

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 90 & 94/ 2007

BEFORE: THE HON. MR JUSTICE HARRISON, JA
THE HON. MISS JUSTICE PHILLIPS, JA
THE HON. MR JUSTICE BROOKS, JA (Ag)

OMAR STEWART & ANDRE ENNIS v R

Mr Delano Harrison, QC for applicant Ennis

Mr Ravil Golding for applicant Stewart

Miss Paula Llewellyn, QC, Director of Public Prosecutions for the Crown

8 and 10 June 2010

ORAL JUDGMENT

HARRISON JA

[1] Both applicants were tried and convicted before Beswick J and a jury in the Home Circuit Court for the offence of murder. On 15 June 2007 each was sentenced to life imprisonment with a stipulation that he would not become eligible for parole until a period of 20 years was served. The single judge who dealt with the matter refused them leave to appeal so they have now renewed their respective applications to the court.

The Prosecution's Case

[2] Jason O'Connor was the only eyewitness to this murder. He said that on 27 July 2005, at about six o'clock in the evening, he was on Westmore Drive in Spanish Town walking along with Andre Baker and three girls.

[3] He and Andre were walking side by side when he heard a voice say, "A so unno du it". He recognized the voice as 'Tauffus', who is the applicant Ennis. He looked around, and saw 'Chineman' (the applicant Stewart) and 'Tauffus'. They alighted from their bicycles which they dropped on the roadway. Mr O'Connor said that after Ennis spoke, each one took a gun out of his pants waist and "Chineman buss" a shot in Andre Baker's head whilst he, O'Connor, was standing beside Andre Baker. O'Connor then ran off into a yard and as he ran, he saw when Andre fell to the ground in the yard. He ran past him and Ennis chased him. O'Connor said he jumped a gully and Ennis also jumped the gully. He said that whilst Ennis was chasing him, Ennis 'buss' a shot after him but he was not harmed. He continued running to where he lived, and Ennis by this time had stopped chasing him. He made a report of what had happened to Andre Baker's mother and a friend and he and his friend ran back to where Andre had been shot. When he looked at Andre, who was still lying on the ground, he saw that he was bleeding from a wound to the back of his head. Andre Baker was taken to the hospital and O'Connor subsequently made a report to the police.

[4] O'Connor was the subject of a lengthy cross-examination at trial. It was suggested to him by counsel for the applicant Stewart that he had made up a story about seeing Stewart at the scene at the time of the shooting. However, he responded, "Him de deh, man". Counsel for the applicant Ennis suggested to O'Connor that at no time did he see 'Tauffus' with a gun but he responded, "Mi naw tell nuh lie".

[5] Dr Prasad, a consultant in forensic pathology, had performed the post-mortem examination on the body of Andre Baker. The body was identified by Kenneth Baker. He observed that there was a gunshot wound to the upper occipital region of the head (back of the head). No gunshot powder was found on the body of the deceased. In his opinion, the shot was fired at a distance greater than two feet from the deceased. Death, he said, was due to the gunshot injury and could have occurred instantaneously or within two minutes of its infliction.

[6] Constable Claudia Miller Hunter who is attached to the Scene of Crime Division of the Constabulary Force gave evidence that on 27 July 2005, she went to Spanish Town CIB sometime during the night and had done swabbing on the applicant Stewart's ("Chineman") hands. He had consented to have the hands swabbed. She described the swabbing process and testified that the swabs were placed in plastic bags and thereafter sealed in a brown envelope in the presence of Stewart. He had affixed his signature to the back of the envelope.

This sealed envelope was placed in her desk drawer which she locked by using a key. On 2 August 2005, the sealed envelope was taken to the Government Forensic Laboratory where it was handed over to the Government Analyst. She said when she took it to the analyst, it was in the same condition as when it was locked away. She had received a receipt from the analyst and it was handed over by her to Detective Sergeant Daniels who was the investigating officer.

[7] Marcia Dunbar, the Government Analyst, testified that she had received the swabs from Constable Miller Hunter on 3 August 2005. She said she had examined them and found gunshot residue at the intermediate level, on the palm of the left hand of the applicant Stewart. She also found that there was a trace level on the swab taken from the back of his right hand. It was her opinion that an intermediate level deposit could have arisen from the firing of a firearm by the applicant. It was also her opinion that the intermediate level deposit could have arisen from someone being in the direct path of gunshot residue at the emission of the firearm within a distance of 18 inches. According to Miss Dunbar, the trace level could have arisen from an initial deposit of either elevated or intermediate level deposits. It could also arise, she said, from someone being in the direct path of gunshot residue that is emitted from a firearm within a distance of 24 inches from that individual.

[8] Detective Sergeant Daniels, who was the investigating officer, had visited the scene of the shooting on 27 July 2005. He thereafter proceeded to Spanish

Town Hospital where he saw the body of the deceased. Witnesses were interviewed and warrants were issued for the arrest of "Tauffus" and "Chineman". Later that day the applicant Stewart was pointed out to him. He told him of the report made against him and executed the warrant. He was charged with the murder of Andre Baker. On 29 July 2005 the applicant Ennis was shown to him and he was also charged with the murder of Andre Baker. Both men denied knowledge of the murder.

[9] Lisa White was the Clerk of the Courts at Half Way Tree Court when the preliminary enquiry was held in respect of both Ennis and Stewart. She testified that Kenneth Baker, father of the deceased, had given evidence at the preliminary enquiry in the presence of both applicants and that he had testified that he had identified the body of his son to Dr Prasad at the post-mortem examination. Kenneth Baker had died before the trial took place so his deposition was admitted into evidence. The jury was reminded how they should treat the evidence of Kenneth Baker.

The Defence

[10] The applicant Stewart made an unsworn statement from the dock. He said he was a higgler and that on 27 July 2005 he was not in the area of Westmore Garden and that he knew nothing about the murder. He said that his mother telephoned that evening; he walked down to the police station and he was held. He also told the court that he had six children at his home.

[11] The applicant Ennis also made a statement from the dock. He said that on 27 July 2005 he was at Hellshire at 6:30 p.m. and that he knew nothing of the crime.

The Issues

[12] It is our view that there were two major issues for determination in the trial. They were:

1. Joint enterprise
2. Visual identification

[13] The learned judge had given directions on joint enterprise and had explained to the jury the nature of the common design or joint enterprise and the role that each applicant had played in this venture.

[14] On the issue of visual identification the learned judge had given directions on how the jury should exercise caution when it comes to placing reliance on such evidence.

[15] In our view, the evidence showed that both applicants were well known to the witness O'Connor. In relation to the applicant Ennis, the witness testified that he had known him for about three years before the date of the incident. He knew him from they attended Crescent All-Age School. They used to "talk good" and he (the witness) would visit where he lived at least twice per week.

They would cook and eat together and he knew members of his family. In addition to recognizing Ennis by sight he had also recognized him by voice.

[16] Now, in relation to the applicant Stewart, Mr O'Connor testified that he had known him for a long time, from he was a baby. He had known where he lived and they had spoken to one another over a period of time. As a matter of fact, he did testify that they were friends and that he would see him at least three times per week.

[17] In directing the jury on this issue of identification the learned judge did remind them that there was really no challenge with respect to O'Connor's evidence but was careful to warn the jury that even in circumstances where someone recognizes another, they had to be careful because mistakes are still likely to be made.

[18] The learned judge had also assisted the jury in relation to the circumstances under which O'Connor had recognized these two applicants. She reminded the jury about the lighting condition at the material time, that the evidence revealed that there was nothing covering the applicants' faces and that the witness O'Connor had an un-obstructed view of both applicants.

[19] Mr Delano Harrison QC, for the applicant Ennis, agreed that the learned trial judge's directions on visual identification were impeccable. Initially, he had a slight concern with an aspect of the directions on joint enterprise but after

having dialogue with the court, he eventually agreed that the learned trial judge's directions on this issue could not really be faulted. He was quite candid with the court and told us that he was not in a position to formulate any grounds of appeal challenging the conviction.

[20] Mr Golding, for the applicant Stewart, was likewise candid and informed the court that he could find no useful ground of appeal to advance on his behalf.

[21] Miss Paula Llewellyn QC, Director of Public Prosecutions, also informed the court that it was her view that the learned judge had given impeccable directions to the jury. She also could not urge anything useful on behalf of the applicants.

[22] We are in agreement with the views expressed by both counsel for the applicants and the learned Director of Public Prosecutions. We firmly believe that the learned judge had dealt with the issues and the evidence in general quite meticulously. Her directions to the jury were quite lucid and her analysis of the evidence was of an exceptionally high quality.

[23] We are of the view that there was opportunity for the recognition of these two applicants by Mr O'Connor. The evidence pointed quite clearly to a joint enterprise. Based on the evidence presented, it is clear that each applicant

played different roles but the evidence clearly revealed that they shared a common intention to commit the offence of murder.

[24] In the circumstances, the applications seeking leave to appeal are refused. The sentences shall commence as of 15 August 2007.

