[2011] JMCA Crim 15

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 8/2008

BEFORE: THE HON. MRS JUSTICE HARRIS JA
THE HON. MR JUSTICE DUKHARAN JA
THE HON. MRS JUSTICE M^{C}INTOSH JA

GRAEME BENNETT v R

Michael Lorne for the applicant

Miss Sanchia Burrell for the Crown

9 November 2010; and 1 April 2011

M^{C}INTOSH JA

[1] The applicant herein was convicted for the offence of murder in the Circuit Court for the parish of Trelawny, on 19 December 2007 and was sentenced that same day to life imprisonment without the possibility of parole until he had served 23 years. He then filed an application for leave to appeal against his conviction and sentence, complaining that his trial was unfair and that the verdict was unreasonable, having regard to the evidence adduced. However,

his application did not find favour with the single judge of appeal before whom it first came, resulting in its renewal before this court.

[2] The scene of this murder was a Petcom Service Station in Albert Town, Trelawny, known as Virgo's Petcom and the deceased, Anthony Hewitt, was an employee there. At about 7:50 pm on 9 November 2006, as the service station was about to be closed, tragedy struck. Another employee, Neriesha Laing, described the surrounding circumstances which led to Mr Hewitt's death. As she stood on the outside of the station talking to a fellow employee, she saw a person who appeared to her to be male, approaching the second of the station's two pumps, where the deceased and yet another employee were standing. The approaching man wore a mask and he held on to the deceased, taking him inside the building. The employee who was with the deceased ran and so did Miss Laing who said that as she ran she heard an explosion. She hid in nearby premises and after about 15 minutes she returned to the service station and saw the deceased lying face down on the roadside, motionless. He appeared to her to be dead and indeed she subsequently attended his funeral.

[3] The link between that incident and the applicant was provided by Delroy Thorpe who for 16 months up to November 2006 was a prisoner at the Ulster Spring Police Station lock-up, awaiting the disposal of a charge of larceny of a motor vehicle which he faced. It was his evidence that while he was at Ulster Spring lock-up, two men were brought there, one of whom he came to learn

was called Corro, and the other was the applicant. The latter was brought to the lock-up about the day after Corro's arrival. Mr Thorpe said he heard the applicant speak the following words to Corro, "Everything oonu do oonu call up man name to police." Corro responded saying, "Ah police dem name, a ginnal dem name. Dem will tell lie pon you. Dem wi say you say, me say and tell me say you say." Mr Thorpe said Corro went on to say, "Dem will tell me say a you do it and then tell you say a me do it fi throw out the case." He said Corro and the applicant began to quarrel so he took the applicant to the cell which he occupied and they sat down. He had cigarettes and he offered one to the applicant. Then, said Mr Thorpe, they started to talk and "him tell me what happen".

[4] The narrative suffered many interruptions but the learned trial judge summarized it well in this way:

> "He told me that there was a gas station by Stettin. So he call his friend and say he is going to eat a food. He told me that when he went up there, he told his friend to stay across the road and watch and see if police a come. He told me he walk to the side of the building and go into the gas station and then he saw a lady (sic) came out and throw some water. He turn to me and say he was going to hold on to the lady but he did not know if she had the money. He said he looked across and saw a youth at the pump and then he put on a mask over his head and went across to the youth at the pump and jook the youth and tek him upstairs. So he turn to the youth and asked him where the money. He said the youth turn to him and say 'Come mek mi show yu the money.' He said after he went in

> there a lady run out, so they began to wrestle, both of them. He told me the guy was strong and nearly (sic) overpower him so he had to give him one shot. He said the guy was trying to take the mask off his head when they were wrestling. He told me after he was wrestling the guy was stronger than him so he gave him a next shot, by the pump. He told me that he run across the road to his friend and said 'See deh, the man dead, me no get nutten and you no get nothing. Because when me jook the man you should come upstairs come help me tek the money.' He said he then went away and (sic) leave the scene."

Mr Thorpe said the applicant named Corro as the friend to whom he referred.

[5] About two days later, on 20 November 2006, Mr Thorpe said he spoke to Inspector Simms who was the officer in charge of the station and the inspector gave him certain instructions. Then, on a subsequent date, he gave a statement to Detective Sergeant Wayne Jacobs who was the investigating officer in the murder case as well as the arresting officer in his case. At first he said that he had not yet been sentenced for the charge he faced when he gave the statement, but, he later recalled that he had given the statement on 11 December 2006 and was sentenced on 6 December 2006 to a term of 12 months imprisonment. He had given the statement willingly, he said, and was offered nothing in return.

[6] In cross-examination he agreed that his relationship with Detective Sergeant Jacobs was not good prior to giving that statement and that the sergeant had been "giving him a fight", resisting all efforts to have him bailed

during his 16 month stay at the lock-up. Further, he said, he started having problems in the cells after the applicant and Corro came there and was beaten up by other cell mates who accused him of being an informer. He also had problems with Corro, he said, and was accused of 'taking up' for the applicant. At first, he denied the suggestion that he had become friends with Detective Sergeant Jacobs after giving the statement, but accepted that there had been a change in their relationship only when his evidence at the preliminary inquiry was put to him. He also denied that the reason he told Detective Sergeant Jacobs that the applicant had made those admissions to him was that he (Mr Thorpe) was trying to get back at Corro and because he and his former enemy, Detective Sergeant Jacobs, had become friends.

[7] In November of 2006 Detective Sergeant Jacobs, was the sub officer in charge of criminal investigations for Southern Trelawny, which included Ulster Spring. He testified that some time after 8:00 pm, on 9 November 2006, he received a report in response to which he went to Virgo's Petcom Service Station in Albert Town, Trelawny. There he saw the body of Anthony Hewitt, who had been known to him, lying face down in front of the service station with two wounds to the left side of the body. Thereafter, Detective Sergeant Jacobs said he conducted investigations into the matter during the course of which he spoke to the applicant, enquiring of his whereabouts on the night of the murder. Detective Sergeant Jacobs said the applicant told him that he was "same place where you pass me the night … a deh me did deh." (This would seem to

be the basis of the learned trial judge's treatment of the defence as an alibi defence as the applicant in his unsworn statement did not speak to his whereabouts on 9 November 2006). Indeed, at about 9:30 to 9:45 pm on 9 November 2006, (notably after the time of the killing), the sergeant said he had seen the applicant in Freeman's Hall District, which is a district adjoining Albert Town, and he was about a five minute walk from Virgo's Petcom Service Station. After their conversation and because he had received certain information, Detective Sergeant Jacobs said he arrested the applicant on suspicion of murder.

[8] It was undoubtedly based on what the witness Delroy Thorpe said the applicant told him that the prosecution asked Detective Sergeant Jacobs about the district called Stettin. The sergeant said it was a district almost adjoining Albert Town. There is no gas station in Stettin, he said, but Virgo's Petcom Service Station is just outside of Albert Town, almost in the Stettin area.

[9] Detective Sergeant Jacobs said he received information from Inspector Simms on 11 December 2006 and he went to the Ulster Spring Police Station where he saw and spoke to Delroy Thorpe, recording a statement from him on that same day. Then, on 17 December 2006, he went to the cells at the said station and, after pointing out the offence of murder and relating the particulars of the offence to the applicant, the sergeant said he charged him with the murder of Anthony Hewitt.

[10] In cross-examination Detective Sergeant Jacobs said that he and Mr Thorpe were not on the best of terms when he arrested him for larceny of a motor vehicle and Mr Thorpe had been openly hostile to him. However, Mr Thorpe started speaking to him after his statement was recorded. The sergeant went on to say that although he was aware of problems Mr Thorpe was having in the cells with Corro, he did nothing to assist him in that regard.

[11] The final witness for the prosecution was Dr Murari Sarangi, the pathologist who conducted a post mortem examination on the body of the deceased on 13 November 2006 and found it to have two gunshot wounds, one to the left side of the face, exiting on the left side of the neck and the other to the left side of the chest, resulting in devastating internal injuries. He concluded that death was due to haemorrhagic shock consequent upon a gunshot wound to the chest which caused injury to the left lung and a major blood vessel, namely the pulmonary artery.

[12] The applicant gave an unsworn statement in which he denied any knowledge of or any involvement in the murder. He said that at the time of the murder he was in Freeman's Hall, the district from whence he hails. That is where the police found him and took him first to the Ulster Spring Police Station, then to Wait-a-Bit Police Station where he was kept for two weeks before he was returned to Ulster Spring and placed in a cell there. The applicant said the police removed him from the cell on two occasions and beat him then returned

him to the cell. While at Ulster Spring, he said he had no argument with anyone and he told nothing at all to Delroy Thorpe. He planned no robbery and killed no one.

The Appeal

[13] Mr Lorne obtained the leave of the court to abandon the two original grounds of appeal filed by the applicant and to argue in their stead six supplementary grounds, though only five grounds were actually argued.

Ground 1

> "The Learned Trial Judge erred in law in not explaining to the Jury, sufficiently, that no explanation, or no reasonable explanation has been offered by the Prosecution as to why the Applicant was in custody for approximately thirteen (13) days prior to the alleged confession when there was no obvious evidence to connect him to the crime. This was in itself, a breach of his Constitutional Rights

[14] Counsel submitted that in light of Detective Sergeant Jacobs' evidence that, until the cell confession, he really had no case against the applicant, the learned trial judge ought to have given some directions to the jury as to how to treat with the absence of any explanation on the Crown's case, for keeping the applicant in custody for some 13 days, prior to charging him. This detention, Mr Lorne argued, was a breach of the applicant's constitutional rights and

warranted some direction to the jury but, instead, the learned trial judge made no reference to it in his summation.

[15] Miss Burrell for the Crown quite correctly argued that the detention of the applicant prior to his being charged was subject to the laws relating to the police's powers of detention under the Constabulary Force Act. It was after the officer carried out investigations, during the course of which he received some information and recorded statements, that he arrested the applicant and another, in connection with the murder. Further, Miss Burrell submitted, the fact of the 13 day detention was not explored in any way at the trial, so that a direction in this regard would have been highly unusual and unwarranted.

[16] A review of the transcript revealed that no evidence was elicited from Detective Sergeant Jacobs, whether by way of explanation or otherwise, which would have warranted a direction from the learned trial judge on the applicant's detention before charge and it certainly does not suffice to simply say to this appellate court, without more, that the detention was unconstitutional. Such a complaint would need to be expressed with precision and argued accordingly so that the Crown would not be left to assume, as Miss Burrell did, that the constitutional right which Mr Lorne had in mind was the applicant's right to freedom of movement. The focus of the complaint was clearly the absence of any direction on the pre-charge period of detention in

circumstances where there was no evidence upon which to charge him with the murder of the deceased.

[17] According to Mr Lorne, prior to the cell confession there was no obvious evidence connecting the applicant to the murder. However, that may well have been because Detective Sergeant Jacobs was interrupted when he sought at trial to respond to defence attorney's question on the point. He was asked whether "Without Mr Thorpe's statement nothing would connect Mr Bennett to this murder?", and all that he was permitted to say was the word "Only", before his response was interrupted with another question. The jury was therefore deprived of hearing what other material the sergeant may have had in this connection. However, the learned trial judge, in his review of the evidence, recounted what he referred to as the time line which directed the jurors' attention to the area of the prosecution's case which addresses the applicant's complaint in this ground.

[18] The learned trial judge repeatedly impressed upon the jurors the need to examine the circumstances of the prosecution's case with care and to seek to determine if timing assisted them in arriving at the truthfulness of the evidence given by Mr Thorpe. At pages 166 – 169, he said:

> "The timing leading up to the statement of admission is also part of the circumstances you must assess and weigh as you consider the truth or whether the truth is being told either by both witness Delroy Thorpe or Detective Wayne Jacobs. The following is the timing: November 9,

2006, Anthony Hewitt was murdered, shot and killed. The date of the murder, November 9. November 9, 2006, Detective Sergeant Wayne Jacobs saw the accused Graeme Bennett at Freeman's Hall District and spoke to him and that was about 9:00 to 9:45 pm. Okay? And at that time there was no evidence connecting the accused to the offence which took place somewhere about 7:15 to 8:00 that night. November tenth, time line, Detective Jacobs visits (sic) the scene… And he interviewed witnesses and he took statements. Up to that time there was no evidence linking the accused. Then November 28, 2006, Detective Jacobs took the accused Graeme Bennett into custody on suspicion of murder…Up to that time there is (sic) no evidence linking the accused to the offence of murder by the police.

…December 6, 2006, Delroy Thorpe, convicted for larceny of motor vehicle… Up to that time there is no evidence connecting the accused Grame Bennett, to this murder that took place on the 9th of November.

December 11, Detective Jacobs recorded a statement about (sic) accused admission confession from Delroy Thorpe and this is the first occasion that there is any evidence linking the accused to the offence of murder. The time line shows that approximately four weeks after the death of Anthony Hewitt is the first time that anything linking anyone to his murder was on the December 11th and that was by his admission given to the witness, Thorpe… This time line also shows that between the time of the 28th of November when the accused was taken into custody on suspicion, there was nothing between the 28th and the 11th that connected him with the offence of murder. So the connection that the prosecution relied (sic) came weeks after, and it came as a result of the witness, Thorpe, giving this evidence of admission. The time line is relevant in terms of examining the circumstances. It is

> relevant because what you have to consider is whether there was collusion between the witness and the police to give this statement because the police could not get any evidence to link or to connect Graeme to the murder charge because coming down the line there is nothing. … So, you have to ask yourself whether this time line suggests it is an arrangement by the police to get something to link the accused to the offence of murder.
>
> You should also bear in mind that time line also in the context (sic) whether it is something staged by the police. That they deliberately put the accused in that fixed environment in custody where this other witness was so that such a statement could be said to occur."

[19] In directing the minds of the jurors to these considerations the learned trial judge adequately assisted them in their task of evaluating the evidence concerning the detention of the applicant as well as the statement of admission. Thereafter, it was for the jurors to arrive at their own conclusions and they clearly accepted that there was no collusion between Mr Thorpe and the police, that the circumstances giving rise to the statement of admission were not staged and that the applicant had not been kept in custody for the purpose of contriving a confession. Ground 1therefore fails.

[20] **Ground 2**

> "That the Learned Trial Judge erred in not providing the Jury with adequate instructions, in relating (sic)to the main witness for The Prosecution; Delroy Thourpe, that he was a prisoner informer with (sic) obvious interest to serve."

Briefly, Mr Lorne submitted that although the learned trial judge made strenuous efforts to give directions to the jurors concerning the statement and to warn them about relying on the evidence of a witness with an interest to serve, there seemed to have been "a lot of mix-up" concerning motivation. It was suggested that Mr Thorpe concocted a story because the applicant's co-accused had organized a gang to beat him up, argued Mr Lorne, and that may give rise to actual benefit in action being taken by the authorities to afford him protection from the beatings. However, counsel contended that motivation may arise not only from considerations of actual benefit but also from perceived benefit. Consequently, if Mr Thorpe perceived that by cooperating with the authorities, he would get a lighter sentence, that would be a motivating factor to ingratiate himself with the authorities and to lie, argued Mr Lorne, and that was not adequately dealt with in the directions to the jury on the issue of a witness with an interest to serve.

[21] Miss Burrell's response to this submission was equally brief. She contended that the learned trial judge demonstrated in his summation that he was aware of the issue of whether Mr Thorpe was a witness with an interest to serve. There was, however, no proof that Mr Thorpe had an interest to serve or was a person of bad character, rendering him incapable of belief, she submitted. Further, she contended, there was no evidence, of any promise made to him or of any benefit received by him as motive to concoct a story. What is critical, she argued, is that Mr Thorpe was already convicted and sentenced on 6

December 2006 while the statement was given on 11 December 2006 so there could have been no perceived benefit to Mr Thorpe at the time when he was giving the statement. She referred us to ***R v Linton Berry*** (1990) 27 JLR 77 and submitted that, in the circumstances of this case, the learned trial judge was very generous in his summation, emphasizing that the jury should consider the possibility that there might have been some contrivance on the part of the police and Mr Thorpe, thereby inviting the jury to consider the possibility of an interest.

[22] In our view, this ground of appeal was entirely without substance. The learned trial judge recognized the status of Mr Thorpe early in his summation when at page 147 he said:

> "The prosecution in this trial has also presented a witness in respect to a statement of admission given by the accused. This witness was a witness in custody at the time and this witness was someone who was later convicted of a criminal offence. And I direct you that you should, before you rely on that witness, take into consideration whether that witness has an interest to serve for giving that statement. If you take that into consideration and you believe the witness, then you can proceed to rely on the evidence of the witness in this case."

Later, at page 160, the learned trial judge told the jurors that in considering the circumstances of the prosecution's case, they were to:

> "... look at, … and assess, firstly, the person to whom the statement was made. You look at all the circumstances in respect to the person to

> whom the statement was made, that is, Delroy Thorpe."

[23] At page 162, he said "you have to decide if he is a truthful witness. What was the circumstance surrounding Delroy Thorpe?" The learned trial judge then reminded them of the evidence that Mr Thorpe was a prisoner at Ulster Spring police lock-up with the applicant, that he was charged with, convicted and sentenced for the offence of larceny of a motor car, reminded them of the duration of his stay at the Ulster Spring lock-up and that he was having problems with certain inmates there. These, the learned trial judge said "were factors you are to look at in relationship to the person, the witness who gave that statement, as judges of the facts. You must assess and weigh each of these factors I have outlined and decide if you find Delroy Thorpe credible".

[24] Then, the learned trial judge continued (pages 163 and 164):

> "The defence has raised some of these factors for your consideration in cross-examination as factors which are relevant to the motive of the witness testifying about this admission or this confession. It is a matter for you to take all of these factors into consideration and decide, having given thought to them, whether you accept Delroy Thorpe's evidence. You are to decide whether these factors amount to material that disclose (sic) he has an interest to serve. By that I mean he had a compelling personal reason to give evidence or to give a statement that this accused man did this confession to him and that for this reason he has his own self interest to serve and he is not speaking the truth. That is what you have to look at because this is

> the reality of the position of the witness who gives that statement. This is just where he was and what he was he said and testified freely about his status and said notwithstanding that the prosecution is saying, his status, he is still a witness of truth. That you are to decide. The prosecution has presented him as a witness of truth and you are to decide if you accept him as a witness of truth."

[25] The Court of Appeal has held in **Linton Berry** (relied on by Miss Burrell) that:

> "with regards to special warning to the jury about a witness who is of bad character, biased and with an interest to serve; the law is, that there is no such obligation on the judge to warn the jury where there is no basis to suggest that the witness is a participant in the material crime." (Headnote ii)

Mr Thorpe was not a participant or in any way involved in the crime, the subject matter of the trial. There was no proof that he was a tainted witness and such evidence as there was that could give rise to such considerations was adequately left to the jury. In the circumstances, the directions of the learned trial judge were both adequate and fair.

[26] In ***Michael Pringle v The Queen*** Privy Council Appeal No. 17 of 2002 delivered 27 February 2010, (cited by Mr Lorne in reply to the Crown's submission on this ground), their Lordships said, at para 30:

> "It is not possible to lay down any fixed rules about the directions which the judge should give to a jury about the evidence which one prisoner gives against another prisoner about things done or said while they are both together in custody. "

However, their Lordships went on to say that:

> "… a judge must always be alert to the possibility that the evidence by one prisoner against another is tainted by an improper motive. The possibility that this may be so has to be regarded with particular care where, as in this case, a prisoner who has yet to face trial gives evidence that the other prisoner has confessed to the very crime for which he is being held in custody. It is common knowledge that, for various reasons, a prisoner may wish to ingratiate himself with the authorities in the hope that he will receive favourable treatment from them."

Their Lordships said further that there must be some basis for taking that view and the indications of taint from improper motives must be found in the evidence. If they are present, the judge must direct the jury's attention to them and must point out their possible significance, advising them to be cautious before accepting the prisoner's evidence.

[27] In the instant case, although there was no proof of taint, the learned trial judge adverted the minds of the jury to the possibility of taint from the evidence that was adduced and dealt with the matter clearly following the **Pringle** guidelines so that this case offers no support to the applicant in his complaint. Having been properly directed, the jury clearly accepted the evidence of Mr Thorpe and accepted that at the time he gave the statement to Detective Sergeant Jacobs he had already been convicted and sentenced, that there was no proof of any benefit to him, perceived or otherwise and no motive whatsoever for him to concoct the statement implicating the applicant who

was not even the person with whom he was having the problem in the cells. Accordingly, ground 2 also fails.

[28] **Ground 3**

> "That the Learned Trial Judge, did not properly or adequately put the Defence Case to the Jury, in that he was taken out of his cells and beaten, and that he was removed from Want-a Bit(sic) Police Station to Ulster Spring Police Station, where there was no apparent reason for so doing."

Mr Lorne submitted that there are two aspects to this ground:

i) the beating of the applicant which he recounted in his unsworn statement and which the learned trial judge seemed to have glossed over and

ii) the disclosure that he was taken from one station to another.

On the first aspect he contended that the learned trial judge gave no direction that if the applicant had been beaten, whether or not it took place before the cell confession, then that could or should have some bearing on the matter. On the second aspect, counsel conceded that the learned trial judge did invite the jury to consider whether or not the movement of the applicant from one station to another was to facilitate the cell confession. However, he argued that there should have been some explanation provided to the jury for this movement in circumstances which would appear suspicious especially as this movement seemed to have coincided with Mr Thorpe awaiting his movement from Ulster Spring to either the General Penitentiary or the St Catherine District Prison. It was Mr Lorne's submission that where there is no explanation for the movement, the

judge ought to tell the jury that any inference to be drawn must be in favour of the applicant.

[29] In her counter-submissions, Miss Burrell said that the trial judge was under no duty to rehearse all aspects of the evidence or statements given at trial. Any beating suffered by the applicant caused no injustice to him in his trial, she said, as he gave no statement and no question arose as to the voluntariness or otherwise of such statement. Further, she said that although no explanation was provided for the movement of the applicant from one station to another, the judge gave to the jury for their consideration, the view most favourable to the applicant in his comments, as he was entitled to do. This direction inured to the benefit of the applicant, she submitted, and accordingly there can be no justifiable complaint in this ground.

[30] A review of the learned trial judge's summation did not disclose to us any failure to properly and adequately direct the jury's attention to the case for the defence. At the very outset of his summation, the learned trial judge correctly summarized the defence of the applicant thus:

> "His defence is a denial of the killing of the deceased. A denial of an admission of killing anyone. In addition, the accused has raised in his defence an alibi. That is, he was not present at the business place where the deceased was killed."

The beating about which the applicant spoke was mentioned for the first time in his unsworn statement. At no point in the questions put to Detective Sergeant

Jacobs was it mentioned and there was no allegation that he was beaten to confess to the killing. Therefore, the approach taken by the learned trial judge to the beating cannot be faulted.

[31] In dealing with the applicant's account of his movement from station to station, this is what the learned trial judge had to say, at page 170 of the transcript:

> "Well, he is explaining about beating but the point you need to look at is that he was placed on his evidence (sic), first in Ulster Spring, taken from Ulster spring (sic) and carried to Wait-A-Bit and then he said two weeks later he was carried back to Ulster Spring and remember we said that one of the circumstances we must look at is where the statement was given. It was given in the lock -up at Ulster Spring and you must decide whether it was something, deliberate, taking into account all that was said, including what the accused man said, whether it was something deliberate to put him in Ulster Spring where that witness Delroy Thorpe was, to create a fixed environment to say he gave this statement. You have to consider that timing."

The applicant denied confessing to Mr Thorpe and the learned trial judge was clearly inviting the jury to consider the impact that the movement may have had on this critical area of the case from the perspective of both the Crown and the defence. It was, in our view, fairly and adequately left for the jury's consideration and we wish to add here that there is no basis in law for Mr Lorne's submission that in the absence of an explanation for the movement of the applicant, the learned trial judge ought to have directed the jury that any

inference to be drawn must be in favour of the applicant. Carey, P (Ag), as he then was, in delivering the judgment of this court in **Linton Berry**, dealt with the boundaries beyond which a trial judge cannot go in directing a jury on the treatment of inferences when, at page 86, he said:

> "A judge is not entitled to tell a jury what facts they must find, and inferences are, of course, facts…
>
> "A jury can only be directed that inferences, the drawing of which is within their sphere of responsibility, must be reasonable which means possible having regard to all the other facts and circumstance which bear on the matter, and which make the inference drawn inescapable."

In our opinion, the complaint is therefore without merit and ground 3 must fail.

[32] **Ground 4**

> "That the Learned Trial Judge ommited (sic) to give the usual directions (sic) as to the approach that should be taken by the jury if they concluded that the Appelant (sic) had told lies, when he was giving his evidence."

Learned counsel for the applicant argued that even though the applicant gave an unsworn statement, the principle in ***Regina v Lucas (Ruth)*** [1981] 1 QB 720 ought to be applied and the jurors should have been directed on how to treat with lies if they were of the view that the applicant was not speaking the truth when he was giving his evidence. However, it was Miss Burrell's contention that there was no need for a ***Lucas*** direction in this case. She submitted that the applicant did not give sworn testimony and what he said was never tested, so

the question of lies never arose. Further, she said, the learned trial judge told the jury, in very clear language, that the burden was on the prosecution so that even if they disbelieved the applicant, that could not be held against him.

[33] Miss Burrell's submissions are well founded. In ***Lucas*** the question for determination was the extent to which lies might in some circumstances provide corroboration. The four criteria which the court held were necessary for lies (whether told in or out of court) to be left for the jury's consideration, were:a.

a. the lie must firstly be deliberate;

b. secondly, it must relate to a material issue;

c. thirdly, the motive for the lie must be a realization of guilt and a fear of the truth; and

d. fourthly, the statement must be clearly shown to be a lie by evidence other than that of the accomplice who is to be corroborated, that is to say by admission or by evidence from an independent witness.

[34] In the instant case, these considerations did not arise. The applicant gave no evidence and there was no accomplice evidence in need of corroboration. The quest for the truth, therefore, mainly required the jurors to examine and make determinations on the sworn testimony of Mr Thorpe and the unsworn and untested statement of the applicant. If they accepted the former, it would mean that the latter had spoken falsely and, in our opinion, the learned trial judge's directions to them addressed the matter adequately. He specifically

dealt with the applicant's denial that he was present at the murder scene and emphasized that there was no duty on the applicant to prove anything including where he was at the time of the murder. The judge told them that it was the prosecution's duty throughout the trial to prove its case, thereby disproving the applicant's alibi defence and directed them on how to deal with that defence in the event that they rejected it. In our view, he gave them clear and adequate directions on this issue when he said:

> "…if you don't believe what he says, you must not convict him only on that ground because you don't believe what he says. What you are to do you must consider the evidence, all the evidence presented by the prosecution, including what the accused has said and see whether you are satisfied so that you feel sure that the prosecution has proved his (sic) case.
> That is the approach."

That indeed was the appropriate approach and no direction on lies was warranted. Accordingly, ground 4 also fails.

[35] **Ground 5:**

> "The Learned Trial Judge erred in law in failing to direct the jury, adequately or at all, in relation to the weaknesses and/or inconsistencies on the prosecution's case and consequently deprived the Applicant of a fair trial resulting in miscarriage of justice."

While accepting that the learned trial judge did give directions to the jury on discrepancies and inconsistencies, Mr Lorne's complaint in this ground is that he did so in a general way and failed to address the minds of the jurors to specific

weaknesses in the prosecution's case. Miss Burrell disagreed, submitting that on the authority of ***R v Omar Greaves and Others*** SCCA Nos 123,125 and 126/2003 delivered 30 July 2004, there was no need for the learned trial judge to set out every discrepancy and/or inconsistency arising on the prosecution's case. She argued that in any event, the learned trial judge had more than adequately dealt with weaknesses, discrepancies and inconsistencies in the Crown's case. He was thorough, she contended, and quite generous in his directions to the jury on how this aspect of the prosecution's case was to be assessed.

[36] It is true that at no point in his summation did the learned trial judge use the word "weakness" to describe any area of the evidence but there could be no doubt in the minds of the jurors that in directing their attention to discrepancies and inconsistencies in the evidence, inviting them to carefully assess these areas and giving them reasons for so doing, the learned trial judge was in effect pointing to challenges to the prosecution's case. Our review of the transcript revealed that the learned trial judge gave adequate assistance to the jurors on how to deal with such discrepancies and inconsistencies as they found in the evidence as that was their task as judges of the facts. He assisted them further by drawing their attention to some areas where, in his opinion, discrepancies and inconsistencies arose for their consideration and left it for them to determine what was true. He particularly highlighted the discrepancy as to the date when Mr Thorpe was sentenced and put it in the context of whether that left him open to a conclusion that he may have had an interest to

serve in stating that the applicant had made the admissions to him. He also highlighted the discrepancy as to the date when the statement was recorded and the way in which the evidence of the reported attempt to remove the mask from the face of the assailant at the murder scene was unfolded. The effect of all of that, it seems to us, was to give to the jury an understanding as to how they should assess such other discrepancies as they found on the prosecution's case. They could not fail to appreciate that in their evaluation of the evidence such discrepancies and inconsistencies as they found to be serious, according to the general direction given by the learned trial judge, would have the effect of weakening the prosecution's case and the use of the word "weakness" would, in our view, have been superfluous.

[37] In a majority decision in ***Omar Greaves,*** this court endorsed the sentiments expressed by Sharma J in the Trinidadian Court of Appeal case of ***Naresh Boodram and Ramiah (Joey) v The State*** (1997) 55 WIR 304 when, at page 335 , his Lordship said:

> "…Our criminal jurisprudence is replete with cases which are intended to guide trial judges; we think, however, that it would be unrealistic and impractical to ask a judge to point out all material discrepancies to the jury. After all, appellate courts have repeatedly said that jurors today are intelligent and enlightened; and by the same token the same appellate courts must not seem ready to erode that approach. It all depends on how a case is conducted, what are the salient issues; and the judge has to be very astute to ensure that the jurors' attention is

> not diverted from the issues by exhaustive and copious directions."

In the instant case, the learned trial judge's directions to the jury on discrepancies and inconsistencies followed established guidelines and, in our opinion, were more than adequate in all the circumstances. The complaint that the applicant was deprived of a fair trial and consequently suffered a miscarriage of justice, as a result of inadequate directions on this issue, is therefore entirely without merit and accordingly, ground 5 also fails.

Conclusion

[38] In light of the foregoing, the applicant's application for leave to appeal against his conviction is refused and his conviction is affirmed. His application is also refused with respect to his sentence which is affirmed and ordered to commence from 19 March 2008 for the purposes of eligibility for parole.