

SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO, 25 of 1993

BETWEEN:

NATHANIEL JOHN

Appellant

and

THE QUEEN

Respondent

Before: The Rt. Hon. Sir Vincent Floissac	- Chief Justice Justice of Appeal
The Honourable Mr. C.M.Dennis Byron	- Justice of Appeal
The Honourable Mr. Satrohan Singh	- Justice of Appeal

Appearances: Mrs. M. Hughes-Farrara and Mr. R.A. Cummings for the Appellant

Mrs. J. Jones-Morgan for the Respondent

1994: March 22.

July 18.

JUDGMENT

SIR VINCENT FLOISSAC, C.J.

On 23rd June 1992, the decomposed corpse of the deceased (Leconthus Simmons nicknamed Doctor) was found floating in the sea. Thereafter and as a result of statements made to the Police by Joel Simmons (the brother of the deceased) and Vilston Morgan, the appellant and George Pollard were charged with the murder of the deceased between the 20th and 23rd days of June 1992 in Bequia in St. Vincent and the Grenadines. On 29th November 1993, after a trial by jury presided over by *Joseph J.*, the appellant and Pollard were convicted of the murder and were sentenced to death. The appellant has appealed against his conviction.

At the trial, Morgan revoked certain incriminating statements which he had previously made to the Police. He testified that these statements were made under *"pressure from police by threat of words and brutality i.e. by getting licks first of all in Bequia in my face, a couple of strokes on my body"*. The gist of Morgan's testimony was that, contrary to his statement to the Police, he had not in fact seen Pollard or the appellant on Princess Margaret Beach in Bequia on the night of 20th June 1992.

The net result is that the case against the appellant depended wholly or substantially on the evidence of Joel Simmons who testified that shortly after midnight on 20th June 1992, he saw the appellant on Princess Margaret Beach where and when the appellant held the deceased and thereby enabled Pollard to assault and beat the deceased with a 2x2 stick and to cut the deceased's foot with a knife. In examination-in-chief, Joel Simmons said:

"I saw Pollard cut my brother behind there with knife - points foot. My brother was standing up like this when Pollard cut him. Pollard don't say nothing after he cut him I bawl out. I say 'Oh God Pollard you killing me brother'. He leave my brother and run off after me to catch me. He didn't catch me. Nathaniel John was by Sunny caribbee watching. I only see when Nathaniel John hold my brother for Pollard to cut my brother. I run. I don't see my brother again. After that I run go home. When Pollard run behind my brother Nathaniel John was at Sunny caribbee. Nobody else run behind my brother. When I saw my brother again was when he was floating. When I ran Nathaniel John was still holding my brother."

Under cross-examination by Mrs Ferrari, Joel Simmons said:

"I use lot of cocaine every day. I smoke it. The day I met Pollard I had been smoking cocaine before I met Pollard. That day in day I had two rocks. In the night I had one. It's big piece of rock of cocaine I smoke. I smoke day and night all the time. To get money to buy cocaine I work. I love cocaine. I can't do without it. Am an addict. Never had treatment for my addiction."

Under further cross-examination by Mrs Ferrari, the witness said: "I tell Magistrate when we got to Crabe Hole Boutique we

saw two other persons whom I did not recognise running along with George Pollard and Nathaniel John behind Leconthus. I didn't see two running down by brother with Pollard and Nathaniel. Truth is what I told Magistrate. Not telling lies to this court. When I saw Pollard cutting my brother I was near to bank along the beach. This was about one night. I was five miles

away from where Pollard was cutting my brother. I was very high at the time. I didn't go and ask anybody to help my brother. I don't go to police at all. I just go home. I never reported to police about my brother. I went home and sleep."

Under cross-examination by Mr. Cato, Joel Simmons said:

"I. never feel like I could fly when ah smoking cocaine but I feel light and tipsy and I see things sometimes. 20th at Sunny Caribbee I saw several persons running behind my brother. I recognise some of persons and some I didn't recognise. People I didn't recognise there I don't now know their name. The people I didn't recognise I hadn't seen them before in Bequia. I don't saw them in Bequia afterwards. That's only time I saw those people in my life."

The witness added:

"If I see people in court today I wouldn't be able to say those are people I saw. When these people were chasing my brother they didn't pass in front of me from one end to the other. When I saw them they were about four yards from me. I wasn't seeing things at the time when I saw those people. When I smoke coke colours look bright. When I smoke when I could see something on table and it. could be gone next minute. I was doped up under cocaine that night. I see Pollard. What I saw that night was real."

Having regard to this evidence and the admissions therein, the credibility of Joel Simmons was an important issue in the case. A relevant factor in that credibility was the effect of cocaine on perception and recollection. In this regard, Dr. Maynard Kanti (a psychiatrist called by the defence) testified as follows:

"If person has taken drugs throughout day his consciousness already altered and then with frequency of five rocks in five hours would suggest he was highly intoxicated during that time. As result of that intoxication he can have auditory hallucinations, hearing voices and/or visual hallucinations, seeing things which are not there."

Dr. Kanti added:

"During intoxication because of his hallucinations or delusions it is usually not likely he would be able to recollect events properly or coherently. It is also possible what he tells later on it can be distorted because of his altered state of consciousness."

However, under cross-examination, Dr. Kanti said:

"What I have said a lot depends on individual taking cocaine, his psychology, because we are all different. If three persons use rock it depends on how much each person use. Effect can be quite different."

The jury (who saw and heard Joel Simmons and Dr. Kanti) convicted the appellant on the evidence of Joel Simmons notwithstanding the opinions of Dr. Kanti and a general warning by the trial judge. The warning was in these terms:

"Now you should use the utmost caution when -you are considering the evidence as it relates to identification, because it is quite possible that Joel Simmons was mistaken as to the person he saw beating his brother, and he may not even be aware of his mistake. And an honest witness making what he thinks is an honest identification may be mistaken and not even be aware of his mistake. So that you should look at a number of factors in determining whether a correct identification was made."

In *R v Turnbull* (1973) 3 A.E.R. 549 at 551 and 552, *Lord*

Edgery C .J. said:

"First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words."

In **Reid (Junior) v The Queen** (1990) 1 A.C. 363 at 390, *Lord Ackner* (delivering the opinion of the Privy council) said:

"Now it is clear that the first warning set out above is a warning in general terms applicable to all witnesses and the second warning adds very little to the first. What the judge failed to do was to explain that visual evidence of identification is a category of evidence, which experience has shown is particularly vulnerable to error, errors in particular by honest and impressive witnesses and that this has been known to result in wrong convictions. Accordingly identification evidence has to be treated with very special care.¹¹

In the present case, although the learned judge warned the jury "to use the utmost caution when you are considering the evidence as it relates to identification", she did not warn the jury of the danger of convicting and of the special need for caution before convicting the appellant in reliance on the correctness of the visual identification of the appellant by Joel Simmons. Nor did the learned judge adequately explain to the jury the reason for the danger and the special need for caution. The reason required to be explained is that experience has shown that visual identification (even by way of recognition) is a category of evidence which is particularly vulnerable to error and that no matter how honest or convinced the eye witnesses may be as to the correctness of their visual identifications and no matter how impressive and convincing they may be as witnesses, there is always the possibility that they all might nevertheless be mistaken in their identifications.

An adequate warning to the jury of the danger of convicting on the evidence of the visual identification of the appellant by Joel

Simmons and an adequate explanation of the reason for the danger were particularly necessary in this case. Such adequate warning and explanation were mandatory in view of the witness's admission that he was "very high at the time" and in view of Dr. Kanti's opinion as to the probability of visual hallucinations during intoxication as a result of the use of drugs and as to the improbability of accurate recollection thereafter. The said probability and improbability should have been included among the circumstances which determine the quality of Joel Simmons' evidence of the visual identification of the appellant.

counsel for the appellant contended that the inadequate

- warning is fatal to the conviction. She relied on judicial dicta to the effect that it is only in the most exceptional circumstances that a conviction based on uncorroborated evidence of identification will be maintained in the absence of an adequate warning. Counsel argued that the quality of the uncorroborated evidence of identification was so poor that the trial judge should on principle have withdrawn the case from the jury and should have directed an acquittal rather than risk the injustice which could result from the jury's reliance on such evidence. Counsel finally submitted that in any event the verdict is unsafe and unsatisfactory.

If counsel's final submission or the appellant's final ground of appeal is sustainable, there is no need to adjudicate the other submissions or grounds of appeal. I therefore concentrate on the final ground of appeal that the verdict is unsafe and unsatisfactory. That ground of appeal was explained in **R v cooper** (1969) 1 A.E.R. 32. There *Widgery L.J.* said (at p.34):

"However, now our powers are somewhat different, and we are indeed charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. That means that in cases of this kind the court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the court experiences it."

In **Stafford V D.P.P.**, (1973) 3 A.E.R. 762 at 769, *Lord*

Kilbrandon said:

"The setting aside of a conviction depends on what the appellate court thinks of it - that is what the Act says. If it were necessary to expand the question which a member of the court, whose thoughts are in question, must put to himself, it may be, 'Have I a reasonable doubt, or perhaps even a lurking doubt, that this conviction may be unsafe or unsatisfactory? If I have I must quash. If I have not, I have no power to do so'."

Accordingly, the ultimate question to be decided in this case is whether this Court of Appeal has a subjective reasonable or lurking doubt that justice may not have been done by the verdict

- and has been left in that doubt as a result of considering all the circumstances of the verdict including the evidence, the summing up and "the general feel of the case".

This is a case of a conviction of the appellant of a capital offence under the following circumstances:-

(1) There was no direct evidence that any act or omission on the part of the appellant caused or substantially **contrflwted** to / the death of the deceased. No witness testified that he saw anyone kill the deceased.

(2) The only evidence adduced against the appellant is the evidence of Joel Simmons who testified that he saw the appellant hold the deceased while Pollard assaulted and beat the deceased with a stick and cut the deceased's foot with a knife. This visual identification of the appellant was admittedly made in a state of intoxication which adversely affected the quality of the identification. There was no corroboration of the evidence of the visual identification and there was no adequate warning of the danger of relying on such evidence generally or in the particular circumstances of this case.

(3) Joel Simmons did not make any report to the Police of the alleged assault on or wounding of his deceased brother. He implicated the appellant in the assault and wounding after he was arrested two or three days later.

(4) The appellant's conviction purports to be based on inferences or circumstantial evidence. In that case, it is necessary to identify some evidence or proven fact which supports or justifies those inferences or from which those inferences may reasonably be drawn. Moreover, this being a criminal case, to sustain the conviction, the inferences or circumstantial evidence relied on must be proof beyond reasonable doubt of the guilt of the appellant.

(5)) To the extent to which the conviction purports to be based on the inference that the alleged assault and wounding and the appellant's complicity therein caused or substantially contributed to the death of the deceased, that inference is falsified by the medical evidence. A post-mortem examination of the deceased was performed by Or. Subhanere B. Debrath who gave evidence at the trial. Dr. Debrath stated positively that "There was no cut at the back of any leg" According to Dr. Debrath:

"Cause of death as shown by examination appeared to be asphyxia secondary to strangulation. There was probably bullet injury in face, also probably hit by blunt object on right upper part of body. Person died early hours of June 1992. Entry and exit wounds were probably bullet wounds."

(6)

To the extent to which the conviction purports to be based on the inference that the appellant's alleged complicity in the attack on the deceased continued or was renewed after Joel Simmons fled or was chased from the scene of the alleged assault and wounding by Pollard, there was no evidence from which that inference could properly be drawn. The death in issue was one proved

to have been caused by strangulation and bullet wounds. There was no evidence of the time of such death. This could have occurred at the time of the incident described by Joel Simmons or many hours thereafter. Joel Simmons reluctantly admitted that he saw the deceased being chased by several unidentified persons. The evidence which implicates the appellant is an alleged complicity in an assault with a stick and a knife. There is no evidence that the appellant had or was involved in the use of any firearm. Any inference (from the proven facts) that the appellant was involved in the strangulation or shooting of the deceased would be unreasonable and extravagant in the light of the infinite possibilities disclosed by the evidence. In these circumstances, I have a subjective lurking doubt that justice may not have been done by the verdict. For this reason, I conclude that the verdict is unsafe and unsatisfactory. I would accordingly allow the appeal and quash the appellant's conviction and sentence. ·

SIR VINCENT FLOISSAC

Chief Justice

I concur.

C.M. DENNIS BYRON

Justice of Appeal

I concur.

SATROHAN SINGH

Justice of Appeal