JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 151 of 1990

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE WOLFE, J.A. (Ag.)

REGINA vs. EVERALD ELLESTON

Ernest McCauley, Q.C. and
Wentworth Charles for the applicant

Diana Harrison, Deputy Director of Public Prosecutions, for the Crown

May 5 and 18, 1992

WRIGHT, J.A.:

This is an application for leave to appeal against conviction and sentence of death resulting from the trial of the applicant in the Home Circuit Court on October 23, 1990, before Smith, J. and a jury for the murder of Noel Johnson at Treadways District in the parish of Saint Catherine on March 5, 1990. The following three grounds of appeal were argued in support of the application:

> "1. The learned trial judge in directing the jury on the Applicant's defence of alibi, (unlike his direction to the jury on both the onus (or burden) and standard of proof required on the prosecution for a jury to be satisfied of its case against the applicant), totally failed to direct the jury on the standard of proof required of the prosecution to disprove the alibi of the applicant that he was at his mother's place and not in Treadways on the night of the killing of the deceased named in the Indictment. The learned judge directed the jury only on the onus (or burden) which rests on the prosecution to disprove the alibi - (pages 83, 92, 106, 115, 116 and 117 of the Transcript).

2. While the trial judge correctly directed the jury on the issue of identification, he failed to direct the jury or adequately, on a relevant discrepancy in the evidence of the sole identifying witness, Merrit Duncan (pages 24-54; 55-67 of the Transcript), that is to say, whether or not, the said Duncan did identify the applicant when he gave evidence that he saw the applicant "walk out of the shop, in front of the shop", and another person "come out of the Bar", "come out of the shop", and other evidence given by him "could not see the shop door", "I can't see anyone coming out of the shop", "I can't see the door of the shop", or "walk away from the shop" (pages 29-35; 44 & 48) (Judges directions pages 100, 103, 106, 109.)

3. In view of the fact that identification was the crucial or real issue in the trial, as the Judge himself reminded the jury (pages 84, 87 & 111 of the Transcript), the defence of alibi in relation to the issue required a full direction on the standard of proof required of the prosecution to disprove the alibi. The total failure in this regard continued (sic) with an inadequate direction on the discrepancy of the sole witness, relevant to the same issue of identification, deprived the applicant of a fair chance of acquittal open to him."

Mr. Noel Johnson and his wife Beverley operated a business consisting of a grocery shop and a bar at Treadways in the parish of Saint Catherine. They lived in the upstairs portion of the building while the downstairs accommodated the business. In order to facilitate truckmen who collected chickens from a chicken farm in the area, the shop would occasionally be kept open beyond the usual closing time. The night of March 2, 1990, was one such occasion. At 2:30 a.m. that night Mr. Johnson was in the process of closing up the shop. His wife was reclining in an adjoining store-room when she heard strange sounds of men talking in the shop. She was not at first alarmed thinking the voices were those of the men from the "chicken truck". At the entrance door of the bar there was a bamboo curtain which rattled when a person passed through it. The unusual sounds of

the curtain alerted her that some mischief was afoot. Her fears were confirmed by the echo of two gunshots inside the shop and her husband's voice crying, "Help, help, murder, murder." She also heard the rattling of silver kept in a pot in the bar. She sought to secure herself by bolting the door to the store-room. Afterwhile she investigated and discovered her husband lying on the floor in a pool of blood. He was rushed off to the Linstead hospital where he died two days later, that is, March 5. She obviously could not assist on the question of the identity of the intruders, but it was extracted in cross-examination that she had asked her husband whether he had recognized his attackers and was told no "because their faces were all tied up."

The cause of death, as related by Dr. Royston Clifford, Consultant Forensic Pathologist, was multiple gunshot wounds - three in number:

1. A through and through gunshot wound to the left forearm.

2. An entrance gunshot wound without gunpowder deposit in the right supra-clavicular region - travelling through the chest from right to left and exiting on the left posterior chest.

3. An entrance gunshot wound without gunpowder deposit in the lateral aspect of the right chest - travelling through the cavity, liver and lung and exiting in the right posterior chest.

Detective Constable Arnold Sutherland, stationed at the Linstead Police Station, received the report about 3:00 a.m. and visited the scene where he observed silver coins scattered about the shop where he recovered two spent 9mm shells.

The evidence on which reliance was placed to lay this crime at the door of the applicant was supplied by Harrit Duncan, a taxi operator, who grew up with the applicant in the same district - they knew each other for some ten to fifteen years. To him, the applicant is known as "Ellesten Pup". Mr. Harrit's house, like the bar, faces the road and is some seven to eight

yards to the side of the bar. Sometime in the early morning, Mr. Harrit was awakened by the noise of the "chicken truck". Next he heard a car pass, and about twenty minutes later he heard what sounded like the same car pass from the opposite direction. Then "bout a couple minutes after, I hear Johnny voice," that is Noel Johnson's voice, but he could not make out what he was saying. He then heard two explosions which he concluded were gunshots. He then got out of bed and stood looking through the front window of his bedroom in the direction of Mr. Johnson's shop. There was a curtain by the window which was made of clear glass. He parted this curtain just enough to see without being seen. The area outside the shop was well lighted. The piazza was lighted by a bulb shining from the roof of the piazza and besides there were two flood lights on the shop - one lit up the area in front of the shop and the other was directed so that it shone on the witness' gate. The witness was accustomed to the rattle of the bamboo curtain in Mr. Johnson's shop when someone passed through it. While looking he heard the rattle then he saw the applicant walking on the piazza towards him with a gun held up in his right hand. When he first saw the applicant on the lighted piazza he was about ten yards away and he saw the applicant's face for that distance as he walked up to and close by the window through which the witness was viewing, passing about four yards from the window. The witness estimated the time at a half to one minute. The applicant looked towards the witness' house and then passed on out of sight.

After a ratule of the bamboo curtain for a second time, another man appeared on the piazza. The witness did not have a good look at him because he bent down to pick up something which had dropped from him, then he ran off in the direction where the applicant had gone. For a third time the curtain rattled, followed by the appearance of a third man with a gun in his hand which he pointed at the driver of a truck parked on the opposite

side of the road, who was looking in the direction of the shop. There was no explosion from the gun, whereupon he hit the gun on the ground and then ran off in the direction taken by the other two as just then the second man called him. None of the three wore any mask of any sort. The truck driver came out with a cutlass and called to another driver. Responding to a call to render assistance in the shop, the witness went to the shop where he saw Mr. Johnson on his back in blood. He conveyed the bleeding victim to the Linstead Hospital. He said he had last seen the applicant at the taxi stand at Quarry in December, 1989, but at that time the applicant was no longer living in Treadways.

On March 7, Detective Bertram Lee collected a statement from Mr. Marlit and on March 23 he arrested the applicant, who was then in custody at Spanish Town, on a warrant of arrest. Cautioned after arrest, the applicant responded, "You and mi lawyer will talk 'bout it because me nah say nutten."

The defence briefly stated from the dock was:

> "On that night, My Lord, the 2nd of March, 1990, My Lord, I don't leave my mother yard, My Lord and I don't went with no other, no other."

The plea of alibi clearly puts in issue the accuracy of the visual identification of the applicant as a perpetrator of the crime. This was readily appreciated by the trial judge. Indeed, at page 66 of the record, he told the jury that "the crucial issue here is identity" and thereafter, having given the requisite warning, he proceeded to treat the issue with such meticulous care that even counsel for the applicant conceded that his directions on that aspect of the case were impeccable and provided no cause for complaint. Indeed, counsel for the applicant stated that but for the failure in the judge's directions, identified in ground 1, the discrepancies set out in ground 2 would have been of no moment. It is, therefore, the combined effect of such failure and the discrepancies which justify complaint. He said further that, on the facts, if the

proper direction on the standard of proof had been given there would have been no complaint whatsoever against conviction. He contended that the trial judge should have directed the jury:

> "that the prosecution must satisfy you beyond reasonable doubt that the accused was not where he said he was on that night - if you are so satisfied then the prosecution must go on to satisfy you that he was where they say he was."

Now, it is well known that in this jurisdiction the defence of alibi is never raised until the day of trial and sometimes not before the accused stands to make the traditional unsworn statement which may not go beyond saying the accused was not at the scene of the crime. So, while it is true that a finding of guilt cannot properly be arrived at without the rejection of the alibi, the only practical way in which the prosecution can comply with the requirement that it must disprove the alibi is by presenting evidence to establish his presence at the scene of the crime without adverting to any place where he may at the last moment choose to say he was at the relevant time. The complaint is that the directions are inadequate in that although the jury were directed on the burden and standard of proof to establish guilt there is no direction as to the standard of proof required of the prosecution to disprove the alibi. It, therefore, becomes necessary to look at the impugned directions.

At page 83 appears the following direction:

> "In all circumstances, Mr. Foreman and your members, such as this, of course, the burden or proof rests on the Prosecution; it never shifts. It is always on the Prosecution. There is no burden on the accused person at all.
>
> His defence is an alibi, but that does not mean that he was assuming any burden to prove that he was elsewhere. It is not for him to do so. On the other hand, it is for the Prosecution to disprove the alibi. I will deal with that further, but you remember this, that that burden is always on the Prosecution. The accused is presumed innocent and

> "It is only you, by your verdict, can say that he is guilty. Only you can remove that presumption of innocence.
>
> The standard of proof, Mr. Foreman and your members, is beyond reasonable doubt. The Prosecution must satisfy you that you feel sure of the guilt of the accused person before you, by your verdict, can find him guilty."

At page 113:

> "Now, the accused person gave an unsworn statement, you remember I told you, Mr. Foreman and your members, that there is no burden on the accused to prove anything, and the fact that he stood there and said something, he was not assuming any burden to prove anything to you."

Then finally at pages 116 to 117 this:

> "Now, as the burden of proof is on the prosecution, the defendant does not have to prove that he was elsewhere. On the contrary, it is for the prosecution to disprove his alibi. If you conclude that the alibi is false, that does not of itself, Mr. Foreman and your members, entitle you to convict the defendant. The prosecution must still establish his guilt. Alibis are sometimes invented to bolster a genuine defence. Now, the prosecution, Mr. Foreman and your members, must disprove the alibi. And you heard crown counsel, he told you how the prosecution sought to disprove this alibi, by asking you to accept Mr. Duncan.
>
> In other words, what the prosecution is saying, I think the words of Mr. Clarke were these: The accused couldn't be in two places at the same time. So if you accept Mr. Duncan's evidence, if you feel sure, bearing in mind all that I told you before as to visual identification, if you are satisfied so that you feel sure that the accused was there that night, then you would have rejected his alibi. You can't convict him unless you reject his alibi. If his alibi convinces you of his innocence, then you must acquit him. If the alibi leaves you in doubt as to where he was that night too, when you look at the whole evidence, then you must also acquit him because that would mean the crown has not discharged its burden. But even if you entirely reject the alibi, you cannot on that alone convict him. You have to go back now and look at the prosecution's case and ask yourselves whether or not we feel sure that the accused was one of the three men who went to Johnson's bar all with guns."

We are of the opinion that in the quoted passages the jury were correctly and adequately directed on the burden and standard of proof required of the prosecution as well as the fact that there was no burden whatever on the applicant to prove anything. See **R. v. Wood** (1988) 52 Cr. App. R. page 74; 16/7/90; **R. v. Barrett** S.C.C.A. 45/89 (unreported) 16/7/90; **R. v. Chambers & Bell** S.C.C.A. 17 & 18/90 (unreported) 1/3/91. And be it noted that on the facts of this case there is no evidence which the prosecution had to meet. When the applicant was arrested on March 23, twenty-one days after the shooting of Noel Johnson, he elected, as was his right, to say nothing apart from, "You and mi lawyer will talk bout it because mi nah say nutten." For the first time on October 23, some seven months later, his defence of alibi was disclosed:

> "On dat night, My Lord, the 2nd of March, 1990, My Lord, I don't leave my mother yard."

There is nothing here that the prosecution can meet by calling rebutting evidence. The prosecution can only seek to disprove the alibi by presenting credible evidence which makes the jury feel sure that he was indeed at the scene of the crime. Counsel maintained that the jury should be told that the prosecution must disprove the alibi to the same degree that guilt must be proved, that is, beyond reasonable doubt.

No authority dealing with alibi was cited before us. Instead, the Privy Council decision in **Segismund Palmer v. R.** (1971) A.C. 814; (1971) 1 All E.R. 1077; 55 Cr. App. R. 223; (1971) 2 W.L.R. 831 and the decision of the Court of Appeal in **R. v. Abraham** (1973) 1 W.L.R. 1270 dealing with self-defence were cited - and principle being that both self-defence and alibi are defences which the prosecution must disprove. In delivering the judgment of the Board in **Palmer's** case [(1971) 2 W.L.R. 831 at page 844], Lord Morris of Borth-y-Gest said:

> "There are no prescribed words which must be employed in or adopted in a summing-up. All that is needed is a clear exposition, in relation to the particular facts of

> the case of the conception of necessary self defence. .....
> A jury will be told that the defence of self-defence, where the evidence makes its raising possible, will only fail if the prosecution show beyond doubt that what the accused did was not done by way of self-defence. But their Lordships consider, in agreement with the approach in the De Freitas case (1960) 2 W.I.R. 523 that if the prosecution have shown that what was done was not done in self-defence then that issue is eliminated from the case."

We can do no less than to adopt their Lordships' reasoning that if the prosecution show by evidence which makes the jury feel sure that the applicant was indeed at the scene of the crime then the issue of an alibi is eliminated from the case. We are in no doubt that, inasmuch as there are no prescribed words in which a summing-up must be delivered, the directions (supra) given by the judge, in which the standard of proof required of the prosecution was correctly stated, meets with the requirements. Further, we are of the view that the case of **R. v. Abraham** (supra) is distinguishable from the present case because, in that case, the trial judge gave no express direction that there was an onus on the prosecution to disprove the plea of self-defence. It is our opinion that the point at issue has been settled on the basis of the authorities cited earlier.

We are in agreement with counsel for the applicant that the discrepancies listed in ground 2 of the grounds of appeal do not by themselves indicate that the applicant was denied a fair chance of acquittal. But we go further to say, unlike counsel, that there is nothing to improve their status. These discrepancies had to do with whether the witness Harrit Duncan could have seen the men "walk out of the shop" or "come out of the bar."

On the evidence of Mrs. Beverley Johnson she and her husband had been operating their business for ten years. Mr. Duncan said he was living "right beside the bar for six years." He obviously knew of the bamboo curtain in the shop

and the result of someone passing through the curtain. He gave evidence of hearing the curtain rattle three times and after each such occasion a man appeared on the shop piazza and it is obvious that he drew the reasonable inference that each man had come out of the shop although, as he said subsequently, he could not see the shop door nor anyone coming out of the shop.

The trial judge reminded the jury of the discrepancies having previously correctly directed them how to deal with discrepancies and having regard to the evidence relating thereto, it is difficult to conceive how the jury could have failed to put the correct interpretation on the evidence.

The complaint set out in ground 3 has been appropriately addressed while dealing with the question of the burden and standard of proof and merits no further mention.

We are, accordingly, of the opinion that there is no merit in any of the grounds of appeal and for this reason the application for leave to appeal is refused.