JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 134/77

BEFORE: The Hon Mr. Justice Lowcroft Robinson - P.
The Hon. Mr. Justice Zacca J.A.
The Hon. Mr. Justice Melville J.A.

REGINA vs. STAFFORD PINE

Mr. Berthan Macaulay, Q.C., for Appellant

Mrs. Marva McIntosh for the Crown

November 8, 1977

ZACCA J.A.

The applicant was convicted at the Home Circuit Court on May 13, 1977 for the murder of Orville Brown on February 2, 1976. The facts may be briefly stated. The deceased, on February 6, 1976, at about 9.00 o'clock in the morning was in a bar at the corner of Milk Lane and Spanish Town Road. One Junior Tyrell, a witness who gave evidence for the Crown, indeed the sole eyewitness as to this incident which is alleged to have happened in this bar, was also in the bar. He stated that whilst he was in this bar, he heard a voice saying, "Hey boy, don't move, I want your gun." He said that he saw the deceased Constable Orville Brown, go for his service revolver. He then heard an explosion. He looked and he saw the applicant and another man in the bar. He said that the applicant had a gun in his hand and the gun was smoking. He also stated that the applicant spoke to the other man who had come into the bar and told this other man to take the gun from the deceased. The gun was taken away and both men, that is the applicant and this other man left the bar and went away.

There was also evidence from another witness, that is, the proprietor of the bar, one Barry McLean, who stated that he was in this bar; that he did not see the witness Tyrell in the bar; that he heard an

explosion - after the explosion he ran to the back of the bar and after the shot he said he saw, what he describes as a "big black man with a black gun." He stated that, that man was not the applicant. It was the Crown's case that it was the applicant who had a gun which inflicted the injury on the deceased from which he died.

Mr. Macaulay has urged two grounds on behalf of the applicant. The first ground of appeal which he argued was that the learned Trial Judge, having given a right and proper general direction regarding the way in which the jury should approach discrepancies, proceeded to erode his directions when dealing with the evidence of the eyewitness for the prosecution, and in such a manner as, in effect, to cause a miscarriage of justice - he sought to explain away the discrepancies of the evidence which had been given by the witness. Mr. Macaulay has pointed out at page 14 of the transcript of the evidence, two bits of evidence which he said the witness Tyrell gave at the trial and which in fact he had not given at the preliminary enquiry. These are the two omissions which Mr. Macaulay complained about. With respect to this ground of appeal it is alleged that the witness Tyrell, at the trial, had stated that he had heard the applicant say, "I want your gun." Again he had given evidence that he heard the applicant saying, "Star, take him gun and come." The witness, under cross-examination, said that he had made these two statements to the Resident Magistrate at the preliminary enquiry; he had in fact given this evidence. On being shown his deposition he admitted that the deposition did not contain these two bits of evidence. He said, in his explanation, that it may have been an error on the part of the Resident Magistrate. He stuck to the story that he had said this at the preliminary enquiry. He admitted at the trial, that the deposition did not contain the

two bits of evidence. Mr. Macaulay has complained, not about the Judge's general direction, as to discrepancies and inconsistencies, but he has complained that the learned Trial Judge, while properly giving general direction on these points, proceeded to erode what he had said previously. He pointed to the summing-up of the learned Trial Judge: page 52, line 13 to the end of that page; again at page 53, line 1; page 66, line 16 to the end of that page; page 67 lines 1 and 2. I do not propose to repeat what was said in the summing-up, but Mr. Macaulay has urged on the Court that at these pages the judge attempted to "explain away," as he puts it, "explain away the discrepancies of the evidence which had been given by the witness and therefore this would lead to a miscarriage of justice." On this ground he relies on two cases, Regina vs. Mills and Hodges, 1963, 6 West Indies Report, page 418, and Regina vs. Curtis Irving, 1975, 13 Jamaica Law Report, page 139. These cases in our view may be distinguished from the instant case.

We have considered this submission and we are of the view that the learned Trial Judge in his summing-up was not trying to rehabilitate the witness or to "explain away discrepancies of the evidence" which had been given by the witness, Tyrell. We are of the view that what the Trial Judge was doing was making a comment on the evidence, as it appeared to him at the trial, and we do not view this as any attempt by the Trial Judge either to rehabilitate the witness by making comments which were not proper on the evidence which was before him or attempting to explain away discrepancies on behalf of the witness, Tyrell. There is nothing that could be said to be improper about the learned Trial Judge's summing-up in this respect. Therefore, we hold that there is no merit in this ground of appeal.

The other ground argued was to the effect that the verdict was unsafe and unsatisfactory, having regard to the evidence, was unreasonable and cannot be supported. Mr. Macaulay has pointed out certain discrepancies in the trial as between the evidence of the main eyewitness for the Crown, Junior Tyrell, and the evidence of Barry McLean. It is true that there may be discrepancies between these two witnesses although what has been said to be discrepancies may not really be discrepancies at all because although the witness is alleged to have seen some other man with a gun which he said was not the accused, there is evidence that another man was there with the applicant and it was after the shooting that this witness Barry McLean saw this other person. It may very well be that this other man may have been the second man who had come into the bar with the applicant. It is to be remembered that the applicant, Pine, had asked this other man to take the gun from the deceased and it may very well have been that this man, when seen by the witness McLean, could have been this other man and it may be that he had already taken this gun from the deceased.

On a review of the evidence, looking at any discrepancies that there may be, even if there were discrepancies, these discrepancies were not such as to make the verdict of the jury unsafe or unsatisfactory. We are satisfied that the discrepancies, if any, were accurately and properly put before the jury for their consideration. There is no complaint about the summing-up generally as to whether the verdict was unsafe or unsatisfactory. There is no specific complaint or real complaint about the way in which the evidence was left for the consideration of the jury. The evidence was properly left for the consideration of the jury. Whatever

discrepancies there were, were left for the consideration of the jury and the jury considered the evidence before them and came to the verdict that the applicant was guilty of this charge of murder.

We are satisfied that there was evidence on which the jury could have come to this verdict, and we cannot say that the verdict could be said to be unsafe and unsatisfactory, or that it was unreasonable and could not be supported, having regard to the evidence. For these reasons the application is refused.