JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 45/2000

BEFORE: **THE HON. MR. JUSTICE FORTE, P.**
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE SMITH, J.A (AG.)

DAVID EBANKS V R

L. Jack Hines for the Appellant

Janet Scotland for the Crown

July 2 and 31, 2001

SMITH, J.A. (AG.)

The appellant was convicted of capital murder on the 2nd day of March, 2000 in the Home Circuit Court. The particulars of offence were that David Ebanks on the 4th day of February 1998 in the parish of St. Andrew murdered Joel Russell, he being a witness in pending criminal proceedings. Of course, he was sentenced to suffer death.

The case for the prosecution rests mainly on the identification evidence of Isaiah Russell, a brother of the deceased. This witness was at the time a self-employed electrician.

He testified that on the 4th of February, 1998 about 8.40 p.m. he was walking along Olympic Way in the direction of Maple View Avenue. He saw a van which belonged to the deceased on Maple View Avenue. He went up to the van and saw his brother, the deceased, sitting in it. He stood by the van and engaged the deceased in

conversation. As they spoke, the witness saw two men – hands in pockets approaching the van.

The appellant was one of these men. He knew him before as "Country". The appellant, he said, came up to the van and said to the deceased "yuh nah stop go court pon mi cousin". The deceased and his girlfriend who was with him, started to get out of the van. The appellant took something which the witness later described as a gun, from his pocket. He pointed the gun at the deceased. The witness said he heard a loud explosion. The deceased ran into 24 Maple View Avenue. The appellant and his companion ran behind the deceased into 24 Maple View Avenue. He heard loud explosions inside. He then walked down Maple View Avenue and when he turned around he saw the appellant and the other man coming out of 24 Maple View Avenue. Each had a gun in his hand. The witness left the scene. He next saw the body of his brother at the funeral .

The witness testified that he had known the appellant for more than 7 years. They lived in the same community – Majestic Gardens. They had never spoken. He would see him about once per week. He identified the appellant at an identification parade on 4th May 1998.

About 8:55 p.m. on the 4th February 1998 Det. Cpl. Fletcher went to 24 Maple View Avenue. There he saw the body of the deceased Joel Russell, lying on the ground in the yard. He had known the deceased for about 3 years. He observed what appeared to be gun shot wounds to the back of the head, lower back and left side of face. The body of the deceased was removed to the morgue.

Dr. Kadiyala Prasad, a consultant forensic pathologist conducted a post mortem examination on the body of the deceased. The body was identified by Judith Forbes. There were six gun shot wounds on the body. In the doctor's opinion the cause of death was multiple gun shot wounds.

The uncontradicted evidence of Det. Sgt. Norman Hamilton is that the deceased was a witness in criminal proceedings then pending in the Gun Court.

The appellant gave evidence. He denied knowing the deceased Joel Russell and the witness Isaiah Russell. He said he was not called "Country", and he never lived in Majestic Gardens. He did not know Maple View Avenue and could not recall where he was on the night of the 4th February 1998.

The following piece of evidence is interesting. During examination-in-chief the appellant was asked:

> "You have heard Isaiah Russell say in this court that on the 4th of February 1998 you and another man came down the road to a van that the deceased was sitting in and he was beside that van. Anything like that happened?"

His answer was:

> "I can't recall sir."

Following on that his counsel asked him:

> "At around that time did you have a gun?

Surprisingly, his answer was in the same vein:

> "I cannot recall that, sir."

At the end of the examination-in-chief counsel revisited this aspect in the following way:

> "Q. Yes, I ask you one more time. Did you shoot at the deceased Joel Russell on the night of the 4th February 1998?
>
> A. I don't know what you talking about."

The jury took little time to return a verdict of guilty of capital murder.

Two separate Grounds of Appeal have been advanced by Mr. Hines on behalf of the appellant:

1. "That the learned trial judge erred in not removing the charge of capital murder as the proper verdict for the consideration of the jury in accordance with the facts touching upon the murder and section 2(2) of the Offences against the Person (Amendment) Act of 1992.

2. That the learned trial judge erred in failing to point out to the jury weaknesses in the evidence concerning the recognition of the applicant by the purported witness as to identification which weaknesses showed that he could be mistaken as to the identity and also added significance to the exposure of the applicant before the identification parade."

Ground 1 -Capital Murder

Section 2(1)(b)(i) of the Offences against the Person Act (the "Act") provides:

> **2.** – (1) Subject to subsection (2), murder committed in the following circumstances is capital murder, that is to say -
>
> ...
>
> (b) the murder of any person for any reason directly attributable to –
>
> (i) the status of that person as a witness or party in a pending or concluded civil cause or matter or in any criminal proceedings; ..."

Section 2(2) provides:

> "(2) If, in the case of any murder referred to in subsection (1) (not being a murder referred to in paragraph (e) of that subsection), two or more persons are guilty of that murder, it shall be capital murder in the case of any of them who by his own act caused the death of, or inflicted or attempted to inflict grievous bodily harm on, the person murdered, or who himself used violence on that person in the course or furtherance of an attack on that person; but the murder shall not be capital murder in the case of any other of the persons guilty of it."

Therefore there were three issues for the jury to determine:

(i) Whether the prosecution had proved beyond reasonable doubt that the appellant was one of the gun men who murdered Joel Russell; if so

(ii) Whether Joel Russell was killed because he was a witness in pending criminal proceedings; and if so

(iii) Whether the appellant: (a) by his own act caused the death of Joel Russell <u>or</u> (b) inflicted or attempted to inflict grievous bodily harm on the deceased <u>or</u> (c) used violence on the deceased in the course or furtherance of an attack on him.

In this case the evidence is that the appellant asked the deceased - "yuh nah stop go a court pon mi cousin?" On hearing this the deceased alighted from the van. The appellant pulled a gun from his pocket pointed it at the deceased and fired. The deceased ran into 24 Maple View Avenue. The appellant and his partner in crime ran around the van and ran into 24 Maple View Avenue. Further, explosions were heard coming from 24 Maple View Avenue. The appellant and his companion were seen coming therefrom, each with a gun. The body of the deceased was seen lying on the ground in the yard of the said premises with gun shot wounds.

The first issue will be dealt with when considering ground 2. The second issue is not the subject of complaint before this court. Indeed as was stated earlier the evidence in that regard is unchallenged. This ground concerns the third issue.

The submission which Mr. Hines presented on behalf of the appellant is that there was no evidence as to who fired the shots in the premises at 24 Maple View Avenue. That is, whether both men fired or the second man only. Therefore, there was no clear evidence that it was the appellant who used violence, which caused the death of the deceased. Accordingly, he argued, the learned trial judge should have withdrawn the charge of capital murder from the jury.

In light of the clear language of section 2(2) of the Act the essential fallacy of Mr. Hines' submission is plain. His contention is indubitably founded on a fundamental misconception of the decision of their Lordships in ***Daley and Montique v. R***. [1997] 52 WIR 397, [1998] 1 WLR 494 on which he relied. In that case their Lordships held that the trial judge had misdirected the jury where the effect of such direction was to tell them that all they needed to be satisfied about in order to find each defendant guilty of capital

murder, was that the murders were committed by them both in the course or furtherance of an act of terrorism as part of a joint enterprise. Their Lordships at p. 406 went on to say:

> "But that is not the test which section 2(2) lays down. What is required is that where two or more persons are guilty of any of the categories of murder referred to in subsection (1) – except that referred to in paragraph (e) – one or other of three additional tests must be satisfied before one or more of them can be found guilty of capital murder. These are (1) that the person by his own act caused the death of the person murdered; (2) that the person inflicted or attempted to inflict grievous bodily harm on the person murdered; and (3) that the person himself used violence on the person murdered in the course or furtherance of an attack on that person."

and at p. 407 held that

> "the subsection was intended to limit the imposition of capital punishment. ... Its purpose is to separate out those whose participation was on the principle of joint enterprise from those who must answer for their own acts by the imposition of the death penalty."

In light of the foregoing the Board was unable to accept the argument of counsel for the Crown that a person who assists another person to cause the death of the victim by chasing him albeit without touching him, would be guilty of capital murder, because he had used violence in the course or furtherance of the attack.

In the instant case the appellant fired a shot at the deceased – he attempted to inflict grievous bodily harm on him. Such conduct is within the second test of subsection (2) of the Act.

In ***Alfred Flowers v. The Queen,*** (unreported) Privy Council Appeal No. 54 of 1999 delivered on the 30th October, 2000 the Board had this to say:

> "The judge told the jury that for the appellant to be guilty of capital murder they must be satisfied that he shot the deceased. As a matter of strict law this was too narrow a direction, because if two robbers fire shots at a victim and only one shot strikes him and he is killed, the robber whose shot does not strike the victim is still guilty of capital murder

> because he attempted to wound him. *(See **Tracey v. The Queen*** [1998] 1 WLR 1662 at 1667), ..." (Emphasis supplied)

Finally we should say that counsel also sought to rely on ***Goldson and McGlashan v. R*** (2000) 56 W.I.R. 444. It is enough to say that their Lordships substituted verdicts of non-capital murder for verdicts of capital murder because their Lordships held that it was "impossible to say of any of the men in the room, with the necessary degree of certainty, that he must have fired a shot at the deceased!" p 452(e) (Emphasis supplied).

In the instant case there is evidence that the appellant fired a shot at the deceased. Accordingly we reject the submission of counsel for the appellant on this ground.

Ground 2: Inadequate direction on recognition

The evidence of the sole eyewitness is that he saw the face of the appellant for about 3 minutes. He recognized him as "Country" whom he had known for over 7 years. He first knew the appellant when he was over 7 years old and he the witness was about 11 years. He had last seen him about 2 years before the incident. They used to live in the same community in Majestic Gardens.

The witness said there were bright streetlights and the place was well lit. The appellant was about four to five feet from him at one stage. He gave a description of the appellant to the police.

The appellant's evidence is that he did not know the witness Isaiah Russell before. He had never lived in Majestic Gardens. He was 25 years old at the time of trial.

Mr. Hines has one complaint with the otherwise full and fair direction by the learned trial judge on the issue of identification. His contention is that, if at the time of the murder (1998) the witness had known the appellant for 7 years and the appellant

was 25 years, at that time, it would follow that when the witness first knew the appellant the latter would have been 18 years of age. Therefore, he argued, the witness' evidence that he first knew the appellant when he was 7 years old raised the question whether or not he recognized the right person. He complains that the learned trial judge failed in his duty to treat properly with this aspect of the matter of recognition. He submits that these details should have been highlighted by the trial judge for the consideration of the jury in determining whether the witness actually knew the appellant – whether he was making a mistake as to the identity of the person he said he knew from that person was 7 years of age. Counsel further contends that in this context the exposure of the appellant before the identification parade was held, would take on some significance.

It is necessary to look at the exact evidence of the witness in this regard. In examination-in-chief the witness was asked:

> "Q. Now before we go on, this person that spoke and said, 'Yuh nah stop go a court pon mi cousin' did you know him before?

He answered;

> "Yes, Miss."

and the examination proceeded:

> "Q. Who was it?
>
> A. Country.
>
> Q. And how long before that night did you know Country?
>
> A. A number of years.
>
> Q. About how many years?
>
> A. The exact amount I don't ...
>
> Q. Just give us an idea, one year, two years, three years, twenty years?
>
> A. More than seven years."

From this excerpt it is abundantly clear that the witness could not say, with any degree of certainty, for how long he had known the appellant. He was asked to "give the court an idea" and he then said more than seven years. He knew that his acquaintance with the appellant had been for a period in excess of seven years, but could not say exactly how long.

Later on during cross-examination his evidence was:

> "Q. At that trial, who did you know him to live with, when you first knew him?
>
> A. Like from a little boy.
>
> Q. You told us approximately seven years ago before the incident was he a little boy before you knew him first?
>
> A. Repeat your question.
>
> Q. Was he a little boy when you first knew him the seven years before?
>
> A. Yes, sir.
>
> Q. Would you give us approximately what age he was or appear to you then?
>
> A. Like seven.
>
> Q. Approximately seven years of age, and you are approximately what age? How old were you when you first knew him.
>
> A. About eleven, eleven/twelve."

From the above it emerges that the witness knew the appellant for much more than 7 years. In fact he would have known him for about 18 years.

It would seem that no issue was made of this at the trial. Indeed the learned trial judge who is of considerable experience and who is characteristically thorough did not think it necessary to comment on this aspect of the evidence specifically as affecting the recognition of the appellant.

The learned trial judge reminded the jury of the evidence referred to above and directed them as follows:

> "... where the prosecution's case rests wholly or substantially on the evidence of someone who says that he recognized the assailant, then I have to warn you that you must be careful how you assess that evidence because it is possible that a person who says he knows so and so, one who claims that he recognizes someone else, as a perfectly honest witness can make a mistake and a mistake is no less a mistake because the person is an honest person.
>
> So I must warn you that it is dangerous to convict persons on this evidence unless you are satisfied that the person who comes along and claims that he has seen this accused man had the kind of opportunity to make the recognition and to recall the circumstances of this recognition, and you the jury can be quite sure that the person is not making any mistake at all. You must be satisfied that it is a true and correct recognition."

It was immediately after this direction that the judge reminded the jury of the evidence we have quoted.

We entertain no doubt that the direction was demonstrably fair, accurate and adequate.

Finally, we must mention the complaint concerning the exposure of the appellant before the identification parade was held. The evidence is that, due to inadvertence, the appellant was taken to court "in relation to this case" before the identification parade was held. The evidence of this exposure came from Det. Sgt. Leroy James during cross-examination:

> "Q. Did you on an occasion have to attend the Gun Court to retrieve the accused man?
>
> A. Yes sir.
> **His Lordship**: Just a minute. You say you have to retrieve him from the Gun Court?
>
> **Witness:** Retrieve him from the Gun Court?
>
> Q. Was that before his going on the I.D. Parade?

A. Yes, sir, before the I.D. Parade.

Q. Do you know how or why he came to be at the Gun Court?

A. When he was sent to the Gun Court.

Q. From what station?

A. From Hunts Bay.

Q. On whose instructions?

A. I don't know. Apparently there was some mix-up.

Q. Can you recall on what occasion that was?

A. I cant recall the date. It was a date before the parade, sir."

The appellant also gave evidence of his exposure. He testified that he was charged and twice taken to the Gun Court before the identification parade was held. During cross-examination by Crown Counsel he was asked:

"Q. Now, the person that is called Isaiah Russell that came in court, you knew him?

A. I saw him at the Gun Court. I don't know him.

Q. Now you said at one point you went to the Gun Court and the police came and took you and put you on a bench. You remember you told us that?

A. Yes, Miss.

Q. You didn't see Mr. Isaiah Russell around that day?

A. I saw a brown man like him, sir. ...

Q. Where you saw him? Where exactly you saw this Brown man?

A. I did see him in the C.I.B. room at Hunts Bay when I was brought there.

Q. And when you had seen him at Hunts Bay, was that the first time you were seeing him or you had seen

him before?

A. I see him at court the same day."

From the above it appears that the appellant was saying that he saw a brown man at the Gun Court and also at the Police Station who looked like the witness.

The value of identification evidence may be compromised if a potential witness in an identification procedure views the suspect before the parade or is given any indication of his identity.

However, the unequivocal evidence of the witness Russell is that after the murder he next saw the appellant on the identification parade. The witness emphatically denied the suggestion that the appellant was pointed out to him. There was no evidence of the witness being given any indication of the appellant's identity. Thus, there is no evidential basis to suggest that unfairness resulted from the exposure of the appellant to the public before the identification parade.

The learned trial judge's directions to the jury in respect of identification parade procedure as well as the evidence of the exposure were fair, correct and copious (they occupy some 20 pages – 222-241). He commented that the exposure would be of no significance if the jury were sure that the witness knew the appellant before as he testified. However, he left it for the jury to consider. He told them:

> "I now come to the issue of identification parade Mr. Foreman and your members, and I say this, it is a recognition case, as the witness Isaiah Russell says that he knew the accused man before the date of this incident. It could be said that that there was no need for an identification parade, but there was one, and the accused man was pointed out by the witness Isaiah Russell. In those circumstances then Mr. Foreman and members of the jury, you must or will therefore have to consider the evidence and make your findings, whether this parade was fairly held. It says, where an identification parade is held, the conduct of the police should be scrutinised to ensure that the witness has independently identified the accused man on the parade.

> It is a question of fact for you to consider carefully, all the circumstances of the identification case on that parade to see that there was no unfairness and that the identification was obtained without prompting."

We are unable to agree with counsel for the appellant that the trial judge had failed in his duty to point out to the jury the significance of the exposure. We have treated the hearing of this application for leave to appeal as the hearing of the appeal.

For the reasons given, the appeal is dismissed. The conviction and sentence are affirmed.