JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 15/92

COR: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE WOLFE, J.A. (AG.)

R. v. BALVIN JAMES

Delroy Chuck for applicant

Michael Palmer for Crown

September 22 & October 12, 1992

FORTE, J.A.

The applicant applies for leave to appeal his conviction for murder in the Home Circuit Court on the 25th April, 1991. The deceased, Authur Kelly was shot and killed, on the road near his home on the 19th August 1990, an incident which the prosecution alleged was witnessed by Ferdinand Kelly, the father of the deceased. The incident had its beginning when both Kellys, father and son, were awakened at sometime after midnight by the sound of stones hitting upon their home. Ferdinand testified that his son and himself, both got out of bed, looked through a window which faced the gateway, and there at the gate he saw the applicant looking over the gate. They both then came out of the house, and went to the gate, but at that time, the applicant was no longer there. He was however seen at his gate about one chain away. The deceased went to where the applicant stood, and was heard by the witness to say "Wappy, stop fling stone round me yard". The applicant who is called "Wappy" then started to use indecent language to the deceased. At this time two other men were also by the applicant's gate. The deceased was then heard to say "Boy, I tell you the truth, anything you want to do with me I left it to you." The applicant, as if in response, stepped

back, lifted his shirt and using his right hand drew a gun from his waist and fired two shots at the deceased who was at that time standing before him and facing him. The deceased, then spun around, ran back towards his gate where the witness was still standing and fell at his feet. The witness then shouted, "Wappy, look how you kill mi pickney fi nothing". He started to "bawl over" his son, and on looking up, he saw the applicant coming towards him, with the gun pointed at him. He 'dropped' backways, as the applicant fired a shot at him, and was successful in avoiding being shot. The applicant then ran, jumped over the gate of "Jennifer's house" - opposite to the gate of the witness' yard shouting "Gunman in the area". He testified that at the time the applicant shot his son, the other two men, whom he did not know before, and whom he could not describe, ran away in the opposite direction. Soon after, the applicant returned from Jennifer's yard, and went into a car which drove away.

Detective Actg. Cpl. Norman Anderson was on mobile patrol on that same morning at about 1.00 a.m. along Newland Road when a car 'signalled' him to stop. Having stopped, he saw the applicant alight from the car and come up to the police vehicle. The applicant then made a report to him saying -

> "Some thieving bwoy come back down the lane and shoot up them one another, and one of them is in the lane lying down".

As a result the Detective proceeded to Torna Lane, behind the applicant who travelled in the other vehicle. There he saw a crowd of people and the deceased lying on the road in front of Ferdinand Kelly's gate. In the opinion of the Detective the deceased had already expired, but nevertheless was bleeding from a wound to his chest. The Detective testified that as he approached the scene, and in the presence of the applicant the

witness Kelly pointed to the applicant and said "A Wappy kill me son." The applicant then replied "Mi kill your son" whereupon the witness stated "Yes I saw you shoot my son and fire one shot at me".

A post-mortem examination was subsequently performed on the body of the deceased by Dr. Royston Clifford, the Government Forensic Pathologist who opined that death was due to a gunshot wound to the chest, and gave detailed evidence of the wound.

In an unsworn statement given in his defence, the applicant admitted to living on Torna Lane where the incident occurred, but denied any involvement in the killing of the deceased. On that night he was at home, but as he was under medication, he was asleep in bed. He was however awakened by the sounds of two gunshots, and consequently looked outside, and there saw two or more men run past his gate. There was another man standing at the gate across from his, who asked him if he had heard the explosion. At the time, this man was with his "baby mother", and two other persons. After he had replied in the affirmative, the man pointed out some of the men that had run down the lane and he replied that he had seen them. Because the area had been recently frequented by 'criminals' he, in the company of the other man, went down the lane with the intention of getting in touch with the police. When he reached Mr. Ferdinand Kelly's gate, he saw a man lying on the ground, but in his anxiety to get to the police he did not stop to see who was lying there. He went by the tavern out in the square, where he saw Mr. Kelly and his friends. To Mr. Kelly he said "German bwoy, the man dem come back and shoot up the lane again". At that time a man named Sammy offered to take him in his car to the police and it was on their way that he saw the police car, which he stopped, and thereafter made the report to Detective Anderson. They returned to Torna Lane, where he admitted, the witness Kelly told the police that it was he

(the applicant) who had killed his son. He said, in response he laughed, and said "Wey him say? A no me kill you son."

Two grounds of appeal were argued in support of the application. The first contended that the verdict is unreasonable and cannot be supported having regard to the evidence. The second, deals with the manner in which the learned trial judge dealt with the evidence of a defence witness Professor John Golding who testified as to the results of an examination of the right hand of the applicant, as it would affect his ability to discharge a firearm. This evidence will be examined in more detail, when we come to examine this second ground of appeal.

In so far as the first is concerned the gravamen of the complaint related to the issue of visual identification, and the circumstances under which the witness purported to have identified the applicant. Mr. Chuck submitted that -

> "The identification evidence is highly unsatisfactory; the circumstances in which the sole eye witness for the prosecution purported to identify the accused are such as to cast grave doubts on the accuracy of such identification."

He then in detail, attacked the evidence, relating to the three separate occasions during the incident, that the witness described as offering opportunities for identifying the applicant.

(i) The identification at Kelly's gate

The witness testified that he had seen the applicant at his gate which was five yards (pointed out and estimated by the court at page 6) from his bedroom where he was then standing. He was able to see by the light on the eave of Jennifer's house across the road, and which shone unto the road. The applicant, was facing him, and had his head stretched over the gate, which the witness estimated to be six feet high.

He had known the applicant for approximately twelve years, and it was admitted that during this period, the applicant lived on the same road, and also knew the witness.

Mr. Chuck, however complained that the witness could not properly identify the person at his gate, as the gate was 6 ft tall, and the light from Jennifer's house was too far away to enable sufficient light to focus on the spot where the assailant stood at the gate. He submitted further that as the person at the gate was facing into the yard of the witness Kelly, the light would only shine on the back of his head, and would not enable the witness to make an identification.

The distance between Jennifer's house and the witness' gate was never made clear by the witness, and no attempt was made to ascertain a proper approximation of that distance. It appears, however that he was maintaining that Jennifer's house was ten feet from his gate but also in answer to counsel for the defence, admitted that there was a road in between the two houses and that road was about 10 ft wide. The impression therefore is that in speaking of Jennifer's house the witness obviously meant the 'gate' of that house. The light from which he purported to identify the applicant was however upon the eave of the house which must have been some distance back from the road. He however testified that the light was sufficiently near and sufficiently bright to light up the road, so as to facilitate his recognizing the applicant at the gate. In this he received support from Detective Anderson, who testified that "The area was brightly lit from a burning electric bulb". Apart from challenging by way of cross-examination the circumstances of lighting described by the witnesses Kelly and Anderson, the defence brought no evidence to establish anything to the contrary.

In those circumstances, it was open to the jury with proper directions to come to the conclusion that the witness could identify the applicant who was well known to him for a long period of time.

That, however was not the total opportunity for the identification, as the witness also purported to recognize the applicant while he stood at his gate, one chain away from where his son was shot at the applicant's gate. That brings us to the second area of contention by counsel for the applicant.

(ii) Identification at applicant's gate

The evidence establishes that the witness was one chain away from the applicant at the time he purports to identify him as the person who shot his son. The evidence of light was the same, as he made this identification by virtue of the light shining from the eave of Jennifer's house. The witness, as did Detective Anderson, testified that the light shone into the road and lit it up. Mr. Chuck however submits that a light approximately one chain away would be poor and could not have enabled a proper identification to be made.

In our view, this was essentially a question for the jury, as given the totality of the evidence, the jury could properly conclude that the identification was accurate.

(iii) Identification as applicant approached witness

Mr. Chuck contended that, the witness as he bent over his son, and looked up and saw the assailant, would have been experiencing a "most short and terrifying moment" and consequently his identification in those circumstances would be dubious.

This contention however was based on a false premise, as there was no evidence to suggest that the witness was in any way affected in this regard.

Counsel for the applicant, approached the evidence of identification by segmenting the incident into three separate and distinct areas, and failed to address the fact that the identification of the applicant was based on an almost continuous viewing of the assailant throughout the incident, i.e. with the exception of movement from one gate to the other, the moment he was seen at the gate until he jumped over Jennifer's gate. In determining whether there was room for error in the identification made by the witness, the jury, therefore rather than looking at each segment by itself was entitled to look at the incident as a whole, the duration of time (almost ½ an hour) the almost continuous viewing of the applicant throughout, the state of the lighting, and the fact that the applicant was well known to the witness for a number of years, and that he was accustomed to seeing him almost daily as he lived on the same road.

In our view, there was ample evidence upon which the jury who, were admittedly properly directed on the issue of visual identification, could have found that the circumstances under which the identification was made, were adequate and such as would allow for a correct identification.

Under this ground, it was also contended that the credibility of the witness was so destroyed that his evidence was incapable of belief. Mr. Chuck in support pointed to two discrepancies in the evidence of the eye-witness, one relating to whether the sleeves of the shirt worn by the applicant that night was long and the other relating to what hand the applicant used to lift his shirt before drawing the gun from his waist.

These were certainly not of sufficient weight to warrant the conclusion called for by Mr. Chuck, and since the learned trial judge had correctly directed the jury on the manner in which to treat discrepancies we cannot find any justification for the complant made in this regard.

In a last effort to impeach the witness' capability to make a correct identification Mr. Chuck pointed to evidence which disclosed, that the witness admitted that on another occasion he had made an incorrect identification of Detective Anderson, but maintained that the reason was because he did not know him well enough. He was however insistent that he had made no such mistake in identifying the applicant. In our view the two circumstances are different. In this case, the applicant is well-known by the witness who was accustomed to seeing him every day for the twelve years he was known to him. In the case of the police officer, apart from the morning of the incident, he had seen him on one other occasion when he was driven to Court by the officer, and his knowledge of him, was limited to that extent. In those circumstances, the mistake made in the incorrect identification of the police officer could have had no weight in determining the issue of the applicant's identification. In any event, the learned trial judge did remind the jury of that evidence and left it for their consideration. We consequently find no merit in this contention. The ground of appeal therefore fails.

We turn now to the second ground of appeal which reads as follows:

> "The learned trial judge failed to direct the jury that they should give such weight as they saw fit to the expert evidence of Professor John Golding on the matter of the condition of the accused man's injured hand in relation to whether he would have been able to apply sufficient pressure to discharge bullets from a firearm, and that if they believe the expert evidence or had reasonable doubt as to whether the accused man could have fired a gun they should acquit him."

This complaint arose out of evidence given for the defence by Professor John Golding, a surgeon who had examined the applicant on the 24th September, 1990 approximately one month after the murder of Arthur Kelly, and found the following (see page 107):

> "... he was complaining of weakness and deformity of the right wrist. I found that he had sustained a severe fracture of the lower end of the radius, which had healed by scar tissue rather than bone. There was 1½ inches of shortening of his right forearm. The rate of rotation of his wrist was considerably reduced and there was only about a half of normal range of flexion and extention at the joint. He was unable to fully flex his fingers and the power of flexion of his fingers was markedly reduced."

No attempt was made to discover from the doctor, whether he could estimate the age of the injury, the offence having preceded the date on which the applicant was examined. The applicant in his unsworn statement, however, did say that on the night of the incident he had been in bed, having taken medication for the pain he was suffering from his injured hand. It was also admitted by the witness Kelly in cross-examination, that the applicant had had an accident "with his hand" prior to "the killing of his son."

The issue arose therefore, as to whether or not the applicant was capable of discharging a firearm on the morning of the murder.

In an effort to get some assistance from the doctor, counsel for the defence entered into the following dialogue with him at page 107-108:

> "Q. Professor Golding, in your opinion, would he be able to support any weight in his right hand?
>
> A. Well he could certainly support some weight but not a normal amount.
>
> Q. Professor Golding, have you ever used a firearm?
>
> A. Yes.
>
> Q. In your opinion, Professor Golding, would Mr. James, Balvin James, in your opinion, be able to discharge a firearm three times?

A. I think it would depend on the weight of the firearm, M'lord, but it certainly would not be easy for him to do.

HIS LORDSHIP: Depending on the weight, he would be able to?

WITNESS: He would be able to fire it, but with difficulty and I think he would have difficulty in aiming it. Keeping it still."

Counsel also elicited from a Ballistic Expert called for the defence, that depending on the type of firearm it would take anywhere from one pound to six pounds of pressure to discharge it. The expert also identified three cartridges found by Detective Anderson at the gate of the applicant on the morning of the incident, as having been discharged from a magnum firearm. In the end, Professor Golding's evidence was not as helpful to the defence, as was obviously hoped for because he admitted that the applicant could, albeit with some difficulty, discharge a firearm. As the complaint however relates to the treatment of this evidence by the learned trial judge, we have only to refer to one passage, which occurs after the learned trial judge had reminded the jury of the Doctor's evidence, and which in our view effectively disposes of the complaint in ground 2:

"... Mr. Foreman and members of the jury, those are things that you will have to consider, but what the Defence is saying, they are asking you to draw the inference that this accused man would not be able to handle a firearm as the witness Ferdinand Kelly said he did, and that goes to show that Kelly is also telling a lie, in other words, Kelly is lying all the way.
<u>If you accept the evidence that this man could not use a firearm because of the condition of his hand then, Kelly must be lying to you because he could not,</u> Kelly said he saw him pull the gun from his waist with his right hand, point it at his son, fired two shots and he ran towards him and fired another shot at him which didn't catch him." [Emphasis added]

The underlined words indicated to the jury that an acquittal was inevitable, if they found that the applicant could not discharge a firearm. This was in fact very favourable to the applicant as the evidence revealed that he could discharge a firearm albeit with some difficulty. With reference to the applicant's ability to aim the gun it is significant that the son who was near to the assailant was hit by the bullet fired at him while the shot fired at the father while the assailant was running towards him missed its mark. These directions read together with the earlier directions of the learned trial judge in respect of Ferdinand Kelly, made it very clear to the jury that unless they were sure that the witness Kelly did see the applicant fire the shots at his son, they must acquit him. Here are those directions:

> "Now the burden of proof is on the prosecution to satisfy you so that you feel sure that what Mr. Ferdinand Kelly had said that he was there and saw the accused man fired that shot that killed his son. You have to be satisfied so that you feel sure about that, and it is the prosecution who must satisfy you."

He later directed the jury as to the conclusions which result from the view they took of the evidence of Kelly. He said:

> "... Mr. Foreman and members of the jury, if you find that the witness, Ferdinand Kelly has told you a deliberate lie when he said he recognized and saw the accused that night shot his son, or if you find that he <u>may</u> be lying about it then, you must find the accused man not guilty."

It is conceded by learned counsel for the applicant that the learned trial judge gave very careful directions on the dangers of acting on the evidence of visual identification, and reminded the jury of the possibility of a mistaken identification being made.

Having considered the specific areas in which it was sought to impugn the quality of the visual identification evidence as well as the credibility of the witness Kelly, we are satisfied that the trial judge dealt appropriately with those issues. We are also satisfied that the defence of the applicant was fairly put to the jury. In the result we conclude that there is no merit in this ground.

The application for leave is accordingly refused.