

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 48/2011

**BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE P WILLIAMS JA (AG)
THE HON MR JUSTICE F WILLIAMS JA (AG)**

DWAYNE TULLOCH v R

Cecil J Mitchell for the applicant

Miss Paula Llewellyn QC and Mrs Lenster Lewis-Meade for the Crown

15 and 19 February 2016

ORAL JUDGMENT

P. WILLIAMS JA (AG)

[1] This is an application by Mr Dwayne Tulloch (the applicant), for leave to appeal his conviction and sentence for the offence of murder. The applicant was convicted following a trial in the Home Circuit Court on 20 May 2011. The learned trial judge sentenced the applicant on that said date to life imprisonment and directed that he should serve 15 years in prison before becoming eligible for parole.

[2] A single judge of this court refused the applicant permission to appeal against his conviction and sentence but, as is his right, he has renewed his application before this court. His grounds of appeal as set out in his filed application were as follows:

- “1. **Unfair Trial:** That the evidence and testimonies upon which the learned trial judge relied on for the purpose to direct the jury lack facts and credibility, thus rendering the verdict unsafe in the circumstances.
2. **Lack of Evidence:** That the persecution witnesses failed to produce to the court any form of material, forensic, ballistic evidence to link me to the alleged crime.
3. **Misidentify by the Witness:** That the prosecution witnesses wrongfully identified me as the person or among any persons who committed the alleged crime.
4. **Miscarriage of Justice:** That the court failed to recognised [sic] the fact that it is quite clear that I was wrongfully convicted of a crime I knew nothing about base [sic] on the testimonies of the witnesses.”

[3] The evidence of the circumstances which led to the death of Deddrie Graham (the deceased) came from the prosecutor’s sole eye witness to her killing Mr Wayne Graham, her brother. He testified that at about 9:00 pm on 23 March 2006, he was at home in Thompson Pen, Saint Catherine. This was a home he shared with his parents, Mr Altman and Mrs Erna Graham, his brother Andrew Graham and the deceased. His parents occupied one room to the front left hand side of this house; the deceased had occupied the room to the front right hand side. He shared the back room on the left side with his “baby mother” and his brother occupied the back room on the right hand side. The house was described by Wayne Graham as an “Uncomplete [sic] building, unfinish [sic] building.”

[4] At approximately 9:00 pm, Wayne heard the dogs barking and sounds suggesting the fence to the back of the property was being kicked down. He went to the back door and saw there “a man with his foot on the door step”, saying “Pussy-hole

a you mi come fi kill". He was able to see the man's face with the assistance of an electric light located in the room which pointed to the door from which the man approached him. As the man stood at the door step, he was about 4 feet away from Wayne. There was nothing on the man's face and nothing to obstruct a view of him. Wayne recognized him to be the applicant who he knew as "Back Hoe" and had known him for some 20 to 24 years before that night as someone who lived in the same community.

[5] Upon seeing the applicant at his back door, Wayne saw a gun in the applicant's hand. Upon hearing the words uttered by the applicant, Wayne turned to run but was shot under his right breast while attempting to get away. He kept running and exited the house into a flower garden located to the front of the deceased's room. He laid down in the garden and hid. He had been able to see the applicant's face for about 10 seconds before he had turned to run.

[6] As he laid in the garden, Wayne watched as the applicant ran into the room occupied by the deceased and placed the gun to her head while asking her for her brother. The deceased was heard to utter words to the effect "just cool nuh man". At this time Wayne was at a distance of approximately 8 feet from them. He was able to see what was happening with the assistance of electric light from a bulb in the ceiling of the deceased's room and also from one outside of that room.

[7] From his vantage point, Wayne saw another man enter his sister's room. This man, he recognized to be someone he knew as "Seventeen" whose correct name was

Anthony Reid. The applicant was heard asking "Seventeen" if him "ketch him". "Seventeen" responded "mi kill that like dog, him dead like dog".

[8] Wayne then heard an explosion which he said sounded like "the gun that Dwayne Tulloch had at Deddrie head explode". He then saw the deceased fall to the ground. The men then ran through the passage and out through the back fence.

[9] Wayne ran into the room and saw the deceased lying on her back with blood flowing from the back of her head. Wayne eventually went to the Spanish Town Hospital where he saw his brother lying on a stretcher suffering from gunshot injuries. Wayne was treated for his injury and released.

[10] Wayne was subjected to intense and thorough cross-examination by both counsel who appeared for each accused men at the trial. He was challenged as to his version of what took place that night in so far as he sought to identify the applicant and his co-accused Anthony Reid as the men who had come to his home that night. The cross-examination exposed several inconsistencies between his evidence at trial when compared with what he had said previously in his statement to the police and his evidence at the preliminary enquiry relative to this matter. There was also exposed discrepancies between his evidence and that which was later given by his brother and the police witnesses. Wayne also claimed he was unable to recall much of the matters about which he was confronted.

[11] Andrew also testified as to what occurred at the home that night. He had been in his room with his brother watching the television when he had heard the sound of the gate at the back being kicked down. He armed himself with a machete, opened the room door and went through the passage. As he got to a point where he could see the back of the house, he was just in time to see "the fence kick and fly straight open". He saw a man walk inside the yard. He recognized this man to be "Seventeen" who he had known for several years.

[12] Seventeen called out to Andrew and said "A you mi come fa. Come out here". Andrew then saw "Seventeen" take out a gun from out his waistband and tell him to come outside. At this time the men were approximately 4 feet apart and Andrew stabbed at "Seventeen" with his machete. Seventeen shot Andrew in his left hand. Andrew ran back into the room and shut the door. His mother tried to bar the door with her body. Seventeen kicked open the door, pushing aside Mrs Graham in the process. Once in the room Seventeen again shot Andrew, this time in his shoulder.

[13] Mrs Graham got up and started wrestling with Seventeen and Andrew was then able to run from that room, run through the deceased's room and run out into the yard. He noticed the deceased standing at her doorway. He made good his escape and kept running. "Seventeen" chased him and continued to shoot at him. He was able to escape and eventually got assistance and was taken to the Spanish Town Hospital.

[14] On 30 March 2006, a post mortem examination was conducted on the body of the deceased by Dr Mynedi, who was at the time a government pathologist with the

Ministry of National Security. At the time of the trial, Dr Mynedi was outside of Jamaica and it was not reasonably practicable to secure his attendance. The post mortem examination report that Dr Mynedi had prepared was admitted into evidence pursuant to the provisions of section 31D(c) of the Evidence Act. It was read into the records by a colleague of Dr Mynedi, Dr S N Prasad Kadiyala.

[15] On examination of the body one gunshot wound was observed on the left side of the forehead, 11 centimeters below the top of the head, 4 centimeters away from the midline without gunpowder deposition. The bullet had travelled upwards, backwards and to the right and had exited on the right parietal region of the head. Cause of death was due to the gunshot wound to the head. Death would have been instantaneous to two/three minutes after the injury was inflicted.

[16] Three police officers gave evidence as to their involvement in the investigation relative to this matter. Sergeant Norma Cox was the officer responsible for conducting an identification parade which was held for Anthony Reid o/c "Seventeen". Andrew identified him as the man who had shot him. Wayne also attended the identification parade but did not point out Andrew Reid. Wayne explained that the instructions he had received was to identify the person who had shot and killed his sister and shot him. Anthony Reid was not that person hence his failure to point him out.

[17] Deputy Superintendent Gladstone Ellis was the officer who supervised the investigation of this matter. This became especially necessary since the investigating officer had to attend a course and was unavailable for some time to carry on the

necessary investigations. It was Deputy Superintendent Ellis who had interviewed and recorded statements from the Graham brothers. It was he who had spoken to the applicant and Anthony Reid on 4 April 2006 when they were already in the custody of the police. It was he who had made the decision to have an identification parade held in respect of Anthony Reid and none in respect of the applicant. Finally it was Deputy Superintendent Ellis who was responsible for conducting a question and answer session with the applicant.

[18] Detective Sergeant Collin Myers was the investigating officer in this matter. He testified as to his visiting the home of the Graham's upon receiving the initial report of the shooting at approximately 9:30 pm on 23 March 2006. He had seen the body of the deceased at the scene. He had observed blood stains in rooms within the house and out in the yard. He had noted spent shells also in rooms in the house and out in the yard. He had arranged for the scene of crime personnel to visit and process the scene. Detective Sergeant Myers also testified to having returned to the scene sometime in May 2006. He gave detailed evidence as to the lay-out of the house and yard and the position of the flower garden in particular. The witness was requested to draw his impression of what he had seen at the premises in relation to buildings, trees and the garden. This diagram was admitted as an exhibit. Sergeant Myers testified to arresting and charging the appellant and Anthony Reid on 2 May 2006.

[19] At the end of the case for the Crown submissions of no case to answer were made on behalf of both accused men. The learned trial judge ruled that the matters

raised were within the province of the jury and ought to be left to them for their decision.

[20] The applicant gave sworn testimony. He acknowledged that he was called "Back Hoe". He further acknowledged that he knew the Graham brothers. He indicated that he was closer to Andrew than to Wayne but he was on speaking terms with the latter who he had known for approximately 15 years and would see every day because they "lived in one community".

[21] His defence was an alibi. He testified that he had been at his home in the Tryall Heights community of Saint Catherine on the night of 23 March 2006. He had arrived there from approximately 8:00 pm and remained there for the entire night. He further testified that he had heard shots being fired from somewhere in the community while he was inside his house but this did not cause him to leave. He was not alone at home when he heard the explosions. His brothers, sisters-in-law, two nephews and other persons were also there.

[22] Anthony Reid made a statement from the dock. He acknowledged being called "Seventeen" but he denied knowing either of the Graham brothers. He maintained that he was "not involved in the things that the brothers were talking about".

[23] The learned trial judge summed up the case to the jury comprehensively. She recognized that the major issue in the case was identification and as such the issues of the credibility and reliability of the sole eye witness was of supreme importance for the

jury's resolution of the matter. She identified the major inconsistencies and discrepancies that had arisen, especially those in the evidence of Wayne Graham. She gave the jury accurate and detailed instructions as to how to deal with them. She carefully and in a fair and balanced manner dealt with both the case for the prosecution and for the defence. She fairly placed for the jury's consideration, the applicant's unequivocal denial of any involvement in the killing of the deceased.

[24] The jury retired for a total of over seven hours before returning with an unanimous decision. They returned initially after approximately five hours and requested further directions and assistance in respect to three areas. The first thing they requested was hearing again the evidence regarding when Wayne said he had seen "Seventeen", whether it was before or after the explosion that killed his sister. Further they requested an explanation "in regards to murder by common design, or in terms of mere presence". Thirdly, they asked the question "Should our conclusion be based on our belief of the evidence, or solely on the evidence presented?" Upon their further deliberations thereafter, they returned after another two hours with their verdict being that the applicant was guilty and Anthony Reid not guilty for the offence for which they had been jointly charged.

[25] At the hearing of this application by this court, Mr Mitchell, counsel acting on behalf of the applicant, indicated that after having a careful consideration of the matter, he was unable to find any arguable points or points of merit to argue in terms of the conviction and sentence. He quite correctly noted that the issues that arose for the

jury's consideration were identification and the credibility and reliability of the sole eye witness. He recognized that the learned trial judge had quite adequately left these issues to the jury. He candidly and commendably noted that the learned trial judge could be viewed as being quite generous to the applicant.

[26] We perused the transcript and considered the question of whether there ought to have been a good character direction based on a response which had been given by the applicant while being cross-examined. The words stated in his evidence arose from the exchange as follows:

“Q: And you never have you gun pointed to her head at this time?

A: No, Sir, I'm not a gun man. I couldn't have a gun pointed to her head and I wasn't on the Graham premises.”

[27] We reviewed the leading cases namely **R v Vye** [1993] 1 WLR 471 and **Teeluck and John v The State of Trinidad and Tobago** [2005] 66 WIR 319 and took note of the guidance to trial judges as to the appropriate direction which must be given if the need arises. In **Teeluck and John** at paragraph [33] Lord Caswell stated:

“The standard direction should contain two limbs, the credibility direction that a person of good character is more likely to be truthful than one of bad character, and the propensity direction, that he is less likely to commit a crime, especially one of the nature with which he is charged.”

[28] In **Denjah Blake v R** [2014] JMCA Crim 19, this court thought that a good character direction ought to have been given in a case where the appellant had said these words as stated in paragraph [5] of the judgment:

“I did not had [sic] no weapon on mi, not even a pin...”

“Anyone know mi would tell yuh that I am not a violent person and I don’t walk with weapon.”

[29] In **Bruce Golding and Damion Lowe v Regina** SCCA Nos 4 & 7/2004 delivered on 18 December 2009, the following words were used by Bruce Golding in an unsworn statement as stated in paragraph 85 of the judgment:

“I never run down nobody that morning, I never run down nothing with no gun at no time, I am not a gunman, your Honour, I am a working youth.”

[30] This court found that the use of those words brought into question the issue of the appellant’s good character. However, this court found that since the appellant had made an unsworn statement, if a good character direction was necessary, the proper directions were to address the issue of the appellant’s propensity to have committed the crime without giving any direction as to his credibility.

[31] In the instant case, the learned trial judge did not give any direction on good character and we were of the view that given the words spoken by the applicant, it was potentially a border line case. Further in any event, we were of the view that the failure to give a good character direction would not have been fatal to the conviction. In the circumstances of the case, the evidence against the applicant was such that a

direction as to his credibility or propensity would not have caused the jury to have reached a verdict other than guilty.

[32] The applicant having been sentenced to life imprisonment and that he serve 15 years before being eligible for parole , Mr Mitchell did not seek to advance any arguments against this sentence . Indeed if he had this court may have been compelled to use its powers under section 14(c) of the Judicature (Appellate Jurisdiction) Act which provides:

" On an appeal against sentence the court shall, if they think that a different sentence ought to have been passed , quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal"

[33] The callous and cold manner in which the jury accepted that the applicant killed the deceased was reprehensible and frightening. The fact that her killing was in circumstances where there had clearly been an orchestrated attack launched on this family while in the safety of their home makes it nothing short of heinous and vicious. Such an attack should attract a severe sentence .While accepting that each case must be examined on its own merit and facts, the court's experience in sentencing for like or comparable offences should always act as a guide in imposing appropriate sentences. While a term of imprisonment for life was appropriate , for an offence such as this it could well be said that a more severe sentence than 15 years before being eligible for parole may have been imposed .

[34] The decision therefore is as follows:

1. The application is treated as the hearing of the appeal.
2. The appeal against conviction is dismissed.
3. Sentence of life imprisonment with the appellant serving 15 years before becoming eligible for parole is imposed is affirmed .
4. Sentence is reckoned to have commenced on 20 May 2011.