

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 69/2015

**BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA
THE HON MR JUSTICE PUSEY JA (AG)**

O'BRIAN McDERMOTT v R

Cecil Mitchell for the applicant

Mrs Christine Johnson-Spence and Miss Yanique Henry for the Crown

20 June 2018

PHILLIPS JA

[1] The applicant, O'Brian McDermott, was charged on an indictment for the murder of Kafi Simms (the deceased). He pleaded not guilty. The case was tried on 29, 30 September, and 1 October 2015. He was found guilty by the jury. On 8 October 2018, he was sentenced by M Gayle J to life imprisonment with the direction that he should serve 30 years before being eligible for parole.

[2] The single judge of appeal who reviewed his application for leave to appeal against conviction and sentence refused the same on 4 July 2017. The judge stated

that the learned trial judge had properly identified the main issue in the case to be that of identification. Other issues, she stated, which flowed from that were, namely, the question of credibility, discrepancies, and inconsistencies, and also the defence of alibi. The learned single judge of appeal found that the directions of the trial judge were adequate in relation to these issues. There was also, she stated, an issue related to circumstantial evidence as the main witness for the prosecution did not actually see the shooting. That issue, she indicated, was also dealt with adequately by the learned trial judge. She therefore refused the application for leave to appeal the conviction. The learned single judge of appeal also refused leave to appeal sentence based on the brutal nature and circumstances of the killing.

[3] The brief background facts to this matter are as follows. On 29 September 2015, the main witness for the Crown gave evidence that on 3 September 2013, she had lived with her child, the father of her child, and the deceased, Kafi Simms (who she also knew as 'Addi'), who was a good friend. They all lived together in a one bedroom house at Rose Heights, Beirut, in the parish of Saint James. They had been living there since November 2012.

[4] On that particular day (3 September 2013) however, her child's father was not at the house, he was at work, but the deceased was at home. The witness said that there was only one house in the yard and there was a fence around it with a gate at the front of the yard. The deceased was sleeping in one of the beds which was closest to the kitchen. The witness testified that she was standing at the gate with her child in her arms, which was about 20 feet from the front door of the house. She said that as one

stood at the gate, if the front door was open, one could see straight through to the kitchen. There was nothing impeding her vision between the front door and the gate.

[5] The witness further testified that while standing at the gate with her child, the front door was "open wide". She was trying to get the child to go to sleep when she saw the applicant whom she called "John John" coming down the road towards her. He came within touching distance of her. The applicant was someone she knew since 2012 living in Beirut. She was familiar with him as she saw him every day at Miss Little's shop which was some distance from her home. She saw him "hanging out on the road side" near Miss Little's shop as she would pass on her way to visit a friend. This would occur "early" in the day. The witness testified that although she did not know any member of the applicant's family, she knew some of his friends, and had actually seen the applicant earlier in the day around 12:30pm.

[6] When she saw him later in the afternoon that day, he was wearing a blue jeans pants, a blue plaid shirt and a blue All Star sneakers. She observed him walking towards her quickly and he stopped for a minute and asked her for "Addi". She said she saw him, his entire face, and she identified him by pointing him out in the court room in the dock. She confirmed that she had never spoken to him before that day, but that she had heard him speak to people when she passed him at Miss Little's shop. She said that when he asked her for "Addi", she turned around in answer to his query and pointed inside the house. Thereafter the applicant went straight inside the house and she remained at the gate, where she said she could see everything. Then she said:

"A After he went straight inside he stand up right at the bed where Addi was sleeping.

Q Yes?

A While he was standing at the bed, he were pulling out something from his side. [sic]

Q Pulling out something from his side, you say?

A Yes, miss.

Q Did you see what the something was he was pulling out from his side?

A No, miss.

Q Did he do anything else?

A After, I hear explosion inside the house.

Q. Yes?

A After, I hear explosion, I heard John John talking to Addi.

Q Were you able to hear the words that were spoken?

A Yes, miss.

Q Tell us what you remember them to be?

A John John turn to Addi and said, 'Unno naah tap...round me.'

Q No, I want you to tell us, don't be shy.

A John John said to Addi, 'Unno naah tap fuck round me?'

Q And Addi responded?

A Yes. After him seh that Addi sey, 'Fuck round you wid wah, John John? After me naah fuck round you.'

HIS LORDSHIP: Just a minute. What Addi said?

THE WITNESS: 'After me nah fuck round you,
John John.'

Q You heard anything else?

A After that Addi say, 'If you a go kill me, tell me weh
you a go kill me fah.'

Q And after that?

A After that I hear several more explosion."

[7] Subsequent to that, she ran up the road with her child, and she indicated that she did not see the applicant after that, nor did she ever see the deceased again, although she saw his body outside the house at the back door. She indicated that she returned to the house once the police came, but she did not speak to them at that time. The reason she gave for not speaking to anyone at that time was that she feared for her life and did not trust the police. On 18 November 2013, she attended an identification parade at the Freeport Police Station in the parish of Saint James where she positively identified the applicant.

[8] Dr Murari Sarangi gave evidence that as a registered medical practitioner he was the consultant forensic pathologist for the western region of Jamaica and he was assigned to the Cornwall Regional Hospital in Montego Bay, Saint James. He had conducted the post mortem examination on the deceased. He had noted five gunshot wounds to the back of the head, the front left shoulder, the chest and abdomen and the left forearm. He indicated that the injury to the left forearm appeared to have occurred in circumstances where the deceased would have raised his arm to ward off

an attack, as it was characteristic of a defence injury. In his opinion death was caused by gunshot wounds to the head, chest and abdominal cavity. The deceased had lost three litres of blood, and death would have occurred immediately, within minutes.

[9] In his unsworn statement, the applicant said that he, having returned from football training, was awakened from sleep by a neighbour who asked him if he was aware that someone had died in the vicinity. He indicated that he was unaware, as he had been sleeping, but that he would go and investigate the situation, which he did. He said that he saw several officers and a crowd of people. He was subsequently, apprehended by the police when returning from training on another day. He was asked, he said, if he was "John John" from Mount Salem, and he answered in the affirmative. He said he was thereafter placed in custody, put on an identification parade, and identified. He denied having anything to do with the murder of Kafi Simms.

[10] The trial judge gave a very detailed and thorough summation. He dealt comprehensibly with the burden and standard of proof, credibility, inferences, inconsistencies, discrepancies and demeanour, ingredients of the offence of murder, the presumption of innocence and the unsworn statement of the applicant. He dealt at length with the issue of identification, the fact that it was a recognition case, where the applicant was known to the main witness for the prosecution for some time, and that the incident had taken place in the daytime. He exhorted the jury to consider all the evidence of the case and to return a verdict true to their oath. Within half an hour of deliberations, the jury returned a unanimous verdict that the applicant was guilty of murdering the deceased.

[11] In sentencing the applicant, the learned trial judge indicated that he had taken into consideration the social enquiry report which he stated was "not the best". He said the applicant had not displayed any remorse at all, and from the report, he had associated himself with a wrong group, and whilst he had been in Salt Spring, he had been hunted by people from that area which is why he had ended up somewhere else. The applicant, he said, also had previous convictions, which he had taken into consideration, save and except one of them. He commented on the fact that a life had been lost, and that no one could replace that life. He commented further on the prevalence and use of guns in this society. He referred to the principles involved in sentencing and stated that he had a duty to protect the public from persons with guns. He stated that:

"This is what I describe as a brutal murder. Here is it, the witness says you came to the gate, asked for Kafi, she pointed to where Kafi was. Kafi was inside begging for his life, want to know why you want to kill him and all she could hear gunshot ringing out and Kafi was nowhere -- his body was found in blood with several gunshot wounds. This is serious and as such, the sentence of the Court is life imprisonment and he is not eligible for parole until he has served 30 years."

[12] At the hearing of the application for leave to appeal, Mr Cecil Mitchell, counsel for the applicant, submitted that having reviewed the evidence and the summation, he was of the view that the latter was unobjectionable, as it was quite extensive and dealt with all the possible legal issues that arose in the case. He said the circumstances of the killing demonstrated an unprovoked slaying of the deceased, who was not armed, and

who had pleaded with the applicant. In those circumstances, he said the sentence appeared to be in line with sentences imposed in similar cases. He therefore indicated that he would not advance any grounds of appeal on this application. He also informed the court, this being an application relating to the offence of murder, that he had had dialogue with the applicant, and indicated to him the position that he intended to take.

[13] Counsel informed the court that he had formed the opinion that the applicant seemed to think that in retrospect, it may have been prudent for him to have given sworn testimony, but he did not think that the applicant was not aware of the options he had at the trial. He got the impression that the applicant had a concern that no character evidence had been led on his behalf, but counsel accepted that as he had previous convictions, adducing evidence as to character may not have been helpful. Counsel also voiced a concern that it appeared as if no one had been willing to come forward to give evidence in support of his alleged alibi.

[14] Crown Counsel accepted the submissions of counsel for the applicant with regard to the efficacy of the conviction and the sentence.

[15] We too are similarly of the view that no grounds can properly be advanced as arguments on this appeal. This was an invasion in a man's home and a brutal slaying of him while he slept in his bed. As the learned trial judge said, the deceased begged for his life, and to be given the reason why the applicant wished to kill him. There is no doubt that it was the applicant who committed this brutal slaying. He was readily identified by the sole eye witness for the Crown who had known him for some time, had

seen him regularly, the incident occurring in daylight, and the witness had pointed him out at an identification parade. She also had testified about the conversation between the applicant and the deceased before his death where the deceased called the applicant by his alias "John John". It is significant too that the applicant accepted that he was called "John John". The directions of the learned trial judge were comprehensive and cannot be faulted. It is not surprising that the jury came to its unanimous verdict in half an hour. Additionally, with regard to the sentence imposed, it was well within the range of, and is an appropriate sentence for a killing in the particular circumstances of this case.

[16] The application for leave to appeal against conviction and sentence is therefore refused. The sentence is reckoned as having commenced on 8 October 2015.