JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 61/2003

BEFORE: THE HON. MR. JUSTICE PANTON, J.A.
THE HON MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.(Ag)

MARK McNEIL v. R

L. H. Mclean for the applicant
Ann-Marie Lawrence-Grainger for the Crown

October 7, 8, 15 and December 20, 2004

SMITH, J.A.:

The applicant was convicted of murder on the 4th March , 2003 before Dukharan J and a jury after a trial that lasted 5 days. The particulars of the offence were that on the 20th day of February 2002 , the applicant murdered Richard Belnavis. The Learned Trial Judge specified that he should serve a period of 30 years before becoming eligible for parole.

His application for leave to appeal was refused by a single judge on the 30th March , 2004. He has now renewed the application for leave to appeal before this court.

Prosecution's Case

The case for the Prosecution depended on the evidence of the sole eyewitness, Mr. Tommy Miller. Mr. Miller's evidence is to the following effect: In February, 2002 he was living in Portmore, St. Catherine . The deceased, Richard Belnavis, otherwise called 'Belly' was his cousin and used to live in the same yard. About 10:30 p.m. on the 25th of February, 2002 he was going home from a 'Nine Night' in Portmore when he saw Richard sitting on a stone at his gate. He saw two men " come from round the corner and start firing shot at him" (Richard). An old bus was there and one of the men came from one "corner" and the other from another "corner". The deceased got off the stone and ran. He then fell by the side of the house. The witness saw Mark McNeil, the applicant, coming from "around a corner " of the said bus. The applicant who had a gun, walked up to where the witness was and fired a shot in the direction of the people at the "nine night". The witness said he had to go under a car which was in front of the house and the people who were at the gate ran inside the yard.

When asked how high the bottom of the car was from the ground he indicated with his hands and the judge estimated this to be two (2) feet. He moved further underneath the car when he saw the applicant approaching. When he was under the car, he said he heard the applicant say, " I told you that Rema man a come bout yah". When

asked how he knew it was the applicant who spoke he said , " because I saw his face and I know him from a long time and I know his voice". He said that when the applicant came down to where he was he heard him say, "Shoot him in a him head". He was talking to the other two men, 'Fish Tea' and the 'brown man', who were standing over the deceased. The men fired shots at the deceased who fell on his back on the ground by the side of the house (pp 24-25). All three of them, "the brown man", Fish Tea and applicant, fired shots at him. He said that it was when the deceased had fallen on his back that the applicant said "shoot him in a him head". He pointed out the distance between himself and the three men which was estimated to be 30 feet. He said that while he was under the car he saw the applicant's face (page 27).

After they had finished firing shots at the deceased the three men came out of the yard and went into the bushes. When they were coming out of the yard he could see the applicant's face. He then heard the applicant say, "him come fe done the family" and "Fish Tea" said, " No is not that we come here for". The applicant took up a chair and flung it in the front glass of the witness's house just before he left.

The witness was 18 years old at the time. He knew the applicant from he was a little boy. He knew where the applicant lived across the

road from his house. He knows the applicant's parents, brothers and sister.

Voice recognition

In addition, the witness, at page 33 of the record , said he had spoken to the applicant before the incident. They would speak in the lane and would speak every Wednesday and Saturday – (race days at the track) they would talk about horseracing. The applicant agreed that they talked almost everyday.

Visual Recognition

There was light from two houses on the street- the applicant's house and the witness' house. The light shone unto the street. This is not in dispute. However, he said he saw the face of the applicant for about 4-5 seconds before he went under the car. He was about 30 feet (estimated by the court) from the applicant. He said the applicant had a stocking over his head but not over his face. In addition, he said he saw the side of the applicant's face for about 4-5 minutes while he was under the car.

The doctor testified that he counted some sixteen gun shot injuries on the body of the deceased. The cause of death was multiple gun shot wounds. Detective Sergeant Everald Bennett told the court that he went to the scene. He later obtained warrants for the arrest of the applicant

and "Fish Tea." On the 9th April he executed the warrant on the applicant who, when he was charged and cautioned said, " Me a wait until me go a Court".

The Defence of Mark McNeil

The applicant gave sworn evidence . His defence is one of alibi. He called three witnesses in support. He testified that he knew Tommy Miller and the deceased , Richard Belnavis. He had no fuss with Miller. On the night in question, he was gambling at the Black Magic Club. He got to the club at about 7:00 p.m. and left at about 11:00 p.m. He went to his house . He saw a crowd at Richard's house. He does not own a gun. His father has an old car at his gate and the 'tyre is flat' so no one could go under it.

Rupert McNeil, the father of the applicant testified that he towed an old car to his gate and left it there. A person would not be able to get under the car. Under cross examination he said he saw his son after 12 midnight on the night of the shooting. He was coming from a back road. He was with a boy named "Brown Man". When asked about the complexion of the latter, Mr. McNeil pointed to a Police Officer in court and said his complexion was like that of the Officer.

Devon McNeil, the brother of the applicant, spoke about the shooting of the deceased by "Fish tea." He also spoke about the old car at his father's gate. The tyres of this car were flat at the time. It was too low for anyone to get under it, he said.

Washington Dennis gave evidence in support of the applicant's alibi. He said he and the applicant and another man were out gambling from 5 o'clock to about 11:00 p.m. that night. They were at the 'Big Yard'. While they were gambling they heard that someone had been shot. Under cross examination he said the name of the gambling place was 'Bull Yard' and that it was about ½ mile from where the shooting took place.

Grounds of Appeal

Four original grounds of appeal were filed. On the 19th March, 2003 two supplemental grounds were filed :

The first complaint is that the verdict is unreasonable and cannot be supported having regard for the evidence.

The second ground is that the summing up was not fair and balanced. The second ground was not pursued. Seven further supplemental grounds were filed but ground five was not pursued. These are as follows:

1. That the learned trial Judge made the intemperate and unfortunate comment that the applicant /appellant 's defence of

an alibi was in effect tantamount to that which is known as a "shaggy defence". This could only have confused the jury, or influenced them in favour of rejecting the alibi.

2. That the learned trial Judge fell into error on at least two occasions. Firstly, in telling the jury that Rupert McNeil, father of the appellant , had in fact testified that he had seen his son, sometime after the incident, coming from "around a corner" in committing a similar error the learned trial judge , in his summation to the jury , stated that the said witness, Rupert McNeil, had given evidence to the effect that he had seen the applicant/appellant in the company of a "brown man" shortly after the incident of the murder. Both these errors were adversely prejudicial to the case for the appellant and could have been prejudicially instrumental in causing the jury to come to a wrongful conclusion in the vital issue of identification having regard to the evidence of the sole eye-witness for the prosecution, Tommy Miller, who had testified that not only did two of the three gun men come from "around a corner" but that one of the men was a "brown man." On both these two occasions the witness, Rupert McNeil was misquoted by the judge.
3. That the learned trial judge failed to point out that the sole eye-witness for the crown, Tommy Miller, had contradicted himself on a number of occasions. This included his testimony as to the

measurement of the bottom of the old car from the level of the ground on which it was parked; in one instance he stated that it was two feet and in another instance he stated that it was only six inches above the ground.

4. The learned trial judge failed to place sufficient emphasis on the surprising fact that the eye-witness for the prosecution only gave his statement to the police some two months after the incident of the murder in question.

5. ...

6. Although identification is, doubtless a salient issue in this case the matter of the absence of the street lights as admitted to by the evidence in the prosecution's case did not extract the deserved comment, from the judge, so as to bring to the attention of the jury that the glow which would have come from the light in any house or houses bordering the scene of the incident in question, would, of course, be very likely a different kettle of fish, so to speak as it would be expected to be dimmer than the usual street lights.

7. The summation, for the jury's benefit, failed to point out to the jury that the instances in which the aforementioned eyewitness testifying for the prosecution, gave conflicting evidence in his testimony must have affected his credibility unless a satisfactory explanation was forthcoming from the witness.

In the first ground, counsel for the applicant argued that the description of the defence as a "shaggy defence" was "intemperate and unfortunate". In his summing up the learned judge told the jury that:

> " his defence is an alibi, that is to say that he was not there . It is not me; some lawyers call it "The Shaggy Defence"- it wasn't me".

In fact, the learned Judge was making reference to a popular song sung by a popular artiste who goes by the name of "Shaggy". The reference to the alibi defence as a "shaggy defence" is completely innocent. The ground is wholly misconceived and should not detain us.

In ground 2 the complaint put shortly is that the learned trial judge misdirected the jury on two important aspects of the evidence . Firstly, counsel complained that the learned trial judge misquoted the evidence when he told the jury that Mr. Rupert McNeil testified that he had seen the applicant coming from "around a corner" sometime after the shooting. Secondly, Counsel pointed out that the judge misrepresented the evidence when he told the jury that Mr. Rupert McNeil said that he had seen the applicant in the company of a "brown man". The evidence of Mr. Rupert McNeil under cross examination was as follows (p213):

> "Q: Now when you went to your yard that night, tell me something, you recall seeing Mark any at all that night?
>
> A: No Ma'am.
>
> Q: You never see him at all, never see him?

A: I see him about 12 o'clock, I see him ...

Q: Where you saw him?

A: Saw him coming from the back

Q: Back where?

A: The road, you have a back road, I saw him coming from that way...

Q: How was he travelling when you saw him coming?

A: He was walking , him and a next boy was walking.

Q: Him and a next boy was walking?

A: A next boy name 'Brown Man' was walking...

Q: Now when you saw Mark –so 'Brown man', the guy name 'Brown Man' is brown in complexion?

A: A just 'Brown man' we call him

Q: A 'Brown man you call him. He had brown complexion, I asking you about his complexion. What complexion Brown man have?

A : About like the Officer"

In his review of the applicant's evidence the learned trial judge said (p246):

> "...but what is interesting , when his father gave evidence he told you that after the incident he saw him coming from around a corner, and he saw him with a brown man.

> Now, you have to ask yourselves, which brown man? Because there can be several brown men. That is important because from the evidence, Mr. Miller, he is saying that is 'Fish tea' and is 'brown man ' and the accused man , who shot Richard. The father of the accused said, after the incident he saw the accused coming from around the corner with this brown man, is that there is no evidence of who this brown man is, there is plenty brown man in Jamaica. It's a matter for you if you may find that it's an important piece of evidence . So, you see what you make of it. It's a comment I am making."

In at least two recent cases this Court had to deal with a similar complaint. See ***Anthony McCalla v.R*** SCCA 145/2002 delivered December 18, 2003, and ***Ian McDonald v. R*** , SCCA 202/2001 delivered July 31, 2003. In these cases the Court was guided by the principle stated by Scarman L.J. in ***R v. Wright*** (1974) 58 Cr. App R 444 at 452:

> " At the end of the day when the appellant's case is not that the judge erred in law but that the judge erred in his handling of the facts , the questions must be first of all , Was there error and secondly If there was, was it a significant error which might have misled the jury? If this Court has a lurking doubt, it is its duty to quash the conviction as unsafe..."

It is conceded by the Crown that the errors complained of were in fact made . However, counsel for the Crown contended that these errors would not have misled the jury.

The burden of Mr. McLean's submission is that the judge's misstatement of the evidence would have the effect of lending support to

the identification evidence of the only eyewitness, Mr. Miller. Having examined the evidence as a whole we are not persuaded that the two misquotations of fact are such as to make it reasonably probable that the jury would not have returned their verdict of guilty if there had been no misstatements.

The jury had been pointed to a man whose complexion was similar to that of the person called " Brown man". It would be for them to evaluate the evidence of Miller in this regard. Further the judge was careful to remind them that there are many persons in Jamaica whose complexion could be described as brown. Juries are to be credited with common sense. As Lord Goddard CJ said in ***R v Kritz*** [1949] 2All ER 406 "Juries are not such fools as they are often thought to be." We do not agree with counsel for the appellant that the errors complained of might have misled the jury.

Grounds 3, 4, 6, and 7

Ground 3: We have examined the transcript of the evidence and agree with Counsel for the Crown that this ground is without merit . Miller was asked to indicate the "height of the car from the ground" (p18). He demonstrated this and the height was estimated as 2 feet by the learned trial judge. During cross examination it was suggested to the witness that the car was not more than about six inches off the ground. The witness' response was that the tyre was almost flat on the ground "because we

gamble on the car." At no time did the witness say or agree that the car was six inches off the ground.

Ground 4 is not a proper ground of appeal. There is no duty on a judge to place emphasis on the fact that a witness gave his statement to the police sometime after the crime.

Ground 6: The fact that there was light from two nearby houses was not in dispute. The evidence of the applicant is that light from the house " shine out on the lane" (p121). The learned judge emphasized the importance of the light in his giving the Turnbull direction.

Ground 7: No argument was advanced in support of this ground . Counsel for the applicant in ground 3 referred to what he termed a contradiction in Miller's evidence. We have already considered this.

Ground 1 of the Supplemental grounds

The sole issue was identification. Mr. Miller's evidence was crucial . He knew the applicant for nearly 18 years. He used to see him frequently. On the night in question he said with the aid of light from two houses he was able to see and recognize the applicant. He saw his face for about 4-5 seconds. His visual identification was buttressed by the voice

identification. However, this was not left to the jury by the learned trial judge who left the Crown's case to the jury on the basis of the witness' visual recognition of the applicant. The evidence led was sufficient to support the verdict of the jury.

Counsel failed to persuade us that the verdict of the jury in the light of the evidence adduced on behalf of the defence, was obviously and palpably wrong. This ground also fails.

Conclusion

For the reasons given, the application for leave to appeal is refused. The conviction and sentence are affirmed. We order that the sentence commence as of the 4th of June, 2003.