J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 31/1974

BEFORE: The Hon. Mr. Justice Luckhoo, Ag. P.(Presiding)
The Hon. Mr. Justice Swaby, J.A.
The Hon. Mr. Justice Zacca, Ag. J.A.

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R. v. LINDELL ALEXANDER

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L. A. Marcus for the applicant.

B. Macaulay, Q.C. and T.G. Usher for the Crown.

July 25, September 23, 1974

LUCKHOO, P. (Ag.):

This is an application for leave to appeal against conviction and sentence of death for murder on an indictment tried in the Home Circuit Court before Smith, C.J. and a jury.

The case for the prosecution was to the effect that on October 23, 1972, the deceased Nathan Grant was carrying on a wholesale and supermarket business at premises situate at the corner of Lindene Drive and Olympic Way in Olympic Gardens in the parish of St. Andrew, the wholesale section of the business being housed at No. 6 Lindene Drive and the Supermarket section on Olympic Way. At about 8 a.m. on that day two men were seen to come on foot along Olympic Way and go into the wholesale section of the deceased's business premises (hereinafter referred to as the wholesale section). As soon as they did so the deceased was heard to shout "Lord Jesus Christ" and simultaneously the sound of four gunshots was heard to come from within the wholesale section. Thereupon, a grey Valiant

motor car was seen to come from off Olympic Way into Lindene Drive from a direction opposite to that from which the two men had come. The car stopped outside the wholesale section. The applicant was seen to come from the back seat of the car and quickly enter the wholesale section. He was carrying a travelling bag. Two men remained in the car. Then the applicant and the two men who had gone into the wholesale section immediately before the four shots rang out were seen to come out of the wholesale section in Indian file. The applicant was carrying the black travelling bag which he had taken into the wholesale section. The applicant and these two men entered the car which was then driven off along Lindene Drive. John Meggiah who resided in a house on the other side of Lindene Drive directly opposite the wholesale section said that he observed these happenings and that after the car had driven off he and a friend one Patrick Wickham ran into the wholesale section. There he saw the deceased lying in a caged area with a hole in his side and another in the forehead. He thereupon made a report to the police at Hunts Bay Police Station. On November 10, 1972 at an identification parade held at Hunts Bay Police Station he pointed out the applicant as the person he saw enter the wholesale section and later come out with the black travelling bag. He said that he had known the applicant for some three months before the incident in question took place on October 23, 1972. At about 10 a.m. on October 23, 1972 Det. Const. Moore went to the deceased's wholesale premises at Lindene Drive where he saw the dead body of the deceased lying in the caged area. The cage was comprised of board at the bottom and mesh at the top. There were three holes in the mesh wire. The deceased's body was removed to the Kingston Public Hospital.

On October 27, 1972, Dr. Dawson a registered medical practitioner performed a post mortem on the deceased's body. The injuries he found indicated that the deceased had been shot three times - twice in the chest and once in the left thigh and in addition had received lacerated wounds to the middle of the forehead and to the left of the left eyebrow as well as an incised wound to the left temple.

Death was due to shock and haemorrhage resulting from the gunshot wounds to the chest.

On October 31, 1972, Det. Cpl. of Police Bevan Simpson stationed at Hunts Bay Police Station was on patrol duty along Mahoe Drive in St. Andrew when he saw the applicant riding a Honda motor cycle. He stopped the applicant and told him that he had received information that he killed Nathan Grant. He cautioned the applicant and the applicant said "A no me shoot him, a Big shoot him." Sgt. Simpson then asked the applicant whose motor cycle he was riding and the applicant said "A my motor cycle. Big give me two hundred dollars and me buy it from Miss Chin son Tony." The applicant and the motor cycle were taken by Sgt. Simpson by police car to Hunts Bay Police Station. On the way there the car was driven to Three Miles where the applicant pointed out a shop to Sgt. Simpson. At Hunts Bay Police Station the applicant was confronted with Miss Chin's son Tony who handed over $200 to Sgt. Simpson.

On the same day Det. Const. Moore at Hunts Bay Police Station cautioned the applicant after telling him that he had information that he killed Nathan Grant. According to Const. Moore the applicant said "Me only go in the car, sir, me never shoot him." On November 10, 1973, the applicant was charged for murder and robbery.

The case for the prosecution in short was that the applicant and others planned to rob the deceased by force of arms and arranged that the two men who entered the wholesale section should hold up the deceased with guns, the applicant and the others remaining in a motor car a short distance away ready to come to the deceased's premises upon hearing the sound of gunfire proceeding from those premises; that in pursuance of that plan the deceased was shot and killed and that the applicant thereupon proceeded to those premises by car with the black travelling bag to collect the spoils of the planned robbery.

In his defence the applicant denied all knowledge of the incident and said that he was not in the area when the deceased met his death. He denied the statements attributed to him by Sgt. Simpson and Const. Moore.

Patrick Wickham testified at the instance of the defence to the effect that he was in the company of John Meggiah and one Regs on the morning of October 23, 1972, when he saw two men whom he did not know before enter the deceased premises. At that time he and his companions were at the corner of Olympic Way and Lindene Gardens. He heard Grant's voice calling out and then the sound of one shot. Thereupon he and Meggiah ran to premises in Olympic Way facing onto Lindene Drive and both stood behind a fence. Regs ran away down the road. There was the sound of three more shots being discharged. About a minute later a white car came up Olympic Way with three men in it. The car turned on to Lindene Drive and stopped at the gate of the wholesale section. Three doors of the car were opened but no one came out of the car. The two men who had gone into the wholesale section just before the shots were fired then came out of the wholesale section. They were carrying paper bags which they threw into the car before themselves entering through the back door of the car. The car was then driven away. Wickham said he attended an identification parade on November 10, 1974 at Hunts Bay Police Station but did not pick out anyone. In cross-examination Wickham admitted that he had given a statement to Sgt. Simpson which Sgt. Simpson reduced into writing. He admitted signing the statement but he denied that he told Sgt. Simpson that "When the car stopped by the entrance to the wholesale a man came out of the car." Wickham's testimony had been adduced to contradict Meggiah's testimony that he had seen a man - identified by Meggiah as the applicant - come out of the car and go into the wholesale section. On application by the Crown Attorney the learned trial judge permitted evidence in rebuttal to be given in respect of Wickham's denial that he told Sgt. Simpson that "When car stopped by the entrance to the wholesale a man came out of the car." It was the

part of the case for the defence that not only did Meggiah not see anyone leave the car and enter the grocery but also that he was in no position to identify any person who might have left the car and enter the wholesale section because there was an insufficient period of time for him to identify such person.

Having regard to the directions given the jury by the learned Chief Justice, in returning a verdict of murder the jury must clearly have accepted and acted upon the testimony of Meggiah that he did see the applicant come out of the car and enter the wholesale section and further must have inferred from the circumstances that the applicant was a party to a plan to rob the deceased, the robbery to be carried out by armed men whose discharge of their firearms would serve as a signal to bring him and other participants in the plan to collect the spoils of their crime.

It was submitted that in the first place there was no evidence that the killing of the deceased was occasioned as a result of any plan to rob the deceased because there was no evidence that any money or goods were taken from the deceased's premises. While it is true that no actual loss of money or goods was proved it was a reasonable inference from the circumstances of the case and, if believed by the jury, the evidence of Sgt. Simpson and Const. Moore as to what they said the accused told them after being informed that they had information that he had killed Grant that the deceased was shot in the course of a plan to rob him, indeed in the course of a robbery. It was next submitted that the evidence of identification of the applicant by Meggiah was extremely weak as Meggiah did not have a reasonable opportunity from the position in which he was to identify anyone entering the wholesale section from where he said the car had stopped. Further it was urged that in the light of the conflicting testimony given by Meggiah and Wickham as to whether anyone did get out of the car a doubt should have been raised in the minds of the jury in respect of that matter. These arguments were put forward at the trial and were carefully brought to the attention of the jury by the learned trial judge. In this connection it must not be overlooked that Meggiah testified that he had known

the applicant for some three months before October 23, 1972. Again there is the testimony of Const. Moore that the applicant told him that he was in the car but had not shot the deceased. We are of the view that the applicant's conviction cannot be challenged successfully on this ground.

Then it was submitted that the learned trial judge erred in allowing evidence to be called in rebuttal at the close of the defence when nothing had arisen ex improviso in the course of the defence and that the admission of such evidence seriously prejudiced the applicant's defence. What the learned trial judge did was not to allow further or fresh evidence to be given in proof of the Crown's case but rather he exercised his discretion to allow evidence in rebuttal of Wickham's denial of a portion of the signed statement he had given the police. The learned trial judge directed the jury that the contents of Wickham statement could not be regarded as evidence of the matters contained therein but could only be used in respect of Wickham's credibility. If authority be required in support of the course taken by the learned Chief Justice reference need only be made to Crippen (1911) 5 Cr. App. R. 255 where a similar point was raised before the Court of Criminal Appeal in England. We pointed this out to Mr. Marcus at the hearing and he thereafter did not pursue this submission.

It was next submitted by Mr. Marcus that the verdict of the jury was unreasonable and could not be supported having regard to the evidence as it could not reasonably be inferred from the evidence that the applicant was a party to a plan in which the use of a firearm in the commission of robbery was envisaged. Further Meggiah when cross-examined had said that an interval of half an hour had elapsed between the discharge of the last shot and the arrival of the Valiant motor car outside the wholesale section and thus destroyed the whole basis of the case as put forward by the Crown.

Meggiah's concept of the passage of time was tested by the learned Chief Justice himself and it emerged from that test that a period of 5 seconds indicated Meggiah's idea of the period of half an hour. The learned Chief Justice specifically directed the jury that the case against the applicant would fail if they came to the conclusion that any appreciable interval of time did elapse between the sound of the shots and the arrival of the car. It should also be observed that Wickham put that interval at 2 minutes but his concept of the passage of time was not put to the test. Returning to the submission that it could not be reasonably inferred from the evidence that the applicant was party to a plan in which the use of a firearm was envisaged, once the jury accepted that the car arrived almost simultaneously with the sound of the shots - indeed with the sound of the last three of four shots which were all in rapid succession - and that the applicant left the car and entered the wholesale section with a travelling bag and then left the wholesale section and re-entered the car in company with the two men whose entry therein was simultaneous with the discharge of the shots it can hardly be urged that the inferences contended for by the Crown could not be reasonably drawn. This submission in our view is without substance. In the result we hold that the applicant's conviction for murder cannot be disturbed.

The applicant also seeks leave to appeal against the sentence of death pronounced on him on January 30, 1974 after inquiry as to his age at the date of his conviction on October 18, 1973. The inquiry as to the applicant's age commenced after the allocutus was put. The applicant said he was born on June 9, 1956 and was then over 17 years of age but under 18. The learned Chief Justice desired to have strict proof of his age and the matter was accordingly adjourned to October 22, 1973. On that day the learned Chief Justice was informed that searches made in the relevant offices had revealed that no particulars existed in respect of the applicant's birth. The applicant's school record offered no assistance in that regard. The matter was further adjourned for further enquiries to be made. On October 24, 1973, the applicant's mother Mervis Hunt

testified that she had seven sons and three daughters among the former being the applicant who was born on June 11, 1956. It was then elicited from her that she had another son Gerald George Gilzene born on January 27, 1957 a little more than 7 months after the date she gave as the date of the applicant's birth. She said that all her babies were full term babies and that the applicant was but 3 or 4 months old when he went to live with one Myra Edwards. The learned Chief Justice was not satisfied that the applicant's mother had given the correct date of the applicant's birth and the matter was further adjourned. On December 17, 1973 Counsel for the Crown applied for an order that the age of the applicant be determined by a scientific process which involved the taking of x-ray photographs of certain parts of the applicant's bone structure. The learned Chief Justice then explained to the applicant (his counsel was not present) the nature of the order requested by Crown Counsel and asked if he had anything to say against the making of the order that an x-ray be taken of his hip. The applicant replied that he had nothing to say against making the order requested. The learned Chief Justice then made the order prayed and the matter was further adjourned. On December 19, 1973, the medical witness requested was not available and the matter was further adjourned. In the meanwhile the applicant refused to have himself x-rayed when he was taken for that purpose to the Kingston Public Hospital and said that he would not submit to being x-rayed unless his counsel was present. The matter came before the learned Chief Justice and Mr. Marcus the applicant's counsel at the trial said that he would at a time to be arranged between himself and the Director of Public Prosecutions Department attend at the Kingston Public Hospital for the purpose of the x-ray photograph ordered being taken. Mr. Marcus did not in fact go to the hospital and the applicant said that he did not intend to submit himself to being x-rayed. Subsequently the applicant agreed to be x-rayed and returned to the hospital for that purpose but then decided again that he would not submit to being x-rayed. On January 8, 1974, the learned Chief Justice made a further order in that if it should become necessary reasonable force must be used to have the applicant

x-rayed. He directed that copies of the x-ray report and photographs be furnished Mr. Marcus and that Mr. Marcus be given sufficient time to study them before the matter was again called on.

The x-ray photographs of certain parts of the applicant's body were duly taken by Dr. William Magnus, a specialist in Radiology at the Kingston Public Hospital, on January 14, 1974. Dr. Magnus photograph the pelvis, knees, hands and chest of the applicant. On January 30, 1974, Dr. Magnus testified in relation to the x-ray photographs he had taken of the several parts of the applicant's body. He explained that x-rays are sometimes used to attempt to establish the age of an individual and that this is possible because certain bones in the body mature at different ages. These bones have bone formation or ossification centres which appear at quite constant periods of an individual's development, different ones appearing at different ages. The centres appear on average at particular times and sometime later they become firmly attached to the main portion of the bone to which they relate. Dr. Magnus then referred to the x-rayed photograph he had taken of the applicant's pelvis. With the use of visual aid apparatus Dr. Magnus indicated bone formation centres shown in the photograph which for the ischium and the ilium, parts of the pelvis, usually appear at puberty which may vary from 12, 13, 14 years depending on the maturity of the individual and become firmly and permanently attached - completely fused - by the age of 25 years. On one side the centre was well in the process of attachment though not completely so while on the other side it was little less advanced. This indicated that the applicant was over puberty but not necessarily as old as 25 years of age when the x-ray was taken.

In respect of the x-ray photographs taken of the applicant's knees the photograph of the right leg showed the bone formation centres to be firmly attached so they were main portions of the bone. Attachment in these occurs with maturation somewhere between 17 and 19 years of age.

The x-ray photograph of the applicant's chest which shows the collar bones and clavicle likewise showed final bone centres

one on each side of the collar bone and these appear between the ages of 18 to 20 years.

In respect of the x-ray film of both hands Dr. Magnus explained that they were especially useful in chronologically placing age because there are a multiplicity of joints all of which have bone formation centres. He said that a great deal of work has been done in academic institutions and elsewhere on the establishing of age by way of x-ray photographs of the hands and in that regard a set of standards has been completed which he accepted and which are generally accepted internationally. He examined the films taken of both of the applicant's hands and pointed out that there was a complete attachment of the bone formation centres to the main part of the bones. He contrasted this with the x-ray film taken of the left hand of a 16 year old individual which showed a distinct gap between the bones and the main part of the bone. In respect of the applicant's hands the films showed complete fusion and the accepted standard he referred to showed that complete fusion in the hands would not take place before the age of 19 years. Dr. Magnus gave as his opinion that by reason of complete fusion of bone centres to the main bones in the applicant's hands the applicant was not less than 18 years of age. He also gave that as his opinion having regard to a consideration of all the prints exhibited in evidence. He further said that had the applicant been 17 years of age in July, 1973 he would not expect to find the bone centres as completely united as disclosed in the x-ray photographs. He placed the applicant's age on October 18, 1973 (date of conviction) at 18 years and two or three months having regard to the state of maturation of the bones.

When cross-examined Dr. Magnus said that based on the film of the clavicle the applicant could have been 18 - 20 years of age but based on the films of the hands he was over the age of 18 years. The film of the pelvis was inconclusive as to the applicant's age. While admitting that people in tropical areas do tend to develop more rapidly than people in temperate

areas and that the standards he used were prepared on people living in temperate areas, Dr. Magnus said that in the latter case development is only slightly lower than what is found in tropical countries, the degree of variation not being very significant given the absence of metabolic disease or severe nutritional standards and there were none of these to be observed in the film taken of the applicant's body. In answer to the learned Chief Justice Dr. Magnus said that he had himself made allowance for the fact that the applicant lived in a tropical area. From his experience there was no marked differentiation as the rate of fusion to the main shaft of the bone occurs at almost the same rate - any differentiation being only a matter of two or three months. He had made allowance for this when he concluded that the applicant at October 18, 1973 (time of conviction) was over 18 years of age - about 18 years and 2 or 3 months.

Mr. Marcus then submitted that -

(1) Dr. Magnus' evidence could not be regarded as conclusive proof that the applicant was over the age of 18 years as environment differences and lack of proper nutrition in early childhood could possibly affect the fusion of the bone centres.

(2) The material age is the age of the applicant at the date of the commission of the offence.

These submissions were overruled by the learned trial judge who referred to the fact that Dr. Magnus had stated that in his opinion the applicant was not less than 18 years at October 18, 1973 (date of conviction) and that the Court of Appeal had already ruled that the material date in respect of sentence of death was the date of conviction. The learned Chief Justice accepted Dr. Magnus' opinion that on October 18, 1973, the applicant was in fact not under 18 years of age and he proceeded to pass sentence of death on the applicant.

Two grounds have been urged before us in respect of the question of sentence. It was first submitted that the learned trial judge erred in law when he made an order for the applicant to be compelled to submit to x-ray photographs being taken of his body since he was thereby ordering an assault or battery to be committed upon his person. In respect of the first ground it will be observed that no objection was taken to the admissibility of the evidence of Dr. Magnus and so the question whether in fact the applicant did or did not submit voluntarily to the taking of the x-ray photographs was not explored nor was it suggested that any submission by the applicant to the taking of the photographs resulted from the fact that the learned Chief Justice had made a supplementary order that reasonable force be used if necessary to have the photographs taken. The applicant had expressed his willingness to submit to the taking of x-ray photographs of his body for the purpose of determining his age and his later dissent when taken to the hospital for that purpose was on the ground that he wished his counsel to be present. There is nothing on the record to suggest that the applicant persisted in his dissent at the time the photographs were taken. In any event the supplementary order of the learned Chief Justice was directed to the ascertainment of a fact material to the determination by him after conviction of the proper mandatory sentence required by law to be pronounced and must be distinguished from the case of the ascertainment of a fact in the course of the determination of the guilt or otherwise of an accused person.

We can see no reason at all why it should not be lawful for a trial judge after conviction to order the mere taking of photographs, x-ray or otherwise of the convicted person's body, as distinct from some surgical or other operation which might involve some physical or mental discomfort to that person, with a view to discharging the statutory duty cast on him of determining whether by reason of that person's age he should be sentenced to be detained during Her Majesty's pleasure or should be sentenced to death or to some other form of punishment. In our view the first ground urged by Mr. Marcus fails.

It is interesting to observe that there appears in the April/June 1972 issue of the Journal of Criminal Law (No. 146) at pp. 134 - 136 a reference to two cases where in Scotland the sheriff issued a warrant in one case to take teeth impressions from a youth detained at an approved school who was suspected of murdering a girl on whose body there was a bite mark. (Hay. v. H.M. Adv. (1968) J.C. 40) and in the other where a warrant was granted to take a sample of blood from a person in prison awaiting trial (H.M.Adv. v. Milford (1973) S.L.T. 12). In neither case was reference made in the warrant of any use of force that might be necessary to obtain the desired effect. In the former the propriety of the warrant was upheld by the Criminal Appeal Court in part by analogy with the law relating to search warrants, but the case was said to be exceptional. It was held that the situation was one of urgency. In the latter the accused was arrested on a charge of rape and was subsequently committed for trial on the charge. On his arrest the police took possession of his trousers on which they found bloodstains belonging to the same group as the complainant. The Crown being anxious to ascertain the accused's blood group, the accused refused a request to allow a sample to be taken from him. The Crown thereupon petitioned the sheriff's court to have a warrant granted for the sample to be taken from the accused on the ground that it was necessary in the interests of justice. The accused objected to the grant of the warrant on the grounds that it involved making him give evidence against himself as well as the insertion of an instrument in his body. He argued that to take a blood sample without consent was an unprecedental invasion of personal liberty and, if warranted, could lead to further invasions of a more repugnant kind." The temporary sheriff granted the warrant sought after hearing argument on both sides. He said that the basic principle is that it is the duty of the court to reach a fair reconciliation of the interest of the public in the suppression of crime and the interest of the individual "who is not entitled to have the liberty of his person unduly jeopardised". The accused asked for leave to appeal.

The sheriff held that leave was not necessary. No appeal was taken and the accused was ultimately convicted after trial.

As to the second ground that the evidence based on the x-ray photographs could not be conclusive as to the applicant's age we do not think the learned Chief Justice's acceptance of Dr. Magnus' opinion in the light of the evidence given by him could fairly be said to be unreasonable. While the applicant's exact age could not be determined by the x-ray photograph method it was clear that Dr. Magnus was firmly of the opinion that the applicant was not under the age of 18 years at the date of conviction.

In the result the application for leave to appeal against conviction and sentence is refused.