

CRIMINAL LAW — Murder — firearms — identification —
defence alibi — trial judge after summing up tells accused
— at jury request to stand in the dock — whether fundamental
rule of procedure breached — JAMAICA — Appellate to appeal dismissed —
Applicants intend to petition for special leave
to appeal to Privy Council —

SUPREME COURT CRIMINAL APPEALS NOS. 125, 126 & 127/83

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE CARBERRY, J.A.
THE HON. MR. JUSTICE CAREY, J.A.

*Quay
Has matter
been heard
by Privy Council?*

REGINA

VS.

MICHAEL MCLEAN
MICHAEL SAWYERS
DESMOND MCLEAN

Mr. Hugh Small, Q.C. for Sawyers
Mr. L. McLean for Michael McLean and Desmond McLean
Mr. M. Dukharan for the Crown

March 10, 1986 and February 11, 1987

KERR J.A.:

The applicants were jointly charged and convicted in the Home Circuit Court on the 15th November, 1983 before Morgan J. and a jury for the murder of Rudolph Ramsay and sentenced to death.

Ramsay was shot and killed in the early hours of the morning of the 9th July, 1982 as he and his sister Dawn Ramsay were returning home along a track in that area of Waltham Park known as Mongoose Town.

Dawn Ramsay, a girl of 14 years of age, said in evidence that the deceased and herself about 2:00 a.m. went to a shop by Waltham Park Road. There the deceased had drinks before leaving for home about half hour afterwards along the track in Mongoose Town. On approaching a zinc fence at the back of premises of the McLeans she heard the fence "crack" and on looking up she saw all three applicants. The fence there had been bent back and she could see their chests, shoulders and faces and by the street light she was able to recognise the three men whom she knew before. Michael she knew for about five years; he lived in the same yard from which the shot was fired and she saw him often, about twice weekly; Sawyers she knew for about two years and she saw him most times in the company of Michael and Desmond McLean. she had regularly seen for about five years in the Payne Avenue area.

When she first saw them they were about three to four yards away and Michael McLean and Sawyers each had a gun in his hand.

Carl Martin was then coming along behind on the track. She said: "Michael fire a shot" and the deceased fell. Martin grabbed her skirt and they turned back and ran - she took a short cut to her home and there made a report to her father. While running she heard two more shots.

Her father and herself left for the track where her brother fell. On the way she saw the three accused going along Delacree Lane. She and her father went to the track where her brother lay bleeding from a wound in his head. Deceased died after surgery by Dr. Leramo.

Dawn Ramsay was cross-examined at great length, much of it being ineffective. It elicited from her, that some time before, Desmond McLean had taken a twenty dollar bill from her, and when deceased asked for it, he Desmond, stabbed him with a knife. Desmond lived a stone throw from her house. She said that she has a step-sister also called Dawn but who has not returned to the home since the death of the deceased.

She said that there are no street lights in the track but about two premises before one comes to the lane there is a bright light near the entrance to the track. The light is on a pole with the bulb at an iron extension and the light was a kind of yellow. The distance the light was from the track where shooting took place was pointed out and estimated as eighteen feet. There were trees in the area, but none close to McLean's fence.

The other eye-witness Carl Martin, a labourer, said that deceased, Dawn Ramsay and himself left the Night Life Club after 2:00 a.m. Deceased was in front, Dawn in the middle and he at the back as they walked along the track. He saw the three accused behind the zinc fence. Accused Desmond McLean had a gun in his hand - it rested on the fence and was pointing at them. Michael McLean who was in the middle pushed forward and fired a shot from a small gun about eight inches in length, at the deceased.

The deceased dropped in the track. He bounced Dawn and they both ran away.

He ran to the home of the deceased. The street light shone on Desmond McLean. They were no trees to impede his vision. He knew the McLeans before; Michael for over four years but he had never seen Sawyers before that night. He next saw him at the Gun Court where he made a dock identification. The learned trial judge advised the jury that this evidence was not reliable.

The cross-examination of this witness revealed an inconsistency with his evidence at the preliminary examination. To this, the jury's attention was properly adverted by the trial judge thus, at p. 456:

"Now he was asked about the preliminary examination which is the same examination I keep telling you about before the Magistrate, and he says at the preliminary examination it is true that I never mentioned Michael McLean as having a gun; I say today he did. When I first saw them I saw Desmond McLean with gun and the middle man Michael pushed forward. At Gun Court I said he did not have a gun because it was just an examination. I figured it was not the real thing so I could tell anything. Yes, I swore on the Bible there. I appreciate I was giving evidence in a serious matter and I said something different up there to what I say here.

Madam Foreman, members of the jury, I would say that this is a conflict which is serious and material. At the Court here he says he saw Michael with the gun and Michael pushed forward and Michael fired, and he admits saying so, so you can take it into consideration; and at the Gun Court he never said anything about Michael having any gun. It was Desmond he spoke of with a gun. It is for you to say that this does not go to the root of the case."

and later at p. 457:

"The explanation that he has given you must look on that. First of all he says it was just an examination; it wasn't the real trial. He mentioned it now because this is the right trial going on. You must say whether or not that satisfies you. Somebody who swore on the Bible to speak the truth."

She had earlier in her summing-up given clear directions as to how the jury should treat inconsistencies. Because this witness was accused of recent fabrications his statement to the police in which he named Michael as firing at deceased was put in evidence.

Dr. Carl Escoffrey who performed the postmortem examination on the body of the deceased was of opinion that death was due to brain damage from a gun-shot wound to the head. He saw one entry bullet wound in the right parietal region of the head four inches above the right ear. From the brain he took a cylindrical copper coloured bullet. He saw evidence of the recent surgery performed by Dr. Leramo.

Witness, Detective Corporal Reid said he visited the scene that morning. He corroborated Dawn Ramsay as to the state of the fence at the back of the McLeans premises, the front of which was on Delacree Road and the back on the track. Sections of the fence were about six feet two inches and others about five feet nine inches in height. The fence was of rough zinc. At the particular spot indicated by Dawn Ramsay, the top section flopped over into the premises and the ground level inside was higher than outside - a person standing inside would be about eighteen inches above the level of where he would be outside. He saw dry blood in the track outside. Consistent with their challenge to the eye-witness' evidence, the three accused gave evidence of an alibi.

The accused, Michael McLean, now a mason employed as such by Marley and Plant at Washington Gardens; formerly he and accused Sawyers were members of the Jamaica Defence Force at Up Park Camp. He used to live with his mother Monica McLean at 20 Delacree Lane but on 9th July he was no longer living there. He was not there that night. He said he knew all the tracks and lanes in the area. At the time he was living some distance away from his mother on Delacree Road. At 2:00 a.m. on July 9, he was in "Water House", Dill Pathway, sleeping on a cot. Earlier he had been there at the gate with Richard Turner and others drinking but left them about 11:30 p.m. Turner who joined him inside, spread a jacket on the ground and went to sleep. The house belonged to one Dutchie. Sawyers who had been there earlier left with his lady for his yard at Rushworth Path about three hundred yards away.

Richard Turner corroborated the accused Michael McLean. He saw Sawyers and a lady friend who were at Dutchie's home at about 9:30 p.m. left

shortly after and he went to bed at about 11:00-11:30 p.m. In cross-examination he said his house was but a short distance from Dutchie but he was feeling tipsy, it was getting late and he did not want to wake up his grand-mother, so he slept on the floor of Dutchie's room.

The accused Michael Sawyers said that he lived at Rushworth Path, Kingston 11 and he too was employed to Marley and Plant but as a guard and time-keeper. He was at Dutchie drinking that night but left with his lady friend. He knew Dawn Ramsay but not the deceased. Linnett Blake, the lady friend corroborated him. She slept with Sawyers that night.

The accused Desmond McLean said that at the time he was living at 32 Delamere Avenue, St. Andrew. He had never been in any incident with Dawn Ramsay over \$20.00. At about 2:00 a.m. on the night in question he was at home. Rudolph Huntley was there. Huntley is the owner of the house and he has tenants. He has been living at Huntley's for some years, but still visited his mother for meals. He knew Carl Martin and Dawn Ramsay, and also the deceased.

Monica McLean, the mother of Michael and Desmond McLean, said there is a tamarind tree in the yard and its limbs hang over the track. There are lights in Delacree lane. The street light is about forty yards away from the track at the back of her home and has not been working for many years. On the night in question she heard gun-shots - three explosions in all. She has been living at 20 Delacree Lane since 1970. She has five daughters and two sons. At her house with her, live her husband, four daughters and three grand-children. Desmond comes to the home regularly for his meals but that evening he left about 5:00-5:30 p.m.

At the hearing of the applications for leave to appeal, Mr. Small said that he had read the transcript of the evidence and the summing-up and in his opinion there is no arguable ground of appeal. He had communicated this opinion to Mr. McLean, Counsel for the other applicants. Mr. McLean, in turn, said having consulted with learned Queen's Counsel no useful purpose will be served in seeking leave to argue the additional grounds filed save Ground 3 which reads:

"The learned trial judge further erred in wrongfully allowing further evidence to be adduced after the case had been summed up to the jury when the learned judge at the request of the foreman juror to see the three accused (a) in a standing position and (b) to see them positioned closely together, that is, standing side by side touching one another, acceded to the request thereby violating a fundamental rule of procedure in such a trial."

The jury had retired for thirty-five minutes - 11:52 a.m. to 12:27 p.m. when the following transpired (p. 498):

"REGISTRAR: Madam Foreman, please stand.
Madam Foreman and members of the jury, have you arrived at a verdict in respect of the accused Michael McLean?

FOREMAN: No, sir; it's not unanimous.

HER LADYSHIP: Well, you are not unanimous.

FOREMAN: We would like the three accused to stand for us.

HER LADYSHIP: You said that you are not unanimous.

FOREMAN: No, ma'am.

HER LADYSHIP: You haven't all agreed?

FOREMAN: No, ma'am.

HER LADYSHIP: All right, I am afraid you will have to go back. It's just half an hour. Before you go, may I just ask you, is there any help that you need?

FOREMAN: Yes, Your Majesty. A member of the jury would like to ask you to let the three accused stand in the dock.

HER LADYSHIP: Oh, I see. Would all you three please stand for us.
Is that all right?

FOREMAN: Yes, thank you.

HER LADYSHIP: Okay. Come together (To accused)
(Accused stood beside each other)
Very well, sit down. Sit for me, please.
(To Foreman and members) You wish to go back out now?

FOREMAN: Yes, ma'am."

The new evidence, submitted Mr. McLean, was that without being so asked, the learned trial judge directed the three accused to stand close together. In support of this ground he referred to R. v. Gearing (1968) 1 All E.R. 581,

This case is unhelpful, in that, after the summing-up was conducted, in relation to the issue of identity, a man who had not previously been before the Court was brought in apparently for comparison with the accused. Here from the outset all three applicants were before the Court. Mr. McLean did not even attempt to indicate how by so doing this could in any way prejudice the fair trial or cause a miscarriage of justice. We indicated then that we found no merit in this ground of appeal.

In our view the judge's directions were full and careful and relevant to the issues raised and in particular, to that of identity of the accused. She painstakingly reviewed the evidence and identified the important issues and the evidence relevant to those issues. In the light of the opinions expressed by both Attorneys for the applicants and with which we agreed in dismissing the applications for leave to appeal from their convictions, we felt that an oral judgment was sufficient.

On learning however, that the applicants intend by way of a petition for Special Leave to appeal to Her Majesty in Council, for the record we now set out herein our reasons for so doing.