JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 93 OF 2006

APPLICATION No. 78 OF 2008

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE DUKHARAN, J. A. (Ag.)

MARIO McCALLUM
V
REGINA

Frank Phipps Q.C. and Kathryn Phipps for the Applicant.

Miss Kathy-Ann Pyke (on fiat) and Nigel Parke for the Crown.

June 9, 18, 2008

Ruling on Application to Adduce Fresh Evidence

HARRISON, J.A:

This is an application under section 28(b) of the Judicature (Appellate Jurisdiction) Act by Mario McCallum ("the applicant"). He seeks the following orders:

(i) That leave be granted by the Court to adduce fresh evidence on appeal;

(ii) That leave be granted to receive further evidence contained in the statements of Dennis Wiggan dated July 22, 2003 and Cpl. Clive Lawrence dated August 10, 2003;

(iii) That the deposition of the witness Dennis Wiggan be produced at the hearing of the appeal; and

(iv) That the police statement of the witness Dennis Wiggan dated July 8, 2003 be produced at the hearing of the appeal.

The applicant and Herbert Brown were both convicted of murder in the St. James Circuit Court on the 5th April 2006 and their appeals are due to be heard during the week commencing July 7, 2008.

The application is supported by an affidavit sworn to by the applicant on the 26th May 2008 and he seeks to rely on the under-mentioned grounds:

(i) The jury had convicted the applicant for murder solely on the uncorroborated and tenuous evidence of recognition made in difficult circumstances by the witness Dennis Wiggan;

(ii) Dennis Wiggan's evidence was supported by an unfairly conducted identification parade where the witness knew before going on the parade that the suspect would be there;

(iii) The evidence of Det. Cpl. James and Cpl. Clive Lawrence which seriously undermined Dennis Wiggan's credibility was withheld from the jury. The evidence revealed the following:

(a) Cpl. James had recorded a statement made by Wiggan on July 22, 2003 about him identifying the applicant under position number 4 at the identification parade but he testified at the trial that the applicant was under position number 5;

(b) Cpl. Lawrence had recorded in his statement dated August 10, 2003 that he had detained the applicant and Brown whilst they were travelling in a black Toyota motor car.

(c) The evidence by Cpl. James and Cpl. Lawrence are relevant in the case and should have been presented to the jury for consideration along with the evidence of Dennis Wiggan; and

(d) There is no certainty that the verdict of the jury would be the same had the two police officers testified at the trial.

The court has considered the proposed evidence, and is mindful of the principles which have been laid down in the English case of **R v Parks** ((1961) 46 Cr App Rep 29), and followed in a number of cases decided by this Court.

The first question which we have asked is whether the application conforms to the conditions under which this Court should consider and act upon additional evidence. The judgment of the Lord Chief Justice, Lord Parker of Waddington, in **Parks** case has laid down the following guidelines for the purpose of such an application:-

i) the evidence was not available at the trial;
ii) that it must be relevant to the issue; and
iii) that it must be credible evidence;

These conditions are cumulative hence the applicant must satisfy each one.

Mr. Frank Phipps Q.C, for the applicant, faced an uphill task. He has submitted that the evidence of Cpl. Lawrence and Cpl. James was material and although available and known at the trial would qualify nonetheless as fresh evidence on appeal. He argued that the prosecution had served a notice to adduce their statements at the trial but ultimately did not. This he said had hampered the defence. He submitted that in the interest of justice their evidence should now be accepted on appeal.

The transcript was made available to us by the Registrar of the Court of Appeal so we have examined the evidence which was proffered at the trial. Having considered that evidence, in addition to the submissions made by Mr. Phipps, we have come to the conclusion that the proposed fresh evidence which he seeks to adduce has failed to satisfy the first pre-condition laid down in **R v Parks.** We are of the view that that evidence was available at the trial. In fact not only was it known to the defence but it was utilized by Counsel at the trial.

We do agree with Miss Pyke when she submitted that the discrepancies which arose in the identification evidence of Dennis Wiggan, were dealt with extensively at the trial. In our view, he was thoroughly cross-examined with respect to the circumstances relating to his recognition of the applicant in addition to the circumstances in which he had pointed out the applicant at the identification parade. If there is any disquiet or complaint in respect of the discrepancies, that is a matter to be raised at the hearing of the appeal, rather than using this medium to have that matter dealt with.

We have also observed in the transcript that one of the documents (the deposition of Cpl. James) which is now being sought to be adduced, was successfully objected to by Counsel appearing for both convicted men when the prosecution sought to have it admitted in evidence pursuant to section 34 of the Justice of the Peace Jurisdiction Act.

Furthermore, forensic evidence was led by the Crown in relation to the black Toyota motorcar and Counsel had cross-examined Miss Marcia Dunbar, the government analyst, on the absence of any finding of gunpowder residue in that motorcar.

We respectfully disagree with the submissions of Mr. Phipps and have declined to grant the application. It seems to us, as if the applicant now wishes to get a "second bite at the cherry."

ORDER

The application to adduce fresh evidence on appeal is hereby refused.