

N.M.L.S

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 27/96

COR: THE HON MR JUSTICE FORTE, J A
THE HON MR JUSTICE GORDON, J A
THE HON MR JUSTICE HARRISON, J A

R V ROBERT SEWELL

No appearance for Applicant

Hugh Wildman and Miss Marva McDonald for the Crown

19th May & 31st July, 1997

FORTE, J A

On an indictment, which charged him for capital murder, the applicant, was convicted for non-capital murder in the Manchester Circuit, on the 12th February, 1996 and sentenced to life imprisonment. The learned trial judge ordered that he should not be eligible for parole until he has served twelve years imprisonment.

The application for leave to appeal came before us on the 19th May, 1997, when we refused it and ordered that the sentence should commence on 5th May, 1996. Though the applicant was unrepresented and Mr. Wildman for the Crown, advised that after careful examination of the transcript of the learned trial judge's summing-up, he could find no arguable ground of appeal, we nevertheless put our reasons for the refusal in writing.

A brief summary of the evidence is necessary. The incident which led to the death of Mr. Alwin McDonald occurred on the 20th August, 1992, when Mr. Donald Gillings (the eye-witness), George West, and Mrs. McDonald left St. Elizabeth in a van

owned and driven by Mr. Alwin McDonald, who had hired the van to the two gentlemen with the intention of proceeding to the parish of Manchester, to purchase pigs. Having let off Mrs. McDonald at Spur Tree the three men proceeded into John's Hall in the parish of Manchester. As they travelled, Mr. Gillings and Mr. West were in the back of the van. Mr. Gillings sat on the railings to the right side of the van and Mr. West on the left. While driving through Johns Hall, they called out to the residents that they were there to buy pigs and stopped when anyone showed interest in doing business with them. It was while they were doing so, that Mr. Gillings saw the applicant come unto the road wearing a towel wrapped over his head, covering a small part of his forehead, just below his hairline. The rest of his face remained uncovered. He observed that the applicant had a gun in his right hand, as he waived down Mr. McDonald with his left hand. As the van came close to him, Mr. Gillings heard him say words indicating that this was a robbery. He was then pointing the gun at the men in the van. The speed of the van at that time was about 20 mph. The applicant was on the right side of the road, and the van on the left side. Mr. McDonald, drove the van unto the right side and slowed almost to a stop, when the witness saw two other men each armed with a gun come out from a little track on the same side of the road. He then heard a gun-shot, which caught Mr. McDonald in his head. The two men immediately spun around, so that Mr. Gillings was unable to see their faces. At the time the shot was fired, the applicant was at the rear of the van. The witness testified that he was "concentrating" so much on the applicant, that he did not see the faces of the other two men. After the shot was fired, the van continued in motion and when it eventually came to a stop, Mr. Gillings jumped from it and ran to a nearby shop for assistance. On his return to the van, he saw Mr. McDonald slumped in the driver's seat. He had a "hole to the right side of his head from which blood was coming. He appeared to be dead".

Mr. Neil Watson, a farmer at Johns Hall was in his "field", when he saw three men running together, one of whom was the applicant, the others being Palmer, who was jointly charged with the applicant but who was released on a no-case submission and a man called "Rough Neck", all of whom he had known before. Palmer stopped and spoke with him, and then proceeded after the other two as they ran towards a district called "Topsham". Later, on his way to Johns Hall Square and about 1/4 mile from his garden he saw a van on the road with a man behind the steering wheel. This man, (who was Mr. McDonald) appeared to be dead.

On the 21st April, 1993 Mr. Gillings attended an identification parade where he identified the applicant as the man whom he first saw with a gun and who had indicated that it was a robbery.

At the post mortem examination of the body of the deceased, the doctor found -

- (1) an entrance wound to the right temporal parietal region with darkening of the edges of the wound.
- (2) An exit wound in the region of the left ear. This wound fractured the bones of the temporal area.

The wound started from the right parietal area, went through the skull bones with fractures along the suture lines extending to the parietal area. In the doctor's opinion death was due to extensive brain laceration with secondary intra-cranial haemorrhage which itself was secondary to a gun-shot wound to the head. The darkening around the wound indicated that the missile would have been fired from a distance of between eighteen inches to about six feet from the site of the actual wound.

In his defence the applicant made an unsworn statement as follows:

"I don't know anything about it. At that time I was in town. I was in Greenwich Town, Kingston 13 Kingston. I spent three months in custody before I was charged."

His defence therefore amounted to an alibi thereby challenging the witnesses' identification of him on the scene.

The issue consequently in the case was one of visual identification, which called for careful directions from the learned trial judge. Having examined the summing-up we are in agreement with Mr. Wildman, who indicated that he could find no arguable ground which could have been advanced for the applicant. The learned trial judge dealt adequately with the issue. Having given the jury the necessary warning, he examined with them the strength and weaknesses of the identification, and specifically pointed out the discrepancies which related to that evidence. We are of the view that there was ample evidence upon which the jury could have come to the verdict of guilty, and that no reason exists for interfering with that verdict.

There are however two matters which call for specific attention -

1. The witness Mr. Gillings admitted saying at the preliminary examination, that he did not see the applicant again after the van had passed him, whereas at trial he stated that he saw him even after that time, and in fact it was his concentration on the applicant which contributed to his lack of ability to identify the faces of the other two men. If what he had said at the preliminary examination was accurate, then he would have observed the applicant for much less time than the 15 seconds in which in the latter account, he had had him under observation. He was however asked for an explanation.

Here is how the learned trial judge dealt with it:

"Then he told you that what he told the Resident Magistrate on this aspect of the matter was not correct, it was a mistake. He said he was not telling a deliberate lie, it was a mistake. So what he is saying, what he has told you is the truth; what he told the Resident Magistrate is a mistake. You have to decide, members of the jury, whether you accept that

explanation, because it relates to an important aspect of this case. His ability to identify this defendant, did he see him after the van passed him or is it that he never saw him after the van passed him? If he sees him after that van passed him, you may think he might have a little more time to be able to take note of his features. If he only saw him as the van was passing him, you may believe that he must have had a few seconds; the van was travelling at about 20 miles per hour. It would be taking a few seconds, less than fifteen, to have passed him. So, if that was all the sight that he got of this defendant, he would have been less able to identify him again, rather than if he had seen him for a longer time at the back of the van.

You must decide if you accept his explanation, as to the difference in the evidence he gave before the Resident Magistrate and the evidence he gave before you. ...

Then he went on to tell you, there is no confusion in his mind as to the identification of this defendant, Sewell; he is absolutely sure that Sewell is the man he saw that morning. The defence is saying, this is a witness you should not believe, the defence is saying that Donald Gillings is an unreliable witness, you can't place any confidence in him, because he say different things at different times as to the circumstances in which he was able to identify this defendant, Sewell."

In those words, the learned trial judge left fairly to the jury the question of whether, they could accept the explanation of the witness as to his earlier contradictory statement, on such an important issue, and made it clear that it is only then that they could act upon the evidence he had given before them on this issue. i.e. on the length of time in which he had the opportunity to observe the applicant. In the end, the jury's verdict indicated that they had in fact accepted the explanation.

2. The other matter related to a discrepancy in time between the evidence of Gillings as to the time of the incident, and the evidence of Mr. Watson as to the time he saw the three men, including the applicant, running away. Mr. Gillings had testified that the incident occurred at about 9:40 a.m. whereas Mr. Watson who was in his

garden 1/4 mile away, saw the men running, at about 12 noon. This is how the learned trial judge dealt with it:

"Now that van was positioned about a quarter mile away from his garden. He told you that he had gone to his pimento garden from about 10:00 a.m. that day. While he was in his pimento garden he heard nothing, no sound. So, members of the jury, when you relate this evidence to the evidence of Mr. Gillings, if Mr. Gillings is speaking the truth the shooting took place before Mr. Watson reached his pimento garden. Mr. Watson reached his pimento garden about 10:00 a.m. According to Mr. Gillings the shooting took place about twenty minutes to 10:00 a.m. so you may think that Mr. Watson heard nothing because the shooting had already taken place before he reached his garden.

This is a matter for you to assess the evidence and to say what you find. You may ask yourself the question, if the shooting took place at 9:40 a.m. a quarter mile away from Mr. Watson's garden, how is it that two hours later the men only reached Mr. Watson's garden if they ran away from the scene immediately after the shooting? Is it that these men had lingered for as long as two hours in the area after committing the crime and were now just running away in the vicinity of Mr. Watson's garden two hours later or is it that Mr. Watson is mistaken as to the time that he gives you or is it that the witness, Gillings, is mistaken as to the time, as to the time of the incident?

You must remember, members of the jury, that these - this evidence as to time is an approximation coming from each witness because I think one witness told you he had no watch and it may be that Mr. Watson in his garden had no watch, was not wearing a watch so they are giving you an estimate as to time. It may be that one or the other of them is mistaken as to the time he has given in evidence. This is a matter for you but on the evidence of these two witnesses there would be a time difference of two hours between the time of the shooting and the time Mr. Watson saw the men if both of them are accurate as to time. That is, both witnesses."

In our view the learned trial judge, also dealt adequately with this discrepancy, leaving it as an issue for the jury as to whether the discrepancy in relation to the time could be resolved, given the other evidence in the case. The jury obviously resolved this difference which would be quite reasonable. When Mr. Watson saw the van, the deceased was still sitting behind the steering-wheel, a factor which no doubt aided in that resolution given the fact that from his garden to where he saw the van was a mere 1/4 mile away.

For the above reasons, the application for leave to appeal was refused.