

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NO.61/2006**

**BEFORE:     THE HON. MR. JUSTICE SMITH, J.A.  
                  THE HON. MR. JUSTICE COOKE, J.A.  
                  THE HON. MR. JUSTICE DUKHARAN J.A. (Ag.)**

**WAYNE RICKETTS V R**

**Alonzo Manning** for the Applicant.  
**John Tyme** for the Crown.

**21<sup>st</sup> and, 25<sup>th</sup> July and 3<sup>rd</sup> October, 2008**

**SMITH, J.A.:**

On 3<sup>rd</sup> March 2006, Wayne Ricketts , the applicant was convicted in the Home Circuit Court of the murder of Anthony Daley, alias "Creature". He was sentenced to life imprisonment at hard labour. The learned judge, Marsh J, directed that the applicant serve at least 25 years before becoming eligible for parole. The applicant's application for leave to appeal against conviction and sentence was refused by a judge in chambers. He has renewed his application before the Court.

On 21<sup>st</sup> July, 2008, we heard submissions and on 25<sup>th</sup> July 2008 we refused the application and directed that sentence should commence as of 3<sup>rd</sup> July 2006. We then promised to put our reasons for so doing in writing. This we now do.

The main witness for the prosecution was Detective Corporal Winston Melhado who was at the time of the murder attached to the Olympic Gardens Police Station in St. Andrew. He testified that on the 23<sup>rd</sup> of December, 2000 at about 7:00 p.m. he was on special duty at the intersection of Olympic Way and Bay Farm Road. While standing near the intersection he saw a green Camry motor car coming from the Waltham Park Road direction. The car drove up and parked on Bay Farm Road, across the road from where he was standing. The licence number of this car was 7738BK. Detective Melhado saw a man alight from the car through the right front door. The man looked in his direction. Detective Melhado recognized him as Marvin Jackson alias "Peas Head". Jackson walked to the back of the Camry motor car; he then returned to the door from which he had alighted; he stooped and seemingly looked inside the car. Detective Melhado saw another man alight from the said car through the left front door. The witness described the car as having four doors. The windows of the two front doors were down. It was a right hand drive vehicle. At this stage the detective did not recognize the second man. Jackson and this man walked towards the entrance to the Olympic Court Housing Scheme which was not far from the intersection. The entrance was on the same side of the road about 30 feet from where the Camry motor car was parked.

A group of persons were standing at this entrance to the Housing Scheme. According to Detective Melhado both men went to the entrance and looked inside the compound. Then they turned around, went to the middle of Bay Farm Road and began to walk in the direction of the detective. As they walked towards him, Detective Melhado looked at the other man and recognized him. He was Wayne Ricketts, the applicant, also known as "Glamour Wayne" of an Oakland Crescent address. As they approached the intersection a motor car passed them going in the opposite direction. Detective Melhado saw them go towards the parked Camry motor car. Jackson entered the car through the right front door and sat at the driver's seat while the applicant entered through the left front door and sat at the front passenger seat.

The car moved off very slowly then it made a U-turn in the middle of the intersection and continued to drive very slowly in the direction of Waltham Park Road. As the car passed by where he was standing, Detective Melhado observed that the front windows were fully wound down. Just as the Camry car reached in front of a bar known as "Massive Cozy Corner" which was on the same side of the road as he was, Detective Melhado saw Courtney Daley, the deceased, come out of the bar and walk towards the Camry. As the deceased reached the left front of the Camry a hand emerged from its left window and at that point in time Detective Melhado heard several gunshot explosions. The

Detective took evasive action by crouching at the side of a car which was nearby. The Camry car sped away along Bay Farm Road in the direction of Waltham Park Road. The deceased ran some distance and fell. He was mortally wounded. Detective Melhado said that he saw blood oozing from a wound to the deceased's chest.

Other police personnel arrived on the scene in a jeep. The deceased was placed in the jeep and taken to the hospital. Subsequently, Detective Melhado went to Oakland Crescent in search of the applicant and Jackson. He did not see any of them or the Camry motor car. He knew the applicant for about five (5) years before the incident. He used to see him once or twice per month on the Waltham Park Road and in the Oakland Crescent area. He had spoken to him on several occasions. On the night of the murder he first recognized the applicant when the applicant was about 50 feet away walking towards him. The applicant, he said, came within a distance of nine (9) feet of him before the applicant re-entered the Camry. He saw the applicant's face for thirty (30) seconds. He testified that the area was well lit by street lights and lights from nearby buildings. He gave a full description of the lights in the area generally and particularly where he saw and recognized the applicant. It cannot be said that the lighting conditions were not adequate.

In cross-examination he admitted that although in his written statement he gave a description of the clothes that Jackson was wearing, he did not give a description of the applicant's clothes. Detective Melhado denied the suggestion that he was mistaken in respect of his identification of the applicant. He said that he knew that the applicant was a bus conductor but that the applicant gave up that occupation about two (2) years before the incident.

Detective Sgt. David Campbell testified that in December, 2000 he was stationed at the Olympic Gardens Police. On December 23, 2000 at about 7:25 p.m. in response to a report he went to the intersection of Olympic Way and Bay Farm Road. There he saw the deceased lying face down in a pool of blood. He was placed in a police vehicle and rushed to the Kingston Public Hospital. There, he was pronounced dead. The body of the deceased was taken to Madden's Funeral Home.

On the 4<sup>th</sup> January, 2001, Sgt. Campbell went to Spanish Town morgue where the postmortem examination of the body was done by Dr Sessaiah. He saw and heard Miss Ionie Barnaby and Mr. Sylvester Daley identify the body as that of their son Anthony Daley.

Dr. Ere Sessaiah's evidence was as follows. He is a registered medical practitioner and a consultant forensic pathologist. On January 4, 2001, he conducted a post mortem examination of the body of the deceased at the Spanish Town morgue. He observed an entrance

gunshot wound on the left side of the chest 54 cm below the top of the head and 12 cm from the midline without any gunpowder markings. The bullet travelled through the underlying tissues, entered the thoracic cavity and exited at the right side of the chest, 48 cm, below the top of the head and 7cm from the midline. The absence of gunpowder markings indicated that the muzzle of the gun was at a distance of 12 feet or more from the victim. In his opinion the cause of death was the gunshot wound to the chest.

Detective Inspector O'Connor of the Olympic Gardens Police Station was the investigating officer. On Saturday, December 23, 2000, he went to the scene of crime. There he saw Anthony Daley alias "Creature" whom he knew before lying on the ground. He was bleeding from gunshot wound to the chest.

On his instructions the deceased was taken to the Kingston Public Hospital (KPH). He searched the area and found one 9mm spent shell on Bay Farm Road in the vicinity of the Cozy Corner Bar – about 35-40 yards from the spot where the deceased lay. He received a report from Detective Melhado and subsequently obtained warrants for the arrest of the applicant and Marvin Jackson. On June 13, 2002, he saw and arrested the applicant at the KPH Casualty Department. He read the warrant to the applicant and cautioned him. The applicant said "Mi nuh know bout no murder, Mr. O'Conner, mi nuh kill nobody".

### **The Defence**

The applicant made an unsworn statement. He denied any involvement in the crime. He worked as a conductor on Mr. Kenroy Brown's bus. On the day in question he started to work at 5:00 a.m. and apart from breakfast and lunch breaks at 10:00 a.m. and 3:00 p.m. respectively, he worked "straight up till about 12:00 to 1:00 o'clock in the night". He concluded: "I am sure I am very innocent".

### **Grounds of Appeal**

Mr. Manning sought and obtained permission to argue the following supplementary grounds.

1. The applicant did not receive a fair trial:
  - (a) the learned trial judge misdirected the jury in law on the question of alibi.
  - (b) He further misdirected the jury in law on the question of the 9mm spent shell.
2. The learned trial judge should not have left the case for the consideration of the jury as there was no or no reliable evidence linking the applicant to the offence.
3. Further or in the alternative the learned trial judge failed to give adequate directions on inferences and circumstantial evidence.

### **The Misdirection Complaint**

From the discussion between the bench and counsel for the applicant we conclude that counsel's complaint is really that the learned judge failed to direct the jury that if they rejected the applicant's alibi such rejection would not necessarily support the identification evidence of Detective Melhado. The learned judge after faithfully reminding the jury of the applicant's unsworn statement said:

"So Mr. Foreman and your members, what in fact, Mr. Ricketts is saying, is that, it wasn't me, I know nothing about it, and I was not there. Now, that is what is called in law an alibi. I told you earlier on, Mr. Ricketts has no duty to prove anything, so you cannot hold against him the fact that he never called Mr. Brown and never called anybody to say that he was on the bus, because he has no such obligation.

If you believe him from what he has said, then you have an obligation to find him not guilty, because it would mean that he was not the person because he was not there. Even if you don't believe him, if you don't, that he is telling you a lie you cannot convict him on that, you are going to have to look at the Crown's case to see if the Crown has satisfied you beyond a reasonable doubt, that is, until you are sure that it was the accused man whose hand was put out of the window who shot and killed the deceased man... because as I told you before and will tell again, there is no duty placed on him to prove anything."

We are clearly of the view that the above directions were abundantly fair, accurate and adequate in the circumstances of the case. There is no general rule that a jury must be directed that if they rejected an alibi



defence that such rejection would not necessarily support the evidence of visual identification – see **R v Penman** 82 Cr App. R. 44 which was followed in **R v Anderson** (1991) Crim. L.R. 361. The **Turnbull** guidelines indicate that care should be taken by the judge when directing the jury about the support for an identification which might be derived from the fact that they have rejected an alibi. However, where the collapse of an alibi forms no part of the Crown's case or there is no risk that the jury may regard the collapsed alibi as confirming a disputed identification it is not necessary for the judge to give a warning about a false alibi.

This Court in **Oniel Roberts** and **Christopher Wiltshire v R** SCCA 37 & 38/2000 delivered 15<sup>th</sup> November, 2001, clearly expressed the view that there is no rule that such a warning must be given in all cases where the defence of alibi is raised.

As regards the spent shell counsel for the applicant was unable to identify any misdirection by the learned judge. In reference to this aspect of the evidence the learned judge in his direction to the jury said:

"The evidence was that it was found in the vicinity of Massive Cozy corner Bar and there is no connection from the evidence in this case, that this 9mm spent shell related to the incident that we are dealing with. So I am going to ask you not to speculate and to remove that from your contemplation."

We think that the above direction is unexceptionable. This ground fails.

**The Complaint of Insufficient Evidence**

The burden of counsel's submission is that there was no evidence which linked the outstretched hand to the shooting of the deceased and no evidence that the hand was that of the applicant. Counsel for the Crown conceded that there was no direct evidence, linking the outstretched hand to the shooting and to the applicant but submitted that if the identification of the applicant by Detective Melhado is correct then the inescapable inference is that it was the applicant who shot the deceased. Thus, in the first place, of critical importance is the issue of identification. Detective Melhado testified that he knew the applicant for about 5 years before the incident and had spoken to him on several occasions. He saw his face for about 30 seconds as the applicant walked towards him. He said the area was well lit – there were utility poles with street lights in the area, there were five fluorescent bulbs on a building in front of him and two on a building immediately behind him; the applicant came within 50 feet of the fluorescent lights and within a distance of 9 feet from where he was standing. In our view the quality of the identification evidence could be reasonably described as good. We must add that the learned judge was careful in warning the jury of the special need for caution before convicting the applicant in reliance on

the evidence of identification. Indeed, no complaint is made of the learned judge's direction to the jury in this regard.

The second issue is whether or not there was sufficient evidence to link the applicant with the shooting.

Mr. Manning argued that the evidence adduced by the Crown only established that a hand was seen and explosions were heard. He emphasized that there was no evidence that a gun was seen in the hand and no 'flash' was seen coming from the hand. The prosecution, he argued, had failed to link the shooting with the hand that was stretched through the window. Further, he said, the prosecution had failed to link the hand with the applicant.

The Crown relied on circumstantial evidence or rather inferences. The Crown contends that the inescapable inference from the evidence of Detective Melhado is that it was the applicant who shot the deceased. The facts on which the Crown relies are:

- (i) The applicant sat in the left front seat of the car.
- (ii) The window on that side of the car was down.
- (iii) The deceased was seen walking on the road on the left side of the car.
- (iv) As the deceased reached the left front side of the car a hand was stretched through the left window.
- (v) Gun shots were heard.

(vi) The deceased ran and fell bleeding from gun shot wounds.

If the jury were sure about those facts then it was open to them to draw the following inferences:

- (i) That it was the applicant who stretched his hand through the window.
- (ii) That the applicant had a gun in his hand.
- (iii) That the applicant fired the gun and shot the deceased.

We are satisfied that there was sufficient evidence on which a jury properly directed could reasonably convict. It remains for us to consider whether or not the learned judge adequately and accurately directed the jury in relation to circumstantial evidence or inferences.

### **The Complaint of Inadequate Directions on Circumstantial Evidence**

The complaint is that the judge failed to direct or to adequately direct the jury on circumstantial evidence. Counsel for the applicant contends that the learned judge did not assist the jury in understanding the role of inferences where the evidence was circumstantial. It is counsel's contention that it was incumbent on the trial judge to point out to the jury the various circumstances of this case on which the Crown relied for the necessary inferences.

We understand counsel for the applicant to be saying that the learned judge had a duty to assist the jury with a critical analysis of the evidence and to make them understand that they must not convict on

circumstantial evidence unless they are satisfied that the facts proved are consistent with the guilt of the accused and exclude every reasonable explanation other than guilt.

We do not share counsel's view that the directions of the learned judge were inadequate and unsatisfactory. In his direction to the jury the learned judge said (p113):

"Now Mr. Foreman and your members, it is not in every case that there can be a witness who would come to say I saw this happen and therefore you are allowed to draw what are called inferences and simply put, Mr. Foreman and your members, inferences are common sense conclusions which you arrive at based on aspects of the evidence that you have agreed, that you have found proven".

From the above passage the jury would have understood that in the absence of direct evidence they could nevertheless arrive at a reasonable conclusion based on inferences drawn from proven facts. Earlier in his directions the learned judge addressed the burden and standard of proof (p109):

"Now when Mr. Ricketts pleaded not guilty to this indictment, it became the obligation of the prosecution to satisfy you by the evidence it produces, of the guilt of this accused man beyond a reasonable doubt. That is, to make you sure that what is alleged against him is true".

Nearing the end of this summing-up the learned judge revisited the standard and burden of proof (p147):

"Even if you do not believe him... you cannot convict him on that, you are going to have to look at the Crown's case to see if the Crown has satisfied you beyond a reasonable doubt, that is, until you are sure that it was the accused man whose hand was put out of the window, who shot and killed the deceased man..."

The learned judge made it abundantly clear to the jury that they must not convict unless they were satisfied beyond reasonable doubt of the guilt of the applicant.

The learned judge in his summation reviewed the evidence of Detective Melhado in detail. He then identified the issue for the jury (p136):

"The real issue in this case... is whether or not the accused was properly identified as the man who was on the scene that night and who the prosecution is asking you to say owns the hand that pushed through the left side of the car so remember that."

The jury's mind was directed to the inferences which the Crown was asking them to draw from the evidence.

In **McGrevy v. Director of Public Prosecutions** (1973) All ER 503, the House of Lords held that:

"In a criminal trial it is the duty of the judge to make it clear to the jury in terms which are adequate to cover the particular features of the case that they must not convict unless they are satisfied beyond reasonable doubt of the guilt of the accused. There is no rule that, where the prosecution case is based on circumstantial

evidence, the judge must, as a matter of law, give a further direction that they must not convict unless they are satisfied that the facts proved are not only consistent with guilt of the accused, but also such as to be inconsistent with any other reasonable conclusion".

The House was also of the view that (p 507 f):

"The particular form and style of a summing-up, provided it contains what must on any view be certain essential elements, must depend not only on the particular features of a particular case, but also on the view formed by a judge as to the form and style that will be fair and reasonable and helpful. The solemn function of those concerned in a criminal trial is to clear the innocent and to convict the guilty.

... It is not to be assumed that members of a jury will abandon their reasoning powers and, having decided that they accept as true some particular piece of evidence, will not proceed further to consider whether the effect of that piece of evidence is to point to guilt or is neutral or is to point to innocence. Nor is it to be assumed that in the process of weighing up a great many separate pieces of evidence they will forget the fundamental direction, if carefully given to them that they must not convict unless they are satisfied that guilt has been proved and has been proved beyond all reasonable doubt".

At (p 510 (h)) their Lordships said:

"It requires no more than ordinary common sense for a jury to understand that if one suggested inference from an accepted piece of evidence leads to a conclusion of guilt and another suggested inference to a conclusion of innocence, a jury could not on that piece of evidence alone be satisfied of the guilt beyond all reasonable doubt unless they wholly rejected and excluded the latter suggestion. Furthermore

a jury can fully understand that if the facts which they accept are consistent with guilt but also consist with innocence they could not say that they were satisfied of guilt beyond all reasonable doubt. Equally a jury can fully understand that if a fact which they accept is inconsistent with guilt or may be so they could not say that they were satisfied of guilt beyond all reasonable doubt".

The learned judge in the instant case adequately directed the jury on the burden and standard of proof; he fairly and accurately reminded them of the evidence on which the Crown relied; he correctly directed them on the ingredients of the offence charged; he told them that they were entitled to draw reasonable inferences from proven facts; he correctly directed them as to how they should approach the unsworn statement of the applicant.

The jury were made clearly to understand that they could not convict unless they were sure that the outstretched hand was that of the applicant and that the applicant had a gun in his hand and that the applicant fired the gun and shot deceased. It must not be assumed that in weighing up the separate pieces of evidence the jury would forget the fundamental direction that they must not convict unless they were satisfied that guilt has been proved beyond reasonable doubt. We are of the view that in the circumstances of this case the judge's summing up was fair, reasonable and helpful.



It was for the above reasons that we dismissed the application for leave as stated at the outset.