JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 236/2002

BEFORE: THE HON. MR. JUSTICE FORTE P,
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR.JUSTICE HARRISON JA (Ag.)

R v DAMION THOMAS

Ian Wilkinson and **Shawn Steadman** for the appellant
Lisa Palmer, and **Meridian Kohler**for the Crown.

20th April and December 20, 2004

SMITH, J.A.:

The appellant, Damion Thomas was charged on an indictment for the murder of Donovan Brown on the 4th day of February, 1998 in the parish of St. Catherine. His trial commenced on the 14th November, 2002 before Marsh, J and a jury in the St. Catherine Circuit Court.

On the 18th November, 2002 he was convicted and sentenced to suffer death in the manner authorized by law.

The sentence of death was passed on proof that the appellant, before this conviction, had been convicted in Jamaica of another murder see Section 3 (1A) of the Offences Against the Person Act. The appellant appealed against the conviction and sentence.

On the 20th April 2004 after hearing submissions from Mr. Wilkinson on behalf of the appellant we dismissed the appeal. We then promised to put our reasons in writing. This we now do.

The prosecution case

The sole eyewitness, Mr. Chester Shedden is a Correctional Officer. In February, 1998 he was attached to the St. Catherine Adult Correctional Centre. The deceased Donovan Grant and the appellant were inmates of that institution.

On the 4th February, 1998 at about 2:15 p.m. Mr. Shedden was patrolling the prison. He saw the appellant walking towards him. The appellant passed him. Mr. Shedden turned his head to see where the appellant was going. The appellant walked up to two other inmates who were in front of him. He took something from his waist-band and made a "jamming motion" at the back of the neck of one of these inmates. The person at whom he stabbed spun around. Mr. Shedden said he did not recognize the person. He saw the appellant stab at the person again and he fell. Mr. Shedden went towards the appellant who evaded him and ran in the direction from which he was coming. Mr. Shedden chased and caught up with him as he ran into a group of prisoners. "Damion, give me the knife" Mr. Shedden demanded. "Mr. Chess, I don't have any knife", the appellant replied. "Give me the knife weh you use to stab the man", Mr. Chester Shedden repeated. The appellant gave him a

piece of wire which is called a "jammer" and told him that that was what he used.

Mr. Shedden frisked him before he had him taken to the Overseer's office. The witness then went to the person who was stabbed. He said he knew him as "Bucker" but could not remember his real name. He was lying on the ground. He noticed a small wound to the neck of "Bucker". "Bucker" was removed by the warders. The witness said that he later learned that "Bucker" had died. Since that day he had not seen "Bucker" In cross-examination he said that there were gangs at the institution. Some were "carrying feelings" against others. He said he did not see the "jams" actually catch "Bucker". He agreed he did state in his written statement to the police that :

> "I looked around saw Damion walk right up to the deceased, Donovan Brown, who was also walking in the same direction, pull a ratchet knife from the right side of the pocket, the right with the knife in the same and stab the deceased in his neck".

When asked if that was the truth he replied: Anything I told the police a couple of days after the incident is the truth the whole truth." When asked if he actually saw the knife, he said he assumed that it was a ratchet knife as he was " a couple distance from it."

He was extensively cross-examined by defence counsel Mr. L. Gayle and other discrepancies were ferreted out. Marva Brown, a sister of the deceased, told the court that the deceased, Donovan Brown, was also

known as "Bucker". On the 17th February, 1998 she attended a post mortem examination of the body of the deceased at the Kingston Public Hospital. She identified his body to the doctor. She said that in February, 1998 the deceased was an inmate at the St. Catherine District Prison.

Dr. Ademola Odunfua, a registered medical practitioner and a pathologist also testified. His evidence is to the following effect: On the 17th February, 1998 he conducted a post-mortem examination of the body of an adult male at the Kingston Public Hospital. The body was identified by Marva Brown as that of Donovan Brown her late brother. The doctor observed a stab wound measuring 3cm by 1 cm on the right side of the neck: "The track of the wound traveled through the skin and underlining tissues, with associated stab wounds to the vein and arteries on the right side of the neck". The depth of penetration was about 5cms. There was massive extensive bleeding in the muscles and underlining tissues of the neck. This made breathing difficult or virtually impossible. In the doctor's opinion if the weapon was left inside the wound there might not have been extensive external bleeding. If the weapon was removed it is not likely that there would not be any bleeding. The injury could have been caused by a sharp pointed weapon. The cause of death was due to stab wound to the neck. When cross-examined the doctor said he did not recall seeing any other injury

on the body. If there were any other significant wound, he would have recorded it, he said.

The Defence

The appellant gave evidence to the following effect: On February 4, 2004 at about 2:15 p.m. he was at the security section of the St. Catherine District Prison. Some warders accosted him and told him that they heard that it was he who stabbed the inmate. The warders started to beat him. He denied stabbing the inmate. Mr. Shedden did not ask him for the knife. He did not give Mr. Shedden a 'jammer'. Mr. Shedden did not search him.

Other warders also accused him of stabbing the inmate and remarked that he should die. In cross-examination he denied knowing the deceased "Bucker". He knew Mr. Shedden as a warder but not by any name. He denied that he was chased by Mr. Shedden that day.

Grounds of Appeal

Mr. Wilkinson was granted permission to argue the following supplemental grounds.

1. The learned trial judge erred in law in failing to direct the jury properly, or at all, in relation to the law on circumstantial evidence and how to apply this to the evidence before the jury; this omission deprived the applicant of a fair trial and resulted in a miscarriage of justice.

2. The learned trial judge failed to deal or assist the jury adequately or at all with the inconsistencies which arose on the evidence for the prosecution as a result of which the applicant was denied a fair trial.
3. The learned trial judge erred in law in failing to direct the jury adequately or at all, in relation to the alibi raised by the applicant in answer to the charge which omission resulted in a miscarriage of justice.
4. The learned trial judge erred in law in failing to deal sufficiently, or at all, with the issue of visual identification evidence and in failing to highlight the factors affecting the quality of such identification.
5. The verdict is unreasonable having regard to the evidence.
6. The applicant's sentence of death be set aside pursuant to section 3C(3)(a) of the Offences Against the Person (Amendment) Act 1992 for reason that his appeal against his conviction of murder was allowed in SCCA 192 of 2000 on the 7th day of April 2003 by the Honourable Court and a sentence (sic) of manslaughter substituted.

Ground 1 – Failure to give direction on circumstantial evidence

Mr. Wilkinson submitted that the case for the prosecution depended largely on circumstantial evidence because:

(i) Mr. Shedden did not know at whom the appellant had stabbed; and

(ii) Mr. Shedden did not see a weapon in the appellant's hand and the wire he claimed the appellant gave him did not have any blood on it.

Counsel for the appellant contended that the learned trial judge should have told the jury that the circumstantial evidence must be inconsistent with any other rational conclusion.

We do not share counsel's view that the case for the prosecution depended largely on circumstantial evidence. There was direct evidence from Mr. Shedden as to the circumstances in which the deceased Donovan Brown met his death. Mr. Shedden testified that he saw the appellant stab at an inmate who turned around and the appellant stabbed at him again. The inmate fell. After Mr. Shedden chased and caught up with and recovered a "jammer" from the appellant, he returned to the spot where the inmate had fallen and discovered that it was the deceased whom he had known before as "Bucker".

A direction on 'reasonable inferences' is all that was required. In this regard the learned judge told the jury:

> "Now, Mr. Foreman and your members, it is not everything that requires to be proven that can be proved by direct evidence. And that is you can come to a reasonable conclusion as a result

> of certain facts which you find proved on the evidence. Having ascertained the facts which you have found proven to your satisfaction, you are entitled to draw reasonable inferences or conclusions from these facts in assisting you to arrive at a decision. You are entitled to draw inferences only from proven facts if those inferences are quite inescapable. You must not draw an inference unless you are quite sure it is the only inference that can reasonably be drawn."

The above directions are correct, fair and adequate. This ground is without merit.

Ground 2 – Inconsistencies

The complaint in this ground is that the learned trial judge failed to highlight the major inconsistencies in the evidence. Counsel concedes that the general directions on inconsistencies are correct. However, he complains that the learned judge "did not apply them to the evidence." Counsel listed the following inconsistencies which he said the learned judge should have specifically referred to in his directions:

(i) At the trial the witness Shedden said that he saw the accused approach two men. He admitted saying at the preliminary enquiry that he saw the accused approach three men.

(ii) In his written statement to the police Mr. Shedden stated that he saw the appellant pull a ratchet knife from his pocket and stab the deceased. At the trial he said he only assumed it was a ratchet knife as he was not near enough to identify the weapon.

(iii) The evidence of Mr. Shedden is that he saw the appellant stab at the deceased two times but the doctor said he only saw a wound to the deceased's neck.

(iv) In examination-in-chief the witness said he saw a little wound on the deceased but in cross-examination he said he saw no wound.

(v) The witness said he saw no blood on the deceased's neck; the doctor said the deceased would have bled from his neck.

The duty of a trial judge where there are inconsistencies and discrepancies as stated in ***R v Baker et al*** [1972] 19 WIR 278 is as follows:

> "A trial judge is under a duty to assist the jury in assessing the credit worthiness of the evidence given by a witness whose credibility has been attacked on the ground of inconsistencies in his evidence; this duty is usually sufficiently discharged if he explains to the jury, the effect which a proved or admitted previous inconsistent statement should have on the sworn evidence of the witness at the trial and reminds them with such comments as are considered necessary of the major inconsistencies in the witness' evidence; it is then a matter for the jury to decide whether or not the witness has been so discredited that no reliance be placed on his evidence."

The judge's general directions to the jury on inconsistencies were correct and the jury were clearly made to understand the relevance of a previous inconsistent statement to the credibility of the witness. The learned judge told them:

> "Now what that witness says on a previous occasion is not evidence unless that witness says that it is true. But when you come to consider whether you can accept that witness as a witness of truth or not you can take into consideration the fact that the witness said one thing before you at the trial that is in evidence and something else on a previous occasion. And you can take into consideration any explanation that the witness would have given you as to why he said one thing on one occasion and something else when that witness came to give evidence."

The learned trial judge was no doubt mindful of the fact that although there was no requirement "that he should comb the evidence to identify all the conflicts", it was expected of him to give some examples of the discrepancies and inconsistencies - ***R v Fray Diedrick*** SCCA No. 107/89 delivered 22nd March, 1991. In this regard he told the jury:

> "Now Mr. Foreman and your members, I will point out to you areas of the evidence which I consider to be a previous inconsistent statement. But it is entirely a matter for you and if I point out some and there are others that you can act on that bearing in mind what I have just said."

The learned judge did not keep this promise. After reminding the jury of the effect that the passage of time may have on the ability of a witness to recall events accurately the learned judge proceeded to direct them as to how they should treat with inconsistencies. He told them:

> "Now these may be slight or serious, they maybe material or immaterial. If you find that they are slight you may probably think they don't really

> affect the credit of the witness that is whether you can believe the witness or not. On the other hand if you find them serious, you may say that because of them, it would not be safe to believe the witness on that point (or) at all. It is always a matter for you... in examining the evidence to say whether there are any such, and if so, whether they are slight or serious bearing in mind the principle that I have just outlined to you."

Before reviewing the evidence of the sole eyewitness the learned judge said of him:

> "... you saw him, it is for you to decide whether he is a witness of truth, whether he was telling lies, whether he was assuming everything, not having seen anything according to defence counsel or whether the areas that he was consistent (sic) in, his inconsistencies were because the incident had happened quite sometime ago. You heard both counsel in their addresses to you."

As would be expected both counsel addressed the jury on the issue on inconsistencies and discrepancies. The learned judge should have given some examples of the conflicts as indeed he promised to do. His failure to do so is obviously an oversight. Is this failure fatal? We think not. In the circumstances of this case, in our judgment, it is not reasonably probable that the jury would not have returned a verdict of guilty if the judge had reminded them of the major inconsistencies in the witness' evidence.

What is the significance of the inconsistencies identified?

The first inconsistency listed is clearly immaterial. The second was explained by the witness. He said he was not near enough to see the weapon. He saw the appellant make a "stabbing motion" at the

deceased and assumed it was a ratchet knife. The third is probably more apparent than real. The witness said he saw the appellant stab at the deceased twice. The doctor's evidence that he saw only one wound is not inconsistent with the witness' evidence. As to the fourth, the witness said he told defence counsel that he saw no wound because "mi fed up with minor questions and because I was being ignorant". In respect of the fifth inconsistency again this may be more apparent than real. None of these inconsistencies was of such significance that it could reasonably be said that the failure of the judge to draw the jury's attention to it might have resulted in a miscarriage of justice. This ground also fails.

Ground 3- Alibi

Counsel for the appellant complained that the learned trial judge did not in his direction to the jury make it eminently clear that the appellant in putting forward an alibi did not assume the burden of proving it.

In ***R v Leroy Barrett*** [1990] 27 JLR 308 Rowe P delivering the judgment of this Court said:

> " It has become so customary that we had come to regard it as the invariable rule for the trial judge to expressly tell the jury that although the alibi has been raised by the defence there is no burden on the defence to prove the alibi. Rather there was a burden on the prosecution to negative the alibi and if at the end of the day the jury either believed the alibi defence or were in doubt about its authenticity, the prosecution would have failed to discharge its burden of

> proof. This very simple direction covers the entire field whenever alibi defence is raised. But this is not to say that in all cases where the direction is less full than that suggested above there is a misdirection. What the cases show is that the jury should not be left in any doubt as to where the burden of proof lies. (emphasis supplied)

The trial judge did not expressly tell the jury that the appellant was relying on the defence of alibi. He told them that the appellant said that he was at AI section which is a security section of the St. Catherine District Prison at the material time. Further, that he said that other inmates were with him in the section. The trial judge did not specifically tell the jury that by saying he was not there, the appellant did not thereby assume any burden of proving the alibi. However, in directing them on the burden of proof the judge told them:

> "Under our system of law, Mr. Foreman and your members, the burden of proving a case against the accused is on the prosecution throughout and that burden never shifts. There is no obligation at all on the accused of proving anything, because the accused is presumed innocent until the prosecution satisfies you beyond a reasonable doubt, by the evidence produced, that the accused is guilty of any offence. But although there is no duty on the accused to prove this case, he may attempt to do so and if you find that his attempt succeeds, then you are going to be obliged to find him not guilty of any offence. If the attempt to prove his innocence leaves you in doubt, then you are going to have to exercise that doubt in his favour and find him not guilty. It is only if the prosecution has satisfied you beyond a reasonable doubt, that you can find the accused man guilty of the offence."

Then after he had reviewed the evidence of the appellant, the learned judge directed the jury as follows:

> "Now, Mr. Foreman and your members, the effect of the defence may be, if you accept what Mr. Thomas said, if you accept it, you are going to be obliged to find him not guilty of any offence, if it leaves you in reasonable doubt, then you are obliged to find him not guilty, even if you believe that he is telling you a lie, you are going to have to go back to the prosecution's case and look on that case, all the evidence that you have heard in the case and it is only if having done that the prosecution has satisfied you beyond a reasonable doubt, that the accused is guilty of the offence, can you find this accused man guilty. Remember the accused man is saying he never did it, and the prosecution is saying, you are the person who did it. You will remember the submissions made to you by both counsel for the prosecution and for the defence".

We are clearly of the view that in the circumstances of this case, the above directions were abundantly fair and adequate.

In our judgment the jury could not have been left in any doubt as to where the burden of proof lay and that they could not convict the appellant solely because they rejected his evidence as false. This ground also fails.

Ground 4 - Identification

Counsel for the appellant complained that although the learned trial judge did give a warning as to the danger of acting on evidence of visual identification, he nevertheless, failed to tell the jury that an honest

witness can be mistaken and that a mistaken witness can be a convincing one, (the ***Turnbull*** direction). Further, he complained that the learned judge failed to sufficiently elucidate on all the relevant factors affecting the quality of the visual identification evidence of the sole eyewitness.

In our judgment this complaint is wholly misconceived. We have examined the evidence of the sole eyewitness and cannot agree with counsel that any identification problem arose in this case at all. The evidence of Mr. Shedden is that he never took his eyes off the appellant from the time of the incident to when he gave chase and caught up with him as he ran into a group of about fifteen prisoners. Further, when Mr. Shedden asked the appellant for the knife he used to stab the deceased, he gave him a "jammer" and told him that that was what he used. The appellant's conduct could reasonably be interpreted as an admission. This is certainly not the sort of case which ***R v Turnbull*** [1976] 3 All ER 549 is intended to cope with. ***Turnbull*** is intended to cope with the danger of mistaken identity and "the ghastly risk run in cases of fleeting encounters." If the jury accept Mr. Shedden as a witness of truth it is not possible to say there might have been a mistake. This ground is devoid of merit.

Ground 5 –Unreasonable verdict

This ground was abandoned.

Ground 6 was not pursued when it was brought to counsel's attention that of the appellant's two previous convictions for murder, only one was reduced to manslaughter.

Conclusion

For the reasons given we dismissed the appeal as stated at the outset and affirmed the conviction and sentence.