[2014] JMCA Crim 12

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 67/2011

BEFORE: THE HON MRS JUSTICE HARRIS P (Ag)
THE HON MRS JUSTICE MCINTOSH JA
THE HON MS JUSTICE LAWRENCE-BESWICK JA (Ag)

SEPARUE LEE v R

Hopeton Clarke for the appellant

Jeremy Taylor for the Crown

23 September 2013 and 21 March 2014

MCINTOSH JA

[1] On 7 July 2011, the appellant was convicted in the Circuit Court Division of the Gun Court for the parish of Clarendon, on an indictment which charged him with two counts of murder, arising from the deaths of Dwight Fraser and his wife, Joan Fraser, on 1 February 2010, in the said parish. The appellant was then transferred to the Home Circuit Court for sentencing where, after a hearing on 13 January 2012, he was sentenced in respect of each conviction, to suffer death in the manner authorized by law.

[2] He appealed his convictions and sentence and after hearing submissions on 23 September 2013, we made the following order:

> "Appeal against convictions dismissed. Appeal against sentence allowed. Sentence of death is set aside on each count and substituted therefor is a sentence of life imprisonment.
>
> It is ordered that the appellant should serve a period of 20 years consecutively on each count, before becoming eligible for parole. Sentence to commence on 13 January 2012."

We indicated then that we would reduce the reasons for our decision into writing and we do so now.

The grounds of appeal

[3] On 24 January 2012, the appellant filed five grounds with his notice of appeal. However, before us, his attorney-at-law, Mr Hopeton Clarke, abandoned all but two of the grounds with the leave of the court, arguing only grounds four and five which read as follows:

> Ground 4 No case submission should have been upheld on the basis of a fleeting glance (a two second viewing of accused. Accused not well known (known for 2½ months).
>
> Ground 5 The death penalty should not have been imposed for the following reasons:
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> (a) 'Notice' given in December by the prosecution.
> (b) Killings do not fall in the category of 'rarest of the rare'.
> (c) Convict's Antecedent, History, Social Enquiry Report speak well of him; no indication that he cannot be reformed.

Ground 4 – Should the prosecution's case have been left to the jury?

[4] To appreciate the arguments advanced in relation to ground four it is necessary to look briefly at the evidence adduced from the prosecution's main witness as to fact, Makalia Grant, who was 13 years old at the time of the killings and was the niece of the deceased Joan Fraser. She testified that she then resided with her aunt, her aunt's husband and their three children in Bucknor District, Clarendon. At about 6:30 on the evening of 1 February 2010, the family of six (including the witness) had returned home from a shop which her aunt operated in the district. The adults were in the kitchen while she and two of the children went to their room, leaving the third child sitting in the living room. As she was preparing to have a bath, she heard what she took to be the sound of three gunshots and saw her aunt running towards the children's room, calling on the Lord's name and being pursued by a man. When her aunt reached into the room she bounced Makalia who then fell backwards on the bed, in a sitting position.

[5] The man called her aunt to come out but she refused and backed away from him. He then held her by her blouse and pulled her out of the room. At first, when he was pulling her aunt, he held his head down, as if to conceal his face, she thought, but as he pulled her out to the living room, he held up his head and, because her aunt had bent down in front of him, she was able to see his face from where she still sat on the bed. At some point after that, she went behind a settee which was near to one of two doors in the room.

[6] Questioned about her ability to see the intruder that night Makalia said there was electric light in the house – in the kitchen, in the room and in the bathroom (see page 44 of the transcript). She further testified that "the house is bright" and that the electric light in the room was "near to the door" and was "right beside his face. The light shine in his face and I see his face" (see page 79). She had seen his face for about two seconds that night, she said.

[7] When her aunt was dragged from the bedroom Makalia said she heard male voices in the living room asking her aunt for money and her aunt's voice telling them that she had none. She heard other demands being made of her aunt and, after hearing the sound of about three or four more gunshots, there was silence. She emerged from her hiding place behind the settee and saw that her aunt was back in the room but she could not say how or when she got there. Blood was coming from her aunt's mouth and her face was "messed up". Afterwards she saw Mr Fraser in the kitchen lying on his belly with two holes in his back which she thought were bullet holes.

[8] Young Makalia further testified that she recognized the man she saw pulling her aunt out of the children's bedroom towards the living room as a man she had seen before, passing in the lane where they lived, "about three to four times" before the night of the incident (pages 64 – 68) although she was unable to say exactly when it was that she had last seen him. When pressed however, she said it was a long time ago. That night he was wearing a white T-shirt and a cut off jeans and his hair was

pulled up. She had not shared that with the police when she spoke to them after the killings that night although she had told her mother. The following morning she had seen the appellant twice, first passing with a friend and then by himself. He was wearing the same clothes and his hair was in the same condition. Prior to 1 February 2010, she had also seen the appellant, on about two occasions, at premises to the rear of her aunt's house.

[9] On 13 February 2010, she attended an identification parade at the May Pen Police Station where she pointed out the appellant, in the number six position in a line-up, as the man who had killed her aunt and her aunt's husband on 1 February 2010.

[10] In cross-examination she was asked about a previous statement she had made that she had seen the face of the intruder for one second as opposed to her evidence before the jury that the time was two seconds. She said she did not know what a second was then but she subsequently found out and maintained that two seconds was the correct assessment of the viewing time. She was also asked about her evidence that she had lived with her aunt for three months before the killings, as opposed to her statement to the police that it was two and a half months. This was a factor to be considered when assessing the opportunity she would have had to see the man she said was the appellant and be able to subsequently identify him. In response, Makalia said she had told the police that it was November that she started to live with her aunt and agreed that that would make the period closer to two months than three months.

[11] When further cross-examined Mekalia testified that although there was nothing special about the appellant to aid her recollection of him, she definitely knew it was he who was in the house that night. She first saw him in the very month of November when she started to live with her aunt and she added that "sometime he in a yard behind us ... Sometime he go down a him friend dem" (see page 96). When it was suggested to her that she did not know the man well she said "I know him well. I saw him" and, in answer to defence attorney's question as to why she had not disclosed her prior knowledge of him to the police that night, she said "[b]ecause I told my mother and my mother said to don't tell anybody 'cause they will come back and kill us" (see page 109 of the transcript). It is to be recalled that this was a child of 13 years.

[12] At the close of the prosecution's case defence attorney made a no-case submission urging the court to find that the evidence adduced by the prosecution was tenuous and weak so that the appellant should not be called upon to answer the charges. Ground four was based upon the rejection of that submission.

The arguments

[13] Mr Clarke contended that the purported identification of the appellant by Makalia Grant amounted to a mere fleeting glance and there was no other evidence to support it. In addition, he submitted that although the court may view this as a case of recognition of a person previously known, he urged the court to consider that the period of two and a half months would be insufficient to enable Makalia to recognize the appellant in a viewing time of two seconds. She gave no evidence of ever speaking

to him or him to her, counsel contended and she would have been fearful for her safety in what must have been difficult and trying circumstances when she purported to recognize him. It was his further contention that her subsequent identification of the appellant on an identification parade would do nothing to cure the weaknesses in her identification evidence. In sum, Mr Clarke submitted, the quality of the identification evidence was too poor to have been left to the jury and the appellant should therefore not have been called upon to answer to the charges in the indictment.

[14] In his response, Mr Jeremy Taylor for the Crown argued that the evidence adduced by the prosecution was sufficiently reliable to have entitled the learned judge to leave it to the jury. Mr Taylor submitted that from her demonstration, at particular points in her evidence of what was taking place, it was clear that the time which the witness would have had to view the face of the appellant must have been longer than the two seconds she assessed it to be. For instance, Mr Taylor continued, she was able to see his face as the appellant dragged her aunt and as her aunt resisted him, which must have caused the appellant to have exerted some amount of energy. The fact that he was struggling with her aunt, counsel contended, is what resulted in him holding up his head, thereby exposing his face to Makalia's view and, as she demonstrated, the jury would have had the opportunity to see what parts of the appellant the witness was able to see and come to their own conclusion as to the length of time involved.

[15] Mr Taylor bolstered his submission by referring to this court's decision in **Bruce Golding and Damion Lowe v Regina** SCCA Nos 4 and 7/2004 delivered on 18

December 2009, where it was held that as the witness indicated in her evidence that she was unaware of time, the learned trial judge would have had to consider the chronology of events relative to the opportunity to view the appellant's face. Counsel submitted that in cases where there is a varying estimate of time, it is for the trial judge to consider the events as unfolded in the evidence, where opportunity was available to the witness to view the assailant's face and decide whether the identification evidence was so poor as to warrant its withdrawal from the jury. For this proposition he relied on **Fitzroy Nelson and Leroy Nelson v Regina** SCCA Nos 32 and 33/2007 delivered on 23 January 2008.

[16] It was his contention that the instant case involved recognition of the appellant as the witness had known him before and, to support that recognition, said Mr Taylor, she spoke of the hair of the appellant in terms which suggested some familiarity with it having seen it in the same condition on the previous occasions she had seen him. Mr Taylor further contended that the fact that they had never spoken to each other, on those encounters, in no way detracted from her ability to recognize him.

[17] Counsel submitted that, in any event, a viewing period of two seconds was sufficient for Makalia to make the recognition and he relied on a decision of this court in **Jerome Tucker and Linton Thompson v R** SCCA Nos 77 and 78/1995 delivered on 26 February 1996 where it was held that the viewing time in recognition cases need not be as long as in cases where the assailant is a stranger to the witness. He also referred us to **Ian Gordon v R** [2012] JMCA Crim 11 where a time of three seconds was held to

be sufficient for identification purposes and submitted that the instant case was properly left to the jury to sift and deal with the range of issues which flowed from the identification, inclusive of credibility, inconsistencies and discrepancies and explanations that may have been advanced for the differences in the evidence. There was ample justification, counsel submitted, for the judge's decision not to withdraw the case from the jury and the no case submission was properly rejected.

Analysis and conclusion

[18] A good starting point for trial judges when called upon to rule on a submission of no case to answer is the guidance to be extracted from **R v Galbraith** [1981] 2 All ER 1060 where at page 1062 the court had this to say:

> "How then should the judge approach a submission of 'no case'?
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> (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.
>
> (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.
>
> (a) Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case.
>
> (b) Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness' reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is

> evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. ... There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

[19] This court has consistently approved and applied these guidelines and this is amply demonstrated by Morrison JA in **Herbert Brown and Mario McCallum v Regina** SCCA Nos 92 and 93/2006 delivered 21 November 2008. Referring to the Privy Council decision in **Jones (Larry) v R** (1995) 47 WIR 1, (in terms applicable to the instant case) Morrison JA had this to say at paragraph 34 of the judgment:

> "34 ... despite the fact that the Board considered that "the real attack" by the defence on the sole eyewitness' evidence "was principally that it was not sufficiently reliable to found a conviction and therefore should not have been left to the jury" (essentially a **Galbraith** point). It was nevertheless held that the trial judge had been entitled to allow the case to go to the jury on the question of identification "even if the circumstances were not ideal" (per Lord Slynn)."

[20] The real question, Morrison JA said, was whether the evidence rested on so slender a base as to render it unreliable and therefore insufficient to found a conviction. He continued at paragraph 35:

> "So that the critical factor on the no case submission in an identification case, where the real issue is whether in the circumstances the eyewitness had a proper opportunity to make a reliable identification of the accused, is whether the material upon which the purported identification was based was sufficiently substantial to obviate the 'ghastly risk' (as Lord Widger y CJ put it in **R v Oakwell** [1978] 1 WLR 32, 36-37) of mistaken identification."

[21] As Mr Taylor correctly pointed out, this court has held, following a long line of well established authorities, that if the identification evidence depends solely on a fleeting glance or on a longer observation made in difficult circumstances it would be the duty of the trial judge to withdraw the case from the jury and direct an acquittal (see **Alphanso Tracey and Andrew Downer v Reginam** (1996) 33 JLR 150; **Junior Reid et al v The Queen** [1990] 1 AC 363). This is the approach which Mr Clarke urged upon the court but on the totality of the identification evidence we were firmly of the view that the circumstances amounted to more than a fleeting glance and were substantial enough to entitle the learned trial judge to conclude that the matter ought to have been left to the jury.

[22] There is no gainsaying that the circumstances of the identification were not ideal but the evidence of Makalia Grant in its entirety provided a sufficient basis upon which a jury properly directed could return a verdict adverse to the appellant. We found that the learned trial judge carefully followed the **Turnbull** guidelines (see **R v Turnbull** (1976) 63 Cr App R 132; [1976] 3 All ER 549) and gave adequate directions on this issue. Ground four is without merit and therefore failed.

Ground 5 – Was the death penalty properly imposed?

[23] Mr Clarke submitted that these killings did not fall within the category of "the rarest of the rare" for which the sentence of death may be held to be appropriate. No doubt counsel had in mind the Privy Council decision in **Daniel Dick Trimmingham v**

The Queen [2009] UKPC 25 where at paragraphs 20 and 21 Lord Carswell who delivered the judgment of the Board had this to say:

> "20. Judges in the Caribbean courts have in the past few years set out the approach which a sentencing judge should follow in a case where the imposition of the death sentence is discretionary. This approach received the approval of the Board in **Pipersburgh v The Queen** [2008] UKPC 11 and should be regarded as established law.
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> 21. It can be expressed in two basic principles. The first has been expressed in several different formulations, but they all carry the same message, that the death penalty should be imposed only in cases which on the facts of the offence are the most extreme and exceptional, "the worst of the worst" or "the rarest of the rare". In considering whether a particular case falls into that category, the judge should of course, compare it with other murder cases and not with ordinary civilized behaviour. The second principle is that there must be no reasonable prospect of reform of the offender and that the object of punishment could not be achieved by any means other than the ultimate sentence of death. The character of the offender and any other relevant circumstances are to be taken into account in so far as they may operate in his favour by way of mitigation and are not to weigh in the scales against him. Before it imposes a sentence of death the court must be properly satisfied that these two criteria have been fulfilled".

[24] In **R v Peter Dougal** (2011) 77 WIR 353, this court accepted and applied the principles expounded in **Trimmingham** and, applying them to the instant case what remained to be determined is whether these killings were of such a heinous nature as to warrant the description "worst of the worst" or "rarest of the rare" thereby attracting the death penalty. Additionally, on the material before the learned judge could it be said that there was no reasonable prospect of reform of the appellant and that the object of punishment could not be achieved by any means other than the ultimate

sentence of death? Unless these two criteria were satisfied the sentence of death could not be properly imposed.

[25] The learned judge could not be faulted for considering the killing of the mother and father of three young children, aged 12, 9 and 4 years old, virtually in their presence and hearing, as a most reprehensible act. Makalia, only 13 years old at the time, described the children as "jumping up and crying" during their ordeal that night. One child was in his mother's arms and she was ordered by one of the intruders to put him down, with threats to shoot his father if she did not obey. On hearing this, the children begged their mother to let him go but alas that did not save their father's life. It was clearly the coldness and callousness of this double murder that led the sentencing judge to conclude that it was "exceptional" and could not escape the classification of "the rarest of the rare".

[26] However, when compared to other murder cases, in this jurisdiction, as the sentencing judge is constrained to do, this could not truly be said to have been the "worst of the worst" or the "rarest of the rare". Further, Mr Clarke urged the court to conclude, on the strength of the social enquiry report, in which the appellant was described by members of his community as a hard working person, the antecedent report which disclosed that he had no previous convictions and the evidence of the superintendent of the remand facility where the appellant was being housed, that he was not beyond redemption. The superintendent spoke of "his conduct and his behaviour" as being "conducive to the institutional law" meaning that "he has never

been reported for any misdemeanor, any misconduct" (see page 443 of the transcript). Indeed there was no indication on the material before the sentencing judge that the object of punishment could not be achieved by any means other than the ultimate sentence of death (see **Trimmingham**).

[27] Mr Taylor conceded that the sentence of death could not be supported as the prosecution did not give the required notice of its intention to seek the death penalty at the appropriate time. Referring to the decision of this court in **Peter Dougal** counsel submitted that the Director of Public Prosecutions should have ensured that by the time the accused came to be pleaded and definitely before the commencement of the prosecution's case, the accused, his attorney-at-law and the trial judge were informed of the prosecution's intention. As notice was not given in the instant case until during the sentencing exercise Mr Taylor contended that the death penalty ought not to have been imposed. He submitted however that the period of pre-parole eligibility should reflect the gravity of this double murder for which there were no mitigating factors.

[28] Quite apart from the concession of the Crown in relation to the absence of the required notice, it is clear that the death penalty was not properly imposed in this case and therefore had to be set aside. Ground five therefore succeeded.

[29] In all the circumstances, we considered that the only appropriate disposition of this case is as set out in paragraph [2] above with the result that the appellant will serve a total of 40 years imprisonment from 13 January 2012 before he will be considered for parole.