

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 87/2007

**BEFORE: THE HON MR JUSTICE HARRISON JA
THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE BROOKS JA (Ag)**

OLIVER BLAGROVE v R

Earle DeLisser for the applicant

Mrs Diahann Gordon-Harrison and Brodrick Smith for the Crown

21, 22 June 2010 and 17 June 2011

HARRISON JA

[1] The applicant was tried in the Gun Court Division of the Clarendon Circuit Court held at May Pen, Clarendon, on an indictment containing two counts. He was found guilty on both counts on 7 June 2007 and was sentenced on 12 June 2007. On count 1, which charged him for illegal possession of firearm, he was sentenced to seven years imprisonment and on count 2, which charged him for shooting with intent, he was sentenced to ten years imprisonment. The sentences were ordered to run concurrently.

The Case for the Prosecution

[2] The two main witnesses for the prosecution were dead at the time of trial so their statements were tendered pursuant to section 31D (a) of the Evidence Act. They were admitted and read into evidence as exhibits 1 and 2 respectively.

[3] Kirk Miller, a bus conductor who lived at 35 ½ Evan Street, Denbigh, Clarendon, stated as follows:

“Paul Blagrove, otherwise called 'Screechie' o/c 'One Time', the owner of a Hiace mini bus, ply the route, May Pen, Spanish Town, and Mandeville. I have been conducting this bus for about three months, it is been driven by a man by the name of David from Longville, in the parish of Clarendon.

Paul Blagrove is well known to me, we grow up in the Evan Street and Lewis Street area. We used to play football together. Paul's mother's name is Miss Lucile. His father, now deceased, was called, Mass Jimmy. He has two brothers. They are called Benfoot, and Jimmy. When Paul was about in his twenties, he migrated about six years. He returned to Jamaica, he started the business of operating the mini bus. On his return, we continue our relationship, Paul presently lived with his wife, and other family members at Evan Street near to Paradise and Lewis Street. I can stay where I live and look across Paradise Street and Lewis Street. I live with my girlfriend, Tamara Cooper, our house, is a one apartment and structure of board, zinc roof, it had two windows made of plain glass louvre blade, the windows are situated, one to the left side as one faces the front of the house, the other to the verandah.

It has two doors, one to the back and the other to the front leading from the verandah. The front door is equipped with night clock and power bolt, the back doors equipped with one tower bolt. The house is equipped with electricity

lights. I obtained the light from my sister's house, she is my neighbour. There are three outside light bulbs, lights are placed as follows: One on the verandah, one on the left, as one faces the front, and one on a piece of rafter facing the road. All the bulbs are working. My house is about a chain or less from the road. About three weeks up to Sunday, the 2nd day of July, 2006, David and I operate a bus, we did not get our pay, Paul told us to work the bus on Sundays and pay ourselves, and full the tank with gas oil for Monday morning. On Sunday the 2nd, David and I ply the road from May Pen to Frankfield, I purchase \$5000.00 gas oil and obtained a receipt. Sometime about midday, we came home we went to Paul Blagrove home. I told him what happened, he disputed the amount of gas oil I purchased. I gave him \$1000.00, he began saying that I robbed him and even in the police station. He said I am talking to him too long, a kill he should kill me, and say I should pass up his money. He said I am talking to him too long, a kill he should kill me. I saw him went to his house, I became fearful and ran to my home. I went into my house about fifteen minutes, I was inside my house, when I heard Paul's voice calling me, at that time, I had turned off all the lights, I looked through the front window, I saw Paul standing at the gate with a machete in his hand, David opened the gate, came in the yard and also called out my name. I did not answer, when I heard the driver said, it sound like him nuh deh there, both man (sic) left. On Monday morning, I did not return. I received a call from the driver, via cell phone, saying that Paul wanted to kill me. On Thursday the 6th day of July, 2006 at about 10 pm, my girlfriend Cooper and I went inside our house, and I securely locked up the doors and windows. I turned on the lights about 11:10 pm. I was seated on the bed.

"While I was eating, I heard a loud explosion, I saw something pass me. I heard a rattling sound. I look and saw smoke coming from a bucket, I got up and look through the front window, I saw Paul Blagrove and another man, I know as 'Blacks', and I saw Paul had a black gun in his right hand. He pointed it in the direction of my house, I then heard two more explosions. I saw blue flames coming from the mouth

of the gun. I still look through the window, I saw when he pointed it in the air and fired several shots and I saw flames coming from it. I... he then left. I was able to recognize him both from the electricity light shining from the outside pub bulb. Paul was a dreadlocks, he -- his head was not covered. He was dress (sic) in white merino and jeans pants. I could see his face clearly. 'Blacks' was dressed in jeans jacket and jeans pants. 'Blacks' is of black complexion, about five feet 4 inches tall, mean face, small head, low cut hair, round face with a scar. I don't remember which size really he is of, medium built. Blacks live at Beckford Street in the vicinity of Evan's Street and Lewis Street. I know Blacks from about January of this year. I know his home, I know the people who will go live there but I don't know the names; I met Blacks at Paul Blagrove's home. We speak to each over. I last spoke to Blacks on Sunday the second of July 2006. I am certain that the men I saw were Paul Blagrove and Blacks. The light were shining very bright, that I with (sic) facing the house, I saw their faces for about eight minutes when the men left at fifteen minutes after my girlfriend and I left to the payment place and made a report to the police. I took the police to my home, Friday the seventh day of July, 2006. I gave a statement to the police. It was read over to me and I sign my name as correct. This statement consisting of five pages signed by me, is true and correct to the best of my knowledge and belief and I make it knowing that if it is tendered in evidence I shall be liable to prosecution if I had wilfully stated in it anything that I know to be false, I do not believe to be true. Statement recorded by me on the seventh of July, 2006 at 2:00 a.m." [Pages 81-86 of the transcript]

[4] Tamar Cooper, who was 29 years of age and was unemployed, stated inter alia:

"I am living at the above mentioned address with my common-law husband, Kirk Miller for the past six months. We live in a one bedroom board-house with two windows, one to the front and one at the side. There is two doors, one at the front and one at the back. The window are however made

from glass, on Thursday the 6th of the 7th, 2006, about 11:10 p.m., Kirk and I were at home when he was about to have his dinner. I then heard someone call Kirk, I immediately recognized the voice to be that of a man known as Hall, otherwise called Screechy. I turned to Kirk and said Screechy is calling you, are you not going to answer him and he said that I should keep quiet, and look through the window. As I look through the window I saw Screechy and three other men, one of them I know only as Blacks from Beckford Street. When I looked through the window I saw Screechy holding a gun in his hand pointing toward the house. I saw when he turned to Blacks and say something. I was able to see all of this because it was a glass window and it was transparent, and allow me to see through where Screechy and the men, were. Where Screechy and the men were, was well lit with electric bulb from our neighbour's house which is very close to ours which is about 16 feet apart. Two lights from our house, and the outside were on. The light inside my house was on, and as I look through the window I saw when Screechy fired three shots in our house. I was able to see flashes of light from where Screechy was. Immediately, I fell to the ground and I saw Kirk standing at the back door between the stove and I was lying on the floor, I heard several shots. I stood there for about fifteen minutes. Then Kirk and I open the front door and we came out, and turn on all of the lights on the outside. We then both walked out at the gate and I saw a man who asked me what was going on because they heard the shots and saw Screechy. We then walked to the station and made the report. I know Screechy since February of this year, I see him two weeks. Kirk was working for screechy who owns a bus name One Time. Kirk was the conductor on this bus. I also know Blacks, he about five feet, 6 inches tall and dark complexion with a cut to the right side of his face and one on his mouth, if I see him again I will be able to recognize him.

On Friday the seventh of the seventh '06 about 3:00 a.m., I attended the May Pen CIB office and gave the statement to the police. It was read over to me and I sign same as true and correct ... This statement

consisting of two and a half pages each signed by me is true to the best of my knowledge and belief and I make it knowing that if it is tendered in evidence, I shall be liable to prosecution if I had willfully stated in it, anything to be false or to not believe to be true, ..., the seventh of seventh of '06 and taken by me the seventh of July, 3:00 a.m." [Pages 87-90 of the transcript]

[5] Detective Corporal DaCosta recalled that on 6 July 2006, he had recorded a statement which was given by Tamara Cooper and had caused one to be taken from Kirk Miller. After the report was made, he went to the applicant's house, spoke to him and took him into custody for questioning. The applicant told him that he was not involved in any incident because he was at home all evening with his wife and family. Detective Corporal DaCosta subsequently accompanied both Miller and Cooper to their home at 35 ½ Evan Street. He saw impressions in the board house which he said were consistent with gunshot marks. He had also seen what appeared to be a gunshot impression on a drill bit that was in a bucket. Four 9 mm empty casings were found 30 feet away from the board house.

[6] The applicant was interviewed by Detective Corporal DaCosta on 10 July 2006. He was asked a number of questions in the presence and hearing of his attorney-at-law in order to clarify certain ambiguities that arose in the statement given by Tamara Cooper. The officer said that the applicant was called by other names so he was trying to ascertain what the other names were. The applicant was subsequently arrested and charged for offences of shooting with intent and illegal possession of firearm. He

cautioned him and he said: "Officer, it could not have been me because I was at home all evening with my wife and family. A lie dem a tell on me".

[7] Under cross-examination, Detective Corporal DaCosta testified that Tamara Cooper had given him a description of two persons who were involved in the incident. He said that the applicant was brought to the station whilst Cooper was there, but no confrontation had taken place. He told the court that she was concealed from him.

[8] Detective Sergeant Michael Norman was also called by the prosecution. His evidence was more or less in support of Detective Corporal DaCosta's visit to the premises on 6 July 2006. On 8 July 2006, he returned to the premises and saw the bodies of both Miller and Cooper lying on the ground. They had multiple gunshot wounds to their bodies. They were pronounced dead by Dr Bryan at the May Pen Hospital. He was present at the postmortem examination that was done on the bodies of Miller and Cooper.

[9] Constable Patro Gayle testified that on 7 July 2006, he was at the May Pen Scenes of Crime Office when he received a telephone call. He proceeded to the CIB Office and Detective Corporal DaCosta introduced him to the applicant. He was requested to take swabs of the applicant's hands after he volunteered for this to be done. Constable Gayle said he washed his hands, put on pair of clean latex gloves and proceeded to swab the webs and palms of both hands. The swabs were placed in transparent plastic bags which were labelled and placed in a refrigerator in the Scenes of Crime Office. On 11 July 2006, he retrieved the swabs, took them to the Government

Forensic Laboratory and obtained a receipt. The four spent shells that were recovered at the scene were also handed over at the Laboratory. On a subsequent date, he received results in respect of the swabs but none was received for the spent shells.

[10] Miss Marcia Dunbar, the Government Analyst, also gave evidence on behalf of the prosecution. She had received the swab samples that were taken to the laboratory and had conducted forensic tests on them. Examination of the swabs in bag number one revealed the presence of gunshot residue at the intermediate level. Gunshot residue at the trace level was found in bag number two. There was no evidence of gunshot residue on the swab in bags numbered three – five respectively. The bag that was marked "1" bore a label, "right palm of Oliver Blagrove". Bag number 2 had a label marked "right web of Oliver Blagrove".

[11] Miss Dunbar further testified that results which indicated an elevated level meant that there would be a large amount of gunshot residue. The trace level indicated that there is a small amount of gunshot residue. The intermediate level was a level between the elevated and trace levels. She agreed that if someone was standing beside someone who had fired a gun there was the possibility that any of the three levels could be attached to that person's hand. She further explained that the levels would depend on the proximity with the person who fired the gun.

[12] Miss Dunbar agreed, under cross-examination, that if someone's hand was held by a police officer who had recently fired or discharged a firearm it was possible that gunpowder residue could be transferred from that police officer's hand to the hand of

the other person. She also agreed that it was possible for gunpowder to be transferred to a person's hand if he were to hold on to a desk that was used by police officers who discharge firearms from time to time. She also said that gunpowder residue could be circulated by a fan in a room where there is gunpowder and thereby deposit it on someone's hand.

[13] Detective Corporal Floyd Allen, who was stationed at May Pen Police Station on 6 July 2006, recalled that on 7 July 2006, Kirk Miller had attended the CIB Office and made a report to Detective Corporal DaCosta. He had spoken to Miller, interviewed him and recorded his statement.

The No Case Submission

[14] At the close of the case for the prosecution, the defence made a no case submission. The defence did not dispute that both Miller and Cooper were dead but it was submitted that the prosecution had failed to adduce evidence linking the accused with the shooting incident. Counsel argued that neither Kirk Miller nor Tamara Cooper had identified the accused in their respective statements as one and the same person known as Paul Blagrove or 'Schreechy'. It was further submitted that the witnesses had not mentioned in their statements that Oliver Blagrove had been involved in any shooting. Counsel also submitted that the accused was never confronted with the witnesses in order to confirm that the accused was the person referred to in their respective statements.

[15] The learned judge, it would appear, had some concern as regards the nexus between the accused and the alleged shooting. At page 97 of the transcript the following dialogue is recorded:

“Her Ladyship: So, tell me now, help me, what is the evidence, that links this man with the offence?

Mr. Tyme: M’Lady, this man is that, m’lady, this m’lady, is that this man was well known to the complainant.

Her Ladyship: This man?

Mr. Tyme: M’Lady

Her Ladyship: Or the assailants”

And at pages 98-99:

“Her Ladyship: What is the link between the assailants and this man?

Mr. Tyme: M’lady, the evidence, it is not mentioned, but however, M’lady and I do submit, m’lady, that it will not be unfair for the court, if the court sees it in that particular light, to amend the indictment at this stage, to reflect Oliver, Paul Blagrove.

Her Ladyship: And that amendment will be based on what?

Mr. Tyme: That it will not be in the circumstances, be unfair to the accused man, m’lady. No disadvantage would have been proven to him insofar as the evidence that has been led against him in these

proceedings, because I see as he stipulates, he is alien to this, then certainly, that amendment would not affect him in the least.

....

Her Ladyship: But what is the Crown - what evidence has the Crown brought to link this accused, to link this man with the person in the statement; there must be some link to even consider amending the indictment, which is it? What is the evidence.

Mr. Tyme: I see no cause, I see no link and I will be honest with the court, there is none, if I am to answer that question.....

Her Ladyship: I am just going to refresh my memory as to the evidence as gone before. I will rise for about 15 minutes."

[16] The learned judge made the following ruling on her return to court:

"Her Ladyship: Now, having examined the detailed notes I find in the statement of Mr. Kirk Miller, which was admitted as evidence. Mr. Kirk Miller speaks of Paul Blagrove at the residence of the Miller's, speaks of Paul Blagrove having gun in hand and described what happened afterwards. He speaks of knowing Mr. Blagrove well and that he was known also as 'Squeechie' and they grew up together in the Evans and Lewis Street area.

The statement of Mr. Miller speaks of Paul presently living with his wife and other family members. Detective Corporal DaCosta says Mr. Blagrove, this man before the court, resided at 13 Lewis Street, according to the evidence,

this was based on the statements and reports of the witnesses, Miller and Cooper. I find the reference to Paul Blagrove, otherwise called 'Squeechie' is a reference to this accused man and therefore, I am ruling that there is a case to answer." [Page 111 of the transcript]

The Defence

[17] The applicant gave evidence on oath. He is a farmer and businessman who lived at 13 Lewis Street, May Pen, Clarendon. The premises is owned by his mother and he lived there with his wife and family since 1969. Apart from farming he did, he owned and operated a mini bus since July 2006. The deceased witness Kirk Miller, who he had known from he was a "kid", was the conductor on his bus for about one month. He had also known Tamara Cooper and up to the time of their deaths they had no fuss or any dispute between them. The relationship between them was good and he had never threatened to kill Miller.

[18] On 6 July 2006, he went to his farm and returned home at about 6:00 pm. He had a bath and went to a restaurant on Manchester Avenue in May Pen at about 7:00 pm. He had rented a DVD movie before he returned to his home. At 7:30 pm whilst he was at home he and members of his family watched the movie.

[19] At about 11:00 pm the driver of the bus came to the premises and called him. He went outside, spoke to him and whilst they spoke, a police motorcar drove up. The police told him that they wanted to search him and he told them to go ahead. They did

not search him. However, the driver, conductor and another man, who were also present, were searched. Detective Corporal DaCosta then told him that they had come for him. The officer told him of a report that he received that he had shot at Miller's house. He told him that was impossible because he did not leave his house that evening after he had come from the "chicken shop" at 7:30 pm. Detective Corporal DaCosta told him that he wished to ask him some questions and he was taken to the station. He was not handcuffed but he was "draped". He was held in the waist and in the back of his neck. He was taken to the CIB office and was told that his hands would be swabbed. He responded:

"...you can't take me here and looking for gun residue and you guys having your stuff on all over the table, why you going, exposing me in where you dealing with you guns and stuff." [page 127 of the transcript]

He nevertheless told the police words to the effect that he would oblige them to have his hands swabbed.

[20] The applicant denied that he and another man by the name of 'Blacks' went to Miller's house and fired shots towards the house during the night. He also denied that he was in the company of anyone known as 'Blacks' because he did not know that person. He also denied that he was at Miller's house and had called his name.

[21] Under cross-examination, the applicant said he was not called Paul or 'Squeezy'. He said he had known Kirk Miller for a number of years and they had played football together. He said that the conductor who had come along with the driver was not Miller

because he had stopped working for him since 2 July and had never worked for him again. He agreed that he would at times tell the driver David and the conductor to put gas oil in the bus. He also said it was not true that he and Miller had fallen out. He did not accuse Miller of stealing his money or threatened to kill him.

[22] Mrs Kim Blagrove, wife of the applicant, testified on his behalf. She said that on the morning of 6 July 2006 her husband had left home for the farm and did not return home until about 5:30 - 6:00 pm. He had left home again at 6:30 pm and returned at about 7:00 pm. They watched a movie and he did not leave the house after it was finished. She said that the driver of the bus and the conductor came to the premises at about 10:45-11:00 pm. Her husband went outside and spoke to them. She had remained inside the house and sometime after her brother-in-law came and told her that the police was there. She went outside and saw her husband, family members and police officers. Shortly thereafter, her husband left with the police.

[23] Mrs Blagrove had known Kirk Miller previously and that he had been a conductor on her husband's bus. She also knew that Kirk and her husband were good friends but she could not say why he had stopped working for him. She did not know Tamara Cooper and had only seen her. She disagreed with the suggestions that her husband was not at home at 10:00 pm and that he was not at home watching a movie with the children.

The Grounds of Appeal

[24] The single judge had refused the applicant's application seeking leave to appeal so he has renewed this application to the court. The original grounds of appeal were abandoned and leave was granted to argue four supplemental grounds, which read:

- "1. The evidence of the Government Analyst was flawed as the prosecution had failed to establish a nexus between the evidence of the swabbing done by Constable Patroy Gayle and the evidence of Marcia Dunbar (the Analyst) as the Constable gave no evidence of any marks of identity of the evidence which he gathered nor was this evidence tendered.
2. The prosecution had failed to establish the death of the two witnesses to the required proof, whose statements were tendered under Section 31D(a) of the Evidence Act; notwithstanding the concession of Counsel who appeared for the Appellant that he knew the witnesses were dead.
3. The evidence in the Statements of the deceased witnesses was conflicting as to the circumstances of the shooting incident and was insufficient to establish a conviction for the offence of shooting with intent and in any event the evidence of the identification did not meet with the standard approach which was necessary for such evidence to be considered.
4. That the Learned Trial Judge should have upheld the submission of 'no case to answer' made by the Defence at the end of the case for the prosecution, as up to that point there was insufficient evidence that the Appellant was the person named in the statement of the witnesses as the person who fired the shots."

The Submissions

[25] Mr DeLisser, for the applicant, contended that the evidence of the Government Analyst was flawed because the prosecution had failed to establish a nexus between

the evidence of the swabbing done by Constable Patroy Gayle and the evidence of Marcia Dunbar (the Analyst). He argued that the Constable had not given evidence of any marks of identity of the evidence which he gathered nor was this evidence tendered.

[26] Mr DeLisser also contended that the prosecution had failed to establish the death of the two witnesses to the required proof. He submitted that notwithstanding the concession of counsel (who appeared for the accused) that he knew the witnesses were dead their deaths would still be required to be proved.

[27] Counsel also submitted that the evidence in the statement of the deceased witnesses was conflicting as to the circumstances of the shooting incident and was insufficient to establish a conviction for the offence of shooting with intent. It was submitted that the learned judge should have upheld the submission of no case to answer made by the defence at the end of the case for the prosecution, since up to that point there was insufficient evidence that the appellant was the person named in the statement of the witnesses as the person who fired the shots. He also argued that there was not sufficient evidence that the applicant was the person referred to as "Paul Blagrove", "Screechie" or "One Time".

[28] It was also contended on behalf of the applicant that since there was gun powder residue on the hand of the applicant up to intermediate level, this evidence should have been considered along with the evidence of the Analyst, that a person who

stood near to a person who discharged a firearm can acquire such accumulation. This evidence he said should have been considered by the learned judge moreso, as the applicant was willing to have his hands swabbed.

[29] Mrs Gordon-Harrison, for the Crown, submitted that it would indeed be most unusual for swabs taken of a suspect's/accused's hands to be made available at trial for any purpose whatsoever. She submitted that the usual practice, which has been accepted by the courts as being satisfactory, is that the analyst's certificate and evidence would speak to the findings of the tests conducted on the relevant swabs. Counsel submitted nevertheless, that there was some paucity of evidence in relation to the integrity of the chain of custody which should exist in a bid to satisfy the tribunal of fact that the same swabs that were taken of the hands of the applicant were in fact the ones submitted to the analyst for testing. She submitted however, that despite this concession (in part), even if this aspect of the evidence were treated with diminished regard, there is other evidence which is sufficient to substantiate the finding of guilt by the learned trial judge.

[30] In relation to ground 2, counsel submitted that there was sufficient evidence to establish and prove beyond a reasonable doubt that both witnesses were in fact dead. She argued that the evidence of Detective Sergeant Norman had provided overwhelming evidence in proof of death of both witnesses.

[31] In relation to ground 3, Mrs Gordon-Harrison submitted that when one carefully examines the statement of each deceased witness there is no grave or material difference as to the manner in which the shooting incident unfolded. Both witnesses she said, spoke of three identifiable shots followed by a number of other gunshots. She further submitted that if there were differences they were immaterial and that each witness spoke from his/her own perspective and as was reasonable, could only give an account of the event from the juncture at which he or she started observing the incident.

[32] Counsel submitted that, as to the offence itself of shooting with intent there was evidence which substantiated the offence. Miller had in fact stated at page 84 lines 7-12:

"... I saw Paul Blagrove and another man I know as 'Blacks', and I saw Paul had a black gun in his right hand. **He pointed it in the direction of my house, I then heard two more explosions.** I saw blue flames coming from the mouth of the gun." (emphasis supplied)

She submitted that for her part, Cooper, in her statement as recorded at page 88 lines 19-20, stated:

"I saw Screechy holding a gun in his hand pointing toward the house."

And she continued at page 89 lines 5-8, thus

"... as I look through the window I saw when Screechy fired three shots in our house. I was able to see flashes of light from where Screechy was."

[33] Mrs Gordon-Harrison further submitted that there was other evidence which came from Detective Sergeant DaCosta and Constable Patroy Gayle which had substantiated the offence of shooting with intent. Both officers had mentioned the presence of a gunshot hole and impression in the board house and a gunshot impression on the handle of drill which was inside the house. Counsel therefore submitted that when the applicant pointed the gun at the house in which the complainants were present and fired at it, he was reckless as to whether they were in fact inside and reckless as to any injury which they could have sustained. She submitted that the requisite ingredients necessary to prove the 'intent' were established.

[34] With respect to ground 4, counsel argued that while the Crown agrees that there was no mention of the name 'Oliver Blagrove' in the statement of either of the two witnesses, there was sufficient context provided as to surrounding 'identifying factors' from which the specificity of the applicant could be recognized. She therefore submitted that on the Crown's case there was sufficient, cogent and specific identification evidence which properly connected the applicant to the offence(s); as a consequence it could not be successfully contended that the learned trial judge erred in not acceding to the submission of no case to answer made by learned defence counsel at the trial.

The Discussion and Analysis

[35] We agree entirely with Mrs Gordon-Harrison that it would be most unusual for swabs taken from the suspect's hands to be made available at trial. Indeed, it is the Analyst's certificate and the evidence which speak to the findings of the test that are relevant. We also agree with counsel that even though there may have been some gap as it relates to the chain of custody in relation to the swabs taken by Constable Gayle and those handed over to the Analyst for testing, this issue, as she says, could be treated with "diminished regard" since there was other evidence upon which the Crown relied in substantiating the guilt of the applicant. We therefore see no merit in ground 1.

[36] The issue in relation to ground 2 touches and concerns whether the prosecution had provided satisfactory evidence as it relates to the proof of death of both prosecution witnesses. Section 31D (a) of the Evidence Act comes into focus and it states inter alia as follows:

"Subject to section 31(G) a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if it is proved to the satisfaction of the court that such person –

(a) is dead;

..."

Section 31(G), to which section 31(D) is subject, deals with a statement contained in a document produced by computer. The prosecution was, therefore, required to prove that the witnesses Kirk Miller and Tamara Cooper were dead. They proceeded to do so through the evidence of Detective Sergeant Michael Norman who told the court that he was present at the home of both witnesses on the scene of a double murder; that he saw the bodies of both witnesses lying on the ground with multiple gunshot wounds, and that the bodies were removed from the scene to the May Pen Hospital where they were pronounced dead by Dr Bryan. Detective Sergeant Norman had also testified that he had attended the post-mortem examination conducted on both bodies after relatives had identified each body.

[37] It is also worthy of note that Detective Sergeant Norman had known both individuals before their demise. He had visited their home during investigation of the case. We therefore agree with counsel that there was sufficient evidence to establish and prove beyond reasonable doubt that the witnesses were in fact dead - see **Regina v Clarence Peck** SCCA No 68/1997 delivered 1 November 1999. There is also no merit in this ground.

[38] We turn next to ground 3. It was argued by the defence that the evidence in the statement of the deceased witnesses was conflicting as to the circumstances of the shooting incident. The argument put forward by Mr DeLisser was that Miller had stated that:

He had heard a loud explosion and saw smoke coming from a bucket (inside the house). He saw Paul with a black gun in

his right hand. He pointed it in the direction of his house. He heard two more explosions. He pointed it in the air and fired several shots." (page 84 of the transcript)

However counsel pointed out that when one examines the statement of Cooper she had stated:

That she looked through the window she saw Screechy fired three shots in their house. She was lying on the floor. She heard several shots.

[39] Mr Delisser also made reference to the evidence of Constable Gayle in relation to what he had observed when he had visited the scene. It was pointed out by counsel that this witness said, "I saw a hole to the front section of the dwelling ... I went inside and at the front section inside I saw a bucket ... that bucket was exactly behind the hole that I circled before" (page 46 of the transcript). Counsel therefore argued that the most likely conclusion to be drawn was that one shot was fired at the house and that this shot hit the drill in a bucket. This alone he said, was insufficient to ground the offence of shooting with intent at Kirk Miller and Tamara Cooper. We must say that we cannot agree with these submissions. The submissions by Mrs Gordon-Harrison are unassailable and ground 3 also fails.

[40] Ground 4 is without a doubt the most crucial ground for consideration. It was contended by Mr DeLisser that the learned judge ought to have upheld the no case submission because there was insufficient evidence in the statements of Miller and Cooper implicating the applicant as the person who had fired the shots. It was argued that the prosecution had not satisfactorily proved that the applicant Oliver Blagrove was

one and the same person referred to by the witnesses as "Paul Blagrove", "Screechie" or "One Time". Whilst agreeing that there was no mention of the name "Oliver Blagrove" in the statements, Mrs Gordon-Harrison argued quite forcefully that there was sufficient context provided as to the surrounding 'identifying factors' from which "the specificity of the applicant ... could be recognized".

[41] The entire case clearly turned on the issue of identification, so, it was of utmost importance for the learned trial judge to have properly directed herself on the proper approach to the evidence as it related to this issue. The general requirements for such directions have been laid down in the judgment of Lord Widgery CJ in **R v Turnbull** [1977] QB 224 at 228 and 229. They have been stated in several judgments of this court but they are nevertheless worthwhile repeating. His Lordship said:

"First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people Had the

witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.

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. All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger."

[42] The learned judge in the instant case reminded herself that both complainants were dead and that they were not able to be placed under the "search light" of cross-examination. Further, she properly warned herself that she had been deprived of the opportunities of assessing their demeanour and that she should exercise caution in considering the evidence that was contained in the respective statements and the weight that should be attached to them. She stated inter alia:

"One of the main questions to be determined is the identity of the persons who these complaints (sic) say were shooting outside their home. The circumstances, according to Mr. Kirk

Miller's statement, were that he was able to recognize both men, that is including Paul Blagrove, from the electric lights which were shining from the outside bulb. He said he could see Paul's face clearly. Paul is a dreadlocks he told us. He is certain that the men that he saw were Paul Blagrove and Blacks because the lights were shining very bright, according to the statement, and because both men were facing the house, and that he saw their face for about eight minutes.

Counsel has urged me to consider the length of time that eight minutes is, and I do agree with him, that eight minutes is a very lengthy time for what he described as having Kirk under observation to have been passed. Eight minutes looks to me to be excessive as he speaks about how much time he saw these faces for." [Page 171 of the transcript]

With respect to Cooper she stated:

"Tamara Cooper in her statement speaking about the opportunity to identify the person or persons who were at the gate, says that she was able to see all of the activity and the persons because she was looking through a glass window and the window was transparent and allowed her to see through, so as to note that 'Screechi' and the men were outside.

She tells us in the statement that the place was well lit with electric bulbs, from electric bulbs, rather, from the neighbour's house and she said the neighbour's house is close to the house where she was with Kirk Miller, that is a distance of about 16 feet. She also says in her statement that the two lights from their house on the outside were on. Not only were those on, but according to the statement, there was a light inside the house which was on. She said that she - it was - she saw 'Screechi' fired three shots on to the house. That concerning the situation as we have to know about identification, whether or not there was sufficient lighting and whether the complainants were really in a position to see who it was that was at the gate outside the premises, rather, who was outside their premises." [Pages 182-183 of the transcript]

[43] The learned judge then moved on to the crux of the matter. She stated:

"The next question to be determined apart from the identification of the actual assailant outside is whether the persons who Kirk and Tamara identified was Blagrove and 'Screechi', at one time whether those persons, those names, the persons bearing those names, is the same person, Oliver Blagrove, who has been charged and who is now being charged and who is now being tried.

Kirk Miller's statement described his assailant as Paul Blagrove otherwise called 'Screechi otherwise called 'One time' and he said that Blagrove is the owner of a Hiace minibus which plies the route between May Pen and Spanish Town and Mandeville. According to Mr. Miller, he, Miller, has been conducting, the bus, Mr. Blagrove's bus, for about three months and the bus, he said, is driven by a man name Dave. Mr. Miller's statement indicates that Paul Blagrove is well known to him because they grew up together in the Evans and Lewis Street area and that they, in fact, used to play football together.

He tells us that Paul's mother has the name of Lucille and that his father is deceased but was called Mass Jimmy. He said that Paul Blagrove has two brothers, they are called Banfoot and Jimmy. When Paul was about in his 20s, he migrated, according to this statement, and about 6 years ago or before the incident, he had returned to Jamaica.

In a further effort to describe this person who he says is Paul Blagrove, he said in the statement that, Mr. Miller says in his statement that Paul presently lives with his wife and other family members. Evan Street is very near to Lewis Street and according to Mr. Miller, he can stay where he lives and look across into Lewis Street where Paul lives.

Tamara Cooper in her statement speaks about 'Screechi'. She said that she recognized the voice that she heard to be the voice of a man known to her as Paul, otherwise called 'Screechi' and that it was 'Screechi' whom she saw holding a gun in his hand pointing towards the house where she was. She said she knows 'Screechi' since February of that year which is 2006 and that she would see him almost every two weeks and that Kirk was working for 'Screechi' who owns a bus name 'One time' and that Kirk was the conductor on that bus.

I recognised that none of those statements include the name Oliver Blagrove which is the name of the accused person before me, nonetheless, it is as a result of these statements that the police testified that they went and apprehended Mr. Oliver Blagrove." [Pages 183-185 of the transcript]

[44] On the issue of identification she stated:

"I need to consider whether this person is the Oliver. I am sure that both complaints (sic) had the opportunity to see these complaints (sic) and did in fact see who they called Paul Blagrove, Squitchy and One Time. I accept the evidence that Paul Miller lived on Lewis Street, was his friend for a long time, owned a bus that he Kirk Miller conducted and also that Paul Blagrove's mother is Lucille. I accept that Mr. Oliver Blagrove's evidence is true that he owned the bus that Mr. Miller conducted on and that they were friends from childhood and that Mr. Blagrove's mother is Lucille. I accept that Paul and Oliver Blagrove is one and the same person. That is fortified that Kirk Miller was the conductor on the bus called One Time. I accept her evidence as being true, his mother's name is Lucille, brother name Jimmy and the father deceased.

This description was contained in the statement as he sought to describe the person who he calls Paul..." Pages 204-205 of the transcript]

[45] Finally, the learned judge having reviewed the evidence of the other witnesses called by the Crown rejected the defence. She stated:

"Discrepancies exist, they are not in my view substantial. I accept as true the evidence of there being a gun in the hand of Paul Blagrove shooting toward the house well knowing that Tamara and Kirk Miller were there, intending to do them grievous (sic) bodily harm..." [Page 205 of the transcript]

[46] We do agree with Mrs Gordon-Harrison that based on the evidence the learned judge could have properly concluded that Paul Blagrove and Oliver Blagrove is one and the same person. Miller in his statement did speak of Paul Blagrove otherwise called "Screechie" as the person who is owner of a Toyota Hiace Bus and that he was once a conductor on that bus that was driven by one "David". It will be recalled that the applicant had said in evidence that David was his driver. Under cross- examination the applicant agreed that he would at times allow his driver David and the conductor to put gas oil in the bus. The applicant had also agreed that Miller was once his conductor but had ceased working for him on 2 July 2007. Now, it had been mentioned by Miller in his statement that "Paul" had told them, that is, he and David, that they could work the bus on Sundays and pay themselves provided that full tank of gas oil was in the bus on Monday morning.

[47] Miller had also stated that this person, Paul Blagrove, lived in Evans Street and Lewis Street area. The applicant in his evidence said he lived at 13 Lewis Street, May Pen at the time of the incident. As a matter of fact, the police having received the reports from both Miller and Cooper did in fact visit the home of the applicant at Lewis Street. He was seen there and was taken into custody from that address. Miller had also provided the names of Blagrove's relatives and the persons with whom he lived. The applicant did say that this house where he lived was owned by his mother. It is also worthy of note that Miller did mention that there was some disagreement between himself and this Blagrove individual in relation to the bus on which he was a conductor.

His evidence further indicated that this was the same person who came to his house some days later and fired shots at/into his house.

[48] We have carefully examined the evidence and the directions given by the learned judge and are satisfied that the learned judge had reminded herself at considerable length, and with scrupulous care, about the circumstances bearing upon the quality of the identification evidence, and the opportunity which presented itself to both Miller and Cooper in recognizing the applicant as the person who was seen armed with a firearm and who had fired shots from that firearm in the direction of the house which they occupied. It is our view that the learned judge did address her mind to the **Turnbull** guidelines and had properly warned herself about relying on statements given by the deceased witnesses. We firmly believe that her directions cannot be flawed.

[49] We also find no merit in the arguments raised on behalf of the applicant in ground 4 and this ground also fails.

Conclusion

[50] We find no merit in this application. In the circumstances, the application seeking leave to appeal is refused. Sentence is to commence as of 12 October 2007.