BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 15 OF 2001

BETWEEN:

LEON QUEELEY

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Sir Dennis Byron — Chief Justice
The Hon. Mr. Albert Redhead — Justice of Appeal
The Hon. Mr. Ephraim Georges — Justice of Appeal [Ag.]

Appearances:

Mr. Hayden St. Clair Douglas; Ms. M. Williams with him for the Appellant
Mr. Terrance Williams; Ms. C. Rosanne with him for the Respondent

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2003: January 14;15;
September 29.

JUDGMENT

[1] REDHEAD, J. A.: August 3, 2000 was Festival Day in Tortola, the British Virgin Islands. There were celebrations at Shirley Recreation Grounds, Festival Village, Road Town, Tortola. Jam Band was in attendance. It provided the music. Many persons were present at Festival Village.

[2] Among the persons who attended the festival were, twin brothers Jalani Cameron and Jabraldi Cameron, the elder brother of the twins Kemo Smith, Tyrone Hendrickson, Tristan Todman, Jamal Todman, Levin Wheatley, Nicholas Hodge, the deceased and Leon Queeley, the appellant.

[3] Unhappily the twins Jalani and Jabraldi got into a fight with Jamal Todman and Tyrone Hendrickson while they were at Festival Village.

[4] At some point in time the combatants were separated by the twin's older brother and the appellant's brothers. Shortly afterwards Nicholas Hodge received a chop to his head. He died of his injuries on 8th August 2000.

[5] The appellant was tried and convicted for the offence on 18th October 2001 and was sentenced to life imprisonment.

[6] The appellant now appeals to this court against his conviction.

[7] In his amended notice of Appeal 9 Grounds of Appeal were filed on behalf of the appellant.

a. the learned trial Judge erred in law

[8] I think it is convenient to deal with grounds 1, 2 and 3 together.

[9] The appellant's complaint is that the learned trial Judge was wrong in not excluding evidence of "dock identifications" of appellant. He argues that S 78 Code of the Police and Criminal Evidence Act 1984 (UK) PACE is incorporated into the laws of the British Virgin Islands (BVI) by virtue of S48 of the Criminal Procedure Act CAP 18 of the BVI Laws. He argued that the learned trial Judge failed to exercise his discretion under S78 to exclude the evidence of dock identification by four witnesses for prosecution.

[10] Learned Counsel, contended on behalf of the appellant that as a result the learned trial Judge exercised his discretion wrongly in allowing that evidence to be admitted.

[11] Mr. Hayden Douglas took issue with the learned trial Judge admitting the evidence of Tristan Todman who said that he did not know the appellant before. He testified before the judge and the jury that he had witnessed the incident.

[12] He explained to the jury what he saw. He gave a description of how Nicholas Hodge's assailant was dressed.

[13] He said the person was dressed in khaki clothes, shirt and pants, a dark colour head tie around his head. His hair was braided or plait. He had a stick like a walking stick and it had some design on it. This witness testified that he had seen the stick at the police station after the incident.

[14] He then identified the stick in court as the stick he had seen the man with at the time of the incident. He did not identify the appellant in court as the man who inflicted the injuries on the deceased on the morning of the 4th August 2000.

[15] In my judgment the admissibility of the testimony cannot be called into question except in my opinion it was unfortunate to have shown or allowed the witness to see the stick at the police station before the trial because that would have compromised his reliability of the description of the stick at the trial.

[16] Learned Counsel then argued that "as a result of the judge's declining to exercise his discretion three of the four witnesses made a dock identification of the appellant. This type of identification is universally acknowledged to be unsatisfactory and highly prejudicial."

[17] The three witnesses referred to by learned Counsel are Levin Wheatley, Jelani Cameron and Jabraldi Cameron.

[18] Levin Wheatley testified that he is a boat Captain. On 3rd August 2000 he went to Festival Village at about 9.00 p.m..

[19] At about 1.00 a.m. he noticed a fight which involved "twins from Sea Cows "Bay" and a another young fellow from St. Kitts. He said that he then saw two persons arguing – "a boy from Carrot Bay and a next one from Hannah's"

[20] "the boy from Carrot Bay I know his name to be Nicholas Hodge."

[21] Levin Wheatley then testified that the fellow from Hannah's, he knew him by seeing him hanging out in Spanish Town Virgin Gorga. He said he had seeing him for three years. He said he used to see him working on Nanny Cay Marina. This witness said if he sees he hails him up and he would hail him back. The witness said that he calls him "Labba."

[22] The other two witnesses referred to by the defence are Jalani Cameron, Jabraldi Cameron.

[23] Jalani Cameron said in his evidence among other things that he knew Nicholas Hodge the deceased, he was from Carrot Bay. He used to see him at least once a week. He said his twin brother Jabraldi and his older Kevon Smith went to Festival Village. He got in a fight with Jamal Troman and Tyrone Hendrickson. He said his older brother Kevon Smith and the appellant Leon Queeley were around when he got into the fight. He said that he had known the appellant for about two or three years prior to the incident on 3rd August 2000. He said that the appellant is from Sea Cows. He knows the appellant playing basketball and he used to see him once a week. He knows him by the name Labby.

[24] This witness testified that on the night in question the appellant was dressed in a "brownish/beige shirt with a brown and beige bandana round his head and the same kind of pants."

[25] Jalani Cameron testified that his older brother and Leon's brother [the appellant's brother] parted the fight. His older brother was then asking Jamal and Tyrone why they were fighting.

[26] This witness said on oath:

[27] "Then, I saw Leon like he pull a machete out and he put it in the air and Nichol asked him where he going with that machete if he think anybody 'fraid it.

[28] And he chop him in his head. He fell on the ground. His head was burst open and he started bleeding."

[29] This witness testified that at the time of the incident Festival Village was well lie he saw the appellants face.

[30] Jabraldi Cameron testified that he lives at Sea Cows Bay. He said that he had known the appellant for about three years prior to the incident. He said that the appellant "lives around the same area I live in. He lives in Hannahs."

[31] He said that he used to see the appellant sitting down on a wall at Hannahs, sitting down on the basketball court.

[32] Jabraldi Cameron testified that the appellant was dressed in "a light brown/beigish colour shirt and a light colour jeans pants a pin up shirt…"

[33] He also said that the appellant was wearing a head tie, a bandana.

[34] He said that he saw the appellant's face that night. This witness describes the lighting condition as "bright lights, big lights on the fields."

[35] This witness said on oath to the jury that he saw the appellant chop the deceased in his head with a cutlass. He said he was standing "not far away from Leon [the appellant" (a distance which he indicated to the jury)

[36] He said that he had played basketball with the appellant before. He then pointed out the appellant in box as the person he was referring to. Jalani Cameron having given his evidence also pointed out the appellant in the box as the person he was referring to.

[37] The three witnesses Levin Wheatley, Jalani Cameron and Jabraldi Cameron were they making a dock identification of the appellant? I think not.

[38] In Archibald 2002 paragraph 14-42 the learned authors state:

[39] "The practice of inviting a witness to identify a defendant for the first time when the defendant is in the dock has long been regarded as undesirable."

[40] The Court of Appeal in England has held to be improper to identify a defendant only when he is in the dock. R v Cartwright 10 Cr App R. 219.

[41] In the case at bar it cannot be said that the three witnesses were identifying the appellant for the first time in the box while they were giving evidence. They gave evidence, that they knew the appellant, some two or three years before 3rd August, 2000, having given that evidence they pointed out the appellant as the person they were referring to. This cannot be regarded as dock identification.

[42] This disposes of grounds 1, 2 and 3.

[43] However for completeness I address the question whether the learned trial judge erred in ruling that code D of the Police and Criminal Evidence Act 1984 UK is not received in the British Virgin Islands by virtue of the Provisions of S48 of the Criminal Procedure Act Cap 18 of the Laws of the British Virgin Islands.

[44] S 48 provides as follows:

[45] "All other matters of procedure, not herein nor in any other Act expressly provides for, shall be regulated as to the admission thereof by the laws of England, and the practices of the Superior Courts of Criminal Law in England.

[46] Mr. Williams, learned Counsel for the crown argued that Section 48 is designed to receive and apply UK Superior Court practice into the British Virgin Islands or such matters where British Virgin Islands law makes no provision.

[47] He contended that Code D does not regulate or form part of UK Superior Court Practice. It is a code of practice for police officers. Mr. Williams further contended that the discretion under Section 78 is similar to the common law discretion to exclude evidence. (See R v Mason 1988 68 C AR 348, 354).

[48] The Codes therefore form part of the procedural rules for UK police forces and may be referred to by the UK Courts as part of the governing UK Superior Courts. They do not form part of the procedural rules governing UK Superior Courts.

[49] I agree entirely with the submission of Mr. Williams that the Codes do not form part of the laws of the British Virgin Islands.

[50] Grounds 1,2 and 3 are therefore dismissed.

[51] I now address ground 4. the appellant alleges under this ground that the learned trial judge erred in law in failing to discharge the jury, when at the commencement of the prosecution's case and no factual evidence having been led the jury's question to the mother of the deceased demonstrated clearly that it, or its members had already come to a conclusion that the appellant had committed the crime of which he stood accused.

[52] Mr. St. Clair Douglas argued that this predisposition of bias on the part of the jury had the effect of denying the appellant a fair trial.

[53] Learned Counsel for the Crown Mr. Williams had opened the case, he had outlined the facts the prosecution had hoped to prove in order to sustain a conviction of murder. In his outline of the facts he told the jury that the appellant had chopped the deceased in his head with a cutlass and the victim died shortly thereafter.

[54] After the opening statement of learned Counsel for the Crown the first witness called to the stand to give evidence was Sandrene Donovan, the mother of the deceased, who only gave formal evidence.

[55] The jury then asked the mother the question how she felt about the appellant killing her son? In my view that question was not predicted upon prejudice but upon ignorance. I am of the view that that ignorance would have been dispelled at the end of the trial because the trial Judge had stressed to the jury in his summation that the prosecution had to prove the guilt of the appellant to the extent that they felt sure of his guilt.

[56] It is to be noted too that this question was asked before the judge's summation and appellant's Counsel's address who I am sure in his address would also have stressed that it was the duty of the prosecution to prove the guilt of the appellant so that they felt sure of his guilt.

[57] At the time the juror asked the question learned Counsel for the appellant did not have in his contemplation that by asking the question the juror was predisposed to bias, if he did, I have no doubt in my mind that he would have asked the judge to discharge the jury. Having regard to the state of the trial at the time there would not have been much inconvenience in discharging the jury at that stage and empanelling a new one. The appellant failed to raise the matter below, can he not do so? I think not. (See R v Tomar 1997 Crim Lr 682).

[58] Grounds 5, 6 and 8 can be considered together in my opinion. Ground 5 alleges that the learned Judge erred in failing to withdrew the case from the jury at the close of the prosecution's case.

[59] When the evidence that had been led by the prosecution was poor, inconsistent and unsupported by any evidence.

[60] Under ground 6 the appellant alleges that the conviction is unsafe and unsatisfactory in that it was based entirely on the testimony of purported eye witnesses whose evidence conflicted with each other and with the physical evidence adduced at the trial and on the dock identification of the appellant.

[61] I have perused this record very carefully and nowhere in this record can I find any support for the allegation as contained in ground 5. The evidence adduced by the prosecution establishes reliable identification of the appellant by at least three witnesses who testified that they knew him prior to the incident and that they identified him on the morning in question as the person who inflicted the injury to the head of the deceased.

[62] Having perused this record I can see no conflict so far as the identification of witnesses who identified the appellant as the assailant of the deceased. One of the witnesses even testified that he played basketball with the appellant. Having regard to the state of the evidence it would have been improper, in my view, for the judge to have withdrawn the case from the jury (See R v Galbraith 1981 2 ALL ER 1060).

[63] In view of what I have said above there is no room for the argument that the verdict is unsafe and unsatisfactory. Grounds 5, 6 and 8 are therefore dismissed.

[64] I deal finally with ground 7. The appellant alleges that the learned trial Judge erred in law in that he failed to provide the jury with any or any sufficient direction on the issue of lies and failed to direct them that they could not convict even if they found the appellant had lied with matters not connected to the issues at bar.

[65] The issue arose because the prosecution witnesses testified that on the morning of the incident the appellant was wearing a brown trousers when the police went to the

appellant's home and requested him to hand over the clothes he was wearing on the morning of the incident, he gave them a pair of jeans.

[66] At pages 50, 51 and 58 the learned trial judge dealt with the issue of lies. At page 50 he instructed the jury as follows:

[67] "Now let me tell you something about the jeans. What in fact, the prosecution are saying that the accused intended to mislead the police by giving them the wrong pair of jeans. Now you have to approach this matter carefully because this is something he did while he was out of court and it was not something that was done on the basis of him being sworn.

[68] What they're saying is that he gave false information to the police by misleading then as to the jeans he was wearing. Now you have to decide whether that's really so, whether in fact, he handed over the wrong pair of jeans. To arrive at that conclusion you will have to have regard to the evidence of the other witnesses, some of whom insisted that it was never any blue jeans.

[69] Now you'll have to decide whether the jeans was relevant to the offence. Well, you may have little difficulty with that because it is relevant to the offence because it is the clothing that allegedly was worn by the alleged assailant. And you must also take into account that there are several reasons why he may have wanted to mislead the police. It might have been to save embarrassment in front of his mother. It might have been fright. It might have been fear. It could be many reasons why he was trying to mislead the police. You must bear all of these matters in mind in determining whether the accused was telling a lie to the police."

[70] Finally at page 58 the learned trial Judge told the jury:

[71] "You must not convict the accused purely because you felt he is telling lies."

[72] I am of the view that the Judge's direction on this was adequate (See Burge & Pegg v R 1956 1Cr App. R 163).

[73] This ground of appeal is therefore dismissed.

[74] The appeal is dismissed. The conviction and sentence are affirmed.

A.J. Redhead
Justice of Appeal

I concur

Sir Dennis Byron
Chief Justice

I concur

Ephraim Georges
Justice of Appeal [Ag.]