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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 159/95

**BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.**

NIGEL ABDULL v. R.

Delroy Chuck for the applicant

**Brian Sykes, Deputy Director of Public Prosecutions, and
Anthony Armstrong for the Crown**

June 3 and July 7, 1998

PATTERSON, J.A.:

On the 13th December, 1995, the applicant was convicted in the Home Circuit Court of the offence of non-capital murder of Everton McDonald on the 1st April, 1993. He was sentenced to imprisonment for life and the court specified that he should serve twenty-five years before becoming eligible for parole. On the 24th June, 1996, a single judge refused his application for leave to appeal, but he applied to have his application determined by the court. That application came before the court on the 18th October, 1996, but on the application of Mr. Delroy Chuck, counsel for the applicant, it was taken out of the list. The application was re-listed before the court on the 3rd June, 1998, and Mr. Chuck, in his usual candid way, informed us that he had read the transcript of the learned trial judge's

summing-up, he was quite unable to argue the grounds on which leave to appeal was sought, and that he could not support the application.

The grounds set forth in the application for leave to appeal were no doubt drafted by the applicant himself and, for what they are worth, are as follows:

1. "Witness gave conflict evidence
2. Unfair trial
3. No witness was called on my behalf
4. Sentence too much (long)
5. I was no where near the scene of the crime
6. I have never carried a gun."

We were able to glean from the applicant's grounds, the nature of his complaint, and, notwithstanding counsel's expressed views, we considered the merits of the application.

The case on which the prosecution relied may be briefly stated as follows: Sometime after mid-day on the 1st April, 1993, the deceased and one Orlando Tucker were working on furniture in a yard at 52 East Street in Kingston. The applicant entered the yard with a box in his hand. He greeted Tucker, walked past him, took a gun from the box and fired shots at the deceased. The deceased fell to the ground and the applicant then ran from the yard with the gun in his hand, and went down East Street. When the shooting commenced Tucker took cover behind a van parked in front of the yard on East Street. After the applicant escaped, Tucker returned to the yard where he saw the deceased on the ground bleeding from wounds to his body. He appeared dead.

Donnette McDonald, a sister of the deceased, worked at 53 East Street and lived at 52 East Street. She left for lunch at mid-day, and on her way home she

passed the applicant on East Street, near to her gate, with a box under his arm. She saw the deceased in the yard as she went to her room. Sometime after she said she heard shots but at first she thought they were "clappers". Noises from the yard caused her to go out there, and she saw her brother on the ground with injuries to his side and arm. He was taken to the hospital where he was pronounced dead. A post mortem examination revealed that the deceased was hit by three bullets and the cause of death was multiple gunshot wounds.

Detective Corporal Phipps was the investigating officer. A report was made to him at about 1:30 p.m. and he collected statements and swore to a warrant for the arrest of the applicant. He executed that warrant on the 7th April, 1993, and when the applicant was cautioned he said, "Me no know East Street nor who name Everton. Me no know whe you a talk 'bout' ."

In an unsworn statement, the applicant insisted that he knew nothing about the charge. He said he did not know East Street, nor did he know Orlando Tucker and Donnette McDonald.

It is clear that the prosecution case against the applicant depended on the correctness of the identification of him by the witness Orlando Tucker and to a lesser extent by the witness Donnette McDonald. Implicit in the defence was the allegation that they were mistaken. The applicant said he did not know either witness, but both witnesses testified that they knew the applicant for a number of years before that fateful day. Tucker said they went to school together while McDonald said she knew the applicant "from he was a little boy." He lived at George's Lane, and she would see him in his yard and on the street. The applicant would come to the deceased's home and they were in the habit of going to sea together while he lived at George's Lane. He had removed from George's Lane,

and she had not seen the applicant for about two years before seeing him on East Street that day.

The learned trial judge was not unaware of the absolute necessity to warn the jury of the special need for caution before convicting in reliance on the correctness of the identification evidence. His directions to the jury on that issue were full and impeccable. He made special reference to the fact that McDonald's evidence, if believed, could only support Tucker's evidence by placing the applicant near the scene of the murder at the relevant time. We were quite unable to identify any conflict in the evidence that would go to the root of the case. There was ample evidence to support the finding of guilt by the jury. We found no ground to support the application for leave to appeal against conviction. The sentence of imprisonment for life is fixed by law and the period of twenty-five years that was specified by the court, that the applicant should serve before becoming eligible for parole is, in our view, by no means excessive in the circumstances of this case. Accordingly, for the reasons set forth, we refused the application for leave to appeal.