SAINT KITTS AND NEVIS

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.1 OF 2005

BETWEEN:

JAVA LAWRENCE

Appellant

and

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Before:

The Hon. Mr. Justice Brian Alleyne, SC	Chief Justice [Ag.]
The Hon. Mr. Justice Michael Gordon, QC	Justice of Appeal
The Hon. Mr. Justice Denys Barrow, SC	Justice of Appeal

Appearances:

Dr. Henry Browne and with him Mr. Hesketh W. Benjamin
Ms. Pauline Henrickson D.P.P. and with her Ms. Simone Bullen and Mr. Reynold Benjamin

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2007: February 12;
February 26.

JUDGMENT

[1] BARROW J.A.: Notwithstanding it was a trial for murder this was a short case in which all the evidence, including evidence on a visit to the scene of the crime, was taken in 2 days. The jury returned a verdict of guilty of murder, divided 11 to 1, and the appellant was sentenced to life imprisonment.

Cricket, dance and murder

[2] During a dance at the community centre in Hickman's village, in Nevis, following a day of Sunday cricket, some time after 9:00 p.m., while the 16-year old deceased was on the dance floor, someone standing outside the building, from through the

louver window, shot the deceased just behind his left ear. Before morning a doctor pronounced the victim dead.

[3] The police received the report of the crime at 11:35 p.m. and went to the scene. By 1:30 a.m. the police were making inquiries of the appellant, at his home in Rawlins Village. The investigating officer testified the appellant told the officer that the appellant had not done the shooting and at the time when the shot was fired the appellant was behind the building smoking weed with “Blackie” and “Skinbo”.

The eyewitness

[4] Virgil Martin testified that he had earlier been dancing and at the material time he was sitting on a stone outside the building, where he had gone “to just cool “. He said he saw the appellant run outside with “a screw face’, put his hand in a little bag, go to the back of the building by an apple tree, the witness heard a “click”, the appellant came back to the building, put his hand by the louvers and the witness heard a pop which sounded like a gunshot. At this point, the witness testified, the appellant was 25 to 30 feet away. The witness said, “it had a lot of lights” so he could see everything; there was moonlight and the light from a lamppost 15 to 18 feet away. The witness said he had known the appellant for about 5 years.

[5] Another witness testified that in the dance that night, before the shooting, the appellant had pointed “gun fingers” at him. He asked the appellant “what happening” but the appellant did not answer.

Contradiction

[6] Blackie and Skinbo were called as prosecution witnesses. Neither of them supported the alleged alibi of the appellant. Skinbo said he had gone home before the shooting. Blackie testified he was outside at the time of the shooting and the

appellant was not with him. Blackie, however, also stated in cross-examination that when he heard the gunshot Virgil Martin was not outside; "I left him inside."

[7] The jury were particularly interested in this testimony, as shown by their questions to Blackie:

> "Q. At what time did you leave Virgil Martin inside?
>
> "A. I don't know the time.
>
> Q. Is the back of the building to the mountainside or the seaside?
>
> A. I believe it is the seaside, but I don't know the place.
>
> Q. Were you with the accused when the gunshot went off?
>
> A. No."

[8] On the visit to the scene of the crime, after Blackie had pointed out where he stated he had been sitting when he heard the gunshot, and had stated again that he had left Virgil Martin inside the dance when he, Blackie, went outside, the jury again questioned him:

> "Q. What time you were there sitting"?

To which he replied:

> "A. I don't know the time. I had no watch."

[9] The appellant testified on oath, and denied doing the shooting. He specifically contradicted what Virgil Martin said. He said he was inside the dance area at the time he heard the gun shot and so was Virgil Martin. He said he did not see who got shot. He also denied that he had told the investigating police officer that he had been outside smoking weed with Blackie and Skinbo. The appellant called a witness who testified he was in the company of the appellant at the time of the shooting, they were both inside the dance at that time, and the appellant was not the shooter.

Who to believe?

[10] The issue before the jury was a single one: who to believe? On the one hand, the prosecution was asking them to believe Virgil Martin when he said he was outside the dance and saw the appellant shoot the deceased. On the other hand, the defence was asking them to believe the prosecution's own witness, Blackie, that Virgil Martin was inside the dance when the shot was fired and could not have seen who did so. The defence was also asking them to believe the appellant and his witness that the appellant was inside the dance when the shot was fired. The verdict of the jury was a clear finding that they believed Virgil Martin.

Grounds of appeal

[11] None of the nine grounds of appeal originally filed was argued, and there is nothing in them that engages consideration in the absence of argument. Instead counsel for the appellant, who did not appear in the court below, obtained permission to argue three new grounds, which were argued together. The three new grounds were: 1) the judge erred in failing to withdraw the case from the jury at the close of the prosecution's case; 2) the evidence was wholly inadequate to sustain the verdict; and 3) the summing up contained grave omissions, mischaracterized the evidence and was inadequate in its directions on crucial aspects of the law.

The no-case submission that was not made

[12] The argument that the judge should have concluded, even in the absence of a submission by counsel for the defence of no case to answer, that the evidence was insufficient to make out a case for the appellant to answer and so should have stopped the case is, in my view, a non-starter. At the close of the case for the prosecution it was properly open to the jury to believe the evidence of Virgil Martin. There were no specific weaknesses in the identification evidence so there was

nothing to trigger the course that counsel advocated to this court. At the close of the prosecution's case the jury had before them a classic jury question: was Virgil Martin telling the truth or not? It would have been quite wrong for the judge to withdraw that question from the jury.

Extinguishing the light

[13] The duty that the judge bore, on the facts of this case, was to direct the jury in accordance with Turnbull[1], to consider the strengths and weaknesses of the identification evidence, according to their assessment of the criteria laid down in that case. This is exactly what she did; and she did so twice. Counsel was not able to challenge the Turnbull directions but did his next best by arguing that the judge failed to draw the jury's attention to the impact of Virgil Martin resiling, when answering questions at the scene of the crime, from his earlier testimony that there was a light on the lamppost. This was counsel's interpretation of an answer that counsel completely divorced from its context. The answer Virgil Martin gave to a question from the jury, "Was a bulb in the socket?" was "Maybe there was a bulb there, but it was not on at the time of the dance." Counsel took this to mean the witness was speaking to the light from the lamppost. He was forced to concede he had no basis for arguing the judge was wrong when his attention was drawn to the judge's direction to the jury, in recapping the evidence Martin gave at the scene, that "He confirmed to you that there was no light from in the socket inside the building at the time of the incident." Counsel was also forced to concede how extraordinary it would have been for defence counsel at the trial not to have made a mountain out of what would have been Virgil Martin's dramatic change in testimony if Martin had been speaking of the light from the lamppost.

[1] R v Turnbull 1976 Cr. App. R 132.

Complaint that the judge premised the guilt of the accused

[14] Another argument advanced by counsel for the appellant was that the judge directed the jury, in the passage dealing with intent, on the clear premise that the appellant was the person who did the shooting. This complaint focused on these words in the summing-up:

> "Intent. Before you can convict you must find that the death was caused intentionally. The Prosecution must make you feel sure that the accused had the intent to kill or an intention to cause grievous bodily harm. You then have to decide whether the accused intended to kill or to cause grievous bodily harm, that is, do some serious bodily harm. In order to reach that decision you must have regard to all the relevant circumstances including what was said and done by the accused. Before you can find that the accused had the necessary criminal intent, you must be sure that this intent is the only reasonable inference to draw from the proven facts. …"

[15] Counsel for the appellant submitted there was no issue about intent in this case and the issue was whether it was the accused that did the shooting. Counsel submitted that implicit in the direction was a statement by the judge that it was the accused that did the shooting and the jury needed only consider his intent. That submission ignored the context of the direction. What the judge did, at the beginning of this portion of her summing-up, was to tell the jury what were the elements the prosecution had to prove and the approach she would take in directing them. She stated:

> "On an indictment charging murder the Prosecution must make you feel sure of the following ingredients: The identity of the accused as the offender. The time and place of the offence as set out in the indictment. That the accused unlawfully killed. The victim Glenroy Liburd was a human creature in being. The victim Glenroy Liburd was under the Queen's peace when he was killed. The accused had the intention to kill or cause grievous bodily harm and that the victim Glenroy Liburd died of injuries within a year and a day of the infliction of them.
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> "I shall discuss the law and review the evidence which I think is important in respect of each ingredient. Remember if I have left out anything which you think is important please do not feel that you do not have to consider it. I remind you that you are the sole judges of the facts."

[16] The judge was true to her word and directed the jury on each ingredient in turn. The first ingredient on which she directed, and on which she directed at a length that was almost twice as great as her directions on the other ingredients combined, was the identity of the shooter. It was only after she had exhausted this issue that she turned to each of the other ingredients, clearly identifying each ingredient as she began her directions on it. In that context I do not see how it would have been conveyed to the jury, as counsel submitted, that the judge was implicitly saying that it was the appellant who was the shooter. There was no need for the judge, when she dealt with the other ingredients after dealing with the ingredient of the prosecution proving the identity of the appellant as the shooter, to repeat each time, the mantra 'if you conclude that it was the appellant who did the shooting then you may consider, if you so conclude, in relation to the ingredient of … ' I am satisfied that the jury would have understood this premise both from the structure of the treatment and the language the judge used. The issue in this case, to repeat, was clearly and solely whether the appellant was the shooter and I reject the notion that the jury would have thought the judge was telling them that the appellant was the shooter.

Conflict between prosecution witnesses

[17] The submission that most closely engaged the court's attention in argument was that the judge failed to direct the jury on the conflicts between the testimony of the witnesses Virgil Martin and Glenroy "Blackie" Isaacs, who were both prosecution witnesses, and how they should approach the conflict.

[18] The judge treated the conflict of testimony as a straightforward matter for the jury to resolve by deciding whom to believe. The judge specifically identified the opposing testimonies under her treatment of the ingredient whether the appellant was the offender. It is true she did not mention the fact to the jury that Blackie, who said that Virgil Martin was inside the dance (and not outside so as to have been able to see the shooter), was a prosecution witness. But, as counsel for the appellant accepted, there was no principle or rule of law that precluded the jury

from choosing to rely on one prosecution witness and not the other, where their testimonies conflicted. Perhaps it would have been favourable to the appellant had the judge highlighted that this was a conflict in the evidence for the prosecution. But the obligation of a judge in a summing up is not to be favourable to the accused or offer the view of the evidence most helpful to the accused; the obligation is to give a summing up that is fair.[2]

[19] There is nothing to support a conclusion that the judge not having emphasized that Blackie was a prosecution witness may have misled the jury or may have left them unappreciative of the conflict between witnesses. The jury were unmistakably seised of the conflict. This conflict was really the only issue in the case; it was essentially the only thing they needed to resolve; the other elements of the case were uncontroversial.

[20] Apart from the fact that the conflict between witnesses for the prosecution potentially weakened the case for the prosecution there was no other significance to the fact that it was one prosecution witness contradicting the other. The examination-in-chief shows Blackie was not brought by the prosecution to give evidence as to the whereabouts of Virgil Martin at the time of the shooting or, for that matter, as to the whereabouts of the appellant. One deduces that Blackie was brought to disprove the alibi that the investigating police officer testified the appellant gave when interviewed the night of the murder, that he was outside the dance smoking weed with Blackie at the time of the shooting. Specifically, Blackie testified that at the time the shot was heard he was outside at the back of the building with one “Ras” and no one else. That was all that was elicited by the prosecution from Blackie at the end of examination-in-chief.

[21] The prosecution was not, therefore, putting forward inconsistent versions of the shooting. The prosecution advanced only one version of the shooting. It was the, perhaps predictable, good fortune of the defence that it was able to elicit testimony

[2] McGreevy v D.P,P. (1973) 57 Cr. App. R 424 at page 430.

in cross-examination from Blackie, a friend of the accused that was capable of undermining the evidence of the prosecution's star witness. There was no significance to the conflict in the prosecution evidence beyond its potential for destroying the credibility of the eyewitness account that founded the prosecution case. By their verdict the jury indicated they did not believe Blackie.

[22] In my view none of the grounds of appeal was made out. I would dismiss the appeal.

Denys Barrow, SC
Justice of Appeal

I concur.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Michael Gordon, QC
Justice of Appeal