JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 142 OF 2001

BEFORE: **THE HON. MR. JUSTICE BINGHAM, J.A.**
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE HARRISON, J.A. (Ag.)

REGINA V KEMAR WILLIAMS

Delano Harrison, Q.C., for Appellant
Miss Grace Henry, for the Crown

June 2, 3, and December 20, 2004

HARRISON, J.A. (Ag.):

This is an appeal against the conviction and sentence of the appellant at the St Elizabeth Circuit Court on the 2nd day of July 2001, for the offence of the murder of Calman Barrett on May 31, 2000. The appellant was sentenced to imprisonment for life with a further order that he should not become eligible for parole until he has served a period of fifteen years. We dismissed the appeal; affirmed the conviction and sentence and promised to put our reasons in writing for so doing. This is a fulfilment of that promise.

The case for the Prosecution

The facts are that on May 31, 2000 at about 10:00 p.m., Peter McDonald, a student at the Saint Elizabeth Technical High School was studying in a classroom. He said he saw the appellant who he knows as "Chucky" enter the classroom looking around. He was able to see him because at that time there was bright electric light burning in the classroom. The appellant spent about eight to ten minutes in the classroom and then the deceased who was a security guard at the school, came into the classroom and took him out.

McDonald said he remained in the classroom and he heard both men talking. Some fifteen to twenty minutes later, he heard a voice crying out for "help, murder". He rushed out of the classroom and went onto a platform in front of the classroom. He looked up to the second floor and saw the appellant sitting on the security guard. He went back into the classroom, retrieved his books and bag and ran up a staircase. He turned right at the top of the staircase and he realized that the appellant was still sitting on the security guard. As he ran up the stairs, he said he saw the appellant use his right hand to punch the guard in the region of his chest. When he got to where they were, he said he "chucked" the appellant in his back and told him to leave the security guard alone. He then went in front of the security guard and saw the appellant's face for a "couple of seconds" with the aid of electric light.

The appellant was wearing a cap with a peak and whilst he stood in front of him he chucked him again and told him once more to leave the security guard. McDonald said the appellant held up his head, looked at him and asked if he knew that the security guard had a gun. He said he was able to see his face again when he looked up. There was no one else where he saw both men. McDonald then left them and went downstairs. He walked along the staff room corridor and when he reached a certain point he saw the appellant walking behind him. He was able to see who it was because a bulb was burning in the ceiling of the corridor. The appellant was about six yards away at that time and he had seen his face for a "couple of seconds."

They spoke to each other whilst the appellant was behind him. He asked him what was it that he and the old man had and the appellant told him that the security guard had spat on him. The appellant then bent down and McDonald observed that he had a knife in his hand. Blood was on this knife. They walked off in the direction of the corridor for the girls' bathroom and left the building. Whilst they walked on the asphalted section of the compound, the appellant grabbed on to his neck from behind. He got away from him and fell to the ground. He then rolled and saw the appellant coming at him. He was able to see his face as he ran towards him. The appellant then used the knife and slashed his throat. He got up and ran off and the appellant chased him. He ran to the

teacher's cottage where he saw Mr Wilson, a teacher on the staff of the school and made a report to him. He was bleeding from the throat and Mr Wilson gave him a towel that he used to wrap around his neck. Mr Wilson took him to the Santa Cruz Police Station where he made a report. He was subsequently taken to the Black River Hospital where the doctor examined and treated him.

Under cross-examination McDonald said that he was not making a mistake when he said he saw the appellant that night and that he was sitting on top of the security guard. He denied that he was telling lies on the appellant and that he told the police in his written statement, that the person he referred to as Chucky was someone who stammers. He said he had used the word "stutter" to the police and he maintained that there was a distinction between the words "stammer" and "stutter."

McDonald testified further that he had known the appellant for approximately five to six months before the incident. He had seen him several places including a tuck shop in Santa Cruz, and on the school premises. They had also spoken to each other on several occasions before the incident and he had last seen him on the school compound the day before the incident.

Corporal Vassell Mitchell who is stationed at the Black River Police Station testified that in May of 2000, he was stationed at Santa Cruz Police Station. He recalled seeing Peter McDonald at the Station during the

night of May 31, and that he made a report to him. He observed that he was bleeding from the neck. Cpl. Mitchell said he went to Saint Elizabeth Technical High School as a result of the report made to him and when he went to the second floor he saw the body of Calman Barrett lying face down in a pool of blood. He noticed that there was a wound to the left side of his chest and he appeared to be dead.

Cpl. Mitchell commenced investigations into a case of murder and on September 27, he saw the appellant at the Black River Police Lock-up. He told him of the report he had received and the appellant said to him:

> "A mi dweet, sir mi a goh plea guilty but, me nah go dead a prison".

He cautioned him and asked him why he had killed the watchman and he said he told him that the deceased had taken a baton and hit him. Under cross-examination Sgt. Mitchell said that after the appellant was cautioned he further stated that he had cut the student because they had beaten him up and that McDonald was the one he wanted to kill.

Cpl. Mitchell attended the post-mortem examination that was held on the body of the deceased at the Black River Hospital morgue. He subsequently arrested and charged the appellant with the offence of murder. Dr Audley Hamilton is the medical officer for the Black River Hospital and on June 13, 2000 he performed a post-mortem examination on the body of Calman Barrett, at the Black River Hospital morgue. He found two stab wounds in the upper left chest wall and they were

approximately six inches apart. The lower wound had penetrated the deceased man's left lung and heart. In his opinion, death was due to the wound to the heart and this was consistent with being inflicted by a sharp instrument such as a knife.

The Defence

The appellant gave evidence on oath. He said he was not in a classroom at St. Elizabeth Technical High School during any night in May or June 2000. He denied that he sat on the watchman and punched him in the region of his chest. He further denied that he had a knife that had blood on it. He also denied that he stabbed the security guard. He said he did not chase Peter McDonald, hold him and cut his neck. He said that he knew nothing of the death of the security guard at St. Elizabeth Technical High School and that he was living in Kingston at the time of the incident. He denied that he told Cpl. Mitchell that he killed the guard and that he was going to plead guilty.

Grounds of Appeal

Counsel for the appellant abandoned the original grounds of appeal and with leave of the court advanced the following supplemental grounds of appeal.

1. The learned trial judge erred in law:

   (a) in permitting the reception into evidence of evidentiary material so prejudicial as to have occasioned incalculable damage to the applicant's chances of a fair trial; and

(b) in failing to warn the jury adequately as to how they should treat with that material.

2. Although the case against the applicant depended substantially on the disputed correctness of the visual identification of the applicant by the solitary identifying witness, Peter McDonald, the learned trial judge omitted to warn the jury of the danger of convicting and of the special need for caution before convicting the applicant in reliance on the correctness of witness McDonald's (evidence of) visual identification.

3. The learned trial judge erred in law in his failure to afford the jury any directions whatsoever as to how they ought to approach voice identification.

Ground 1

Mr Harrison, Q.C., argued on behalf of the appellant that the evidence led by the prosecution that the appellant wounded McDonald was inadmissible for the following reasons:

(a) It was irrelevant to the applicant's trial since he was charged only for the murder of Calman Barrett; and

(b) It showed or tended to show that the applicant had a propensity for violence.

He further argued that the evidence was highly prejudicial and this would have deprived the appellant of a fair trial. He submitted that in the circumstances, the learned trial ought to have directed the jury in the plainest and most forceful terms, to disregard that evidence utterly.

Miss Henry, Crown Counsel, submitted on the other hand that while the evidence, on the face of it, may appear to be prejudicial, it was,

nevertheless, highly probative and outweighed any prejudicial effect there might have been.

Mr Harrison, Q.C., had referred us to the case of ***R v Marcello D'Andrea*** SCCA 77/98 (unreported) delivered on March 26 1999. He submitted that the arguments deployed in respect of this ground were well fortified by that case and for present purposes they were on "all fours" with the present appeal.

We do not agree with Mr Harrison. ***D'Andrea's*** case is indeed distinguishable on the facts of this appeal. In ***D'Andrea,*** the witness who gave evidence had been stabbed before the deceased was stabbed. He was called as witness not to identify the applicant but to say that he was stabbed. That evidence was held to be prejudicial. Langrin, J.A. (Ag.) in delivering the judgment of the Court said at page 3:

> "Evidence cannot be given for the prosecution to prove that a defendant has a propensity to commit criminal acts of the same nature as the offence charged merely for the purpose of leading to the conclusion that the defendant is a person likely from his criminal conduct or character to have committed the offence for which he is being tried."

We are of the view that the evidence complained of was elicited by the prosecution in order to strengthen the visual identification in the case. The events that led up to the slashing of the throat of McDonald allowed further contact between the witness and the appellant. This contact would have allowed the witness greater opportunity to identify

the appellant. The evidence was therefore brought in as part of the narrative and in the circumstances its probative value far outweighed the prejudicial effect.

We have further observed that shortly before the jury retired, counsel for the Crown had reminded the learned trial judge that he ought to direct the jury that if they accepted that the appellant had used violence against McDonald that in and of itself did not automatically mean that he was the one who had injured and killed the guard so they ought not to say that the appellant had a propensity for violence and thereby killed the guard. There was dialogue between the learned trial judge and counsel and the trial judge made it clear that he did not wish to place too much emphasis on this evidence and by so doing cause the jury to be prejudiced in any way. The learned trial judge directed the jury as follows:

> "Mr Foreman and members of the jury, I'm reminded of this, you remember that Mr McDonald had a wound to his throat and, in fact, the evidence indicates that Mr McDonald is saying that is this man who inflicted the wound on him. Now, suppose you believe that he, in fact, that that man inflicted the wound on Mr McDonald's neck, you can't say because he inflicted the wound on his neck then he is guilty of killing the watchman. The two of them are two separate things. This man is before the Court, he isn't charged with injuring Mr McDonald and if you believe – you remember the question that I told you about, visual identity, about the possibility of mistaken identity? You are not to have any link, any relationship with the

> cutting or the injuring of that man's neck and the killing of the watchman; two separate incidents. Don't say because you believe that this man injured McDonald's neck that he must be the man who killed the watchman. Two separate incidents."

We are of the view that the learned trial judge gave adequate directions to the jury how they should treat the evidence complained of. There is no merit in this ground and it therefore fails.

Ground 2

This ground complains about the failure on the part of the learned trial judge to direct the jury correctly on the visual identification evidence of Peter McDonald. The main complaint concerned the omission by the trial judge to warn the jury of the special need for caution before convicting the appellant in reliance on the correctness of McDonald's evidence of visual identification.

We agree with Miss Henry that although the learned trial judge did not give the standard direction with regard to visual identification he nevertheless gave the jury adequate directions how they were to approach visual identification evidence. The trial judge did alert the jury to the possibility of mistake and allude to recognition as the crucial element in the case. He also highlighted the circumstances under which McDonald is alleged to have seen the appellant whom he had known for five to six months before the incident. He alerted the jury in relation to the opportunity to observe the appellant, the length of time and the nature of

the lighting. There was ample evidence of identification. The prosecution's case did not rest solely on the identification evidence however, but in addition on the oral admission which the appellant made to Cpl. Vassell Mitchell which corroborated the visual identification evidence. This ground of appeal therefore fails.

Ground 3

This ground complained that the learned trial judge failed to direct the jury how they should approach voice identification. The learned trial judge in relating the narrative to the jury made reference to the various occasions on which both McDonald and the appellant had spoken to each other. But, looking at the evidence in its entirety, it is our view that the prosecution had not really explored the evidence concerning voice recognition. We therefore agree with Miss Henry that on the facts of the case a direction on voice identification was not warranted. The prosecution's case was centred upon visual identification which we think was of exceptional good quality. There is no merit therefore in this ground and consequently it fails.

For the above reasons we arrived at our decision as stated.