CA-CRIMINAL LAW - Murder - Trial - Prejudicial material: Whether judge forfeited making jury act on facts to treat prejudicial comments. Evidence - deceased's declarations, whether "dead man's evidence" rule applied, whether part of "res gestae". Identification: whether judge misdirected in inadequate. Manslaughter: Whether judge erred in withdrawing manslaughter from jury. Provocation: whether judge erred in withdrawing provocation from jury - whether evidence of provocation. APPLICATION FOR LEAVE TO APPEAL REFUSED. Case referred to: R v Andrews (1987) 24 WIR 413

JAMAICA

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EVIDENCE

CRIMINAL PRACTICE

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 163/90

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

(Referred to in R v Winston Hanklyn SCCA 48/91 - 5/6/92)

R. V. WINSTON HANKLE

L.H. Bunny McLean for Applicant

Miss Diana Harrison for Crown

March 9 & 23, 1992

FORTE, J.A.

The applicant was convicted in the Home Circuit Court on the 22nd November, 1990 for the murder of Clive Wint committed on the 10th July, 1989. He now applies for leave to appeal the conviction.

The evidence for the prosecution included the testimony of three eye-witnesses, all of whom knew the applicant before the date of the offence. All three witnesses were at a dance on the morning of the 9th July, 1989 at Lover's Hide-Out where it could be said that the incident which led to the death of the deceased Clive Wint commenced.

Carl Shaw testified that at about 2.00 that morning while he was at the dance, a man whose name he did not know came to the deceased, and sought to borrow a knife from him. It appeared (per the evidence of Stennet Smith) that this man had had a fuss with the applicant, who was there at the dance. The deceased, was then taken by this man, over to where the applicant stood at the juke-box, and he then told the man "A you and 'Blacka' a war, you can cool off." The applicant is also called 'Blacka.' After this was said, the applicant

walked off saying "Man a give man knife fe stab me, me a go fe me gun." As he left the dance, he was seen by Stennet Smith who also testified that he used the words indicating that he was going for his gun. The applicant on going outside was seen by Smith to take a bicycle from a young boy whom he told to meet him at Benbow Street corner. He then rode off.

At about 3.00 a.m., the three eye-witnesses, Shaw, Smith and Derrick Salmon left the dance together and in the company of the deceased and others, some riding bicycles and others walking. As they reached in front of the Admiral Town Police Station, they were stopped by two men, one by the name of Crawly, who engaged the deceased in conversation. As they continued along the way, the two men followed behind. When they reached Beckford Street, the witnesses saw the applicant come from behind a light post with a gun in his hand. He pointed the gun at the deceased and said "Give man a knife now nuh." The deceased replied "after me never give man nuh knife, mi done talk to Crawly already." The applicant then said Crawly can't help you because is Power House man run things." The deceased ran off and the applicant fired a shot which caught the deceased, causing him to fall. The others also ran but as they ran they looked behind to see the deceased on the ground. Crawly was heard to say "Dont shoot the youth and kill him" and the applicant was seen to fire three other shots into the deceased as he lay on the ground. He then departed the scene. The three men then returned to where the deceased lay; Smith and Shaw ending up nearest to him in the crowd which gathered. In fact it was Smith and another man who raised him up, and he was then heard by Smith and Shaw to say "Look how Blacka shot me for nothing". The deceased was thereafter placed in a car, and taken to the hospital where he subsequently died.

In his defence, given in an unsworn statement, the applicant admitted to having been at the dance, but maintained that he was not at the scene of the killing, as he had left the dance with his girlfriend with whom he went straight home where he spent the rest of the night.

The only issue in the case was therefore one of identification.

Mr. McLean filed six supplementary grounds of appeal, and was given leave to argue them. However, he argued only four of these grounds, apparently abandoning the others. The grounds argued were as follows:

> "1. The learned trial judge failed to, in any way, point out that the observation or report which was made to the Court by Crown Counsel, in the case, in the presence of the jury to the effect that the witnesses for the prosecution had received threats which had scared the witnesses and kept them from attending court on the first day of the hearing into the instant matter, being prejudicial to the case for the accused, ought to have been expunged from their minds, bearing in mind that it is the duty of the Court to prevent improper evidence and the like, from going to the jury, in the interest of a fair trial.
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> 2. The learned trial judge fell into error in, allowing hearsay evidence to be admitted by ruling that what the witnesses for the Prosecution deponed had been said by the deceased, at least some five minutes after he was shot, to wit 'Look how Blacka shot mi for nothing', was admissible as being a part of the res gestae.
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> 3. That the learned trial judge failed to adequately and properly direct the jury on the law of identification particularly as it dealt with the matters of a dock identification, the sufficiency of such evidence in the instant case and the amount of caution to be applied in cases where the evidence discloses that little or no physical description has been given of the accused/applicant and where whatever description that was given was so given after the accused was firstly taken into custody, or where it is doubtful that it was

"given before or after the accused man was firstly apprehended in connection with the offence as in the instant case especially since the first identification of the accused took place at the preliminary Court hearing into the matter, according to the evidence in the case.

4. The learned trial judge was wrong in directing the jury that they, the jury, need not consider the matter of manslaughter in their final deliberation as the evidence in the case did not warrant such consideration and hence was a matter of the applicant being guilty of murder or nothing at all, thereby withdrawing the issue of manslaughter from the jury.

Ground 1

This complaint arose as a result of a statement made to the Court by Crown Counsel, after the jurors had been sworn but before the evidence commenced. The transcript records the statement as follows:

"May it please you M'Lord, the investigating officer, Corporal Howard has returned M'Lord, but his efforts have not borne fruit. He actually spoke with relatives of the witnesses and they keep on informing him the witnesses were threatened, hence their reluctance to come to court."

Contrary to the complaint made, however, the learned trial judge did address the jury on this matter as hereunder set out:

"As I mention extraneous matters, Mr. Foreman and your members, let me tell you that - you remember at the beginning of the trial you were empanelled and I think I should tell you that when the court was told - I think by police officers - I don't remember by whom - that the witnesses were afraid to come to court now that, Mr. Foreman and your members, you should completely discard that. You should not have that in your mind at all when you are considering the guilt or innocence of the accused person because you would be speculating and you are not permitted to speculate."

In our view, this passage correctly instructed the jury as to their duty in relation to that allegation which was made in their presence and answers directly the complaint made in this ground of appeal. Indeed, on this passage being brought to the attention of Mr. McLean by the Court, he readily conceded that his complaint was misconceived, and advanced no argument to support it. This ground is without merit and therefore fails.

Ground 2

Mr. McLean argued that the statement alleged by Smith and Shaw, to have been made by the deceased after he was shot was wrongly admitted by the learned trial judge as it was hearsay and not a part of the res gestae. Significantly, no objection was made at the trial when the statement was admitted into evidence. In his summing-up, however, the learned trial judge made it quite clear that the statement was admitted on the basis that it was part of the res gestae. He said at page 205:

> "... You might remember the exact words, 'look how Blacka shot mi for nothing.' You remember that was said and that was received in evidence, Mr. Foreman and members, I exercised my discretion to receive that evidence. Ordinarily though, what somebody else says, like somebody out of Court says, would be hearsay and not admissible, but in the circumstance of this case, where it forms a part of what in law is called, the res gestae, it's part of the whole transaction, then it is received, the Judge has a discretion to receive that in evidence, not only as an assertion that the witness said it, but to receive it as evidence of the truth, leave it to you to decide whether you accept it."

In admitting the statement, the learned trial judge must have been mindful of the case of Regina v. Donald Joseph Andrews [1987] 2 W.L.R. 413 in which it was held:

> "... that where the victim of an attack informed a witness of what had occurred in such circumstances as to satisfy the trial judge that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim so as to exclude the possibility of concoction or distortion and the statement was made in conditions of approximate but not exact contemporaneity, evidence of what the victim said was admissible as to the truth of the facts recited as an exception to the hearsay rule; ..."

Mr. McLean, nevertheless, submitted that the lapse of five minutes between the shooting and the making of the statement was not sufficiently contemporaneous and that the events were not such as to dominate the mind of the deceased, so as to exclude the possibility of concoction or distortion.

With this submission we cannot agree. The time lapse was about 5 minutes after the deceased had been shot, during which time he did nothing but lay there until he was assisted by his companions. In our view this case, demonstrates even more aptly than the **Andrews** case, a set of circumstances which reveal an approximate contemporaneity to the shooting and which made it impossible for any concoction or distortion to have been made by the deceased.

We are also mindful of the words of Lord Ackner in delivering his speech in the **Andrews** case at page 424:

> "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. Of course, having ruled the statement admissible the judge must, as the Common Serjeant 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 upon 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 juries' attention must be invited to those matters."

That the learned trial judge was aware of what was required of him, and that he adequately discharged that responsibility is revealed in the following directions to the jury at page 205:

> "Now, Mr. Foreman and members, you have to decide what was said. You first have to decide whether you accept those two witnesses, I think it's Shaw and Smith, whether you accept their evidence that the deceased used those words. That's the first thing you have to decide, what was said, and if you accept that anything was said, then you have to be sure that the witnesses were not mistaken in what they believed had been said to them. Those witnesses might - you know when you hear something and you try to report what the person is saying, many of us are like that. So you now have to be sure that the witnesses were not mistaken when they, as to what they believed had been said to them, and further, Mr. Foreman and your members, you have to be satisfied that the deceased was, when he was saying it, did not concoct, or to distort to his advantage or disadvantage of the accused, the statement attributed to him. In other words, that there was no malice, so to speak, from the declarant."

In our view, the learned trial judge was correct in accepting the statement into evidence on the basis on which he admitted it and we are satisfied that he applied correct principles not only in the exercise of his discretion to admit, but also in his instructions to the jury as to their responsibility in relation to the assessment of that particular evidence. This ground consequently fails.

Ground 3

This ground was argued very tentatively by Mr. McLean, and he was content to rely on the submission that the learned trial judge did not tell the jury that they are to bear in mind that no physical description was given by any of the witnesses of the man who shot and killed the deceased, and further that the learned trial judge failed to stress the point that the assailant was wearing a mask.

1. **Description**

This was a case in which all the eye-witnesses knew the applicant for a long time before the incident, and in which the applicant admits that he knew them. They all knew him as 'Blacka' and in fact there was evidence from the police officer that he knew 'Blacka' and that after the report, he knew exactly whom he was looking for. In those circumstances, the necessity for description paled into insignificance and there would therefore be no necessity for the learned trial judge to emphasize that aspect to the jury.

2. **Assailant wearing a mask**

The evidence in this regard was that the assailant was wearing what was described as a "gnarvi curl bag" over his face and/or on his head. The bag was also described as a clear plastic bag through which the witnesses could see the face of the applicant.

During the course of his argument, Mr. McLean was directed by the Court to several passages coverign several pages on which the learned trial judge was at pains in assisting the jury as to how they should approach this evidence. Two such passages are set out hereunder:

Page 210: "Then also Mr. Foreman and your members, was the observation impeded in any way. Now, each of the witnesses told you about plastic bag and Mr. Foreman and your members, you have to look at their evidence carefully. Each of them mentioned a plastic bag, they are all at one there, and they mentioned that they see jherri curls under the plastic bag.
One told you that it was over his face. Remember one of the witnesses said he had it over his face? Shaw, for sure, he told you that it was over his face. Stennet Smith said it was over his face. Now, Salmon didn't actually say whether it was covered ... What he said he could see jherri curl through it and the police officer said that he didn't name the witnesses too, he said he was told that it was part-way, you remember he indicated to you, a part of his face, just by the eye or by the eyes. Now you have to say what you make of it. You have to consider carefully whether you think the plastic bag was an obstruction to the witnesses and therefore prevented them from making a correct identification. You heard the evidence, you saw them and you must say what you make of it."

Page 229: "Now you remember he said that Blackka had a jherri curl bag over his face and he described it to you that it covered the whole face, and, again, you remember Mr. McLean addressed you on this discrepancy, this between his evidence and Stennett Smith's, who said that it was on his head not covering his face and it is for you what you make of it. You saw all the witnesses, three of them, and you remember what the police told you too, so, Mr. Foreman and your members, you have to decide on this bearing in mind the real issue whether this is the man. Was this an obstruction to their being able to identify the person? You remember he, who it was that told you about the plastic bag and described

> "the colour to you and that you can see through it. He said it was something like the glass so you must say what you make of it."

In our view, these directions adequately highlighted to the jury, the evidence concerning the wearing of the plastic bag by the assailant, and correctly cautioned them to consider that factor in their determination of the question of the witnesses' ability to correctly identify the assailant.

Before leaving this ground, it should be recorded that the learned trial judge dealt extensively with the question of identification giving the jury the necessary warnings in respect to evidence of visual identification and the reason for the caution. He assisted them by indicating the areas of evidence that they had to consider in coming to a conclusion on the issue of identification e.g. opportunity for correct identification taking into account the lighting, the duration of time, previous knowledge of the assailant and other relevant factors. This ground is also without merit and consequently fails.

Ground 4 - Provocation

Mr. McLean contended that the learned trial judge should have left the issue of provocation for the jury's consideration. Asked by the Court, however, what was the provocative act disclosed in the evidence which would form the basis for such a proposition, he relied on the fact that the deceased, knowing of the fuss between the applicant and the other man at the dance, loaned this man a knife. There was, however, no evidence that the deceased loaned the man a knife - all the witnesses having testified that they did not see the deceased with a knife at the dance or at all that night. In fact, the evidence portrayed the deceased in the role of a peacemaker, because when he was asked to lend the knife to this other man, instead of doing so, he cautioned him to

"cool it off". Mr. McLean's assertion that the applicant's words when leaving the dance "man a give man knife fe stab one etc" is sufficient to raise the question of provocation is, in our view, a wholly unmeritorious submission. There was absolutely no evidence of any legal provocation of the applicant by the deceased or any other person acting together with him, and the learned trial judge was quite correct in withdrawing that issue from the jury's consideration.

In conclusion therefore, in our judgment nothing has been advanced in this application which could move us to interfere with the verdict of the jury, for which there was ample evidence. The criticisms made of the summing-up were all without merit, the learned trial judge having delivered thorough, clear and correct instructions to the jury on the law and on the facts upon which they had to deliberate. The application for leave is refused.