

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NOS. 65, 67 and 72/03**

**BEFORE: THE HON. MR. JUSTICE SMITH, J.A.  
THE HON. MR. JUSTICE HARRISON, J.A.  
THE HON. MISS JUSTICE GLORIA SMITH, J.A. (Ag.)**

**REGINA**

**v**

**BERNARD DACOSTA  
WAYNE DAWSON  
COLLIN GUTHRIE**

**Mr. Leslie Cousins for Bernard DaCosta**

**Mr. Robert Fletcher instructed by Mrs. Valerie Neita-Robertson for  
Wayne Dawson**

**Mr. Robert Fletcher for Collin Guthrie**

**Mrs. Simone Wolfe-Reece, Assistant Director of Public Prosecutions  
(Acting) and Miss Annette Austin, Crown Counsel for the Crown**

**October 18, 25 and December 20, 2007**

**HARRISON J.A.:**

During the night of August 10, 1999 Prince Troy Thompson was killed whilst he was in custody at the Spanish Town lock-up in the parish of St. Catherine. All three applicants were convicted of his murder in the St. Catherine Circuit Court, held at Spanish Town on March 21, 2003. Guthrie was sentenced to life imprisonment at hard labour with the recommendation that he serve thirty years before becoming eligible for parole. DaCosta was

sentenced to life imprisonment and it was recommended that he should serve a period of forty years before becoming eligible for parole. Dawson was also sentenced to life imprisonment and it was recommended that he serve forty years before becoming eligible for parole.

### **The Applications**

The three applicants applied for leave to appeal their convictions but the applications were refused by the single judge on 4<sup>th</sup> May 2003, who was of the view that the learned trial judge had adequately dealt with the critical issue of identification. The applicants renewed their applications to the Court on the 25<sup>th</sup> October, 2007.

At the very outset of the hearing before us, Mr. Fletcher who appeared for the applicant Guthrie, and who held for Mrs. Neita-Robertson who appeared for Dawson, announced with commendable candour that after the most careful consideration on their part, they could find nothing of merit to argue in support of the applications for leave to appeal in respect of these two applicants' convictions. We agreed with their concessions.

Mr. L. L. Cousins, who appeared for the applicant DaCosta, argued a sole ground of appeal. He contended "that the verdict of the jury was against the weight of the evidence and contrary to law" for the following reasons:

"1. ...

2. That Wayne Johnson the only eye-witness for the prosecution was proven to be a liar in that he lied at the Preliminary Examination when he said that he saw the accused cut off the balls of the deceased and stuff them in his mouth, and further that the accused "jointed" the deceased. This the evidence of Dr. Clifford the Pathologist, proved to be untrue.

3. That Wayne Johnson further lied at the trial when he said he saw the accused drain out the blood of the deceased in cell 9 after stabbing him. This Dr. Clifford would have noticed at the post mortem examination and remarked on.

4. That the evidence of Cpl. Tyser showed that the lighting conditions were "poor" and that Cells nos. 7 and 9 of the Cell Block were about 100 ft. away from where he sat in the Guard room which had the only light in the Cell Block at the time.

Cells 7 and 9 must have been in complete darkness and the witness could not have seen what he testified that he saw.

5. That Cpl. Tyser testified that the accused was locked up in Cell no. 4 as he himself claimed, and not in the bathroom as Wayne Johnson testified.

The accused claimed that the lock for Cell no. 4 was sound and he was securely locked inside and never came out of his cell during the course of the night and not until the cell was opened by Cpl. Tyser next morning with a key.

6. That the evidence given by the prosecution witness at the Trial differed in material respects from that which he gave at the Preliminary Enquiry. E.g (sic) that he saw the applicant throw a piece of cloth around the deceased's head and lead him from Cell no. 9 to the bathroom and slit his throat there.

7. That it was dangerous and unsafe for the case to be sent to the Jury (sic) because of the numerous lies by the prosecution witness".

All three applications were refused by the Court and we considered it desirable to place on record the reasons for our decision.

### **The material facts**

On August 10, 1999 Cpl. Hugdel Tyser was the sub-officer in charge of the midnight to 8:00 a.m. shift at Spanish Town Station lock-up. He assumed duties at 11:45 p.m. and had taken over from a Cpl. Scott. His duties

entailed the supervision of men under his charge and the safe custody of persons held in the lock-ups. Only two District Constables were on duty along with him. The full compliment of officers ought to have been seven.

The cell block is comprised of a series of cells facing each other. There is a passageway between the cells about four feet in width and about one hundred feet in length. It was designed to hold forty-six persons, but on August 10, the 'muster board' showed that there were one hundred and sixteen men in custody. The cells were normally secured by a locking system but on August 10, only three cells could be locked. The locks for the other cells were defective but Cpl. Tyser was unable to say which of the cells could not be locked. He agreed with Counsel for DaCosta however, that the locks for cells 7 and 9 were defective. He was unable to say if the lock for cell number 4 was a sound one or if it was securely locked during the night of August 10.

One bathroom is provided for the cell block but it was out of service at the material time. It was used however as a cell in order to accommodate some of the prisoners due to overcrowding in the cell block. The bathroom was referred to as Cell number 3.

Due to the shortage of men on duty on August 10, Cpl. Tyser was unable to do a head count when he reported for duties. He said that with the limited number of police officers who were on duty, it would have been dangerous to enter the cell block that night. He said he heard no unusual sounds from the cell block during the time that he was on duty.

The evidence also revealed that cells 7 and 9 are situated at the end of the cell block. The passage way is fitted with eight sets of fluorescent bulbs. There were two bulbs in each set but on the night in question only one set of lights had been working. The others had been destroyed by inmates over a period of time. These bulbs burned continuously on a twenty-four hour basis.

The guard room for the station is in close proximity to the cell block. The bulbs which were lit on the night of August 10, were nearer to the guardroom where Cpl. Tyser had been sitting. Those lights according to Tyser illuminated the passageway down towards cells 7 and 9 that were facing each other.

The evidence disclosed that the applicants Dawson, DaCosta and Guthrie had been placed in cell numbers one, four and seven respectively. The sole eyewitness, Wayne Johnson had occupied cell number 7 and the deceased Prince Troy Thompson occupied cell number 9.

Wayne Johnson, the principal Crown witness was called a "grunder" in the cell block. As a "grunder" he had to clean the cells and bathroom area. He reported to other prisoners called "orderlies" who were said to be 'in charge' of other inmates. The "orderly" would give the "grunders" orders; call the prisoners' names for court; order men to empty buckets and clean the corridors. Of course, the police are quite aware of this arrangement but they do not formally recognize it. DaCosta and Dawson, were "orderlies" on the cell block.

At about 10:00 pm on August 10, Johnson said that he was in the passageway of the cell block and was sitting on a bucket at the doorway of

cell number 7 which he occupied. Dawson who is also known as 'Waynie Bones' was seen standing in the passage way speaking to the deceased man who was then inside of cell number 9. Whilst talking, Dawson was whirling a knife on his fingers and said to Thompson: "Dead yuh come yah fi dead". The passage where Dawson stood was lit by a fluorescent bulb. After 'Waynie Bones' spoke, the deceased said:

"Waynie Bones, leggo dat nuh. Better we have it out a road than have it out inna jail. Nuh badda mek we have any road vibes in a jail".

The conversation between the deceased and Dawson lasted for approximately 6-7 minutes and then Dawson walked away.

'Bones', Aubrey Knight, 'Copper' and DaCosta also known as 'Gotti' were next seen talking in front of cell No. 1. Johnson said that all the cells were opened at that time and that it was coming up to the last meal time. Some of the prisoners were bathing and he Johnson was bailing out water from the bathroom. 'Bones' then shouted and told everyone to bathe because he was going to lock up the block. 'Bones' and 'Copper' started to "lock down" the cells but Johnson was still sitting at his cell door which was opened. Cell number 9 was also not locked and the deceased man was seen talking to one of his cellmates. 'Bones' then gave 'Copper' a sheet of newspaper and told him to block off a part of the fluorescent light which was shining in the direction of the guardroom. 'Guthrie', 'Gotti', 'Bones' and 'Copper' were seen talking and then they "split up". 'Gotti' was seen with a piece of cloth in his hands and Johnson said he got scared.

'Gotti' went down to cell number 9 and the three others walked behind him. 'Gotti' called out to the deceased and he came from under his bunk and sat on it. 'Gotti' then used the piece of cloth and "cast" the deceased around his neck. The deceased started to shout for the police but no one came to his assistance. The three other men had open ratchet knives in their hands. 'Gotti' held the cloth, pulled the deceased from his cell and took him to the bathroom (cell number 3). Johnson was very close to the bathroom and he saw 'Gotti' use a knife to slit the deceased's throat.

At this time, other prisoners were beating their bunks whilst the deceased was crying out. He was then placed to lie down in the passage. Bones stabbed him in the left side of his chest with a ratchet knife and said, "You know how long I want to kill you". Guthrie stabbed him in the right side and 'Copper' also stabbed him in the right side a little above the waist. 'Copper' asked the deceased if him can "dis the big man when him come to jail". Johnson said that the deceased was "screwed" that is "jointed up" and was stuffed in a barrel that contained garbage in the cell-block.

The following morning the barrel was taken out of the cell block by the "grounders" and was rolled to a mini dump on the station compound. The body of Thompson was discovered by a grounds man at the station and he summoned Cpl. Tyser. The body was removed from the barrel. A pair of underpants and a boxer shorts had been used to stuff the wound which was inflicted to the neck.

A head count was done in the cell block and it was discovered that Prince Troy Thompson was missing from cell number 9.

The police commenced investigations into a case of murder and a written statement was subsequently taken from Wayne Johnson. He said he was not threatened to give the statement and that no promise or favour was held out to him by the police. He also said that he was not given any special treatment regarding the case which he had pending against him in court. After further investigations were carried out by the police, the three applicants were charged for the murder of Prince Troy Thompson.

Since Dawson and Guthrie did not pursue their applications there will be no need to set out what they had said at the trial.

The applicant DaCosta, made an unsworn statement from the dock. He said that he was locked up by Cpl. Tyser in cell number 4 at the Spanish Town lock-up on the night of the incident. No light was on the block so he went to sleep. The next morning he awoke and Cpl. Tyser came to the block and told them that he wanted to collect the 'muster' because a dead body was found in a drum. He said that Cpl. Tyser used a key to "pull" his cell as it was locked and the prisoners were counted.

**Is the verdict unreasonable and cannot  
be supported having regard to the evidence?**

Despite the looseness of the wording of the ground of appeal in respect of DaCosta, we treated it as intending to express the Ground of Appeal provided by Section 14(1) of the Judicature (Appellate Jurisdiction) Act, namely: "The verdict is unreasonable and cannot be supported having regard to the evidence." This provision came to be understood as signifying that the appellate court intervenes only if there was no evidence on which, if it were uncontradicted, a properly directed jury could convict. If the verdict

can be supported by evidence then the conviction will be affirmed. See **R v Lao** (1973) 12 JLR 1238.

The cases have established the following principles where this ground of appeal is concerned:

- i) It is not a sufficient ground of appeal to allege that the verdict is against the weight of evidence: **Aladesuru v R** ([1956] AC 49, [1955] 3 WLR 515.
- ii) It must be shown that it is unreasonable or cannot be supported having regard to the evidence.
- iii) It is insufficient merely to show that the case against the appellant was a very weak one: **R v McNair** ((1909), 25 TLR 228.
- iv) It is also not enough for members of the Court of Appeal to feel some doubt as to the correctness of the verdict: **R v Simpson** ((1909), 2 Cr App Rep 128.
- v) The court will set aside a verdict on a question of fact alone only where the verdict was obviously and palpably wrong: **R v Hancox** ((1913), 29 TLR 331, 8 Cr App Rep 193.

After a close examination of the transcript, we agreed with the single judge that the critical issue at the trial was one of identification. The question which the jury had to determine was this: Who killed Prince Troy Thompson? The credibility of the witness Wayne Johnson was therefore a live issue for the consideration of the jury. It was therefore of the utmost importance for the learned trial judge to have carefully directed the jury on how they should approach his evidence.

Johnson had known all three applicants prior to August 10 due to their close contacts with each other in the cell block. He was closely examined and

cross-examined on the lighting conditions which existed before and at the time of the crime. He had spoken of seeing the face of 'Bones' as he walked down the passage towards cell number 9. He said that 'Bones' had come under the fluorescent bulb when he made his way down to cell number 9. He said that he could also have seen the deceased man in cell number 9.

Cpl. Tyser said there was one lit fluorescent bulb in the cell block and that it was nearer to the guard room where he was seated. He also said that the light from that bulb shone further down in the passage way for the cell block. When he was asked if the lighting down by cell number 9 was poor he said that from where he sat, it would be poor for him to see straight down to cell 9. When he was further cross-examined by Counsel for DaCosta, he agreed with Counsel that the lighting conditions in the cells were poor. He did say however that although there was only one lighted bulb in the cell block on the night of August 10, if one went into the "lock-up area" one could see from where the fluorescent bulb was installed down to cells 7 and 9.

The other question which arose on the broader issue of identification was; How close the witness Johnson was to the applicant DaCosta at the time the murder took place? The evidence was that Johnson was sitting about one step away from the door of cell number 9 which the deceased had occupied. The width of the passage was between three feet six inches to four feet and cell number 7 which he occupied, was facing cell number 9. He had overheard a conversation between 'Bones' and the deceased which lasted for about six to seven minutes and then 'Bones' walked away. Johnson said he saw 'Bones', Aubrey Knight, 'Copper', also a prisoner, and 'John Gotti'

(DaCosta) talking together in front of cell number one. It was shortly thereafter that DaCosta and the other men came back to cell number 9. The deceased was cast with the cloth by DaCosta and taken from cell 9. He said he was in close proximity to the bathroom where DaCosta had taken the deceased and he had seen DaCosta slit his throat.

In our view, the learned trial judge had properly warned the jury on the dangers of relying on the correctness of the visual identification by Johnson. At page 234 of the transcript he said, inter alia:

"... In any trial where the case against the accused depend (sic) wholly or to a large extent on the correctness of the identification which the Defence alleges to be mistaken or wrong, I must warn you of the special need for caution before convicting the accused in reliance on that evidence of identification. This is because it is possible for an honest witness to make a mistaken identification, because there have been wrongful convictions in the past as a result of such mistakes because an apparently convincing witness can be mistaken. You must therefore examine carefully the circumstances in which the identification by the witness was made ... you must look long and hard at the identification of any accused when it is visual identification. You will, of course, remember that Crown Counsel is saying this is really not identification. That identification really is not a real issue, because the persons were known to each other before, so it is a case really of recognition. Remember my warning, and I will return to this later on when dealing with the evidence. I am now going to remind you of the evidence which were (sic) taken".

The judge had also told the jury that there was really no question that a murder was committed but the issue which loomed large was really who did it. He directed the jury that the defence were saying that because of the poor lighting conditions in the cell block identification would be difficult. This is what he said at pages 306 – 309 of the transcript:

"In this case the Prosecution is depending for proof of its case on which one witness, Wayne Thompson, who claims to be an eyewitness. The the (sic) Defence are saying you should not be sure for two reasons, at least two basic reason (sic). Firstly, because on on (sic) the night of the 10th of August, 1999, or in the morning of the 11th of August 1999, in that cell lighting was so bad that one would not be able to see.

It is that same witness Wayne Johnson who has told you that there was only one light in the cell block which was shining and this is corroborated by the other witnesses for the Prosecution. It is he who tells you that on that night a newspaper was used to shield the side of the light which would be towards the guardroom, that is towards where cell number one was located but he says that that light would shine down towards cells number seven and nine. It is the contention of the Defence and they are not saying that the newspaper was not used to shield the light. What they are saying was that even if the light was not shielded because their contention is that the witness Wayne Johnson is not a witness of truth. He says that one side of the light was shielded by newspaper. He might also be telling lies about that. A matter for you. But what they are contending is that whether it is shielded or not shielded. (sic) There is great difficulty in seeing down towards cell number seven and nine with only one light which was available in the cell block. Remember I warned you of the dangers of convicting on the evidence of visual identification and I did that for that reason because the prosecution is saying that the lighting was bad. Of course, you will bear in mind, as commonsense should dictate, that if you are in the dark you don't need cats eyes as Mr. Cousins would suggest, to see while you are in the dark. If you are in the dark, your eyes focus and adjust and you can see your surroundings.

The fact of the matter is if you accept that these persons were able to move about freely, then clearly they should be able to see freely too. But again these are matters of evidence and the evidence, of course, is a matter for you.

Let's face it, the longer you are in the dark is the better you are able to see in the dark. But the witness is not saying that the place was in darkness. The police officers are not saying that the place was in darkness. The police

officers say you can see. How well you can see is another matter.

If you take this courtroom, we have lights here. It's broad daylight. Would you be able to see if the lights were turned off? A matter for you, because you have to think about the conditions that existed in respect to identifying persons who were on that block. Because, there is no issue that a murder was in fact committed. There is no issue that the murder did take place in the cell block, and there is no issue about who was murdered. The issue is who committed the act.

So you look carefully at the evidence. You look to see in all the circumstances, would the witness who says he was there, bearing in mind the particularity with which he describes what he said took place, bearing in mind the particularity with which he speaks to the events, it's a matter for you whether or not in all the circumstances you think that he would have been able to identify cell mates, persons who are in a cell-block, a cell-block which has several cells four feet apart, containing a hundred and sixteen men, men who have been there for varying times. Whether they were there before he got there or whether they came after him, these are matters entirely for you. Would he have been able to see them? Did he actually see them? Did he see who perpetuated the crime"?

The learned judge had also directed the jury on the question of the credibility of the sole eyewitness, Wayne Johnson. He reminded the jurors that there were discrepancies and/or contradictions in his evidence which they had to resolve. He then said at page 309:

"Then, of course, the matter of the credibility of the witness is the other crucial issue. (sic) Because as you remember there are discrepancies in the evidence of the witness. He has said things on a previous occasion which you might think are important and which you might think affects his credibility. These are matters entirely for you. As far as any discrepancies and or contradictions are concerned, I have told you how you should approach that. And as they are matters of evidence they have been repeated by Counsel both for the prosecution and for the Defence, I am also repeating them, it's for you to decide how you wish to deal with them. Essentially, your issue is

not that a murder has been committed but who committed the murder. And you have a sworn duty to return a true verdict according to the evidence...".

Counsel submitted that Johnson's credibility would also have been greatly affected since DaCosta had said in his statement from the dock, that on the night of the murder, he was securely locked inside his cell and that Cpl. Tyser had used a key to open it the following morning. Cpl. Tyser who was cross-examined by Mr. Cousins was asked a series of questions about the security of the cell block. At page 139 of the transcript the following questions and answers appear:

"Q. The lock for nine and seven were defective?

A. Yes, Counsel.

Q. Is it correct to say, some of the locks were sound and some were defective?

A. Yes Counsel, as I said before.

Q. Was not the lock for number four cell, a sound lock wasn't it a sound lock?

A. I can't recall right now.

Q. Did you lock down the prisoners that night?

A. No, counsel.

Q. Didn't you lock down the prisoners early that night, because did you not have sufficient staff?

A. No, Counsel I did not enter that area none at all.

Q. Didn't you lock down the whole lock-up, locking all the prisoners at a certain time because you didn't have a certain number of staff?

A. No, Counsel no, sir we run three shift there.

Q. Can you say if cell number one was securely locked down?

A. I can't recall.

Q. Can you say if cell number four was securely locked down?

A. I can't recall, Counsel.

We have examined the transcript with care, and have taken heed of the submissions of counsel, but we were unable to discern from the transcript any evidence, apart from what the applicant said, that Cpl. Tyser had used a key to open DaCosta's cell door on the morning following the murder.

It has been clearly established by the authorities that the credibility of witnesses and the acceptability of their testimony are essentially matters for the jury, and that this court will not interfere with their verdict on the facts unless it is obviously and palpably wrong. In this case, far from it being so, we think that the verdict was fully justified by the evidence which the jury had to consider. We were also of the view that the complaints made by Counsel that Wayne Johnson was a proven liar, were matters solely for the consideration of the jury. The jurors had the opportunity to assess Johnson and it is clear from their verdict that they believed him.

### **Conclusion**

Finally, in our view, the reasons put forward on behalf of the applicant in support of the sole ground, failed to establish that the jury's verdict was unreasonable or could not be supported having regard to the evidence.

It was therefore for the above reasons why the applications for leave to appeal were refused and we ordered that the sentences should commence as of the 21<sup>st</sup> June 2003.