JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 10/86

COR: The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice White, J.A.
The Hon. Mr. Justice Downer, J.A. (Ag.)

R. v. MAURICE FRANCIS

Bert Samuels for Applicant

Canute Brown for Crown

May 21 and June 19, 1987

CAREY J.A.:

The applicant was convicted in the Home Circuit Court on 30th January, 1986 before Morgan J. and a jury for the murder of Raymond Yee and sentenced to death. After hearing submissions from Mr. Samuels on 21st May, we refused the application for leave to appeal, and, as is now customary, we have put our reasons in writing.

The facts are short. On 2nd January, 1984 at about 8:15 p.m. David Turner, the main witness for the prosecution was visiting at premises in Trinity Ville in the parish of Saint Thomas when a number of men abducted Raymond Yee, the victim, and himself, placed them in a car, and drove them to a section in the lower foothills of Wareika Hills known as Back Bush. There, one of the men left the car, and some five minutes later returned with the applicant whom the witness knew before, as "Caney."

On his arrival, the applicant looked in the car, and then remarked - "Ah thought is two dead man you bring come give me." He left, but returned armed with a submachine gun, ordered Raymond Yee from the car, and to lie face down on the ground. He proceeded to tie Yee's hands behind

his back with a piece of electric wire. The witness was similarly treated, and by way of variation his hands were not only tied together behind him but secured to the back of his trousers. After this, both men having been ordered into a yard were directed to lie on their backs. The applicant kept guard while two other men who were present went away. They were absent for about half an hour. When they returned, one was overheard to counsel against killing anyone. The applicant's response was chilling - "Before I mek them get away, a prefer dead."

The torture continued. The applicant then gagged Yee. There was however an interruption in the unfolding of this tragic drama when another man arrived on the scene to ask the applicant if he was ready. That man boasted an M-16 assault rifle. The witness was ordered up but had to be helped up as was Yee. With the M-16 man at point, they marched off in single file up into Waresska, escorted by a number of men including the applicant. At some point between, what the witness described as the second and third level, the applicant grabbed hold of the witness by his hair, kicked him in the back of his knee, so that he fell onto his knees. He pulled out an ice-pick. To the enquiry, why a gun was not being used, the applicant responded that the neighbourhood would hear the shots. The witness was then stabbed twice in his right ear and to the back of his head. He fell to the ground bleeding through the right ear and nostril. As he lay on the ground, the applicant came over him and inflicted some five to six stab wounds in his back. He pretended to be dead. The applicant felt for a pulse and also placed his fingers under the injured man's nose. Doubtless satisfied with his handiwork, he flung Yee across the witness' back and proceeded to stab him all over his body. Yee was then taken off and put to lie beside the witness. This activity caused a stone which had been preventing the witness from rolling down the hill, to be dislodged, prompting the observation from one of the escort, "what a boy tough, him no dead yet, you know!" Whereupon, the applicant set to, and began stabbing Turner all over including his left ear, using some unknown object "to nail the ice-pick inside 'my ears." The applicant used his foot to raise up the hapless Turner

and then let him fall back to the ground, gave him other stabs, but by this time the injured man had lapsed into merciful unconsciousness.

This man despite this ordeal, lived to recount his dreadful experience. He said he is deaf in his left ear. He regained consciousness at about 5:00 to 5:30 the following morning and eventually made a report to the police. He never again saw Yee alive.

On 30th January, 1984 he pointed out the applicant to the police on Olympic Way from a patrol car.

The witness said he was able to make out the applicant when he came to the car and peered in, by a street light and while they were in the hills, by the moonlight. Of course, the applicant and the witness were quite close to each other on these occasions. The motive for the killing of Yee, and indeed, the attack on Turner, was that Yee was accused of taking a gun away from the applicant and failing to return it.

Despite searches made to find Yee, it was not until the third day following these events, that crows hovering about in a particular area attracted the searchers, who then recovered the body which was found some distance up in the Wareika Hills. Although there were multiple stab wounds over the area of the back, death was due to a fracture of the skull as the result of blunt external force. No theory was advanced on the evidence as to how this particular injury could have been caused. But it is beyond conjecture that he must either have fallen down the hill-side or been thrown down it. The area is known to be precipitous.

The applicant made an unsworn statement, the standard practice in this country. He declared that he had never been to Wareika Hills and injured anyone. He was unable to say where in fact he was on the day in question because he had kept no particular check of the date.

Learned counsel sought and obtained leave to argue one supplementary ground of appeal, formulated thus:

> "The learned trial judge's directions on the defence raised, i.e. alibi was insufficient and fatal to the conviction."

In support of this ground, Mr. Samuels said that it was not sufficient for the learned trial judge to have commented on the unsworn statement in a general way and say to the jury if they were in doubt, they should acquit. They should have been told that if they were in doubt or accepted the defence of alibi, they should acquit.

The learned trial judge dealt with the applicant's defence in this way. Having reviewed the unsworn statement, she then stated as follows:

> "What he has said may convince you of his innocence. If it does that, then you must acquit him; or it may raise a reasonable doubt in your mind, in which case also you must acquit him, or you may think that it may strengthen the prosecution's side. If it does that and you are satisfied that the prosecution has made out a case which satisfies you to the extent that you feel sure, then it is open to you to convict him.

What the applicant said is his defence. Directions thereon hardly qualify as general.

She then categorized the defence as an alibi in these words:

> "What he has raised is, in law what we call an alibi."

And continued:

> "He says he is not the person. He says he was not there. When an accused man puts forward an alibi as an answer to a charge he doesn't in law assume any burden. There is no burden on him to show that on that night he was at 'X' point. The burden is on the prosecution to establish to the extent that you feel sure that he was not elsewhere but that he was, in fact, up at Wareika Hills with Yee and Turner. So, you can't convict him unless you definitely reject his story, because, of course, a person can't be in two places at the same time. That is what he says, and the crown has put forward its story and asks you to say that he was there, that he murdered Raymond Yee or that he was one of the group of men who murdered Raymond Yee."

In these words the defence is explained. The directions are specific not general.

We think the argument advanced by learned counsel is wholly devoid of merit. The learned trial judge in her directions put the defence

clearly, succinctly, and correctly, and explained the alternatives open to the jury depending on their acceptance or rejection of the defence. She was careful to tell them what was their function in the event of entertaining a reasonable doubt about the defence. She did all that was required in the circumstances and plainly had in mind R. v. Finch 12 Cr. App. R. 77.

We would add that the summing up was not challenged in any other particular nor did counsel seek to argue that the verdict was unreasonable. We ourselves have carefully examined the facts and circumstances of the case and are quite unable to find any ground which would incline us to interfere with the jury's verdict which we think was warranted. As must now be obvious, we did not think that there was any ground whatsoever to attempt to criticize the directions of the learned judge.