JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 68/2004

BEFORE: THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MR. JUSTICE MARSH, J.A (Ag.)

DERRICK LLOYD

V.

REGINA

Richard Small and Mr. Lindel Smith, for the appellant.

Mrs. Stephane Jackson-Haisley, Acting Asst. Director of Public Prosecutions, for the Crown.

June 12, 13, 14, 15, 2006 and March 30, 2007

PANTON, J.A.

1. The applicant was convicted on February 19, 2004, in the Manchester Circuit Court of the murder of Tanisha Francis. His application for leave to appeal was refused by a single judge of this Court. The application was renewed before us, and at the end of the hearing, we reserved our decision. We have given very careful consideration to the arguments and have read the entire

transcript of the proceedings which ran into several hundred pages. The application for leave to appeal is granted. The hearing of the application is treated as the hearing of the appeal, and the conviction is quashed and the sentence set aside. We are of the view that the interests of justice dictate that there be a new trial, and this we hereby order to take place as soon as possible.

2. There was no known eye-witness to this murder, although it occurred during daylight at the appellant's residence at a time when there were adult persons on the premises. There are certain unchallenged facts which demonstrate the nature of the crime for which the appellant was convicted. The deceased teenager had been for several days a guest at the residence of the appellant at Cedar Grove, Manchester. She occupied the master bedroom on the third floor of the house, whereas the appellant slept in the basement. The appellant's adult nephew, Dexter Lloyd, occupied a bedroom on the second floor. The deceased, who was right-handed, was killed by a single bullet injury to the left side of the head. The expert evidence ruled out suicide. The gun from which this bullet had been fired is owned by the appellant.

3. The expert evidence disclosed that the appellant had intermediate level of gunpowder residue on his right arm and left web. His nephew, Dexter, also had intermediate level of gunpowder residue on his right palm. In both cases, the expert evidence was that the presence of this level of gunpowder residue

indicates that the part of the body in question was in the path of gunshot residue.

4. In view of the fact that the firearm belonged to the appellant, and both he and his nephew lived at the premises, they were naturally treated as suspects by the police who took them into custody. Eventually, Dexter was released and the appellant arrested and charged. Dexter then became a witness for the prosecution in a case that depended on circumstantial evidence. It is unchallenged that at different times on the day of the death of the deceased, between daylight and 11 or 11.30 a.m., the appellant and his nephew were on separate missions away from the house. The nephew at the request of the appellant had purchased lunch for the deceased. The appellant took the lunch to the deceased but was unable to deliver it as the door to her bedroom had been secured from within. The appellant requested Dexter to open the door. This he did, as he had done on another day previously. The deceased was then discovered lying on the floor with the gun beside her and blood running away from her body.

5. The appellant did not give evidence. Instead he made an unsworn statement. The right to make an unsworn statement, though abolished by England, which introduced it here, and by many other countries in the Commonwealth, remains rooted in our system. In this statement, the appellant

denied involvement in the crime. He said that on the night prior to the death, there had been a power outage and he had loaded his firearm and retired to the basement. Next morning, that is, on the day of the killing, he went to his farm. On the return journey, he had purchased oranges some of which he had given to the deceased. He had also asked Dexter to purchase lunch for the deceased. When an attempt was made by him (the appellant) to deliver the lunch, it was discovered that the door to the room was locked. He asked Dexter to open the door as he had done on a previous occasion, and Dexter obliged. The appellant said that the whole situation had caused him to be in a state of shock. He said that initially when questioned by the police he had told them that he could not remember firing the gun for a while. After he was arrested, however, he said that he felt obliged, influenced and compelled to say something about gunpowder being on his hand. He then said that he had fired the firearm the previous day at the farm. He said that even though he owned the gun he had never been on a firing range. He had never shot anything in his life that he could remember. He did not remember shooting any animals or "anything".

6. The appellant has challenged his conviction on two main bases:

(a) that the learned trial judge committed serious errors during his charge to the jury; and

(b) that the prosecution behaved unfairly in withholding vital information from the defence.

The judicial errors complained of were in relation to the treatment of the evidence of Dexter Lloyd and the forensic experts, and the directions on inferences, circumstantial evidence, and the burden and standard of proof.

7. So far as (b) above was concerned, the appellant sought to impugn the conduct of the prosecution in that it was suggested that there was a failure to disclose information to the defence. The relevant ground of appeal reads:

> "The Crown breached its duty to disclose to the defence material evidence in its possession prior to the hearing and has continued in breach of this duty. Counsel for the Crown had a duty to and failed to honor (sic) it by placing before the jury the evidence in her possession that Dexter Lloyd had been questioned under caution in relation to the events surrounding Tanisha Francis' death and that he refused to answer any of those questions. There was also a duty to disclose to the defence and to place before the jury evidence of the circumstances in which the witness was converted from being a suspect refusing to answer questions and his later becoming a principal Crown witness in relation to the very issues on which he refused to answer questions".

This ground of appeal presupposes that the defence was unaware of the fact that the witness Dexter Lloyd had been questioned by the police. The reality is that the defence was fully aware that this witness had been taken into custody, and had been questioned by the police. The transcript reveals the following, while Dexter Lloyd was being cross-examined by learned Queen's Counsel Miss Hylton:

Page 180 lines 25-26

" Q. Tell me, do you recall when your uncle was locked up by the police?"

Page 181

"1. A. If I remember?
2. Q. Yes?
3. A. Yes, I remember.
4. Q. Were you locked up too?
5. A. Yes, ma'am".

There was no follow-up on this as the very next question was an inquiry as to what the witness had stepped on to get to the window. Further examination of the transcript reveals the following during the cross-examination of Detective Sergeant Lorna Wright by Miss Hylton:

Page 373

"16. Q. Did you do questions and
17. answers in respect of Dexter Lloyd?
18. A. Yes, ma'am.
19. Q. Did Dexter Lloyd answer the questions asked him?
20. A. He answered some of them, ma'am.
21. Q. What in relation to the others?
22. A. He said he did not wish to answer on instructions".

The record does not reveal that any specific request was made then or at any other time during the trial for any further information from the prosecution. As Mrs. Stephane Jackson-Haisley for the Crown has submitted, it was clearly a matter for the defence to have explored if they so wished. It is therefore our

view, given the facts, that this point that is now being advanced by the appellant is misconceived.

8. The case of **Berry v R.** (1992) 41 WIR 244 has been prayed in aid by the appellant. The situation in the instant case is, however, quite different from that in **Berry**. At page 249 b-c of **Berry**, the Court said:

> "...the most important ground of appeal was the contention that written statements made by Zaidie and Matadial to the police and not disclosed before or during the trial had been wrongly withheld from the appellant and his advisers".

And at page 253 e:

> "Since the defence must be given a copy of the statement of a proposed witness who has not made a deposition, it must follow that, if a Crown witness' evidence is intended to depart significantly from his deposition and to be based on his statement to the police, it is the duty of the Crown to give the defence a copy of that statement in advance of the hearing".

It is quite clear that in the instant case the appellant was not kept in the dark as may have been the position in **Berry**. The appellant himself would have personally known of the taking into custody of his nephew. In any event, as pointed out earlier, the evidence given by Dexter and the Det. Sgt. would have alerted the appellant's advisers to the situation. That they chose to ignore it at the time is not a matter to be blamed on the prosecution. It will be recalled, however, that even in **Berry**, the Privy Council did not see the matter as one which merited the entering of a verdict of acquittal, which Mr. Small has

submitted is the only choice which this Court has in this case. The Privy Council in **Berry** remitted the case to the Court of Appeal for a determination as to the future course of action. This Court directed a new trial which duly took place.

9. Having stated our position in respect of this ground, we must note our regret that the Director of Public Prosecutions waited until during the hearing of the appeal to respond to the correspondence from the appellant's advisers. Such tardy responses create unnecessary discord, frustration and tension in a situation in which the aim of everyone ought to be the attainment of justice.

10. In respect of the judicial errors complained of, we do not accept that the learned judge's directions in respect of the burden and standard of proof were deficient. However, there is merit in the contention that his directions as to inferences were unhelpful to the jury. The ground containing this complaint reads:

> "The learned trial judge in the main body of his summation failed to give the jury careful directions on the law of inferences and the circumstances in which the jury could draw inferences. The learned trial judge also failed to relate such directions to the issues which the jury had to determine and in particular to the burden and standard of proof. The directions which were eventually given at pages 655-656 after he had completed his summing up [a] were wholly inadequate, [b] contained errors, and [c] were abstract and unrelated to the factual issues in the case. It was misleading to direct the jury that the law of inferences was equivalent "to use[ing] your common sense". This misdirection further compounded the learned trial judge's earlier error at

> pages 580-581 where he invited the jury to use their common sense to fill gaps in the evidence which the Crown had failed to close".

11. It is necessary to quote the passages wherein the learned judge purported to have dealt with the matter of inferences. At page 574 of the transcript, he said:

> "Now, what was the intention of such an injury? We can't open people's heads and say what she (sic) intended, but you can look at what was done and find out surely, what is called the inference, as to what you think was intended. If somebody fired a gun at somebody's head, what you expect would be the intention. That is for you to decide. And the result as the doctor said, one this side through to the other. Use your common sense as I said. Don't leave it out when you are considering this case. Common sense is very important."

At page 655, line 20 to page 656 line 4, he said, as a result of a suggestion by Miss Lobban, Counsel for the Crown at the trial:

> "You are entitled to look at the evidence, to use your common sense, to draw what we call inferences, look at the facts, even though some things are missing, you can draw from these facts, that you have a certain thing occurring. You remember the example Crown Counsel gave about the mouse and the rat, that kind of thing. Use your common sense, be careful when you draw inferences they may be reasonable and inescapable. That's it."

12. We have no idea what Crown Counsel may have said about the mouse and the rat. It may have been accurate as well as it may have been incorrect.

However, by no stretch of the imagination can it be said that the directions were adequate, particularly in a situation where there were no eye-witnesses to the killing. The learned judge ought to have made it clear to the jury that inferences may only be drawn from proven facts, that is, facts which they had found established beyond reasonable doubt. Further, he should have also made it clear that they could not return an adverse verdict, unless as a result of the inferences they drew, they were satisfied so that they felt sure of the guilt of the accused.

13. The reference to "common sense" in the passages quoted above prompted Mr. Small to submit as follows:

> "The learned trial judge had a duty to direct the jury that there was no evidence on which the inference could be drawn. Instead the learned trial judge specifically left the issue for the jury's consideration and told the jury that in the absence of evidence it was permissible for them to use their common sense to base their finding. This error was later compounded by the learned trial judge's direction on inferences in which he directed the jury that they could fill gaps in the evidence by using their common sense".

We agree that the directions by the learned trial judge may have left this unfortunate impression on the minds of the jury. This is not to say that there is no room for the "common sense" of jurors. It is just that in this instance there was a misunderstanding of the circumstances in which the "common sense" of the jury is important and relevant. This requirement that jurors use their common sense is of critical importance in determining the **credibility** of

witnesses. It is necessary for there to be firstly the presentation of facts by witnesses to form the base for the application of common sense in determining credibility. McIntyre, J. in **R. v Boland and Phillips** 43 DLR (4th) 641 at 653 demonstrates the situation thus:

> "It has been the traditional function of jurors in our system to apply their own daily experiences to the testimony and the other evidence presented to them to determine which witnesses are truthful. It is the jurors' own expertise in conducting their personal and business affairs which our judicial system has long regarded as making them specifically qualified to make this determination".

In other words, common sense cannot be applied where there is a vacuum.

14. Ground 1 of the amended supplementary grounds of appeal reads:

> "(a) The Learned Trial Judge's directions in relation to the presence of gunshot residue on the palm of Dexter Lloyd, a principal Crown witness, were seriously flawed. The Learned Trial Judge at pages 580-581 invited the jury to consider an explanation for the presence of intermediate level gunshot residue on the right palm of Dexter Lloyd when there was no evidence to support this theory.
>
> (b) There was in fact specific expert evidence which contradicted this theory. Instead of properly relating the evidence to the issues which the jury had to consider the Learned Trial Judge wrongly invited the jury to speculate as to what evidence may have been adduced by calling upon the members of the jury to rely on their common sense to fill the gaps in the prosecution's case.

(c) The Learned Trial Judge erred in directing the jury as follows at page 617, lines 13 to 18 when referring to the evidence of Miss Dunbar, the Government Analyst:

> "It would follow, therefore, that her opinion would be that the accused man had fired a firearm. It would seem from her evidence, that the swab would have been taken fairly shortly after that firing of the firearm by the accused man".

15. It is necessary to note that the analyst found gunshot residue at intermediate level on the swabs from the appellant's right arm and left web (p.446 lines 20-23), and the witness Dexter Lloyd's right palm. The presence of gunshot residue at intermediate level could possibly arise, she said, as a "result of the right palm being in the path of gunshot residue" (p.450 lines 6 and 7). Earlier, (at p.448 lines 4-12) she had said:

> "The presence of gunshot residue at intermediate level would indicate that the individual possibly fired a firearm, with the passage of time and activity..., the level was reduced from the elevated level to the intermediate level".

Under cross-examination by Miss Hylton, she continued:

> "I would expect to find gunpowder residue on the right web and on the right palm, if the person used the right hand to fire the firearm and there is an opening in the firearm". (page 460 lines 16-19)

This finding, she said, would arise if the swabs that she tested were taken a short time after firing the firearm.

16. The learned judge, in directing the jury, having accurately summarized the evidence of the analyst as set out above, is recorded as having gone on to say thus:

> "And here I have to digress a little bit. Remember I say that the expert evidence is not to be accepted without consideration. There was evidence of the ballistic expert, Mr. Hibbert, who said that you can get gunshot residue on your palm if you pick up the gun, or if you handle the gun after it has been fired. So the question is, and he didn't give any opinion on it, something you have to use your common sense to decide, if handling that gun could leave gunshot residue at intermediate level. You remember that Miss Dunbar said that if you fire a gun, touch a surface, all you would get is trace level but she did not address and she was not asked what level you would get if you handle the firearm yourself. So something you have to look at to decide". (p.580 line 23 to p.581 line 16)

It is clear that the jury was here being invited to draw a conclusion as to the reason for the findings of the analyst in respect of Dexter Lloyd when the witness himself had not offered any evidence in support of the point. However, the learned judge went on further to say:

> "It would follow, therefore, that her opinion would be that the accused man had fired a firearm. It would seem from her evidence, that the swab would have been taken fairly shortly after that firing of the firearm by the accused man". (p.617 lines 13-18)

17. There is no doubt that it was inaccurate to say that the analyst had concluded "that the accused man had fired a firearm". Mrs. Jackson-Haisley has described that direction as "not entirely accurate". However, it cannot be ignored or down-played as this was the very matter that the jury had been sworn to decide. To have said that the analyst had expressed such an opinion, when she had not, was a very serious mis-statement. When this situation is viewed against the background of the earlier direction which suggested how gunshot residue might have ended up on Dexter's hand, in circumstances where the evidence was to the contrary, the jury's verdict is called into serious question, and on this ground also cannot be allowed to stand.

18. The Court is quite mindful of the circumstances that guide us in deciding whether a new trial is to be held. Bearing in mind the unchallenged facts referred to earlier, we are satisfied that the interests of justice dictate that there be a new trial, and this we order to take place as soon as possible.