JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 18/85

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

R E G I N A

v.

NIGEL COLEY

Carlton Williams & Robin Smith for applicant

Miss Joan Joyner for Crown

December 4 & 18, 1986

CAREY J.A.

The applicant was convicted in the Home Circuit Court on the 12th February, 1985 before Gordon, J., and a jury on an indictment charging the murder of Percival Jackson, and sentenced to death. This application is for leave to appeal against that conviction.

The facts upon which he was convicted were these. In the early morning of 28th March, 1982 the slain man, Percival Jackson, Peter Hutchinson, the sole eye-witness and another man who in the event could not apparently be found to testify, were walking in the vicinity of Salt and Thorbourne Lanes in the parish of St. Andrew, when there was the sound of an explosion. Hutchinson said he turned, to see this applicant standing a matter of three feet off, with a short firearm in his hand. He and his companions immediately made off, Percival Jackson in the van, followed by Leonard Mattis, with the witness bringing up the rear. In the course of their headlong flight, further explosions were heard coming from behind them.

Hutchinson related that when he looked behind, it was this applicant he noticed coming up behind still armed with a gun. When Mattis and himself reached near Thorbourne Lane and Mountain View, they stopped and turned along Saunders Lane. As they continued along this road, Hutchinson said he again observed the applicant standing by a gate, and overheard him say in reference to Mattis, - "him was there, you know." Thereafter, the applicant entered the premises at the gateway of which he had been standing.

At this point the witness realizing that he had not seen his companion Percival Jackson, set off to inform the family of his suspicions that he had been shot. Enroute, he saw a trail of blood which led to a place called Mountain View Drive-In, where Jackson was seen lying apparently dead. He was taken to the Kingston Public Hospital where death was confirmed.

The witness testified that he knew the applicant for some 15 years, and at one time both lived at the same address - 63 Mountain View Avenue.

So far as the medical evidence went, which was read at the trial in the absence of the pathologist, Dr. Ramu, it disclosed that there were two firearm entry wounds, one in the back involving the lung and aorta, the other in the left side of the back, the former being the injury which caused death.

The applicant gave evidence on oath. He admitted knowing the witness Hutchinson but said that at the material time, namely, 3:00 a.m. of 28th March, 1982, he was at home with his child, the child's mother and a younger brother. He suggested a reason for Hutchinson to fabricate the story he had in order to implicate him in the murder of Jackson. He said that the witness Hutchinson had cut him on his hand in February of the same year, and because the slain man was a friend, of Hutchinson, he developed animosity towards him. His evidence was - "him carrying feelings for me from him cut me on my hand."

He also told the jury that after he had received this knife injury, his arm was "in plaster polish."

Some party politics was injected in the proceedings when the applicant explained that on the occasion of the infliction of the wound, Hutchinson had referred to him as a "dirty Labourite."

The defence amounted to this. The applicant was not on the scene at the time of the crime. He could not have fired a gun because he had received an injury which required his arm to be placed in a plaster paris case. The sole eye-witness for the Crown had a motive for fabricating the story he had related to the jury involving him in the murder of Jackson.

One ground was argued before us and it was stated thus:

> "3. That the Learned Trial Judge did no more than to narrate the evidence of the witnesses, failing to properly analyse and to assist the jury (having regard to the crucial issue of identification) on the following aspects:
>
> (a) the allegation that the accused soon after the incident was standing at his gate which was in close proximity to where the incident was alleged to have taken place, and there conversing with other persons,
>
> (b) the motive put forward by the accused as to the reason for the witness Peter Hutchinson to lie on him, the accused (pg. 79),
>
> (c) the fact that the alleged eye witness in the circumstances of the attack, may not have had more than a fleeting glance of the attacker."

Mr. Williams submitted that on an analysis of the evidence regarding identification, the witness would at best have had only a fleeting glance of the assailant, namely, the

short interval of time which elapsed between hearing a gun-shot, turning to see the cause, being confronted by a man with a hand gun, and then endeavouring to escape. The evidence that the applicant after the shooting was observed standing by some gateway so as to be identified was an implausible story. As to the motive for lying, learned counsel submitted that the learned trial judge had not dealt with this aspect of the defence in its proper context. We understood counsel to be saying that the learned trial judge had failed to make it clear to the jury that the applicant had put forward a reason why the witness was fabricating a story to secure his conviction.

We have not been able to appreciate what analysis it was suggested that the learned trial judge should have undertaken with reference to the evidence of Hutchinson who said that after the shooting, he had seen the applicant standing at a gate. It was for the jury to make up their minds having seen and heard the witness, whether he was speaking the truth or not. The learned trial judge at page 82 of the Record, correctly, as we think, adverted to the evidence as one of the occasions when the witness said he saw the applicant and then observed:

> "It's a matter for you Madam Foreman and members of the jury, what you accept and what you reject. The crown, the Prosecution has a burden of proving the guilt of an accused. That is a duty, a burden they must discharge. There is no burden on the accused to prove his innocence."

By that direction, the learned trial judge, it is plain was inviting the jury to consider the plausibility of the story. Did they believe the witness? Credit is a matter for the jury. In our view, the point raised has little to commend it.

As to this question of motive, we are again quite unable to fault the approach of the learned trial judge. It is perfectly true the applicant testified that the witness Hutchinson had cut him on his hand, and that the slain man was

Hutchinson's friend. But the applicant had also said that the very injury had made it impossible for him to have committed the murder. If the jury rejected the facts on which the opinion as to motive rested, that would be an end of the matter. Now the trial judge said this at page 79:

> "His evidence from the witness box is that he on the night in question he was at home with his girlfriend, his little b[illegible]ner and his little son. At that time he said he was ill, that he had a plaster cast on his right arm - right forearm - which extended from his wrist up to this arm. He indicated the length of the plaster - wrist through arm, up to forearm. He said this was the result of a cut which he got on his wrist which was given to him by the witness, when he was attacked by the witness who referred to him as a Labourite. He said what the witness Hutchinson said about him, nothing that he said was true and he told the lie because Percival Jackson who died is Hutchinson's friend. He said the cut on his wrist he got in February of 1982."

Then at page 81 he gave the following directions:

> "So you cannot convict him unless you definitely reject the story, because he cannot be in two places at the same time. If you believe his story, then you must acquit him. If it leaves you in doubt, then you must acquit him. If you are not sure whether to accept or reject, you must accept it and acquit."

The plain duty of a trial judge in so far as the defence is concerned, is to put the defence fairly and adequately. The defence here, was an alibi. To buttress the defence, the applicant endeavoured to demonstrate this incapacity at the material time and went further to suggest some animus on the part of the Crown's principal witness. That was his story. The directions were in our view, entirely appropriate and adequate.

Finally, there was a suggestion on the part of learned counsel that the period for the witness observing the applicant amounted to no more than a "fleeting glance." The learned judge accurately reviewed the evidence of the circumstances

in which identification was made, and then at page 82 he made the following observation:

> "You take into consideration, too, the general conditions under which the identification was made. As I mentioned before, the witness said he looked behind, he saw the accused, continued running. He saw the accused matter of minutes he passed back in the area and the accused was still in the area talking with his friend. These are the general factors you take into consideration in deciding whether you can accept the evidence of the witness Peter Hutchinson on the issue of identification."

On the first occasion that the witness said he observed the applicant, both men were stationary. Shortly after the chase had ended, the applicant was again seen talking to other men while the witness walked by. To describe these circumstances as no more than "fleeting" is to be guilty of myopic advocacy. The point is unfortunately without vestige of merit.

Learned counsel did not endeavour to challenge the verdict of the jury. We have ourselves considered the facts as a whole and the directions of the learned trial judge in other respects and can find no reason whatsoever to interfere with the verdict of the jury which was justified on the facts.

It was for these reasons we refused the application for leave to appeal the conviction.