Privy Council Appeal No. 3 of 1993

Michael Rose *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH OCTOBER 1994

Present at the hearing:-

LORD GOFF OF CHIEVELEY
LORD JAUNCEY OF TULLICHETTLE
LORD MUSTILL
LORD LLOYD OF BERWICK
LORD NOLAN

*[Delivered by **Lord Lloyd of Berwick**]*

On 1st December 1988, the appellant, Michael Rose, was convicted in the Gun Court of Jamaica of murdering Ian Atkinson. He was sentenced to death. On 28th April 1989 his application for leave to appeal was dismissed by the Court of Appeal. He now appeals to Her Majesty in Council by special leave granted on 17th December 1992.

The only issue at the trial was identification. The sole eye witness was Devon Atkinson, the brother of the deceased. Devon Atkinson gave evidence that at about midnight on Sunday, 7th June 1987 he and his brother left a dance at Elletson Flat in Saint Andrew to make their way home. Ian Atkinson was riding a bicycle. Devon Atkinson was walking by his side. At the swing bridge at Kintyre the road forked. Ian took the lower road, Devon took the top road. As Ian moved off, three men ran up to him and took hold of his bicycle. Another two men emerged from a gulley, and came towards Devon. According to Devon, one of the two men was the appellant. He was carrying a long gun. Devon started to "draw back". He heard his brother scream "murder". The two men ran towards his brother, and shot him at close quarters. The others also fired shots. The appellant then fired three shots in Devon Atkinson's direction, as he ran off to his aunt's house nearby.

A police officer gave evidence that he searched the area, and found eight spent shells beside the body.

Four and a half months later, on 28th October 1987, Devon Atkinson identified the appellant at an identification parade.

Mr. Hooper, for the appellant, advances two main arguments in support of the appeal. His first argument is that the quality of the identification evidence was so poor that the judge ought to have stopped the case, there being no other evidence to implicate the appellant. Mr. Hooper's second argument is that the judge failed to direct the jury correctly in accordance with the requirements stated in *R. v. Turnbull* [1972] Q.B. 224.

As for the first argument, Mr. Andrade for the respondent, points out that, though the incident took place at night, there were two street lights (described by the witness as "floodlights"), one on the top road where the witness was standing, and the other on the bottom road. The distance between the witness and his brother was estimated at three quarters of a chain, or about sixteen yards. The witness had a good opportunity to see the two men, including the appellant, as they came towards him, before they turned to shoot his brother. The top street light must have been on their faces. Moreover the witness said that he had seen the appellant on two previous occasions, the last being on the square at Papine a week before the shooting.

Mr. Hooper made a number of powerful points on behalf of the appellant.

(1) The witness was extremely vague about time. In his evidence-in-chief he said that he saw the two men's faces for about half an hour. In cross-examination he said the shooting went on for about an hour. However he was then referred to evidence he had given at a previous trial as follows:-

> "Q. ... You said when you first saw the men you took two steps back, the men took four steps forward and I put to you that in this period it only took a matter of seconds and you remember saying that it only took a matter of seconds?
>
> A. No sir.
>
> Q. You see Mr. Atkinson, I am putting to you that when you first saw the men over - I think you said three-quarters of a chain away - and from the time the shooting started, this happened in a flash, in seconds, Isn't that correct?
>
> A. Yes sir."

(2) The evidence relating to the two previous occasions when the witness had seen the appellant in the square was, to say the least, unsatisfactory. There was no evidence-in-chief that the witness knew the appellant to speak to, and in cross-examination he agreed that he had not spoken to him on the two occasions in question. He merely passed him in the street. In those circumstances one is left to wonder what, if any, reason he had for remembering him.

(3) There were material discrepancies between the evidence which the witness gave at the trial and the evidence which he had given at the previous trial.

(4) The witness must have been in a state of considerable alarm. Mr. Hooper relied in that connection on certain observations of the Board in the case of *Anthony Bernard v. The Queen* (unreported) 26th April 1994.

(5) The witness does not appear to have given a description of the appellant in his statement to the police, if indeed he gave a statement.

(6) Finally, Mr. Hooper pointed to the prolonged and unexplained delay in holding the identification parade.

Their Lordships have given anxious consideration to this case, depending as it does on the uncorroborated evidence of a single eye-witness. Nevertheless, they are not persuaded that the case ought to have been stopped by the trial judge. They are fortified in that conclusion by the view that must have been taken by the Court of Appeal. In a careful and comprehensive judgment Gordon J.A. explained the ambiguous answers which their Lordships have already quoted in the following passage:-

> "From this it can be seen that what the witness was saying is that the shooting started or happened in a flash. The 'in a flash' referred not to his opportunity for observing the approaching men but to the commencement of the shooting."

At the end of the judgment, the court held that this was not a "fleeting glance" case. Their Lordships agree. Estimates of half an hour or an hour are obviously exaggerated. But the whole incident must have taken minutes rather than seconds. Their Lordships are satisfied that during that period the witness would have had a sufficient opportunity to make a reliable identification as the two men approached him.

In addition, there was the witness's evidence that he had seen the appellant on two previous occasions, shortly before the shooting. Although this was not a "recognition case" in the ordinary sense, and although the circumstances surrounding the two occasions should have been explored at greater length in chief, the

witness's evidence to that effect affords at least some further justification for the judge's decision not to withdraw the case from the jury. For these reasons their Lordships would reject the appellant's first line of argument.

Before considering the second line of argument, it is convenient to set out certain passages from the summing up.

> "On the question of identification you are to approach the evidence with utmost caution as there is always the possibility that Mr. Atkinson might be mistaken. It is common knowledge that more than two million people inhabit Jamaica and there is a rich mixture of all races in this population. There is also the possibility that one person may bear mark resemblance to some in any given area. The further possibility exists that an honest and prudent person may make a mistake in visually identifying another. A mistake is no less a mistake if it is made honestly. It is also possible that a perfectly honest witness who makes a positive identification may be mistaken and not be aware of his mistake. In order for you to determine the quality and the cogency of the identification you must have full regard in all the circumstances surrounding the identification. Now, you ask yourself whether there was this opportunity for the witness to view the accused."

A little later he said:-

> "Again, you have to ask yourselves what were the physical condition at the time of the viewing of the accused man, place, the light, distances and whether there were obstructions. ... Again, you will have to ask yourselves whether, having seen this person, on two occasions before, and then on the night of the incident, whether four months later he would be able to point him out as the accused man. ... But in all this, you will have to remember what I told you about a witness doing a physical identification of person or persons; he might be mistaken, because if you, from this evidence, come to the conclusion that the accused man is mistakenly identified, then it means you would be in doubt and you would have to resolve that doubt in the accused man's favour, because if he is mistaken you wouldn't be certain he was the person there."

Mr. Hooper's only criticism of this aspect of the summing up, is that the judge did not in terms say that a "convincing" witness may nevertheless be mistaken. But he does say that an honest witness may be mistaken, and not be aware of his mistake. Having regard to the very strong warning given by the judge ("utmost caution") and the repeated references to the possibility of a mistaken identification, their Lordships do not regard the absence of the word "convincing" as being fatal to the summing up. Indeed Mr. Hooper did not himself place much weight on this argument.

Mr. Hooper's main point was that nowhere does the judge list the specific weaknesses in the identification. Now it is true that the judge did not list the weaknesses in numerical order, nor did he use the word "weakness" when drawing the jury's attention to the points made by the defence. But nothing in *Turnbull*, or in the subsequent cases to which their Lordships were referred, requires the judge to make a "list" of the weaknesses in the identification evidence, or to use a particular form of words, when referring to those weaknesses. The essential requirement is that all the weaknesses should be properly drawn to the attention of the jury, and critically analysed where this is appropriate. Of the six weaknesses which their Lordships have already identified and which formed the basis of Mr. Hooper's argument in this appeal, all but (4) and (5) were dealt with by the judge at some length, and in some cases more than once. Their Lordships do not regard the omission of any reference to (4) and (5) as crucial. The Court of Appeal said of the summing up:-

> "The trial judge no doubt had all these factors in mind and his summation in this short case was in our view, adequate. He outlined the principles involved to the jury in simple language and in so doing followed closely the directions in *Oliver Whylie*."

The Court of Appeal will have been well aware of the need for the judge to deal adequately with the strengths and weaknesses of the identification evidence: see *Oliver Whylie* (1978) 25 W.I.R. 430 at 433E. Their Lordships see no reason to disagree with the view expressed by the Court of Appeal. They will therefore humbly advise Her Majesty that the appeal should be dismissed.