JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 30/95

COR: THE HON MR JUSTICE CAREY JA
THE HON MR JUSTICE GORDON JA
THE HON MR JUSTICE PATTERSON JA

BERESFORD WHYTE v THE QUEEN

Terrence Williams for applicant

Deborah Martin for Crown

September 26, October 23, 1995

GORDON JA

On 17th February 1995, the applicant was convicted in the Home Circuit Court before Panton J and a jury for the capital murder of Roy Cockburn on 28th November 1990, in the course or furtherance of robbery. The capital punishment prescribed by law was imposed and in these proceedings he sought leave to appeal against his conviction.

The case for the prosecution was presented mainly on the evidence of Buntin Cockburn the son of the deceased who resided with him and was present when the injuries from which the deceased died were inflicted. At the time of the incident he

was twelve years old; at the Preliminary Enquiry he was fourteen and at trial he was sixteen years old.

Roy Cockburn was a shopkeeper and his shop was situated at Rock Hall in St.Andrew. His son Buntin Cockburn lived with him. On the night of the 27th November, 1990 he closed his shop and with his son Buntin he went to his home situated on the same premises with his shop. He took with him a tin with the day's take amounting to about four thousand dollars and a threadbag also containing money. The tin with the money and threadbag placed on the floor by the bed and they both retired to bed in the same bed and fell asleep. Buntin was awakened by the "shaking up" of the bed. He saw a man standing by the door which was now open, and another man over his father who lay across the bed. The man over his father was striking his father in the head with a hammer and demanding money. His father "ah bawl out like you know when somebady a feel pain and say "Lord". He also heard his father say to his assailant "Don't kill me for me nuh know you". The assailant wore a hat with the rim pulled low over his face forming a mask. The assailant apparently realising that Buntin was awake stretched to hold Buntin by the hand and the mask fell from his head. The witness then recognised him as one Billy who lived nearby. He had known Billy all his twelve years but they barely exchanged greetings in passing.

Billy he said asked him for money and he replied he had none. It is instructive to quote from the evidence.

Q "What next happened after you told him you dont have any money?

A. He asked me if I see him again I would know him and me said no, then he lick me.

Q. Any reason why you tell him No?

A. Yes

Q. Why

A. Because if I did tell him yes, he would kill me too"

This indicates how alert this youngster was when awakened in traumatic circumstances and finding himself in a dilemna.

The applicant struck him again with the hammer and the man standing in the doorway said "him must 'low the youth" . This by interpretation means "Do not harm the youth." The applicant then took up the bag with the money and the tin . The applicant standing at the front of the bed then stabbed his father with a knife and both men walked away closing the door. His father's blood was everywhere in the room. The hat and knife he said were left in the room and were taken by the police. The police were summoned and Mr. Cockburn was taken to hospital but he later that day succumbed to the injuries he sustained.

On the issue of identification he was questioned.

Q. Since it was night how were you able to see his face?

A. A light outside at my gate, a street light and is louvre window and the street light outside.

Q. You had louvre windows?

A. Yes

Q. What sort of louvre window?

A. Plain louvre

Q.. You remember what colour curtain it was?

A. White curtain, Meshy, Meshy

Q. What you said about the street light?

A. The street light focussed inside the house and the yard

The street light made inside the room bright, he said, so that one can see inside the room. "It bright but dont bright like when you would turn on the light inside your house." Buntin said he saw the applicant's face in the room for about half hour. In cross examination he was asked to describe the clothing the applicant wore and he replied it was so long ago he did not remember. He said that the applicant wore a mask when he first saw him and he was challenged with his deposition in which he spoke to the contrary. He insisted that what he said in court was correct, the applicant was masked when he awoke. He denied he told the police in the statement he gave that the bedroom light was burning brightly when he awoke. His statement was read to him and he responded, "A mus soh it goh den, because from it deh pon the paper a must soh mi tell the police. Mi noh member that now but I remember the streetlight."

He insisted he was not mistaken in his identification of the applicant.

Detective Inspector Colin Pinnock testified that on the 28th November, 1990 he was a Sergeant stationed at Red Hills Police Station. In the early morning in response to a call he went to the home of Roy Cockburn there he saw the unconscious body of Roy Cockburn in bed in a blood-spattered bedroom. Mr.

Cockburn was removed to the Kingston Public Hospital where he later died. The medical evidence showed that Mr. Cockburn had multiple abrasions, lacerations and haematomas to the head, face, mouth and back of head. His face in area of the left cheek was depressed, there he had a comminuted fracture of the nasal and left cheek bones. His mouth was smashed and teeth knocked out. He had multiple abrasions over the right clavicle over both shoulders, right arm and forearm, right and left sides of abdomen. He had puncture wounds on the right second and left ninth intercostal space. These were stab injuries. He had fractures of the metacarpal bones of both hands. He was battered , death was due to extensive blunt trauma with multiple lacerations and facial fractures and a closed head injury.

Sergeant Pinnock collected a statement from Buntin Cockburn and obtained three warrants for the arrest of the applicant by the name Beresford Whyte also called Billy. He knew the applicant. On 13th January 1992, he went to the Balaclava Police Station in St. Elizabeth where he saw the applicant. He took him to Constant Spring Police Station. There he cautioned him and told him he had warrants for his arrest for burglary, robbery and the murder of Roy Cockburn. He asked the applicant how much money he got on the night of the incident and he in reply said thirteen thousand dollars. He executed the warrant and on being cautioned the applicant said "Ah nuh me alone do it, sir."

The applicant in a statement from the dock said that he was learning trade in St. Elizabeth and he visited his family in Rock Hall monthy. He was on his way on one of his monthly visits when he was taken into custody by the police after he

walked into a roadblock. He was subsequently informed of the murder of the deceased and charged therewith. He knew nothing of it. His defence basically was a denial of involvement in the murder of Mr. Roy Cockburn.

The grounds of appeal were:

> "1. The learned trial judge erred in law in not withdrawing the case from the jury particularly in light of the many material discrepancies and inconsistencies in the crown case and also because of the poor physical conditions for observation of the sole eye witness.
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> 2. The learned trial judge misquoted the evidence in a material particular by stating "the louvre was plain glass window" (pg 51) when the evidence did not suggest that the louvres were made of glass (pg 7).
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> 3. The learned trial judge failed to adequately direct the jury on the way they ought to treat the evidence of the sole eye witness bearing in mind the numerous material inconsistencies therein.
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> 4. The learned trial judge failed to direct the jury on what level of participation in the crime would be required to find the applicant guilty on the capital charge.
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> 5. The learned trial judge failed to direct the jury that the previous inconsistent statements of the eye witness could not be used as evidence of truth particularly where these previous statements tends to strengthen the Crown's case"

The issue in the case was indentification and the judge in directing the jury followed the guidelines given in **R v Turnbull** [1976] 3 All ER.549 and approved in **Junior Reid v R** 1989 3 WLR 71. This is not a case in which the witness had a fleeting glance of the applicant. He had him in view for about half an hour. They

touched as the applicant held him and struck him. There was ample light and the witness had known the applicant all his life. Explanations were given for the inconsistences. There was evidence fit for the consideration of the jury. There is no merit in ground I.

Ground 2 was not urged as Mr. Williams well knew that in the Jamaican vernacular or context "plain louvre" means the louvre blades were of " plain glass,"clear, translucent glass in common use. The learned trial judge did not misquote the evidence.

The jury could not but be impressed by the testimony of the sole eyewitness. He was an ordinary young man from a rural district who spoke forthrightly, who had good powers of observation, great presence of mind and much common sense. He spoke frankly and they acepted him as a truthful witness. The learned trial judge directed the jury on the approach to the assessment of the evidence of the witness, the evaluation of inconsistencies and or discrepancies and any explanation offered by the witness. These directions were flawless and we found the third ground of appeal to be without merit.

On the evidence the applicant was seen inflicting severe injuries on Roy Cockburn, injuries from which he died. The other man involved stood by the door and pleaded for the witness to be spared. Mr. Williams could find nothing to urge on this ground 4 which failed in conception.

Two areas of inconsistencies were highlighted by the defence in cross examination of the witness Cockburn. One related to the mask and when it fell from

the applicant's face, the other to the lighting in the room. The witness dealt with the questions with candor and his explanations were accepted by the jury. His affirmative testimony was the applicant first wore a mask. The mask fell from his face and he saw the face he recognised as the applicant's for half an hour. The light by which he was able to recognise the applicant came from the street light on the road by the home.

These matters were raised for the jury's consideration and the learned trial judge gave directions on them

> "Now he was cross-examined on the statement that was recorded in his deposition. In his deposition he is recorded as saying that the accused man was not wearing a mask when he first woke up and saw him. That is what is in his deposition before the Resident Magistrate. Well, he told you that when he first saw the accused the accused man did indeed, have on a mask and when he was asked how can he account for his discrepancy his reply to you was: 'Something must be wrong there as I never said that"...
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> "At first, he was asked if he told the police that the electric light in the bedroom was on and he said no,he never told him. Well, his statement to the police, signed statement to the police was shown to him and in it he is recorded as saying, 'when I woke up the electric light in the bedroom was burning brightly so I could see anyone in the room, including my father'. When he was asked what he got to say about that his response to you was this: 'if it is in the statement then I must have told the police so. I don't remember now, What I remember is the streetlight'. You consider this evidence carefully, Mr. Foreman and members of the jury. He is saying if it is in the statement, and indeed it is in the statement, if it is in the statement then he must have told the police so. So, shortly after the incident he is saying he must have told the police that electric light in the room was burning brightly. Is it that now he

> has forgotten that and remembers only the streetlight? You have to consider that. Or is it that he is confused and doesn't know what he is saying? Consider that also."...
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> Of course, if he is confused and doesn't know what he is saying you wouldn't be able to rely on him.
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> Well, there hasn't been any serious challenge of the existence of a streetlight. Notwithstanding that there hasn't been any serious challenge of the existence of a streetlight, you nevertheless have to consider if indeed there was this streetlight which provides satisfactory light through the window for the witness to have been able to identify someone whom he is saying he knew before. It is all a question for your consideration."

The grounds were argued by Mr. Williams who, to his credit, presented them with thoughtful economy of time. We agree with counsel for the Crown that they were insupportable. The learned trial judge's summation was painstakingly clear, scrupulously fair and gives us no reason to interfere. The application for leave to appeal is refused.