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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 135 & 136/82

BEFORE: The Hon. Mr. Justice Zacca - President
The Hon. Mr. Justice Carberry, J.A.
The Hon. Mr. Justice Ross, J.A.

R. v. Oval Stewart
Errol Smith

Mr. D. Chuck for the applicant Stewart

Mr. D. Chuck (holding for Mr. McKoy) for the applicant Smith

Mrs. C.L. Beswick for the Crown

14th December, 1984

ROSS J.A.

In this case the applicant Stewart was charged with the murder of Mr. Owen Bailey in Saint Catherine on 30th June, 1980, and convicted along with Errol Smith for this offence. The main witness for the prosecution was Mr. Rohan Francis, in a trial which took place some two years after the incident occurred.

The complaints in the grounds of appeal filed on behalf of the applicant Stewart are based firstly on identification, and secondly, that the evidence in all the circumstances is unsatisfactory. There is also a complaint about the summing up on the question of identification. The learned trial judge in his summing up reminded the jury of the evidence of Rohan Francis that he knew the applicants prior to the day of the incident and that he was the only witness as to the identification of the applicants.

When we look at the evidence of the witness Francis, he said that on the day in question, he and the deceased Bailey were coming from Bailey's house; they were coming out of a track on to

the main road carrying a bed when they met a group of men among whom were the accused Smith and Stewart. These men, he said, used words to the effect "See two a di boys them from up so," and at the same time the witness Francis and the deceased dropped the bed which they were carrying and ran back along the track towards the house from which they were coming. Francis went on to say that while he and the deceased were running the other men were running them down. He was specifically asked about these two accused and he said that they (the applicants) were running them down along with the others, and that the accused Smith had a leather bag over his shoulder from which he took a gun. Counsel for the applicant submitted that the witness' answer in reply to a question is not clear on this point as it cannot be said that the words used by the witness necessarily refers to the accused Stewart. It must be remembered that the evidence was heard by the jury and the trial judge and they concluded that when the witness said that "they" were at the scene, he was referring to these two accused among others. It was open to defence counsel to attempt to clarify by cross-examination any answer which may have appeared to the defence to be ambiguous. If the evidence of Francis is accepted (and the jury obviously accepted the evidence) it would mean that while Francis and Bailey were running towards the house they were being chased by these two applicants and others. Francis went on to say that while he was running he also heard gun shots fired from behind, from which it seems that the inference to be drawn is that members of this group were firing shots at them, and the evidence, as we understand it, is that they were chased up to the house of Bailey and that Bailey entered the house where he was shot shortly after, while Francis ran through the house. It is not of particular importance whether he went through the house or

around the house; although the defence made much of a discrepancy in the evidence of Francis as to whether he ran through or around the house he then went down to a gully and that subsequently while down the gully he heard more shots being fired in the vicinity of the house.

We have too, the evidence of the father of the deceased as to the circumstances in which his son was killed, although the evidence of the father does not implicate the applicants whom he was unable to identify. There was sufficient evidence from which the jury, if they accepted the evidence, could infer that both these men and others unknown were acting together, had a common design to cause serious injury to the deceased and did inflict such injury; it would seem that in consequence of that the jury found them guilty.

In his submissions, counsel for the appellant suggested that Rohan Francis gave his evidence in a manner which does not lend credibility to his evidence, that his demeanour was rather poor, that he took a long time to answer the questions. It was noted that the learned trial judge in her summing up made it quite clear to the jury that they should take all these matters into account when considering whether to accept or reject the evidence of Francis. Although Francis was the only witness who gave evidence implicating the appellants, the jury nevertheless must have decided that they would accept the evidence of Francis and the fact that they found the appellants guilty meant that they accepted his evidence as they considered him a truthful witness.

In the course of the submissions on behalf of the appellant Stewart, reference was also made to the summing up and it was suggested that the directions on identification were not adequate. But we find no merit in this submission nor do we find any merit in the other complaints made insofar as the summing up is concerned.

Having regard to the evidence which was adduced to the summing up of the learned trial judge it seems to us that there is no merit in the arguments in support of the application for leave to appeal and consequently there is no basis on which we could properly interfere with the verdict of the jury, and for these reasons the application of Oval Stewart is refused.

We should mention too, that insofar as the other applicant (Errol Smith) is concerned, the court was advised by Mr. Chuck who was holding for Mr. McKoy (attorney for Smith) that Mr. McKoy had asked him to say that he had considered the notes of evidence and the summing up insofar as it affected Smith, and that having done so he found nothing on which he could properly base an application for leave to appeal. The application in respect of Errol Smith is refused.