Privy Council Appeal No. 35 of 1992

Delroy Hopson *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 16TH MAY 1994, DELIVERED THE 13TH JUNE 1994

Present at the hearing:-

LORD TEMPLEMAN
LORD JAUNCEY OF TULLICHETTLE
LORD MUSTILL
LORD NOLAN
SIR VINCENT FLOISSAC

*[Delivered by **Lord Nolan**]*

On 1st February 1980, in the Home Circuit Court, Kingston, Delroy Hopson ("the appellant") was convicted of the murder of Trevor Jackson on 31st July 1978, and was sentenced to death. On 19th July 1982 the Court of Appeal of Jamaica dismissed the appellant's appeal against his conviction and sentence. On 18th February 1992 the appellant was granted special leave to appeal as a poor person from the judgment of the Court of Appeal. The appeal came on for hearing before their Lordships' Board on 11th May 1994. On 16th May 1994 their Lordships announced that they would humbly advise Her Majesty to allow the appeal, and would give the reasons for their advice at a later date. The reasons are as follows.

At about 9.00 p.m. in the evening of 31st July 1978 Trevor Jackson was shot dead near the Queen's Theatre in Spanish Town Road, Kingston. The prosecution case against the appellant was based upon the evidence of two Home Guards, who were on duty at the theatre when the shooting occurred. The first of these witnesses, Eustace Bloomfield, described how, on hearing shots, he ran out of the theatre and saw the victim lying on the ground on the other side of the road and another man standing over him with a gun. He said that he recognised the other man

as the appellant, whom he knew as "Dello". At first he only had a side view of the appellant's face, but when he called out "Dello" the appellant turned round and looked at him before running off. Bloomfield said that he ran after the appellant, towards Charles Street. On reaching Charles Street the appellant turned and fired at Bloomfield, who fired back. The appellant ran on down Charles Street, and Bloomfield abandoned the chase, because Charles Street was dark.

The second witness, Alvin Mitchell, also heard the initial shots from the Queen's Theatre and came out onto Spanish Town Road. He said that he saw a man on the ground and Eustace Bloomfield chasing another man. He joined the chase and heard two more shots. When he heard them, he turned back to where the man was lying on the ground. He said that while the chase was going on he did not know who was being chased, but then said that after the two further shots were fired he "got to realise" that it was the appellant. That was because the appellant turned round and looked at Mitchell and Bloomfield. Mitchell said that he had known the appellant all his life. He was able to recognise him because of the street lights and because the appellant was only about a chain away from him when Mitchell saw his face. Under cross-examination, however, Mitchell stated that when he first saw Bloomfield in pursuit of a man, Bloomfield was just going into Charles Street about three chains ahead of Mitchell, and the man whom Bloomfield was pursuing was a chain ahead of Bloomfield. Unlike Bloomfield, Mitchell described the chase as continuing down Charles Street.

The appellant made an unsworn statement from the dock, in the course of which he said that he had been at home in bed at the time of the shooting, and that he had never spoken to Bloomfield or Mitchell. Thus, as the judge made clear to the jury in his summing up, the crucial issue in the case was whether or not the jury could be sure that Bloomfield and Mitchell had correctly identified the appellant at the scene of the crime. He reminded the jury at considerable length, and with scrupulous care, about the circumstances bearing upon the quality of the identification evidence, dealing in particular with the distances at which and the lighting in which the brief visual contacts were said to have occurred and the points at which the evidence of Mitchell was internally inconsistent, and at variance with that of Bloomfield. Towards the end of this part of his summing up, referring to the evidence of Bloomfield the judge said:-

> "Who was that man that he was chasing? Was it in fact the accused, or was it somebody else and he, Mr. Bloomfield, has come here to lie on Mr. Hopson saying that he was the man who he was chasing? You saw Mr. Bloomfield. He is speaking. He told you of the movement of a man whom he has known for two years. Of course, it may be that he has known him for two years and as Mr. Thwaites submitted to you, it might

> very well be that he was mistaken. Because sometimes people are mistaken when they say they saw somebody. But you are not concerned with a general situation. You will bear that in mind. It is possible to make mistakes in identification. Or when you saw that witness, Bloomfield, has he given you evidence which will make you feel sure, make you not have any reasonable doubt that he spoke the truth saying, 'I saw the accused with a gun that night and I saw the accused standing over Trevor Jackson who was lying on the ground'. You are the only persons who can answer any such questions."

That was the only specific reference made by the learned judge to the possibility that a mistaken identification might be made by an honest witness. Mr. Fitzgerald, for the appellant, submitted that it constituted a wholly inadequate warning of the dangers of mistaken identifications, the more so since it was qualified by the statement that the jury were "not concerned with a general situation". The principle that, as a general rule, such a warning should be given even in cases of recognition as distinct from identification by strangers was established by the decision in *R. v. Turnbull* [1977] 1 Q.B. 224 (itself a recognition case) and has recently been restated by their Lordships' Board in emphatic terms: see, for example, *R. v. Beckford, Birch and Shaw* (1993) 97 Cr.App.R. 409.

Mr. Guthrie Q.C., for the Crown, acknowledged that the passage quoted above did not by itself constitute an adequate warning, but submitted that the summing up taken as a whole must have made it perfectly clear to the jury that they had to scrutinise the identification evidence with the greatest care, and must exclude the possibility that it might be mistaken, before they accepted it as the basis for a verdict of guilty. Thus, there had been no significant failure to follow the principle established in *Turnbull* and the later cases.

Their Lordships regard it as unnecessary, however, to resolve this issue because there is a second ground of appeal which, in their Lordships' judgment, cannot be controverted, and which inevitably requires the conviction of the appellant to be set aside. It arises from evidence which was given by a police officer, Detective Corporal Grant, and from the manner in which the judge directed the jury in relation to that evidence. Corporal Grant was called by the prosecution to describe his visit to the victim in hospital on the night of the shooting, and the investigations which he subsequently made. In the course of Corporal Grant's examination-in-chief, when he was describing his visit to the victim in hospital, the following exchanges occurred:-

"Q. ... Now did you speak to him?

A. Yes, sir.

Q. Did he speak to you?

A. Yes, sir.

Q. And I believe in police language, 'he told you something'?

A. Yes, sir.

Q. After what he told you, corporal, did you make any decision to look for anybody in particular?

A. Yes, sir.

Q. I mean as part of your investigation?

A. Yes, sir."

This evidence was, of course, hearsay, highly prejudicial, and wholly inadmissible. There was no suggestion that the victim's statement to the Corporal was a dying declaration.

The Corporal went on to say that, after leaving the hospital, he visited the scene of the crime and then, that same night, he spoke to Bloomfield and Mitchell. The following morning he obtained a warrant for the arrest of the appellant.

The judge referred briefly to the evidence in the course of his summing up saying:-

> "[Detective Corporal Grant] said he spoke to Trevor Jackson and Jackson spoke to him and after this he continued his investigation, going first to the Spanish Town Road ..."

The judge had completed his summing up and was about to send the jury out to consider their verdict when the point was raised by the foreman of the jury. The transcript reads as follows:-

"FOREMAN: If it pleases, m'lord, today or yesterday in Detective Grant's statement he mentioned that he went to the hospital and he was told something by the deceased. If it pleases, m'lord, why that something could not be revealed in court?

HIS LORDSHIP: I will explain it to you. I will explain it to you: It was not followed up because, presumably, whatever was said by the deceased was said with the accused not present, so if the

> crown counsel had attempted that little piece - get out what was said - or even the defence attorney, if he attempted to get out what was said I would have stopped him, because that is known as hearsay. ... No evidence can be given about what was said, because the accused, presumably, was not present. If he had been present, what was said could have been said; so please don't consider it. You remember that the corporal said that - the corporal even went as far as to say that after 'I spoke to Mr. Jackson and he spoke to me I left the hospital with the intention of looking for somebody'. Well, you can't - you know, you have to be careful how you use that piece of evidence. Suffice it to say that the next day he got a warrant for Delroy Hopson. You have to be very careful about that aspect of the case and I ask you to consider your verdict now. I hope I have explained it satisfactorily."

As the Court of Appeal observed, it seems clear that when the judge reached the point of saying "Well, you can't - you know ..." he was about to say "you can't take it into consideration at all", but seems to have had a change of heart. The Court of Appeal took the view that nonetheless the passage, read as a whole, must have conveyed the message to the jury that they should ignore this evidence.

With respect, their Lordships are unable to agree. The evidence of Corporal Grant that the victim had told him something, followed by the question:-

> "After what he told you, corporal, did you make any decision to look for anybody in particular?"

and the answer "Yes, sir" could only be understood as implying that the victim had named the appellant as his attacker. It is true that Corporal Grant went on to speak to Bloomfield and Mitchell before he took out a warrant for the appellant's arrest, but that could not serve to displace the implication of the earlier question and answer. The foreman of the jury must surely have had this implication in mind when he asked the judge why the jury could not be told what the victim had said. The judge's reply, including the words "suffice it to say that the next day he got a warrant for Delroy Hopson" left it open to the jury to conclude that the statement of the victim to the Corporal could be added to the evidence of Bloomfield and Mitchell identifying the appellant as the

murderer. In the light of the acknowledged inconsistencies in the evidence of Mitchell it may well be that this was a critical factor in the decision reached by the jury. Consequently, their Lordships cannot exclude the possibility that a substantial miscarriage of justice occurred.

It is for these reasons that their Lordships resolved humbly to advise Her Majesty that the appeal of the appellant against conviction and sentence should be allowed.