

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 76/87

BEFORE: THE HON. MR. JUSTICE ROWE, F.
THE HON. MR. JUSTICE CAMPBELL, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.

REGINA

VS.

KARL SHAND

Delroy Chuck for the Applicant

Miss J. Straw and Mrs. L. Errar-Gayle for the Crown

February 15, 1988

ROWE P.:

The applicant in this case was convicted on the 28th of April last year, before Walker J. and a jury in the Home Circuit Court for the murder of Dudley Campbell, which took place on the 26th of October in 1984. Counsel on his behalf has filed two grounds supporting his application for leave to appeal against this conviction.

The first ground is that the learned trial Judge failed to direct the jury and/or inadequately directed the jury on the law of identification which was the central issue in the case and for this ground he relied upon the decision of this Court in Bradley Graham and Randy Lewis, S.C.C.A. 158 and 159/81. Ground 2 complained that the learned trial Judge misdirected the jury when he told them that the alleged admission by the applicant to the witness Sonia Simmonds "amounts to a confession."

The facts upon which the prosecution rested were that on the early morning of the 26th of October, 1984 at about 8 o'clock or thereabouts there were a number of people who went to transact business in a shop on Mountain View Avenue in the vicinity of No. 57 Mountain View Avenue. Among these people were Sonia Simmonds and Phillip Daley.

Sonia Simmonds said that as she stood on the piazza of that shop she saw the applicant cross a fence, enter the road and approach the shop and he was carrying a gun in his hand. The gun was pointing up towards her. She called to the people in the shop loudly enough for everyone to hear: "Duppy a come." She said that when she called one man ran from the shop, he was Phillip Daley. By this time the applicant was now on the piazza, and she heard a gun-shot and she saw Daley hold on to his side and fall to the ground. Then she said another man ran from the shop and when he came out on the piazza, that man Dudley Campbell, he was face to face with the applicant, and she said she heard another shot. Dudley Campbell continued to run into the roadway where he fell. She herself ran away at that time and she heard two further shots.

Sonia Simmonds further said that she had known the applicant for a number of years in the vicinity of 57 Mountain View Avenue where he lived. She had not actually spoken to him before that day but he is somebody whom she knew very well. She said too that some time after the appellant was arrested her boyfriend was also arrested and both of them were detained in the General Penitentiary. On one occasion when she went to the Penitentiary she was asked by her boyfriend to put in a request to have an interview with the applicant which she did. In the course of that interview the applicant told her that he was sorry for what he had done and she interpreted this to mean that he was sorry for having shot Dudley Campbell in October.

It was suggested to this witness firstly, that she was not there on the morning at all and therefore she was in no position to see anything. It was suggested to her further, that the conversation which took place at the Penitentiary was at her bidding and that she told the applicant that she was

being pressured by the mother of the deceased as also by the arresting officer to give evidence against the applicant and she was unwilling to do so. However, when these questions were put to the witness by defence counsel she stoutly denied them and insisted that the conversation took place at the invitation of the applicant through her boyfriend and that what she had said about his being sorry was indeed the whole truth.

Now Phillip Daley, who gave evidence, said he had known the applicant for some five years before the occasion when the shooting took place. He said he was inside the shop and at the approach of the applicant he ran out. He heard the sound of a gunshot and then he felt a blow: "Something hit me in my back and flew through my belly." He was taken to the hospital and he was operated on. In the process he lost one of his kidneys. I think the learned trial judge described him as one of the very lucky people who having suffered such an injury lived to tell the tale.

The medical evidence was that Dudley Campbell was shot twice. One of the shots caused an entry wound to the right lower face, five centi-meters in the infer-lateral to the right angle of the mouth and an exit wound in the mid-line, two centi-meters below the lower lip. This was 2.5 centi-meters long with irregular edges. The third injury, which was really the second bullet wound, was an entry wound two centi-meters infer-lateral to the left sternum clavicular joint, and that bullet rested in the chest wall. The doctor found that the cause of death was due to haemorrhage from the gunshot wounds.

The defence was an alibi. The applicant said that he had left his home early that morning, he had gone to see his sister, he spent some time with her, then he went down to Windward Road and Pembroke Road corner, where he spent the rest of the morning and the early part of the afternoon with a lady for whom he sometimes did good deeds. He returned to his home about 2 o'clock in the afternoon and his sister told him what had happened.

Now, this sister was called as a witness and she said she did not see the actual shooting but she saw the witness, Phillip Daley, throw a gun over a fence before he fell to the ground and she said too that her brother

had left home, she did not see him in the vicinity at the time when she heard the gun-shots. His other sister came along and gave evidence and she said the applicant was at her home around mid-day but her evidence did not cover the period between 8:30 and 9 o'clock when the shooting is alleged to have taken place.

The witness, Phillip Daley, was cross-examined to suggest that he was giving evidence because he was on the opposite political side to the applicant. Phillip Daley said he had only reached the age of eighteen at the time of trial, which was some two years after the shooting and he had not up to that time got himself mixed up in politics.

One thing which was characteristic of the case is that the applicant said he had known Phillip Daley from they were small boys; that they played together; that they grow together and it was only since there is violence in the Mountain View area that they had been going their separate ways. He in fact put himself ⁱⁿ much closer association to Phillip Daley than Daley had admitted when he gave evidence. The applicant said that the deceased was his very good friend, suggesting that he would have had no cause to want to shoot his friend.

The incident happened in broad day-light. The two witnesses for the prosecution, as well as, the applicant himself admitted that all three persons were all well-known one to the other. In those circumstances the learned trial Judge in directing the jury as to the manner in which the trial was conducted said:

".... the question of identification is most important in this case. Defence Counsel has suggested to you that this is not a case of mistaken identity, it is not a case in which the witnesses Sonia Simmonds and Phillip Daley have mistaken somebody else for the accused or mistaken the accused for somebody else. There is no question of mistake. What the Defence is saying is that this is a case of deliberate lies."

This direction, having regard to the line which the defence took was given on the basis that these persons knew the applicant well, that it was not conceivable that they could have mistaken him for anybody else and therefore that the only explanation for the evidence which they were giving was that

they were lying. That was how the case was put up to the jury.

Mr. Chuck in arguing the first ground relied heavily upon the decision of this Court in Bradley Graham and Randy Lewis (supra) and he said that these are all identification cases and the general warning which is recognised in all identification cases as necessary ought to have been given in this particular case. I said in the Bradley Graham and Randy Lewis case:

"In the recognition cases where the accused is said to be well-known to the witness for an extended period the true test might be that of credibility rather than of an honest witness making a positive yet mistaken identity. Therefore the language of the general warning to be given in the recognition cases might differ in detail from that which is to be given where the accused was not known to the witness previously."

As a general statement of the law, I can find no fault in what I said then, but I did give the example this morning of a brother and a sister giving evidence against another brother who is the defendant. If all three had lived in the same house and the incident giving rise to the case had allegedly taken place in broad day-light in the presence of all three, then if the defendant brother says: "I was not present, they are telling lies on me," obviously it would be ludicrous for the Judge in those circumstances to give the jury a direction as to identification, then to give a general warning as to the untrustworthiness of visual identification evidence, when in truth and in fact the only live issue was as to the credibility of that brother and that sister.

We are of the view that the way in which this particular case was conducted the trial Judge took the correct view that no live issue as to mistaken identification arose and so he focussed and he focussed quite strongly upon the credibility of these witnesses and about that focus there has been no complaint. We therefore do not find that there is any substance in ground 1.

As to ground 2 Mr. Chuck did put the ground forward but on re-reading the Record he was constrained to say that there could be no other interpretation to what the applicant is alleged to have said to Simmonds other than that the applicant was admitting that he had shot Dudley Campbell for which he was sorry. In the circumstances he could not support the complaint contained in ground 2.

We do not see any merit therefore in either ground argued. The application for leave to appeal is refused.