JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 112,115,116,118/2004

BEFORE: THE HON. MR. JUSTICE HARRISON, P.
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MRS. JUSTICE HARRIS J.A.

R v ONEIL HALL
ONEIL BARTLEY
ORAL BROWN
KEVIN McKOY

L. Jack Hines for the applicants **Oneil Hall** and **Oneil Bartley**
G. Cruickshank and **L. Jack Hines** for the applicant **Oral Brown**
I. Wilkinson for the applicant **Kevin McKoy**
Ms. Lisa Palmer, Acting Deputy Director of Public Prosecutions and **Mrs. M. Reid Acting Crown Counsel** for the **Crown**

April 4,5, and July 28, 2006

SMITH, J.A.:

On May 26, 2004, the applicants, Oneil Hall, Oneil Bartley, Oral Brown and Kevin McKoy were convicted in the Home Circuit Court before Mrs. McCalla J (as she then was) and a jury of the murder of Claudene Anderson o/c "Chritsol". They were sentenced to imprisonment for life. The learned judge specified that they should serve 25 years before becoming eligible for parole. Their applications for leave to appeal were refused by a single judge in Chambers. They have now renewed their applications for leave before this Court.

The Prosecution's Case

The sole eyewitness, 50 year old Miss Marlene Williams, was at the time living at 59¼D Crescent Road, Kingston 13. She had been living there since she was sixteen years of age. The deceased, who was her niece, lived about four gates from her house. She knew all the applicants well. They were residents of the Crescent Road area. She knew Oneil Hall as "Gummy Bear", Oneil Bartley as "Ninja"; Oral Brown as "Pressers" and Kevin McKoy as "Fine Voice".

She knew "Gummy Bear", who used to live next door to her, for over 12 years. "Ninja" lived on Bartley Lane which is behind Crescent Lane and she knew him for over 9 years. She had an intimate relationship with "Pressers" brother and knew "Pressers" for about 10 years. She knew "Fine Voice" for about 15 years. She had a cordial relationship with all the applicants. At times she would cook for them and give them money when they were broke.

On March 16, 2002, about 9:30 p.m. Miss Williams was sitting at her gate when she saw the four applicants sitting at the "mouth" of the lane, which is in front of the deceased's home. They were about 55 feet away from her. The area where they sat was well lit – there were street lights and lights from a shop and house nearby. She saw their faces intermittently for about one half of an hour. Thereafter she went into her yard and remained there for about ten minutes before going to a shop

which was beside the deceased's house. Whilst calling the shopkeeper she heard gunshots in the direction of the deceased's home. She looked in the direction of the deceased's home and saw "Fine Voice" (the applicant McKoy) standing under a tamarind tree in the deceased's yard. A light bulb was hanging from this tree. She watched him for about three minutes. He was unarmed. She then saw him run through the gate of the deceased's yard. He was followed by "Ninja" (Bartley) and "Gummy Bear"(Hall), both had guns. "Pressers" (Brown) who was unarmed was in their train. They ran towards the lane where they were sitting earlier. As they ran from the yard towards the lane she heard the applicant Hall say "Cole Lane man kill Christine. Cole Lane man kill Christine". After the men disappeared Miss Williams went into the deceased's yard where she saw the deceased lying on the ground mortally wounded. The post-mortem examination revealed that she sustained six gunshot wounds to the head, neck and shoulder, thigh and abdomen. The cause of death was multiple gunshot wounds.

The investigating officer, Detective Corporal Errol McKenzie visited the crime scene a few hours after the incident. He was able to make an inspection of the premises aided by light from the one-room house of the deceased namely a light bulb connected to an electrical cord running from the building to a tamarind tree on the premises, as well as light from the surrounding buildings. Subsequently he obtained warrants for the

arrest of the applicants for the murder of Claudiene Anderson. Bartley was arrested on the 4th April 2002, when cautioned he denied involvement in the murder. Hall was arrested on the 5th April, when cautioned he said "a di gal Marlene a call mi name." Brown was arrested on the 4th July, 2002; and McKoy was arrested on the 5th October, 2002 after he was identified by Miss Marlene Williams on an identification parade.

The Defence

All four applicants gave unsworn statements. Hall denied being at Crescent Lane at the material time. He said he did not kill anybody and that someone told Marlene to call his name.

Bartley said that he was not at Crescent Lane on the 16th March. He did not see Marlene and did not shoot Christine.

Brown said he was 19 years old and was employed as a mechanic. On the 16th March, he returned home from work at about 5:00 p.m. He played football, watched the news on television and thereafter he went to sleep. The next morning he heard that someone was killed. He denied any involvement in the killing. He called his brother Andy Brown as a witness. Andy told the Court that he was a security officer. On the day that Christine was killed he was at home all day. At about 8:00 p.m. he and his brother, the applicant Oral Brown, and their father were watching news. His evidence is to the effect that his brother never left

home that night. Kevin McKoy said he did not see Marlene on the day in question. He was not in Christine's yard that day and he did not shoot her.

The jury retired for just over one hour and returned unanimous verdicts of guilty.

Grounds of Appeal

Oneil Hall, Oneil Bartley and Oral Brown

Mr. Hines sought and obtained permission to argue two supplemental grounds. Ground one which relates to the applicant Hall alone, reads:

> "(1) That the learned trial judge erred in that she failed to direct the jury specifically and adequately (not merely by reciting the facts) that it arose from the prosecution's case (i.e. the sole-eyewitness as to identification) that the accused Oneil Hall (alias) Gummy Bear stated as follows: -
>
> '[Cole] Lane man kill Christene, Cole Lane man kill Christine" (see page 46 lines 19 of transcript) and that by –
>
> (a) logical extension this meant that the accused did not kill Christene since he lived at Crescent Lane and not Cole Lane and this amounted to a defence.
>
> (b) this therefore necessitated a specific warning that they should consider all the evidence and if they believed he was speaking the truth then they should acquit.
>
> (c) the learned judge in [her] failure to so direct deprived the applicant of the possibility of being acquitted.'

Ground 2 which applies to Hall, Bartley and Brown reads:

> 2. "The period specified by the trial judge before the above accused become eligible for parole of 24 years was in all circumstances excessive."

The original grounds were not pursued. We should also state that at the outset Mr. Cruickshank and Mr. Hines who jointly represent the applicant Oral Brown told the Court that they could find no fault with the learned trial judge's summing-up in so far as it relates to Brown. Mr. Hines expressed a similar view in respect of the applicant Bartley. However, after counsel for the appellant McKoy had concluded his submissions, Mr. Hines persuaded the Court to permit him to argue the following as ground 3.

> "3. The learned trial judge erred in failing to direct the jury that it arose from the evidence of the sole prosecution witness as to identification that the applicant Hall had stated: Cole Lane man kill Christine... and that if they believed the statement to be true then that the deceased was killed by someone else and the cardinal requirement that the evidence should point to one direction only would be breached."

KEVIN McKOY

The following six (6) supplementary grounds were argued by Mr. Wilkinson on behalf of the applicant McKoy.

> "1. The learned trial judge erred in law in failing to direct the jury properly, or at all, in relation to the law on circumstantial evidence and how to apply this to the evidence before the jury. This omission deprived the applicant of a fair trial and resulted in a miscarriage of justice.

2. The learned trial judge failed to assist the jury adequately with the inconsistencies which arose on the evidence for the prosecution thereby depriving the applicant of a fair trial.

3. The learned trial judge erred in law in rejecting the applicant's "no case" submission.

4. The learned trial judge erred in failing to direct the jury sufficiently in relation to the issue of visual identification evidence and to highlight the weaknesses or factors affecting the quality of such evidence, thereby denying the applicant a fair trial.

5. The learned trial judge failed to direct or assist the jury adequately, or at all, regarding the evidence on which reliance was being placed to establish a conspiracy or common design among the accused to kill the deceased, whether there was any weaknesses in that evidence and, if so, how the jury was to treat such weaknesses.

6. The verdict was unreasonable having regard to the evidence."

Ground 1 (Oneil Hall)

Miss Marlene Williams, in her evidence in chief, told the court that after she heard the sound of gunshots coming from the deceased's yard she saw the applicants running through the gate. After describing what she saw her evidence continued:

"Q. Now, when the men ran from the yard, did you hear anything?

A. Yes, I [hear] Christine children crying.

Q. What about the men who ran from the yard?

A. When they ran from the yard I hear Gummy Bear (Oneil Hall) saying, 'Cole Lane man kill Christine, Cole Lane man kill Christine"

The burden of Mr. Hines' contention is that the alleged words of Hall constitute a mixed statement in that the statements were both inculpatory and exculpatory. Exculpatory, in the sense that the statement means that it was someone else who killed Christine since the appellant lived at Crescent Lane not Cole Lane and inculpatory in that it puts him on the scene and is inconsistent with his unsworn statement of alibi. This, he submitted, necessitated a specific direction to the jury that they should consider all the evidence and if they believed he was speaking the truth then they should acquit him. The learned judge's failure to give that direction, he contended, deprived the applicant Hall of the possibility of being acquitted. In support he referred to ***R v Andre Jarrett*** SCCA130/2001 delivered March 4, 2003 and ***Alexander Von Starck v the Queen*** Privy Council No. 22 of 1999.

In ***Andre Jarrett*** (supra), the charge was murder. ***Jarrett*** was alleged to have said to the police "mi never mean fi cut him". This Court held that the statement was sufficient to raise the defence of lack of intention to kill or cause grievous bodily harm. And the fact that ***Jarrett*** in an unsworn statement denied using those words and claimed that he knew nothing about the murder, did not restrict the judge's responsibility to leave the defence of "lack of intention" for the consideration of the jury. This is the upshot of their Lordships' decision in ***Alexander von Starck*** (supra) .

The statement in the ***Jarrett*** case contains an admission of fact and an "excuse" or "explanation." In that case it was the duty of the trial judge to direct the jury that the whole of the statement must be taken into consideration as evidence in deciding where the truth lay – see ***R v Sharp*** 86 Cr. App. 274 and ***R v Aziz*** [1996] 1A.C. 41.

In the instant case the words "A Cole Lane man kill Christine..." do not contain an admission – they do not incriminate the applicant Hall. For words to constitute an admission they must, we should think, be capable of at least adding some degree of weight to the prosecution's case on an issue which is relevant to guilt. Accordingly the words in question do not constitute a declaration against interest and this cannot be received as evidence of the facts therein - ***R v Pearce*** 69 Cr. App. R 365.

Indeed the prosecution did not rely on the content of the statement to advance its case against the applicant Hall. Of importance to the prosecution's case was the evidence of Miss Marlene Williams that she saw and identified the applicant as he ran from the deceased's yard with a gun in hand and that she heard him speak and recognised his voice. In dealing with this aspect of her evidence the learned judge told the jury :

> "...she said they ran from the yard then she heard the accused man referred to as Gummy Bear (Hall) [say], 'whoy, Cole Lane man dem kill Christine, Cole Lane man kill Christine,' and she

> went on to tell you that she knows his voice because its not the first she had heard him speak, he is a very loud man that speaks and make[s] loud noise, and she said that he would come to her house and wake her up for food saying 'Mama Marlene wake up, daylight' and told you that two to three times per week that would happen that when he was hungry he would come."

The above direction of the learned trial judge in this regard, is in our view, unobjectionable. We cannot accept the submissions of Mr. Hines that a special direction in the manner suggested as regards the words allegedly made to Miss Williams was required. This ground fails.

Ground 2

The complaint here is that the sentence is manifestly excessive we will return to this.

Ground 3 (Hall)

The complaint of Mr. Hines in this ground is that the learned trial judge failed to direct the jury specifically, that if they accepted the statement "Cole Lane man kill Christine" to be true then it would weaken the prosecution's case and would point to a direction other than that Hall and his co-accused killed the deceased. He contended that such a direction was necessary since the prosecution relied on circumstantial evidence. Further, he contended that even if the common design to kill the deceased was proved, the jury should be directed that if they believed the statement to be true then the common design was not

executed by the applicants, but by someone else. Additionally, if they had doubts as to whether the killing of the deceased was by someone other than the applicants, then, the common design would not have been carried out and they should acquit.

We cannot agree with counsel for the applicant Hall. As we have already said the statement which Hall is alleged to have made is purely exculpatory and thus may not be received as evidence of the truth. It is admissible only to show the attitude of the applicant Hall at the time when he made it. This ground also fails.

Kevin McKoy

Mr. Wilkinson referred to the evidence and submitted that the case for the prosecution depended to some extent on circumstantial evidence. Therefore, he argued, the learned trial judge should have directed the jury that the circumstantial evidence must not only be consistent with the applicant's guilt but must also be inconsistent with any other rational conclusion. Counsel for the applicant McKoy relied on ***R v Everton Morrison*** 30 JLR 54. In effect the criticism by counsel is that the learned judge failed to give the Hodge's direction. Where the Crown's case is made up of circumstances entirely, this requires the judge to tell the jury that before they can find the prisoner guilty they must be satisfied not only that the circumstances were consistent with his having committed the act but they must also be satisfied that the facts were

such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person. This Court in ***Loretta Brisset v R*** SCCA No. 69/2002 delivered December 20, 2004 expressed the view that it was bound by the decision of the House of Lords in ***McGreevy v the D.P.P*** [1973]1All ER 503; [1973]1WLR 276. In that case the House of Lords held that it was clear law that even when a case is based on circumstantial evidence no special direction is required. Their Lordships were clearly of the view that "the basic necessity before guilt of a criminal charge can be pronounced is that the jury are satisfied of guilt beyond all reasonable doubt."

In any event the prosecution's case was not based on circumstantial evidence alone. Although the witness Miss Marlene Williams did not actually see the shooting of the deceased she said that just after the shooting she saw the applicant McKoy who was unarmed run through the gate of the deceased's yard. He was followed by Bartley and Hall both of whom were armed with guns. Brown who was unarmed was the last one to go through the gate. Shortly thereafter Miss Williams went into the deceased's yard and saw the deceased, on the ground, bleeding. The post mortem report indicates that there were six gun shot wounds to her body and that those were the cause of death.

In our view, careful directions on visual identification and on reasonable inferences will be sufficient. We will return to the judge's

directions on visual identification. As regards the drawing of reasonable inferences from proven facts where direct evidence is not available, the learned trial judge's directions were unobjectionable. Indeed there is no complaint in this regard.

In sum the complaint that the learned judge failed to give the special direction on circumstantial evidence is without merit, firstly, because there is no such requirement and secondly, because the Crown's case was not based solely on circumstantial evidence.

Ground 2 (McKoy)

In this ground Mr. Wilkinson complained that the learned trial judge failed to "highlight the various instances of discrepancies and to assist the jury as to how to treat with them." In this regard counsel referred to several inconsistencies/discrepancies in the evidence of witness Miss Marlene Williams. Counsel concedes that the trial judge's general directions on discrepancies and inconsistencies were correct. We do not share counsel's view that the learned trial judge did not "highlight" these discrepancies and assist the jury as to how to deal with them. During the review of Miss Marlene Williams' evidence, the learned trial judge, was at pains to underscore the discrepancies to which counsel referred. The trial judge carefully went through with the jury, what she called, "the prominent features of the cross-examination of Counsel, Mr. Wilkinson." Earlier she had told the jury:

> "One of the purposes of cross-examination is to ferret out conflicts in the evidence and to provide material for the suggestion that the truth has not been spoken. But, whether there has been honest mistake or wicked invention is essentially a question for your determination, You have seen and heard the witnesses in this case and in particular the witness, Marlene Williams, and it is for you to say whether you find inconsistencies or contradictions or discrepancies, whether they are profound or inexplicable, whether they are central to the issues involved in the case and whether the reasons which have been given for these are satisfactory. In the final analysis you will have to determine... whether Marlene Williams is a credible witness on whom you can rely."

We are clearly of the view that on the whole, the learned judge's directions on discrepancies and inconsistencies are impeccable. This ground also fails.

Grounds 3 and 4

In ground 3 the complaint is that the learned judge erred in rejecting the applicant's no-case submission. Mr. Wilkinson submitted that the prosecution's evidence was manifestly weak, tenuous at best, and that this was exacerbated by the glaring absence of credibility on the part of the prosecution's chief witness, Marlene Williams. He gave as an example the fact that the witness when confronted with the contradictions was evasive. It is the contention of counsel for the applicant that the evidence of the witness was so rife with inconsistencies that no reasonable jury properly directed should convict.

It is not for this Court to decide whether or not Miss Williams should be believed. Credibility is normally a matter for the jury (see ***Brooks v DPP*** [1994] A.C. 568 at 581.) Where the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness' credibility, reliability or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which the jury could properly come to the conclusion that the defendant is guilty then a no case submission should be rejected (see ***R v Galbraith*** 73 Cr. App. R 124).

In our judgment the evidence of Marlene Williams cannot reasonably be described as "self contradictory and out of reason and all common sense." The learned judge was right, we think, in leaving her evidence to the jury for them to determine whether or not she is a witness of truth.

In ground 4 the contention is that the quality of the identification evidence was so poor and manifestly unreliable that the judge should have withdrawn it from the jury. In this regard counsel referred to the fact that (i) it was night, (ii) the witness' poor eye sight, (iii) the events occurred quickly, and (iv) the men who left the deceased premises were running and were viewed sideways.

Further, counsel complained that the learned judge, having left the case to the jury, should have dealt with the weaknesses in the

identification evidence and should have assisted the jury as to how to treat such weaknesses. We do not agree with counsel for the applicant that the quality of the identifying evidence is so poor that the case should have been withdrawn from the jury. Of course the trial judge is obliged to warn the jury of the special need for caution and to expose the weaknesses and dangers of the identification.

In this regard, Miss Palmer, Deputy Director of Public Prosecutions (Ag.) submitted that the learned trial judge adequately directed the jury on visual identification. She referred to passages in the record where the learned judge dealt with the weaknesses referred to by counsel for the applicant.

It is not disputed that the learned judge gave the jury the full **Turnbull** directions. At the end of those directions she told them:

> "(In) looking at all the circumstances, the fact that it was night, you have to consider the evidence given by the witnesses that the men were running; you have to consider the view that she had of them as they ran, and the length of time that the incident took; her opportunity to have seen and recognised these persons as persons seen running away from the scene of the crime; if you accept that she saw anything."

The learned judge then reviewed in detail the evidence of the sole eyewitness. She reminded the jury of the witness' evidence of her association with each of the applicants who resided in the same area in which she lived. She reminded them of the witness' evidence as to where

she was sitting reading a tract and where the applicants were sitting. The witness had told the court that she "could see them just like how she was looking at the prosecutor". She reminded them of the witness' description of the clothes the applicants were wearing when she saw them sitting" at the mouth of the lane in front of the deceased's yard and that when they were seen running from the yard they had on the same clothes.

The learned judge reminded the jury of the witness' evidence during cross-examination in respect of her eyesight. She told them:

> "Then you will recall counsel's cross-examination of her in respect of her eyes. She told you that her eyes were getting bad and she didn't have glasses and that she couldn't afford one, that her eyes burn her sometimes and run water. It was at this stage, you will recall, that the witness said that and counsel was suggesting to her that on that night her eyes were running water and she said the tract she was reading in answer to counsel..."

In our judgment the directions of the learned trial judge on visual identification were demonstrably copious, correct and helpful to the jury.

<u>Grounds 5 & 6 (Common Design)</u>

Mr. Wilkinson submitted that there was not sufficient evidence to prove beyond reasonable doubt that McKoy was part of a criminal enterprise. It is therefore the contention of counsel that the verdict of the jury is unreasonable having regard to the evidence. He also complained that the learned judge failed to assist the jury with the evidence on

which the prosecution sought to base the applicant McKoy's involvement in a common design.

The Crown's case against McKoy is that he was one of four men seen sitting "at the mouth of a lane" in front of the deceased's house. Later he was seen in the deceased's yard after the sound of gunshots was heard coming from that yard; he was then seen running from the yard followed by the three other men, two of whom were armed with guns. They all ran towards the lane where they were earlier seen sitting. The deceased was seen in her yard on the ground bleeding. The medical evidence showed that she died from gunshot wounds. We cannot share the view of counsel for the applicant that this evidence, if believed, is insufficient to found a verdict adverse to the applicant.

The learned trial judge in her careful directions to the jury emphasized that mere presence is not enough to prove guilt. She told them:

> "Your approach to this case should therefore be that if looking at the case of each of these accused men, you are sure that with the intention I have mentioned, each committed the offence on his own, or took some part in committing it with the others, then each would be guilty. Mere presence at the scene of the crime is not enough to prove guilt..."

The learned trial judge reminded the jury of the evidence led against each applicant and of the alibi defence of the applicants. McKoy in his unsworn statement told the court, "I did not see Christine

that night, I did not shoot Christine, I was not in Christine's yard that night, That's all". This was clearly a matter for the determination of the tribunal of fact, and it has been said over and over again that this Court must recognise the advantage which a jury has in seeing and hearing the witnesses and if the summing up was impeccable, this Court should not lightly interfere – See ***R v Cooper*** [1969]53 Cr. App. R. 82 at pp.85-86.

In our view the summing-up was impeccable; we may not interfere.

Sentence

This is another case of a person being murdered in her home by a gang of intruders. This Court must be mindful of the prevalence of offences of this nature. We are of the view that murders committed by a gang and murders which involve the invasion of the victim's home merit a substantial term of imprisonment if the death sentence is not authorised by law or appropriate.

We are clearly of the view that in the circumstances of this case the sentence of life imprisonment with the direction that the applicants serve at least 25 years before becoming eligible for parole, is not excessive or wrong in principle.

Conclusion

For the above reasons, the applications for leave are refused. The sentences are to commence as of the 24th August, 2004.