

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 266 & 269/01

**BEFORE: THE HON. MR JUSTICE FORTE, P.
 THE HON. MR. JUSTICE SMITH, J.A.
 THE HON. MR. JUSTICE K. HARRISON, J.A. (Ag)**

**REGINA V
ROHAN VIDAL
KEVIN THOMPSON**

Anthony Williams for the Appellant Vidal

Mrs Pamela Shoucair Gayle for the Appellant Thompson

**Miss Paula Llewellyn, Senior Deputy Director of Public
Prosecutions and Mr. Chester Crooks, Crown Counsel, for the Crown.**

December 6, 7, 2004 and May 25, 2005

K. HARRISON, J.A:

On the 28th November, 2001 after a trial by jury presided over by Mrs McCalla, J., in the Home Circuit Court, the appellants Rohan Vidal and Kevin Thompson were both convicted of murder. Following their convictions, each was sentenced to a term of life imprisonment and was to serve a period of 21 years before becoming eligible for parole.

On 7th December, 2004 we dismissed their appeals, affirmed the convictions and sentences and ordered that the sentences should commence as

of February 28, 2002. We promised then to put the reasons for our decision in writing at a later date and now do so.

The case for the prosecution

On the 9th day of May, 1997 Sylvia Notice and the deceased Dexton Taylor, who is called "Fidel", among other persons were standing on a verandah underneath the A3 building complex in Majestic Gardens. The main entrance for this building leads from the roadway but there are three other ways of gaining access to the building.

Whilst Notice was talking, she heard a voice say: "Don't move". She looked in the direction of the road and saw three men coming from the roadway towards the verandah. She was able to see these men because "it was bright day". One of the three men had what appeared to be a mask covering his head so she was unable to say whom that person was. However, she recognized the other two men. They were persons she knew as "Jah Tan" and "Ugly". All three persons had guns in their hands pointing at the group of persons who were standing on the verandah.

Two other men came from a section that Notice described as the bottom entrance. She saw the faces of these two men and recognized both of them. They were the appellants, "Meshack"(Rohan Vidal) and "Prince" (Kevin Thompson). Each of them held a gun in his hand. Prince then pointed the gun in the direction of "Fidel" and said:

"Joe Pile", si the bwoy Fidel deh".

The five armed men surrounded Notice, "Fidel" and the other persons on the verandah and the masked man said:

"Oonu deal with him".

After the masked man spoke, Notice said there was an explosion. She further testified that after the explosion, Prince stepped forward, pointed the gun at "Fidel" and she heard another gun shot explosion. Fidel fell to the ground and Sylvia Notice who was terrified, ran directly from the verandah to Hunt's Bay Police Station where she made a report to the police.

"Fidel" died as a result of the gunshot injuries he received and warrants of arrest were prepared for the arrest of both appellants.

On the 13th June 1997, Sylvia Notice went to Hunts Bay Police Station where she pointed out both appellants to the police. The warrants were executed then. Vidal upon being pointed out said:

"A hope oonu can come a court."

Prince made no statement.

The case for Rohan Vidal

Vidal gave evidence on his own behalf. His defence was one of an alibi. He claimed to have been at his mother's home at the time of the incident. He admitted that he lived in Majestic Gardens and that he knows Kevin Thompson. He denied however, that he was in his company along with other men when "Fidel" was shot. He also denied that he spoke the words:

"Si deh the bwoy Fidel deh".

He agreed that after he was pointed out by Notice at the station he said:

"A hope oonu can come a court".

He said he spoke these words because he knew that he was innocent.

The case for Kevin Thompson

The appellant Thompson made an un-sworn statement from the dock. He said that on the 9th May 1997, he was talking to Sylvia Barrett in Majestic Gardens when he heard two gunshot explosions coming from a building. Two men then ran from the building with guns in their hands. A crowd gathered and he heard someone mention that "Fidel" was shot. He saw when "Fidel" was placed in a motor vehicle and taken away, and then he went home.

On the 13th June 1997, the police took him into custody at the Hunt's Bay Police Station. He denied that he was present when the shooting took place or that he took part in any shooting on the 9th of May.

Thompson called Sylvia Barrett as a witness and she testified that they were together on the 9th May. She said four men armed with guns walked pass them. Shortly after they passed, two other men ran into a building and she heard gunshot explosions. After the explosions ceased she heard someone shouted that Fidel was shot.

The Grounds of Appeal

The appeal in respect of Rohan Vidal

Mr. Williams abandoned the original grounds of appeal in respect of this appellant and was granted leave to argue the under-mentioned supplemental grounds:

1. The learned trial judge erred in law in not withdrawing the case from the jury upon the submission of no case by Counsel for the 2nd Appellant at the end of the Crown's case which ipso facto resulted in a substantial miscarriage of justice.
2. The verdict is unreasonable and cannot be supported having regard to the weight of the evidence.

Both grounds were dealt with together. Mr. Williams contended that the learned trial judge did not deal adequately with the issues concerning discrepancies, inconsistencies and visual identification. We will now turn our attention to these issues and deal with them.

The discrepancy and inconsistency issues

Mr. Williams argued that there is a significant number of discrepancies and inconsistencies in the evidence presented by the prosecution. Under cross-examination Notice said:

"1. Five men who were armed entered a building. Three came from one direction and two from another direction. In her written statement to the police however, she stated that all five men were seen walking on a sidewalk coming towards her. ...

3. Jah Tan was one of the three men referred to above. Under cross-examination she said he is "tall and dark" but in her written statement she describes him as one who is of "clear complexion".

4. She was standing "underneath" the A3 building when the deceased was shot. This evidence conflicted however, with her written statement in which she stated that she was standing in front of the A3 building at the time of the shooting."

Mr. Williams criticized the learned trial judge for not dealing adequately with these discrepancies, and also for not directing the jury how they should make a proper assessment of the evidence that was presented. He submitted that Sylvia Notice was so manifestly discredited by cross-examination and was so unreliable that her evidence "ipso facto" rendered the verdict unreasonable and unsafe.

We bear in mind the general principles of law with respect to directions on inconsistencies and discrepancies. They are questions of fact that have to be decided by a jury but it is always the duty of the trial judge to give such directions as will assist them in assessing the credit worthiness of a witness whose credibility has been attacked on the ground of inconsistencies in his or her evidence. See ***Daken v R*** (1964) 7 WIR 442 p. 444 and ***Regina v Fray Deidrick*** an unreported judgment of this Court (Supreme Court Criminal Appeal No. 107/89 - delivered on March 22, 1991). In ***Deidrick's*** case Carey, J.A., 'stated at page 9 of the judgment:

The trial judge in his summation is expected to give directions on discrepancies and conflicts which arise in the case before him. There is no requirement that he should comb the evidence to identify all the conflicts and discrepancies which have occurred in the trial. It is expected that he will give some examples of the conflicts of evidence which have occurred in the trial, whether they be internal conflicts in the witness' evidence or as between different witnesses."

It is our view, that the learned trial judge in the instant case, had properly directed the jury how they should treat discrepancies as well as inconsistencies in the evidence. She said at page 776 of the transcript:

"In most criminal trials it is always possible to find variations in the evidence of different witnesses or in the evidence at different stages of a witness's testimony especially when the facts of which a witness speaks were not of recent occurrence, and these are referred to as contradictions, discrepancies and inconsistencies.

... Counsel on both sides and leading Counsel for the prosecution, they have each made submissions in respect of what have been referred to as discrepancies and contradictions, for example, on the question of whether Miss Notice was standing in front of the A3 building as opposed to her being underneath the building. Defence Counsel say she couldn't be in front and underneath. Crown Counsel say on the other hand, it is the same place to which she is referring and also on the question of all of them were walking on the sidewalk coming towards us, that statement, and on the other hand her testimony, in Court, that three came from one direction, three (sic) came from another, and of course, it is said that there are many more discrepancies in the case and I will allude you to them as the evidence is reviewed."

The learned trial judge thereafter, directed the jury how they should deal with the discrepancies depending on whether or not they are slight or serious and what effect, if at all, they will have on the creditworthiness of the witness. She also directed the jury how they should treat the relevant portions of Notice's statement that were admitted into evidence. At page 778 the learned trial judge said:

"...Now as jurors, you cannot reject the evidence given at the trial and substitute evidence given elsewhere unless the witness admits the conflicting evidence to be truthful. Any conflict that you find in a witness's testimony...you are entitled to take into account and you must also have regard to any explanation that has been offered by the witness in deciding whether the evidence of a particular witness ought to be rejected as being unreliable generally or in so far as her evidence is in conflict on any particular point. It is a matter for you, the jury, to assess the evidence given by the witnesses and I will tell you right away, that Miss Notice is the sole eye-witness in the case. So you have to assess that evidence, and you have to judge her level of intelligence, and it is open to you to accept all that she has said, or to reject all that she has said to you or to accept a part and reject a part, bearing in mind that you are judges of the facts in the case.

One of the purposes of cross-examination is to seek out conflicts and to provide material to say that the truth has not been spoken. So, Mr. Foreman and members of the jury, as I have said, it is for you the jury, to say if you find contradictions, whether those contradictions are inexplicable and whether or not if you find serious contradictions, you can believe anything that a particular witness has said or whether the contradictions are really central to the identification involved in the case. These are all matters for you the jury to weigh and assess in your role as judges of the facts."

Having carefully examined the evidence adduced, we do not think that the learned judge can be faulted in her treatment on the issues of discrepancies, contradictions and inconsistencies. It is our opinion, that once the learned trial judge explains to the jury the effect which a proved or admitted previous inconsistent statement should have on the sworn evidence of the witness at the trial, and reminds them of the major inconsistencies in the witness' evidence, it is

a matter for the jury to decide whether or not the witness has been so discredited that no reliance at all should be placed on his or her evidence. We therefore, find no merit in the submissions of Counsel.

The identification issue

The crucial issue at the trial was that of visual identification. The incident having occurred sometime around 6:00 pm, the quality of the identification evidence was therefore of crucial importance in view of the guidelines laid down by a body of judicial decisions and developed with the objective of possible avoidance of miscarriages of justice. See ***R v Turnbull*** [1976] 3 All E.R. 549 [1976] 3 W.L.R. 445; 63 Cr. App. R.132 and ***R v Oliver Whyllie*** [1977] 15 J.L.R. 163.

Mr Williams, in his written submissions, argued that the quality of the identification evidence in the instant case was poor for the following reasons:

"a. Although the sole eye-witness knew the appellants prior to the date of the incident no credible evidence was led or adduced by the Crown as to the length of time she had the appellants under observation. The evidence at the highest level is that from the time the witness set her eyes on the appellants to the time she ran off after hearing explosions was two to three minutes and there is no evidence as to how much of that time, if any, she took to observe each appellant.

b. The witness purported to have identified the five (5) men including the Appellants under very difficult, stressful and strenuous circumstances. She heard a voice said "don't move "(whilst she was underneath the building and whilst her back was turned to where the men were coming from). She became frightened and fearful and on the authority of

Kenneth Evans v Regina this would amount to unacceptable identification. The learned trial Judge in the circumstances ought properly to have withdrawn the case from the Jury.

c. Although the witness knew the Appellants before the incident she gave no description to the police of the Appellants or even what they wore at the material time she gave her written statement. This certainly makes her evidence unreliable.

d. It is further argued that the witness is very unreliable as to her estimation or correctness of time in every material respects including how long she had the Appellants under observation."

What are the circumstances of the identification in this case? Firstly, the identification of the appellants was by way of recognition. The witness Notice, testified that she had known Vidal by name which was supplied to the police on the very day of the commission of the offence. Up to May of 1997, she knew him for a period of ten (10) years and that he lived in Majestic Gardens. She knew his mother, his aunts and a brother. She and the appellant were friends; they spoke to each other often and she would see him on a daily basis, sometimes twice per day.

Secondly, the incident occurred at about 6:00 p.m. in daylight. According to Notice, "it was bright day". There was also a bulb that was 'burning' on the verandah and it was her evidence that that electric bulb, "never turned off."

Thirdly, the appellants were about 14-15 feet away from her when they came on the verandah. She saw their faces and bodies as they faced her. At that distance she would have had a good opportunity to recognize them.

Fourthly, the encounter lasted for about 2-3 minutes and she was looking at both appellants up to the time that she ran off.

Lastly, the evidence in the case disclosed no material discrepancies or other weaknesses in the evidence of identification of the appellant.

In the result, we are of the opinion that the quality of the evidence of visual identification of this appellant by Sylvia Notice, was exceptionally good.

The appeal of Kevin Thompson

The original grounds of appeal were abandoned and Mrs. Gayle was granted leave to argue four supplemental grounds of appeal. They are:

1. The verdict of the jury was unreasonable and cannot be supported having regard to the conflicting evidence and testimonies of the witnesses for the prosecution.
2. The learned trial judge erred in law in refusing to uphold the No Case Submission.
3. The sentence was excessive in the circumstances as the learned trial Judge appears not to have taken several mitigating factors into account.
4. The learned trial Judge in giving the required directions to the jury on the issue of identification omitted to indicate that there was no nexus established between the accused men and the alleged perpetrators.

Mrs. Gayle argued grounds 1 and 2 together. She contended that there were discrepancies in the evidence of Notice and the statement that she gave to the police on the day of the incident. We have already dealt with this issue in the judgment as it concerns the appeal of Vidal and are of the opinion that the

arguments and submissions of Mrs. Gayle have not altered our conclusions arrived at above. We therefore find no merit in these two grounds.

Ground 3 complained that the sentence was excessive. Mrs. Gayle submitted in her skeleton arguments, that the learned trial judge had not taken a number of mitigating factors into consideration. She did not pursue this ground however, with any real confidence.

We are of the view, that the murder was horrific. It was done in "execution style" and in the circumstances, a very long term of imprisonment before eligibility for parole is warranted. The emphasis in these cases should be one of deterrence therefore, the determination by the learned trial judge that 21 years should elapse before eligibility for parole is not excessive.

Ground 4 complained that the learned trial judge in giving the required directions to the jury on the issue of visual identification omitted to direct them that there was no nexus established between the appellant and the alleged perpetrators. As it was with the case against Vidal, so it was with Thompson. The prosecution relied entirely on the reliability and credibility of Sylvia Notice. Up to May 1997 Thompson was known to Notice for a period of 5 years or more. She knew where he lived and that he lived with his mother. She also knows his other relatives. She was accustomed to seeing him on a daily basis in Majestic Gardens.

In the circumstances, we are of the opinion that the directions given by the learned trial judge in respect of the identification evidence in relation to

Thompson cannot be subject to criticism. This judgment has already discussed the issues of visual identification. No more needs to be said, except that the submissions in respect of that issue having failed on behalf of Vidal would also fail on behalf of Thompson. The jury by their verdict, accepted Notice as an honest, convincing and reliable witness. This ground of appeal also fails.

Further supplemental ground

Leave was granted to Mrs. Gayle to argue a further supplemental ground. The single judge who granted leave to appeal, was of the view that there was an arguable ground with respect to the character directions given by the learned trial judge in respect of the appellant Kevin Thompson. Surprisingly, Counsel did not refer to, or mention any ground with regards to this issue. Submissions were made however in the skeleton arguments in relation to witnesses who were called after the appellant's conviction and who spoke of his previously good character.

In directing the jury on the appellant's good character, the learned judge said at page 852 of the transcript:

"... in deciding whether the prosecution has made you feel sure of the accused's man guilt, you should have regard to the evidence placed before you that Mr. Thompson is a man of good character, and of course, as I have said, his evidence also touched on the other accused, so you have regard in that respect as well.

Of course, good character cannot by itself provide a defence to a criminal charge, but you should take it into account in favour of each accused in deciding what weight you should attach to the statement of Mr. Thompson and whether you accept the sworn evidence given by Mr. Vidal. You bear the evidence in mind, that the statement was made and the

evidence was given by persons of good character and that that supports his credibility as it relates to the confidence that you may have as to the truthfulness or otherwise, as to whether you believe the statement made by Mr. Kevin Thompson or the evidence given by Mr. Vidai".
(emphasis supplied)

It is abundantly clear from the passages quoted above, that the learned trial judge failed to direct the jury as to the effect of good character as regards the appellant's propensity to commit the crime alleged. A direction on good character would go both to the appellant's credibility and to his propensity to commit the offence charged. See ***R v Orville Murray*** SCCA 76/00 (unreported) delivered on the 8th April 2002; ***Langton (Kervin) v The State*** (2000) 56 WIR 491 (a decision of the Privy Council); ***R v Newton Clachar*** SCCA 50/02 (unreported) delivered on the 29th September 2002.

Miss Llewellyn was called upon by the Court to respond to this ground of appeal. She submitted that even if the learned judge had misdirected the jury, the proviso could be applied since it was her view that the prosecution had mounted a formidable case against the appellants. She submitted that the case of identification was a strong one and the directions were extremely thorough. Furthermore, the learned trial judge had put the case in a fair and balanced manner before the jury, so even if the propensity direction were omitted, the nature of the evidence would certainly render a direction on propensity unnecessary.

In a summing-up, which was otherwise careful and commendable, the learned judge omitted to direct the jury that good character evidence went also

to the appellant's propensity to commit the offence with which he was charged. We are therefore of the opinion that the failure to give this additional direction was a non-direction amounting to a misdirection on the part of the trial judge. The question now must, therefore, be whether in the circumstances of this case such a misdirection is fatal to the conviction of the appellant, or whether those circumstances allow for the application of the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act.

The defence of this appellant was one of an alibi that was, quite obviously, rejected by the jury. The evidence of visual identification in the case was exceptionally good hence we are of the opinion, that the jury would necessarily have reached the same verdict against the appellant had they been correctly directed on the propensity aspect of the good character evidence. In the circumstances, we are further of the view that there has been no miscarriage of justice. We consider this to be a proper case for us to apply the proviso to section 14 (1) of the Judicature (Appellate Jurisdiction) Act, and we do not hesitate to do so.

It was for the above reasons that we dismissed their appeals and made the orders referred to at the outset.