JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 81/08

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE DUKHARAN, J.A.
THE HON. MISS JUSTICE PHILLIPS, J.A.

TYRONE HUNTER
v
REGINA

Ernest Davis for the Applicant.

Mrs. Tracey-Ann Johnson, Crown Counsel for the Crown.

October 6, 16 and 30, 2009

DUKHARAN, J.A.

1. The applicant was tried and convicted in the Home Circuit Court in Kingston before a judge and jury on the 17th June, 2008 for the offence of murder. He was sentenced to imprisonment for life with a specification that he is to serve twenty-five (25) years before becoming eligible for parole.

2. The matter was first reviewed by a single judge of this Court who was of the view that the main issue was whether or not the applicant was a participant in the offence charged. It was also the view of the single judge that the trial judge's

directions were adequate, correct and fair. Leave to appeal was refused. This is a renewal of that application.

3. The applicant was charged on an indictment that on the 21st August, 2004 in the parish of St. Andrew, he murdered Sandra Brown.

4. The following is an outline of the evidence on which the prosecution relied. The main eye witness for the prosecution, Verna Plummer, said that on the 21st August, 2004 at about 5:30 a.m. she was at a dance at Myrie Road in Kingston. With her at the time were the deceased Sandra Brown, the witness' brother Aaron o/c Saul, her 'baby father' and a girl named Ann Marie. Her brother and the deceased decided to leave the dance and went outside. Shortly after she saw the applicant, whom she calls 'Grab-up' and whom she has known for over twenty (20) years, exit the dance. He was wearing a white merino and a black pants. The witness said she left the dance behind the applicant and went outside. She said it was daylight although the street lights were still on. She saw the applicant talking to her brother Saul. The deceased was in front of Saul. The applicant said to Saul "Pussy you a go dead." The applicant then pulled a gun from his waist and started firing shots. There were other persons present who were also firing shots along with the applicant. Both the deceased and Saul ran off. The witness also ran off to her parked car nearby along with her baby father. She subsequently made a report at the Hunts Bay Police Station. While giving her statement she saw the applicant being brought into the station by police officers. She immediately said "see him deh officer, a him kill mi friend". He was wearing the same

white merino and black pants. The deceased was taken to the Kingston Public Hospital Morgue.

5. Constable Mark Gordon said he received information and went to Myrie Avenue where he saw and recovered several spent shells on the ground in the area where the dance was held. He later went to the Kingston Public Hospital Morgue where he photographed the body of the deceased. He subsequently swabbed the hands of the applicant and took the swabs to the Forensic Laboratory for testing.

6. Mrs. Marcia Dunbar, a Government Analyst, gave evidence as to receiving the swabs taken from the applicant. She concluded that trace level of gunshot residue was found on the palm of both hands of the applicant. She explained that trace level could arise from (1) being in the direct path of gunshot residue as it is emitted from a fired firearm within a distance of twenty-four (24) inches, and (2) secondary transfer, which is not being in the direct path of the gunshot residue, but coming in contact with a surface on which there is a deposit of gunshot residue.

7. Dr. Kadiyala Prasad, a Forensic Pathologist, who performed the post mortem examination on the body of Sandra Brown found a single gunshot entry wound to the back. No doubt this was inflicted as she sought to flee from the barrage of shots being fired that morning. Dr. Prasad recovered the bullet which lodged in the chest cavity of the deceased and handed it over to the police. He concluded that the deceased had died from gunshot injuries.

8. Detective Sergeant Andrea Hemmings, who arrested the applicant, said when arrested and cautioned, he said "mi nuh know anything about that".

9. The applicant in an unsworn statement denied firing any gun that morning. He said he is also called 'Grab-up'. He put himself at the scene of the shooting and said, he had left the dance to go home. He said, he saw Saul who used expletives to him, and it was Saul who took a gun from his waist and started firing shots at him. In a bid to escape he ran back into the dance and hid himself in a bathroom. After the firing had ceased he came out and saw the police. He heard someone had died and was told he was wanted at the station.

10. The applicant called a witness Erica Hylton who told the Court that on the morning in question, she saw Saul firing wildly and she never saw the applicant with any gun.

11. The applicant filed several grounds of appeal. They are as follows:

Ground 1

The learned trial Judge erred in fact and in law in failing to assist the jury on how to treat the evidence of the sole eye witness Verna Plummer on the issues of inconsistencies and contradiction page 26, lines (1-11).

Ground 2

The verdict is unreasonable having regard to the evidence.

Ground 3

The learned trial Judge erred in fact and in law in not adequately dealing with the issue of identification of the applicant.

Ground 4

The learned trial Judge erred in fact and in law in not properly directing the jury on the issue of the firearm as no firearm was recovered and the description of the firearm given by the witness is inadequate.

Ground 5

The learned trial Judge erred in fact and in law in not properly assisting the jury on the evidence as it relates to the cause of death and to show that it was the applicant who caused the injuries that resulted in the death of Sandra Brown.

Ground 6

That the learned judge erred in not upholding the no case submission.

12. Mr. Davis submitted that there was no direct evidence that the applicant had shot the deceased, or was acting in concert with anyone who had done so. He further submitted that from the fact that other persons were firing shots, the deceased could have been shot and killed by someone else. Counsel cited the case of **D.P.P. v Merriman** [1972] 3 WLR 545.

13. The evidence of Verna Plummer is that when the applicant pulled the gun from his waist and started firing, there were others who were also firing. On the issue of common design this is what the learned trial judge said at page 263 et seq. of the transcript:

> "Now, Mr. Foreman and your members, the evidence that you have heard does not indicate who fired the gun, and which bullet came from which gun, that the Prosecution is saying ended the life of Sandra Brown. But, Mr. Foreman and your members, where there has been no prearranged plan, but spontaneous violence had been done by persons together, there is a common victim, and from the evidence it

> would appear that the enterprise arose on the spur of the moment, the scope of the joint enterprise may be ascertained, considering the knowledge and the actions of those participating. And in a situation as the Crown seems to be relying on, you will have to draw inferences."

In continuing he said:

> "Having the common purpose of inflicting grievous bodily harm was not something that required expressed or verbal agreement between the participants, because Mr. Foreman and your members, you'll recall that the evidence that the Prosecution is relying on, is the fact that they are saying from the witness Verna Plummer, that the accused man popped a gun from his waist, fired shots, that he was not the only person firing, that they were a number of others. Miss Plummer said she could not recall what that number was. So, Mr. Foreman and your members, remember that aspect of the evidence. You'll also remember Miss Plummer's evidence that the accused man is alleged to have made a particular statement to Saul, and that statement which I'll mention when I am going in some details of Miss Plummer's evidence, was to the effect that Saul should die.
>
> Now, Mr. Foreman and your members, there is no evidence as to the accused man or anybody else pointing a gun at Sandra Brown. But Mr. Foreman and your members, if you are to accept it, is a matter entirely for you, that the accused man and the others were shooting at Saul, the person who Miss Plummer said the accused man had this argument with, and it missed Saul and caught Sandra. Then, when you are coming to look at what was the intentions of the persons who are alleged to have shot them, you can take that into consideration, because if it was intended for Saul, and caught Sandra, it is what in law is transferred malice."

14. It can be seen from the above passages that the learned trial judge gave a comprehensive and accurate direction on joint enterprise. It cannot be said that the jury was uncertain of the issue that they had to determine. The learned trial judge told

the jury it was a matter for determination by them. We are of the view that there is no merit in this ground.

15. The other grounds were not forcibly argued by Mr. Davis. In this case, identification was not a live issue. The applicant put himself at the scene and it was a question of credibility for the jury to determine. Whatever contradictions and inconsistencies that arose in the case were adequately dealt with by the learned trial judge at pages 261-2 of the transcript. We are of the view that there is no merit in the other grounds that were filed. Consequently, we did not wish to get a response from the Crown.

16. On the issue of sentence it was argued by Mr. Davis that the sentence was manifestly excessive, the sentence being imprisonment for life and not being eligible for parole until after 25 years. Mr. Davis submitted that the applicant spent four (4) years in custody pending the trial and that the learned trial judge failed to take that into consideration when considering the period to be served before parole.

17. It cannot be said that the learned trial judge failed to take into consideration the incarceration of the applicant before trial. He said (at page 337 of the transcript):

> "I am going to take into consideration the fact that you have been in custody since the year 2004, but I have a responsibility to the people of Jamaica ..."

18. We are of the view that the period of 25 years before parole is not manifestly excessive in the circumstances. Life in this country has become cheap. This should

never be so. Therefore, persons who embark on a life of crime and use illegal guns to commit murders must expect long sentences of imprisonment when convicted. In this case, an innocent victim's life was taken away for no apparent reason.

19. For the above reasons, we treated the hearing of the application for leave to appeal as the hearing of the appeal and on the 16th October, 2009, we dismissed the appeal, and affirmed the conviction and sentence. We ordered that the sentence run from the 17th September, 2008.