

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO.: 60/93

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.  
THE HON. MR. JUSTICE FORTE, J.A.  
THE HON. MR. JUSTICE WOLFE, J.A.

REGINA

v.

GEORGE MCFARLANE

No appearance for the Applicant

Dr. D. Harrison for the Crown

January 30 and February 20, 1995

FORTE, J.A.:

This is an application for leave to appeal the applicant's conviction for non-capital murder, in the Home Circuit Court on the 25th of May, 1993. He was sentenced to the mandatory sentence of life imprisonment, the learned trial judge ordering that he should not become eligible for parole until after serving fifteen (15) years imprisonment. The only grounds filed and upon which the single Judge of Appeal refused leave to appeal, were as follows:

1. Unfair trial
2. Insufficient evidence

These grounds remained the only grounds of appeal when the matter came on for hearing before us. Nevertheless, having examined the transcript and the summing up of the learned trial judge, we came to the conclusion that there was no arguable complaint that could be made on the applicant's behalf, and accordingly refused leave to appeal.

The case against the applicant was very strong. The prosecution alleged that the applicant who had previously visited the home of Ainsworth McBean (the deceased) on two or more occasions for the purpose of work, came knocking at the door of Mr. McBean on the morning of the 15th February, 1992 at about 8:40. Mr McBean went out to him and had conversation with him after which he (the applicant) left. Miss Michelle

Rhone, the common-law wife of Mr. McBean, who gave this account at the trial, testified that the applicant returned later that ~~same~~ morning at about 10:30. On this occasion she went to the door and saw the applicant, who asked for the deceased. Having informed him that her husband was asleep, the applicant insisted that he see him. At that time however, the deceased came out and went on the verandah to him. According to the witness there was another man standing outside. She then left on her way to the kitchen, when she heard the applicant ask her husband for a drink of water. She went outside to get her daughter and when she returned to the house, she saw her husband standing in front of the refrigerator. The applicant and another man ~~were~~ also standing there. This other man had a gun in his hand pointed at her husband. She then heard him say "Give me all the money you have there". The deceased said "We don't have any money". The gunman then turned the gun on the witness, who was then holding her daughter in her arms. The deceased said "No No leave them alone". The gunman turned back the gun on the deceased and repeated his demand for money. With the gun held at his head, the deceased said "Come and take what I have". As he moved off the gunman fired, and he (deceased) fell. The gunman then turned the gun on the witness and demanded money from her. She went to the bedroom followed by the gunman and the applicant. She pulled out a drawer in which there were two thousand dollars. As she did so, **everything** fell from the drawer including the money. Both men picked up the money, and after another unsuccessful demand for more money, they ran out through the living-room and disappeared. When she returned to where her husband lay, he was dead. At the post-mortem examination done some ninety-six hours after death, the doctor found the following injuries:

"On external examination there was a half inch diameter entry gunshot wound without gunpowder deposition, on the left side of the forehead,

"four inches below the top of the head and two inches from the midline.

The track of the wound travelled through the skin and underlying tissues to penetrate the cranial cavity with brain perforation and haemorrhage."

The doctor recovered a lead bullet from the scalp on the right parietal region of the head. There was, of course, no exit wound. In the doctor's opinion death was due to the gunshot wound to the head.

In addition to this evidence, the Crown also tendered a caution statement which the applicant allegedly gave to Detective Inspector Chin. The statement reads as follows:

"George McFarlane saith,

Mi know Ainsworth long time, is a next youth mi work with name Selvin Moore who mi call Bush mek me know him. Mi do a job with Bush fe Ainsworth weh me fix a air-condition cage. Bush pay mi some a de money fe de job and when mi ask him fe the rest him seh mi must go to Ainsworth. Mi did mek a rake fe Ainsworth and him pay mi a hundred dollars fe it even though the price a did really seventy dollars. Saturday gone about after 9 o'clock in de morning mi go to Ainsworth home at 25 Rochester and call cut Ainsworth and tell him seh Selvin seh mi must get some more money from him. Him tell mi seh him nuh have no money fe Selvin and him start to gwone a way till him cool down back.

Mi show Ainsworth seh mi shoes mash up and mi all tek off de right foot and all beg him some glue and him seh him nuh have none. Mi leave de yard and go back a Grants Pen, mi see Sapper in a Grants Pen gully and mi show him wha happen down a Ainsworth yard. Wayne was there and Sapper sey him a go down a Ainsworth wid mi and Wayne seh him a come to. We split up after we talk and bout after 11:00 we meet pon Grants Pen Road. Wayne ride him bicycle and we walk, dat a me and Sapper. Wayne all pass Ainsworth yard through him ride and Sapper a fe call him back. The three a we go in a de yard and Wayne stay a de front weh de bigger house in a de yard deh, but Sapper come down a de cottage with me and stay pon de side. Me go a de door and call Ainsworth and him woman answer, mi know her name but me nuh quite remember it, but mi know that she know my

"name as George McFarlane. She tell mi sey dat Ainsworth a lay down and mi tell her fe tell him sey mi want to talk to him for a minute and him come out and mi tell him seh boy, mi a beg him a drink a water, and same time him go back in and tek up de water and mi waiting for him to come out and give mi. Same time Sapper just run in, mi never know seh him a go run in pon him, mi frighten, mi couldn't sey nutton. Sapper ask him weh de money him have fe mi and him seh him nuh have none.

Sapper point de gun in a him head and him put up him hand dem and Sapper said, 'Give mi de money you have in de house', and just dat time mi see and hear de explosion and mi hear him woman bawl out and one little baby did deh deh, all a cry and mi tek up de baby and hush her and put her fe sit down. Me and Sapper go into de bedroom after Ainsworth get shot and de girl show Sapper weh de money deh in a de bedroom and him tek it up and it in a hundred dollars, it could a be bout three thousand dollars. Me and Sapper come out through de front door a de cottage and go round a de back and walk down pon de gully and come out pon de road. We go down pon Red Hills Road. Wayne did ride out through the front gate before we left, cause when me a go weh me nuh see him. Sapper give me five hundred dollars out a de money weh him tek out a Ainsworth room when me come out a de gully and me go a White Hall Avenue and him go bout fe him business. Me buy a T-Shirt fe hundred dollar a White Hall Avenue out a de money, a it mi have on now, and mi buy a crep downtown fe eighty-six, fifty, mi feget weh the store name. Me give a youth bout three hundred dollars out a de money fe go back fe de bicycle to the man weh mi sell it to and did buy some crack from him. The youth come back and tell me say Di Di sey me can't get back de bicycle unless him get de full seven hundred dollars fe de crack. De youth come back wid de money me give him and mi tell him fe see if him can get bout a half of eight a crack wid it because the half of eight cost leabit three hundred and eighty dollars and de youth come back wid de half a eight and me smoke fe me and give him fe him. The eight weh me sell de bicycle and buy, a Friday night me smoke it wid some other man. De reason mek me go round a Ainsworth in a de morning a because me did did want a money fe go a Di Di fe de bicycle. A nuh even dat yah sah me a tell you the truth me did want something fe smoke in a

"de morning deh and dats why me go round a Ainsworth. Me never want Sapper fe kill Ainsworth even though me know seh him have de gun pon him, me tink him would a just tek it and frighten him and we just tek weh we come for and gwane.

Me did feel bad bout the whole thing, so me go up a Stony Hill Saturday night fe go give up me self, but when me reach up deh me change me mind and tell dem bout de bicycle down a Di Di and tell dem everything bout the bicycle and de crack, but me nuh sey nothing bout down a Ainsworth house. Dem detain me until me talk to you now sah, dats all."

In his defence the applicant admitted to being present at the time the deceased was killed, but maintained that he was forced to be present by two gunmen who held him up when he went to visit the deceased, and ordered him to call Mr. McBean out of the house. He called Mr. McBean, but his wife came out and said he was sleeping. The gunman ordered him to tell her it was urgent and he did so. When Mr. McBean came out, one of the gunmen told her to ask him (McBean) for some water. This, he also did and when the deceased went for the water one of the gunmen went inside and shot him (the deceased). Thereafter one of the men pushed him in the house and demanded money from "Michelle". Then one pushed him in the room, where he said money dropped on the floor from the drawer. He was ordered to take up the money and he complied. He gave the money to the gunman. He did not get any of the money. He denied that he had got the gunmen to go to the house. He himself was frightened and was fearful because the man had the gun on him. He denied that he was a part of a pre-arranged plan to commit the acts which took place, and maintained that he was held up in the deceased's yard on his way to visit and was forced by the gunmen to do the acts which he did.

The issue in the case was one of fact. The jury had to decide between the case advanced by the prosecution, and that presented by the defence. In the end they obviously rejected

the defence offered and concluded that the Crown had discharged its burden to the required standard.

The summing up of the learned trial judge was fair and dealt adequately with the principles of law that were applicable to the case. This was not an identification case, as the applicant admitted his presence. The real issue was directed to whether or not the jury accepted his defence that he was forced to be present, had no prior plan with the other men, and did not participate and/or acquiesce in the commission of this cold-blooded murder of Mr. McBean. The learned trial judge addressed this area with utmost fairness. In summarizing the defence as simply as he could, he addressed the jury as follows:

"So let me just repeat what the accused is saying is that, 'my presence there was not pursuant to an agreement or a pre-arranged plan. I was there legitimately and two gunmen pounced on me and held me captive.' If you believe that, Members of the Jury, then it is your bounden duty to acquit him. If you are in doubt as to what happened, then you are to acquit him too."

In our view, the jury convicted the applicant on evidence which could be described as overwhelming and having examined the transcript, we can find no reason to interfere. For those reasons we refused the application for leave to appeal.