JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 17/91

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.

REGINA vs. TREVOR PALMER

Lord Gifford, Q.C. for the applicant

Misses Carol Malcolm and Audrey Clarke for the Crown

April 11, 12, 13 and May 30, 1994

WRIGHT, J.A.:

This is an application for leave to appeal against conviction and sentence of death imposed upon the applicant in the Manchester Circuit Court on February 5, 1991, for the murder of Godfrey Lindsay on March 26, 1990, in the parish of Manchester.

This is but another example of the all-too-frequent and frightening incidents of the wanton destruction of human lives in the endeavour to secure the immediate and unjust enrichment of the murderer.

The victim died on March 26, 1990, from anoxia due to hypovolemic shock the result of a gunshot injury to the anterior aspect of his right shoulder which penetrated deep into the thorax fracturing the first and second ribs on the right side.

The evidence of what transpired at the scene was given by Cleveland Pommells and Trevor Wallace. Godfrey Lindsay purchased yams from farmers to whom Trevor Wallace had issued purchasing orders in the area of Bombay in the parish of Manchester. At about 1:30 p.m. on March 26, 1990, Mr. Lindsay drove his truck to Bombay and picked up Trevor Wallace who

accompanied him to pick up the yams. They drove to Hope Prope. Blue Mountains, where Kenneth Pommells, a yam farmer, and his son Cleveland Pommells awaited them. The truck stopped in an **orange grove about three chains from the yam field and thereafter** the yams were transported to the truck. Cleveland Pommells was in the back of the truck receiving and packing the yams which were being passed to him by Trevor Wallace who was on the ground. The witnesses agree that while thus engaged they saw three men, whom they did not know before, pass close to the truck and enter the orange grove. Mr. Lindsay was then leaning against an orange tree. The time was then about 2:00 p.m. Although the men were unknown to both witnesses, they observed the applicant who was distinguished by "liver spots" on his face. Shortly after entering the orange grove, the three men rushed back to the truck. Two of them, including the applicant, were brandishing short guns and they shouted, "Don't move." The applicant held Trevor Wallace as the witness puts it "in a me 'tomach" and kept waving his gun in such a manner as to cover both Pommells and Wallace who were by the truck and Kenneth Pommells who was taking yams to the truck. The men demanded money but the witnesses said they had none. The applicant then, according to Wallace in his racy tongue, "Him lick me down in a me 'tomach" and then rushed off to Mr. Lindsay who was still leaning against the orange tree. Wallace fell before the truck then he got up and ran. The applicant had dragged Wallace from the back of the truck to the front while demanding money of him. Just then Mr. Kenneth Pommells, while approaching the truck, called out to his son Cleveland. The applicant then shot Mr. Lindsay and the three of them fled the scene.

The evidence of Emmanuel Collins was of very formidable effect although he did not witness the killing. He testified that he and the applicant were well known to each other for sixteen years. They used to work together on jobs cultivating yams. He put the time at about 4:30 p.m. on March 26, 1990, when on the way from his field he saw the truck driven by the deceased

Lindsay in the orange grove on Hope Property. Yams were being loaded on to the truck. He spoke with Mr. Lindsay, whom he had not known before, and passed continuing on his way home. On the way he met the applicant and two other men who were strangers to him. The applicant came up to him, took a cigarette from the witness' shirt pocket and asked him for a light. Next, the applicant asked him "if is Dread truck up the top there." He told him no. Then one member of the trio enquired whether it was an orange truck, to which he replied that it was not an orange truck it was a yam truck. The applicant and his cohorts then hurried off up the hill in the direction of the truck. The two questions asked of this witness in cross-examination evoked the response that the applicant had not reached the orange grove at the point where they met but he was going in that direction.

The witness Trevor Wallace had run from the scene to the Williamsfield Police Station where he made a report to Detective Constable Barrington Daley about 5:00 p.m. Detective Daley visited the scene where he saw the body of the deceased Lindsay on its back behind the truck. Blood was flowing from a wound in the region of the right shoulder. The body was removed to the Mandeville Hospital where death was pronounced.

The evidence does not disclose when the applicant was taken into custody but it was not until July 13, 1990, that Detective Daley received information which led him to the Half Way Tree Police Lock-up where the applicant was pointed out to him. He identified himself to the applicant and informed him of the murder of Godfrey Lindsay in which the constable had information that the applicant was involved. The latter made no reply. He was transferred by night to the Porus Police Lock-up and thence to the Mandeville Police Lock-up where on an identification parade, conducted on August 4, 1990, he was identified by the witnesses Cleveland Pommells and Trevor Wallace. Thereafter, on the same day, he was arrested and charged by Detective Constable Daley with the murder of Godfrey Lindsay and

upon being cautioned, without any threat, promise or inducement, he responded, "So what 'bout the other two?".

His defence was presented in what may now be properly called the Jamaican style, that is, an unsworn statement, which went thus:

> "I don't kill any man. I don't murder any man. I don't know anything about it."

After a summing-up which lasted for 1 hour and 54 minutes the jury retired for 4 minutes and returned with a unanimous verdict of guilty as charged.

Three grounds of appeal were presented in support of this application. The first ground complains:

> (a) that the summing-up lacked a reference to the fact that judicial experience had shown that miscarriages of justice have occurred as a result of mistaken identification;
>
> (b) that the warning on the necessity for caution in dealing with identification evidence was blunted by certain comments made by the learned trial judge.

The second ground criticises the conduct of the identification parade and the third ground questioned the classification as capital murder.

Included in the guidelines governing visual identification evidence is a requirement that the trial judge refer to the fact that judicial experience has shown that miscarriages of justice have resulted from mistaken identification and a failure to comply with this requirement has been regarded as a fatal flaw resulting in convictions being quashed. (See S.C.C.A. 83, 85, 86/91 **R. v. Devon Laidley et al** [unreported] delivered 1st April, 1993; **Thomas Palmer v. R.** P.C. Appeal No. 44/90 delivered 3rd February, 1992; **Junior Reid v. R.** [1989] 3 W.L.R. 771; [1990] 1 A.C. 363). However, insofar as Jamaica is concerned the Privy Council has now accepted that it is not necessary for judges to give such a direction to jurors. This was the decision of the Board in the recent case of **Desmond Amore v. R.** [unreported]

P.C. Appeal No. 5/93 delivered 15th March, 1994. In delivering the opinion of the Board, Lord Nolan at page 8 said this:

> "There is one further passage in the **Reid** judgment to which their Lordships must refer before leaving the case. It occurs on page 390 of the report where, in the course of explaining why the appeal of **Oliver Whylie** must be allowed, Lord Ackner said:
>
> > 'What the judge failed to do was to explain that visual evidence of identification is a category of evidence, which experience has shown is particularly vulnerable to error, errors in particular by honest and impressive witnesses and that this has been known to result in wrong convictions.' (emphasis added)
>
> The closing words reflect the fact that in England and Ireland wrong convictions have indeed been known to occur as a result of mistaken identification evidence. But it was accepted by Mr. Kuldip Singh that there is no record of any similar occurrence in Jamaica. The point was touched upon in the later case of **Daley v. The Queen** [1994] A.C. 117 where Mr. James Guthrie Q.C., who represented the Crown both in that case and this, is quoted at page 121 of the report as stating in argument that:
>
> > 'There is no history in Jamaica, as there is in England, of well publicised miscarriages of justice resulting from erroneous identification, and it would not assist a jury in Jamaica to tell them that that has happened elsewhere.'
>
> Mr. Guthrie told their Lordships that the statement thus attributed to him reflected what was said by Zacca C.J. (who was sitting as a member of their Lordships' Board) during the course of the hearing. In these circumstances their Lordships are satisfied that the judge cannot be criticised for making no reference to experience of injustice in other cases as a result of mistaken identification. Such a reference would have been unnecessary and unhelpful."

This decision, therefore, supplies the complete answer to the complaint in the first ground that there had been this omission. Further, the decision underscores the fact that a summing-up is not a dissertation on the whole law. Rather, it must provide the jury with the necessary equipment to resolve the issues which are

left to them for their determination and while events in other jurisdictions may be of interest, if they are not relevant to the jury's functions, then they are indeed unhelpful and should be omitted.

Ground 1(b) of the grounds of appeal is founded on three aspects of the directions on identification at pages 137, 155 and 163, the criticism being that the direction on the need for caution was negatived or at least blunted by the judge's comments. The passage at pages 137 to 138 is as follows:

> "On the other hand, you heard defence counsel contending that insofar as Trevor Wallace is concerned, he was certainly frightened out of his wits, you may say he was. He, himself, admitted that he was shocked, he was shocked when he was accosted by the man, who he is saying is the accused, with this gun and what was done to him. He even went as far as to say that he was dead already. But, members of the jury, you need to use your common-sense and experience as well because even though the witness, Wallace, did say all that, when it was pressed upon him by defence counsel that he was being mistaken, he said no, he is not being mistaken. That is the same man, is him.
>
> You may have some experience - some of you, some of you may not but it is a situation where circumstances such as that which confronted Mr. Wallace can have, apart from the effect that he has admitted, it can also have an opposite effect on him. It could have the effect that the picture of the person with whom he was confronted that evening and who did this act to him by hitting him to the ground with the gun and who caused him to have to come here and frankly admit the ablutions that he said he underwent, someone like that, you may well say that his assailant's impression, his figure, his picture, would become indelibly imprinted on Mr. Wallace's mind. It is a face that maybe in the agony of the moment, you may well say, he might also, equally, have not forgotten. But that is a matter which is entirely for you as to what view you take of, not only of Mr. Wallace, but of Mr. Pommells as well; because I have to be going very carefully through their evidence because it is through their evidence that the prosecution seeks to establish the circumstances surrounding the killing of Mr. Godfrey Lindsay."

The impugned passage at page 155 is underlined in the following extract from pages 155 to 158:

"And, remember what I said to you in this regard. It must have been a frightening experience, but equally balanced with that in the same way, as in so many persons, it might shut out their minds, out their memory the event, because of the frightening nature of the experience as to cause them to completely forget the face or features of these persons including the accused, one of whom they are saying was the accused. It might equally, as well, always have the opposite effect of indelibly imprinting on their minds the faces of these persons and in this case, there are things to commend the last suggestion that I am putting forward and why do I say this, because the accused man, you can look at him. Look at him, and you must ask yourselves whether this is not in keeping with what one of the witnesses say, I think it was Mr. Wallace, that he stood out on the parade because he was stout and he had this liver mark, what look like a liver mark, and it's my duty to tell you this: A peculiar feature on an accused person, of some mark, can aid the visual identification of that person. There is nothing wrong with that. As a matter of fact, it is one of the factors that goes towards identification of someone who is alleged to have been involved in a particular crime. If they don't have some peculiar feature about them, and in this case both these witnesses are saying, Wallace and the young man there, Pommells, is that the accused had a liver spot on the side of his face which would have assisted them, you may well say, in identifying him, apart from any other feature that he might have had. This was daylight. Whether it was 2:30, 3 o'clock, 4:30 or 5 o'clock, it was still daylight and in these circumstances, the distance couldn't have been closer, you may well say. In the case of Pommells, he was on the back of the truck and you may well say from that young man's evidence, as to what he objected, that he was paying rapt attention - careful attention to these men, including the accused, not only when they first passed by the truck as Pommells has said, because he is saying they passed close to the accused in particular pass close to the truck. On the same side they passed on was the same side they came back on, this time, however, running.

This evidence as to the sort of attention he was paying you may well say was bolstered up by his unchallenged evidence as to how he described the dress of the men - shorts, short pants cut off, cut off pants below the knee; the accused had on a guernsey and that is also supported by Mr. Wallace's evidence as to how the accused was dressed. The

"guernsey he describes as not white, a more dirty type a white, more creamish and he puts himself, Mr. - young Pommells, at the back of the truck, about three feet from the back of the truck and Mr. Lindsay, when accosted by the accused who was pointing a gun at him, about another one and a half feet away. So he puts a distance of about four and a half feet, bearing in mind that he is also describing how the accused was swinging the gun from side to side.

So this young man, if you accept his evidence, you may well ask yourself whether he not only had the opportunity for some three minutes, as he puts it, of observing what was taking place for some three minutes after the accused and the other two men went into the bushes, that they came running back. Not very long. So, given all these factors, if you accept them, the distance, the lighting, the peculiar feature of the accused man, the period of time for which he was observing him and the very manner in which he has described so graphically, you may well say, what was taking place, you need to ask yourself that given his evidence, how did he strike you?

If he struck you as a truthful and reliable witness, then it is my duty to tell you that in those circumstances it is a matter for you as to whether faced with the situation he was faced with that afternoon and given his evidence, he does strike you as being the sort of witness on whose testimony you can safely rely upon, whose testimony you can safely accept in determining whether he has made a positive identification of this accused man and made a positive identificatioin of this accused man in circumstances where he is not being mistaken; despite that, despite the warning that I gave you, if you accept his evidence then that is evidence upon which you can safely act in coming to your verdict in this case."

The final passage as recorded at page 163 reads:

"He changed his shirt for a brown and white striped shirt, but despite that the witnesses came on the parade and pointed him out without difficulty and you need to ask yourselves, given the time that elapsed, had the circumstances prevailing at that time, have been of such nature as to indelibly imprint on these witnesses, the picture which no doubt might have haunted them through these succeeding months; as to cause them to have no difficulty in pointing out the accused man, who was the suspect on the parade."

Taking the last passage first we make the comment that the harm complained of could not possibly result from that

direction for indeed that is the question with which the jury had to grapple, that is, did the witnesses acquire a good picture of the features of the applicant and carry that picture in their minds up to the time of the confrontation on the parade so that they could match those features with those of the man they identified? That is the question that the jury must resolve as judges of the facts; so it can do no harm to remind them as the learned judge did.

The directions complained of on page 137 have to do with the witness Trevor Wallace as the first paragraph on that page makes plain. It reads:

> "Now, the ability of witnesses to recollect an incident and to give an account of it before you will vary with the ability of each witness. It's a matter as to how the witness strikes you. Cleveland Pommells, how did he strike you? You heard comments by Crown Counsel that he appears to be a very intelligent young man."

It is difficult to contemplate a more balanced presentation of the relevant aspects of identification which the jury had to consider than is set out in the passage at pages 137 to 138 (supra). The learned judge put clearly before the jury the opposing contentions of the defence and the prosecution and left the decision to them:

> "But that is a matter which is entirely for you as to what view you take not only of Mr. Wallace but of Mr. Pommells as well."

The passage at page 155 begins with an obvious reference to the earlier direction at page 137:

> "And remember what I said to you in this regard."

The learned judge was obviously being very careful to ensure that as the summing-up progressed the jury remained alert to the need for caution. In substance, he merely repeated what he had said at page 137 and then gave guidance to the jury on the determination of the question of the acceptance of the evidence of identification.

That ground of appeal is singularly unmeritorious.

The second ground of appeal which criticises the conduct of the identification parade in two respects is clearly a non-starter. The first area of complaint is based on the mistaken belief that the rules for the conduct of identification parades in Jamaica are in all respects identical with the English rules, which is not the case. The English rules do provide that:

> "Witnesses shall be brought in one at a time. Immediately before the witness inspects the parade, the identification officer shall tell him that the person he saw may or may not be on the parade." (See Rule D 14 para 14-49 Archbold Criminal Pleading, Evidence and Practice [1992]).
> **[Emphasis supplied]**

In Jamaica, the conduct of identification parades is governed by rules published in the 1939 Jamaica Gazette and there is no such requirement as the portion underlined (supra). The criticism is, therefore, clearly misconceived.

The second area of complaint relates to the treatment of the "liver spots" on the applicant's face. Cleveland Pommells, who first saw the applicant from the vantage point of the edge of the back of the truck, said, "I see his face and liver spots all over his face." The applicant passed the truck at a distance of about two feet. Within a very short while, about three minutes, he returned and came within 3 feet of the truck and confronted the witness with the gun. When the witness saw the applicant for the first time his observation was not affected by the element of fright because there was no gun in sight. So there is no question that if he saw the applicant so close to him he would be able, as he said, to see the marks on his face.

Cross-examination of the witness at page 38 regarding the identification parade was as follows:

> "Q. This man, Trevor Palmer, he was the only one in the line with spots on his face - liver spots?
>
> A. No, sir.
>
> Q. You had other men in the line with liver spots?

"A. I didn't, as I see him I know him.

Q. All right, listen to me, I am putting it to you that this was the only man in the line with liver spots on his face. Isn't that so?

A. Not that I know of but I know him and I know his complexion.

Q. You know him and you know his complexion?

A. Yes, sir, as I said.

Q. You say you know him and you know his complexion?

A. I don't know his whereabouts but I know him the first time I see him."

Further pressed, he said at pages 41-42:

"Q. And him stand out among the other men dem? As you look on him, him look different from the other men?

A. Yes.

Q. Right?

A. Yes.

Q. Plus the spots on his face, the liver mark?

A. Yeah and his complexion and his body built.

Q. What - you keep talking about his complexion.

A. Because I know his complexion, sir.

Q. Wait, wait the judge has to write.

HIS LORDSHIP: "I knew..."

Q. You would say his complexion look like some members of the jury? Look on the members of the jury.

A. I saw him already, sir.

Q. Look on His Lordship, and then you can look at me, his complexion can look like anybody in the court here?

A. Yes, it can easily. More people out the road but I know him, sir."

It is apposite to comment that the men to take part in the parade were chosen with the assistance of one Fitzroy Parker who undertook that role at the request of the applicant when he was given the opportunity to join in the selection.

Trevor Wallace's encounter with the applicant was more traumatic than Cleveland Pommells'. He did not have as timely a view of the applicant as did Pommells when he passed the truck and went to the orange field. When he next saw the applicant the latter was holding the witness in the front of his shirt, or, as he put it, "in me 'tomach." At that time he said, "I see a scrawl over him face, is like a liver spot." Concerning the identification parade, he said he did not see anyone with "liver marks" on his face and that the applicant was neither the tallest nor the shortest man on the parade. A portion of his cross-examination at page 92 ran thus:

> "Q. When you go to the ID parade, you see anybody with a mark like that in him face or he was the only one.
>
> A. No, a him mi did a look for, sar.
>
> Q. Did you see anybody in the line of the men?
>
> A. No, sir. Is him mi was locking for. A si him that day."

Here again it is abundantly clear that the witness knew who he was looking for to be able to identify the suspect.

The criticism was that the learned judge did not warn the jury of the danger of the witnesses pointing out the applicant because he had the "liver spots". Identification evidence has assumed great importance within the last twenty years since the decision in **R. v. Turnbull** (1976) 3 All E.R. 549 and is now included in the special category to which special rules apply. Special features of an accused person are factors which commend the acceptance of identification evidence. A person with a distinguishing feature such as this applicant has who engages in a criminal escapade runs the risk of being identified by that very feature and can hardly be heard to complain if, in fact, he is identified by the aid of that feature. Having regard to the nature of his distinguishing feature, it appears that nothing short of a mask could hide him from detection. What if his face were severely pock-marked, what would the identification officer

be required to do, short of masking him? Such a course would render his identification very nearly impossible and would not be in the interests of justice because what is indeed a deficit in the criminal would by official action be converted into a criminal asset! He would now be free to offend with impunity. We were referred to cases from Guyana which would tip the scales in favour of the criminal with distinguishing features but we are not persuaded to adopt that course. In considering the fairness of the identification parade, it is of paramount importance that the identification was made on the strength of the unaided recollection of the witness and in this regard we can find no fault. The portion of the directions to the jury at pages 155 to 157 (supra) shows how the learned judge dealt with the matter and we find no fault with his treatment.

The third ground of appeal which seeks to challenge the classification of the murder as capital murder was not taken beyond the stating of the contention which reads:

> "It is submitted that the evidence does not beyond reasonable doubt disclose a case of murder in the course or furtherance of robbery, since the assailant, although he asked the deceased for money, did not in fact rob or attempt to rob the deceased."

In fairness to Lord Gifford, Q.C. he finally capitulated to the force of the evidence which makes the murder evidently one done "in the course or furtherance of robbery" and as such capital murder under section 2(1)(d)(i) of the Offences against the Person Act.

Apart from those criticisms raised in the grounds of appeal, we have satisfied ourselves by a careful reading of the summing-up that the learned judge gave correct directions on the issue of visual identification which was the live issue for the jury's determination. He dealt with the need for caution and the reasons therefor as well as making a detailed consideration of the opportunity which the witnesses had for observing the applicant. He also considered, as the circumstances warranted, the conduct of the identification parade.

It was really an uncomplicated case consisting of:

(a) the evidence of actual shooting and the attendant circumstances as related by Cleveland Pommells and Trevor Wallace;

(b) the evidence of Emmanuel Collins which rules out a plea of alibi; and

(c) the remarks attributed to the applicant on his arrest, that is, "So what'bout the other two."

In none of these areas was the case for the prosecution affected either by the ineffectual unsworn statement made by the applicant or by any failure inherent in the evidence.

We accordingly refuse leave to appeal and affirm the conviction and classification as capital murder.