctness of the identification of each accused, and because of that, I am warning you that there is a special need for caution on your part before convicting in reliance on the correctness of the identification. The reason for this, is that it is quite possible for an honest witness to make a mistaken identification, and indeed there are reports of notorious miscarriages of justice in some countries of the Commonwealth as a result of faulty identification. You are to bear in mind that a mistaken witness can also be a convincing witness, so what you are to do Madam Foreman and Members of the Jury, is examine carefully the circumstances in which the identification by the witness Morris was made. You consider that he is saying that he knew them. He knew them before. You consider his evidence as to being with them. You consider all the circumstances here. The Crown is saying that this

> killing took place in broad daylight, 9.30 in the morning. The Crown is saying that the witness had been with them shortly before. The Crown is saying that the witness positioned himself in bushes near to the scene where he was able to see and not to be seen. So you consider all that Madam Foreman and Members of the Jury."

There is no doubt that the word "recognition" was not used by the judge. There is no particular magic in words. It has been said in a great many cases that no formula need be recited, no incantation is required. The directions were to be applied to a case where the assailants were known to the witness before the events. What assistance could be given to the jury by telling the jury what they already knew viz that the witness knew the applicant before? We venture to think - none. The directions applied whether the case was a recognition case or a case of a perfect stranger. The evidence was to be viewed with the utmost caution. The question of the accused being a stranger or a person known before is important when the judge is dealing with weaknesses in the prosecution case, we would suggest. We do not think that by omitting the label "recognition", it makes the direction inadequate or deficient in any way.

Incorporated as a ground of appeal is a complaint that the judge erred in his directions on alibi. **R. V. Bernard (unreported)** 26th April, 1994 was prayed in aid. We do not read that decision to be saying that in every case a jury must be told that an accused may put forward a false alibi which is not to be taken, if disbelieved, as a basis for inferring guilt.

The learned judge directed the jury thus - (page 789):

> "Each accused man said to you he was elsewhere at the time. He said what in law is known as an alibi. Now an accused who pus forward an alibi, does not assume any burden of proving it. If you

> accept his alibi, not guilty would be your verdict. If you doubt the alibi, that is, if there is a doubt as to whether or not he was where he said he was, not guilty would be your verdict. If you reject the alibi, that does not necessarily mean that the accused should be convicted. The accused may only be convicted if the case for the prosecution makes you feel sure."

McTaggart made an unsworn statement. He called no witnesses. The directions as to alibi were succinct and clear. The options open to the jury left no room for uncertainty. If the jury rejected the alibi because they disbelieved the alibi, it would have been a false alibi and they could only understand from that direction that that conclusion was not a basis for conviction. The accused may only be convicted if the case for the prosecution made them feel sure. We do not think anything could be clearer or simpler to grasp. The Privy Council in **Nigel Coley v. R** (unreported) delivered 26th July, 1995 came to the same conclusion - Their Lordships said in respect of directions similar to those of which complaint has been made:

> "Their Lordships regard this as a perfectly adequate direction upon the point. No doubt it would have been possible for the judge to deal with the matter more fully but that would not necessarily have been in the interests of the appellant. It would have been open to the judge, if he was so minded, to say that while an innocent person might put forward a false alibi out of stupidity or fear, the deliberate fabrication of an alibi, if it can be established beyond doubt, might properly be counted against the appellant."

A summing up, we would remind must be custom built, that is, it must have regard to the facts in the case, the issues joined, and the jury called upon to make a determination of guilt or innocence in the particular case.

In the circumstances of this case, the directions in respect to alibi were, in our opinion, adequate, accurate, clear and succinct.

It must be obvious from what we have said that we reject the submissions in regard to this applicant.

The application of Geddes

Miss. Nosworthy submitted that the verdict was unreasonable and could not be supported having regard to the evidence. She argued that the prosecution failed to put before the jury credible evidence as to the identity of Geddes. There were two descriptions of the person who pushed the cart across the road as part of an ambush viz, Geddes according to the evidence of Morris and a little boy, possibly Morris, according to the evidence of Mrs. Shim. There were discrepancies in the evidence of Morris as to when it was he had given his first statement to the police.

We do not propose to deal with the latter submission as we do not think it can enure to the benefit of the applicant. Some suggestions were put to a police officer, Det. Superintendent Reginald Grant, but they were not accepted and no evidence was adduced by the defence in that regard. They created a mystery but never explained it.

It is passing strange that there was minimal cross-examination of Mrs. Shim. Her mental state at the time of the incident was certainly not explored, doubtlessly, because she did not identify any of these applicants as participating in the murder and robbery. She did say that the person who pushed the cart across the road was a little boy. She has not ever stated that the little boy was Morris. She would have seen him attending at identification parades and must have brought his identity to the attention of police officers present. She attended court at the preliminary examination and the trial and we would think that if she recognized him or had suspicions about him as the cart

pusher, she must have divulged his identity. We do not think all this would have escaped the attention of the jury who saw Geddes in Court.

The jury saw Mrs. Shim and they also saw Morris. They were warned by the judge fairly and adequately as to his status. The dichotomy in the evidence which we have mentioned was identified by the learned trial judge at pages 802-803:

> "Now Madam Foreman, in relation to the witness Morris, there are certain key questions that you have to ask yourselves. One, is he a truthful witness. Two, was he present witnessing what he said he witnessed. Three, was he a participant in the proceedings only so far as he pushed the cart up to the palm tree. Four, was he a more active participant in the proceedings, in that he was probably the person who Miss Shim described as struggling with the cart in the road. Of course, Madam Foreman and Members of the Jury, if you were to find that he was the person pushing the cart when the car was stopped, then it would mean that it could not have been Geddes."

It seems to us that the trial judge in those directions was clearly dealing with the defence of Geddes which was an alibi. We have come to the conclusion that there is no substance in these arguments.

In the result, we treat the application of Sewell as the appeal which we allow. The conviction is quashed and the sentence set aside. In the interests of justice a new trial is ordered in the Circuit Court Division of the Gun Court in Kingston. With respect to the other applications for leave to appeal, these are refused. The sentence of Geddes is directed to commence on the 12th July, 1995.