JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 83/2004

BEFORE: **THE HON. MR. JUSTICE COOKE, J.A.**
THE HON. MRS. JUSTICE HARRIS, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.

DONALD FRANCIS V REGINA

Ian Wilkinson & Ms. Sharon Donaldson instructed by Wilkinson and Company for the Appellant

Jeremy Taylor, Deputy Director of Public Prosecutions (Ag.) for the Crown.

21st, 22nd April and June 19, 2009.

COOKE, J.A.

1. On the 26th March 2004 the appellant was convicted in the Home Circuit Court on an indictment which charged him with murdering Clover Kent, on the 19th of August, 2001. He was sentenced to a term of life imprisonment without the possibility of parole "for the space of thirty years". The single judge who perused the transcript granted leave to appeal based on his concerns as to the quality of the identification evidence.

2. At the trial, the evidence adduced by the prosecution was entirely that of visual identification and such evidence came solely from the lips of Kenneth

Blackwood. He was the common-law husband of the deceased – a relationship which had subsisted for some twenty-eight years. The couple lived at 7 Seventh Street, Kingston 13. At about 6:30 a.m. on the 19th August 2001, they were in their yard. In this yard there was an area which had been fenced off with old zinc sheets. It was fenced off to protect Blackwood's callaloo crop from damage that could be caused by the "country fowls" which he had. Blackwood was in this area. The zinc fence had a number of holes in it. These, Blackwood had created by chopping the zinc with his machete. The purpose of these holes was to enable him to see what was taking place on the other side of the fence. The deceased was in the open yard.

3. The sequence of events as described by Blackwood is as follows. While he was in his calaloo garden, he heard the deceased in "a brawling manner" say "This a fi wha now?" He then "peep" through one of the holes in the zinc fence. He did this from a bending position. He saw a man standing in front of the deceased with a gun in his hand. This man who was taller than the deceased was whispering in her ear. The gunman, after whispering

> "take a gun and put it a her forehead and do so bow".

After which Blackwood said he saw -

> "all her face light up with fire".

The gunman then "pressed" the gun "over the left breast" and he heard "bow again". He further said "the whole a here so light up with fire and mi see she just wriggle so and drop straight pon her face". Thereafter the gunman "shub"

the gun in his waist and walked to the fence of an adjoining neighbour, which fence he scaled and went on his way. When the gunman had left, Blackwood ran to the street announcing to those who could hear that "Mikey just kill Clover round a back, Mikey just kill Clover round a back."

4. Blackwood said the gunman was the appellant. There is no dispute that the appellant was well known to Blackwood. The latter knew him from he was "a baby". The appellant was known to Blackwood as "Mikey". Blackwood said the gunman who walked to the neighbour's fence after the shooting exhibited an impediment in his gait. "Mikey" he said carried such an impediment. On the 28th August 2001, Blackwood attended an identification parade where he pointed out the appellant. It is impossible to discern how the holding of an identification parade, in the circumstances that attended the identification issue, could have served any useful purpose. See (1) **Irvin Goldson and** (2) **Devon McGlashan v. R** (Privy Council Appeal No 64 of 1998, delivered March 23, 2000).

5. There are no dimensions of the hole through which Blackwood "peeped". Blackwood conveyed the size of the hole by way of demonstration. However, in an exchange between the bench and the bar the learned trial judge described the hole as "a v" which accommodated all of his eye (Page 306 of transcript). It was his left eye which Blackwood utilized. The distance between where Blackwood was bending over "peeping" and where the shooting occurred was some twenty–five feet. At the time when Blackwood said he saw the

confrontation he had a sideview of both parties. He was seeing the right side of the deceased and the left side of the gunman. There is no issue that it was daylight.

6. There is no evidence that after the gunman walked off after the shooting that Blackwood was able to observe his features. Accordingly, his opportunity to so do, was limited to the time during which the confrontation took place and then only from a sideview. As to the time factor this is what the transcript at pages 241 – 243 reveals: -

> "HER LADYSHIP: So, in order (sic) words, what he is asking you is this, how long did it take between the time you peep through the fence, through the zinc and saw them standing there to when him bend over and whisper to when him get up back and fire, how much time passed?
>
> WITNESS: Not even a minute, your Honour, him ease up, so him just "bow", as he just ease up, he just took up his hand and bow. It goes from when you first saw them so as he whisper. As him whisper done and ease up back.
>
> HER LADYSHIP: Did he whisper long?
>
> WITNESS: Yes, ma'am.
>
> HER LADYSHIP: What I ask you just now?
> What did I ask you just now?
>
> WITNESS: Say, how long your Honour.
>
> HER LADYSHIP: How long what?
>
> WITNESS: Repeat back that, yes?

HER LADYSHIP: That's the thing, you need to listen. You need to listen. I asked if he whispered long, did he whisper for a long time.

WITNESS: No, ma'am.

HER LADYSHIP: Okay. So, you look through the zinc, see him bending, you see him standing in front of her first then he bend over and then he whispers not for a long time, then get up back and then fire?

WITNESS: Yes, ma'am.

HER LADYSHIP: How much time all of that tek? So, how much time? How much time all of that tek?

WITNESS: Not even a minute, your Honour. Believe me, ma'am, not even a minute, just bend and do so. (indicating)

HER LADYSHIP: Yes, Mr. Wilkinson.

MR. WILKINSON: Much obliged, madam. So just a few seconds.

Q. You say that not even a minute. You are asking if just a few seconds. Just a second you didn't say this, not even a minute then Mr. Blackwood?

A. Say just a second, ma'am.

Q. Would you say then, that it was just a few seconds?

A. Yes, your Honour, just a few seconds."

7. Dr. Pawar conducted the postmortem examination on the deceased. He was a consultant pathologist employed to the Government. He resigned his post

and went back to India in February 2002. The prosecution tendered his report through Dr. Kadiyala Prasad who was also a consultant forensic pathologist. This report was admitted into evidence by virtue of section 31D (c) of the Evidence Act in that Dr. Pawar was

> "outside of Jamaica and it is not reasonably practicable to secure his attendance"

The relevant part of the report is as follows: -

> "The body is that of five foot, ten inches female, (obese) about one hundred and eight kilograms dressed in yellow floral, that's the blouse and black panties.
>
> Evidence of injury, two gunshot wounds present on the body, and an entrance gunshot wound 0.7 cm without gun powder markings present on right side of lower head, (low indicated) 17 cm below top of head and 7 cm from anterior midline. It entered the skull cavity and travelled downwards to the facial bones, down to the cavity, to exit below the chin. A 2x1 centimetre wound, located at 75 cm below the top of the head in an anterior midline.
>
> Brain injured. Number two: An entrance gunshot wound 0.7 in centimetres in diameter without gun powder marks present on left upper front of chest located 7 centimeter below top of the head arid ten centimeters from anterior midline. It entered the chest cavity travelling backwards medially through the left lung, heart, resulting in haemothorax and back to the soft tissues of the back of the chest on its left side."

The cause of death was due to multiple gunshot wounds. Dr. Prasad in giving evidence opined that if the muzzle of the gun is within two feet of the victim at

the time of the shooting it would be expected that there would be gunpowder marks around the area of any inflicted wound caused by that shooting.

8. There was evidence garnered from the identification parade that the appellant was 5ft. 7" in height. Blackwood gave evidence that the deceased was shorter than himself – that in a standing position the deceased would reach him at his cheek. There was no evidence of the height of Blackwood. However, it would appear that the evidence of Blackwood pertaining to the height of the deceased viz-a-viz his height was to cast some doubt on the accuracy of the measurement of the deceased by Dr. Pawar. If Dr. Pawar's measurement was to be accepted then the gunman would have to be taken to be taller than 5ft. 10".

9. The foregoing was essentially the state of the evidence when the prosecution closed its case. At that stage Mr. Wilkinson (who also appeared at the trial in the court below) mounted an expansive no-case submission. With due respect to that effort, the no-case was really grounded on three factors:

(a) the poor quality of the identification evidence given by Blackwood based on the opportunity he had to observe the gunman;

(b) (i) the expert scientific opinion of Dr. Prasad pertaining to gun powder markings which underminded Blackwood's account;

(ii) The measurement of the deceased by Dr. Pawar as being 5ft.10" thereby further undermining Blackwood's account

that the appellant was the gunman since the murderer was taller than the deceased. The appellant was 5ft. 7" in height.

(c) The inconsistencies between what Blackwood said in his statements to the police and his deposition as against his evidence at the trial were such as to completely destroy his reliability.

The no-case submission failed. The appellant now complains that the learned trial judge was in error in not acceding to that submission.

10. In **R. v. Turnbull** [1977] Q.B. 224 Lord Widgery C.J., gave the following direction at page 229-230: -

> "When in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions ... (the) judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."

Jones (Larry) v. R. [1995] 47 WIR 1 is a judgment of the Privy Council. The headnote is as follows: -

> "Where the defence sought the dismissal of a charge on the ground that there was no case to answer as the essential identification evidence of the only witness was not sufficiently reliable to found a conviction, the trial judge was entitled to rule that the case should be left to the jury even though the circumstances relating to the identification were not ideal."

It is therefore incumbent on trial judges when faced with a no-case submission grounded on the alleged poor quality of the identification evidence, to subject the evidence to careful scrutiny to avoid the risk of a conviction thus occasioning an injustice.

11. Blackwood was a dramatic witness. His histrionic talent was evident even from the lifeless pages of the transcript. It is more probable than not, that he portrayed himself as a convincing witness – and honest too. Repeatedly he called upon the Almighty to corroborate his account. He unquestionably knew the appellant. His common-law wife had been murdered before his very eyes. It would be expected that more than a little emotion pervaded the courtroom. In a situation such as this it becomes even more critical that trial judges are fully aware of the risk of an injustice.

12. This was a recognition case. The general judicial approach is nonetheless the same as that espoused in **Turnbull**. See **Karl Shand v. R** (Privy Council Appeal No. 8 of 1994 delivered November 27, 1995). The fact that it was a recognition case does not relieve trial judges from engaging in a rigorous analysis of the evidence which the identifying witness claims provided the opportunity to make his identification. In this case there is no issue as to the adequacy of the lighting. The distance between Blackwood and the gunman was some twenty-five feet. He was looking through a hole in the fence which "accommodated" his left eye. He only had a sideview and that for only "a few

seconds". The question now arises as to whether this evidential base is so slender that it is unreliable and therefore not sufficient to found a conviction. See **Daley v. R** (1993) 43 WIR 325 at page 334. Was the identification evidence so poor that the learned trial judge should have withdrawn the case from the jury? There was the evidence of the gunman walking with an impediment – as does the appellant. However, this evidence is not necessarily probative – for if the appellant was well known to Blackwood, the latter could have buttressed his evidence of identification by introducing this description. Likewise Blackwood's shouting out that "Mikey" had killed the deceased is nothing more, (if he so did) than an assertion as to who he believed murdered Clover Kent. Counsel for the prosecution has submitted that this is a borderline case – that it fell within the category of being a case where although the circumstances relating to identification were not ideal, there was a sufficiency of evidence fit for the consideration of the jury. We are not readily inclined to this view and as the ensuing discussion will indicate there was other evidence that spoke to the issue of the reliability of the evidence of Blackwood.

13. There can be no doubt that there appears to be an irreconcilable conflict between the account of the shooting by Blackwood and the expert opinion of Dr Prasad pertaining to gunpowder marks. The opinion expressed by Dr. Prasad is universal and is readily accepted. It is uncertain if the learned trial judge addressed her mind to this conflict. In her summing up, this is what was said:-

> "Now, what Dr. Prasad was asked about though, was that area of Dr. Pawar's Report that mentioned that there was no gunpowder marking around the entrance wound of the two gunshot injures (sic) and he says that that means that the person would have had to be more than two feet away from the deceased when the firearm was discharged, it would be a (sic) within a range of two feet, you would be from the muzzle of the gun, you would expect to see gun powder markings.
>
> "Now, defence attorney -- sorry, prosecuting attorney in closing address yesterday, was inviting you to consider what he calls depth, perception meaning, how did he appear from a distance, in terms of space, how you can look ahead and see two points clearly, leave the space between the smaller, it is then when you get closer sometimes it might even appear to you as if they touch, you can see the point clearly, you are just able to see accurately how many space is between them, it is more, so you say whether you agree with her. You may recall that point, Mr. Blackwood said he saw the gun over her, Ms. Kent left breast, he was, he would say if it was touching. You should consider that the deceased did have would be precisely at the point where the two police officers is, that he speak of the forehead and her chest more than two feet away, might be couple inches more, it is a matter for you how you view this evidence, and that completed the review of the prosecution's evidence."

It would seem that the learned trial judge did not fully appreciate the import of the expert evidence of Dr. Prasad, pertaining to gun powder markings as it affected the issue of identification. This was evidence which was pertinent to

the reliability of the account given by Blackwood. Did Blackwood see the shooting?

14. The evidence as regards the height of the deceased, is to say the least, quite murky. Suffice it to say that the burden to prove its case lay on the prosecution. It was the prosecution who tendered evidence that the deceased was 5ft. 10" tall.

15. The inconsistencies enumerated by the appellant will not trouble this court. These inconsistencies, if material at all, would have been best left for the consideration of the jury. None of these inconsistencies, which need not be set out, were of such telling effect, as to so adversely affect the reliability of Blackwood as to warrant withdrawal of the case from the jury.

16. Based on our analysis of the identification evidence, it is our conclusion that the complaint that the learned trial judge was in error in not acceding to the no-case submission is of merit. In our view the evidence of identification adduced by the prosecution was characterised by such a degree of unreliability, that the learned trial judge should have withdrawn the case from the jury. The evidential base in respect of Blackwood's visual identification was all too slender. Then there was the expert evidence as to the absence of gunpowder marks. This is sufficient to dispose of the appeal. Accordingly, it is unnecessary to advert to the other grounds of appeal which levelled criticism at aspects of the summing-up of the learned trial judge.

17. Finally, the appeal is allowed. The conviction is quashed, the sentence is set aside and judgment and verdict of acquittal entered.