[2013] JMCA Crim 9

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 77/2008

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE HIBBERT JA (Ag)

DANE BONNER v R

Leroy Equiano for the appellant

Miss Maxine Jackson for the Crown

7 June 2011 and 8 February 2013

HIBBERT JA (Ag):

[1] On 7 June 2011 we allowed this appeal, quashed the conviction, set aside the sentence and entered a judgment and verdict of acquittal. We now, as promised, put our reasons in writing.

[2] The appellant was on 27 May 2008 convicted of the murder of Sheryl Powell who was shot and injured at her home in Sucaba Pen in St Catherine and subsequently died in the Spanish Town Hospital.

[3] At the trial, the prosecution, in order to link the appellant to the offence, relied entirely on a statement allegedly made by the deceased shortly before her death. Detective Constable Christopher Royal gave evidence that on 17 February 2002, at about 9:40pm, while he was on duty at the Old Harbor Police Station, he received information and as a consequence went to a house at Sucaba Pen. Having observed what appeared to be blood stains in the house, he went to the Spanish Town Hospital where he saw the now deceased lying on a bed. She appeared to be lapsing in and out of consciousness. After stating her name, address and occupation, she is alleged to have said:

> "Mr. Royal mi a go dead, a Dave and Brass shot mi, you nuh know Dave, Miss Ena son, Laga brother and Brass them call him Cass-eye and Casie, the three a wi did deh deh a talk and them shot mi over drugs money because mi boyfriend did get hold a foreign wid drugs."

[4] Doctor Kadiyala Prasad, a consultant pathologist, conducted the post-mortem examination on the body of Sheryl Powell on 1 March 2002. He found two entrance gunshot wounds. The first was to the lower posterior thorax, the bullet travelling upwards, forward and to the left. The second was to the left buttock, the bullet travelling upwards, forward and to the left.

[5] Leave to appeal having been obtained from a single judge, Mr Equiano, on behalf of the appellant, relied on the following grounds of appeal:

> "1. The identification evidence did not reach the requisite legal standard. The learned Trial Judge should have

upheld the No Case Submission made on behalf of the Appellant.

2. Having allowed the case to go to the jury the Learned Trial Judge failed to give adequate direction on the rational [sic] for the admissibility of the deceased [sic] statement and failed to refer to the importance of the state of affairs at the time the statement was made, and the effect that may have in determining if the statement can be relied upon.

3. Having allowed the case to pass to the jury, the learned trial Judge, failed to assist the jury and/or failed to assist the jury with weaknesses in the identification evidence and crucial areas of discrepancies that would affect the credibility of the main witness for the Crown.

4. The direction given by the judge on character evidence in respect of the Appellant was inadequate."

[6] Before this court, Mr Equiano submitted that the learned trial judge's failure to identify to the jury the weaknesses in the evidence of identification and to give adequate directions to them concerning these weaknesses rendered the conviction of the appellant unsafe. In particular, Mr Equiano drew the attention of the court to the fact that the deceased was shot in the back while apparently lying face down on a bed by a person or persons who would have been positioned in the region of her feet. He also drew the court's attention to the absence of evidence of lighting and the length of time within which the deceased could have observed her assailants.

[7] The learned judge, in identifying the issues which arose in the case, at page 111 of the transcript said:

> "The main issue, the fact to be resolved in this case is whether or not the evidence of Constable Royal, Christopher Royal, and the deceased, Sheryl Powell, is firstly truthful and secondly reliable. It is whether the deceased had the opportunity to identify the accused as her assailant."

[8] The judge thereafter gave the general **Turnbull** directions, then sought to identify in the evidence adduced, the circumstances of the identification of the appellant. He pointed out that the appellant and the deceased were known to each other and that, on the doctor's evidence, the assailant was at least 2 feet away from the deceased when the shots were fired. Turning to the question of lighting, the judge at page 124 of the transcript said:

> "The lighting conditions are important in examining how you deal with the question of identification. What were [sic] lighting conditions like? Did the deceased have adequate lighting for proper identification?
>
> Now Constable Royal explained that the respondent (he must have meant deceased) was in the bedroom. And the implication was that she was shot and the spent shells were found. In cross-examination, he said that there was light in the house, but there was no evidence of light in the front bedroom, whether or not, he simply said light was in the house."

At page 125, however, the judge said:

> "In this case, as I said before, it can be inferred that there was light in the front bedroom."

[9] We found that the invitation to the jury to draw the inference that there was light in the front bedroom was a serious misdirection. Furthermore, even if there was

light in the room when Constable Royal got there, it does not necessarily follow that there was light in the room when the deceased was shot, as Constable Royal had testified that when he got to the house a large number of persons were there. The judge failed to highlight the weaknesses in the evidence of identification as they related to the absence of evidence with regard to the duration of the incident, the nature of the lighting and the position of the assailant in relation to the deceased at the time of the shooting. We found that the judge's directions to the jury on the question of identification were inadequate and therefore deprived the appellant of a fair trial.

[10] Mr Equiano also submitted that the directions to the jury with regard to the treatment of a dying declaration were inadequate. He submitted that no directions were given to the jury stating the reasons for the admissibility of the statement allegedly made by the deceased.

[11] In directing the jury on the issue of the statement allegedly made by the deceased, the judge at page 121 of the transcript said:

> "You also need to consider how the statement was given. There is nothing to suggest that the deceased was prompted to give the particular answer or response to the questions asked. In fact, the response seemed a spontaneous plea. It is a matter for you as judges of the facts. Secondly, you have to examine the circumstances, whether the possibility exists that at the time when Sheryl Powell gave the statement, you must take into account her state of mind when she made the statement. Was the statement of Sheryl Powell one that you can safely rely on what was being said as the truth."

[12] This direction to the jury is quite similar to the direction to the jury by Smith CJ during the trial of Neville Nembhard for the offence of murder. The direction which was quoted in the judgment of their Lordships of the Privy Council in **Nembhard v The Queen** [1981] 1 WLR 1515 at page 1519 received the approval of the Board. In that case, however, their Lordships at page 1518 observed:

> "In this part of the summing up Smith CJ. began by putting in contrast the evidence given on oath by a witness who has appeared in person in the courtroom and the hearsay evidence of a dying declaration. And he took pains to describe the basis upon which a dying declaration was regarded as admissible and the tests which must be satisfied in that regard."

[13] In the case before us, the judge, at page 125 of the transcript, in terms similar to those used by Smith CJ and quoted at page 1519 of the judgment in **Nembhard**, drew the attention of the jury to the fact that the dying declaration had not been tested by cross-examination. He, however, gave no directions on the basis upon which a dying declaration is regarded as admissible and the tests which must be satisfied in that regard. The absence of such directions was addressed in a judgment of this court in **Regina v David Sergeant** SCCA No 123/2007. In the judgment, which was delivered on 12 March 2010, Harrison JA in paragraph 17 stated:

> "It is our view that the learned judge ought to have made it sufficiently plain that it was for them (the jury) to decide as a question of fact whether they were satisfied that the deceased had, when making the observations in question, a settled hopeless expectation of death."

[14] In our view, the directions given to the jury by the learned judge were not sufficient to enable the jury to understand the basis on which dying declarations are admissible in evidence, or that they needed to be satisfied that at the time of making the declaration the deceased had a settled, hopeless expectation of death.

[15] On the basis of the views which we held, we found that the non-directions were of such a nature as to render the verdict returned against the appellant unsafe. Accordingly, we allowed the appeal, quashed the conviction, set aside the sentence and entered a judgment and verdict of acquittal.