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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 77/85

BEFORE: THE HON. MR. JUSTICE KERR - PRESIDENT (AG.)
THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE DOWNER, J.A. (AG.)

REGINA

VS.

MICHAEL BAILEY

Mr. Dennis Morrison and Mr. Hugh Thompson for the Appellant

Mr. Garth McBean for the Crown

October 30 and November 13, 1986

KERR, P. (AG.):

This application for leave to appeal from a conviction for murder of Maxine Gordon in the Home Circuit Court Division of the Gun Court before Bingham J. and a jury was refused. Herein are the reasons for so doing.

Eye-witness evidence of the incident in which the deceased was killed, was contained in the deposition of Pauline Ellis who died on 21st November, 1984 after she had given evidence at the preliminary examination on the 9th November, 1984. Evidence of her death and interment was given by her brother Arthur Ellis and of the proper taking of the depositions by Monica Gray, the acting Clerk of the Courts. The depositions were tendered and read without objection from the defence.

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The deceased was the daughter of the deponent, and at the time of her death was nineteen years old and they lived together at 7 St. Michaels Road, Kingston 2. At their home at about 8:00 p.m. on the 21st June, 1984 were the witness, the deceased and two friends Debby and Marlene. The deceased and witness were in the bedroom. The deceased looked out through an open window, spoke to her mother and went out on the verandah. Then followed in her evidence a graphic description of swift action and sudden death. She heard explosions like gun shots. The deceased ran back into the bedroom and went under the bed. She was followed by the appellant whom she knew as "Teetie". He had a gun in his right hand. She pleaded with him not to kill the deceased. He made no answer but pointed the gun under the bed and fired three shots. The deceased called out "Me nuh say so Teetie, you know." The applicant jumped across the bed, lifted up the mattress, pointed the gun at the deceased and fired two more shots. He then opened the door and walked away. She noticed the deceased bleeding from the head. She ran to the nearby Rockfort Police Station and made a report. When she returned, the body of the deceased had been removed. In cross-examination by the attorney for the applicant, she said she did not know if the deceased saw the applicant when she looked through the window. She was examining some clothes on the bed when the applicant came in the room and only the deceased and herself were in the room at that time.

Constable Errol Marsh on receiving information about 8:00 p.m. that night promptly visited the premises and in the bedroom saw the dead body of the deceased lying face down in a pool of blood. The bedroom was lit by electric lights which were on when he went there. The applicant was arrested on 27th August 1984 at the Hunt Ward of the Kingston Public Hospital by

Detective Corporal Zimroy Green on a warrant charging him with the murder of Maxine Gordon. On arrest and upon being cautioned he said: "All me have to say sir, a me one kill her" and when asked by the officer why he killed her the applicant said: "Me and she did have a long time argument". In cross-examination he said that he recorded the statements made by applicant on arrest in a diary. The diary was not then with him and he could not recall what he did with it. He denied the suggestions that those statements were not made. He also denied that the applicant said: "Is not me - I don't know nothing about it". Detective Sergeant V.L. Ximines, who attended the scene found in the bedroom six expended cartridge cases and two .45 calibre bullets. These he submitted to the Ballistic Expert D.J. Wray, who examined and tested them and concluded that the bullets and the cartridge cases had been fired by a .45 semi-automatic pistol.

Dr. Gangadaharan who performed the post-mortem found the entrances and exits of three bullets - one through the head, one through the thigh and one through the chest. The absence of scorching or tattooing around the wounds indicated that the fire-arm muzzle was more than eighteen inches away at the time of firing. In his opinion death was due "to brain damage and shock due to the injuries caused by projectiles of firearm".

In his brief statement from the dock the applicant said he lived at 163 Windward Road but he sold clothes and shoes with a lady at Princess Street. On that day he was at home with his brother and sister. About 10 o'clock a neighbour inside the yard told him that one of his baby mother friends died a while ago and he asked where she died and was told at her home.

Leave was sought and granted to argue the following supplemental ground:

> "That the learned trial judge erred in law in failing to hear the concern of the jury and if necessary to give them further directions when it appeared that they wished his guidance on something in the case."

The basis of this complaint rested on the following interchange between judge and jury on their returning to Court after they had been in retirement for one hour and thirteen minutes:

" REGISTRAR:	Mr. Foreman, please stand (Foreman stands).
	Mr. Foreman and members of the jury, have you arrived at a verdict?
A:	No, we have not.
HIS LORDSHIP:	What is giving you trouble, is it a question of fact or question of law?
A:	No, it is a question of ....
HIS LORDSHIP:	Just answer. Is it a question of fact or law?
A:	Neither of the two.
HIS LORDSHIP:	Neither of the two. But, Mr. Foreman, you all have an oath which you took, you know ....
A:	That is what they are not taking ...
HIS LORDSHIP:	.... to render a true verdict according to the evidence. Just please go back into your jury room and please consider the case and return a proper verdict in accordance with the evidence.
A:	Your Honour, can I ask a question, can I make a statement?
HIS LORDSHIP:	A question about what?
A:	About ....
HIS LORDSHIP:	About what?
A:	General question I want to ask.
HIS LORDSHIP:	A general question to do with what, the conduct of the case?
A:	No.

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" HIS LORDSHIP:	What?
A:	What happened is that there is .....
HIS LORDSHIP:	Does it have anything to do with the conduct of the case?
A:	No, it doesn't.
HIS LORDSHIP:	Well, it is extraneous, it has nothing to do with your decision. You don't understand? You have to put it out of your mind. I don't make myself clear?
A:	Yes, right.
HIS LORDSHIP:	Yes. You know, I sometimes wonder what is happening you know. You all take an oath, you hear the evidence. Now the time comes to go and consider your verdict and if it is not a question of fact or not a question of law, somebody is playing the fool. Now, please go and do your duty."

The jury then retired at 4:12 p.m. and returned at 4:56 p.m. with their unanimous verdict.

Mr. Morrison submitted that when the jury indicated that they wished to have guidance of the learned trial judge on something, it was his duty at the very least to give a hearing to their concern and it is only at that stage that he could arrive at his discretion as to the appropriate way to deal with the matter.

Mr. Morrison conceded that it would be speculation as to what was troubling the jury and although the judge's enquiry covered the areas in which he would be required to help, the jury were laymen who might not appreciate the import of the questions.

Now there is no presumption that the jury are unable to understand simple questions. The judge was obviously concerned that irrelevances that might be prejudicial were not blurted out in open court. His clear enquiries were exhaustive of the aspects of the case on which he could assist them. His final admonition was to advert them to their responsibilities and their duty to

discharge those responsibilities in accordance with the oath which they had taken.

Accordingly, we are of the view that the learned trial judge acted with reasonable prudence. This ground of appeal therefore failed.

Mr. Morrison with his usual frankness advised that he could find no other grounds for complaint.

In our view the Crown presented a strong case against the applicant and the learned trial judge gave full and careful directions. He reminded them that in assessing the evidence for the prosecution they should give consideration to the fact that they did not have the opportunity of seeing and hearing the witness Pauline Ellis and observing her demeanour. He reviewed the evidence and identified and left for their determination the material issues of fact.

For these reasons we refused the application for leave to appeal.