JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 164/90

COR: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA VS. NEWTON MCLEOD

L. Jack Hines for applicant

Michael Palmer for Crown

20th & 31st July, 1992

CAREY, J.A.

In the Circuit Court Division of the Gun Court held in Kingston on 22nd November, 1990 before Panton, J., and a jury, the applicant, after a four day trial, was convicted of the murder of Benton Sutherland. It was alleged that Mr. Sutherland was shot to death on 29th December, 1989 by this applicant in broad daylight. Sentence of death was imposed as is required by the law of this country. He now seeks leave to appeal his conviction.

The Crown's case, as the learned trial judge correctly described it, was a simple one. The circumstances of the actual shooting were related by one witness Clive Dewar, and there was support in material particulars from another witness Elaine Sutherland, who was the sister of the slain man. According to Dewar, while he was in conversation with four young men including Benton Sutherland on Lacy Road in Kingston, a bicycle approached with two men on it, one of whom was this applicant. He was being carried on the bicycle by the other man who was a stranger to the witness. The applicant appeaared to be settling himself on the bicycle when Dewar who had momentarily taken his eyes off the men, heard a sound as if something had fallen. It was a gun which had fallen onto the roadway, about a yard from the bicycle. Everyone scattered. The applicant retrieved

his firearm. By then, it appears that while the witness went in one direction and hid behind a board-fence, the victim ran in the opposite direction but unfortunately towards the applicant. When both men were about twenty feet apart by the trial judge's estimation of the distance indicated in Court by the witness, McLeod cried out - "don't shoot me, Bucko." That was the sobriquet of the applicant. His response was to squeeze the trigger, but there was no discharge. The applicant released the safety catch and discharged several shots at Sutherland who fell to the ground bleeding from several places over his body. The applicant and his companion then disappeared.

The support of which we spoke, came from the victim's sister, who resides on Lacy Road. At about that time while at the front of the premises, she heard the sound of gunshots in the street. Immediately she saw her young son running towards her and he gave her some information. She rushed onto the street to find this applicant confronting her. He had a gun in his hand. Prefixing his remarks with an obscene word, he demanded to know where she was going. Thus menaced, she made a detour, in the course of which she heard more shots being fired. She however, ended up where she had started and was in time to see the applicant returning a gun to his waist. Thereafter, in the company of another man, the applicant left the scene. She went onto the street. There she found her brother bleeding and moaning loudly. She rushed him to the hospital where he died.

On the 19th January, 1990 Detective Acting Corporal Gilmore Simpson came upon the applicant in an area in Kingston named Dunkirk. He was standing in front of a Toyota motor car which was parked on William Street. According to this police officer, the applicant removed a firearm from his waist, and quickly entered the car in which he sat in the passenger seat in the front. The officer went up to the car, observed that the floor mat was rumpled and extracted a 9mm. pistol from beneath it. The magazine contained eight live rounds. The applicant then observed - "I know yuh gwine

seh it belong to me because you find it under the mat." The applicant as well as two men who were then seated in the back and another man who was engaged on a job on the body of the car were all arrested and charged for illegal possession of the firearm and ammunition.

The post mortem examination confirmed the fact that the victim died from multiple gunshot wounds. Although there were a number of entry and exit wounds, the pathologist Dr. Patricia Sinclair was able to recover two 9mm. bullets from the body which were submitted to Superintendent Rupert Linton, the ballistics expert. He also received the firearm and ammunition found in the applicant's possession. Tests carried out by him showed that the bullets taken from the body of the slain man were fired from this firearm.

On 29th January, the applicant was arrested and charged for the murder of Benton Sutherland. On being cautioned, he is recorded as having said - "A no me ah deal with that, a me lawyer."

The applicant made an unsworn statement, the sum of which was that he was nowhere near Lacy Road nor did he shoot anyone on 29th December. He called a witness Lennox Rodgers who operates the garage where the applicant was held. He confirmed that a gun was found by the police in the car on which he worked and that the applicant worked at his garage. He acknowledged also that the applicant was one of the persons arrested for illegal possession of the firearm which the police recovered. He did not agree that anyone was in the car while he worked on it.

We must now say something about the identification evidence in this case. Both witnesses who testified in this regard knew the applicant. Dewar gave that period as six to seven months, and stated as well that he would see him once or twice in a week. He said the last time he had seen him was some four to five months prior to the incident. That seemed odd, and the possibility is, that the witness meant four to five weeks before the incident. Elaine Sutherland spoke of knowing the applicant over a nine to ten

month period, and the last occasion when she saw him was in October in the area of Lacy Road, viz on Portland Road.

So far as the duration of observation was concerned, Dewar mentioned a period of five minutes or less. Elaine Sutherland did not state any period of viewing. But she spoke of two occasions for viewing, first after she heard the sound of gunshots, ran out into the applicant who spoke to her in manacing terms and secondly, when she had circled in her detour and peeped through some crevice in the zinc fence of her yard. Then she observed him return the gun to his waist, get onto the bicycle and ride off with his colleague.

With respect to distance from the applicant for observation, Dewar was, on the evidence, no more than twenty yards which was pointed out in Court. Elaine Sutherland confronted the applicant and observed him through the fence, a distance of nine feet away.

We would repeat that the shooting took place in broad daylight.

Mr. Hines, in his grounds of appeal, challenged the trial judge's direction on what he characterized as the crucial factor of identification. One of the examples of this failure which he identified, was that the trial judge failed to point out to the jury the weaknesses of the identification evidence and any difficulties that arose from the circumstances surrounding the identification. Counsel was however, constrained to concede that the directions though brief, were appropriate to the circumstances.

In our view, so far as the physical conditions went, these presented no difficulties. These were not conditions which rendered identification or recognition problematic. In sum, there were no weaknesses which needed identification or elucidation. But if there were, we think the learned trial judge dealt with them in this extract at p. 232:

> " So Mr. Foreman and Members of the Jury, in considering this question of identification you bear in mind what I have already said, you consider the details given by this witness as

> "to distances, you consider also that all this took place in less than five minutes, and you decide whether Clive Dewar is speaking the truth or not, you decide whether he is mistaken or not."

Plainly he was isolating for especial careful consideration the details as to distance which although stated in evidence seemed to be at odds with the actual distances pointed out in Court. It would seem to us that the distances were grossly overstated. But the jury would have observed the distances actually indicated in the course of the hearing. Moreover, he mentioned also the time, i.e., five minutes, or less. Learned counsel was perfectly right in his concession that the directions were appropriate. We would add that they were adequate as well.

Another example of the deficiency in the trial judge's summing up, which counsel identified, was stated thus:

> "1. The learned Trial Judge's direction on the crucial factor of identification was inadequate in that:
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> (a) he failed to give a warning of the support if any, of the identification evidence which could be derived from their rejection of the alibi; in particular he failed to point out to the jury that false alibis may be put forward for many reasons and also that proving that the accused has told lies about where he was at the material time does not by itself prove that he was where the identifying witness or witnesses says he was."

There were some faint submissions in this regard but counsel did not feel able to pursue them to any finality. The applicant in his defence, contented himself by telling the court that he was nowhere near Lacy Road. That statement, it is believed amounts to an alibi. In England, when alibi is the defence advanced, notice is required to be given. That notice, if it is to enable the police to investigate and verify it, calls for specifics of place and time. In those circumstances, therefore, where an accused person puts up a false alibi which means an alibi proved to have been manufactured,

a judge is expected to warn the jury against using the fact of that rejected false alibi as evidence that he was where the Crown's witnesses assert he was at the material time. Thus Widgery, LCJ., in **R. v. Turnbull & Ors.** (1976) 3 All E.R. 549 at p. 553 said:

> " Care should be taken by the judge when directing the jury about the support for an identification which may be derived from the fact that they have rejected an alibi. False alibis may be put forward for many reasons: an accused, for example, who has only his own truthful evidence to rely on may stupidly frabricate an alibi and get lying witnesses to support it out of fear that his own evidence will not be enough."

We do not think that where an accused merely says I was not present at the place where the crime took place or I know nothing about it, he is raising alibi. Alibi means more than not present but rather he was at a specific place. The accused is, in our judgment, merely denying the charge. Accordingly, the warning ordained in **R. v. Turnbull** (supra) is not called for. It was not necessary in the instant case.

At all events, the learned trial judge gave proper directions to the jury with respect to their consideration of the defence. At p. 224 the trial judge guided the jury in these words:

> " Now an accused person who says that at the time of an offence he was elsewhere, sets up what is known as an alibi; and where an accused puts forward an alibi, there is no burden on that accused to prove the alibi. If you accept, you the jury accept the alibi, i.e. that he was elsewhere, then you have to acquit him. If you doubt it, i.e. if there is a doubt as to whether or not he was where he said he was, you will have to acquit him, too. If you reject the alibi, that does not necessarily mean that he has to be convicted. He can only be convicted if the case for the Prosecution makes you the jury feel sure; and the area of the case which is crucial, is the area relating to identificaiton."

The jury could not have been in the least doubt that no support whatever could be derived from their rejection of this "alibi."

On the issue of identification of the applicant, we conclude that the Crown's case was a powerful one. Additionally the identification evidence derived support from the finding of the murder weapon in the possession of the applicant within a comparatively short time of the murder. We use the word support deliberately. We would regard the applicant's possession of such incriminating evidence as an odd coincidence and not corroboration in the legal sense.

The final ground argued was in the following form:

> "2. The learned Trial Judge erred in not ascertaining upon the return of the jury after 82 minutes of deliberation as to what was the specific problem they had encountered, whether in law or in fact with the evidence of the two crucial prosecution witnesses and so merely gave a brief repetition of his original directions and as a consequence it is impossible to state whether what he said did or did not resolve the problem of the jury."

The circumstances from which this ground stems are these. The jury after a retirement of one hour and twenty-two minutes, returned to say they had not arrived at a verdict. The following colloquy then ensued at p. 243:

> "FOREMAN: No, Your Lordship. We are having some difficulty.
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> HIS LORDSHIP: Just a moment, just a moment, just a moment. Now, I really did think this was a simple case. Anyway is there any area of the case on which you require, you think further directions from me, any area of the case?
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> FOREMAN: I think perhaps on the question of the statement of Mr., the two primary witnesses, Mr. Dewar and Sutherland.
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> HIS LORDSHIP: Mr. Dewar and Miss Sutherland?
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> FOREMAN: Yes.

"HIS LORDSHIP: You think that the jury requires further directions in relation to their evidence?

FOREMAN: Yes. May I ask a question, Your Lordship?

HIS LORDSHIP: Yes.

FOREMAN: Is it required that all twelve members must have the same verdict?

HIS LORDSHIP: Yes, yes.

FOREMAN: The same decision?

HIS LORDSHIP: Yes, yes. All right, take a seat now let me see what further assistance I can give you."

It is quite plain that the trial judge was careful to ascertain from the foreman the specific area of difficulty. The foreman made it perspicuously clear that the difficulty was in the area of the evidence of the two crucial witnesses on identification. The trial judge then reminded them of the evidence given by each witness. He made clear the question which arose for their consideration and reminded them of their function. He said this at pp. 245 - 246:

" Now, as I told you earlier, there can be no conviction of the accused unless you believe these witnesses that they saw the accused with the gun.

I pointed out to you that it was broad daylight, so you have to assess these two witnesses, I can't assess them for you, your duty. I can only help you to bring points to your attention but I can't do the assessment for you, you have to think of them, the two witnesses, particularly Mr. Dewar and ask yourselves: are they speaking the truth? are they mistaken? If they are speaking the truth, if you find that they are speaking the truth and you reject the statement of the accused that he was not there, if you find that they are speaking the truth, the proper verdict is guilty.

> " If you find that they are not speaking the truth, the proper verdict is not guilty. If you are not sure if they are speaking the truth, and you are not sure if they are mistaken, or if you find they are mistaken, the proper verdict is not guilty. I cannot make it any simplier.
>
> Now, you are all intelligent people blessed with commonsense, this is a simple case. You either accept those witnesses who say they saw him or you don't. It is as simple as that. And wherever you are not sure, not guilty is the verdict."

He then went on to deal with the other area of difficulty, viz the question of a unanimous verdict. There was no argument before us impugning his assistance in that regard. We see no basis for challenge in that regard. They returned to the jury room with these parting words which were directed at the difficulty raised by them:

> " So please go back to the jury room and consider whether you believe them, the witnesses, Dewar and Sutherland, or you don't believe them; whether you find them to be mistaken or not."

Mr Hines is therefore in error when he stated that the trial judge had not ascertained the specific problem. As we have demonstrated, he most assuredly had done so and his directions thereafter were sufficient to focus their attention on the consideration they should bring to bear on the difficulty which they had identified. He did so in lucid terms. What he said was adequate and appropriate. In our view, he cannot be faulted. It appears to us that he had made the position so clear and understandable that the jury returned in ten minutes with a unanimous verdict. We think that verdict was justified on the facts and we can find no warrant for interfering.

We would add, that on a consideration of the summing up as a whole, the learned trial judge left to the jury not only all the issues raised by the defence but also the issues which fairly arose on the facts in a manner that was fair, clear and adequate.

The application for leave to appeal is accordingly refused.