JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 47/96

COR: THE HON MR JUSTICE RATTRAY, P
THE HON MR JUSTICE GORDON, J A
THE HON MR JUSTICE HARRISON, J A

R. V. DESMOND McKENZIE

Earl Witter & Carolyn Reid for Appellant

Vinnette Graham-Allen and Deneve Barnett for Crown

21st, 22nd, 23rd, 24th; 25th, 28th, April & 13th October, 1997

GORDON, J A

The appellant was convicted in the Home Circuit Court on 2nd April, 1996, at the end of a trial which commenced on 13th March, 1996, of the capital murder of Fitzroy Dawson on 19th October, 1993 and sentenced to death.

Miss Levina Miller was the chief witness for the Crown. She testified that she lived at Summerfieid in Clarendon with Fitzroy Dawson now deceased. On the night of the 18th October, 1993 at about 11.00 o'clock she was in bed at her home with Fitzroy Dawson. She heard a truck drive to her gate and stop. She looked, went out and saw the appellant sitting in the driver's seat. Lights were on inside and outside the truck and she recognized the appellant as a person she knew very well. He was a businessman who operated a supermarket often patronized by her. The appellant was blowing the horn of the truck and she

heard him ask if the black girl was over there. Dawson who had accompanied her outside the house said to the appellant "Mr. McKenzie, get away from there, no whore house here again. I rent the house. Go suck your mother and your wife."

The appellant then said "I going to show you how somebody suck their mother." He drove off, the deceased and herself returned to their house and at about 12.30 a.m. she heard a car stop at her gate. She heard the car door slam, then someone opened the gate and entered the yard. She next heard an explosion like a gunshot and her door was kicked in. By this time the deceased and herself were standing behind the door. By the light of a lamp which was lit in the room, she saw the appellant enter the room gun in hand. The appellant placed the gun at the deceased's neck. The deceased said: "I am sorry I tell you to suck your mother." The appellant responded "You are the first person to tell me so." She then heard an explosion and the deceased fell to the ground. She told the appellant that the deceased should be taken to the doctor. He responded "Him dead already. Better we carry him go down a river go dash him way." The witness told of being engaged in conversation with the appellant who placed the gun on her hand with the muzzle to her stomach, told her to open the door of the house wide; he asked her to point the way to the river and he dragged the deceased from the house to the bank of the river. She heard the bank collapse and saw the appellant and the deceased disappear. She then ran back to the house collected her baby and ran to a neighbour's house. She then went to Marlene Dawson's house. Eventually, she went to the police station at Chapelton.

Levina Miller rejected suggestions that she was party to a plot to rob the appellant. She denied that the deceased was involved in the plot and acting her role, she with her baby in her arms flagged the appellant down as he drove by in his motor vehicle. She denied that he pulled up and asked her what she was doing there at that time of the morning. She denied that two men attempted to rob the appellant.

Marlene Dawson is a sister of the deceased. She received a report from Levina Miller and went with her to her home. They then proceeded to the police station where she saw the appellant talking with a policeman about his gun. She returned to her brother's home and saw his body in the river lying face down. She identified his body to the doctor at the post-mortem examination.

Constable Desmond Carter said he was on duty at the Chapelton Police Station at about 3.00 a.m. on 19th October 1993 when the appellant came into the station and made a report to him. He told him:

> "On my way home I saw a lady on the main road stopping me. I stopped where the lady was and I was surrounded by six men to seven men who proceeded to rob me of cash. I had my licensed firearm on my person and used it to fire at one of the men. I suspected one of these men might have been shot. One of these men held me and managed to take away my firearm and they ran over a premises."

While the appellant was at the station Levina Miller and Marlene Dawson came there. Dawson said to the appellant "you see how you kill Pressy, Mass Desmond?" The appellant did not respond. Constable Carter said Miss Miller proceeded to tell him in the appellant's presence how the deceased came to be killed. Her account was identical to her evidence-in-chief at the trial and

contrary to the report of the appellant to the police. The appellant listened to her account and said nothing.

The witness saw no injury on the appellant who made no report of receiving any injury. The witness Carter detained the appellant, he then went to the home of the deceased. He observed that the door latch was broken and he saw a pool of blood as he entered the room, to the left. Blood was also on the right hand side. He went by the river and saw the body of the deceased lying face down in the water. The body was clad only in underpants. Carter said that in the house, he saw what appeared to be a bullet hole in the wall by the door on the inner surface. He extracted a bullet from this hole. Ballistic examination revealed that this bullet came from the appellant's gun. Constable Carter said at the premises he saw a trail of blood leading from the house to the back of the premises. He returned to the police station and was attracted to the cells by noises coming from the cell block. He went there and saw the appellant with injuries. The prisoners reported they beat the appellant because he should not have killed the youth. This report was made in the appellant's presence.

Detective Superintendent Levi Campbell went to Chapelton Police Station consequent on a report he received. He had with him the police photographer and they visited the scene and photographs were taken. At about 3.00 p.m. on 19th October, he saw the appellant at the police station. He cautioned him and the appellant said "This woman caused me to get involved I am going to talk what really happened." He volunteered a cautioned statement which was recorded by Inspector Cowan. This statement was admitted as part of the prosecution case without challenge.

In the statement the appellant said he was driving his motor car in Summerfield. By a house he saw a girl with a baby in the street. He stopped and while talking to her he was attacked by two men, one armed with a machete the other with a bottle. The one with the machete told him to suck his mother. The lifted the machete to chop him and he pulled his gun and fired. The machete man fell, the other ran. The machete man got up and ran towards the river and fell. He went home changed his clothes and left his gun then he went to the Chapelton Police Station.

The appellant's house was searched and the gun he admitted to be his was found also the clothes he changed. These were tendered as exhibits.

Dr. Vernon Lindo performed the post mortem examination on the body of the deceased. He found a firearm entry wound to the left of the neck. To the left of the clavicle the surrounding skin was burnt. A vertebra in the neck was fractured, there was much bleeding along the path of the bullet. Death was due to acute pulmonary oedema and fracture of the cervical vertebra. He said death would have been most likely instantaneous or within minutes or seconds. With such an injury it is possible the victim could have walked a short distance by reflex action. The bullet entered the front of the neck and exited at the back.

The appellant gave evidence. He told of his movements on the day and that in the evening into night he was in May Pen at his cousin's place on Manchester Avenue playing dominoes. He left at about midnight to go home. On his way he saw a lady flagging him to stop. He recognized her as someone he knew. He did not know her name. She was Levina Miller. While speaking to her two men appeared, one armed with a machete the other with a bottle. The man with the bottle came before him, the other with the machete went

behind him. The car was a left hand drive car and the man with the bottle struck him on the left side of his head. He was frightened and confused. It was the hardest blow of his life. The machete man raised his weapon and he took up his gun and discharged two shots to scare them off. One man appeared to stumble, fall, then he got up and ran. The other ran. He went home and looked in the mirror and saw his face swollen. He drove to the police station feeling dizzy. There he spoke to a policeman. At the station he gave a statement which was recorded and while there Miss Levina Miller came there. He said he had a fractured jaw. He was taken to hospital, was x-rayed and was operated on for injury to his jaw. He denied he was beaten in the cell by inmates. He said the inmates were concerned for his welfare one even offered him his bunk.

He rejected the evidence given by Levina Miller and denied the prosecution case. He said he had an unblemished record.

Mrs. Hyacinth Miller, a teacher in the area for over 30 years gave character evidence. She spoke very highly of him, he was law abiding disciplined, even tempered and of excellent character. Miss Miller had testified that the appellant was a kindly well respected gentleman.

Dr. Seymour Donaldson called by the defence said he saw the appellant on the 25th October at the Kingston Public Hospital. He received a report that the patient was hit by two unknown assailants on both sides of the face on 18th October at about 1 - 2 a.m. He found the patient suffering from a bloodshot right eye a black and blue swelling below that eye and a fracture of the left cheek bone. The patient's mouth could only open 50%. In his opinion the injuries could have been inflicted on the 19th October, 1993.

Early in his summing-up the learned trial judge told the jury:

> "... learned counsel for the defence in his closing remarks yesterday said that the case rests almost entirely on the evidence of Levina Miller. According to him if you believe her you can convict. If, on the other hand, you believe Mr. McKenzie, the accused, then it would be your duty to acquit. So it is with that conciseness in mind why I see no reason why, even bearing in mind the length of the cross-examination of some witnesses, why the summing-up should be lengthy."

The main thrust of the defence on appeal was the credibility of the witness Levina Miller. Mr. Witter submitted that she was thoroughly discredited in cross-examination and the learned trial judge failed to analyse her evidence and to remind the jury of the numerous previous inconsistent statements therein and to relate this to the fundamental issues in the case. Mr. Witter examined the evidence of Levina Miller in great detail adverting to areas of inconsistencies in her testimony ... numerically twelve ... and submitted she ought not to have been believed on oath. In the context of competing versions, Miller's and the appellant's, the circumstances under which the deceased was shot was of great importance, he submitted, and the learned trial judge's direction on time constituted a serious misdirection. If the jury had received the assistance they required they may have found Miller's evidence unreliable and unacceptable. The directions Mr. Witter challenged are at page 912 of the transcript thus:.

> "... certain times were given, but I would ask you not to feel bound by those times, because we are a society that is notorious for not having any regard for time; and then in the circumstances where one has retired to bed, estimates as to 11.30, 12.00,12.30, are all qualified by the word 'about', ought not to be fatal. But there is evidence that the truck passed by, reversed, and here again I remind you, it is for you to say whether you accept this, and words were

> exchanged, enquiry was made for the black girl if she is still in here."

On this issue of time the trial judge gave further directions at page 928:

> "Before the adjournment I had mentioned to you that we are notorious for our lack of punctuality and that Miss Miller had given estimates about time from which you should not, or to which you should not hold. But, in relation to 11. p.m. that night when she said that she first heard the truck reverse, she said that at that time she heard her radio announce 11. p.m. precisely.
> She went on to say that at about 12:30, the accused came back in a car and again she said that she heard the radio announcing the time. This is the reason why I introduced the question of alibi because you will recall the accused man was saying that he was playing dominoes at his cousin's house and at quarter to twelve that night he asked one of the players what the time was and he then decided to leave. So, if he was in May Pen playing dominoes with his cousin he could not have been at the crime. That is why I introduced the question of alibi."

We do not agree with Mr. Witter's submissions that the treatment given to the evidence relating to the time when the offence was committed was inappropriate and led to a miscarriage of justice. The judge's comments on general regard for time were made in language easily appreciated by the jury. In other areas the directions on alibi, self-defence and provocation were fair and adequate. General directions on discrepancies and inconsistencies were given and we are of the view, Mr. Witter's challenge notwithstanding, that taken as a whole the directions on this issue were satisfactory. The inconsistencies in the witness' evidence did not affect the prosecution case which had as its hub the visits of the appellant to the premises, his entry into the house, the discharge of the firearm, the identification of the appellant and the bullet lodged on the inside of the building indentified with the appellant's gun.

As a follow-up to the general directions on discrepancies the judge told the jury:

> "There was also discrepancy or inconsistency between her estimate of the distance between the banking and the road. She pointed out from the witness box to the car park across the street. Another witness has said that it was nowhere as long as that. Again, I remind you that estimates and mistakes are classified as would not affect the credibility of a witness in relation to the main thrust of her argument. If there are other discrepancies and inconsistencies in the evidence which emerged and which I do not deal with specifically in my summing-up, then I implore you as the judges of the facts to consider them and deal with them along the guidelines that I have just indicated.
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> Mr. Foreman and Members of the Jury, you might wish to consider Levina Miller as a simple country-type woman. You will recall that the mere recognition of her baby being in the room produced tears. She readily admits previous discrepancies but says that she never remember those things because is a long time now. In fact, it is over two years and six months and you might wish to consider whether or not forgetting about shirt but remembering that the accused man dragged the deceased by the hands as demonstrated is sufficiently cogent to leave you satisfied that Miss Levina Miller is substantially a witness of truth when she says that she saw the accused man in her house, saw his face about three minutes with him in her room. Prior to his coming in there, the truck had passed, blown, reverse about black girl asked. If you accept that then you have material on which you could say that substantially Miss Levina Miller is a witness of truth."

We conclude there is no merit in this ground of appeal which fails.

Mr. Witter's next ground of appeal charged that the learned trial judge misdirected the jury in terms that the sole object of character evidence is to

show that the defendant was a person "less likely" to have committed the offence charged.

He submitted that the judge's direction was wrong in law and as such amounted to a misdirection which led to a miscarriage of justice in that the jury did not give to the evidence of the appellant's good character the consideration it would have had on proper directions, thus denying the appellant a fair chance of acquittal. He referred for support to the cases of **R. v. Rye** [1993] 1 W.L.R. 471 **Berry vs. D.P.P.** [1992] 3 All E. R. 881. These cases emphasize that it was required that a judge direct the jury in clear terms that character has to be taken into account.

(a) when assessing the credibility of the accused and

(b) when assessing the likelihood of his having committed the offence.

Two witnesses spoke highly of the appellant's good character. The chief prosecution witness Levine Miller spoke of him in unmistakably respectful terms when she said he was a kind gentleman, well respected, in the district of Pennants. Mrs. Hyacinth Miller, a witness called by the defence also spoke in glowing terms of his excellent character.

The trial judge gave the jury these directions:

> "Now, the purpose of character evidence is that it is not capable of refuting facts that having already been proven against the accused, but it is a means of suggesting to you that a person of the accused reputation is less likely to have committed this offence than a person whose character is blemished. But if on your finding of fact in this case you are satisfied to the extent that you feel sure that the accused committed this offence, then character evidence is of no assistance whatsoever to me."

It is readily recognized that the judge dealt only with the likelihood of his having committed the offence and did not address credibility. We take comfort in and adopt the speech of Lord Steyn in **R. v. Aziz** [1996]A.C. 41 at page 53c where he observed:

> "I would therefore hold that a trial judge has a residual discretion to decline to give any character directions in the case of a defendant without previous convictions if the judge considers it an insult to common sense to give directions in accordance with **Rye.** I am reinforced in thinking that this is the right conclusion by the fact that after **Rye** the Court of Appeal in two separate cases ruled that such a residual discretion exists **Reg. vs. H** [1994] Crim. L.R. 205 and **Reg vs. Zappola Barrayce** [1994] Crim. L.R. 833."

In **Berry's** case the defence relied on the credibility of the accused and the complaint was that the trial judge failed to deal with this aspect of the character evidence. The Privy Council acknowledged that in this the trial judge fell in error and the summing up was deficient, this by itself however did not affect the validity of the conviction. Likewise in **R. v. Stephenson** [1993] 1 W.L.R. 471 (reported with R. **v.** Rye)deficient directions on character did not result in a setting aside of the conviction.

In the instant case we agree it would be an insult to common sense for the learned trial judge to have embarked on directions in accordance with **Rye.** What he did was adequate. The jury had to decide who was the credible witness, Miss Miller or the appellant. The evidence was overwhelming for the prosecution. We find no merit in this ground.

The appellant's next ground urged that-

> "1A. The learned Trial Judge erred in law in failing to direct the Jury properly or adequately on how to approach the drawing of reasonable inferences. In the result the jury was left with the

impression that inferences could only be drawn in proof of the Crown's case, or in concluding that the Applicant was guilty as charged and not conversely. The misdirection was reinforced and exacerbated by the illustration viz(pg. 906-907) -

> Now having found the facts to the level that you are certain about them then you are privileged and entitled to draw what is known as reasonable inferences from the proven facts. You see it is not every aspect of the Crown's case or the defence, for that matter, that a witness can be found to come and tell you what he or she saw or heard. But in order to complete the picture or the element of guilt then you are entitled to draw what is known as reasonable inferences from the proven facts. A classic example and it would arise from this evidence but it depends on whether you accept it as truthful or not, is that somebody who makes use of the words, 'when I come back I going show you what a going to do with somebody who tell me to go suck my mother.', words to that effect, if you accept those words were, in fact, used then you would be entitled to draw an inference that if the person comes back he comes back to carry out the words of that threat. And this is particularly so if a firearm is discharged in the yard followed up by kicking or knocking down of the front door.
>
> So you draw an inference from those facts if you find them as having actually happened. A person who does that comes with the intention of carrying out a threat that he issued by those words."

Counsel directed our attention to SCCA 8/83 **Sophia Spencer vs. R.** delivered on 20th April, 1985 (unreported) and **R. v. Chester Gayle** SCCA 40/88 delivered 22nd July, 1988. We accept that a judge has a duty to assist the jury in directing their attention to inferences that may be drawn from proven facts but it is the responsibility of the jury first to determine what facts are Droved. Although the judge did refer to the drawing of inference to complete the

element of guilt he had in his preamble included the defence in his reference to the drawing of inferences. This case however, was one in which the line between the defence and the prosecution was clear cut. The issues of provocation depended on the drawing of an inference and the learned trial judge gave full and fair directions on it, despite the appellant's testimony that he was not provoked. The issue of provocation so arrested the jury's attention that they sought further directions on it from the learned trial judge. We are not persuaded that in the circumstances of this case the judge's directions were inadequate, were unfair and led to a miscarriage of justice. This ground also fails.

Grounds 2, 3 and 4 were framed thus:

> "2. The learned trial judge's comments on the evidence and the case for the Defence and the Prosecution, respectively, overstepped the permissible or tolerable boundaries in that the said comments:
> (a) rediculed, disparaged and/or eroded the defence;
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> (b) overwhelmingly (if not exclusively) favoured the prosecution;
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> (c) diluted or whittled down the directions on the burden of proof;
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> (d) unduly prejudiced the jury's untrammelled and independent assessment of the evidence, and
>
> (e) were otherwise unwarranted
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> WHEREBY the Applicant was denied the substance of a fair trial and justice has miscarried.
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> 3. The learned trial judge's directions on
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> (a) the burden of proof;
>
> (b) the evaluation and treatment of previous inconsistent statements and/or discrepan-

cies in the testimony of witnesses; and

(c) manslaughter

were, in all the circumstances of the case, inadequate or erroneous.

4. The learned Trial Judge failed to put the case for the Defence fairly and adequately to the jury, thereby depriving the Applicant of a fair chance of acquittal. In the result there has been a miscarriage of Justice."

The learned trial judge devoted ten pages of his sixty page summing-up to a careful review of the appellant's evidence, the evidence of witnesses, called by the defence and, as is required of him, he dealt fully in a fair and balanced presentation with the defence, as he did on aspects of the prosecution evidence. He did not in our view over-step the permissible limits nor did he err as claimed in the grounds of appeal. Commenting on the evidence of the appellant at page 951 he said:

"He rejected Levina Miller's version, and as I started at the outset by saying it is a question for you to decide whose version of this incident you accept, but bear in mind there is no burden on an accused person to prove his innocence."

The jury were given a careful review of the prosecution and the defence case. They were directed on identification although the appellant testified that he was in close proximity with the witness Miller in such a manner that he recognized her as a person he knew and one who knew him. They were directed on alibi; self-defence and provocation in adequate terms. They had a choice of one of two versions of the incident and by their verdict they demonstrated acceptance of the prosecution's presentation. The kicking in of the door and the use of the firearm immediately thereafter with lethal effect

places the offence in the category of capital murder. The location of the bullet and the trail of blood was corroborative of Levine Miller's evidence and we are satisfied that the prosecution's case was a powerful one.

We have treated the hearing of the application as the hearing of the appeal and on our findings the appeal is hereby dismissed.