Privy Council Appeal No. 55 of 1994

Calvin Douglas *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, Delivered the 31st October 1995

Present at the hearing:-

Lord Keith of Kinkel
Lord Browne-Wilkinson
Lord Slynn of Hadley
Lord Steyn
Mr. Justice Hardie Boys

*[Delivered by **Mr. Justice Hardie Boys**]*

As long ago as 17th June 1981, Calvin Douglas was found guilty by a jury in the Circuit Court Division of the Gun Court of Jamaica of the murder of Wade Judasingh. As he was under 18 years of age at the date of the alleged offence, he was sentenced to be detained during Her Majesty's pleasure. He applied to the Court of Appeal for leave to appeal. The hearing of the application was treated as the hearing of the appeal, and on 22nd April 1983 the appeal was dismissed, for reasons delivered on 19th September 1983. An application for special leave to appeal to Her Majesty in Council was not lodged in the Registry until 16th March 1994. Special leave was granted on 18th May 1994, and the appeal was heard on 11th October 1995.

The grounds advanced before their Lordships' Board differed markedly from those argued in the Court of Appeal; and at the conclusion of the hearing, their Lordships announced that, for reasons to be given later, they would humbly advise Her Majesty

that the appeal should be allowed, the decision of the Court of Appeal set aside and the conviction quashed. Their Lordships' reasons now follow.

On the morning of 12th July 1980 the deceased, who was 18 years old, and his brother Desmond, who was somewhat older, were walking together in a rural district of the island, when they were set upon by a group of 8 to 12 armed youths. Some had short weapons, some long. One of the youths held a long gun to Desmond's back. The brothers were then forced at gunpoint to move to various places in the vicinity, coming finally to the home of a Mrs. Roberts. On the way there they were at times made to lie on their backs on the ground; they were beaten; at one stage Wade was struck down, at another a gun was put into his mouth. Much of the violence was proffered by the same youth who had held the gun to Desmond's back.

As the party approached Mrs. Roberts' property, it divided in two. Some of the youths remained outside, while others took the brothers into the yard, where they were again made to lie on the ground. While they were lying there, Mrs. Roberts appeared, and was able to see something of what followed.

The evidence she gave about that differed markedly from Desmond's evidence. Nonetheless it is clear that Desmond, at least, was marched away at gunpoint towards a deep ravine that traverses this part of the island for some miles. As they approached the ravine, Desmond was able to break free and in his fear ran to the ravine and jumped into it, followed by a fusillade of bullets. He was injured in his fall, but finally was able to make his way out, and report to the police. The next morning, Wade's body was found in the ravine, some 5 miles by the shortest route from Mrs. Roberts' home. He had been shot a number of times with an M-16 rifle.

It was the prosecution case that it was the appellant who had first presented a gun at Desmond, and had thereafter played a prominent part in the violence done to the brothers; that the appellant was one of those who had marched Desmond towards the ravine; and that he had then been in the group which had taken Wade to the place where Wade was finally shot. The defence was a denial that the appellant was involved at all, and witnesses were called to show that he had spent the whole day in Kingston.

The essential issues in the case were therefore the correctness of the identification of Wade as one of those in the main party of assailants, and, even more importantly, whether he was one of those who had taken Wade away from Mrs. Roberts' property.

The jury were entitled to infer that Wade was eventually killed by one or more of those persons pursuant to a purpose they had in common.

In respect of the first issue, the prosecution was dependent entirely on the evidence of Desmond. On the second, it relied on Desmond's evidence that the appellant was one of those who led him to the ravine, coupled with Mrs. Roberts' evidence that it was those same youths who later took Wade away. There was, however, this difficulty, that on Mrs. Roberts' evidence the appellant was not one of that group.

The appellant is an albino (in the local vernacular a "dundus") and he is a deaf mute. Desmond, having had him pointed out in Court, said he had known him for about four to five years, but only by sight. He said he had seen him as he had walked through the district. But he had not been there often: "just a few Sundays to buy fish". He had heard others call the appellant by the name "Dummy". He knew of other dundus boys in the district; two in particular, one a little boy, one taller and stouter than the appellant. He knew no other dundus who was deaf and dumb. He knew that the dundus among the assailants was deaf and dumb because while the others were "corresponding to each other" the dundus was not; and because during one beating one of the others had made a sign to him to desist.

Mrs. Roberts' evidence was not particularly clear. She said that five youths came onto her property: Wade and Desmond and three others. She did not recognise those three; they did not turn their faces towards her, and one had his head covered. She said they were all darker than the appellant, two she thought were taller and one shorter. All five went towards the ravine. One of the five had a gun, a short gun. Four came back, and took the path that apparently leads to where Wade's body was found. On further questioning, Mrs. Roberts was quite definite that the appellant was not one of this group. The conflict between her evidence and Desmond's goes further, for he said that Wade was left in the yard, while he himself was led away by four, later joined by a fifth.

The prosecution case thus turning on the correctness of Desmond's identification of the appellant, the trial judge was required to give a clear warning of the danger that Desmond may have been mistaken, either in identifying the appellant as one of the larger group, or in thinking that the appellant was in the smaller group that took him to the ravine. The need for such a warning, explained in the well known judgment of Lord Widgery C.J. in *Regina v. Turnbull* [1977] 1 Q.B. 224, has been emphasised in a number of recent decisions of this Board; in, for

example, *Scott v. The Queen* [1989] A.C. 1242, *Reid (Junior) v. The Queen* [1990] 1 A.C. 363, *Beckford v. The Queen* (1993) 97 Cr. App. R. 409, and *Mills v. The Queen* [1995] 1 W.L.R. 511. It arises in all but the most exceptional case: the kind of case in which, as Lord Lane C.J. observed in *Regina v. Bentley* (unreported), 14th January 1991 (C.A.), if the judge were to give the warning, the jury would rightly wonder whether he had taken leave of his senses. The present is far from such a case. It was therefore incumbent on the judge, as the cases show, to warn the jury of the special need for caution before accepting the reliability of Desmond's identification, and of the reason, namely that an honest and convincing witness may nevertheless be mistaken. The judge was required, too, to direct the jury carefully to consider the circumstances in which the identification was made, and to draw their attention to any specific weaknesses in the identification evidence.

The judge began his summing up by emphasising that identification was vital to the case. He did not however explain the need for caution or the reason for it. Rather, he tended unfairly to emphasise the strengths of the Crown case. He referred briefly to two matters supportive of Desmond's reliability, the first being that the accused was deaf, the second the lengthy opportunity Desmond had to observe the particular youth's features. In the course of these remarks, the judge made two unfortunate observations. First, he said:-

> "Apparently, it was well-known in that group of persons that the accused was at least deaf."

Allowing that the reference to "the accused" was a slip of the tongue, there was only the slightest evidence that the dundus youth in the party was deaf. Secondly, the judge added an inappropriate and potentially damaging personal comment when he said:-

> "It is for you to say whether the features of the accused man were not indelibly impressed on the mind. I know they would be on mine if I were in Desmond's position."

Then, in outlining Desmond's evidence, the judge's account of Desmond's prior knowledge of the accused was not a balanced one. He spoke as if Desmond was accustomed to seeing him frequently, rather than pointing out how limited his knowledge actually was.

In other respects also, the weaknesses of the identification evidence were not pointed out. The failure of the police to arrange an identification parade was a matter of some significance, but the judge dismissed it peremptorily. He said:-

> "It would be a farce to hold an identification parade for a person who knows the accused for about four, five years to go and point him out."

Not only was that a factually incorrect statement, but it effectively withdrew from the jury's consideration a topic on which defence counsel had plainly placed some emphasis. A further error crept in when the judge came to discuss Mrs. Roberts' evidence. He fairly directed the jury that if it were correct that the accused had not been on her property, that was the end of the case. But, perhaps in an attempt to reconcile the conflicting evidence, he wrongly quoted Mrs. Roberts as saying that "the one covering his head could well be the accused". She had said nothing of the sort.

A significant failure to give the requisite direction in a case depending on identification evidence will generally result in a substantial miscarriage of justice, necessitating the quashing of the conviction. There will be cases where the evidence is so compelling that it is plain that conviction was inevitable, even had the direction been given. An example is *Freemantle v. The Queen* [1994] 1 W.L.R. 1437 where the quality of the evidence of visual identification was exceptionally good. Reference may also be made to the judgments of the High Court of Australia in *Domican v. The Queen* (1992) 66 A.L.J.R. 285.

The evidence in the present case was far from compelling. The appellant was not well known to Desmond and while there was doubtless ample opportunity for the latter to have impressed on his mind the features of his captors, the dramatic circumstances, especially at the end, might well have resulted in some confusion in his mind. When there is added to that possibility the conflicting evidence of Mrs. Roberts, their Lordships are unable to conclude that a guilty verdict would necessarily have followed had there been a full, careful and accurate direction by the trial judge focused primarily on the final stage of the incident as Desmond described it.

In view of the time that has elapsed since the trial their Lordships do not consider it appropriate that a new trial be ordered.