

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 124/89

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

REGINA vs. CARL DAVIS

Arthur Kitchin for the appellant

Bryan Clarke for the Crown

October 18 and November 2, 1990

WRIGHT, J.A.:

On October 18, 1990, the conviction for murder and sentence of death passed upon this appellant in the Home Circuit Court on the 27th day of July, 1989, were challenged on the under-mentioned Supplementary Grounds of Appeal:

- "1. The conduct and summing up of the Learned Trial Judge was so unfair and unbalanced that it must have operated to the prejudice of the Applicant.
2. The Learned Trial Judge misdirected the jury as to how they should treat discrepancies and/or failed to direct the Jury as to how they should treat previous inconsistent statements and/or misdirected and/or failed to direct the Jury as to the distinction between discrepancies and previous inconsistent statements.
3. The Learned Trial Judge misdirected and/or failed to direct the Jury as to how inferences are to be created.

4. The Learned Trial Judge failed to properly direct the Jury on the Burden of Proof and the Standard of Proof in a criminal trial which must have confused the Jury and operated to the prejudice of the Applicant.
5. The directions of the Learned Trial Judge on the issue of Identification were wholly inadequate.
6. The Learned Trial Judge misdirected the Jury regarding the issue of corroboration which could only confuse the Jury and cause them to reach a verdict adverse to the Applicant.
7. The Learned Trial Judge failed to properly put the case of the Applicant to the Jury.
8. The Learned Trial Judge misdirected the Jury on the evidence and thereby deprived the Applicant of a fair trial.
9. The verdict of the Jury was manifestly unreliable in view of the evidence in the case."

However, damaging though the grounds appear to be, when Mr. Kitchin essayed to make submissions in support he proved to be so out of touch with the reality of the case that the grounds seem to have been taken from a list of sample grounds and not drafted after consulting the transcript of the case. The complaints of misdirection and failure were all misconceived as was easily demonstrated by reference to the transcript nor could any material be identified in support of the rather sweeping allegations in Ground 1. Ground 9 was equally baseless. In the result, we treated the hearing of the application for leave to appeal as the hearing of the appeal. We dismissed the appeal and affirmed the conviction and sentence and promised to put our reasons for so doing in writing. This we now do.

The evidence led before Ellis, J. and the jury in this re-trial was to the effect that at about 12:50 a.m. on

April 9, 1986, Clara Dawes, who lived in an incomplete newly-constructed two-bedroom board house at 13 Old Harbour Road in the parish of St. Catherine, was awakened from sleep by sounds. At home with her were her children, Arlene Townsend, Shelly-Ann McDowell, Kevington Garvin, a nephew, Richie Harvey, and a friend, Ucal Bartley. Miss Dawes woke up and spoke with Arlene, who went to the back bedroom where 12½ year old Kevington was asleep. At that time the front door of Miss Dawes' bedroom, which opened on a verandah, had been damaged in a fracas and had been nailed up thus affording neither ingress nor egress. Through holes in the door, Miss Dawes observed fire on the outside of the door and raised an alarm.

Arlene testified that when she got out of bed she smelled gasoline and that caused her to peep outside through the damaged door and with the aid of the moonlight and a street light, which was some three chains from the house, she recognised persons outside. She saw Bernetta Dawes, Clara Dawes' sister, who was involved in the damage to the door, the appellant Carl Davis, and his sister Vivetta Hallet and one "Tailman". Bernetta, who was standing near the verandah, handed "Tailman", who was on the verandah, a red plastic bottle from which he splashed some liquid on to the damaged door which he then set ablaze with a lighted match which he threw at the door. She said she called their names and jumped on to the bed and it was then that Clara got up and raised the alarm for fire.

Arlene began to rescue some articles of clothing which she put in a small barrel while Clara, Kevington and Ucal threw what water they had in the house on the door. At the time there were lighted kerosene lamps in the house. When they had exhausted the water-supply they had inside,

these three made their way outside to a drum where there was water - Clora in front with Kevington by her side while Ucal followed behind. Clora's evidence is that to reach the drum, after going outside through the back door, they would have to go around the corner of the house. Accordingly, from the door the drum was not visible. As she approached the drum she saw the appellant standing beside the drum, an arm's length away, leaning on a crutch and with a gun pointing at her. Obviously frightened, she jumped back with hands in the air and said, "Do, Donovan, nuh kill me". The appellant did not speak but she heard the sound of an explosion and saw fire gash from the gun in his hand. Kevington fell on his face and lay where he fell. She ran back inside bawling for murder. Arlene heard her mother's plea followed by the sound of the explosion then saw her mother and Ucal run back inside. At this point Ucal took his exit from the case. No further mention of him is made in the prosecution's case.

Clora continued her bawling but no one came to their aid. After a while she opened the kitchen window, which is in the side of the house where the drum was located and there, standing together and looking in the direction of the window, she saw the same four persons whom Arlene had seen earlier, but she did not then see the appellant with the gun. She closed the window and next she heard the kitchen door rattling for about two minutes. In the meantime, she had dared the worse and had rushed outside to pull in Kevington's bleeding corpse. She had also used a wet cloth to complete extinguishing the fire. During the rattling of the door they sought safety under her bed and did not emerge until about 5:00 a.m. when Clora set out to the Police Station at Spanish Town. When she returned home at 7:00 a.m. she saw Inspector Howe there but Detective Acting Corporal Worrel Blacken had been

there before and returned to the station. But, having received further information, he returned to the area where he found the appellant in Little Lane. He identified himself to the appellant then cautioned him and told him he was informed that he was involved in the murder of Kevington Garvin which he was investigating. The appellant said nothing. Inspector Rowe returned to the station, saw the appellant, who was identified to him by Detective Clacken, and cautioned him to which the appellant responded, "A don't know about it". Clara Dawes later came to the station and pointed him out to Inspector Rowe as "The man who shoot mi son". To this he replied, "A nuh mi".

Medical evidence was supplied by the reading of the transcript of the evidence of Dr. Venu Gopaul as recorded by the Court Reporter at the earlier trial. His findings were:

"Externally -

An oval firearm entry wound measuring $3/4$ inch x $1/2$ inch over the left side on the front of the chest.

On dissection -

The projectile was seen to pass through the 4th rib, lower lobe of left lung, the heart, the diaphragm, upper part of the left stomach, the 3rd lumbar vertebra which was splintered off.

The bullet was not recovered and there were no tell-tale indications such as burning, blackening or tattooing around the entry thus indicating a distance of at least 13 ins. from the nozzle of the gun to the skin. Death was due to shock and haemorrhage due to the gunshot injury."

In the cross-examination of the witnesses, counsel appearing at the trial - not counsel appearing before us - in his effort to impeach the credibility of the witnesses

relating especially to the issue of identification, at times demonstrated less than commendable respect for the Bench. In the result, he touched upon anything that could possibly affect that issue. He challenged the adequacy of the lighting available, suggested the presence of trees and fences, which would affect the quality of the lighting, as well as suggesting the relevant witnesses were either lying or mistaken.

Admittedly, there were trees and fences but the witnesses did not agree their respective positions in any way affected their ability to see and recognize the persons whom they claimed they saw.

Previous knowledge of the appellant is not an issue in dispute. While Clora and her children lived at the address in question since 1984 the appellant had lived next door in his mother's house up to the time when he was injured and became hospitalized in February 1986 but while he was in hospital his mother, who lived abroad, sold the house. Accordingly, when he was released from hospital, he had to seek accommodation elsewhere, namely at Tower Hill, St. Andrew. But the stay with his step-father at Tower Hill lasted only four days after which he moved to Job Lane, which appears to be part of 13 Old Harbour Road. The rest of his family then lived at 4 Milk Lane, Kingston. Clora Dawes disclosed that at the time of Kevin's killing the relationship between herself and the appellant was not good because he had sided with her sister, Bernetta, in a feud between her and Clora. Exactly when that was she did not say but the ill-will went back far enough to land Clora with a criminal charge in respect of the injury which lost him his leg. She was charged along with others but she was acquitted subsequent to April 9.

The defence was an alibi. He spent the night of April 9, 1986, in bed with his girl-friend Pema, whose full

name he did not know. That was at William Lane on premises 13 Old Harbour Road. He had no gun and was not in company with any of the persons alleged to have been seen in the vicinity of Clora's house. He knew "Tallman", who lived in a house at 13 Old Harbour Road which appears to be an informal sub-division. He said he had heard nothing about the fire nor, it seems, the shooting, until the following morning when Ucal Bartley pointed him out at a shop to Detective Clacken saying, "See him there, sir, a him shot Kevin last night", and he was taken into custody.

Fema did not testify but Vivetta Mallett, his sister, gave evidence to the effect that on the night in question she was at 4 Milk Lane and so could not have been seen at 13 Old Harbour Road. While this evidence did not go to supporting the appellant's alibi it nevertheless challenged the credit of Clora and Arlene, who testified they saw her outside Clora's house on the night of April 9, 1986.

Nobody gave evidence that there was no moonlight that night and no one said there was no street light. When Clora was asked:

"Q. How were you able to see that it was Donovan out there?"

She replied -

"Because the place light up and we have a street light showing bright."

In clarification, she said:

"We have moonlight and we have street light out there."

Challenged in cross-examination that she had not mentioned the street light at the previous trial she responded that she could swear she had mentioned it. But what is a fact is that a street light was there. The Police saw it. They saw, also, the burnt door and the water drum.

The learned trial judge literally belaboured the issues of burden of proof, discrepancies and the elements of good identification, identifying such weaknesses as he saw but Crown Counsel, apparently apprehending some omission, intervened with the following result, at page 195:

"MISS SIBBLE: My Lord, I rise to bring this to the court's attention. I am wondering, m'Lord, in the light of recent decisions, if your Lordship shouldn't point out the fact that although there is one witness who purports to identify ...

HIS LORDSHIP: Oh, I see.

MISS SIBBLE: ... and she has not been corroborated, if they believe her, then ...

HIS LORDSHIP: Yes.

Mr. Foreman and members of the jury, there is a recent decision about you must have corroboration, and corroboration comes from independent supporting evidence - from an independent source. The only bit of corroborative evidence in this is the statement from Arlene which says, 'I heard my mother say, 'Do, Donovan, don't kill me,' but as I told you, that only goes as far as to say yes, she heard her mother say, 'Do, Donovan, don't kill me' - the accused is called Donovan - but it doesn't support her as to the correctness of her identification because it is only Clara who saw this man with the gun. But although it is desirable to have corroboration, even if you don't find any and you believe Clara Dawes you may nevertheless accept her identification evidence as correct - if you believe it; if you think nothing is wrong with it. That is how I would leave that to you. Thank you very much.

HIS LORDSHIP: That satisfies you, Miss Sibble? I am not doing anymore.

MISS SIBBLE: Very well, m'Lord."

It is patent that the direction on corroboration, unduly favourable to the appellant as it was, was unwarranted but could not provide a legitimate ground of complaint by the appellant.

In approaching the task which he had set himself, Mr. Kitchin grouped Grounds 1, 5, 6, 7 and 8 for presentation. Nevertheless, he set out to deal with them singly but, as we stated earlier, the grounds were so unrelated to the realities of the case that he could find no support from the record of the case. For instance, Ground 6, alleging misdirection on corroboration, was effectively met by the portion cited from page 196, which substantially repeated what the learned trial judge had more accurately said earlier at page 184 of the transcript. Mr. Kitchin was forced to capitulate, conceding he could take the matter no further.

With his concession the Court readily agreed and came to the conclusion earlier stated.