SAINT LUCIA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 14 OF 1997

BETWEEN:

PETER HUGHES

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Satrohan Singh	Justice of Appeal
The Hon. Mr. Albert Redhead	Justice of Appeal
The Hon. Mr. Albert N. J. Matthew	Justice of Appeal [Ag.]

Appearances:

Mr. M. P. Foster for the Appellant
Mr. E. Walker, Director of Public Prosecutions, for the Respondent

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1999: January 27;
February 8.

JUDGMENT

MATTHEW J.A. [AG.]

On July 27, 1998 the Appellant was convicted before d'Auvergne J. and a jury for the murder of Jason Jean on November 12, 1993 about 11.30 p.m. and was sentenced to death.

The pathologist who examined the body of the Deceased found four lacerations in the area of the head, a contusion to the left side of the face, five contusions to the right and left chest, contusions to the right leg, linear abrasions to the right and left part of the back, contusions to the lower back, contusions to the back of the left hand and back of the right hand. He stated that in summary the cause of death was head injury with extensive bleeding and that a contributing cause was chest injury with a contusion to the heart.

He was of the view that the lacerations to the head could be caused by contact with a blunt object like a stone with moderate to severe force. He further opined that the other injuries he saw could have been caused by contact with a blunt object with moderate to significant force.

He stated that the injury to the head was a severe injury and that alone could have contributed to the death and in answer to the Jury he said that both the chest injuries and the brain injuries could individually lead to death and in the particular case he could not say which one did.

The case for the Prosecution centred on the evidence of three witnesses who all claim to live at Saltibus where the incident occurred and who testified that on the night in question they saw the Appellant inflict blows on the Deceased.

Alexis Smith stated that he knew the Appellant for 15 years and knew that at one time he lived at Saltibus. He saw the Appellant strike the Deceased with a piece of post and the Deceased fell to the ground and he saw the Appellant take a stone and struck the Deceased on his head on two occasions and saw blood flowing from the head. He saw the Appellant jump on the chest of the Deceased about four times and he later saw the Deceased on the ground where he appeared motionless. He said the Appellant sought his assistance to throw the Deceased underneath the bridge and he refused.

Thomas Monrose stated that he was 44 years old and has known the Appellant for many years they having attended school together. According to Monrose the Appellant was the person who struck the Deceased when the latter told him “give me my thing Peter”. Alexis Smith’s version is that the Deceased had told the Appellant to give him his $5.00. Monrose saw the Appellant take a stone and struck the Deceased with the stone once on his forehead and once more on the head. He saw the Deceased bleeding from the head. He heard Mr. St. Clair tell the Appellant to move away

from the Deceased. The Appellant obeyed but when Mr. St. Clair left and went to his home the Appellant resumed beating the Deceased. He said he told the Appellant to leave the Deceased alone and the Appellant asked him to move himself from him. He said when he saw the Appellant jump on the chest of the Deceased he left and went to his home.

Hamilton St. Clair said he has known the Accused for 30 years. He said on the night in question on his way home he saw Alexis Smith and Thomas Monrose looking down to where there is a track. He said he looked and saw someone fisting and kicking. He saw it was the Appellant, who all three witnesses know as "FORMIE", who was kicking and fisting the Deceased. He said he spoke to the Appellant and he stopped and the Appellant told him the reason why he was beating the Deceased. He said the Deceased was lying down crying. He said the next morning he saw the Deceased on the other side of the road approximately 95 feet from where he had seen him the previous evening.

The Appellant gave evidence on his own behalf but did not call any witnesses. The Appellant admitted that he is called "FORMIE" and that before he was arrested he lived alone at Saltibus. He said that he knew the Deceased and he knows Alexis Smith, Thomas Monrose and Hamilton St. Clair. The Appellant stated that on Friday November 12, 1993 about 7.00pm he was at his home. He said after supper he went to bed and did not leave his home to go anywhere that night. He said the next morning he was told that the Deceased was found dead on the road. His defence is therefore, that of alibi.

Learned Counsel for the Appellant argued six grounds of appeal as follows:

> "[1] That the Learned Trial Judge erred in law in failing to give adequate directions on the law in relation to the Defendant's alibi re: the Prosecution's duty to disprove the Defendant's alibi beyond reasonable doubt. [See page 123 of the Record of Appeal].

[2] That the Learned Trial Judge failed to direct the Jury as to how to treat the Defendant's evidence if they found his alibi to be false.

[3] That the Learned Trial Judge erred in completely obliterating the possible defence of provocation, [if the Jury had found the Defendant to be lying about his whereabouts] [See page 90 of the Record of Appeal]. This was further compounded and it is submitted, served to confuse the Jury that it was a matter for them to decide on whether there was evidence of provocation.

[4] That the Learned Trial Judge it is submitted, confused the Jury on the issue of identification by hinting that proper identification was vital in the case, but then telling the Jury that once they believed that the Prosecution witnesses knew the Defendant there could be no question of mistaken identity [See page 95 of the Record of Appeal].

[5] That the Learned Trial Judge failed adequately or at all to put the Defendant's case to the Jury by failing, for example to highlight the possibility that more than one person were involved in causing the death.

[6] That the Prosecution at no point disclosed to the Defence that the Prosecution witnesses all had previous convictions. In light of the fact that the only evidence to convict the Defendant was provided by said witnesses, it is submitted that this was a substantial and material irregularity in the Trial".

Ground 1

At page 123 of the record the learned Judge stated:

> "I should put the defence of Alibi according to Blackstone to you. I now tell you Members of the Jury, Alibi is that there is a general rule of law that in every case where Alibi is raised the Judge must specifically direct the Jury that it is for the Prosecution to negative the Alibi.

> It is the Prosecution who has to negative the defence of Alibi. You see in this case the Accused has said he was not there, he was at his home and I recall that I have repeatedly told you so……
>
> The Prosecution is saying that the three witnesses have proved that the Accused's Alibi cannot stand. Should not be believed by you".

Learned Counsel for the Appellant submitted that the directions were inadequate and made reference to Blackstone's Criminal Practice, 1993, page 1773.

The model ruling for the defence of alibi which is frequently used is for the Judge to state that the defence of alibi simply means that the Accused says that he was somewhere else at the material time; but as the burden of proof is on the Prosecution, the Accused does not have to prove that he was elsewhere: on the contrary it is for the Prosecution to disprove the alibi. The Judge ought to tell the Jury that if they conclude that the alibi was false that does not of itself entitle them to convict the Accused. The Prosecution must still establish his guilt. Alibis are sometimes invented to bolster a genuine defence.

Blackstone deals with Alibi in his 1993 edition at paragraph F3.12, page, 1773. There it states:

> "ALIBI. Although there is no general rule of law that in every case where alibi is raised the Judge must specifically direct the Jury that it is for the Prosecution to negative the alibi, it is the clear duty of the Judge to give such a direction if there is a danger of the Jury thinking that an alibi, because it is called a defence, raises some burden on the Defence to establish it".

The learned Judge gave a direction on the alibi raised by the Appellant using the terminology of Blackstone's Criminal Practice 1993.

In LEROY OWEN LESLEY 1996 1 CR. App. R. 39 where the Appellant was convicted of murder the Judge had directed the Jury that it was for the Prosecution to disprove the alibi but failed to

direct them that an alibi was sometimes invented to bolster a true defence. On appeal, the Court of Appeal allowed the appeal because the Judge should, as well as directing the Jury that it was for the Prosecution to disprove the Appellant's alibi, have directed them that an alibi was sometimes invented to bolster a genuine defence and his failure to do so was a misdirection. The Court held that such a direction should routinely be given, but a failure to give it would not automatically render a conviction unsafe. That would depend upon the facts of each case and the strength of the evidence. The Court at page 50 lines C-E of the judgment went on to point out that in the particular case " the chief prosecution witness was not, in all respects, satisfactory, and was one whose account had at least, in part, been doubted by the jury".

In JASON CLIVE PEMBERTON 1994 99 Criminal Appeal R. 228 the Appellant had robbed a minicab driver and was convicted. The Judge had given a careful identification direction to the Jury, but said nothing about the significance of the alibi evidence. On appeal, the Court of Appeal allowed the appeal holding that the collapse of the alibi evidence would have had a significant impact on the Jury, possibly leading them to consider the case on the wrong basis; that accordingly the Judge's failure to direct the Jury as to the proper way to approach the case if they rejected the alibi evidence was a material irregularity rendering the conviction unsafe and unsatisfactory.

This case is perhaps related also to ground of appeal No. 2 and indeed both grounds are closely related and were so argued. It does not assist the Appellant in this case for it cannot be said that collapse of the alibi evidence would cause the Jury to consider the case on a wrong basis. The Jury in this case must have considered the case on the basis of the direct testimony of the Prosecution's three main eye-witnesses.

Even if the learned Judge did not go on to tell the Jury that an alibi was sometimes used to bolster up a genuine defence, her

failure to do so in the circumstances of this case did not render the conviction unsafe as was the position in the case of LEROY OWEN LESLIE where the facts of the case were not very satisfactory.

Ground 2

Under this ground of appeal learned Counsel for the Appellant submitted that the learned Judge gave the "Lucas directions" for something insubstantial at page 96 of the record in respect of the second statement of the Appellant but failed to give it in respect of the alibi where it ought to have been given.

In the 1997 edition of Archbold at paragraph 4 – 402, page 467, it is stated as follows:

> "In R v Goodway, 98 Cr. App R. 11 C.A. it was held that whenever lies are relied on by the prosecution, or might be used by the Jury, to support evidence of guilt as opposed to merely reflecting on the defendant's credibility, a judge should give a full direction in accordance with R v Lucas 1981 Q.B. 720, Cr. App. R. 159 C.A. to the effect that a lie told by a defendant can only strengthen or support evidence against that defendant if the jury are satisfied that -
>
> [a] the lie was deliberate;
> [b] it relates to a material issue, and
> [c] there is no innocent explanation for it.
>
> The jury should be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame, or out of a wish to conceal disgraceful behaviour. The only exception to the requirement for such a direction is in circumstances where rejection of the explanation given by the defendant almost necessarily leaves the jury with no choice but to convict as a matter of logic".

In LEROY OWEN LESLEY, Henry L. J. giving the judgment of the Court said:

> "This is not a case within that exception. If the jury concluded that the defendant had been present at the premises where the shooting took place on the night in question, they would obviously regard the alibi notice

> that they had been told of as being false. That would not, as the judge reminded them, make this defendant the gunman. But the risk identified in Broadhurst, that the jury might take his efforts to hide that he had been there that night, as evidence of guilt, as the Crown had inferentially invited them to, should have been specifically addressed by the judge".

In my judgment this was not a case where a Lucas direction was necessary for in these circumstances where the Jury had rejected the explanation given by the Appellant they were left with no choice but to convict the Appellant as a matter of logic. As submitted by the learned Director of Public Prosecutions on the authority of CARDINAL WILLIAMS V THE QUEEN NO. 10 of 1995 decided by this Court on January 29, 1996 this was a case where the Prosecution produced a powerful case of murder without having to rely on any lies that may have been told by the Appellant. This ground of appeal fails.

Ground 3

In respect of this ground of appeal the learned Judge stated at page 90 of the record:

> "Alexis said he heard Jason say, 'give me my thing Peter' and Thomas Monrose and the same Alexis said that they heard the Accused say 'Jason give me my $5.00. Members of the Jury could you conclude that the last statement amounted to extreme provocation. I have pointed out those words that the Prosecution said they heard but I have told you there is no issue of provocation based on law. But it is a matter for you".

I believe the Learned Judge must have meant that it was the Deceased who was asking the Accused for his $5.00 and not the other way around.

Before this Court learned Counsel for the Appellant mildly suggested that some evidence giving rise to provocation could be the reference by the Appellant to the Deceased having stolen his things. The learned Judge in the part of her summing up referred to

above was saying that the fact that the Deceased had asked the Appellant for his thing or his $5.00 could not amount to extreme provocation to cause the Appellant to lose his self control as required by section 171[a] of the Criminal Code. I do not agree with learned Counsel for the Appellant that the learned Judge should not have withdrawn the defence of provocation from the Jury. I would however agree that it was a misdirection to tell the Jury there is no issue of provocation based on the law and in the next sentence to tell them it is a matter for them. But in my view this is a misdirection that was favourable to the Appellant and could in no way prejudice the verdict. This ground of appeal fails.

Ground 4

At page 95 of the record the learned Judge stated:

> "So Members of the Jury, you will have very little difficulty in arriving at the conclusion, that is if you believe these witnesses, that there has been no mistaken identity that they are people who know each other. It is not only a recognition. They know each other. They also told you, which you will gather when you go through the evidence, the length of time they were standing there on the scene. You see, it is essential that the person who caused the death of Jason Jean is properly identified".

Learned Counsel for the Appellant submitted under this ground that here the Learned Judge hinted at the Turnbull directions but did not give them. He said the Jury were confused. He further said that no where in the summing up were the Jury told that one could make mistakes in the identification of his own relatives. The learned Director of Public Prosecutions conceded that the attempt at the Turnbull directions was inadequate. I agree.

The guidelines for identification were given by the Court of Appeal in the case of R V TURNBULL 1977 Q.B. 224 at pages 228 – 30. They are set out in Blackstone's Criminal Practice 1993 paragraph F 18-2 at pages 2074-2076 and in the 1997 edition of Archbold paragraph 14-2 et seq., pages 1255-1257. These

guidelines are well known and need not be restated here. At paragraph 14-10 of Archbold it is stated that a failure to follow the guidelines is likely to result in a conviction being quashed and would do so if, in the Court's judgment on all the evidence, the verdict was unsafe.

However in MICHAEL FREEMANTLE V THE QUEEN Privy Council Appeal No. 1 of 1993 delivered on June 27, 1994 it was decided that where the Judge has failed to give to the Jury the requisite general warning and explanation in regard to visual identifications, if there were exceptional circumstances the proviso could be applied. In the case their Lordships considered that exceptional circumstances include the fact that the evidence of the visual identification was of exceptionally good quality.

The facts of the present case show that the Prosecution's three principal witnesses and the Appellant have known each other for several years. They know the Appellant by his nickname "FORME". They all lived in the village of Saltibus. On the night in question the three witnesses were near enough to the Appellant and at different times they each spoke to him and he spoke to each of them. So this was not at all instances of fleeting glances. Having regard to the cumulative potency of these facts I am of the view that the quality of the evidence of the visual identifications of the Appellant by Smith, Monrose and St. Clair were exceptionally good and is therefore an exceptional circumstance which could justify the application of the proviso contained in Section 35 of the West Indies Associated States Supreme Court [Saint Lucia] Act subject to my conclusions in respect of the other grounds of appeal.

Ground 5

This ground of appeal is premised on the reply given by the pathologist under cross-examination. At the bottom of page 11 Dr. King said the following:

> "Correct, - this Deceased received a lot of blows that day. Literally all over his body. Possible from a number of persons inflicting blows to that body".

Besides that possibility suggested by the doctor there was no other evidence to the effect that any other person or persons but the Appellant had inflicted blows on the Deceased.

I agree with the learned Director of Public Prosecutions that on several occasions during the summing-up the learned Judge reminded the Jury that the Appellant was saying that he was not at the scene and that she fairly, clearly and quite adequately put the Defence to the Jury. Among other things she told them that the Appellant was saying it is a frame up, that he never met the three Prosecution witnesses and he never saw the Deceased on that night and they are telling lies about him. She also adequately dealt with the burden and standard of proof. Under this head learned Counsel for the Appellant submitted that the directions on intent were inadequate. I do not agree. The learned Judge gave lengthy directions on the questions of intent beginning from the top of page 91 of the record to page 94. Counsel observed that certain sections of the Criminal Code were cited without adequate explanation. It may be that there might have been a more in depth analysis and explanations of various sections but the learned Judge carried out the directions of this Court by reading to them what was stated in HAZEL V THE QUEEN Civil Appeal No.5 of 1989 and followed in other appeal cases which is a paraphrase of the sections. On the totality of the directions as regards the intent the Jury could have been in no doubt that it was imperative to find that the Appellant intended to kill Jason Jean before they could arrive at a conviction for murder. This ground of appeal fails.

Ground 6

In support of this ground of appeal learned Counsel for the Appellant referred to a passage in Richard May's Criminal Evidence on Disclosure at page 389.

There the learned author writes:

> "The Prosecution is under a duty to inform the defence of any previous known convictions of prosecution witnesses. This is so that the defence may cross-examine the witnesses concerning the convictions. A failure to reveal such information may result in a conviction being quashed."

In his submissions under this head learned Counsel for the Appellant could only establish that there was one conviction against Thomas Monrose for possession of cannabis in 1979. There was some disagreement between learned Counsel and the Director of Public Prosecutions as to whether or not the disclosure was made at a previous related constitutional motion.

The Court will assume that there was no disclosure since the Director of Public Prosecutions could not with certainty say that he had made the necessary disclosure. But as the author inferred above failure to reveal such information may, NOT MUST, result in a conviction being quashed. Further, the submission under that ground cannot possibly taint the evidence of Alexis Smith and Hamilton St. Clair against whom there are no known convictions. This would be very much like the position in Freemantle where Sir Vincent Floissac stated:

> "The appellant was indicted for the murder to which he pleaded an alibi. The prosecution relied on the evidence of Anthony King, Wade Campbell and Courtney Cardoza. The learned judge however directed the jury to disregard King's evidence. It may therefore be assumed that the appellant's conviction was based on the evidence of Campbell and Cardoza".

In my view even assuming the evidence of Monrose could be disregarded there would still be the evidence of Alexis Smith and

Hamilton St. Clair that would support the conviction. This ground of appeal likewise fails.

Conclusion

Despite the deficiencies in the summing-up to which I have referred above no miscarriage of justice had actually occurred. I am of the view that the Prosecution had made a strong and persuasive case that the Appellant murdered Jason Jean. As one witness puts it under cross-examination: “The Accused killed Jason bold face.”

I am of the view that had the Jury been properly directed they would inevitably have returned the same verdict of guilty of murder.

I would therefore dismiss the appeal.

A.N. J. MATTHEW
Justice of Appeal [Ag.]

I Concur

SATROHAN SINGH
Justice of Appeal

I Concur

ALBERT REDHEAD
Justice of Appeal