Privy Council Appeal No. 49 of 1993

Nigel Coley *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, Delivered the 26th July 1995

Present at the hearing:-

Lord Keith of Kinkel
Lord Slynn of Hadley
Lord Woolf
Lord Nolan
Lord Steyn

*[Delivered by **Lord Nolan**]*

On 12th February 1985 the appellant was convicted in the Home Circuit Court on an indictment charging him with the murder of Percival Jackson. The crucial evidence in the case was that of Peter Hutchinson.

Hutchinson said that at 3.00 a.m. on the morning of 28th March 1982 he was with Percival Jackson and one Leonard Mattis (who did not give evidence because he could not be traced) at the intersection of Saunders Lane and Thorbourne Lane in the parish of St. Andrew. Hutchinson heard an explosion behind him which sounded like a gun shot, and turned to see the appellant whom he had known for over fifteen years. The appellant was about three feet away and had in his hand what appeared to be a gun. Hutchinson, Mattis and Jackson took their heels. While they were running, Hutchinson heard a number of further explosions coming from behind him. He looked back and again saw the appellant with a gun in his hand. He and Mattis became separated from Jackson. A little later he saw the appellant standing by a gate and overheard him say, with reference to Mattis, "him was there, you know".

At this point Hutchinson went in search of Jackson's family, fearing that Jackson had been shot. He saw a trail of blood which led to a hotel, where Jackson was found lying dead. Jackson had suffered two bullet wounds, one of which had proved fatal. Both bullets had been fired from the same gun.

The defence was an alibi. The appellant gave evidence to the effect that at the time of the shooting he was at home with his girlfriend, his little brother and his little son. He asserted that the evidence of Hutchinson was inspired by malice. He referred to an incident in which Hutchinson had described him as a dirty Labourite. At one stage in his evidence he maintained that he could not have held a gun on 28th March 1982 because his arm was in plaster as a result of a cut inflicted upon him by Hutchinson, but his answers to questions upon the matter were contradictory.

The case for the appellant has been well argued before their Lordships by Mr. Peter Carter Q.C. He acknowledged that the summing-up of the learned judge was clear and concise, but submitted that it fell into error in three respects, all related to the identification of the appellant by Hutchinson.

The first of Mr. Carter's submissions was that the judge had failed to have regard to the well known principle that, even when the identification of the accused person is based upon recognition, the jury should be reminded of the danger of mistake on the part of the witness. Thus in *R. v. Turnbull* [1977] Q.B. 224 the judgment of the court at page 228 contains the following passage:-

> "Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

It is true that the judge did not refer to the possibility of mistakes in the identification of even close friends and relatives. He did, however, direct the jury earlier about the risk of a mistaken identification. His summing-up included the following passage:-

> "It is common knowledge that in any one area, because of the admixture of races that we have in this country, more than one person may bear a marked resemblance. So it is understood that a person may be mistaken in identifying someone. An honest person will readily admit a mistake that he has made, but an honest person who is mistaken may firmly believe that he was correct and not mistaken. So one has to examine with care the circumstances under which

> identification occurred and look to see if you are satisfied that the Crown has led evidence which satisfies you that the identification was proper in this case."

The judge went on to deal with the circumstances in which the identification had taken place. These, of course, included the evidence of Hutchinson that he had first seen the appellant at a distance of only three feet behind him, that he had seen him again as he turned and ran, and finally that he had encountered him shortly afterwards in the same area. The appellant, for his part, denied having known Hutchinson for as long as fifteen years but as has been mentioned his defence included the allegation that Hutchinson bore him personal ill-will, and had both insulted and assaulted him on previous occasions. This was by no means an identification based upon a mere fleeting glimpse. The appellant's principal defence was, of course, that at the time of the murder he was at home with his family. It must be concluded that the jury, having been warned by the judge of the risk of a mistake on the part of Hutchinson, had decided that there was no mistake, that Hutchinson was telling the truth, and that the appellant was lying. Every summing-up must be tailored to the facts and issues of the particular case. In the circumstances in which the identification took place in the present case, it would not have been helpful to remind the jury in the precise terms employed in the passage quoted above from the *Turnbull* judgment. The first of Mr. Carter's submissions therefore fails.

Much the same considerations govern the second of the submissions advanced by Mr. Carter. This was to the effect that, while the judge had correctly directed the jury that it was for the prosecution to demolish the appellant's alibi, he had not made it sufficiently clear that a false alibi might be consistent with innocence. Mr. Carter acknowledged that, as he put it, the appellant had done himself no favours by going into the witness box, and that the jury might well have concluded that he was lying. This made it all the more necessary, submitted Mr. Carter, to warn the jury against concluding that the tendering of a false alibi did not prove that the appellant was guilty of murder.

In their Lordships' view this criticism is also unsustainable. In dealing with the alibi defence the judge said:-

> "If you accept his evidence, he said he was not there that night, then you must acquit him. If you are in doubt whether to accept or reject, then you must accept his evidence and acquit him. Even if you reject his evidence you cannot convict. You do not accept to find him guilty. You have to examine the evidence in its entirety given by

> the Prosecution, ask yourself the question, 'Am I satisfied so that I feel sure of his guilt on this evidence?' When you have answered that question, 'Yes, I feel sure, I am satisfied,' you can return a verdict adverse to him."

Their Lordships regard this as a perfectly adequate direction upon the point. No doubt it would have been possible for the judge to deal with the matter more fully but that would not necessarily have been in the interests of the appellant. It would have been open to the judge, if he was so minded, to say that while an innocent person might put forward a false alibi out of stupidity or fear, the deliberate fabrication of an alibi, if it can be established beyond doubt, might properly be counted against the appellant.

The third submission advanced on the appellant's behalf related to the warrant which was issued for his arrest. The warrant had been taken out on 30th March 1982, two days after the murder. For some unexplained reason it was not executed until 14th April 1983. Hutchinson said, in evidence, that he had made his statement to the police on, he thought, 29th March. The judge referred to the matter in the course of his directions to the jury dealing with the question of identification. He said:-

> "You have to take into consideration what may have been told by way of description, if any description was given. One may not give a description, one may merely mention who the individual is and you may find that the warrant has some supportive evidence. This warrant, as I say I have not given it to you before, but you can take it when you retire, it states that the offence was committed on the 28th of March, 1982 and on the 30th March the police took out a warrant in the name of Nigel Coley for murder."

Mr. Carter submits, correctly, that the issue of the warrant could not in itself be "supportive" of the identification of the appellant by Hutchinson. What the judge clearly had in mind, however, was that the jury could infer from the issue of the warrant the day after Hutchinson had, as he thought, made his statement to the police that Hutchinson had identified the appellant in that statement. This was the only statement which Hutchinson made to the police, and when asked whether he had spoken of the appellant to the police on subsequent occasions he said "No, though I did done do it already". In these circumstances, the evidence of the date on which the warrant was issued was both relevant and admissible. It bore out the fact that, despite the long delay in the execution of the warrant, its issue had been based upon a prompt identification by Hutchinson; and by the same token it was more consistent with the prosecution's case that the identification was spontaneous and truthful than with the

assertion by the appellant that it was a malicious invention on the part of Hutchinson. Taking these circumstances into account, their Lordships do not consider that the use by the judge of the word "supportive" can be seriously criticised. Thus the third criticism against the summing-up also fails.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed.