

NmLs

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 63/2002

BEFORE:

THE HON MR. JUSTICE BINGHAM, J.A.
THE HON MR. JUSTICE WALKER, J.A.
THE HON MR. JUSTICE COOKE, J.A. (Ag.)

R V GARNETT EDWARDS

Janet Nosworthy for the appellant

Suzette Rodgers, Crown Counsel for the Crown

June 24, 25 and December 19, 2003

BINGHAM, J.A.:

The applicant Garnett Edwards was tried and convicted in the Home Circuit Court on an indictment for capital murder committed on Dougal Wright on 13th February 1999. He appealed against the conviction and sentence of death imposed on him.

On the 24th and 25th June 2003, this Court heard arguments in respect of this application. We granted the application for leave to appeal and treated it as the hearing of the appeal which was dismissed. The conviction and sentence of death were affirmed.

At the time of handing down our decision we promised to reduce our reasons into writing. This we now do.

The incident giving rise to the fatal shooting of the deceased took place at a bar known as the Mango Tree Bar situated at the corner of Dames and Anderson Roads in the Allman Town area of St. Andrew.

According to the sole eyewitness for the prosecution Detective Inspector Donovan Bailey, who was a Sergeant of Police at the date of the offence, the deceased Wright and himself were friends. They had met that day around 10:30 a.m. at the Pre-Pack Wholesale and Retail store nearby. Having made their purchases and secured them in their respective vehicles, they retired to the bar to regale themselves in the form of liquid refreshment. The deceased led the way. After placing the order for drinks with the barmaid the deceased took up a position immediately to the left of Inspector Bailey who proceeded to the counter, a distance of about two feet separating them. Inspector Bailey having told the deceased who was ordering the drinks what he was having, suddenly heard a voice coming from behind him saying:

"Big man give me what you have"

Inspector Bailey turned around and saw a man whom he later identified as the appellant standing at a distance of about two arms length away with a firearm which he described as being a 9 m.m. revolver pointed at him. He held his hand in the air and told the appellant:

"me nuh have nutten."

The gun was being pointed at the witness' chest. On turning around Inspector Bailey was facing the gunman and staring at him concentrating his focus on his face, the chest region and down to the revolver in his hand. Then the gunman said to Inspector Bailey (using an expletive):

'P...hole lif up yuh shut!'

Inspector Bailey hesitated for a while then instead of going towards his shirt he moved slightly to the left and made a grab at the gunman's firearm which was then about an arm's length away. He missed his mark and then heard an explosion, the sound coming from in front of where he was standing. Immediately, Inspector Bailey felt a burning sensation to the right side of his stomach. He held his side and ran out of the bar to the Pre-Pack store where he made an alarm that he had been shot. He was assisted to the St. Joseph's Hospital where he was treated as an emergency case and then transferred to the Kingston Public Hospital where he was admitted. He remained a patient at the hospital for thirty-one days during which time he underwent an operation before being discharged.

The nature of the injuries suffered by the witness was an entry gunshot wound, the bullet entering the witness' abdomen at the umbilicus (the midline), travelling through his body and finally exiting through the right upper quadrant to the left of that area.

The evidence from the doctor who attended to Inspector Bailey confirmed that the injury to his body was caused by a projectile fired from a high velocity weapon. Through divine intervention coupled with the skill of the surgeon Inspector Bailey was able to recover to give an account of his experience at the Mango Tree Bar. The deceased Dougal Wright was not so fortunate. The irresistible inference to be drawn was that from the position he occupied in the bar to the left and in line with Inspector Bailey who stood facing the gunman, it was the deceased's misfortune to have been struck in the chest by the gunman's bullet as it exited the body of the police officer.

The post-mortem examination conducted on the body of the deceased by the pathologist on 25th February, 1999 revealed a single entry gunshot wound on the body on the right anterior chest below and medial to the nipple. The trajectory of the bullet was downwards, backwards and to the left. It travelled through underlying tissues, the thoracic cavity, both lungs and heart, and lodged in the soft tissues over the left flank of the chest. The jacketed bullet was handed over to the police present at the post-mortem examination. Death was the result of a gunshot wound to the chest.

Following his discharge from hospital and on resuming work on April 14, 1999 around 2:00 p.m. Inspector Bailey was driving his vehicle in the vicinity of the Mango Tree Bar when upon reaching the stop sign at the

intersection of Dames and Anderson Roads he looked across to the bar and saw the appellant. He immediately recognized him as the man who had held him up and shot him on 13th February 1999. The appellant was then standing on the roadway and about a couple feet from the bar on Dames Road. He was about one chain from the bar. Inspector Bailey drove the vehicle closer to the appellant. On realizing that this was the same person involved in the incident he continued driving along Dames Road towards Arnold Road. On observing the man he noticed that apart from a somewhat higher head of hair, his features had not changed.

On travelling up Arnold Road Inspector Bailey came upon a police patrol car travelling in the opposite direction. He stopped the driver, made a report to him and pointed out the appellant who was still standing at the intersection of Dames and Anderson Roads. He then continued driving north up Arnold Road.

Later that day while at his home around 4:00 p.m. Inspector Bailey received a telephone call and went to the Cross Roads Police Station. There he saw the appellant who was seated on a bench in the guard-room. He pointed him out as being "the man who shot me in February". He identified the appellant as the same man whom he had seen earlier that afternoon and whom he pointed out to the police on patrol in the Arnold Road area.

Upon being told of the report by the investigating officer Detective Sergeant Coleville Ebanks, and cautioned, the appellant denied having killed anyone. He was arrested and charged for the capital offence.

The appellant gave an unsworn statement in which he stated that at about the time of the incident he was down by Sabina Park speaking to a friend and that it was upon reaching his brother's house that he heard that a man got shot in the Mango Tree Bar. In April, 1999 he was standing by the Mango Tree Bar when the police apprehended him and took him to the Central Police Station. He was later taken by another policeman to the Cross Roads Police Station. There he was questioned and then beaten which caused him to lose four of his teeth. The following day he was taken to the Comprehensive Clinic where the pieces of broken teeth left in his gum were pulled out by the dentist.

He was then told by the police that he would be placed on an identification parade. He was never pointed out by anyone, nor was he placed on an identification parade.

On the prosecution's case as related by the sole eyewitness Detective Inspector Bailey the shooting of the deceased and himself resulted from the discharge of a single bullet from a 9 m.m. revolver, a high velocity weapon, at close range.

The Grounds of Appeal

Learned counsel for the appellant Miss Nosworthy filed several grounds of complaint relying initially on three grounds which read as follows:

"1. That the material issue in the charge against the appellant herein being identification and the purported identification of the appellant being during a short period of time under difficult circumstances in the absence of any other evidence to support the correctness of the identification the learned trial judge erred in law when he failed to withdraw the case against the appellant from the jury and to enter a verdict of not guilty against the appellant.

2. That having regard to the alleged circumstances of infliction of the fatal injury to the deceased the learned trial judge erred in law when he failed to leave the issue of accident to the jury as a factor to be considered in respect of whether the ingredients of murder had been satisfied and more particularly as it related to the issue of whether the murder was done as a consequence of a deliberate and voluntary act of the appellant.

3. That the learned trial judge erred in law when he failed to give the jury any adequate directions on the offence of capital murder and more particularly the ingredients of murder in the course or furtherance of a robbery and what evidence the prosecution was required to establish that the murder had been committed in the course of furtherance of a robbery thereby depriving the appellant of the opportunity to have a verdict of not guilty of capital murder returned on the indictment herein".

Eventually learned counsel for the appellant did not seek to argue grounds 2 and 3 mounting her main challenge in the terms of the complaint advanced in ground 1. Before embarking on an examination of that ground, however, it may be necessary to examine grounds 2 and 3 in assessing the adequacy of the learned trial judge's directions in the matter. These grounds may be considered together.

The directions commence at pages 159-160 of the record where capital murder is defined. There the learned trial judge said:

"Mr. Foreman and your members, what is capital murder ? I must first define to you the offence of murder. Now, Mr. Foreman and your members, murder is committed where one person by a deliberate and voluntary act intentionally kills another. Now, in order to amount to murder, the killing must be the result of a deliberate and voluntary act, that is to say, it was not done by accident. Now Mr. Foreman, and your members, where death results by an accident, it is no offence. It has to be intentional, that is to say, the act which resulted in death was done by the intention, either to kill or to cause serious bodily harm or injury. But, the offence charged, Mr. Foreman and your members, is not simply murder, it is capital murder. And, remember I told you when I was reading the particulars of the indictment to you that this accused man is charged with the offence of capital murder; that on the thirteenth day of February, 1999 he murdered Dougal Wright in the course or furtherance of a robbery. So, for murder to amount to capital murder in this case, the prosecution must prove to you that the accused man committed this offence of murder in the course of furtherance of a robbery".

The directions did not stop there but went on to assist the jury with a definition of robbery. The learned judge then said:

"Now, Mr. Foreman and your members, what is robbery? Robbery is the felonious and unlawful taking of the property of another by the use of force or by putting fear into that person. And, in this particular case, you will remember the evidence to which I will return a little later on given by Inspector Bailey. Now, I should point out at this particular point, Mr. Foreman and your members, that the prosecution will have to prove to you that the act was intentional, that is the act which results in the death, was done or committed by the accused with intent to kill or to cause really serious bodily injury. It must also be proven that there was an intention to rob. It must be proven also that somebody died as a result of the intentional act of the accused and in this particular case the prosecution is saying that Mr. Wright died as a result of the accused man's action. So, Mr. Foreman and your members, you may say to yourself that the evidence that the prosecution has led in the evidence indicates that the firearm that was alleged to have been used was used against Mr. Bailey, Inspector Bailey, but in fact, the person alleged to have died is Mr. Dougal Wright".

With these directions no reasonable jury could have failed to grasp the meaning of the term capital murder as it applied to the circumstances of this case. This, therefore, was sufficient to dispose of the complaint raised in ground 3.

Ground 2, concerned as it was with a complaint of the learned trial judge's failure to leave the defence of accident to the jury, was founded,

no doubt, on the premise that the appellant had discharged the firearm at Inspector Bailey and not at the deceased.

This ground of complaint was misconceived and is without merit. It failed to take into account the doctrine of transferred malice as it applied to the facts and circumstances of the case. Following his directions on capital murder the learned trial judge then went right to the heart of the matter when at page 162 he said:

"So, Mr. Foreman and your members, under our system of law, there is a doctrine that is called 'Tranferred Malice' and what it means, is if I pointed a gun at individual A with intention to kill or cause serious bodily injury to individual A and B is standing nearby and the bullet from that intentional act causes B to die, it misses and hits B, then the law says that the intention to kill or to cause serious bodily injury to A is transferred to B. And, if you found that the act, the intentional act of firing a gun at A with the necessary intent causes B to be killed, then the person who did that is guilty of the offence of murder. And remember in this case we are dealing with the offence of capital murder".

These directions are sufficient to dispose of ground 2.

Ground 1 – The Complaint as to Visual Identification

The gravamen of the complaint on this ground is not concerned with the learned trial judge's directions on identification which were delivered with the utmost care. The necessary guidelines, including directions as to the requisite warnings, the reasons for the same and other factors so essential in such matters, were all faithfully followed.

Learned counsel for the appellant while taking no issue with the learned judge's directions on identification, nevertheless, submitted that this was a matter in which the case against the appellant rested wholly on the correctness of the identification of the appellant by a single witness, Detective Inspector Donovan Bailey. She contended that the quality of the evidence as to identification was poor, the identification having been made during a short period of time and under difficult circumstances. Counsel argued that the trial judge ought to have withdrawn the case from the jury and directed an acquittal of the appellant. In support she relied on the dictum of Lord Widgery C.J. in **R v Turnbull** [1976] 1 All E.R. 549 at pp. 550(b) and 553 (c and f).

Learned counsel for the Crown in responding submitted that while the witness Inspector Bailey may have been frightened, he kept his composure and was concentrating on what was taking place at the time of the incident. He was able to recount the details of the incident fully and made use of the opportunity available to him while coming face to face with his assailant. He was able to recognize that person and to positively identify him two months later standing on the road in close proximity to the bar where the fatal shooting occurred.

While there can be no gainsaying the fact that the incident in the bar occurred in terrifying circumstances, the identification of the appellant by the witness, Bailey, cannot be categorized as having taken

place in circumstances of a fleeting glance. As to how long the witness had his assailant under his observation, the witness gave an estimate of one and one-half to two minutes. Learned counsel for the appellant submitted that this period was exaggerated and that the period of observation must have been more in the region of ten to twelve seconds. It is in the nature of human experience that on such occasions time is suspended for the individual caught up in the agony of the moment. This was not an occasion for the faint hearted. The evidence suggests that the witness, Inspector Bailey, kept a calm disposition which was what, no doubt, enabled him to summon up the courage to have attempted to disarm his assailant. Before doing so and after turning around he had been staring at the gunman concentrating his focus on his face, chest region and down to the firearm in his hand.

Learned counsel for the appellant also sought to rest her submission on this ground by relying on the dictum of Lord Widgery C.J. in **R v Turnbull** (supra) at 553(b). There in dealing with the quality of the identification evidence, the learned Chief Justice said:

"When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the identification."

In the present case the learned trial judge left the case to the jury for their determination. In doing so he was careful to remind them to heed the warning necessary in these cases. The directions commence at p. 172 line 24 of the record where he said:

"Now Mr. Foreman and your members, this is a case, or this is a trial where the case of the accused rests wholly on the correctness of the identification of him which the defence questions and alleges to be mistaken. Remember the suggestion that was made to Inspector Bailey, the only eyewitness in the case that he was honestly mistaken. I must warn you of the special need for caution before you can convict the accused on reliance of the evidence of identification and that is because an honest witness can make a mistaken identification. Mr. Foreman and your members, it might be your experience that you may know somebody very well and you saw somebody and you called to them thinking it's the person who you know very well and it turns out to be somebody else. So, you must remember Mr. Foreman and your members, that a most convincing witness can be honestly mistaken so you therefore look at the circumstances in which the witness purports to identify the accused."

In continuing his directions the learned trial judge then went on to explore the factors which go to the quality of the identification evidence.

He said:

"How long did he have to observe the person whom he say was the accused? How far away was he from the accused when he purports to identify him? What was the nature of the lighting? Was there anything that would interfere with that observation? Was there anything on the accused man's head? Anything on the

accused man's face which would have made identification difficult or not possible? How long was it between the original observation and the identification to the police? Was there any marked description between the description given by the witness to the police and the appearance of the defendant?"

Inspector Bailey's testimony remained unshaken and the jury must have been convinced that they could safely regard that testimony as credible and reliable not only as to the events as they unfolded on the morning of the incident at the bar but, more importantly, as to his identification of the appellant.

It was for these reasons that we were led to the result which is set out at the commencement of this judgment.