JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL 42/01

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE CLARKE, J.A. (Ag.)

LLOYD MULLINGS V. R.

Bert Samuels for the applicant

Miss Paula Tyndale and Miss Tanya Lobban for the Crown

APRIL 15, and May 16, 2002

CLARKE, J.A. (Ag.)

On February 23, 2001 the applicant was convicted in the Home Circuit Court of the offence of murder. He was sentenced to life imprisonment with a recommendation that he ought not to be considered for parole until he has served a period of twenty years.

After hearing submissions by his counsel, Mr. Bert Samuels, we refused his application for leave to appeal, affirmed the conviction and sentence and ordered that he must serve a period of twenty years commencing on May 23, 2001 before he shall become eligible for parole.

Out of deference to Mr. Samuels who argued, with the leave of the Court, additional grounds of appeal, we intimated that we would put our reasons into writing. This we now do.

At about 10.30 p.m. on December 3, 1998 the deceased, Cassel Brown, was fatally shot along Tower Avenue, Olympic Gardens in the parish of St. Andrew. Shortly before the shooting two men, each with a gun in hand, walked up Tower Avenue from William Crescent at its junction with Tower and Jasmine Avenues. They then approached a group of men including the deceased who were standing along Tower Avenue. The shorter man pointed his gun in the direction of the group of men and fired several shots in consequence of which the deceased sustained a gunshot wound to the head and died therefrom.

The prosecution case rested on the evidence of the sole eyewitness, David Mitchell. He gave evidence that that night while sitting in the company of about four persons at the intersection of Jasmine Avenue, Tower Avenue and William Crescent, he saw two men coming from about twenty feet away. Both men, each with a gun in hand, were walking towards him, side by side. He became afraid. As they approached he said he could see their faces for some ten seconds from a clear and unobstructed view aided by bright street lights in close proximity to him and them. He said he recognized the shorter man as the applicant whom he knew as "Jango" but he was then seeing the taller man for the first time. The men walked past him at the intersection where he was sitting, turned up Tower Avenue where they approached a group of men. The

applicant pointed his gun in the direction of that group and fired several shots one of which hit the deceased. The witness also said that he and the other men who were sitting at the intersection then scampered away as the taller man turned and fired in their direction.

Although he saw the face of the applicant for about ten seconds some twenty five seconds elapsed from the time he saw the men coming along William Crescent to the time they passed him and went on their way up Tower Avenue. He knew the applicant for about thirty years and would sometimes see him twice a day and would sometimes speak to him. He knew that the applicant lived in the same area where he lived and he knew one of the applicant's sisters. The applicant, however, had not lived in the community for some time and the witness had last seen him some ten years prior to the night of December 3. After that night he next saw the applicant on December 5 at the Olympic Gardens Police Station where they were taken into custody.

The witness admitted that on December 5 he was detained for the murder of the deceased and that while in custody he gave a statement to the police implicating the applicant. He said he had not done so earlier because he had been afraid.

At the close of the case for the prosecution a submission of no case was made on behalf of the applicant. The submission was overruled. As a challenge to the ruling of the learned trial judge the following ground was argued on behalf of the applicant:

"1. The learned trial judge erred when he overruled the submission of 'no case to answer' having regard to the:-

(i) Sole eye witness' unreliable and conflicting testimony regarding the date on which the killing he witnessed took place

(ii) The prosecution's failure to call Sgt. O'Connor to explain how the date 10th December 1998 was 'corrected' to the 3rd December 1998 without the knowledge or consent of the maker, the sole eye witness.

(iii) The fact that the sole eye witness once said he did not see the men during the shooting.

(iv) The fact that he was terrified, shot at frightened during the shooting

(v) The sole eye witness lied to the Court when he said, he was not detained in relation to the murder."

We are firmly of the view that this ground is devoid of merit. The particulars set forth in support of it, whether taken separately or together, were exclusively and eminently matters of credibility and reliability for the jury to consider. Indeed at the close of the case for the prosecution the quality of the identifying evidence which involved the question of identification by recognition of the applicant by the sole eye witness was, we think, good. That evidence was therefore properly left to the jury to assess.

The summing up of the learned trial judge was impugned in grounds 2 and 3. Ground 2 reads:

> "The learned judge failed to give adequate or any directions regarding the circumstances of the alleged identification, that is, he failed to:-
>
> (1) adequately deal with the fact that the witness said he was afraid when he saw the men and they in fact fired at him too
>
> (2) adequately deal with the lapse in time between the 3rd December, 1998 and the last time he saw the [applicant] which was ten (10) years and how this may have affected his recognition of the man. The circumstances of this case warranted the full directions given in the case of **R v Junior Reid** [a Privy Council Appeal]."

It is true that the sole eyewitness did say that he was afraid when the men were approaching him with guns in their hands as he sat at the intersection. He made it clear, however, that it was at that stage that he saw the faces of both men and recognized the applicant as one of them. When he was fired at, the men had already passed him at the intersection, their backs towards him.

We observe that it is not surprising nor even unnatural that an eye witness placed in those circumstances would be afraid when approached at night by men carrying guns in their hands. The trial judge, nevertheless, adequately directed the jury to consider relevant factors, including the evidence of recognition by a fearful eyewitness, that would have enhanced the possibility that an unreliable or mistaken identification had been made. In dealing with such factors the trial judge at page 156 of the transcript helpfully asked the jury to consider the following:

> "Did Mr. Mitchell acquire a good picture of the features of the accused man and carry that picture in his mind? So you take as sensible people all these things that I have given you about the conditions and the opportunity of recognizing this man and say, was the distance too far away for Mr. Mitchell to make a recognition? Was the lighting good or was it poor?
>
> Could he have seen the face of the man who he said he knew? Were there any obstructions to prevent him seeing who it was that approached him and walked past where he was sitting? Was he terrified when he saw those men approaching with guns in hand and hereafter firing at the group of men?"

The jury could therefore have been left in no doubt that they were required to take into account an array of factors in assessing the question of the reliability of the evidence of visual identification and to appreciate that one such factor was the extent of the eyewitness' fear when he made the identification.

Again, of no small importance was another factor, namely, the eye witness' evidence that before that fateful night the last time he saw the applicant was some ten years earlier. In that regard the trial judge also gave correct and concise directions. At page 156 of the transcript immediately following the passage quoted above, he directed the jury in this way:

> " Of course, you will recall also from his evidence that he told you that the last time he saw this man, the accused man, was some ten years ago before the 3rd December 1998. Is that too long a period for a witness who says he knew and recognized this man as someone he knew for over thirty years? Is that too long a period of time for him to make a mistake as to who it was he saw that night? Madam Foreman and members of the jury, those are some of the

> questions which as judges of fact you will have to resolve.
>
> If you cannot accept the evidence of Mr. Mitchell as to his recognition of this accused man on the night of the 3rd December 1998, then there would be no case against this accused man. You would have to acquit him ..."

The trial judge in our view gave careful directions with respect to the evidence of the circumstances of the identification by recognition. And there is nothing in the judgment in **Junior Reid and Others v The Queen** [1989] 3 W.L.R 771 (P.C) (relied on by Mr Samuels) that requires a trial judge in directing a jury on evidence of visual identification to use words in the form of a catechism. Indeed, the directions of the trial judge in the instant case while following the **Turnbull** guidelines were custom–built to make the jury understand their task in relation to the case they were required to consider.

Ground 3 was formulated thus:

> "The learned trial judge ought to have dealt with the question of the good character of the accused given by the prosecution witness, Miss Eileen Josephs ... his failure so to do amounted to a misdirection."

In support of this ground the applicant relied on a section of the cross-examination of the prosecution witness, Eileen Josephs, recorded at pages 10 and 11 of the transcript as follows:

> "Q. Miss Josephs, you know this man.
>
> A. Yes sir. Yes your Honour.
>
> Q. He is a nice guy.

A. Yes, your Honour.

His Lordship: What is the relevance of that?

Mr. Smith: It is very relevant my Lord.

Q. He is a nice person.

A. Yes, your Honour.

Q. You know him to be, a nice person.

A. Yes Sir."

Mr. Samuels' submission that Eileen Josephs' evidence that she knows the applicant to be a "nice person" constitutes evidence of the good character of the applicant as would require the trial judge to deal with in the summing up, has only to be stated to be rejected. Evidence of character must involve the general reputation in which an accused person is held: see **R v. Rowton** (1863) L&C 520.

So evidence that an accused person is known by a witness to be a nice person amounts to no more, we think, than the witness' opinion of the accused's vague disposition in that regard. Certainly, we agree that whenever an accused raises the question of good character it should as a general rule be dealt with in the summing up: see **R v. Berrada** (1989) 91 Cr. App. R 131 at 134. But as no such evidence was adduced at the trial this third ground also failed.

The fourth and final ground of application argued before us reads:

> "The verdict of the jury is unreasonable and cannot be supported having regard to:

> The sole eyewitness' testimony that he did tell the police that he saw the killing on the 10th December 1998 and no reasonable explanation was given regarding the circumstances in which the date was changed when the maker confessed that he had nothing to do with the change in date in his statement."

Although David Mitchell gave evidence that he saw the applicant shoot and kill the deceased on the night of December 3, 1998, he admitted that he had told the police in his statement in writing that he had seen the applicant shoot and kill the deceased on the night of December 10, 1998. That date was subsequently changed in his statement to December 3, 1998 but was not initialed. He said he had nothing to do with the alteration. He insisted that the correct date was December 3, 1998.

So the jury must have been satisfied that the witness had previously made a statement which conflicted with his evidence that he witnessed the shooting on December 3. And although he said he had nothing to do with the uninitialed change of the date in his written statement we are unable to agree that those circumstances rendered the verdict of the jury unreasonable or insupportable.

In determining how far he was believable as a witness the jury was entitled to take into account the fact that he had previously made the aforesaid statement which conflicted with his evidence as to the date on which he said he witnessed the shooting. In making that determination the jury would have been entitled to accept as reasonable the witness' explanation that when he gave

"December 10", in his statement he made a mistake. After all, there was evidence before the jury, if they accepted it, that made that explanation credible. The witness said he was taken into custody on December 5 and gave his statement to the police that same day.

On that basis, how could he, as the trial judge properly asked the jury to consider, be saying in that same statement that he saw the shooting on December 10?

For the foregoing reasons there clearly was no basis on which any of the grounds of this application could have been upheld. The summing up was, in our judgment, full, balanced and fair.