NHLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 82 OF 2007

BEFORE: THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A.
THE HON. MRS. JUSTICE MCINTOSH, J.A. (Ag.)

DAVID LYONS
v
REGINA

Mr. L. Jack Hines for the Appellant.

Miss Winsome Pennicooke for the Crown.

May 5 and July 30, 2009

McINTOSH, J.A. (Ag.)

1. On the 29th of May, 2007, David Lyons was convicted by a jury in the Home Circuit Court for the offence of murder, the jury having accepted the Crown's evidence that on the 3rd of February, 2004, in the parish of Saint Catherine, Mr. Lyons had murdered Gerald Scott. He was sentenced on the 30th of May, 2007 to life imprisonment with no possibility of parole until he had served twenty years.

2. Mr. Lyons filed an application for leave to appeal against his conviction and sentence on the 6th of June, 2007 and leave was granted to him, by a single judge of the court, on July 31, 2008. Three grounds of appeal had been filed with his

application but, when his appeal came up for hearing on the 5th of May, 2009, his Attorney sought and was granted leave to argue two supplemental grounds of appeal in lieu of the grounds originally filed. At the end of the day, however, the supplemental grounds did not avail him and, in dismissing his appeal, we promised to provide written reasons for our decision. This we now do.

THE CASE FOR THE CROWN

3. The sole eye witness for the Crown was David Williams, a police officer who testified that on the 3rd of February, 2004, at about 5:30pm, he heard explosions sounding like gun shots as he stood beside his parked motor car, in the Central Village Plaza, talking with Gerald Scott. He then saw Mr. Scott suddenly raise his arms above his head before running off in the direction of Mandela Highway.

4. Corporal Williams said he took cover by his motor vehicle and pulled his firearm. With firearm in hand he raised his head and saw the appellant, dressed in a red T-shirt and a short black jeans pants, firing shots in the direction in which Mr. Scott had run. He had recognized Mr. Lyons as a man he knew for about five (5) years before that date so he shouted to him saying "police Lyons stop". Mr. Lyons then turned, looked in his direction, fired one (1) shot and ran into the Zion Hill community which was located in front of the Central Village Plaza in Central Village, St. Catherine, making good his escape.

5. About three (3) minutes later he was joined by police personnel to whom he made a report and after a brief search of the Zion Hill Community they all proceeded to

the Spanish Town Hospital, arriving there about 5 to 7 minutes after the shooting. At the hospital he saw the dead body of Gerald Scott and observed that the appellant was occupying a bed not far from the one on which Mr. Scott's body lay. He was bleeding and was being attended to by doctors and nurses. Corporal Williams then pointed out the appellant as the man who had just shot at him and at Mr. Scott and he was subsequently arrested and charged for the murder of Gerald Scott and when cautioned said he did not have anything to say – "mi nuh have nuttin fi seh". His hands were swabbed and the crown relied on the results of those tests in proof of its case.

THE CASE FOR THE DEFENCE

6. Mr. Lyons gave evidence on oath and his evidence was put to the test of cross-examination. He testified that he was in front of Zion Hill Lane at a cook-shop where he had gone to buy food and while walking away from the cook-shop he heard the sound of gunshots close behind him. He then ran off towards the Zion Hill community and while running he felt something hit him first in his back and then his knee, causing him to stagger. He became weak, fell and was unconscious until he regained consciousness in the hospital. He did not see Mr. Williams at the hospital but the investigating officer had spoken to him telling him that he had shot up Randy and that he had killed the Don and was going to be charged for it. He then told the officer that he did not know anything about that. In cross-examination he said he knew Randy (understood to refer to Gerald Scott) but not very well and he had seen Mr. Williams in the Zion Hill community on occasions. He had not told the arresting officer how he came to have been shot because the officer had cautioned him telling him that he did

not have to say anything and he never really got the chance to speak about that. He said he had fired no firearm that day and, when asked, he did consent to have his hands swabbed for the presence of gunshot residue.

THE APPEAL

7. The following were the Grounds of Appeal that were argued:

1. The learned trial judge erred in that she failed to direct the jury that in determining the quality and cogency of the identification they should have full regard to special weaknesses in the identification evidence, in particular, highlighting the difficult conditions in which the identification was made and going beyond a mere faithful recital of the evidence to explain the significance of the weaknesses and enlightening them with her wisdom and experience.

2. The learned trial judge erred in that her directions on silence after the appellant received the caution were unclear and confusing.

Ground 1 Analysed

8. The Crown's case depended upon the correctness of the identification of Mr. Lyons as the person who shot and killed Gerald Scott and so Mr. Hines relied on the case of **R v Whylie** (1977) 15 JLR at page 166, as supportive of this ground. In the judgment of the court delivered by Rowe, J.A. (Ag.) as he then was, it was held that:

> "Where, therefore, in a criminal case, the evidence for the prosecution connecting the accused to the crime rests wholly or substantially on the visual identification of one or more

> witnesses and the defence challenges the correctness of that identification, the trial judge should alert the jury to approach the evidence of identification with the utmost caution as there is always the possibility that a single witness or several witnesses might be mistaken. A mistake is no less a mistake if it is made honestly. Although it is the experience of human beings that many honest people are quick to admit their mistakes as soon as they become aware of them, it is also possible that a perfectly honest witness who makes a positive identification might be mistaken and not be aware of his mistake."

9. Further, it was held to be of importance that the trial judge should explain to the jury the significance of the factors for their consideration when assessing the quality of the identification evidence and not merely provide a faithful narration of that evidence.

> "He should explain to the jury the significance of these matters, enlightening with his wisdom and experience what might otherwise be dark and impenetrable".

10. To determine whether there was any merit in the complaint contained in Ground 1, we carefully reviewed the record of the evidence of Corporal Williams and the trial judge's treatment of it in her summation.

The Identification Evidence

(a) In Chief

11. Corporal Williams' evidence of the circumstances under which he was able to identify the appellant was to the following effect:

(a) He had first recognized Mr. Lyons from a distance of about 15 feet. This was a person he had known for about 5 years and whom he would see in the Zion Hill community on a regular basis, at least

twice per month. The last such occasion before February 3, 2004, was some time in early January. He had not interacted with him but would see him standing with other persons while he was driving in the community and he would toot his horn on seeing them, acknowledging them.

(b) On February 3, 2004, he saw the appellant for about ten seconds, during which time he looked at him from his face down to his foot. Mr. Lyons was then firing shots in Gerald Scott's direction and "trodding" to the side. (The word "trodding" was taken to indicate movement)

(c) When the witness first saw him and recognized his face the appellant was almost fully turned toward him and when he shouted "police Lyons stop" the appellant turned fully towards him. At that point he saw his face for about one second. When the appellant ran off he was able to see his right side.

(d) It was still bright sunlight and this enabled him to see the face of the man he recognized as David Lyons.

(e) There were no other persons exactly in the vicinity or in close proximity to where the incident took place.

(f) At the hospital he observed that the appellant was wearing the same clothes he had earlier observed him wearing during the shooting.

(b) In Cross-Examination

12. The witness agreed in cross-examination that he was feeling fearful at the time and that he was partially scared, sufficient to take cover beside his car. He also agreed that he was concerned for the preservation of his life. Further, as he bent beside his car he continued to hear explosions and saw David Lyons with a firearm in his hands, firing shots in Mr. Scott's direction. At one point he was to the front of his car, almost lying down on his belly, when shots were being fired at him.

13. He said the ten (10) seconds he first saw and recognized the appellant included five (5) seconds when the accused was running away. In those ten (10) seconds he had seen when Mr. Lyons came around the car; when he fired in the direction of Mr. Scott and when he turned and looked at him.

14. Corporal Williams conceded that he had not given the name of the appellant to the investigating officer. He also had not told that officer what the accused was wearing before they got to the hospital and he had not recorded these matters in his statement. He disagreed with the suggestion that this omission was because he had not formed the view that it was Mr. Lyons before getting to the hospital. He also disagreed with the suggestion that he had no opportunity to see so as to be able to recognize the shooter because he was afraid for his life and sought cover by his car.

The Trial Judge's Treatment of the Identification Evidence

15. In her summation, the learned trial judge accurately reviewed the identification evidence and gave the jury the appropriate warning. Indeed, there is no complaint about that. Her review was clearly regarded by Counsel as a faithful narration of that evidence. Then at page 255 she said:

> "Remember I spoke to you about identification opportunity, so you picture the scenario and you determine if he had the opportunity to see. He says the man was moving, trodding to the side, ask yourselves would he be able to see this man that he says he knows".

16. Further at page 259 when dealing with the evidence elicited in cross-examination the learned trial judge reminded the jury of the questions asked of the witness about his state of mind – he was frightened and in fear for his life; that he sought cover because he felt that some of the shots being fired could have been aimed at him. Then she continued:

> "Now, these questions are posed to invite you to consider whether this man who says he was fearful and concerned with preservation of his life was in a position to see David Lyons shooting Scott"

She was careful to remind them that he was the sole eyewitness and there was a need for them to be careful when coming to their determination.

17. The trial judge also dealt with the area of the evidence concerning where the witness was positioned during the shooting, whether behind or beside the car and invited the jurors to consider how that affected the witness's credibility. After telling the jurors that it was a matter for them to decide what they believed she went on to invite them to consider whether this affected his ability to see and to identify the accused, pointing out that at the time the witness said he saw and recognized the accused, whatever his position may have been before, vis-a-vis the car, at that time there was nothing between them, nothing to obstruct his view of the accused.

18. Then at pages 268 - 269, she dealt with the evidence concerning omissions from the statement of Corporal Williams when she said:

> "It was put to him that the reason why he never told the officer that the accused man is the man is because he did not form the view at the time. Now what do you make of

> that Mr. Foreman and your members? Is it that he did not give the name of the assailant, or the description of the assailant.....Is it that he didn't really see the man. You have to determine that".

19. She similarly invited them to consider the defence suggestion about the clothing that the accused was wearing at the hospital – whether that formed the basis of the witness's evidence that that was the clothes he was wearing at the time of the shooting.

20. In his submissions Mr. Hines referred to the features of the identification evidence outlined above and pointed in particular to an exchange in the evidence concerning the length of time that the witness said he had to view the face of the assailant:

> Q. So you didn't see his face for very long?
>
> A. It was about maybe a second.
>
> Q. And then you drop down falling behind your car?
>
> A. Correct.
>
> Q. And having done that did you return fire?
>
> A. Sure he ran and I open fire.
>
> Q. At that time when he was running what part of him were you looking at?
>
> A. I was looking at his right side.

21. The submission that followed was that the identification was carried out in ten harrowing seconds in which he feared for his life; saw the face of the accused for one

second while he was on his belly, firing shots and taking evasive action. These, he said, were special weaknesses in the identification evidence in that the conditions were so extremely difficult and there was no more than a fleeting glance of the face.

22. This submission is misconceived. The viewing time of one second referred to by Mr. Hines was in relation only to the time when the assailant had turned fully to face the witness. He had already seen and recognized him for some four to five seconds before that. So this was no fleeting glance. This court has made many a pronouncement on the adequacy of time in cases of recognition when the viewing conditions are favourable as to distance and lighting and where there is no obstruction.

23. In **Jerome Tucker and Linton Thompson v R**, Supreme Court Criminal Appeals No. 77 & 78/95, (a judgment delivered on the 26th of February, 1996), this court held that in a recognition case, the length of time for observation need not be as long as in a case where the assailant was unknown to the witness at the time of the offence. There, periods of eight (8) seconds and six (6) seconds were held to suffice where the assailant was known to the witnesses for four (4) years. One witness had had only a side view of the appellant from a distance of an arm's length away and another witness had a view of the appellant through a split in a door. These were held not to be fleeting glances and indeed Miss Pennicooke in her very brief response relied on this case for her submission that the viewing time given by Corporal Williams was sufficient in all the circumstances.

24. We noted that Mr. Hines' submission took no account of the witness's answer in re-examination that, though fearful for his life, that did not prevent him from seeing the face of the accused clearly. He had a clear view, "just like the courtroom, open view". One should also not lose sight of the fact that this witness is a police officer and may be taken even in difficult or harrowing circumstances to keep his wits about him so to speak and to focus on the assailant where the conditions make that possible.

25. We were of the view that there was no merit in this complaint. We considered that the learned trial judge fulfilled her duty to the jury in the approach that she took and that although she did not expressly state that the areas highlighted were weaknesses, in bringing their minds to them, she was in effect telling the jurors that these areas required careful consideration. She made it clear, in our view, that they should consider these matters in terms of whether or not they believed the evidence of the witness and whether in all the circumstances they were satisfied that Corporal Williams was in a position to correctly make that identification. Her directions to the jury on the identification evidence were adequate and fair. It is without doubt that the evidence satisfied the jury that the appellant was correctly identified as the shooter in that incident which resulted in the death of Gerald Scott.

26. But, even if the strength of the identification evidence was not beyond challenge, there was an added feature to the Crown's case, provided by the results of the swabbing test done on the hands of the appellant. As stated by Lord Widgery, C.J. in **R v Turnbull** (1976) 3 All E.R. 543:

> "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 situation is very different. 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". [Emphasis ours]

27. It is certainly beyond dispute that the principles enunciated in **Turnbull** have long formed the driving force, in this jurisdiction, behind the approach taken in cases involving visual identification. Following those principles, the Crown placed reliance on the expert evidence of Miss Marcia Dunbar, a forensic analyst, as providing support for the identification evidence.

28. Mr. Hines argued that this forensic evidence, involving tests for gun shot residue, (GSR), did not carry with it the cogency or certainty of DNA evidence. "It is not of the quality of evidence such as DNA" he argued and there was an inference that the integrity of the forensic evidence may have been impugned because the evidence disclosed that the incident took place at about 5:30 pm on the 3rd of February, 2004 and the swabbing was not done until about 11:30 am on the following day.

29. Miss Dunbar's conclusions had not been tested, he further submitted and, the evidence to the effect that she found elevated and trace levels of GSR on the samples allegedly taken from the hands of the accused, ought not to be considered as supportive of the identification of the appellant as the person involved in the shooting. That issue should be resolved in favour of the arguments advanced on the weakness of that evidence.

30. However, the very premise upon which that submission was based heralded its failure. There was no challenge to Miss Dunbar's evidence at trial. Nary a suggestion was made to her that her findings were inaccurate or unreliable. The jury therefore had full recourse to that evidence presented for their consideration as something from which they were able to find support for the identification of the accused, once they accepted it as true.

31. At the end of the day, Mr. Hines conceded that unless there was authority which could show that forensic evidence of GSR was of no value in determining guilt it was the major supporting evidence in this case for the Crown's evidence of visual identification.

32. We know of no such authority and found the complaint contained in Ground 1 to be unsustainable.

GROUND 2

33. Apart from referring the court to pages 299 – 300 of the record Mr. Hines did not really pursue this ground. We are entirely satisfied that in her review of the case for the defence the trial judge dealt with the matter in terms which the jurors could not fail to understand. She invited them to consider what the accused man himself had said when asked by the Crown, in cross-examination, why he did not tell the police that he had heard the sounds of gunshots, close behind him, at a place where he was innocently buying some food and that he was shot by a person he did not know while he was running away from the spot. He said that the arresting officer had cautioned

him telling him that he did not have to say anything and, although when first accosted he had spoken, saying words to the effect that he knew nothing about the shooting, the officer had not given him much chance to speak of how he got shot.

34. The trial judge was at pains to tell the jury that in the caution the accused was told that he had the right to be quiet and that he said he was heeding that caution. At the pages to which Mr. Hines referred us, the trial judge dealt with the matter in this way:

> "Now Mr. Foreman and your members you may well ask yourself why would the caution stop him from speaking about the circumstance of him being shot. Why did it cause[d] him not to explain? Well the officer cautioned gave him the right to be quiet. So Mr. Lyons is heeding that warning. He has been cautioned and he says okay, well I will shut up. The officer tells me I can be quiet and that if I talk it can be used against me so well, let me be quiet".

Then further,

> "If you tell a person you have the right to be quiet you can't turn around and say you are quiet so it means something. At the same time you have to look at your own experience or wisdom. Is this man heeding his right? ... He says he told the officer that he knew nothing of Randy's shooting before he cautioned him ... he has told us because of the caution he does not say anything".

At page 301 she posed the question as to why he spoke at all and said

> "Well, he tells us why. He spoke because up to that time the officer had not cautioned him. So, if you believe him it means that he did not know that he could just shut up."

In our view there was no valid cause for the complaint in ground 2 and it too failed.

35. Based on the considerations above, we dismissed the appeal and affirmed his conviction and sentence. The period after which he will become eligible for parole is to commence on August 30, 2007.