

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 76 of 1991

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.  
THE HON. MR. JUSTICE WRIGHT, J.A.  
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA vs. CONROY LEVY

C. Dennis Morrison for the applicant

Michael Palmer for the Crown

x x

July 20 and 27, 1992

WRIGHT, J.A.:

At a sitting of the Home Circuit Court on June 11, 1991, before Wolfe, J. and I. Levy this applicant was convicted and sentenced to death for the murder of Desmond Johnson on May 5, 1990. The single ground of appeal in which the application for leave to appeal was based reads:

"That the learned trial judge's directions in the issue of visual identification were inadequate."

However, with commendable candour, Mr. Morrison advised the Court that after very careful reading of the record of the case he could not find anything which would usually be argued on behalf of the applicant. He conceded that the issues were simple, the evidence was clear and the trial judge's directions were full. He said, however, that he had advised his client in writing of his opinion and the course he proposed to adopt and that he personally attended upon him on Friday July 17 but that his client did **not** express any contrary wish.

We are wholly in agreement with counsel on the course

he has taken with the inevitable result that the application must be dismissed. Our reasons will be evident from a brief summary of the case.

The country has grown weary of the wanton and senseless murders committed with the gun which over the last two decades have increased with frightening and unabated regularity. The evidence in the case disclosed no quarrel nor any disagreement between the applicant and the deceased. Indeed, the applicant, testifying upon oath, said of the deceased, "Is mi good friend, Your Honour" and that he had known the deceased for seven years. If there was, indeed, such a friendship the early morning of May 5, 1990, was to witness its sudden and tragic end. It was just past mid-night and, assembled at the Cumberland Avenue/Somerset Avenue intersection, was a group of persons including the deceased and his mother Beryl Miller enjoying fish-tee and music when the applicant arrived, hugged the deceased around his neck and took him across the street to a bar. To his mother the incident must have boded ill because she quickly abandoned her enjoyment and ran to her gate which was just a short distance away. Not long after that, she heard an explosion and then she saw her son running to the gate holding his belly. He spoke to her. A friend rushed him off in a car to the Kingston Public Hospital and like a brief candle he was out.

Beryl Miller did not see what took place at the bar. That unhappy experience was reserved for Veronica Townsend who was sitting on a stool by the bar door drinking a bottle of beer and looking out through the doorway into the street. She testified that she saw the applicant whom she had known as "Connie" come before the bar with his left hand hugging the deceased around his neck. At first she thought it was a friendly gesture. Next she heard him say to the deceased, "Iah, me nah hurt you." But his next action contradicted those words because

the witness saw his right hand go up and in that hand she saw a little gun. Then straightway "he fired a shot and it hit Desmond right here." She indicated somewhere in the mid-line of his chest. Desmond held his chest and crouched (the record indicates that she demonstrated a 90° bend). The applicant fired another shot but Desmond slipped it and that shot found its mark in the witness' right leg. Desmond ran off and she lost sight of him. She was taken to the Kingston Public Hospital where she was admitted and remained until the following evening. When she arrived at the hospital she saw Desmond on a stretcher being attended by three doctors but to no avail.

In his zeal to impeach the credit of this witness, Mr. Frater, defence counsel, seemed for a moment to have forgotten her evidence when he suggested to her:

"...You were not there, you didn't see them."

Her response was certainly not anything he hoped or could wish for:

"A. I was not there?"

Q. That is right.

A. That is what you are saying. Then how I got shot?"

Although that answer might appear to have carried a quietus with it, counsel was not to be so easily billeted. His next few questions before taking her case were predicated on his acceptance of her presence because he proceeded to suggest that she could not see because of the brevity of the incident. But she persisted:

"I make out the man, Your Honour."

Dr. Ramesh Bhatt, a Registered Medical Practitioner and Consultant Pathologist, who performed the post mortem examination on the body which was identified by Beryl Miller, testified that there was one firearm entry wound half inch in diameter on the

left side of the epigastrium, 49 inches from the toes and three inches from the mid-line of the body. There was an absence of gun-powder burns, blackening or tattooing which indicated that the muzzle of the gun was more than twelve inches from the body, a fact which could have been accounted for by the manner in which Miss Townsend demonstrated that the gun was held.

Of course, the real issue in the case was that of visual identification which depended for its resolution upon the evidence of Beryl Miller and Veronica Townsend both of whom the applicant testified are his good friends. Beryl Miller's evidence was that she had known him from his childhood. She said, further, that she saw his face quite clearly because he came to within twenty-one feet from her when he hugged the deceased and the area was brightly lit by street lights. As for Veronica Townsend she said that when the applicant stopped before her in front of the bar he was at most about nine feet away from her in an area which was well lighted by street lights and light from the bar. She had lived in the area for forty-two years, knew his parents and knew him since he was a little boy in school, that is, eighteen or nineteen years, and had last seen him three months previously. Regarding the duration of the incident at the bar door Veronica Townsend said:

"I saw him in a split second. By that I mean about two minutes."

Both witnesses were firm in their identification of the applicant.

The defence was that the applicant was nowhere in Franklin Town area. He said he had been living away from the area since March 1990 after he had been shot by one Steve Brown whose family the defence suggested had instigated the witness Veronica Townsend to testify against the applicant. The witness denied the suggestion.

It is correct, as Mr. Morrison conceded, that the trial judge's directions, with particular references to visual

identification, were full so much so that he gave directions on alibi based on the applicant's statement that he was nowhere in the Franklyn Town area at the relevant time. We doubt, however, that an alibi direction properly arises on such a defence. If required, he could give no notice of such an alibi which would enable the prosecution to make a check if such was the practice. No issue arises here, but we make the comment which reflects on the fullness of the directions which, in addition to giving the required warning, focussed on the aspects to be considered when visual identification is being examined.

We are of the view that on the facts, the course adopted by defence counsel is justified, hence our ready concurrence.