NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL 240 & 241/2002

BEFORE: THE HON. MR. JUSTICE HARRISON, P
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE MARSH, J.A. (Ag.)

R v WAVEL RICHARDSON
MICHAEL WILLIAMS o/c EVERTON SIMPSON

Arthur Kitchin for Michael Williams
L. Equiano for Wavel Richardson
Tara Reid and **Natalie Brooks** for the Crown

19th, 20th, 21st July and 8th November, 2006

SMITH, J.A.:

The following judgment and reasons therefor were orally delivered in Court. On the 5th December, 2002 the applicants were convicted of murder in the Clarendon Circuit Court. The particulars of the offence were that they on the 26th day of July, 2001 in the parish of Clarendon murdered Lorenzo Bedward. They were sentenced to life imprisonment. The trial judge ordered that they should serve at least 24 years before becoming eligible for parole.

Their applications for leave were refused by the single judge on the 31st January, 2005.

They have now renewed their applications before the Court. The prosecution's case was based primarily on the evidence of Mr. Delroy

Smith. Mr. Smith hails from Bog Hole District Clarendon. On the 26th July, 2001 at about 3:00 p.m. he was riding a bicycle going to James Hill Post Office. On reaching Corner Shop he heard an explosion which he described as a "gun shot". He alighted from his bicycle. He heard four more gun shot explosions. He crossed the road and went up to an old car. He saw three men " running down the road" coming from the direction where he heard the gunshots. This was about 10 minutes after he first heard the explosion. He could see their faces as they ran. He knew one as Tyrone McKenzie (Michael Williams) and pointed at Richardson as one of the men; he did not know his name but he knew him before. He saw Richardson with a long gun and Williams with a short gun. They ran towards a corner and disappeared from his view. He mounted his bicycle and rode towards the direction in which the men ran. On reaching the corner he saw them go into a Lada motor car.

From his evidence it seemed that the men had some difficulty getting the car started. Ultimately the car drove off. The witness rode home, left his bicycle home and then went up the road in the direction from which the men ran. He saw the dead body of a man lying beside a truck. He said that about one and a half hours had passed from when he heard the explosion to when he saw the dead body. Many people were there. He saw the applicant Williams among them. He said nothing to him. After a while the witness returned home. About a month later he

made a report to the police at the May Pen Station. The reason he gave for this long delay is that he was scared and nervous.

On the 19th and 25th September, 2001 he attended identification parades at the Constant Spring and Black River Police stations and identified the applicants Williams and Richardson respectively.

According to the witness he pointed out both persons under No. 7. Sgt. Michael Patterson, the officer who conducted the parade on which Richardson was, said that the witness identified the applicant who was standing under No. 5.

The investigating officer Detective Cpl. Wade testified that on the 26th July, 2001 at about 4:00 p.m. he got a report and went to Corner Shop in James Hill where he saw the dead body of a man lying in a pool of blood close to a delivery van. He saw gun shot wounds on the body. He extracted a bullet from one of the wheels of the vehicle. On 2nd August, 2001, he attended post mortem examination of the said body performed by Dr. Brennon. He saw the doctor remove a bullet from the body of the deceased. The doctor gave him the bullet. This bullet as well as the one taken from the wheel of the van, was placed in an envelope and taken to the Forensic Lab. They were subsequently retrieved. After the identification parade he charged the applicants with murder; when cautioned neither of them said anything.

Dr. Brennon told the court of his post mortem examination. It was his opinion that death was due to gun shot injury. Detective Inspector Harrisingh, Government Ballistic Expert told the court that he received and examined two .38 fired copper jacketed bullets. The two bullets disclosed matching striation marks and he concluded that they were fired from one and the same firearm of a class Smith and Wesson revolver.

The applicant Richardson gave sworn evidence. Williams made an unsworn statement. Their defence was alibi. Richardson said he did not know the witness Delroy Smith. As regards the identification parade he said he was standing at No. 5. He heard a voice say No. 7 and the police say No. 5.

The applicant Williams said that at the material time he was with his girlfriend in his mother's house. He called his mother to support his alibi.

Grounds of Appeal

Michael Williams

Mr. Kitchin was granted leave to argue the following three (3) supplemental grounds:

(1) The learned trial judge ought to have withdrawn the case from the consideration of the jury as the Crown failed to establish a nexus between the deceased and the second applicant.

(2) The learned trial judge misdirected herself on the evidence in respect of the bullet found on the murder scene and the bullet retrieved from the body of the deceased and the weapons purportedly being carried by the men running down the road as a consequence whereof the applicant was denied a fair trial.

(3) The sentence of 24 years imprisonment at hard labour may have been manifestly harsh and excessive in view of the antecedent and history of the applicant and all the circumstances of the case.

The original grounds were not pursued.

Wavel Richardson

Mr. Equiano was granted leave to argue the following supplemental grounds:

(1) The trail judge erred in allowing the case to go to the jury as the identification evidence did not reach the requisite standard.

(2) The numerous discrepancies surrounding the circumstances under which the applicant was identified were such that it (sic) rendered the identification unsafe and should not have been left to the jury.

(3) Having allowed the case to go to the jury the learned trial judge failed to assist the jury sufficiently with the identification evidence, the weaknesses were never highlighted.

(4) The evidence suggested that the applicants and another were acting together, the learned trial judge erred by failing to give the jury directions in this area.

Ground 4 was not pursued, neither were the original grounds.

Because of the decision we have arrived at in respect of ground 2 which was argued on behalf of Williams and which applied equally to Richardson we will not say much in respect of the other grounds for obvious reasons.

It will be sufficient to say that we were not persuaded by counsel for the applicants that the evidence adduced by the prosecution was not sufficient to raise a prima facie case. The well known principle may be stated thus:

> "A submission of no case to answer should be allowed when there is no evidence upon which, if the evidence adduced were accepted, a reasonable jury, properly directed could convict."

We will content ourselves with saying that we have considered carefully the complaints of both counsel in respect of the quality of the identification evidence, the discrepancies, and the alleged absence of a nexus between the applicants and the shooting of the deceased and we have not been persuaded that the learned trial judge erred in not withdrawing the case from the jury. In our view the submissions of Miss Reid, Crown Counsel, that the evidence was such that, if accepted, a reasonable jury properly directed could convict, are correct.

We now turn to the critical issue that is the apparent misrepresentation of the evidence by the learned trial judge. The impugned passage is at p. 306:

> "The doctor said that Mr. Bedward died from gun shot wounds. The men were seen with firearms, bullet seen on the scene and men seen with firearms that matches (sic) the bullet."

Mr. Kitchen complained that the comment by the learned judge put the Crown's case much higher than the evidence and may have

given the jury the impression that the bullet found on the scene matched the firearm being carried by the men.

Miss Reid in a valiant attempt submitted that when seen in its context the impugned words were not comments by the judge but rather a repeat of counsel's argument.

We have thought over this matter long and hard and have concluded that without more this Court is obliged to treat the words complained of as a misdirection on fact.

The authorities show that to have any effect in itself, a mis-statement of the evidence or a misdirection as to the effect of the evidence must be such as to make it reasonably probable that the jury would not have returned a verdict of guilty if there had been no misstatement – see ***R v Wright*** 58 Cr. App. R 444 and ***R v Wann*** 7Cr. App. R. 135.

It seems to us that the misstatement of the evidence may well have had the effect of bolstering the visual identification evidence which was vigorously challenged by the defence. In that event it is reasonably probable that the jury might not have returned a verdict adverse to the applicants if there had not been the misstatement.

For this reason the convictions cannot stand.

We have treated the hearing of the applications for leave as the hearing of the appeals.

The appeals are allowed. The convictions quashed and sentences set aside.

In the interest of justice we order a new trial. The applicants are remanded in custody.