C.A Criminal Law – Murder – Evidence of commission of other crimes – whether prejudicial effect outweighed probative value – whether judge erred in admitting evidence. Application for leave to appeal refused. Case classified as non-capital murder

JAMAICA

[Case referred to: s.5(1)(a)]

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 64/92

BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.

REGINA vs. EVERETTE PARKINSON

Glen Cruickshank for the applicant

Miss Carol Malcolm, Assistant Director of Public Prosecutions, for the Crown

July 4 and 29, 1994

WOLFE, J.A.:

This applicant was tried in the Westmoreland Circuit Court before Cooke, J., sitting with a jury, for the offence of murder on the 10th day of June, 1992. He was convicted and sentenced to suffer death according to law. He now seeks leave to appeal against the conviction. At the close of the arguments by counsel appearing on behalf of the applicant we did not see it fit to call on the Crown in reply. We refused the application for leave to appeal. However, we were of the view that the killing had to be classified as non-capital murder in accordance with section 2(3) of the Offences against the Person Act as amended. As a consequence we set aside the sentence of death and substituted therefor a sentence of life imprisonment specifying that the applicant be not considered for parole until he had served a period of twenty years from the date of hearing of this application.

At that time we promised to put our reasons in writing and we now do so.

Leonard Ramdas and his nephew Anthony Ramdas were standing at the Gutters Gate crossroad on December 2, 1990, between 7:00 p.m. to 8:00 p.m. when the applicant who was known to Anthony Ramdas,

the sole eyewitness for the Crown, approached them on foot. He was armed with a long gun. When the applicant was about one half chain away from the witness and his uncle he discharged the firearm and Leonard Ramdas fell to the ground. Anthony Ramdas hastily sought the safety of a nearby canefield. From the canefield he peeped out and saw his uncle get up and run over to his garden nearby. The applicant went in pursuit and a volley of shots were heard.

Anthony Ramdas eventually emerged from the canefield and along with other persons he went over to the garden where he saw the lifeless body of his uncle.

This witness knew the applicant for over twenty years, from the time he was attending primary school. He knew that the applicant lived in Paul Island in the parish of Westmoreland. He had last seen the applicant the week preceding the brutal slaying of the deceased. Indeed, there was no issue joined in this regard. The area was lit by a street light nearby where the incident occurred as well as by the moonlight.

The prosecution called a witness in the person of Sydney Sanderson who testified that sometime between 7:00 p.m. and 8:00 p.m. he had seen Parkinson in the Gutters Gate crossroad area armed with a gun, "A pump rifle" and that the applicant had held him up at gunpoint and searched him.

Dr. Barrington Clarke, who performed the post mortem examination, concluded that death was due to massive blood loss resulting in shock as a result of a gunshot wound to the chest.

The applicant gave evidence on oath and denied any involvement in the crime or any involvement with Sydney Sanderson. He said he was somewhere in Little London on the night in question.

One ground of appeal was argued before us, with leave. For full effect, we set it out below:

> "1. That the learned trial judge erred in law when he admitted into evidence the Testimony of the witness Sydney Sanderson as it had the effect of:
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> (a) Telling the jury that the appellant had committed another offence and thereby causing irreparable prejudice in their minds.

> "(b) The presence of the appellant in the area was not at a time substantially contemporaneous (sic) the event in question to warrant its admission."

Mr. Cruickshank submitted that the evidence of Sanderson had no probative value. He further submitted that even if it had probative value the prejudicial effect far outweighed the probative value. We entirely disagree with this submission.

The applicant at the trial put forward the defence of alibi. He said that he was never at anytime that day at Gutters Gate crossroad. He was at Little London. In the circumstances, evidence which established or was capable of establishing his presence in the area at the material time, had to be relevant and, therefore, probative.

In Makin v. Attorney General for N.S.W. (1894) A.C. 57 at page 65 Lord Herschell L.C. said:

> "The mere fact that evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury and it may be so relevant if it bears on the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental or to rebut a defence which would be otherwise open to the accused."

The evidence was adduced to rebut the defence of alibi which was open to the applicant and which in fact the applicant raised. A relevant issue before the jury was whether or not the applicant was in the location of Gutters Gate crossroad and whether or not he was armed with a long gun.

We bear in mind that although the evidence was strictly admissible, the learned trial judge had a discretion to exclude it if its prejudicial effect to the applicant would be out of all proportion to its evidential value.

In the instant case, we are of the view that the learned trial judge properly exercised his discretion in admitting the evidence. Further, having admitted it he made sure in his directions to the jury to stress the limited purpose for which the evidence had been admitted. There was, in our view, absolutely no chance of the jury misunderstanding the limited use

they could make of the evidence. At pages 59 to 60 of the transcript he is recorded as saying:

> "The evidence of Sydney Sanderson is relevant only in two (2) respects. One (1), that the accused man was in the vicinity, in that area about the time when Ramdas was shot. Remember his evidence is that he was in Little London. That is the first thing. The second relevance is that when he was seen in the vicinity at about the time when Ramdas was shot, he had a long gun, and that aspect of the long gun relates to the testimony of Anthony Ramdas, the nephew, that the person who killed the deceased had a long gun. So there are factors which if you accept them, you would take into consideration when assessing the evidence of Anthony Ramdas. You must not say because you are satisfied so that you feel sure that the accused was the person who 'jook' down Saunderson, that it necessary (sic) follows that it was the accused who murdered the deceased. You still and you must subject the evidence of Anthony Ramdas to the greatest and closest scrutiny. You see the 'jooking' down aspect of this case is relevant to this case in that it provided an opportunity for Saunderson to recognise the accused, if you so find that he was properly recognized. And if he was properly recognized then as I said the two relevant aspects are one (1) that he was in the area just at the time, therefore, he couldn't as he said, be at Little London. And two (2), that he had a long gun and Ramdas says the person who did the shooting had a long gun.
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> You must not say, Mr. Foreman and members of the jury, that because if you so find that he is a robber, that he is therefore, necessarily the murderer. I hope that I have made myself clear on that."
>
> [Emphasis supplied]

Later on at page 65 he again reminded the jury as follows:

> "Now, let me remind you again, that the only relevance of Saunderson's evidence is to establish that he was in the area and two (2), that he had a long gun at about the time, the time span I believe is about the time span of an hour."

The extracts quoted show that the learned trial judge made quite clear to the jury the purpose for which Sanderson's evidence could be used and that they were not to say if they accepted Sanderson's evidence, that he was in the area armed with a long gun that he was necessarily the person who shot and killed Leonard Ramdas. He made it quite clear that the guilt of the applicant had to be determined on the evidence of

Anthony Ramdas, the sole eyewitness as to the fatal shooting of the deceased.

The ground of appeal fails as being without merit.

Notwithstanding that there was no challenge as to the quality of the identification evidence, we looked carefully at the evidence and concluded that this was really a case of recognition, the eyewitness having known the applicant for some twenty years prior to the incident. The manner in which the learned trial judge treated the evidence of recognition and his directions to the jury as to how to approach such evidence, cannot be faulted.

For these reasons we refused the application for leave to appeal.

Case referred to
Makin v Attorney General for N.S.W (1894) A.C 57