JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 75/91

COR: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE WOLFE, J.A. (AG.)

REGINA VS. MICHAEL JOHNSON

Delroy Chuck for the applicant

Michael Palmer for the Crown

September 21 & October 12, 1992

WOLFE, J.A. (AG.)

The applicant was convicted before Patterson, J., sitting with a jury, on the 12th July, 1991, in the Circuit Court Division of the Gun Court for the murder of Milton Henry who was brutally gunned down on either the 15th or 16th day of September, 1990. He was charged jointly with Ronald Graham on an indictment which contained two counts. At the close of the case for the prosecution, Graham was acquitted in respect of both counts of the indictment, whilst the applicant was acquitted in respect of count two of the indictment. The acquittal was occasioned by the failure of the Crown to adduce any evidence to implicate both men in respect of count two and Graham in respect of count one.

The applicant now seeks leave to appeal against his conviction. The outcome of this application requires only a brief summary of the contending versions put forward at the trial.

The prosecution alleged that on the night of the 15th September, 1990 there was a dance in progress at Gleaville Avenue, which is off the Red Hills Road in the parish of St. Andrew. At about 11:00 p.m. or sometime thereafter, the deceased Milton Henry was seen in the vicinity of a shop. Donald Graham was in an open lot, whilst

the applicant was seen sitting on a broken concrete column. Both Graham and the applicant, according to a witness Carol Burke, had arrived on the scene in a car driven by Graham. The applicant alighted from the car which was parked in the open lot and went to sit on a broken column. Graham remained in the car. Whilst Graham was seated in the car the deceased went up to the car and engaged Graham in a conversation. Graham alighted from the car. The conversation continued. As both men conversed, the applicant left the column where he was seated, went into the open lot where the car was parked, returned with a gun and shot the deceased at point blank range. The deceased fell to the ground mortally wounded. The body was subsequently removed.

Dr. Royston Clifford, Registered Medical Practitioner and Consultant Forensic Pathologist attached to the Ministry of National Security and Justice performed the post-mortem examination on the 24th September, 1990. On external examination, he observed an entrance gunshot wound without gunpowder deposition on the skin, in the midline of the anterior neck, just above the thyroid cartilage or what is more popularly known as the adam's apple. The wound was located eleven inches from the top of the head. The wound was circular. The projectile carved a path through the skin to the underlying tissues of the neck through the thyroid cartilage, through the cervical spine and exited at the back of the neck, eight inches from the top of the head. Death, in the opinion of the doctor, ensued as a result of the gunshot wound to the neck.

The applicant gave evidence on oath stating that on the night in question he closed his business place at approximately 11:00 p.m. and was making his way home, on foot, when he was set upon by two men who robbed him of his possessions and then shot him. He was assisted by a passing motorist who took him to the Half Way Tree Police Station and then to the University Hospital, from whence he was taken to the Matilda's Corner Police Station and placed in custody. He denied that he was present at Gleaville Avenue and that he was armed with a gun and shot Milton Henry.

Noel Clarke, the passing motorist, who assisted the applicant gave evidence in support.

When the matter came on before us, Mr. Chuck for the applicant informed the Court that he had carefully studied the transcript and could find nothing worthwhile to urge upon the Court with a view to having the conviction quashed and the sentence set aside. He indicated that in his view, the learned trial judge dealt adequately with the issues which arose and that the conviction was unimpeachable. Mr. Chuck further informed the Court that he had advised the applicant and next of kin to this effect. Subsequent to this advice, the mother of the applicant informed him that there were witnesses who were available to testify that at the material time the eyewitnesses who had testified on behalf of the prosecution were elsewhere and could not have witnessed the slaying of Milton Henry. Relying upon this information Mr. Chuck filed a motion supported by two affidavits deposed to by Carlos Francis and Franklin Hunt, seeking to adduce fresh evidence. The tenor of the affidavits was that both Francis and Hunt had seen all three prosecution witnesses, Edna Burke, Lloyd Hall and Carol Burke gambling at the Burkes' home at the time of the shooting, and that it was therefore not true when they testified that they had witnessed the fatal shooting of Milton Henry.

Mr. Chuck embarked upon his arguments but experienced great difficulty to bring the contents of the affidavits within the category of fresh evidence. He eventually conceded that the evidence was available at the time of the trial and therefore did not properly come within the category of fresh evidence. With this view, we entirely agree. For the approach to the reception of fresh evidence within this jurisdiction see **William Beech v. Regina** (unreported) S.C.C.A. 179/80 delivered December 18, 1981.

The main issue raised at the trial for the determiantion of the jury was that of identification. All the prosecution witnesses who purported to identify the applicant knew him for between twenty to twenty-three years. The applicant himself testified that the

witnesses were known to him for approximately fifteen years. The uncontroverted evidence is that the area was well lighted. This was indeed a question of recognition.

The learned trial judge, in addressing the question of visual identification, observed faithfully the principles laid down by the Privy Council in **Scott & Ors. v. The Queen** [1989] 2 W.L.R. 924 and **Junior Reid & Ors. v. The Queen** [1989] 3 W.L.R. 771. He admonished the jury to approach the evidence of visual identification with caution pointing out to them the dangers inherent in evidence of visual identification. He highlighted the strengths and weaknesses of the identification evidence and ultimately left the issue fairly for the consideration of the jury.

The evidence against the applicant was overwhelming. We agree with Mr. Chuck's observation that the verdict is unimpeachable. We find absolutely no merit in the application. The application for leave to appeal is therefore refused.