JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 126/2005

BEFORE: THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A

SAMUEL ROBIE

V.

REGINA

Leroy Equiano, for the Applicant.

Chester Crooks and Miss Sanchia Burrell, for the Crown.

March 20 and 21, 2007

Oral Judgment

COOKE, J.A.

1. This is an application by Samuel Robie, for leave to appeal, he having been convicted in the Home Circuit Court on the 2nd July 2005 for murder. The Court will deal with the factual bases shortly.

2. At about 7:00 pm on the 24th February 2003 the deceased Roy Bailey, also known as Delroy Bailey, was sitting on a bench at the corner of Balcombe Drive and Unity Lane. Apparently, this was a meeting place for persons who live

in that community. The sole witness for the prosecution, Mr. Anthony Simms, gave evidence that, the applicant and another rode up on a bicycle. The applicant was armed with a meat chopper and the other with a stabbing weapon. They attacked the deceased while he was sitting. The deceased got up, ran around some drums and tried to seek refuge in a yard nearby, which gate was kicked off by his assailants and the attack continued. He received some nine injuries and succumbed to those injuries.

3. The evidence of Mr. Simms is that after the attack had ceased, in a stutter, the accused (the applicant) said words to the effect "a long time dah bwoy yah fi dead, a him kill mi bredda." At this stage it is to be noted that the applicant suffers from stuttering. The identifying witness knew the applicant for some 30 years, from the community and he was in the habit of seeing the applicant very, very regularly.

4. There has been no challenge to the quality of the identification evidence. The lighting was adequate and the learned trial judge gave adequate directions in respect of the time and the opportunity for the recognition. The defence was one of alibi, in that the applicant, who is a tiler, had gone to Ocho Rios for a job and he had left at the beginning of January and had not returned home until the end of February, at which time he had a job. So he could not have been the person because at that time he was in Ocho Rios.

5. The applicant gave sworn evidence. Although he lived in that area for all his life, it seems, he was quite unfamiliar with this meeting place at the corner of Balcombe Drive and Unity Lane. Perhaps a little surprising, it was six months after he returned from Ocho Rios, that he heard about the death of the deceased.

6. So, on the one hand, there is the identification evidence led by the Crown through the lips of Mr. Simms, and on the other the defence is one of alibi. At the conclusion of the hearing, the jury found the applicant guilty of murder and he was sentenced to 15 years imprisonment at hard labour. The Court says immediately at this stage that this was an improper sentence and at the conclusion of this judgment or just before the conclusion, the Court will announce what should have been the proper sentence.

7. Three grounds of appeal were filed. The first was that:

> "The Applicant was denied a fair trial because his defence counsel was not allowed to question the main witness Anthony Simms on aspects of his past that would be relevant to the witness' character and the trial."

In the assessment of the evidence of the witness, creditworthiness would have been a very important factor. This was a case in which the central issue for the determination of the jury was the correctness of the evidence as to the culpability of the applicant in the murder of the deceased.

8. The quality of the evidence of identification has not been challenged by the applicant, nor have the directions of the learned trial judge as to the correct approach regarding the assessment of that evidence. Ground 1 does not seek to challenge the credibility of the witness by way of analysis of his evidence to demonstrate by the dissection of that evidence, that his want of credibility has been exposed. Instead it was sought to discredit the witness by suggesting to him that he was a professional witness.

9. The court now adverts to pages 125 and 126 of the transcript, and not without significance is the way in which Mr. Mitchell, who was counsel for the defendant at the trial, introduced his thrust. I quote:

> "M' lady, we have credible information that, in fact, this witness on numerous occasions in the year about, 1993, on instructionings [sic] gave evidence as a Crown witness in a a [sic] murder case, a murder case involving the use of a firearm. They were two young men. I do not have their full names, but one name is 'Bogle' and the other is 'Dean' and having given statement (sic) to the incident, he later retracted that evidence and the men were thereby discharged off [sic] the gun charges."

Quite properly, the judge regarded what was being put forward as sketchy. This is after the witness had said that he had never, ever, given any evidence for the Crown. Mr. Mitchell put it to the witness that sometime in 1993 he had been a Crown witness.

10. The first observation which is to be made is this, that here counsel is suggesting or putting forward that this Crown witness, at an unspecified date in the year 1993, in an unspecified court house and in an unspecified trial, is supposed to have retracted his evidence. Perhaps to use the word sketchy in these circumstances is euphemistic. Counsel did not put forward with any precision, what it was that he wanted to challenge the witness on. In this Court, we asked Mr. Equiano to put forward for us the material which the applicant is saying was material relevant to the question of the witness's credibility. That has not been forthcoming and, therefore, this Court has been provided with no basis for this complaint. Perhaps it may well have been nothing more than a fishing expedition. Accordingly, there is no merit in this ground. However, before we leave this ground, counsel cited the case of **Chandu Nagrecha** [1997] 2 Cr. App. R. 401 which is of no assistance to the applicant. That case is peculiar to the particular facts of those circumstances, in that it would be probative and an issue in that case as to whether the complainant had previously been in the habit of making these false accusations of rape against other persons. Those circumstances are different from what obtains in this case.

11. The court will now move on to ground 2. This is:

> "The Learned Trial Judge's summation though extensive, was biased in favour of the prosecution's case."

The court will not tarry in respect of this ground. Two passages were brought to our attention, and clearly this ground of appeal is without merit. As we indicated

to counsel in exchanges between the bench and the bar, for the most part, all the judge was doing was rehearsing the evidence which had been given in the court. The applicant seems to have put much faith in the witness' inability to speak with precision as to timing. But as for that, what the learned trial judge did was to invite the jury to look at the sequence of events that was taking place, and to determine from their understanding of the sequence of events, whether or not the identifying witness would have had adequate time to properly identify the applicant whom he had known very, very well for some 30 years. Of course, the applicant in his evidence did not deny that he was well known to the identifying witness.

12. The final ground of appeal, ground 3, is that:

> "The Applicant did not receive a fair trial as his defence counsel failed to present to the jury evidence of the applicant's good character."

Reliance was placed on **Kizza Sealey and Marvin Headley v. The State** Privy Council Appeal No. 98 of 2001 delivered on 14th October 2002. That case bears some superficial resemblance to this case, in that, there was one eye witness and the defence in that case was alibi and identification was a central issue. It was held by a majority, that in the circumstances of the **Sealey** case, the failure of the defence counsel to raise the issue of good character resulted in the appellant being deprived of good character direction - see **R v Vye** [1993] 1 W.L.R. 471. In **Sealey and Headley** at paragraph 35 this is what was said:

> "...Whilst recognising that there may be some cases in which the omission of a good character direction does not render a conviction unsafe, their Lordships take account of the observation of Kennedy L.J. in ***Fulcher***, at page 260, that:
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> > "a proper direction as to character has some value, and therefore is capable of having some effect in every case in which it is appropriate for such a direction to be given".
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> and of the observation of Henry LJ in ***Kamar*** The Times, 14 May 1999 that a good character direction:
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> > "was a protection necessary to preserve the fairness of this trial. In our judgment it was imperative that such a direction was given to the jury. It would not be right to conclude that that direction could have no effect in this case."

Then at paragraph 36 the advice continued:

> "In the circumstances of this case the question for the Board is whether the jury (which considered its verdict for about two hours) would inevitably have convicted if a good character direction had been given. Whilst it appears probable that the jury would have convicted, their Lordships are unable to conclude that the jury would inevitably have convicted."

13. Well, the court is grateful to Mr. Equiano for his diligence and no little enthusiasm in respect of bringing this authority to our attention. In due course, as is the virtue of the common law, this requirement of counsel to produce or put in character evidence will be the subject of refinement. As far as this Court is aware, this is the first time this issue is being taken into this Court. However,

despite this learning, we have no difficulty in coming to the conclusion using the very criteria set out in paragraph 36, that even if there had been a good character direction, the jury would have inevitably convicted him.

14. We say this because of the overwhelming strength of the case put forward by the prosecution. We say this because the credibility of the identifying witness has not been tarnished to any degree or at all. We say this because of the length of time in which the witness knew the accused and because there can be no challenge to the lighting. Also, the medical evidence is in harmony with the sequence of events as related by the identifying witness. We have no doubt that the verdict would have been inevitable. We note that in paragraph 30 of **Sealey** (supra) their Lordships' Board said that the fault of counsel in depriving an accused of a good character direction could only afford a successful appeal in "exceptional cases".

15. It should be noted that in the **Sealey** case (supra) the then accused Sealey had specifically given his counsel instructions as to his good character. In this case the applicant had not so done. Mr. Cecil Mitchell who represented the applicant at his trial stated as follows in part of his affidavit:

> "1. That I am an Attorney-at-Law with office at 44, Montgomery Avenue, Kingston 10, in the Parish of St. Andrew.
>
> 2. I represented Mr. Samuel Robie in a case of murder in the Home Circuit Court, between the 27th day of June and the 2nd day of July, 2005.

> The trial Judge was Her Honour Mrs. Norma McIntosh.
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> 3. At the trial I took the decision not to introduce character evidence but to reserve such evidence as part and parcel of the mitigation in the event the accused was found guilty.
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> 4. I was aware of the accused's good character before and during the trial but in my judgment and based on the evidence that was adduced I did not think it would have been necessary."

16. Accordingly, this ground of appeal fails. It follows that the application for leave to appeal is dismissed. However, we will render our correction to the sentence imposed by the learned trial judge which, we may say, was merciful. The sentence will now read: imprisonment for life, with the stipulation that the applicant is not eligible for parole until the passage of 15 years, which will commence on the 22nd October, 2005.