JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 161/2006

BEFORE: **THE HON. MR. JUSTICE PANTON, P.**
THE HON. MRS. JUSTICE HARRIS, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.

DAMINE GREEN
v
REGINA

Michael Lorne for the applicant.

Miss Paula Llewellyn, Q.C., Director of Public Prosecutions and Greg Walcolm, Assistant Crown Counsel for the Crown.

November 2 and December 11, 2009

DUKHARAN, J.A.

1. The applicant was convicted and sentenced on August 18, 2006 in the High Court Division of the Gun Court in Kingston for the offences of illegal possession of firearm, shooting with intent, and wounding with intent. He was sentenced to ten years, fifteen years, and fifteen years respectively with the sentences to run concurrently.

2. The applicant was refused leave to appeal by a single judge of this Court who was of the view that the major issue was the correctness of the identification of the

applicant which was dealt with adequately by the learned trial judge. On November 2, 2009 we heard submissions and reserved our decision which we now give with our reasons.

The Prosecution's Case

3. The following is an outline of the evidence on which the prosecution relied. Tameka McKenzie testified that on December 5, 2005 at about 9:00 p.m., she was at her gate along with her sister Maxine McKenzie at 3 Lord Elgin Street in Kingston. She was making a telephone call on her cellular phone when she heard gunshots being fired. She looked in the direction of the firing and saw the applicant behind a grill gate on the opposite side of the street at premises 4 Lord Elgin Street. He was firing at her. She recognized him as her cousin and stated that they live in the same premises. She said she felt a burning in her abdomen and realized that she was shot. She was taken to the Kingston Public Hospital where she received treatment for her injuries. She said when she was shot she was able to see the applicant for about two minutes before running off. She said the applicant put his hand over the gate and fired and that is how she was able to see him. There were two lights on the house as also a street light. He was about 10-12 feet away from her. She last saw him the day before in her yard. Maxine McKenzie also testified that she was also standing at the gate when the applicant came up to the gate at No. 4 Lord Elgin Street. She said he took a firearm from his waist, put his hands on top of the gate and fired several shots at herself and her sister who was wounded.

4. Detective Corporal Patricia Morrison testified that she received information and as a result went to the Kingston Public Hospital on the same night of the incident. She spoke with Tameka McKenzie. She observed bandages to sections of her body. She subsequently went to No. 3 Lord Elgin Street and observed premises No. 4. She was unable to locate the applicant. On March 17, 2006, the applicant was apprehended, arrested and charged. On caution, she said she could not recall if he said anything.

5. Dr. Hugh Anthony Roberts gave evidence pursuant to the Evidence Act as he was not the doctor who treated Tameka McKenzie, but a Dr. Simpson. He prepared a report based on information from a docket. There were gunshot wounds to the left back, right groin and the exterior left thigh, as well as a gunshot wound to the left epigastric region.

The Defence Case

6. The defence was one of alibi. The applicant, in giving evidence, said that on December 5, 2005 he and his cousin Roderick got into a fight. He said that Roderick drew a piece of board at him while he was cooking. He had a knife in his hand, and in defending himself he stabbed Roderick on his hand. He then left to his mother's house. His mother advised him to stay at his grandmother's house in August Town. He said at about 8:15 p.m. he was towed by his friend Ricky on a bicycle to the bus stop. He said while waiting at the bus stop Ricky got a phone call, and as a result, they both went to the Kingston Public Hospital to see his brother who was shot. He said his cousin Tameka McKenzie was also at the hospital, having been shot, but he never saw her

there. He said he heard that it was he who had shot her. He denied that he was there that night shooting at anyone. The applicant's mother, Deon McKenzie gave evidence, and said that on December 5, 2005 she came home at 6:00 p.m. and at about 6:30 p.m. the applicant came there and told her that he and Roderick had an argument. He was advised to go to his grandmother's house in August Town. She followed him towards the bus stop at about 7:00 – 7:30 p.m. when he saw a friend who agreed to give him a ride to the bus stop. She then returned to her house. About twenty minutes later she heard gun shots being fired. The brother of the applicant, Romaine Brokenridge also gave evidence. He said that at about 7:00 p.m. on the day of the incident he was at his mother's house where he ate his dinner. Shortly after, about 8:15 p.m. he saw his mother, the applicant and Ricky. The applicant and Ricky went through Race Course while his mother went home. He heard gunshots and he saw someone called Mario at the corner of Lord Elgin Street coming towards him. Mario opened fire on him and he got shot in the foot. He was taken by his mother to the hospital.

Grounds of Appeal

7. Mr. Lorne, for the applicant, sought and was granted leave to argue supplemental grounds. They are as follows:

(1) The learned trial judge showed a bias and prejudice towards the Defence, when he said at page 125 of his judgment:

> "... and in this case the accused man has raised the usual defence. He has raised an alibi."

(2) The judge erred in law when he said at page 126 of his judgment:

> "The issues of this alibi and the issues relating to identification are issues which the prosecution must prove."

(3) The learned trial judge seems to have misunderstood the evidence where he stated at page 130 of his judgment:

> "The Prosecution witnesses all indicate that a person of the accused height would have been able to look over the gate. Defence witnesses, of course, disagree, but no other witness apart from the witness this morning, the brother of the accused, speaks to the gate having had any zinc on it on the 5th of December in the year 2005.
>
> Which of course could lead one to think that the zinc has been placed there because of this case.
>
> Perhaps to prevent people from using the gate for target practice, perhaps to prevent others from seeing through the gate, perhaps for other reasons, of course.
>
> Whatever might be the reason, all the witnesses and these I include the accused and the mother of the accused, the Police Officers, the Police Officer Detective Corporal Morrison, Maxine McKenzie, Tameka McKenzie, all spoke of a grill gate through which one can see."

(4) That the learned trial judge in taking the evidence of Dr. Roberts, in the absence of Defence Counsels, (sic) Norma Linton, Q.C. and Diana Jobson, left the defence at a disadvantage, in that crucial bits (sic) of evidence as to where Tameka McKenzie received the injuries during examination in chief was not known or brought to the attention of the defence.

(5) That the learned trial judge erred when he took hearsay evidence of Dr. Hugh Anthony Roberts, who was allowed to refresh his

> memory from documents for which he was not the maker and the origin of which was not explained to the Court. Such evidence is not allowed under the Evidence Amendment Act. This evidence to a great extent prejudiced the defence in that it was not foreseeable and a real miscarriage of justice resulted.

8. Mr. Lorne submitted in grounds 4 and 5 that the defence was prejudiced, in that the medical evidence was not able to state the trajectory of the entry wounds received by Tameka McKenzie. Dr. Roberts, he argued, was allowed to refresh his memory from documents for which he was not the maker and the origin of which was not explained to the Court. He further submitted that no proper foundation was laid for the reception of the evidence of Dr. Roberts and this resulted in a miscarriage of justice.

9. In ground 3, it was submitted by counsel that there was some doubt as to whether or not the witnesses for the prosecution, that is Tameka and Maxine McKenzie, were able to identify the applicant by seeing him through the grilled gate. In cross examination, the applicant stated that the gate had tin metal on it which covers the gate. It was never suggested to the applicant that the gate did not have any metal. It was further submitted by counsel that Detective Corporal Patricia Morrison mentioned a gate made of steel. Nowhere in her evidence did she say it was a gate through which one could see.

10. In grounds 1 and 2 it was submitted by counsel that the learned trial judge showed a bias and prejudice towards the applicant when he said that; "... in this case the accused man has raised the usual defence. He has raised an alibi." This, counsel submitted, may have caused the learned trial judge not to give proper directions to

himself as to how to treat the issue of alibi. It was further submitted that when the issue of alibi is raised, the trial judge must demonstrate that he has considered the alibi and that it is the prosecution who must disprove the alibi. Counsel cited the case of **R v Finch** [1916-17] All ER 1323.

11. Learned Queen's Counsel, Miss Llewellyn for the Crown submitted in grounds 4 and 5 that although the necessary foundation was not laid, the evidence of Dr. Roberts did not cause a miscarriage of justice. The evidence of the complainant that she had been shot, and the investigating officer's evidence that she saw the complainant in bandages all over, would have been enough to support the charge of wounding with intent.

12. In ground 3, it was the submission of counsel for the Crown that there was enough evidence for the learned trial judge to have found that the complainant's view of the applicant was unobstructed. The applicant had his hands on top of the gate when he fired at the complainants.

13. As to the ground relating to the issue of alibi, counsel submitted that the learned trial judge gave due consideration on the issue and there was no miscarriage of justice.

The Issues

14. The main issues in this case were the correctness of the identification of the applicant, alibi and the credibility of the witnesses.

15. On the issue of identification, it is trite law that whenever the case for the prosecution depends wholly or substantially on the correctness of the identification of an accused which the defence alleges to be mistaken, it is the duty of a trial judge (sitting without a jury) to demonstrate an appreciation of the need for caution. See **R v Turnbull** (1977) Q. B. 224. The learned trial judge had this to say at page 126 of the transcript:

> "When it comes to identification, the Court must warn itself of the dangers inherent in accepting evidence of visual identification. The Court has to warn itself of these dangers and to implicate (sic) what the evidence of visual identification is and the Court is (sic) to look at this evidence and to see whether it raises the possibility of error ...
>
> This Court has taken note of all of the evidence as it relates to identification, the weaknesses and such trends as there might be in that area."

16. It is clear from the above, that the learned trial judge appreciated what was required of him on the issue of identification.

17. It is the evidence of both complainants that the applicant took a firearm from his waist, rested his hands on top of the gate and fired several shots. It was never suggested to the witnesses that they could not see the applicant because the gate was covered and thereby obstructed their view of the applicant. In this case, Tameka McKenzie said she was able to see the face of the applicant for about two minutes while her sister was able to see him for about three minutes. In **Jerome Tucker and Linton Thompson v Regina** SCCA Nos. 77 & 78/95, a decision of this Court delivered on

February 26, 1996, it was held that a period of eight seconds was sufficient time for observation so that an accurate identification could be later made. This was a recognition case in which the witness had known the applicant for four years. It is clear that the length of time for observation need not be as long as in a case where the assailant was unknown to the witness at the time of the offence. In the instant case this was clearly a case of recognition. The applicant is the cousin of both complainants. They used to live in the same premises as the applicant, seeing him on a daily basis for almost 18 years. The learned trial judge took all this into account including the adequacy of the lighting on the night of the incident. There is nothing to suggest that the complainants did not have an unobstructed view of the applicant. Even if one were to discount the time the complainants had while they were being fired on, we are of the view that there was sufficient time for them to have made a correct identification of the applicant.

18. In grounds 4 and 5, although there is some merit in the submissions of counsel for the applicant, we are of the view that there was no miscarriage of justice. It is quite clear that the necessary foundation ought to have been laid before receiving the medical evidence of Dr. Roberts, since he was not the doctor who examined the complainant who received gunshot injuries. However, there was the evidence of the investigating officer, Detective Corporal Morrison, who visited the complainant in hospital and saw her in bandages all over. This, in our view, would be enough to support the charge of wounding with intent based on the evidence of the complainant that she heard explosions and felt a burning sensation in her abdomen.

19. On the issue of alibi, it is the complaint of the applicant, that the learned trial judge displayed bias and prejudice against the defence when he said ..."and in this case the accused man has raised the usual defence. He has raised an alibi." It is clear that when the learned trial judge said that, all he was saying is that the applicant said he was elsewhere at the time of the shooting and the only defence was one of alibi. In our view, there is nothing to suggest that the learned trial judge was biased or prejudiced against the applicant.

20. On the issue of alibi, it is expected that a judge sitting without a jury warns himself that when an alibi is raised it is the prosecution who must prove the case against an accused person. In **Wood** (1967) 52 Cr. App R 74 Lord Parkin, C.J. at p 78 said:

> "It is said, as I understand it, in the first instance, that it is a rule of law that when alibi is raised a particular direction should be given to the jury in regard to the burden of proof, and that in every case when an alibi is raised the judge should tell the jury, quite apart from the general direction on burden and standard of proof, that is for the prosecution to negative the alibi. In the opinion of this Court, there is no such general rule. Quite clearly, if there is any danger of the jury thinking that an alibi, because it is called a defence, raises some burden on the defence to establish it, then clearly it is the duty of the judge to give a specific direction to the jury in regard to how they should approach the alibi."

21. In the instant case, the learned trial judge did warn himself that it was for the prosecution to prove the case against the applicant. This is what the learned trial judge had to say (at page 125 of the transcript):

> "Now the reason why the accused man is here being tried, is because when he was indicted and pleaded, he pleaded not guilty. It then becomes the duty of the prosecution to prove the case against the accused to the extent that the tribunal of fact can feel sure of his guilt. In this case, the accused man did give evidence and he did call witnesses. He did ... even in the evidence of all of his witnesses, he is trying to prove his innocence, notwithstanding that an accused person have (sic) no duty to prove anything at all, because it is the prosecution that brings him here and it is the prosecution that must prove his guilt beyond any reasonable doubt. The issues of the alibi and the issues relating to identification are issues which the prosecution must prove."

Continuing (at page 134 of the transcript) the learned trial judge said:

> "let me say, that having considered carefully all the evidence, this court does not accept the accused and his witnesses as witnesses of the truth except in so far as they corroborate the evidence of the prosecution."

22. It is quite clear from the above passages that the learned trial judge gave due consideration to the alibi of the applicant and the evidence of his witnesses. He did say that the applicant had nothing to prove and it was for the prosecution to prove the case against the applicant beyond reasonable doubt.

23. Accordingly, the application for leave to appeal is refused and the sentences are ordered to commence as of November 18, 2006.