

HML8

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 97/2000

**BEFORE: THE HON. MR.JUSTICE DOWNER, J.A.
 THE HON. MR.JUSTICE LANGRIN, J.A.
 THE HON. MR. JUSTICE PANTON, J.A.**

REGINA vs GERALD MUIRHEAD

**Miss P. Llewelyn, Acting Senior Deputy Director Public Prosecutions, and
Miss Tanya Labon Crown Counsel , for the Crown**

Miss Janet Nosworthy for applicant

2nd , 3rd July and December 20, 2001

LANGRIN, J.A.:

The applicant was convicted on May 8, 2000 in the Home Circuit Court for the murder of Carlos Gunn and sentenced to life imprisonment with eligibility for parole after serving twenty five (25) years. On July 3, 2001 when the appeal was dismissed. We promised to put our reasons in writing. This we now do.

The Crown's case is to the effect that Carlos Gunn (deceased victim) and Nancia Webb and their children lived on McKoy Lane. The applicant lived at the top of McKoy Lane with his parents. The only eye-witnesses for the prosecution were Orlando Gunn, one of the children of the deceased and his common law wife Nancia Webb. Orlando Gunn, then only seven years old, his

siblings and a cousin were at home on 29th August, 1997 when the applicant entered the yard in which the family lived in a one room board house. The applicant entered the gate, passed the witness and stood at the doorway of the one bedroom house where he shot and killed the deceased who was standing in the room between two beds.

The applicant was known to Orlando for four years as "Zaza". However, one year after the fatal incident Orlando pointed out the applicant at an identification parade as the man who shot and killed his father.

He was arrested and charged for the offence of murder. The applicant at his trial gave an unsworn statement in which he sought to establish an alibi as to his presence elsewhere at the home of one Miss Alma Seymour between 8:00 a.m. to 4:00 p.m. when the fatal shooting occurred.

The Court heard evidence from Orlando who was ten years old at the time. An important passage in the transcript reads:

"Q....Now when Zaza came through that zinc fence,
you see, you did look pon him?

A. Yes.

Q. What part a him body you look pon? You
understand me? What part of his body you saw?

A. Saw his face.

Q. Now Zaza come through the zinc fence, him do
anything, Zaza?

A. Yes.

HIS LORDSHIP: Just one moment, he is telling us he goes to school, so, you know, standard English is not out of order.

MRS. GRAHAM-ALLEN: I am obliged, my Lord.

Q. What did Zaza do after he came through the zinc fence, what did he do?

A. Tek out him gun out a him right pocket.

Q. Before that, did he stay by the zinc fence and take the gun out of his right pocket?

A. Miss?

Q. Did he stay by the zinc fence and take the gun out Of the pocket?

A. No.

Q. Tell us what he did?

A. He stay at the doorway.

Q. Good. How him get to reach the doorway? You see how him reach the doorway?

A. Him walk to doorway and come inside.

HIS LORDSHIP: He did what?

Q. Speak up again. Say what you just said?

A. Him walk in at the doorway.

Q. Now, when Zaza came to the doorway, you see, did he say anything?

A. Yes.

Q. Who was he speaking to, who was Zaza speaking to?

A. Speaking to the whole of we.

HIS LORDSHIP: what?

THE WITNESS: Him speaking to the whole of we.

Q. We who?

A. Mi Cousin, mi sisters, mi...

Q. And where were you when Zaza came to the doorway?

A. Inside, in the house at the doorway.

Q. You were at the doorway?

A. Side of him"

He continued:

"THE WITNESS: He came and he stand up and he kill him and he drop between the two bed.

Q. Now, why you say him kill him and him drop between the beds? Did you see anything happen why you say him drop between the beds? Tell us what happened why you say he kill him?

A. Him tek out the gun out a him right pocket and shoot.

Q. He what?

A. Tek out the gun out a him right pocket.

Q. Who did this?

A. Zaza.

Q. And after he tek out the gun out a him right pocket, what did he do with it?

A. Tek it out and shot him.

Q. Shot him, him who?

A. Carlos.

Q. Now, Orlando, when Zaza did that, you see, tek out the gun and shot Carlos, did you remove from the doorway?

A. Him shot him and go way."

Dr. E. Seshiah conducted a post mortem examination on the 17th September, 1977 on the body of Carlos Gunn and found the following injuries:

-Two entrance gunshot wounds on the right side of the face without any gun powder markings.

The medical officer opined that the cause of death was due to gunshot wounds to the head.

With these considerations in mind we proceeded to an examination of the substantial complaints advanced by Miss Nosworthy on behalf of the applicant. The complaints read:

- "(1) The Learned Trial Judge erred in law in that the Prosecution's case against the Applicant depending substantially on the correctness of the identification of a single eyewitness in the absence of any corroborating evidence, having regard to the nature and quality of the evidence as to identification and more particularly impropriety of the purported identification of the applicant at the identification parade the learned trial judge ought to have withdrawn the case from the Jury for consideration.
- (2) That in passing sentence the minimum period certified by the learned trial judge before which the applicant becomes eligible for parole is manifestly excessive in all circumstances of the case and the learned trial judge failed to give any or adequate consideration to the following factors:
 - (a) the young age of the applicant at the date of commission of the offence namely 16 years;
 - (b) the young age of the applicant at the time of sentencing;
 - (c) the industry and civic mindedness of the applicant; and
 - (d) the fact that the applicant had no previous convictions.

AND THAT in the exercise of his discretion in determination of the appropriate period the learned trial judge placed undue emphasis on the element of punishment/retribution and failed to give adequate consideration to the element of reform/rehabilitation".

At page 215 of the transcript this aspect of the evidence was put to the jury by the Learned Trial Judge in this way:

"So you have before you evidence from this boy that he saw Zaza come into the premises from the zinc fence, saw his face at the time, and that Zaza came into the room and stood at this doorway beside him and asked the question, and when he, Zaza, asked the question he was looking at Zaza's face. Did he have sufficient opportunity to make out the assailant? Was this broad daylight? He said Zaza was standing beside him. So what? Would he have been able to see Zaza's face, or it was just a side view he had of Zaza, a person standing at a doorway beside another? Is that person precluded from seeing the person's face? You would think that if a person is standing beside another at a doorway, both persons would be standing close to each other. And, of course, members of the jury, you will remember that the witness did tell you at one point that Zaza was about a foot from his father when he fired the shot. You remember he indicated, and then afterward he pointed out a longer distance, that is to say, a distance from where he was standing to this section of the wall behind me. Is this indicative of the witness not being able to tell you accurately what happened? Was he present, and if he was present, was he able to see what was happening? You may think, that having regard to his age, this must have been a dreadful experience indeed, if what he said is true, that this man was shot and killed. Even for an adult it would have been a dreadful experience, let alone a little boy. You must take into account, although he didn't say that he was frightened, you must take into account the incident itself, and ask if the manner in which the incident happened, that is to say, a man coming to the doorway and firing shots at another who was then in his house, and then he although there is no evidence of fright, you take into account whether or not in those circumstances a

boy such as the witness would have been so frightened that he would have been unable to make out who this assailant was.

This boy says, 'I saw Zaza, I knew him before, I saw when he entered the premises, and I also saw him come to the doorway, stood on the inside of the doorway, asked the question, I looked at him, saw his face, and he shot my father'."

Prior to these directions the learned trial judge in dealing with the identification parade told the jury at page 206:

"...in light of what you have heard from the accused that the witness knew him before and well knew him before, so that the identification parade in the light of what you have been told, both from the dock as well as from the evidence from the witness box, the identification parade did not test the accuracy of the witness' recognition of the person who the witness says he saw commit the offence. What remains for you to determine, members of the jury is the identification evidence. This Zaza, is this the person who shot and killed the boy's father? Zaza said that he is not the Zaza who did it. The boy is saying, not only is he Zaza, but he is the man who shot and killed his father, and when he went on to the parade he well knew Zaza and he pointed him out.

There was a line of men, and you may presumably – and you have to take it that he didn't know the others – he sees that man who the police held as a suspect. It would be the easiest thing in the world to point to the man whom he knew as Zaza. So there is no issue then as to who Zaza is as far as the witness' allegation is concerned. The witness says it is Zaza but, of course, the accused man from the dock says that he is not Zaza. There is no issue that the witness knows this accused man and knew him well before the incident. The question, is he mistaken? Of course, members of the jury, the prior question, is he a credible witness? Because if he is not credible, if he has not spoken the truth, if he has been put up, schooled, coached into lying on this accused man, then that's the end of the case. If he is lying, whether he was coached or not, then that is the end of the

case and you would be obliged without going any further to dismiss this accused man of this charge".

Counsel was unable to point out to the Court any specific weaknesses in the transcript pertaining to the identification evidence.

It should be observed that the witness went on to point out the applicant on an identification parade. Again counsel was unable to point out any specific complaint in respect of the parade. During the course of her arguments, Miss Nosworthy said that having looked at the grounds of appeal, the directions of the learned trial judge and the authorities she could not sustain the arguments that she had proposed to make. She sought and obtained leave to argue that the verdict was unreasonable and cannot be supported having regard to the evidence. In view of the foregoing we found no merit in that ground.

We did not find any merit in the ground dealing with sentence.

In our view there is every justification for the length of the custodial sentence which the applicant must serve before becoming eligible for parole. Murder with the use of a firearm is an extremely serious offence which is having a devastating effect upon the stability of this country.

Accordingly, the application for leave to appeal is treated as the hearing of the appeal. The appeal is dismissed. The conviction and sentence are affirmed. The sentence is to commence on August 8, 2000.