JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 159/74

BEFORE: The Hon. Mr. Justice Edun, J.A.

The Hon. Mr. Justice Graham-Perkins, J.A.

The Hon. Mr. Justice Robinson, J.A.

R. V. EDWARD HARVEY

B. Macaulay, Q.C., and W.B. Brown for the Applicant.

Miss J. Bennett and M. Reckord for the Crown.

January 31, 1975
April 9, 15, 1975

GRAHAM-PERKINS, J.A.:

The applicant was convicted in the Circuit Court for the Parish of Kingston before the learned Chief Justice on both counts of an indictment which had charged robbery with aggravation. The first count alleged that the applicant and others unknown, on July 20, 1973 at about 9.20 p.m., robbed Morton Hamilton of a motor car and money. The second count alleged a robbery, on the same occasion and in precisely the same circumstances, of Derrick McDonald. For the purpose of resolving the real problem posed by this application it is unnecessary to relate the events culminating in the arrest of the applicant. Hamilton was not, at any time, able to identify the applicant as one of the persons taking part in the robbery. McDonald, on the other hand, attended an identification parade on August 9, 1973 at which he claimed to identify the applicant as one of the robbers. The applicant denied any part in the robbery. His defence was an alibi. A Sgt. Dawson was in charge of the parade at which the applicant's father was also present. It is fair to say

that no complaint was alleged, nor could any, in our view, be alleged, in respect of the directions by the learned Chief Justice on the very important issue of identify. Those directions were impeccable.

It is, however, to the circumstances surrounding the identification parade that we must turn as it is these that give rise to the crucial problem with which we must now deal. It is necessary to set out at length the relevant portions of the directions of the Chief Justice.

> "He (McDonald) said further - he has not accepted what Mr. Brown put to him - he said further that, when asked whether he walked along the line of the parade, he said" 'It was not necessary for me to walk down the line. I stood there, just stood in one place and pointed him out.' He said: 'It would not be correct to say that I walked down the line once and came back without pointing out anyone. I stood about the middle of the line and I spoke to the sergeant. I then pointed out the fact that I saw. I know I pointed him out. I don't remember if I touched him. He was facing me.' ..... Now, on the question whether he walked up and down the line, or stood in one place, what he has said is in violent conflict with what Sgt. Dawson said, because he said he did walk as far as that is concerned. Please bear in mind that is recollection against recollection; that is, you have to say this is important on that point of view. The picture that Mr. McDonald gave you is one that says: 'Well, as I saw the line, I saw the man.' Whereas the picture that the sergeant gave is one of his going to look in each face, and it wasn't as quick and as certain an identification as McDonald tried to make out. This is the importance of this aspect of the case, and you will have to say whether you prefer the evidence of Sgt. Dawson as to what McDonald did, or whether you prefer to believe McDonald as to what he himself did. He (McDonald) said: 'I don't remember what I said when I pointed out the accused.' He said, 'Possibly I said, 'this could be the one'.' Now, this is what Mr. Brown put to you. He suggested to him - he asked him: 'What did you say?' He said he didn't remember. He (Mr. Brown said: 'I suggest to you that you said this could be the one'. He (McDonald) said: 'Possibly I said that' - recollection again.
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> Now we hear something else from Sgt. Dawson. Of course we

hear from the accused and his father that words to the effect were said. Now, this again is a matter of importance, if what Mr. McDonald said was in fact: 'This could be the one'. You will probably think that that shows he wasn't certain that it was, because if a person could be, it doesn't mean that the person is - could be - so that if that is what he in fact said, then of course it affects the question of the certainty of the identification, and you have to be certain that the identification was made.

Well now, when he said, 'Possibly I could have said that' Mr. Brown said: 'Will you agree with me, having given that answer, that you were uncertain?' He said, 'No Sir'. He insists that he wasn't uncertain about the identification .... What did Sergeant Dawson have to say on this important aspect of the evidence? He said when Mr. McDonald came, he asked Mr. McDonald why he was there and McDonald said, 'To identify a man who robbed me on the 23.7.73.' Afterwards the Sergeant corrected himself and said when he had refreshed his memory from the notes he had made at the time, he said, 'The date Mr. McDonald said was 10th July; not the 23rd.' So the Sergeant's recollection there was faulty, until he refreshed his memory. He said what Mr. McDonald did say was, 'I have come to identify a man' - not 'the' man as was put to Mr. McDonald, which he accpted - 'a man who robbed me.' Well, you will have to say whether there is any difference in 'a man' and 'the man'.

Well, the Sergeant said that Mr. McDonald walked along the line which I told you is in conflict with what Mr. McDonald said, and he eventually touched the accused and said, 'This one.' Not 'this could be the one'; 'this one', is what he said.

Mr. McDonald said, 'Possibly I could have said 'this could be the one.' The Sergeant said the words that he used was 'This one,' and this wasn't given to you merely on the Sergeant's recollection, because since this was an important issue in the case, as to what Mr. McDonald actually said, it goes to the root of the case - of the evidence of identification, Members of the Jury, because the Defence was saying that he said it could be the one, and evidence was called to establish that that was what was said. Well now, since that is what is now being alleged, the Sergeant said he was now speaking from memory, but he had made a note at the time. What was actually said, the best evidence there was what was in this note, so he refreshed his recollection to something else, when he was being

cross-examined by Mr. Brown and quite properly, when Mr. Downer got up to re-examine him, he asked him to refresh his memory in relation to what was actually said, and when he did that, he refreshed his memory, he said that McDonald - sorry - in cross-examination when Mr. Brown was suggesting to him that McDonald said, 'This could be the one', the Sergeant said, 'No, this is not what McDonald said. He said, 'This one,' and the Sergeant stuck to it. Then in answer to Mr. Brown he said what was said by Mr. McDonald was recorded on the sheet for the identification parade, and he said, 'I have not refreshed my memory about the matter. I am speaking from memory.'

Now, it is in those circumstances, in re-examination that Mr. Downer asked him to refresh his memory from the notes which the Sergeant had previously refreshed his memory from, and when the Sergeant did that he said that what McDonald said was 'this one', which the Sergeant had been saying all along. So Members of the Jury, you will have to say what you believe. You will have to contrast this with what the accused told you that McDonald said, and what the accused's father told you that McDonald said.

Well now, in relation to whether Mr. McDonald walked along the line, or not, the Sergeant said he was quite certain that Mr. McDonald walked carefully down the line, looking at each face. He looked at the face of each of the nine men, while walking, and when he went down the line the first time, he did not point him out; he is sure of that. Now, you contrast that with what Mr. McDonald said, bearing in mind that you have to weigh the evidence of one against the other and say which you believe, and of course, if you believe Sergeant Dawson, then Mr. McDonald, and the picture that he painted of seeing the man straight off, is not right. According to the Sergeant, he eventually identified him, but he had gone down carefully and looked into the face of each man first."

It is in connection with the foregoing passages that there arise the principal grounds of complaint advanced by the applicant and we proceed to deal therewith. It is, perhaps, convenient to start with the proposition that certainly for more than 200 years a witness has not been allowed to give his evidence by reciting the contents of some document previously prepared. See, for example. Anon (1753) 3 Keny. 27; 96 E.R. 1295. During the course of his evidence, however, a witness has always been permitted to refresh his memory

by reference to documents or memoranda of one kind or another, subject to certain well-defined conditions, e.g. contemporaneity, and the production, if required, of the document to the other party to the cause or his attorney to enable him to inspect it and, if he so wishes, to cross-examine the witness as to its contents. The jury are also entitled to see the document - if the witness is cross-examined as to parts of it not used by him to refresh his memory with the consequence that the document is rendered admissible as an item of evidence and may be so admitted at the instance of the party calling the witness - since it may assist them in assessing the witness's credit worthiness.

But the first and essential prerequisite that must be demonstrated to the court by the witness is the necessity for him to refresh his memory. Unless it becomes manifest that his memory is faulty with respect to some particular matter on which he is being examined (including cross-examination and re-examination) no question can arise as to his memory being refreshed. Unless, therefore, a witness indicates his desire to refresh his memory because of his imperfect recollection as to some fact about which he is required to testify, it would be quite improper for an attorney to suggest to a witness that he consult some previously prepared document in order to confirm his testimony. Clearly, any such course must be calculated to offend the rationale of the well-established rule against proof of consistency or, as it is sometimes called, the rule against self-corroboration. See, Gillie v. Posho Ltd. (1939) 2 All E.R. 196, and Jones v. South Eastern & Chatham Rail Co's Managing Cmttee. (1918) 87 L.J.K.B. 775.

Now, nowhere does it appear that Sgt. Dawson sought to refresh his memory as to what McDonald said because of his faulty recollection. For whatever purpose he was asked by Mr. Downer (for the Crown) to refresh his memory in re-examination, it certainly was not because Sgt. Dawson appeared not to be able to, or said he could not, recall what McDonald has said when he pointed to the applicant at the identification parade. In this circumstance it was, in our view, clearly improper for Mr. Downer to ask the witness to refresh his memory. What, indeed, the witness was asked to do, was to corroborate himself. With great respect to the learned Chief Justice it is

our firm opinion that that should not have been allowed. He appears to have thought that because Sgt. Dawson had refreshed his memory about "something else" during his cross-examination by Mr. Brown it necessarily followed that there arose a right in Mr. Downer to ask the witness to refresh his memory with respect to a quite distinct fact. It seem to us that any such proposition remains unsupported either in principle or on authority.

But the matter does not, of course, end there. In the view of the Chief Justice the assertion by McDonald on the occasion of the identification parade "was an important issue in the case ... it (went) to the root of the case." We entirely agree. The Chief Justice then proceeded to describe the note made by Sgt. Dawson at that parade as the best evidence of what McDonald said. We disagree profoundly. Not only was Sgt. Dawson's note not the best evidence of what McDonald said; it was clearly, not evidence in the case for any purpose whatsoever. When Sgt. Dawson referred to his note to refresh his memory, as he was requested to do, its contents did not, and could not, become evidence. Indeed, even if it had been produced for inspection by the attorneys or by the Chief Justice it would not, without more, have become evidence. See Gregory v. Tavenor (1833) 6 C. & P. 280; Senat v. Senat (1965) 2 All E.R. 205. In Young v. Denton (1927) 1 D.L.R. 426 the defendant was allowed to refresh his memory as to the date of an accident from a document prepared by him sufficiently soon after the accident. In the particular circumstances of the case the date of the accident was a very material fact. The trial judge regarded the document used by the defendant to refresh his memory as evidence on which he could rely to reach a conclusion in favour of the defendant. On appeal, the Court had not the least difficulty in holding that the document had no probative value since it had not been used by the plaintiff in cross-examination, and the case did not come within any of the exceptions to the general rule prohibiting the proof of previous consistent statements.

In truth the document used by Sgt. Dawson to "refresh" his memory was not produced at any time. If Mr. Brown had cross-examined Dawson on those parts of the note to which he had not referred, then Mr. Downer would clearly have been entitled to demand that the document be received as evidence

in the case. It would then, we apprehend, have been admissible as evidence of the truth of its contents by way of an exception to the rule against hearsay. See Cross on Evidence, 3rd Edition pp. 191 et seq. Again,if Mr. Brown had suggested to Sgt. Dawson that his evidence as to McDonald's assertion was a fabrication or recent invention Mr. Downer would have been entitled to have the note admitted in evidence. See, for,eexample, R. v. Benjamin (1913) 8 Cr. App. Rep. 146. Let it be clearly noted that neither of the foregoing situations had, in the view of the Chief Justice, arisen during the evidence of Sgt. Dawson. We make this observation because we appreciate that the question whether circumstances have arisen in which a previous consistent statement may be proved is almost entirely a matter for the discretion of the trial judge, The following passage from the judgment of Dixon, C.J., in The Nominal Defendant v. Clements (1961) 104 C.L.R. 476 at p. 479 is particularly apposite to the situation last mentioned:

> "In as much as the rule forms a definite exception to the general principle excluding statements made out of Court and admits a possibly self-serving statement made by the witness, great care is called for in ap lying it. The judge at the trial must determine for himself upon the conduct of the trial before him whether a case for applying the rule of evidence has arisen - and must exercise care in assuring himself not only that the account given by the witness in his testimony is attacked on the ground of recent invention or reconstruction or that a foundation for for such an attack has been made - but also that the contents of the statement are in fact to the like effect as his account given in his evidence and that having regard to the time and circumstances in which it was made it rationally tends to answer the attack."

In describing Sgt. Dawson's note - a note that was not produced, not inspected, and certainly not admitted in evidence - as the best evidence of what McDonald had said at the parade the the Chief Justice in our respectful view, fell into a very grave error. As we see it certain consequences

must have ensued upon this error. During his summing up the learned Chief Justice sought to impress on the jury, on at least six occasions, that the case advanced by the prosecution depended entirely on the evidence of McDonald as to the identity of the applicant as one of the men taking part in the events of the night of July 20, 1973. From the moment McDonald admitted in cross-examination that when he pointed to the applicant he could have said: "This could be the one", the jury could quite legitimately have taken the view that they could place no reliance on his purported identification of the applicant on the parade. Indeed, we agree with Mr. Macaulay that if that was all the evidence before the jury the learned Chief Justice would have been perfectly well justified in upholding a no-case submission. It appears, too, from the portions of the summing up quoted above, that this did not escape the attention of the Chief Justice. By rehabilitating McDonald in effect by means of a document not in evidence and by inviting the jury to regard that document as the best evidence of what McDonald had said, the Chief Justice, it may legitimately be observed, was, albeit unwittingly, inviting the jury not only to prefer Sgt. Dawson's evidence but to reject the evidence of the accused and his witness and indeed McDonald's admission. The truth is that there was not the least foundation for this invitation since, as is clear, at the end of the day no one at the trial, except of course Sgt. Dawson, knew the contents of that document and, more particularly, whether that document did in fact confirm Dawson's evidence.

It is perhaps, trite to observe that the creditworthiness of any witness must ultimately depend upon his disinterestedness, his integrity and veracity, his apparent intelligence and his knowledge of the facts to which he testifies. Proportioned to these factors, the real quality of which is revealed more particularly in cross-examination, is the extent to which a jury will repose confidence in his evidence. It is impossible for anyone to say what view the jury would have taken of McDonald's evidence if it had been left to them against the background of Sgt. Dawson's evidence and the evidence of the accused and his witness without reference to the supposed corroboration of Sgt. Dawson's evidence which they were invited to find in the latter's unproduced note. Paradoxically, it is also to be noticed, as

Mr. Macaulay quite properly points out, the Chief Justice having told the jury that the whole case depended on McDonald's evidence, in effect invited them to prefer Sgt. Dawson's undisclosed document, whatever the contents, to the evidence of McDonald on a matter that went to the root of the case. We would add that Mr. Downer's re-examination of Sgt. Dawson, in the particular circumstances of this case, went beyond what is permissible in the re-examination of a witness.

In the circumstances as we have described them we are of the clear view that the applicant's conviction cannot be allowed to stand.

There are several other matters of misdirection by the learned Chief Justice of which Mr. Macaulay complains. We are of the view that these complaints are not without merit but in view of the conclusion at which we have arrived we find it necessary to pursue only one.

Detective Walker testified that on July 26, 1973 when he arrested the applicant he cautioned him "and told him that on Friday night he was seen at the Trap Club in a Fiat car AD 40". He asked the applicant what he was doing in the car and whether he knew who owned it. To this enquiry the applicant replied: "I went out in the car with my friends to a party." It should be observed that the car to which reference is here made is the car, the subject matter of the first count, taken from Hamilton on Coolshade Drive in Havendale at about 9.20 p.m. on Friday, July 20, 1973. When that car was taken from Hamilton there were attached to it registration plates numbered FA 259. No evidence was led as to the location of the Trap Club in relation to Coolshade Drive, nor as to the time at which the applicant was alleged to have been seen in the car. It is clear, however, that if Walker's evidence is accepted - and for this purpose it is to be assumed that the jury did accept it - that evidence was evidence of admission by the applicant that he was in Hamilton's car. The applicant did not, on Walker's evidence, identify the time at which he had travelled "in the car with (his) friends to a party." This would, undoubtedly, have been subsequent to the changing of the registration plate. In dealing with the foregoing situation the learned

Chief Justice said:

> "Now, members of the jury, the fact that (Walker) said he told the accused that he was seen in the car at the Trap Club and so forth, is not evidence that the accused was in fact seen there in the car. What the sergeant (Walker) said is not evidence, but when the accused, if you believe him, said: 'I went out in the car with my friends to a party', that makes what the Sergeant said evidence, and in effect what emerges from this is what the accused admits, if you believe the sergeant. Remember the accused denied all of this, that he said anything to the sergeant. If you believe the sergeant, what the accused has admitted is that on the Friday night, the 26th of July - the 26th of July, 1973 was a Thursday - the previous Friday night the 20th, which is the night when the Fiat is alleged to have been taken away - so, if you believe the sergeant, what the accused is saying here is that he was in that car, on the Friday night when it was taken away from Mr. Hamilton, at the Trap Club. This is an admission, if you believe the sergeant, by the accused that he was in the car on that night and, if you believe that, does that confirm or tend to confirm, does it support identification of the accused by Mr. McDonald, when he said the accused was one of the four men, and drove away in the same Fiat, if you believe it is the same Fiat. Does it help to identify the accused as one of the men who was in that car that night? This, of course, depends on whether you believe the sergeant."

Unfortunately, there are a number of errors in the foregoing passage but we identify two only. Firstly, the applicant did not, on Walker's evidence, admit that "he was in that car, on the Friday night when it was taken away from Mr. Hamilton, at the Trap Club." Secondly, nowhere in that passage or, indeed, in any part of his summing-up, does the Chief Justice tell the jury that the admission by the applicant that he was a passenger in the car on his way to a party at some undetermined time subsequent to its being taken from Hamilton, and subsequent to the change of the registration plates, could not, without more, "confirm, or tend to confirm, or support the identification of the accused by McDonald." See R. v. Stally (1960) 44 Cr. App. Rep. 5. To the contrary, the Chief Justice impliedly invited the jury on at least two occasions to approach Walker's evidence on the basis that they could, if they were so minded, find therein confirmation of McDonald's evidence. For example, he

said:

> "And if you believe that that is so (i.e. what Walker quoted the applicant as having admitted), does that support the evidence of identification given by McDonald, when he said the accused was one of the four men? This is the way that you treat that evidence."

In the opinion of this Court these were serious misdirections. Indeed, Mr. Reckord conceded that the applicant's alleged admission was not inconsistent with his not having been a party to the taking of Mr. Hamilton's car. In the end Mr. Reckord asked this Court to consider applying the proviso. We have not the least hesitation in holding that the circumstances of this case speak rather eloquently against any such course. The test by which this Court is guided in relation to the proviso is now firmly settled. It is not, contrary to Mr. Reckord's submissions, a question of the degree of error found to exist in the conduct of the trial or in the summing-up of the trial judge. Rather the question is whether on an accurate direction a reasonable jury must inevitably have come to the same conclusion so that it could be said that there was no substantial miscarriage of justice. We are of the firm view that this has not been shown to be so in the circumstances of this case, and it is fair to say that Mr. Reckord, in spite of his submission, did not, and perhaps could not, attempt to show that on the evidence in this case the jury would, on a proper direction, have inevitably arrived at the same conclusion.

In the result, we treat the application as the hearing of the appeal. We allow the appeal and set aside the conviction and sentence. The interest of justice does not, we think, require us to order a new trial in this case.