IN THE COURT OF APPEAL OF BELIZE A.D. 2002

CRIMINAL APPEALS NOS. 28, 29 AND 30 OF 2001

BETWEEN:

GILROY WADE, JR.
OSCAR CATZIM MENDEZ
GLENFORD BAPTIST

APPELLANTS

v.

THE QUEEN **RESPONDENT**

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BEFORE:

THE HON. MR. JUSTICE ROWE	**-**	**PRESIDENT**
THE HON. MR. JUSTICE MOTTLEY	**-**	**JUSTICE OF APPEAL**
THE HON. MR. JUSTICE CAREY	**-**	**JUSTICE OF APPEAL**

Mr. Oswald Twist for Wade and Baptist
Mrs. Antoinette Moore for Mendez
Miss Cheryl-lyn Branker-Taitt for Crown

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2002: February 27 and June 28.

CAREY, J.A.

1. Having heard submissions in this appeal on 27 February 2002, we dismissed the appeals in respect of the appellants Wade and Baptist and allowed the appeal of Mendez, quashed the conviction and entered a judgment and verdict of acquittal. The reasons for our decision which we promised then, now follow.

2. The appellants were charged on an indictment for the shooting death of Ozrin White on 24 July 1990. Upon conviction, each was sentenced to death which is the prescribed punishment for murders classified as Class A murders, viz. murders committed by shooting under section106 (3)(b) of the Criminal Code Cap 101.

THE PROSECUTION CASE

3. On the night of 24 July 2000 a number of persons gathered by the gate of one Hinds on Iguana Extension, Belize City, in order to pass the time. Among this group, were Eyean Reid, Juanita Hinds, Sharon Nicholas, all of whom gave evidence on behalf of the prosecution, and Osrin White (the slain man). They were seated on an old refrigerator except for Osrin who sat on a chair about five feet from the others. Such lighting as existed, came from a street lamp at a distance pointed out to the jury but not reflected on the record.

4. Sometime that night, three men rode by on bicycles. They were all dressed in black. Eyean Reid said he observed them through holes in a zinc fence from a distance of ten yards. He recognized Wade whom he referred to as "Cootie", and Mendez whom he referred to as "Negro". After they had passed, Mr. Reid said he retreated to a house in the same yard as Hinds' house. While there, he heard the men asking for him. Sharon Nicholas told them that he was not there. At this point, he heard Wade whose voice he recognized, saying:

> "…Di good wahn soffa fu di bad…" Osrin White then remarked that he was not into this – "(no eena dis)". He heard a voice which he did recognize, say – "give me the thing". Thereafter he heard a shot fired and he withdrew to the back of the house. Later, after the men had departed, he made his way to the front of the house and observed Osrin White lying dead across the drain.

5. Juanita Hinds, the girl friend of the deceased, did not advance the Crown's case. She confirmed the arrival of the men riding bicycles while her group was by the gate.

6. Sharon Nicholas testified that as they stood by the gate, three men all dressed in black, approached them on bicycles. Two of them wore peaked caps, while one was bareheaded. These men passed by but returned and halted before her, one within three feet and the others within seven feet of her. She recognized Baptist whom she knew since 1995. She had not seen him for some time but prior to that, saw him every week. She also recognized Wade or "Cootie" whom she knew for a year.

7. Baptist who had a gun in his hand, demanded the whereabouts of Osrin White. Her response was she had not seen him since the previous day. Baptist then told her that when she saw Reid, also known as "Horseman"

she should tell him that he was dead. Baptist left her and went to Osrin White whom he told that he should not feel safe because he was in front of his yard or in the company of his girl, since he (Baptist) could make something happen then and there. White made no reply but was told by Wade that he was tired of all of this and the good would suffer for the bad. White said that he was not involved, he knew nothing, and further, he had just arrived from work.

8. The three men then moved away. Thereafter the third man asked Baptist for the gun, which was handed over. Baptist then said "Do what you have to do and mek we roll". This third man who was on the bicycle, rode up and shot White at point blank range. White fell dead on the drain. The assailant then rode off.

9. On 28 July 2000, Miss Nicholas attended an identification parade at which she pointed out Gilroy Wade, Jr. as one of the persons she had seen on the relevant night. Subsequently on 26 August 2000, she also identified Baptist at an identification parade.

10. A Police Officer, Cpl. Gladden who was on mobile patrol the early morning of 25 July 2000 saw two men on a bicycle, which was being ridden against traffic. He stopped these men whom he identified as "Hootie" (Wade) and "Negro" (Mendez). He then searched the area and recovered a .38 revolver with three live rounds and an empty casing. The search, he said, was prompted by their conduct. This weapon when examined by the police armourer showed that it had been fired a day or so before his examination. The bullet which had caused the death of Mr. White had been fired, in his opinion, from this firearm.

11. The medical evidence was in the form of a postmortem report prepared by Dr. Mario Estradabran which showed that he removed a "slug" from, the back of the head of the deceased. The cause of death was given as subdural and ventricular, bi-lateral haemorrhage as a consequence of a gun shot to the face.

THE DEFENCE

12. Each of the appellants made an unsworn statement denying the charge and raising alibi as a defence.

THE APPEAL OF MENDEZ

13. For convenience, we propose to deal, first, with the appeal of Oscar Catzim Mendez also called "Negro". Two grounds of appeal were raised in his behalf, challenging the trial judge's ruling that there was a case to answer and secondly criticizing his failure to direct the jury on the alternative verdict of manslaughter in a case involving joint enterprise.

14. Mrs. Moore submitted that the case against the appellant was based on the tenuous, weak, and inconsistent evidence of the only prosecution witness, Eyean Reid, who identified this appellant. His evidence also conflicted with the other prosecution witness Sharon Nicholas. She pointed to the fact that the identification took place in difficult conditions in that the men wore dark clothing, wore peaked caps and that it was dark. Reid's vantage point for observing the three men was from behind an eight-foot high zinc fence through some holes in it, at a distance of ten yards. She drew our attention to the following response of the witness himself in the course of cross examination at p. 38 of the transcript:

"…Q. I will just put one final suggestion to you that based on the condition of that night, the physical condition as well as your own concern that night you could not positively tell this Court who any of the persons you saw on those three bikes were.

THE COURT: You understood the question?

WITNESS: Yes.

THE COURT: What is your response?

WITNESS: Yu have wahn point there…"

15. It is manifest to us that the very witness on whom the Crown was relying to link this appellant with the crime charged, was not claiming to be sure of his own identification. In those circumstances, it was a profound understatement to say that the evidence was weak; in reality, it was non-existent. We would hope that after more than two decades, since *R. V. Turnbull [1977] Q.B. 224* and myriad cases from the Privy Council, it is not in dispute that there is a positive duty on trial judges in cases where identification evidence is crucial, and its quality is poor to withdraw the case from the jury. This case is, in our opinion, graphic proof of what is

likely to occur when this duty is not discharged. We wish to remind of that duty –

> ***"…When in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends on a fleeting glance or on a longer observation made in difficult conditions… [the] judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification…" per Lord Widgeny, CJ in R v. Turnbull (supra) at pp. 229, 238.***

16. Miss Branker-Taitt for the Crown attempted unconvincingly to challenge these submissions of Mrs. Moore.

17. The court found great merit in Mrs. Moore's submissions which were incisive and lucid. We agreed with them. In our judgment, her no case submission should have been acceded to in the circumstances of this case, for the reasons which we have set out above.

THE APPEALS OF GILROY WADE, JR. AND GLENFORD BAPTIST

18. Mr. Twist put forward for the most part similar grounds of appeal on behalf of these appellants but there was one additional ground in respect of Baptist, stated thus:-

> ***"…(5) The learned judge erred in law in that he failed to give the jury a direction with regard to the dock statement of the appellant Glenford Baptist…"***

19. The first of the grounds common to both appellants, which was argued by learned counsel, related to his complaint that the trial judge erred in rejecting the no case submission made in respect of these appellants.

20. He rested his submission on four bases, namely:

GROUND I

(i) Witness Sharon Nicholas said the area where the incident occur was dark and the men were dressed in black.

(ii) The evidence of Sharon Nicholas is inconsistent and contradictory, the evidence of Eyean Reid is that Reid said the men wore stockings over their faces and had on warm caps while Sharon Nicholas said they had on no mask and were wearing peak caps.

(iii) None of the witness that is, Sharon Nicholas nor Eyean Reid gave any description of the accuse to the police as a matter of fact Sharon Nicholas did not know Gilroy Wade's real name or know whether he was Cootie, Whootie or Hootie.

(iv) Contradictory identification evidence coupled with circumstantial evidence regarding the finding of the murder weapon should never have been allowed to go to the jury.

21. We examined the evidence with great care with the assistance of Mr. Twist and Miss Branker-Taitt, for the Crown in order to test the validity of his bases. He pointed to the fact that the area in which the incident took place was dark and that the men were dressed in black, which created a condition of difficulty for identification to take place.

22. As Miss Branker-Taitt pointed out, correctly, as we think, the evidence of Sharon Nicholas had value. There was no doubt that the lighting conditions were not of the best, coming as it did, from a streetlight some distance off. But as against that weakness, was the fact that the appellants rode by Miss Nicholas and stopped in fairly close proximity to her, between three to seven feet she estimated. It was Baptist, the closest, who inquired of her the whereabouts of Eyean Reid. At that time, he, it was, who was armed with a firearm which he held in his hand. She heard his threatening words to White regarding Reid. She also heard Ward's threats as to the good suffering for the bad. Both men were persons she had known for some time.

23. The evidence of Sharon Nicholas was therefore altogether different in character from that adduced in respect of Eyean Reid. She had come fairly close to both men whom she knew for some time and who spoke in her presence. We note that there was an undoubted lack of evidence of the duration of time the entire incident lasted, but this was plainly no fleeting glance situation. Having regard to the events which took place between observing the approach of the men, the various statements made by the appellants, the shooting and their departure, these together

provided the basis for a reasonable assumption that an appreciable time elapsed to allow a fair opportunity for observing the persons present.

24. As his second basis, Mr. Twist identified the contradictory evidence between Sharon Nicholas and Eyean Reid as to whether the men dressed in black were masked or not. Reid said that they had stockings over their faces and in his explanation of this disguise, said it was the lower part of their faces which was exposed; the stockings were over their eyes. Sharon Nicholas did not seem to have been asked and did not speak to any masks being seen on their faces. She agreed with Reid that they wore headdress. So far as the discrepancy went, we do not consider that a material discrepancy seeing that the witness who purported to identifiy the appellant Mendez resiled from that position of confidence to a stance of uncertainty while the other witness, gave evidence of having known two of the appellants previously. We do not think that it could fairly be said that the fabric of the prosecution case was destroyed by that discrepancy albeit, that it related to the issue of identification. The fact of the matter was as Miss Branker-Taitt submitted – they were seen and the faces of the appellants were visible.

25. With respect to the third basis, Mr. Twist identified as a weakness in the identification evidence, the fact that neither of the eyewitnesses gave any description of the appellants to the police.

26. We do not think there was any substance to this "weakness". The witness, on the evidence before the court, said she knew these persons either by their given names or by pseudonyms. In those circumstances we would have thought that the names of the suspects was the best description to facilitate the police in their investigations. The police in the face of evidence that the witnesses knew and recognized and vouchsafed names of the suspects, would hardly thereafter be inclined to request descriptions.

27. Finally, it was said that neither the contradictory evidence mentioned previously nor the finding of the murder weapon, should have been allowed to go to the jury. For this idea, counsel sought to rely on *The State v. Harris (1974) 22 WIR 41* where the Guyana Court of Appeal in considering the issue of using non-eye witness evidence to support weak evidence of identification by eye-witness, made the following observations at p. 44 per Persuad J

> **"…But when the jury were invited to use non eye-witness evidence to clear up any doubt they might have had about eye-witness evidence as regards the identification of the appellant, as they were in fact so invited by counsel for the State – and the learned judge did not correct the situation – a manifest injustice was done the appellant. In his judgment *in Kirpaul Sookdeo v. The State (2)* Crane, JA, in dealing with the question of supporting evidence to identification evidence said (1972), 19 WIR at p. 427:**
>
> > ***"…On the subject of identification evidence, I have myself always held the view … that there ought never to be an aggregation of it with other testimony so as to enable it to be sustained and thereby give illusory potency which, per se, it is incapable of possessing…"***
>
> **If non eye-witness evidence could not be properly used to buttress eye-witness evidence, then the latter stood alone…"**

28. We do not think this case is saying more than that in relation to identification evidence, corroborating evidence cannot be stronger than the evidence it is required to support. In other words, if the evidence to be supported lacks credibility, it cannot be supported. Hence, Crane J's caveat as to the illusory potency which the corroborative evidence potentially possesses. In the instant case, however, the eyewitness evidence was good, it could not be characterized as either poor or weak. The police officer who recovered the murder weapon and detained Wade and Baptist in the area where the murder was committed, knew both men. This was circumstantial evidence, capable of linking the appellants with the crime and therefore supportive of the other identification evidence in the case. The cited case is plainly distinguishable from the facts and circumstances in the case before us. We do not think this case provided the support which Mr. Twist hoped for.

29. In our judgment the basis on which Mr. Twist rested his arguments, were not well founded. We hold that the criticism of the trial judge's ruling on this issue is unwarranted and the ground accordingly fails.

30. The second ground common to these appellants was that the trial judge failed to direct the jury on the alternative verdict of manslaughter this being a necessary requirement where the issue of joint enterprise arises.

31. Mr. Twist was hard put to find any base for this ground and was driven to say that Baptist having handed over the firearm to a colleague must be taken as having withdrawn from the joint enterprise. That submission in the light of the facts of this case, has only to be stated, to demonstrate it as absurd. It was plain on the evidence that the three men who confronted the group, came on one mission, namely to eliminate Eyean Reid but not having found him, killed White instead, for the reason that the good must suffer for the bad. The joint enterprise was to kill, and that purpose was effected. It was the gun handed over by Baptist eventually on the request of the gunman and after he, Baptist, had stated to Sharon Nicholas that he wanted White dead which brought about White's death. It was this handing over which Mr. Twist maintained showed his withdrawal from the joint enterprise. We would note that when Baptist handed over the weapon, his parting words were – "Do what have to do and mek we roll" –. We would suggest that far from withdrawing from the enterprise, he was on the contrary very much involving himself in its successful conclusion.

32. As to the appellant Ward, Mr. Twist did not put forward any arguments for consideration on his behalf.

33. The learned judge cannot therefore be faulted for not putting forward manslaughter on the footing that the killer went beyond the scope of the enterprise. Indeed, when invited to provide appropriate directions for the jury on this issue, he gave reasons why he did not think they would be appropriate. We have no doubt he was correct. It did not fairly arise on the facts and Mr. Twist was not able to identify facts relevant to that issue. This ground therefore fails.

34. It was also argued by Mr. Twist that the defence of neither appellant was put fairly and adequately to the jury. Although the ground was phrased in this way, the arguments really canvassed what counsel identified as weaknesses in the prosecution case which were not laid before the jury by the trial judge. Thus, he spoke of the absence of evidence of any description of the appellants being given by Nicholas or Reid, and that Nicholas had testified that she was at one time looking at the gun and presumably not the face of the man holding the gun.

35. We dealt with weaknesses in relation to the question of the quality of the identification evidence and do not think it is at all necessary to revisit that aspect of the appeal. So far as the defences of the appellants were concerned, the trial judge faithfully read their unsworn evidence almost

verbatim to the jury. In each case, the defence of alibi was raised and the trial judge told them they should accord it such weight as it deserved. In this connection at pp. 329 –330, he is recorded as saying –

> **"…You have to take the statement that they have given in evidence. Their evidence consists of alibi. The law is that as the Prosecution has to prove the guilt of the Accused person he does not have to prove anything including the fact that he was elsewhere at the time. The Prosecution has the onus of disproving the alibi. And even if you conclude that the alibi was false that does not by itself entitle you to convict the Defendant. It is a matter which you may take into account but you should bear in mind that an alibi is sometimes invented to bolster a genuine defence…"**

36. We think these directions were entirely appropriate, fair and adequate. In the Privy Council's advice tendered to Her Majesty in *R. V. Mills (1995) 46 WIR* their Lordships approved the view of the Court of Appeal of Jamaica that:

> ***"…Where an accused makes an unsworn statement, no such directions [i.e. about the impact of the rejection of the alibi] can or should be given. The jury is told to accord to such statement such weight as they fully consider it deserves…".***

This case reinforces the conclusion at which we arrived in respect of this ground.

37. There was also a tangential challenge to the trial judge's directions in relation to the dock statement of each of the appellants. The trial judge, it was said, had failed to give a "proper direction". But Mr. Twist seemed altogether unclear what the trial judge should have said so as not to fall foul of his stark condemnation. Learned counsel had himself pointed us to a passage in respect of which he said, that he had no complaint. At page 283, the learned judge had given the following directions:

> ***"…In like manner, they chose to give statements from the dock and that is their right, that is their entitlement. You're not to hold that against them. You must assess and analyse the evidence which they give. It was not tested under cross-examination nonetheless it was their evidence and you must give to it whatever credibility you think it deserves but you must consider it as part of the case as a whole…"***

38. Counsel also drew our attention to pp. 329 – 330 where the judge is recorded as saying:

> **"…You have to take the statement that they have given in evidence. Their evidence consists of alibi. The law is that as the Prosecution has to prove the guilt of the Accused person he does not have to prove anything including the fact that he was elsewhere at the time. The Prosecution has the onus of disproving the alibi. And even if you conclude that the alibi was false that does not by itself entitle you to convict the Defendant. It is a matter which you may take into account but you should bear in mind that an alibi is sometimes invented to bolster a genuine defence…"**

We have noted one inaccuracy or perhaps looseness in language in these directions, namely, the judge's reference to the unsworn statements of these appellants as evidence. However, we do not think this minor deficiency could affect the outcome of these appeals in the slightest. The court does not sit to correct infelicitous expressions but to ensure that there is no miscarriage of justice. This ground was without substance and therefore fails.

39. As a corollary to the ground dealing with the trial judge's failure to accede to the no case submissions, a ground was submitted that the verdict was unreasonable and could not be supported having regard to the evidence.

40. The case for the Crown rested on the identification evidence of Sharon Nicholas who knew both appellants for some time and, on the evidence presented, had ample opportunity for observing and recognizing them. The quality of that identification evidence was and remained good. There was further evidence of the police officer who detained these appellants whom he confronted, emerging from an area – Prosser compound – where the murder weapon had been disposed of and eventually retrieved by the officer. They were seen at a time apparently shortly after the murder itself – and not far from the location of the murder. The officer gave evidence of their suspicious conduct. The defences raised was alibi, which, it is plain, the jury rejected. There was, in our judgment, evidence on which the jury could safely convict. No cogent reasons have been advanced to incline us to think otherwise. Nor was there any basis for saying that the verdicts were unsafe and unsatisfactory.

41. Finally, we came to the solitary ground filed on behalf of the appellant Baptist, namely, that the judge failed to give the jury a direction on dock identification.

42. The appellant was pointed out at an identification parade held on 26 August 2000 by Sharon Nicholas who had said that she knew the appellant before the murder incident. The identification which took place in court, therefore was not by any manner or means, a dock identification. A direction in that regard was therefore quite unnecessary.

46. We have examined the record with a deal of care and with the assistance of counsel, and came to the conclusion that there was no basis for our interference with the result.