CA - CRIMINAL LAW - Murder - Trial - Counsel for defence concedes no meritorious argument in support of application for leave to appeal. CA looked at evidence and summing-up, issues of identification, visual identification, admission by deceased's statement. APPLICATION FOR LEAVE TO APPEAL REFUSED
Cases referred to:
(1) R v Francis (1987), AMER 513
(2) R v Winston Hamilton SCCA 163/90 - 23/3/92

✓ Comp

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 48/91

EVIDENCE
CRIMINAL PRACTICE

COR: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

R. V. WINSTON ALLERDYCE

Delano Harrison for Applicant

Miss Cheryl Richards & Mrs. Carol Dacosta for Crown

May 27, 28 & June 8, 1992

FORTE, J.A.

The applicant was convicted in the Home Circuit Court on the 10th April, 1991 for the murder of Fitzroy Jones committed on the 28th July, 1989.

Before us, Mr. Harrison who appeared for the applicant was admirably candid with the Court, in revealing that having carefully examined the transcript, on some five detailed perusals, he was unable to find any meritorious argument to advance in support of this application. Asked whether he had consulted the applicant, and advised him of his opinion, Mr. Harrison, on the first day the application came before us, admitted that he had not done so, and craved the Court's indulgence in granting an adjournment to the following day to allow him the opportunity of so doing. His request having been granted, Mr. Harrison returned on the following day and informed the Court, that he had a "candid and worthwhile" discussion with the applicant, during which he explained to him that having looked at "all the legal issues", he could find nothing upon which to urge the Court in support of the application. The applicant understood, and was then well aware of Mr. Harrison's decision to inform this Court, that he could not

urge the Court to grant the application. Miss Richards for the Crown, on being asked, agreed with Mr. Harrison, as her examination of the transcript, resulted in the same conclusions.

In spite of the concession of counsel for the applicant, we have ourselves given serious and detailed consideration to the case, and in the end entirely agree that there is no merit in this application for the reasons which follow.

The main witness for the prosecution, Shornell Bowes, was on the day of the incident i.e. the 28th July, 1989 employed as a day's worker by Sharon Serdrew, and was at about 9.00 a.m. in the back-yard of Serdrew's home. The deceased entered the yard, spoke with Miss Serdrew who was then inside the house, and as soon as he exited the gate, he returned running into the yard, with the applicant chasing him, the applicant then had a long gun in his hand. The deceased was seen by the witness to go over the back-fence into a vacant lot beside Miss Serdrew's home. The applicant then went back through the front gate, and turned into the vacant lot. Shortly thereafter the witness Bowes heard an explosion which she described as "a shot fire". She went to the back-fence and peeped through a hole in the fence unto the vacant lot. She then saw the deceased lying on the ground, and the applicant standing over him with the gun pointed at him. The deceased was heard to cry out "Speng, dont shot me again". The applicant was known to the witness as "Speng". As she looked on, she noticed that blood was coming from the body of the deceased at a spot which she demonstrated to the Court by reference to her own body. After the deceased cried out, the applicant ran off and disappeared. The witness then went with Miss Serdrew to the home of Linda Spence the mother of the deceased, made a report to her, and all three returned to the spot where the deceased was still lying. At this time the witness noticed that there was a "big hole" on the body of the deceased, who was then still alive. They took him to the hospital by taxi. On their way there,

sked by his mother, who shot him, the deceased said "Speng Speng mamma Speng." On the 29th May, 1991, on being arrested on a warrant, and cautioned, the applicant stated, "Mi noh know nutten yuh a talk bout sah". That was in summary the case for the prosecution.

In his defence, the applicant gave an unsworn statement, in which he related an incident in which he was robbed by three men and shot by Everton Jones who was one of the three. He gave no indication of the date on which that incident occurred, or of its relevance or connection with the murder for which he was being tried. During the course of discussion before us, one possible connection was discovered towards the end of the unsworn statement, where the applicant stated "When me get to understand, is Everton Jones told fi him cousin that fi come press a charge on mi fi murder". However, no other mention of Everton Jones was made throughout the trial, and so the reference to his cousin pressing charges, seems devoid of any relevance. It was put to the witness Bowes, however, that it was a man called John Strain who shot the applicant and an enquiry was made by counsel in cross-examinaton whether John Strain was the cousin of the witness. If therefore John Strain and Everton Jones were one and the same person, and a cousin of Bowes, then the allegations made by the applicant would be of some relevance. That defence was however never developed by counsel. The applicant, however, admitted to the fact that he was known as "Speng" and maintained that when he was accused by the police of this murder he told the police officer "Mi dont know what you talking about. Mi not hiding mi name because mi dont know what them talking about."

The applicant both by means of his unsworn statement and the cross-examination of the witness Bowes, who was the only witness to identify him as the assailant, put identification into issue, and that remained the only issue in the case. That there was sufficient opportunity, given the circumstances, for an accurate and reliable identification of the applicant, is easily ascertained from an

examination of the evidence of the witness Bowes. She testified that it was daylight, the time being 9.00 a.m. and that she had known the applicant for six years prior to the incident and was accustomed to seeing him about once per week. She knew him by the name "Spong". On the morning of the incident when he came through the gate, he was coming in her direction and so she saw the front of his whole body. At that stage he had come about 12 yards from her. When she peeped through the hole in the fence, she observed him for 15 minutes while he stood over the deceased and at this stage, she would have been able to touch the applicant if the zinc fence had not been between them. The defence seriously challenged the evidence of identification, and suggested to the witness that she was mistaken as to the identification of the applicant. The evidence of the witness, that she observed the applicant for a period of 15 minutes, was challenged in the following way at page 23 of the transcript:.

> "Q. And you started peeping?
>
> A. Yes.
>
> Q. And then within seconds again this man who you saw with the gun over Keith ran behind some bushes?
>
> A. Yes, sir.
>
> Q. That happened, the whole incident, from the time you saw Keith (dec'd) jumping over the fence, the shooting, you all looking through the fence, everything happened in a flash, in seconds it was over?
>
> A. Yes, sir."

The defence counsel then left it at that, the witness of course having already testified in examination-in-chief that she had observed the applicant for 15 minutes. Crown Counsel as would be expected returned to it in re-examination as follows:

"Q. Miss Bowes, you said you watched the man standing over Fitzroy for 15 minutes and in answer to my learned friend you said in seconds. What is really the situation? You said the incident took place within seconds?

A. Because a say no, sir. Like it occupy say 15 minutes.

HIS LORDSHIP: Say it again.

WITNESS: I was saying just like how you say sixty seconds one minute, so call it how much seconds would make 15 minutes. Take for instance if it is even fifty or sixty seconds or so. You understands?"

At the end of the re-examination therefore the witness had reiterated that she had observed the applicant for 15 minutes, and the number of seconds would be determined by how many seconds constituted 15 minutes.

That was the evidence in respect of the circumstances under which the applicant was identified by the witness. The learned trial judge in his summing-up gave careful directions to the jury on how to approach the evidence of visual identification. He warned them of the dangers of accepting as accurate the evidence of visual identification, as a witness though honest and convincing may nevertheless be mistaken, and that notorious miscarriages of justice have occurred as a result. He stressed the need for careful examination of the opportunity that the witness had of identifying the applicant, and the circumstances under which it was done. The matters that had to fall under their careful scrutiny were also pointed out to the jury. In the end, the jury had been satisfactorily instructed on the issue of visual identification, and like counsel for the defence, we are of the opinion that no error can be attributed to the learned trial judge.

There was one other matter, which we felt should be given special attention. During the course of the trial, defence counsel objected to the evidence concerning the statement made by the

deceased in answer to his mother, while in the taxi, on their way to the hospital. He is alleged to have said, when asked who shot him, "Speng Speng mamma Speng." In his ruling admitting this statement, the learned trial judge stated that he was guided by the case of R. v. Andrews [1987] 1 All E.R. 513. In our view the learned trial judge cannot be faulted for having admitted the statement in evidence, as being part of the res gestae. In the **Andrews** case (supra) which was followed and approved by this Court in **R. v. Winston Hankle** S.C.C.A. 103/90 delivered on the 23rd March, 1992 (unreported), it was held that hearsay evidence of a statement made to a witness by the victim of an attack describing how he had received his injuries was admissible in evidence as part of the res gestae at the trial of the attacker, if the statement was made in conditions which were sufficiently spontaneous and sufficiently contemporaneous with the event to preclude the possibility of concoction or distortion. In our view the learned trial judge was correct in admitting the statement as being a part of the res gestae as the circumstances in which the words were spoken, met all the required criteria for admission. In concluding that we cannot interfere with the ruling of the learned trial judge, we are guided by the words of Lord Ackner in delivering the judgment of the House of Lords in the **Andrews** case (supra) at page 521:

> "Where the trial judge has properly directed himself as to the correct approach to the evidence and there is material to entitle him to reach the conclusions which he did reach, then his decision is final, in the sense that it will not be interfered with on appeal."

Lord Ackner then gave some guidelines as to the duty of the learned trial judge in directing the jury on how to approach such evidence. He stated as follows:

> "Of course, having ruled the statement admissible the judge must, as the Common Sergeant most certainly did, make it clear to the jury that it is for them to decide what was said and to be sure that the witnesses were not mistaken in what they believed had been said to them. Further, they must be satisfied that the declarant did not concoct or distort to his advantage or the disadvantage of the accused the statement relied on and where there is material to raise the issue, that he was not activated by any malice or ill-will. Further, where there are special features that bear on the possibility of mistake then the jury's attention must be invited to those matters."

The learned trial judge in the instant case directed the jury in accordance with the above cited passage when he instructed them thus: (page 61)

> "But you must ask yourselves the question, first of all, do you believe that the statement was made? That is a question of fact for you.
>
> Secondly, if you - suppose you say yes, you believe that the statement was made, you ask yourselves the next question. If he said that 'Speng' shot him, who must you believe or do you believe it? Again, that is a fact for you, and there are a number of factors that you ought to consider. You have to consider the probability of distortion by the deceased at the time when he made the statement. And you can ask yourselves the question, and consider the circumstances in which the particular statement was made. You can bear in mind, or you ought to bear in mind the fact that he was shot; the doctor told you of injuries that he saw on him, and that this man subsequently died at the Kingston Public Hospital. Was this injury so distressing on his mind that he would not think of telling a lie in those circumstances, but that he spontaneously spoke, what he believed to be the facts of the situation."

We cannot therefore fault the learned trial judge for the manner in which he treated with this evidence in his directions to the jury. We note, however that quite rightly no objection was taken to the admission into evidence of the words spoken by the deceased while the applicant stood over him with the gun pointed

at him that is to say "Speng don't shoot me again." These words were a clear indication that the applicant had already shot the deceased. They were words, however which were undoubtedly a part of the res gestae and consequently amounted to admissible evidence.

In conclusion, we are entirely in agreement with counsel that no valid complaint is disclosed in the transcript, and hold that the applicant was convicted, on evidence which amply supports the conviction, and following a competent and adequate summation of the facts, and a correct treatment of the legal issues arising on the evidence. The application for leave to appeal is refused.