

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 197/03

**BEFORE: THE HON. MR. JUSTICE PANTON, J.A.
 THE HON. MR. JUSTICE K. HARRISON, J.A.
 THE HON. MRS. JUSTICE HAZEL HARRIS J.A (Ag.)**

REGINA V PHILLIP MCKENZIE

Dr. Randolph Williams for the Appellant.

Mrs. C. Williamson-Haye Assistant Director of Public Prosecutions for the Crown.

July 18, 21, & November 3, 2005

K. HARRISON J.A:

The appellant was convicted in the Home Circuit Court, on the 10th day of October 2003, on an indictment which charged him for the murder of Calvin Clarke. He was sentenced to life imprisonment and it was ordered that he should become eligible for parole after serving a period of thirty-five (35) years. On the 21st July, the appeal was dismissed and we promised then, to put our reasons in writing for so doing. This is a fulfillment of that promise.

The case for the prosecution

There were two eyewitnesses to this murder. Tiny Chambers testified that on the 24th April 2002, at about 5:00 pm, she and Rohan Shae, her nephew, were at Back River, Temple Hall, St. Andrew. Whilst there, she saw the appellant

whom she knew before for over eight years. She also saw the deceased man whom she also knew, swimming in the river. He was naked and she remarked to the appellant, "watch mi big fren naked in the water". The appellant responded and said: "every time him come a river, him strip naked like him a raper".

Shae and Chambers, walked away after the appellant spoke these words. Tiny Chambers went further down, stripped herself, and, went into the river. She was about 35 ft away from the appellant when she saw him jump over some stones and get closer to where the deceased was swimming in the water. She held her head down in the water and thereafter she heard an explosion. She looked up and saw the appellant with something in his hand pointing in the direction of the deceased who was still in the water. She heard another explosion and saw a bright light coming from the hands of the appellant. After the second explosion the deceased jumped backwards and made a sound. She ran out of the river, grabbed her clothes and both Shae and herself ran away.

It was suggested to the witness during cross-examination that she had concocted this story about the appellant because of a family feud. She denied this suggestion however.

Rohan Shae, was the second eye witness and he gave un-sworn evidence. He was not examined on the *voir dire* in order for the learned trial judge to determine whether the necessary conditions for receiving his unsworn evidence pursuant to section 54 of the Juveniles Act, were satisfied.

Shae said that he and Tiny Chambers went to the river to bathe. Whilst he was there he saw the appellant go on top of a stone and start shooting at the

deceased who was in the river. He said Tiny bawled out and ran after the shots were fired. He then ran behind her.

The medical evidence revealed that the deceased received gunshot wounds to the right arm, left upper chest, and the upper anterior abdomen respectively. Death was due to multiple gunshot wounds. The doctor, who performed the postmortem examination, opined that it was possible that the shots could have been fired above the level of the victim having regard to the position of the wounds.

After the police carried out investigations, the appellant was found at a house in the Parish of Portland. He was arrested and charged with the offence of murder and when cautioned he said: "a people dem say a me do it, so me lef."

The defence

The appellant made an unsworn statement from the dock. He said he went to the river and whilst waiting on his baby mother, he saw Tiny Chambers and Shae. He and Chambers spoke and then she left him.

He did not see his baby mother so he walked off, and crossed the river. He was undressing in order to go into the river when he heard several explosions. He grabbed his shirt and shoes and ran off further up the river.

The appellant said he saw Tiny Chambers running away from the direction of the river and she told him that a man was killed. He left Temple Hall and went to live with relatives in the Parish of Portland. The police came to his relatives' house and he was arrested and taken to Constant Spring Police Station.

The grounds of appeal

The original grounds of appeal were abandoned and Counsel for the appellant was granted leave to argue two supplementary grounds. They are:

“1. The learned trial judge erred in law in receiving the evidence of a 7 year old child without first ensuring that the necessary conditions for receiving his unsworn evidence were satisfied. Not only was that unsworn evidence inadmissible but the learned judge went on to direct the jury that that evidence was part of the prosecution’s case and they could rely on it, if satisfied it was true, to support a verdict of guilty. In the circumstances of the case the conviction was based substantially on inadmissible evidence and there was a miscarriage of justice.

2. The sentence was manifestly excessive in that the period specified by the learned judge before the applicant could be eligible for parole was too long”.

Counsel for the appellant submitted that the learned trial judge misdirected the jury when he told them that the evidence against the appellant was comprised of the testimony of Tiny Chambers and also the unsworn evidence of the 7 year old, Rohan Shae.

He submitted that by virtue of the provisions of section 54 of the Juveniles Act, the evidence of Shae was inadmissible, and of no probative or corroborative value whatsoever, since the learned judge failed to examine the witness on a voir dire in order to ascertain whether he was possessed of sufficient intelligence to justify the reception of his evidence and if he understood the duty of speaking the truth.

We examined the provisions of section 54 of the Juveniles Act and have concluded that the learned trial judge erred in allowing the witness Shae to give

unsworn evidence without first examining him on a voir dire. Accordingly, we are of the view, that the judge's failure to conduct the voir dire and make the required assessment rendered Shae's evidence inadmissible.

Two questions must be decided. First, is the trial judge's direction to the jury that they could rely upon the evidence of Shae, fatal to the conviction of the appellant? Second, do the circumstances of the case, warrant the application of the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act?

Mr. Williams submitted that the proviso ought not to be applied since it cannot reasonably be said in the circumstances, that (a) the evidence of Rohan Shae did not affect the minds of the jurors in arriving at their verdict; and (b) the verdict would have been the same if that inadmissible and prejudicial evidence had not been admitted. He submitted in the alternative, that if the conviction was bad then it would be more appropriate if the court orders a re-trial.

Mrs. Williamson-Haye, Counsel for the Crown submitted inter alia, that the there was no miscarriage of justice; that the conviction ought to be sustained and the appeal be dismissed.

We have to determine first, whether the evidence of Tiny Chambers, standing on its own, is capable of establishing the offence of murder against the appellant.

In this regard, we have carefully examined the transcript of the evidence and have found that the evidence establishes:

1. That the identification of the appellant by Chambers was by way of recognition. They were known to each other for over eight years.

2. That the killing of the deceased occurred at about 5:00 o'clock in the evening.
3. That the distance between the appellant and Chambers at the time of the shooting was about 35 ft. and this provided a good opportunity for Chambers to recognize him.
4. That Chambers had testified that she saw the appellant with something in his hand pointing in the direction of the deceased whilst he was in the river. She saw light coming from the object in his hand; heard explosions and thereafter the deceased fell backwards after making a sound.
5. That the postmortem examination revealed that the deceased had died from multiple gunshot wounds; and
6. That the learned trial judge directed the jury to examine the demeanour of Chambers in order to determine if she had spoken the truth.

We are of the view that the learned trial judge had dealt correctly with the relevant issues especially that surrounding the identification of the appellant by Chambers.

The learned judge had also warned the jury in the clearest terms of the danger of acting on visual identification. It is our view that the quality of the evidence of visual identification of the appellant by Tiny Chambers was exceptionally good.

We are further of the view that the evidence of Chambers was overwhelming and is enough to justify the application of the proviso albeit that the learned trial judge had wrongly allowed Shae to give unsworn evidence and had misdirected the jury on the use of such evidence.

Accordingly, we apply the proviso so as to sustain the conviction. We conclude that in the circumstances, there was no miscarriage of justice. A jury, acting honestly and properly, would inevitably have found that the appellant was guilty of the offence of murder.

On the question of sentence; it was submitted by Dr. Williams that the sentence is manifestly excessive in that the period specified by the learned judge before the appellant could become eligible for parole is too long.

In our judgment, the evidence presented to the jury clearly shows that this murder was carried out in deliberate execution style. There was no reason for the deceased, who was only taking a swim, to have been killed in such a brutal manner. Given the facts of the case, one cannot say that the period ordered before he becomes eligible for parole, is manifestly excessive.

It was for these reasons why the appeal was dismissed and the conviction and sentence affirmed. The sentence was ordered to commence as of the 10th day of January, 2004.