JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 199/2006

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

ANDRE MANNING v REGINA

Everton Bird for the Appellant

Mrs. Caroline Hay and Loxly Ricketts for the Crown

16th, 18th, 19th June, 31st July and 16th October, 2009

COOKE, J.A.

1. On the 31st July 2009, we announced our decision in this appeal. It was that the appellant's appeal against conviction for murder was allowed. We quashed the conviction, set aside the sentence and entered judgment and verdict of acquittal. We undertook to put our reasons in writing, which we now do.

2. The sole issue in this case pertains to the quality of the visual identification evidence adduced by the prosecution to connect the appellant with the murder of Aubrey White. Specifically, we determined that the case should have been withdrawn from the jury.

3. The case for the prosecution was that he, the appellant, shot and killed the deceased. The prosecution relied essentially on the evidence of the purported eye witness Andrew Powell. The scene was at 24 Old Harbour Road in St. Catherine. This address comprised a partially open lot. On this lot there appears to be a number of houses, some of which were fenced in. On the 25th April 2004 there was a "session" to be held on this lot. The "session" was the enterprise of the deceased. At about 5 p.m. on that day "the sound man was stringing the sounds." The deceased was at a box-shaped bar which had apparently been constructed for the "session". The bar counter would have reached the waist of the deceased as he stood by the bar. Powell was standing before the fenced-in home of the deceased. He was approximately 52 feet to the left of the bar as one looks from the entrance to 24 Old Harbour Road. In respect of where the deceased was standing in relation to the position of Powell, that should have been on the farside of the bar.

4. As Powell tells it, he was in conversation with two other persons when he saw the deceased put a phone to his right ear and was talking. Then he saw the appellant behind the deceased. Powell did not see where the appellant came from. He "si him (appellant) pull a gun from his waist and put it at Mr. Aubrey White head and buss it ... After which I si Aubrey White spin round and drop and said time Andrew Powell (appellant) run off and said time mi run off." He heard series of explosions.

5. In the earlier part of his evidence Powell stated unequivocally that at the time of the shooting the appellant was approximately 3 ft behind and to the right of the deceased. Later by demonstration it would appear that the appellant was to the left of the deceased. When asked to explain this inconsistency in his evidence Powell said:

> "I just use anywhere. You said demonstrate it anywhere" (lines 14 – 15 page 40 of transcript).

At the time of the shooting the firearm was about an inch or more than an inch from the head of the deceased. So the firearm was very close to the head of the deceased at the time of the shooting.

6. Powell testified that he knew the appellant for some ten years and had grown up same place in Old Harbour Road. He was accustomed to seeing him about once per month. On that day the appellant wore a peak hat so Powell could only see from the appellant's eyebrow to his waist. He saw him for 15 seconds.

7. During the cross-examination of Powell, Counsel for the appellant at the trial raised material inconsistencies as regards the evidence of Powell. The most significant was that neither in his statement to the police on the date of the murder nor in his deposition at the preliminary inquiry did the witness say that he saw the appellant shoot the deceased. The tenor of his statement and deposition was that he saw when the appellant pointed the gun "in our direction" just before he heard loud explosions.

8. Audrey Walters who is the sister of the deceased lived on the lot at 24 Old Harbour Road. She was in her house. On hearing an explosion, she went outside. She saw, she said, the appellant, one "Coolie Man" and Clayton. They had firearms and were running and firing wildly. She knew the appellant for about a year and would see him "once a week, once a month". She saw him from a distance of 8 ft. However, as the learned trial judge said at lines 5 – 7 on page 85 of the transcript: -

> "If she (Audrey Walters) can identify the person is neither here nor there, it is not a case of joint enterprise".

9. The consultant forensic pathologist in this case was Dr. Ere Sheshiah. He did the post mortem examination of the body of the deceased on the 29th August 2004. There were two gunshot wounds present on the body. Number one was an entrance gunshot wound present on the left side of the face 19 centimetres below the top of the head; and number two an entrance gunshot wound present on the left anterior thigh 16 centimetres above the knee joint. In the opinion of Dr. Sheshiah both wounds were fatal. Neither wound had any gun powder markings. The significance of the absence of gunpowder markings is that at the time of the infliction of those wounds the muzzle of the gun was more than two feet away from the victim.

10. The pathologist's evidence and his opinion as to the absence of gunpowder is to be regarded as expert evidence. It was evidence

adduced by the prosecution. There was no other evidentiary material to cast the slightest doubt on his findings or the authenticity of his opinion. It is therefore clear that the evidence of Dr. Sheshiah undermines Powell's account of the shooting. In his evidence Powell was adamant that the appellant placed the gun very close to the deceased head. If this was so there would have been gun powder markings. Of course, the entry wound being to the left side of the face is not in harmony with the original stance of Powell that the appellant was to the right of the deceased when the wound to the head was inflicted. The entry wound was to the left side of the face.

11. In **Daley (Wilbert) v. R** (1993) 43 W.I.R 325 at p 334 letters g – h, Lord Mustill in delivering the advice of Their Lordships' Board said that a case should be withdrawn from the jury:

> "because the evidence ... has a base which is so slender that it is unreliable and therefore not sufficient to found a conviction."

In the circumstances of this case the pathologist's evidence flatly contradicts the narrative of the sole eyewitness, Powell. Further, the inconsistencies raised by defence counsel at the trial were quite material. Accordingly, the evidential base fashioned by the prosecution would appear to be less than "slender". We held that the learned trial judge should have acceded to the no case submission. We were of the view that the evidence of visual identification given by Powell was decidedly unreliable. Thus, we came to the conclusion which has already been stated.