JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS: 84,85,86,87, 88/96

BEFORE: **THE HON MR JUSTICE FORTE, J A**
THE HON MR JUSTICE GORDON, J A
THE HON MR JUSTICE HARRISON, J A

R v Clifton Shaw
Titus Henry
Morris Boreland
Donovan Mullings
Junior Wright

Lord Gifford Q C and Hugh Wilson for Boreland, Mullings & Wright

Delano Harrison for Clifton Shaw and Titus Henry

Hugh Wildman & Miss Marva McDonald for the Crown

19th 20th & 21st May & 31st July 1997

GORDON, J A

On 27th June, 1996 the applicants were convicted on an indictment containing three counts charging each for the murder of Winston Bowers, Nikeisha Samuels and Christopher Grey on 15th May, 1993. Being capital murder each was sentenced to suffer death in the manner authorised by law.

The evidence against the appellants Titus Henry, Morris Boreland, Donovan Mullings and Junior Wright was given mainly by the sole eye witness Nicola Bowers the sister of Nikeisha Samuels and Christopher Grey and the daughter of Winston Bowers. At the time of the incident she was thirteen years old, when she testified she was sixteen years old. She identified the appellants including Clifton Shaw at the scene of

the murder. Against Shaw, in addition to the evidence of Nicola Bowers, there was a cautioned statement given by him to the police and an oral statement allegedly made by him to Inspector Ivanhoe Thompson "I was there but me never shoot anybody."

Nicola Bowers testified that at about 8:30 on the night of the 15th May, 1993 she was at her home at 82 1/2 Spanish Town Road in Kingston having dinner and watching television. In the room with her, were her father Winston Bowers, her sister Nikeisha Samuels, her brother Christopher Grey, Taneisha Bowers, her father's best friend, Neville Johnson and his daughter Keneisha Johnson. She heard the dog barking and she looked through a hole in the door and saw a group of men enter her yard. Nikeisha Samuels, Tanisha Bowers, Christopher Grey, Keneisha Johnson and the witness Nicola Bowers rushed to take cover under the bed in the room. Nicola was outermost and behind her was her brother Christopher Grey. She said the men began to strike the door and said "open up! open up! Police." The men finally broke off the bottom section of the door leaving the upper part intact and in position. Through the opening thus created, the men entered the room; there were five men, four were armed with guns and one had a knife. She saw and recognized all five men as persons she knew in the area. Shaw was the intruder armed with the knife. When they rushed under the bed, the electric light bulb in the roof of the room was on the television was also turned on and by this light she was able to see the intruders. Someone ordered "Throw over the bed, Throw over the bed." This was done and the men began firing shots at the persons hiding under the bed saying "all who fi dead, dead."

The appellant Shaw, said to Christopher Grey who lay beside the witness, "Blacka, I going to cut your throat." Grey responded, "Shoot mi but no cut mi throat." Shaw then proceeded to cut Christopher Grey's throat with the knife he had. She heard a "goggling" sound coming from Grey . She was awash with his blood. At times

the witness said she had her eyes half open, at times fully opened, at other times closed. She said "mi lie down like me did dead". She heard someone say "Shoot dah gal deh! shoot dah gal deh! she a informer." Someone then shot her sister Nikeisha in her head. She saw but cannot remember who did it. Her sister was beside her brother. The men turned her over checking to see if she was dead "but" she said, "Through mi did full up a blood and mi stop my breath, they just took away the video." When she was turned over and checked she closed her eyes "because may be if they knew that I was alive, may be they would do the same thing they did to my brother and sister."

The witness gave evidence of how long she knew the appellants. She saw them frequently in the area where she lived. She passed them either on her way to the shop or to fetch water. She knew the nick names or aliases by which they were known. She also gave the home address of Boreland, Wright, and Henry. The incident she said lasted twenty or more minutes. When the men left, her brother and sister were dead. She did not see her father, and Neville Johnson was suffering from gun shot injuries, and on Johnson's instructions she sought refuge in his house. She was extensively cross-examined. She said the light in the roof was not turned off by any occupant of the room but her evidence in cross-examination suggests that at one time the light was off. She was positive in her identification of the appellants.

The medical evidence disclosed 16 year old Nikeisha Samuels sustained an entry gunshot wound at the back of her head. The bullet travelled through the brain and was recovered on the right side of the forehead. Death was due to this gunshot wound to the head . Winston Bowers died from a gunshot wound to the chest. The bullet entered the right back, went through the chest cavity perforating the right lung and was recovered from the muscles of the right chest.

Christopher Grey had two gunshot wounds and four stab wounds:

1) One gunshot entered the right side of the chest, the missile travelled through the right lung, diaphragm, liver and exited at the left side of the back.

2) The second gunshot was to the right buttocks. The bullet travelled through the right hip line, right thigh and was recovered from the front of the right thigh.

3) Two stab wounds were to the left lower side of the abdomen with associated stab wounds to the intestines and right bowel.

4) Two stab wounds on the left lower side of the back did not penetrate the abdominal cavity.

5) A four inch long superficial incised wound across the left side of the neck.

Death was caused by the gunshot wounds and the stab wounds.

The doctor's opinion was that Nikeisha would have died almost instantaneously on the infliction of the injury. The others would have died within thirty minutes.

Divisional Inspector Ivanhoe Thompson in response to a report went to 82 1/2 Spanish Town Road, the home of Winston Bowers. He observed that the lower section of the door had been broken off and he entered the room through the opening which was large enough to admit his body. Inside he saw the bodies of Nikeisha Bowers and Christopher Grey. The place was "saturated" with blood. The room size he estimated as being 14'x12'. He said in his examination of the premises he did not see a hole in the door. He commenced investigations into a case of triple murder and had warrants of arrest prepared for the five appellants. On 18th July, he executed three warrants each on Titus Henry and Morris Boreland. On 24th August 1993 he saw Clifton Shaw at Hunt's Bay Police Station and cautioned him, he informed him of the warrants: Shaw

said "Officer I want to tell you how it go, I was there but me never shoot any body." A cautioned statement was taken from him by Det. Inspector Cassells. On the 26th August, 1993 he was formally charged. Donovan Mullings was charged on 13th November, 1993 and Junior Wright on 13th July, 1994.

Each appellant in defence gave a statement from the dock. Each denied involvement in the crime. Each claimed he knew nothing about it. Clifton Shaw, Titus Henry, Morris Boreland and Donovan Mullings each said he was elsewhere at the time of the incident. The defence called no witnesses.

The convictions were assailed on the basis that the sole identifying witness was 13 years old at the time of the incident, the circumstances were that her identification of the appellants took place when she was in abject terror, as her near relatives were slaughtered beside her. She admittedly had her eyes half-opened and closed at times and although she claimed the incident occupied twenty minutes, her identification of the appellants was made in very difficult circumstances hence the learned trial judge should have acceded to submissions made at the end of the prosecution case and ruled that the appellants had no case to answer.

The witness said that positioned as she was under the bed and facing the door, she saw each appellant enter by stooping to get into the room under the portion of the door remaining in place. The appellants perforce, because of the size of the opening, had to enter singly and she saw each from a distance of five feet full face on. She called each man by the name she knew him by ... "Monk", "Headback", "Cassie", "Yellowman" and "Gold Teeth". She said over what period of time she knew each and in what circumstances.

The appellant Shaw, she knew as "Cassie" for about two years. She knew where he lived, in the same Spanish Town Road area, beyond a tyre repair shop. She saw him almost daily. She had never spoken to him.

The appellant Titus Henry, was called "Monk" She saw him every time she went to the standpipe to fetch water, once or twice daily. He spoke to her once about two weeks before the incident. He was armed with a short gun.

"Yellowman" is Morris Boreland. She got to know him earlier in 1993, she saw him by a church which "belongs to Monk's family". She had seen him walking with "Monk" (Titus Henry), "Cassie" (Clifton Shaw) or with his nephew "Headback" (Junior Wright). She saw him the Sunday before the incident at his gate at 201 Spanish Town Road. He, at the scene of the crime, was armed with a short gun.

Junior Wright is "Headback". She knew him in the same year 1993, she said he lived at the same address as Morris Boreland. She would pass him at his gate on her way to fetch water or going to the grocery shop with her sister. On their way to the shop they had to pass his gate. She saw him the Sunday before the incident. On the night of the incident he had a gun but she could not remember if it was a long or a short gun.

"Gold Teeth" is Donovan Mullings, she also got to know him earlier in the year from about January 1993. She saw him in the area, the "same Spanish Town Road". "Not too often." She saw him weekly or forthnightly. He had a gun but she could not recall the type.

The witness said, when she looked through the hole in the door, she saw the men in the yard. She recognized them when they entered the room. While the intruders were in the yard she heard gunshots, and bullets struck the door. The occupants including herself ran for cover. She admitted there were times when her

eyes were half-opened and times when they were closed. They were closed to simulate death because if she were discovered to be alive she would have suffered the same fate her brother and sister shared. She would have been killed. Her eyes were half-opened when her brother's throat was cut thereafter she closed them.

We cannot ignore the fact that the witness lived in a deprived, depressed area of the inner city. An area where violent crime is endemic, where the citizens observe survival as the order of the day and vigilance the watchword. One cannot fail to notice that in her testimony she spoke of going for water, or to the shop with her sister.

Nicloa Bowers said when they sought refuge under the bed the light in the room was burning. By this light she saw and recognized the appellants. Her evidence suggest that at some stage the roof light was turned off but the television remained on. She gave details which suggested inferentially that lights were on when one of the appellants identified her sister as an informer and gave the command that she be shot and she was shot. There had to be light for Shaw to see and identify her brother, threaten to cut his throat and proceed to do as he threatened. This act she saw but she never saw when the stab wounds the doctor found were inflicted.

Nothing turns on the witness looking through the hole in the door and seeing men in the yard. This was before the door was attacked; when Inspector Thompson saw the door a portion was missing.

It was submitted that the witness had far less knowledge of the appellant Mullings than of his co-accused. She knew him from January 1993, she had seen him "not too often" before that night, she never spoke to him.

It is a fact that the murders were committed on 15th May, 1993 and the witness Nicole Bowers testified that she knew this appellant from January of that year. She had seen him on occasions admittedly not as often as she saw the other defendants, but

she declared she saw him and recognized him on the night of the incident and in respect of this appellant and the others, she was firm in her assertion that she was not mistaken. The matter of identification was for the resolution of the jury.

At the close of the prosecution's case there was evidence on which the "jury could properly come to the conclusion that each accused is guilty" **R v Galbraith** [1981] 2 All ER 1060. It was proper therefore for the case to have been left for their consideration and this ground of appeal consequently fails.

The second ground of appeal urged by all the appellants was couched in these terms by Lord Gifford, Q.C.:

> 2. The learned Judge erred in law in his directions on identification in failing to remind the Jury that the witness eyes were closed or half-opened for all or the greater part of the incident. By directing them that ' the incident lasted for about twenty minutes' (p-532), without such reminder, the learned Judge suggested to the Jury that there was ample time for a reliable observation when in fact there was not."

The evidence of Nicola Bowers was that for twenty minutes she was in a well lit but small room with five armed men bent on aggression, killing her relatives, ransacking the room and by their presence terrorizing everyone therein. These men were not strangers to her, she had known them for some time from upwards of two years to several months; some lived in the area others frequented it and she saw them by and large periodically. Her evidence was that she saw the faces of the appellants when they entered the room, she heard the command given "Turn over the bed". She saw when her brother's throat was cut by Shaw after he said he would do it. She heard the command given to shoot her sister and she saw when she was shot in the head. She saw four appellants with guns and Shaw with a knife, she heard shots discharged in the room. She saw the video taken from the room.

Nicola Bowers said that at times her eyes were half-opened, at other times opened, and they were closed when she sought to give the appearance she was dead. On behalf of the appellants it was submitted that the learned trial judge failed to point out to the jury that a weakness in the identification evidence was the fact that she said that at times she closed her eyes. The jury heard her evidence and they saw her. She never purported to see anything when her eyes were closed. Her evidence of identification was based on what she saw. The jury could, from the description of what she said she saw, evaluate her identification evidence and assess her level of intelligence. She said under cross-examination that the period of time the men were in the room was twenty minutes, this was an estimate not a guess.

We find that the learned trial judge did not err in his directions to the jury, from the evidence they would have known that the witness testified of what she saw and heard. This ground of appeal we find fails.

There is no doubt the circumstances in which the crimes were committed were horrifying. Indeed Lord Gifford, Q.C. did not hesitate to admit this, nevertheless he said the prosecution had to prove its case and the quality of the identification evidence he submitted was poor. Mr. Harrison said the witness had "an ineffably harrowing ordeal, which must have had an enervating effect on her identification evidence".

The learned trial judge in his directions to the jury followed the guidelines adumbrated in **R. v. Turnbull** [1977] Q.B. 224, **Junior Reid** [1989] 3 WLR 771 and other cases. He directed them that her evidence was uncorroborated and warned them of the dangers. The defence he said, suggested she was making a "monumental mistake," she said she was not mistaken. He pointed out the weaknesses in her evidence. She never said how long she had any appellant under observation although

she said they were all before her in the room a distance of five feet away. She was lying on the floor looking up at the men and there were bits of furniture about but she said nothing obstructed her view. Above all he reminded them of her mental state. At page 533 he told them:

> "You remember she told us in detail about each person, how she saw him and in what circumstance.
> And you have to consider, Mr. Foreman and members of the jury, any special weaknesses in the case and you will recall that she admitted to everybody, she was frightened, she was scared. You can look through the eyes of a thirteen year old girl, Mr. Foreman and members of the jury, and you think about your own self in the scenario, yourself. I don't know who would not be scared. Who would not be frightened."

This witness said in her evidence:

> "I agree I was frightened that night and I was concerned about protecting myself ... I was terrified ... I was more frightened than terrified."

The witness having testified that she was frightened, terrified, this reminder to the jury would have properly alerted them to a consideration of this "terror" in determining whether the witness was in a position to positively identify the appellants.

The appellants in their statements did not deny that the witness knew them. They did not deny that they were known by the aliases she gave for each of them. When one looks at what they said on arrest Donovan Mullings said "mi and dem a friends ...".

This is a clear acknowledgement that he knew the family of the deceased and was known by them. These words translated into standard English is "We are friends."

Morris Boreland "a lie dem a tell pon mi" translates to "They are telling lies on me."

Titus Henry "a dem kill off de people dem and a frame mi" converts to "They are the ones who killed the deceased and seek to place the blame on me."

The directions given by the learned trial judge were fair clear and adequate. We find no merit in this ground of appeal.

Lord Gifford, Q.C., by leave argued that the "learned judge erred in law in informing the jury of the ruling on the submissions of no case to answer and by so doing created prejudice to the fair trial of the appellants." He submitted that the real risk of prejudice was caused by the learned trial judge instructing the jury that the essential elements of the Crown's case had been proven by the prosecution at the close of the Crown's case. This led the jury to think that in this case vital elements had been proven. The explanation ran the risk of potential prejudice. He cited **R. v. Smith and Doe** (1987) 85 Cr. App. R. 197.

The trial judge applied the law as enunciated in **R v Rupert Crosdale** (1995) 56 W.I.R. 278 and in the absence of the jury heard submissions by the appellants' counsel that there was no case to answer. At the conclusion of the submissions the jury were recalled after he ruled there was a case to answer. In his summing up he told them at page 520-521:

> "At the end of the crown's case, Mr Foreman and Members of the Jury, the attorneys for the defence intimated that they wished to make some submissions, legal submissions, to me and I asked you to remain out of hearing at the end of which you were called back into court and the men were called upon to answer these charges. Now, when I told you that accused persons are called upon to answer, it doesn't mean that I personally have any feeling as to guilt or innocence. All it means is that there is sufficient evidence for you, the jury, to make a decision. In some cases certain elements of the offence charged by the prosecution are not proved at the end of the crown's case, in which case the accused persons are dismissed because certain vital elements of the crown's case have not been proven. All I am saying when I ruled

> that there is a case to answer, was that there was sufficient evidence for you, the jury, to make your independent decision."

In these directions the judge failed to follow the clear dicta of **Crosdale's** case (supra) wherein it was laid down by the Privy Council that the jury should not be privy to the judge's reason for his decision. Where the submission is rejected "the jury need know nothing about his decision "in order to avoid the risk of potential prejudice to the defendants". While it is true that the words "proved" and "proven" could have given the impression that the Crown had discharged its burden of proof, the context in which the words were used by the trial judge made it clear that there was evidence fit for their consideration and that the decision on the guilt of the accused was to be made by them.

The jury were properly directed on the burden of proof and the standard of proof that was required. They could be in no doubt that it was their function to determine guilt. At the end of his summing-up the Judge again reminded them of burden and standard of proof. In the final analysis therefore although what the learned trial judge did was impermissible, it is not in our view in the circumstances of the case, a reason, for allowing the appeal. The evidence of identification was good and the directions otherwise satisfactory.

On behalf of the appellant Shaw it was urged "that the learned trial judge applied the wrong standard of proof upon the voire dire respecting the applicant's cautioned statement and accordingly erred in admitting it into evidence".

At the end of her submissions on the evidence on the voire dire the Crown Counsel referred to the standard of proof beyond a reasonable doubt. The judge then asked her "what is the standard of proof at this stage." She replied, "Well, I am sorry,

my lord it's on a balance of probability." She went on to say that the evidence was so "crystal clear and so good that it would be elevated to even higher standard." The Judge did not comment further but later after submissions were made ruled the statement was voluntarily made. The contention of the appellant was that the learned trial judge applied the wrong standard of proof. The evidence revealed he made no comment as to the standard of proof he applied in admitting the cautioned statement. The appellant in his statement from the dock never challenged the existence of the cautioned statement, never once denied that he told Inspector Ivanhoe Thompson "I was there but me never shoot anybody." Even if the judge applied the incorrect burden, the cautioned statement was unchallenged. The statement made by Shaw to Inspector Thompson and the cautioned statement were surplusage in the evidential proof of Shaw's guilt.

It was submitted that the directions given by the judge on the cautioned statement were inadequate in that "he failed to tell them that what weight they attached to it depends on all the circumstances in which it was taken."

The only evidence the jury had on the taking of the cautioned statement came from the Crown witnesses. Suggestions of impropriety were denied by the witnesses and nothing was forthcoming from the appellant Shaw to support the suggestions put to the witnesses. He mentioned being ill-treated while in custody but said nothing about the statement. To the jury the statement, on the evidence, was unchallenged and the learned trial judge's directions were fair and adequate.

The evidence of Nicola Bowers standing by itself was impressive, it established an overwhelming case for the prosecution. The cautioned statement aside, the Crown presented a powerful case against the appellants. The appellants committed burglary in that they broke and entered the dwelling house of Winston Bowers in the night with

intent to commit murder and murdered Winston Bowers, Nikeisha Samuels and Christopher Grey. In so doing they committed capital murder as defined by law. The evidence indicates that Winston Bowers was shot in the back as he sought to escape from the murderous attack. His trusted bicycle was found abandoned near his home after the incident.

The evidence presented by the prosecution was very strong, the directions given by the learned trial judge were satisfactory. The admission of the cautioned statement was considered and had we thought it necessary we would have applied the proviso. We treat the applications as the hearing of the appeals and dismiss the appeals and affirm the convictions and sentences imposed.