

J A M A I C AIN THE COURT OF APPEALSUPREME COURT CRIMINAL APPEALS Nos. 140/84 & 142/84

BEFORE: The Hon. Mr. Justice Rowe, President
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice White, J.A.

R. v. DELBERT WHYTE AND GEORGE NUGENT

F.M.G. Phipps, Q.C., and K.D. Knight for applicant Nugent

Delroy Chuck for applicant Whyte

Paul Dennis for the Crown

March 18; May 16, 1986

ROWE, P.:

The appellants Whyte and Nugent were convicted in the Home Circuit Court before Walker J. and a jury for the murder of Norman Nichols. On March 18 we treated the hearing of these applications as the hearing of the appeals, allowed the appeals, quashed the convictions for murder and entered verdicts of acquittal, for the reasons contained herein.

Norman Nichols was murdered in the yard of premises No. 25 Sixth Street, Greenwich Town in St. Andrew during the night of May 18, 1982. A post-mortem examination of his body disclosed that he was shot twice. The first injury was caused by a lead bullet which entered the back of the right shoulder and passed through the third intercostal space, right lung, and embedded itself in the chest cavity. The second injury was also caused by a lead bullet which made an

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entry wound to the left side of the back below the shoulder region, passed through the muscles of the back of the shoulder and was found embedded in the muscles of the back of the shoulder. Neither entry wound showed any signs of burning, blackening or tattooing, indicating that the firearm was discharged more than 18 inches from the body of the deceased. In the view of the pathologist, the injury passing through the right lung was fatal, and further, in all probability, both injuries were inflicted while the victim was standing with the assailant to his back, and in relation to the second injury, the victim had a stance with his back slightly to the left of the assailant. A third injury which the pathologist found on the body of the deceased, consisted of an abrasion just over the right eye brow. Of some importance, are two opinions expressed by the pathologist: first, that it was not possible for the injuries to have been inflicted with the victim lying down and, second, that the lead bullets lodged in the body not because of contact with bone, but on account of the loss of velocity.

Two residents of the Sixth Street premises testified for the Crown. Both recounted an invasion into the premises at about 3:30 a.m. by a large number of men, 11 in all, dressed in military uniforms and carrying weapons of various calibres including M16 rifles. Kenneth Lindo, handicapped through the loss of a leg and appropriately nicknamed "One-ie", gave evidence that he saw the appellant Delbert Whyte swing into the premises from atop a guango tree, opened the rear gate and permitted the gang of men to enter. Peeping through an open aperture in his boarded wall, he was able, he said, to make the initial identification which he confirmed when his door was unceremoniously kicked open and the appellant Whyte

confronted him demanding to know where "Prang" lived. He filibustered, loudly protesting the intrusion, and that was the signal for the other witness Winston Belnavis, o/c Prang, who occupied a room behind a shop on the said premises to unobtrusively escape under a cellar. Witnesses Belnavis and Lindo told of a large electric bulb of either 150 or 200 watts hanging from a tree in the back-yard which illuminated the rear of the premises at night. On the account given by Lindo as soon as the appellant Whyte opened the gate, he plunged the yard into darkness by unscrewing the electric bulb. Lindo said he saw the appellant Whyte and two other men take the deceased, known to Lindo as "Whitey" and "same like how he wrap up in the sheet and sleeping, sling him out from the house in the sheet." Lindo described how the deceased was beaten in his head with M16 rifle: "they beat him bad in his head before they shoot him They lick him hard in his head." And of the actual shooting, Lindo said:

"Delbert lean pon the bar and hold the '16' so, sir, so him hold the '16' and crank it and lick Whitey and it fly through Whitey and fly through the car After him crank it, him fire it, sir, and Whitey drop pon him face."

At trial, Lindo maintained that he was only able to recognize one of the eleven invaders and that that one was the chief actor, the appellant Whyte, and he added that he knew him "before him born", and that the appellant Nugent was not among the gang of 11 men. Much cross-examination concentrated upon what Lindo told the police in a written statement on either the day of, or the day after, the murder, and especially as to what Lindo said about "Macca Tom" the nickname of the appellant Nugent. Lindo denied saying in that statement that

"Macca Tom box me in my face, he was there and he box me in my face." Det. Gayle, the policeman who took the written statement from Lindo was asked a few final questions by the presiding judge. They are:

"Q: Well, let me put it this way, Detective, you told Mr. Chuck that Lindo told you in the statement that it was two men who held him?

A: Yes, m'Lord.

Q: He called the names of those two men to you?

A: Yes, m'Lord.

Q: What names did he call?

A: Macca Tom and Delbert Whyte."

Lindo's evidence is important on quite another issue. Lindo maintained that the witness Belnavis had run away from the premises before the deceased was taken from his room and before he was shot. Belnavis, said Lindo, returned to the premises after the police had arrived and Belnavis enquired of him, Lindo, what had occurred and who were the assailants. A sample of the relevant questions and answers in Lindo's evidence are set out below:

"Q: How many of those men did you see with guns that night, how many of the eleven?

A: All eleven (11) of them had guns sir, so when them carry the youth round the front ...

Q: So I am asking you now, if when they went to the front, from where you were, you could see what happening?

A: I sit down right by the guinep tree and I see when somebody creep from under the cellar and flash to

Q: Hold on

A: I saw somebody flash go under the cellar through the back door; don't have on no shirt run through the back gate and go down Fifth Street way. I don't know where him run but I know say him run out of the yard; Prang me talking.

.....

"Q: Did you make him out at that time?

A: I know say is him, him don't have on no shirt. I know say is him. So when Prang get away, him come back to me under the guinep tree and say bout, 'One foot bwoy, you see the bwoy me come fah, you mek him get 'way. I going surely kill you?'

.....

A: So after Prang flash, sir, when me say to him say 'anything him want do' him leave and go to the room, the house where Whitey a sleep in, sir, him kick off the door"

In cross-examination by Mr. Soutar for Nugent:

"Q: When Prang escaped was Whitey alive?

A: No, sir. Prang don't see when Whitey die, sir, only I one and the Almighty see when Whitey die.

Q: When he returned, did he ask you what had happened?

A: When him come back and Prang turn to me and say, 'One-ie, you know who is the man who do the thing?

Q: Did you relate to Prang the details of the incident?

A: I never relate, I only told him who the man who I know do the killing.

Q: Yes, but did you tell him how the thing happen?

A: Yes."

Later in the cross-examination he was asked:

"Q: The next time you saw Prang was when?

A: When everything finish, sir, when everything finish.

Q: Police had come?

A: And when him come, him see police."

Another interesting feature of the evidence of Lindo concerned the position of the deceased at the time he was shot. Lindo said that the deceased "leaned to" the car in a manner demonstrated in court "with his back to a wall", and with the appellant Whyte behind him. Later in his evidence, he said the deceased rested against the car before he was shot, and

in his inimitable style he answered:

"Whitey lean, him a wobble down and him shoot Whitey, right to the next side of the car. If a man inside the car, the next man inside dead."

But in his statement to the police, which was extensively used to contradict the witness Lindo, he not having testified at a Preliminary Enquiry, Lindo had told the police, according to Sgt. Gayle that:

"After Delbert shot Campbell he went back to the rear of the premises and saw him come with Nichols and place him on his face and pointed the gun in his head. I heard explosions and did not see Nichols get up."

The investigating sergeant had no doubt that he understood from Lindo that the deceased was shot while he was lying on the ground.

We turn now to relate the evidence given by Winston Belnavis as to how the shooting occurred. Belnavis said he was asleep in his room at about 3:30 a.m. when he heard a voice asking "Wey Prang" and Lindo answering, "Don't ask me for Prang, I don't know him." He became apprehensive and crawled under the cellar. The back-yard was dark. From that position he observed that the yard was covered with men in green suits and dark shoes all carrying long guns. He said he was able to recognize the appellant Whyte, whom he had known for six months, and the appellant Nugent, whom he had known for 8 years as "Macca Tom". His knowledge of the appellant Nugent was not challenged but where Belnavis purported to be assisted by his knowledge of the voices of the men, this could not appropriately apply to the applicant Whyte whom he had seen just before and the evidence did not disclose that he had actually spoken to the appellant Whyte. Each man, according to Belnavis, had a long gun in his hand and a short gun at his side and they carried big flashlights which shone brightly

in the yard. By this light he was able to see when the appellant Whyte "drape up" the deceased in his waist, carried him some distance and handed him over to the appellant Nugent. Both appellants, he said, then began to beat the deceased with the butts of their long guns. Using his short gun, the appellant Whyte, shot the deceased. The gun was put around the left shoulder of the deceased and the appellant Whyte laughed as he fired the weapon. Belnavis continued by saying that the deceased fell to his knees after receiving the first shot and begged to be killed, saying "Just kill me and done." It was now the turn of the appellant Nugent, whom, he said, prefaced his action by saying "I going put this one fatally to your brain." That action was to fire the long gun which "hit him in him head and run through a car that parked." Pressed by crown counsel to elaborate on that statement, Belnavis said that the bullet went through the head of the deceased and smashed up a car that was parked on the premises.

Belnavis was extensively cross-examined and in answer to Mr. Soutar he gave his position under the cellar as about the middle of the cellar and he was lying on his stomach. That cellar, he said, was about 3 feet high. There was assorted debris under the cellar but this did not impede his vision. Logic led Mr. Soutar to suggest to Belnavis that as he lay under the cellar only the feet of the men were discernible as their bodies would be above the level of the cellar. Belnavis admitted that when the men were about eight yards from the cellar he could only see their feet.

Then followed some important questions and answers:

"Q: Now when you were in that position and the men were at the back of the yard, you only saw their feet because the rest of the body was above the house? You agree?

A: Yes, sir.

Q: When they went around to the front of the house now, do you agree with me that the men were nearer to you?

A: When them come to the front them were nearer in my sight now.

Q: Would you agree with me, Mr. Belnavis, that if that is the position, that the men were nearer to you when you were under the cellar; that you would see less of them?

A: No, please sir."

As the cross-examination continued these exchanges were recorded:

"Q: And while you were under the cellar you then saw the men in the yard?

A: Please, you put it that way now, sir?

Q: Yes?

A: Please, from I come out and enter the first part of the cellar I can see them foot that time.

Q: So from you entered the first part of the cellar?

A: Me only see the man dem foot under the cellar.

Q: You only see them foot but they were in the yard?

A: Yes."

An admission was made by Belnavis that when he said that one man jumped the fence and opened the gate for the others to come in he was only repeating what the witness Lindo had told him.

The prosecution led evidence as to the circumstances in which the appellant Whyte was identified at the Hunts Bay police station. Urgent messages were sent to the witnesses to attend at the police station and soon after their arrival

there, the appellant Whyte was brought within their line of vision and the identification was made. Nothing of consequence turned upon a statement allegedly made by the appellant Nugent upon arrest and caution viz, "Me mix up" and it was suggested to the police officer that the statement was "Dem trying to mix me up."

Long and impassioned submissions were made to the learned trial judge to induce him to hold that there was no case for the jury having regard to the inconsistencies and improbabilities in the Crown's case. These submissions having been over-ruled, the appellant Whyte gave an unsworn statement denying that he took part in the murder and setting up an alibi. The appellant Nugent in his sworn evidence said that Belnavis was a political activist for the Workers Party of Jamaica and had upbraided him for doing mechanical work on "capitalists" cars. He suggested that for base political motives Belnavis had sought to implicate him in this crime.

Against their convictions both men filed a plethora of grounds.

This was a difficult and somewhat confusing case. Lindo, the less mobile of the two crown witnesses who were allegedly present at the time of murder, and there can be no doubt that murder it was, dismissed with disdain the claim of Belnavis to be an eye-witness. "Prang", he said, fled the scene early after the gang entered the premises and returned hours after the incident. This was a critical factor in the case which necessitated the most careful direction from the learned trial judge. It was impossible for the jury to treat both Lindo and Belnavis as witnesses

of truth in circumstances where Belnavis admitted that a portion of his evidence was based on information received from Lindo and where no explanation was forthcoming from the prosecution as to the inconsistencies between the two witnesses.

Commonsense would suggest that if Belnavis was hiding under the cellar from men intent on killing him he would not have himself at the very entrance to that cellar. He placed himself in the middle of the cellar and his evidence is replete with statements that at one time he was only able to see the feet of the men. Even if he had not run away, as Lindo said, it seems to us that it would have been physically impossible for him to have seen the faces of men when they came nearer to the cellar under which he was hiding, if he could not have seen those faces when the men were further away. In our view there was no credible evidence from Belnavis on the issue of identification which could properly have been left to the jury for their consideration, as either he was not present at the material time or he was not in a physical position to see the faces of the attackers.

The evidence of Lindo implicated the appellant Whyte only. Lindo was not an immaculate witness. He had not given evidence at the preliminary examination and in consequence, his earlier statement to the police, was one means by which his evidence at trial could be tested. He resiled from his earlier assertion that the appellant Nugent took a decisive role in the slaying of the deceased, and the jury were entitled to infer that Lindo was a person prepared to tailor his evidence to suit his own purposes. At page 243

of the record the learned trial judge directed the jury as to the manner in which they should approach discrepancies and inconsistencies, he said:

"If you find that in this case there are any discrepancies or inconsistencies in the evidence of the witnesses then you have to decide whether those inconsistencies or discrepancies are slight or serious, whether they are material or they are immaterial. If they are slight you the jury will probably think that they do not really affect the credit of a particular witness, of the particular witness who is concerned. On the other hand, if you think that they are serious you may say that because of them it would not be safe to believe the particular witness on a particular point."

Complaint was levelled at this direction on the ground that it was incomplete. We agree that where a jury finds that there are serious discrepancies or inconsistencies in the testimony of a witness it is open to them not only to disbelieve him on the particular point, but also to reject his evidence in its entirety. In a case such as this, the proper direction as to how to treat discrepancies and inconsistencies was of utmost significance. If Lindo had deliberately given a false statement to the police in relation to the appellant Nugent, with what confidence could the jury approach his evidence in reference to the appellant Whyte? This issue should have been left clearly for the consideration of the jury.

It was argued that the verdicts were unreasonable. As we have said earlier, there was no credible evidence against the appellant Nugent who ought not to have been called upon to answer the charge. If Lindo's evidence was to be believed the deceased was shot through the head at close range with an M16 rifle. No such injury was found to the head of the deceased. The bullets which were found in the body

of the deceased were never produced at trial, thereby corroborating or otherwise the oral testimony that an M16 rifle had been used to shoot the deceased. Of some importance however, is the fact that the bullets did not pass through the body of the deceased, which fact lends support to the defence theory that the deceased was not shot at close range. This evidence would tend to destroy the testimony of Lindo as to the manner in which the deceased met his death.

Everything in this case depended upon the creditworthiness of the two witnesses Belnavis and Lindo. There were enough unexplained circumstances in the case to lead this court to conclude that no jury properly directed could have returned a verdict of guilty against the appellant Whyte and we therefore held that the verdict against him was unreasonable and unsupported by the evidence.