

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 82/2015

**BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE McDONALD-BISHOP JA
THE HON MR JUSTICE P WILLIAMS JA**

RICARDO MEDLEY v R

Cecil J Mitchell for the appellant

Mrs Tracey-Ann Robinson and Miss Alice-Ann Gabbidon for the Crown

24 September 2019

MCDONALD-BISHOP JA

[1] On 9 October 2015, the appellant Ricardo Medley ("Mr Medley") was convicted in the Home Circuit Court for the murder of Richard Facey ("the deceased"), following a trial before D Fraser J, sitting with a jury. On 29 October 2015, he was sentenced to life imprisonment at hard labour, with the stipulation that he should serve a minimum period of 25 years before being eligible for parole.

[2] Mr Medley applied for leave to appeal his conviction and sentence before a single judge of this court. The application was based on four grounds of appeal, which in broad outline were: misidentification by the witnesses; unfair trial; lack of evidence;

and personal vendetta. Leave to appeal was granted by a single judge of appeal although her reasons for so doing were not stated.

The case at trial

The prosecution's case

[3] At trial, the prosecution relied on the evidence of five witnesses. However, the sole eyewitness to fact, and whose evidence, primarily, is the subject matter of the challenge on this appeal, was the uncle of Mr Medley, Mr Michael Miller ("Mr Miller"). Mr Miller's evidence constituted the core of the prosecution's case implicating Mr Medley. His evidence is summarised as follows.

[4] On 8 February 2012, between 6:00 am and 7:00 am, he was at his home at Payne Avenue in the parish of Saint Andrew watering his banana and plantain trees. Whilst there seated and smoking, he heard the breaking of twigs in the bushes and what sounded to him like footsteps coming in his direction. He also heard voices of persons coming from his right. He then saw three persons one of whom was Mr Medley. Mr Medley, he said, was an arm's length away but the other two men were moving away from him and were further away. He observed Mr Medley with a gun in his right hand. He described the gun as having a chrome outer skin, short and barrel-looking. All three men went over a wall, where a house belonging to a man he called "Zigzag" was located.

[5] He waited a few seconds before climbing on some metal cubes in his yard so he could see over the wall. The section of the wall where he stood was six feet. He

concealed himself behind vegetation which did not prevent him from seeing because, according to him, if a leaf was there, he would move it. At first he did not see anything but after a few seconds, he heard the sound of the gate to the deceased yard opening. The deceased was also known as "Blacks" and his house was across from Zigzag's house.

[6] Blacks was standing at his gate with a stick, a rake or a broom in his hand. He could not see below Blacks' knee due to a sheet of zinc which formed the fence and so he was unable to say whether Blacks had a broom or a rake. Blacks was, however, moving his hand back and forth like he was raking or sweeping. When Blacks' gate opened, Mr Medley came out and it appeared as if they were both speaking because their lips were moving. This was for 15 seconds (but could be more). He then saw Mr Medley stand next to Blacks and put his hand up with the gun. He then heard a small explosion and he saw the deceased fell forward.

[7] After seeing this, he went back to where he was sitting. He then saw Mr Medley coming over the wall from a different section from where he had initially entered Zigzag's yard. Mr Medley then crouched under a mango tree and looked in the direction of Payne Avenue. He went up to Mr Medley and enquired of him, why it was that he was walking up and down with a gun in the day with police around. Mr Medley replied, "them shot Skully and a man a go dead fi it".

[8] Mr Miller then went to his house and called his brother who worked with him. He went into his truck and drove out. On exiting his premises, going down Payne Avenue and onto Spanish Town Road, he observed yellow tape at Blacks' yard.

[9] Mr Miller gave no statement to the police about what transpired until about 14 months' later because, according to him, he was called an informer by Mr Medley and his life was being threatened. At the time of the shooting incident, however, he and Mr Medley had no problems but after the incident problems developed because Mr Medley accused him of telling people that he (Mr Medley) had shot someone.

[10] Corporal Anieffe Wilson, a police witness called by the prosecution, testified that at around 7:20 am he was at a crime scene on Payne Avenue when he heard explosions sounding like gunshots coming from Payne Avenue, closer to Spanish Town Road. He looked in the direction of the explosions and he observed persons running. He went to the location and on his arrival he observed the body of a male (which was later identified to be that of the deceased) lying face down on a trail at a gate to one of the houses or premises on the dirt track. The deceased had a broom and a rake in his hands.

[11] On 14 February 2012, a post mortem examination was conducted by consultant forensic pathologist, Dr Prasad Kadiyala, on the body of the deceased. The cause of death was found to be haemorrhage and shock and laceration to the brain due to a gunshot wound to the head, involving the neck.

Mr Medley's case

[12] Mr Medley gave sworn evidence denying his involvement in the murder. He advanced a two-pronged defence. The first prong of his defence was one of alibi. He stated that at the time of the commission of the offence, he was at his girlfriend's house in Trench Town in the parish of Kingston and that it was whilst there that he heard that the deceased was killed. He did not see Mr Miller on that day.

[13] The second limb of his defence was the lack of credibility of the eyewitness, in that, Mr Miller gave false and malicious evidence against him due to what he described as a personal vendetta. Mr Miller had falsified his evidence against him for two reasons. Firstly, he had been involved in a case against Mr Miller in the Kingston and St Andrew Parish Court arising from a report he had made that Mr Miller had chopped and injured him. Secondly, Mr Miller and his mother had an ongoing dispute over a house and the intention of Mr Miller was to get him out of that house.

The grounds of appeal

[14] At the hearing of the appeal, leave was granted to Mr Mitchell, counsel appearing on behalf of Mr Medley, to abandon the original grounds of appeal that were filed and to argue four supplemental grounds.

[15] They were stated as follows:

"(1) That the verdict of the jury was unreasonable having regard to the evidence.

(2) That the verdict of the jury could not be supported by the evidence.

- (a) That the eyewitness was adamant that he saw the Applicant shot the deceased to the right side of the head. However, the evidence of the Doctor who performed the post mortem examination was equally adamant that at the point of entry of the projectile the muzzle of the gun could not be on the right side of the body. That the point of entry of the projectile was to the left side of the head- vide page 166 of the transcript.
- (b) That the evidence of the eyewitness was that at the time the deceased was shot the firearm was about one foot from the head of the deceased. However, the evidence of the Doctor was that there was no gun powder residue on the body of the deceased hence the firearm must have been discharged from a distance of more than two feet from the body. Vide page 167 of the transcript.
- (c) That the evidence before the Court was that although the eyewitness described how he had seen the Applicant carry out the wanton act of murder the eyewitness did not report the incident to the Police or told anyone about this vicious act until fourteen (14) months after the incident. The eyewitness attempted to explain his failure for making the report for a period of fourteen (14) months after the incident. The eyewitness offered the explanation that the Applicant was a family member and that after the incident the Applicant was calling up his the eyewitness's [sic] name as an informer and that the Applicant was telling people that he the eyewitness had shot somebody in relation to the incident.

However, the evidence before the Court was that the eyewitness took fourteen (14) months to make the report against the Applicant. Further, the uncontradicted evidence before the Court was that the eyewitness made the report inculcating the Applicant in the murder only after the eyewitness had been locked up

by the Police for chopping the Applicant and for chopping the mother of the Applicant and after the eyewitness had been charged for the chopping injury of the Applicant and his mother. it is submitted that the eyewitness also used the report against the Applicant to get the case against the eyewitness dismissed.

(d) That there was evidence before the Court that the eyewitness had been attempting to exert control over the family house and land which was occupied by the eyewitness, the Applicant, the mother of the Applicant and other family members. That evidence also shows that in November 2012 the eyewitness chopped and injured the Applicant, chopped and injured the mother of the Applicant. That the eyewitness was arrested and charged for the injury to the Applicant and for the injury to the Applicant's mother. That the eyewitness got bail in February, 2013 and that it is sometime after the eyewitness got bail in February 2013 that the eyewitness made a report against the Applicant thereby implicating the Applicant in the murder of the deceased.

(e) That the Applicant was of previous character.

(3) That the Learned Trial Judge in directing the jury as to the Defence put forward or available to the Applicant failed to mention or highlight an important and vital portion of the Applicant's Defence to the jury.

(a) That although the Learned Trial Judge had at pages 373 to 374 of the transcript alluded to the Defence of the Applicant and to the matters related to the Applicant's Defence. The Learned Trial Judge dealt specifically and purposefully with the Defence of the Applicant at page 391 of the transcript. That in his summation to the jury the Learned Trial Judge left the Defence of the Applicant in the following words 'The Defence is one of Alibi'. No further directions were given to the jury as

to the matter of malice or evil motives on the part of the eyewitness.

It is submitted that the Learned Trial Judge erred in not dealing with the matter of malice or evil motives of the eyewitness and instructing the jury as to how the matter of malice should have been viewed by the jury.

(4) That the sentence was manifestly excessive."

[16] From these grounds of appeal, three core issues have been extracted for consideration by this court; they are:

- i) whether the verdict of the jury was unreasonable and could not be supported by the evidence (grounds one and two);
- ii) whether the learned trial judge failed to give the jury adequate directions in law on how to treat with Mr Medley's defence of alibi (ground three); and
- iii) whether the learned trial judge erred by failing to apply the relevant principles of law in arriving at the appropriate sentence, thereby rendering the sentence manifestly excessive (ground four).

Issue 1

Whether the verdict of the jury was unreasonable and could not be supported by the evidence (grounds one and two)

[17] Mr Mitchell contended on behalf of Mr Medley that the cumulative effect of some of the evidence led at trial, was such that, the verdict of the jury was unreasonable and ought to be overturned. The pertinent evidence as outlined by counsel, are as follows:

- a) The discrepancy between the evidence of Mr Miller and the pathologist as to which side of the deceased's head the gun had been fired as well as how far the muzzle of the gun would have been from the head of deceased at the time of the shooting.
- b) Mr Miller's failure to report the incident to the police until 14 months after the incident.
- c) The conflict between Mr Medley and Mr Miller concerning the house. Mr Medley contended that Mr Miller had wanted to exert control over a house which had been occupied by himself, his mother and other family members at the time of the shooting.
- d) Mr Miller had made the report inculcating him in the murder of the deceased only after he had been locked up for having inflicted a wound on Mr Medley and his mother. Mr Miller had been charged in relation to the incident and had used the report to have the case against him dismissed.

e) the evidence of Mr Medley's previous good character.

[18] Counsel for the Crown, Mrs Robinson, contended that these grounds must fail as there had been sufficient evidence from which a finding adverse to Mr Medley could have been arrived at by the jury who were the tribunal of fact upon proper directions from the learned trial judge. The issue in the case, she contended, was one of credibility and the jury was guided by the balanced summation from the learned trial judge on all the matters complained of.

[19] Mrs Robinson also noted that the learned trial judge highlighted the discrepancies and inconsistencies complained of and directed the jury, as he was required to do, that it was ultimately a matter for them as to how to treat with assessing the credibility and reliability of the evidence of the eyewitness and the doctor. The learned trial judge, she said, also highlighted for the jury that they were required to determine whether any discrepancies in the evidence was of material significance.

Discussion

[20] The matters raised by Mr Mitchell were all matters for the consideration of the jury, having been properly directed in law by the learned trial judge. There was no misdirection from the learned trial judge on how to treat with those matters. There is also nothing in the verdict that can be said to be impeachable in the light of the evidence highlighted by Mr Mitchell. We have arrived at this conclusion for these reasons:

a. *Inconsistencies and discrepancies*

[21] In so far as is relevant, the learned trial judge directed the jury in terms that satisfy us that he had carried out his duty in bringing to their attention the contradictions in the testimony of the witnesses and how to treat with them, when he said:

"So there is the issue of credibility which you will have to determine... So, you have to ask yourself these questions, and this is just a suggestion as to how you might go about determining the issue of credibility. How did Mr. Miller strike you when he gave his evidence from the witness box? Did you find him to be forthright or shifty, believable or unbelievable? Did his evidence have what is sometimes called the ring of truth? What did you make of how he engaged with counsel for the Defence when he got heated? Did you think he was speaking the truth and was being frustrated by some of the questions he was being asked, or was it as the Defence is saying, that the weight of his lies caused him to lose his cool? These are the kind of considerations you should have in mind as you assess his evidence...you should assess all the witnesses for the Prosecution, but I just highlighted Mr. Miller as the main prosecution witness."

The learned trial judge then went on to say:

"It is entirely a matter for you what you make of the evidence of the Prosecution's witnesses, and of the accused in this case, but it is one of your primary functions to assess the witnesses and to determine what evidence you accept and what you reject."

[22] In turning to the evidence, the learned trial judge helpfully reviewed several paramount inconsistencies and discrepancies, which arose during the course of the trial. In treating with the discrepancy between the evidence of the pathologist and Mr Miller complained of, he had this to say:

"...Mr. Miller said the accused man was to the right of the deceased, the right of Blacks and that he shot Blacks to the right side of his head...

Now, the doctor, when he gave evidence, spoke to seeing the wound to [the] left side of the head. Now, as you consider this evidence, you need to remember the evidence of the doctor that the shooter could have been to the front, behind, or to the left of the deceased.

You should also recall the question that was asked of the doctor by counsel for the Defence. He asked the doctor if he could rule out completely that the muzzle of the gun could not be pointed from the right of the deceased. And this was his answer: He says, "I am talking in relation to the head of the person, sir, to the point of entry. I am not talking to the body, I am talking to the point of entry, the muzzle of the gun cannot be on the right side.

Now, you have to determine if you find this material of significance. Is it that, as counsel for the Prosecution is saying, that the witness might have been making a mistake as to the right or left or do you find that the discrepancy between what the witness said and what the doctor says, affects your belief to accept the witness as a witness of truth who was accurate? That is a matter for you."

[23] The learned trial judge having directed the jury in these terms, it was open to the jury to find that despite the contradictions in the evidence, Mr Miller was, nevertheless, speaking the truth when he recounted that he had observed the accused shot the deceased to the head but may have been mistaken or inaccurate when he stated it was to the right side of the head. They could have also accepted the doctor's evidence that the shooter could have been standing to the front, behind, or to the left of the deceased at the time of the shooting. The conflicts in the evidence were for the jury to reconcile and it cannot be said that the conflicts were not capable of being reconciled.

[24] The duty of a trial judge is to point out some of the major inconsistencies that may have arisen on the evidence, give proper directions of the manner of identifying such inconsistencies and further, advise the jury to decide whether they are slight or serious, material or immaterial, and the way in which they should be treated. Upon a close review of the guidance that was given by the learned trial judge, it cannot be said that he failed in this regard.

[25] The learned trial judge could not therefore be faulted in the directions given to the jury as to how to treat with the inconsistencies and discrepancies which arose on the evidence presented by the prosecution.

b. Malice

[26] As it relates to the complaint of malice, the learned trial judge made it very clear to the jury, from the outset, that one of the main issues in the case was one of malice. This was highlighted at page 331 of the transcript where the learned trial judge stated that the matters raised by the defence as affecting the credibility of the witness was that he, "...[was] alleging there is malice afoot".

[27] In directing the jury as to the evidence of the eyewitness and the explanation which had been offered by him, the learned trial judge stated:

"I must also caution you as to the limited way in which you can use the explanation the witness, Miller, gave for why he eventually decided to give a written statement some fourteen months later. He said he was being called an informer by the accused, and he felt his life was being threatened now. The only value of that statement, if you believe it, is for you to consider whether or not you accept

that as a valid explanation for why Mr. Miller is saying he never gave a statement earlier. You should not, in any way, use that statement to prejudiced the accused man. There is no indication that the accused man in any way threatened the witness, or had anything to do with the witness' feeling, if you find that he did have that feeling. I therefore direct you in the strongest possible terms, that you should draw no adverse inference against the accused because of those statements of the witness."

[28] He then said:

"You should also consider specifically if there are any weaknesses in the evidence, any factors that might affect the quality of the evidence in this regard. You should bear in mind that he took 14 months to come forward to say that he saw the accused commit the offence."

[29] The learned trial judge brought to the jury's attention the fact that Mr Miller had come forward to say that the accused was responsible for the death of the deceased 14 months after the incident. He also highlighted the reasons that had been offered by Mr Miller for his delay and directed the jury to draw no adverse inference against Mr Medley because of it. This was juxtaposed against Mr Medley's contention that the evidence had been given by Miller because he had been locked up for having injured him and his mother and he had wanted that case dismissed. The learned trial judge reminded the jury that Mr Medley had also put forward that Mr Miller's evidence was malicious as he wanted the property on which they all used to live on Payne Avenue for himself or for others connected to him and to dispossess Mr Medley, his mother and other relatives.

[30] The learned trial judge did not fail to direct the jury's attention to the heart of the defence, which was that Mr Miller was motivated by malice in giving incriminating evidence against Mr Medley. The complaint is unjustified.

c. Mr Medley's good character

[31] Our analysis of the arguments proffered by Mr Mitchell, with respect to Mr Medley's previous good character, is that when weighed against the evidence, it gives further credence to his contention that the verdict was not supported by the evidence.

[32] The learned trial judge's treatment of the evidence of Mr Medley's previous good character also cannot be faulted. Adequate and accurate directions were given to the jury as to how to treat with Mr Medley's previous good character. This was highlighted by him, for the benefit of the jury, in the following terms:

"Now, you have heard from the accused that he had never been convicted of any offence. That evidence establishes that the accused is a man of previously unblemished good character. Of course, good character by itself cannot provide a defence to a criminal charge, but it is evidence which you should take into account in his favour in the following two ways.

In the first case, the accused has given evidence and as with any man of good character it supports his credibility. This means it is a factor which you should take into account when deciding whether you believe his evidence.

In the second case, the fact that he is of good character means that he is less likely than otherwise being the case to have committed the offence for which he has been charged. These are matters from which you should have regard in the accused man's favour. It is for you to decide what weight you should give to the evidence in the case. Having regard to the fact he has never been convicted of any offence. You

must say that he was entitled to ask you to give considerable weight to his character when deciding whether the prosecution has satisfied you of his guilt.”

The jury was made aware of Mr Medley's previous good character and how to treat with it in coming to their decision as to his guilt.

Conclusion on issue 1

[33] It cannot be concluded that the verdict, when considered against the weight of the evidence, including that of Mr Medley's good character, is unreasonable and insupportable.

[34] The case of **R v Joseph Lao** (1973) 12 JLR 1238 sets out the principle governing what is to be demonstrated by an appellant when contending that the verdict of a jury, when weighed against the evidence, is unreasonable and insupportable. The court stated:

“Where an appellant complains that the verdict of the jury convicting him of the offence charged is against the weight of the evidence it is not sufficient for him to establish that if the evidence for the prosecution and the defence, or the matters which tell for and against him are carefully and minutely examined and set out one against the other, it may be said that there is some balance in his favour. He must show that the verdict is so against the weight of the evidence as to be unreasonable and insupportable.”

[35] Nowhere can it be said that the jury, in arriving at the conclusion that Mr Medley was guilty, was obviously and palpably wrong.

[36] For these reasons, we find that grounds one and two cannot succeed.

Issue 2

Whether the learned trial judge failed to give the jury adequate directions in law on how to treat with Mr Medley's defence of alibi (ground three)

[37] We have previously noted that we considered what the learned trial judge had said in relation to Mr Medley's arguments concerning malice and evil motives. In relation to the defence of alibi, the learned trial judge was sensitive to the case for the prosecution as well as the case for the defence.

[38] The learned trial judge gave the requisite visual identification warning laid down in **R v Turnbull and another** [1976] 3 All ER 549, in the light of Mr Medley's defence, and notwithstanding that it was the credibility of the eyewitness that was being challenged with no suggestion that he had been mistaken. Mr Medley's defence of alibi was clearly rejected by the jury, after clear and accurate directions in law were given to them.

[39] The learned trial judge's direction, in relation to this, was in the following terms:

"Now, it is the prosecution that has to prove his guilt beyond a reasonable doubt, he doesn't have to prove that he was elsewhere at the time. On the contrary, the prosecution must disprove the alibi. Even if you were to conclude that the alibi is false, that does not of itself entitle you to convict the accused, the prosecution must still satisfy you that you feel sure of his guilt.

You should bear in mind that an alibi is sometimes invented to bolster a genuine defence. The prosecution will only succeed in disproving the alibi if you find, you are sure that he was on the scene of the crime as the witness Michael Miller said he was and that he shot and killed the deceased Richard Facey, also called Blacks."

[40] Having instructed the jury on the law in relation to alibi, the learned trial judge then directed them on how to treat with the evidence of Mr Miller in the light of that warning, in this way:

“...[P]lease bear in mind the law that you must apply in this case, as well as the review of the evidence I conducted, always bearing in mind that you have to accept the law from me, but that the facts are yours alone to decide. In seeking to arrive at your verdict, first consider the defence case, that the accused Ricardo Medley, is relying on a defence of alibi. He is saying he never committed any murder. He was at his girlfriend's house at the time of the incident and he only heard about this incident. If you believe his case, or if this gives you any reasonable doubt, so that you cannot be sure whether or not he was on the scene doing what Michael Miller alleged he was doing, he is entitled to be acquitted. Even if you reject it, you cannot convict him on that rejection, you then have to return to the prosecution's case to see if you are satisfied so that you feel sure in respect of each ingredient that the prosecution has to prove.”

[41] Mr Medley's defence was thoroughly addressed by the learned trial judge within the context of the burden and standard of proof. He put Mr Medley's defence fairly and adequately before the jury for consideration. He repeatedly reminded them of the case for Mr Medley, which had raised credibility as the pivotal issue to be resolved. The matter of malice or evil motive was placed at the centre of the issue of credibility. Nothing more in law was required of the learned trial judge.

[42] There is no merit in this argument that the learned trial judge had failed to give the jury adequate directions in law on how to treat with Mr Medley's defence.

[43] Ground of appeal three also fails.

[44] There is no basis in law for this court to disturb the jury's verdict of guilty. The appeal against conviction is therefore dismissed.

Issue 3

Whether the learned trial judge erred by failing to apply the relevant principles of law in arriving at the appropriate sentence, thereby rendering the sentence manifestly excessive (ground four)

[45] The court has examined the learned trial judge's reasoning with respect to sentence and it accepts that he did not follow the required formula in arriving at the sentence he imposed. He, for example, failed to identify a sentencing range and a starting point for the assistance of the court. He, however, noted relevant aggravating and mitigating features and, having balanced those features, arrived at the sentence he did.

[46] Mr Mitchell, before us, candidly accepted that the sentence falls within the range of sentences for an offence of this nature and so there is nothing he could urge to convince the court that the sentence should be disturbed. We accept his forthrightness and commend him for it.

[47] This is a case, which involved the use of a gun in broad daylight, to commit a murder, which is an offence highly prevalent in our society today. Mr Medley violated the sanctity of the home of the deceased who was, at the time, in his yard performing basic domestic chores. All he had in his hand would have been a broom or a rake. He was a helpless victim who was shot in the head at relatively close range in an attack, which was clearly premeditated.

[48] The learned trial judge's sentence of life imprisonment with the stipulation of 25 years before eligibility for parole cannot be said to be manifestly excessive in all the circumstances of the case.

[49] The appeal against sentence is also dismissed.

Order

[50] The appeal is dismissed and the conviction and sentence are affirmed. The sentence is to be reckoned as having commenced on 29 October 2015.