[2010] JMCA Crim 50

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 66/2007

BEFORE: THE HON. MR JUSTICE HARRISON, J.A.
THE HON. MR JUSTICE MORRISON, J.A.
THE HON. MISS JUSTICE PHILLIPS, J.A.

JAFFARI MORRIS v R

Miss Jacqueline Cummings for the applicant

Dirk Harrison and Alwayne Smith for the Crown

15 and 18 February and 30 July 2010

PHILLIPS J.A.

[1] On 26 April 2007, the applicant, Jaffari Morris was convicted on an indictment charging him with the murder of Byron Walker on 29 November 2004 after a trial before Norma McIntosh, J and a jury in the Circuit Court in Montego Bay in the parish of Saint James. He was sentenced to life imprisonment and the court further ordered that he was not to be eligible for parole until he had served twenty years.

[2] On 30 July 2009 a single judge of appeal reviewed the applicant's application for leave to appeal against conviction and sentence and refused the same. The application was renewed before us.

[3] The facts of this case are as brutal as they are short and can be set out fairly briefly. The prosecution called four witnesses: the sole eye-witness to the incident, the witness who identified the body of the deceased, the doctor who conducted the post-mortem examination and the arresting officer. The applicant gave an unsworn statement from the dock and called one witness.

[4] **The prosecution's case**

Miss Carolyn Kerr, the eye-witness, testified that on 29 November 2004 at about 6:00pm, she was standing at a shop on Go-Peace Lane in Salt Spring in the parish of Saint James with her two year old child in her arms and talking to her uncle, the deceased Byron Walker, (otherwise called Steppa) who was standing in front of the shop with her.

[5] Miss Kerr stated that she saw four men who approached them from the main road. At first when she saw them they were 30 feet away from her and she was unable to recognize them. When however they were an arm's length away from her, she testified, she was able to recognize "Ziggy, one name Ninja, Jaffari and the other man was masked. I didn't know that one". She stated that all four of the men had guns in their

hands. When they came up to her, two were standing beside her and two were standing beside her uncle. She stated that their faces were turned towards her, "dark was just coming down" but there was a street-light right outside the shop and also there was a light (a bulb) on the shop. The street-light was about 16 feet from her, and she and her uncle were facing the main road, their backs were to the shop, and they were only a short distance from the shop as they could reach out their hands and touch the shop.

[6] Miss Kerr said that as the men came up to her, she saw Ziggy point a gun at her uncle and shoot him in his forehead. She said the applicant was right beside him within touching distance, when Ziggy shot her uncle. She said she saw fire coming from Ziggy's gun and after Ziggy shot her uncle, he fell to the ground. When the applicant held up his gun and pointed it at her uncle and she saw fire coming from it, she ran off. She described the guns as being short and black and she said that, as she ran away, she still heard shots being fired behind her.

[7] Miss Kerr testified that while the men were at arm's length, she was able to observe their faces for about five seconds, and the applicant had nothing on his face preventing her from seeing him clearly. After she ran off to her home, she stayed there for about five seconds, returned to the shop and saw her uncle lying on the ground in a pool of blood with blood

coming from his body, particularly from his forehead and his hand. She said that he looked dead to her. She had not seen him alive since that day and she had later attended his funeral.

[8] Miss Kerr gave evidence that prior to that evening, she had known the applicant for a long time from he was "small," as she used to wash clothes for his mother and his aunt. She said that they all lived in the same area in Montego Hills, on different streets. She would wash for the applicant's mother every other week, and she used to see the applicant when she went to his mother to work. She said however that at the time of the incident in November 2004, she was no longer washing for the applicant's mother, but she had seen the applicant on a day, two weeks before her uncle got shot, as she was passing by his gate. He was standing in the street and she was able to see all parts of his body including his face.

[9] Miss Kerr testified that when the applicant approached her uncle at the shop, her uncle did not have anything in his hands and he did not at any time attack any of the four men including the applicant. She also said that she only had her baby in her hands.

[10] Miss Kerr was challenged about her statement that she had known the applicant for a long time and she accepted that she had previously stated in another court that she had only known him for six months, but

maintained that although the two statements were different, she had known him since he was small.

[11] It was also suggested to her that as she had a baby in her arms and had also been talking to her uncle, she would not have been paying any attention to the four men as they approached. Further, that when they came close and fired, she was so frightened that she ran off, and so would not have been in a position to identify anyone. In fact it was put to her that when she saw the guns, her first reaction was to run off, which she denied. She was questioned as to whether it was as Ziggy fired that she ran off, (which she denied) and it was suggested that she had also said that before, in a statement to the police. It was also put to her that in her statement to the police she had not said that she had seen the applicant point a gun at her uncle or that she had seen any fire coming out of his gun. She accepted that this evidence was not in her earlier statement. An important part of this challenge was that this statement was given to the police after the applicant had been apprehended by the police, but this she denied. Miss Kerr gave evidence that she had not been invited by any member of the Jamaica Constabulary Force to attend an identification parade in this matter.

[12] Miss Kerr said that from the time that the four men approached until the time that she ran off, was about 30 seconds and then she said later in

evidence a couple of seconds. She also said that she had seen the faces of the men for about three seconds as against the five seconds she had stated initially. She gave evidence that she knew the full name of the applicant to be Jaffari Morris, and that she had given that name to the police. However, she was later confronted by her said statement in which she stated, "That's the only name I gave the police for him. I didn't give the police any surname." This part of the statement was tendered into evidence as Exhibit one.

[13] Miss Kerr maintained under cross-examination that she had known the applicant for many years, had spoken to him over the years, as they used to exchange a few words as they passed each other and went about their respective business.

[14] In re-examination Miss Kerr clarified that although she had her baby in hand she had been focusing and listening to what her uncle had been saying; she had seen the applicant's face for five seconds and not three seconds; and she had given her statement to the police after the incident and thereafter she had heard that the applicant had been held by the police.

[15] Detective Michael Sirjue, the arresting officer in the case, gave evidence that on 29 November 2004, he was on enquiries in the Mount Salem area and having received a report, he proceeded to Go Peace

Lane, Salt Spring in the parish of Saint James where, in front of a shop, he saw a body lying on the ground. From his observations, the body had received what appeared to be gunshot wounds and was bleeding from them. He directed that the scene be processed by the Scenes of Crime officers who secured four 9mm spent shells. He commenced investigations into a case of the murder of Byron Walker who had been identified to him by his mother Miss Ida White. He obtained statements from persons including Miss Carolyn Kerr, and obtained an arrest warrant for Jaffari Morris, the applicant, Adrian Campbell, otherwise called Ziggy, and a third man known only as Ninja.

[16] Detective Sirjue testified that on receipt of certain instructions he went to the Montego Bay Police Station and located the applicant, not by using the name Jaffari Morris, but by using the name Anthony Lyttle. He said he cautioned him and asked him why he had given the police a wrong name and the applicant had responded by saying that he did not want the officer to know that he was in jail, because he knew that he was being hunted. Detective Sirjue said he told him of the allegations which had been made against him, in that he, along with Adrian Campbell, otherwise called Ziggy, and Ninja had shot and killed Byron Walker at Go-Peace Lane on 29 November 2004. The applicant, he said, did not respond, but when he charged him with the said murder, and further cautioned him, he said, "Mi done get caught already mi can't say

nutten". Detective Sirjue said that he had known the applicant from the communities of Salt Spring and Montego Hills before he went to the station to arrest him.

[17] Detective Sirjue under cross-examination, indicated that he had known the names Jaffari Morris and Adrian Campbell before the date of the murder, and he had also received those names from the witness Carolyn Kerr, when he was taking her statement on 2 December 2007. He said that he prepared the warrants on the date after the statements were recorded. He was strenuously challenged about the fact that the warrant was dated 30 November, although it was supposed to have been prepared on the basis of the statement taken from Miss Kerr on 2 December 2007. He was even more strenuously challenged as to why he had not caused an identification parade to have been held.

[18] He was asked specifically what was the purpose of an Identification parade. This was his answer:

> "The purpose of an I.D. parade is to give the witness an opportunity to identify a suspect or to be held when there is no certainty that the witness knows who he is accusing."

A further question was posed to him:

> "Would you agree with me that it is also to confirm that the person whom the witness says it is, is in fact the person that is being charged?"

The detective did not agree with this, In his view, that could be done otherwise. Indeed, he insisted that the parade was not held as it was not necessary. This caused counsel for the applicant to pose a further question:

> "Because you had made up your mind as to who the persons were already, isn't that so?"

Detective Sirjue disagreed with this suggestion.

[19] With regard to the date of the warrant, Detective Sirjue, explained the apparent inconsistency in this way:

> "I actually prepared the warrants the date after the statement was recorded. However a mistake was made as the warrants should have been prepared the day after the statement was recorded but a mistake was made in preparing the warrant, writing the date after the offence was committed. There was a thin line between, a mistake in the date the statement was recorded and the date the offence was committed."

Finally, it was suggested to the officer that he was claiming that the warrant was prepared on 3 December, in order to cover up the fact that he had failed to hold an identification parade and this was also the reason why he had told so many lies against the applicant. The detective maintained his position that there was no need "to cover up" as the identification of the applicant was clear to him and the identification parade would not have assisted him with the identification.

[20] Dr Murari Sarangi, registered medical practitioner and consultant forensic pathologist for the western region of Jamaica, who was stationed at the Cornwall Regional Hospital at the material time, gave evidence that he had conducted a post-mortem examination on the body of one Byron Walker, the deceased. He identified seven gunshot wounds to the body: to the forehead, the back of the right side of the head, the outer aspect of the left side of the chest, the back of the left wrist, the front and upper part of the left arm, 5cm below the left elbow, and the left forearm. Dr Sarangi said that based on both the external and the internal examination findings, he was of the opinion that death was due to the gunshot wounds received, especially the gunshot wounds to the head and chest, with injuries to vital body organs, namely the brain and the left lung accompanied by blood loss.

[21] At the close of the case for the prosecution, the defence submitted that the applicant ought not to be called upon to answer, in that the evidence as to the circumstances under which the applicant was supposedly identified by the witness Carolyn Kerr, was tenuous and that it would therefore be dangerous to send the matter to the jury on such evidence. Counsel for the Crown opposed the application and the learned trial judge ruled that there was a case to answer as the evidence in the case was not of such a quality that would allow her to step in and take the case away from the jury. The primary concern, she said, would

have been the identification evidence and that was a matter for the jury and the directions of the court.

Case for the defence

[22] The applicant gave an unsworn statement from the dock. He said he lived in Sheffield in the parish of Westmoreland, and worked as a labourer on a farm. He said that he had not been living in Montego Bay at the material time and that the witness, Carolyn Kerr, had never worked for his mother. In fact, he did not know her at all. He said his mother had died in 2003, and he denied that having been held, he had told Detective Sirjue that, "mi can't say nutten".

[23] The applicant called Mr Errol Lewis as a witness in support of his case. Mr Lewis was a mason who also lived in Sheffield, Westmoreland, with his stepfather, Kenneth Lyttle, who was also said to be the stepfather of the applicant. He said that in November 2004, the applicant was living with the family which also included his, (Mr Lewis') mother, brother and sisters. On the day in question, there was a family reunion at the house, and he said that the applicant remained there for the entire day. The day's activities started at 9:00 am with the task of obtaining wood to cook the food, which was the applicant's role along with the witness and his

other brother. They also had to kill the goat, season it and "get everything ready". Their stepfather was the chef, and apart from assisting with the preparations, the applicant was also helping his stepfather prepare the meat. The evening entertainment was supposed to begin between 6:00-7:00 p.m and end at 10:00 p.m. It was Mr Lewis' evidence that the applicant stayed in the yard the entire time of the reunion until he went upstairs to retire for the night. He said the applicant had come to live with that household in the summer of 2004, before that in 2000, he used to visit them and so he had known him from then.

[24] In cross-examination, Mr Lewis said that he had seen the applicant for every single hour from 9:00 am until 10:00 pm when the function ended. He said that he did not know where the applicant lived before he came to live with them. He had never visited with him while he lived in Montego Bay. He also did not know what work the applicant had been doing before he came to live with them in 2004.

The Grounds of Appeal

[25] At the hearing of the application for leave to appeal, counsel for the applicant applied for and was granted leave to argue additional grounds, "C" and "D". Therefore arguments were put before the court in respect of grounds, "A-D" and then counsel was invited by the court to

address the adequacy of the directions by the learned trial judge on common design as ground of appeal "E".

Ground of Appeal A - Unfair Trial

[26] "1. The Learned Trial Judge after discussing the Appellant's alibi (at pages 167-168 of the Record of Appeal) failed to advise the jury that even, if the Appellant gave them a false alibi they still have (sic) to go back to the crown's case and be satisfied that they feel (sic) sure before they (sic) can convict him."

[27] Counsel for the applicant submitted that the directions to the jury on his defence of alibi were deficient, as set out in the ground of appeal. Counsel referred the court to the summing-up of the learned trial judge in relation to her directions on the issue of alibi. On page 165 the learned trial judge said:

> "Now in this case there is no issue as to self-defence or provocation, so these are not matters that will concern you in this trial. What the accused man is doing in this case is raising the defence of alibi…."

and on pages 166-168 she stated:

> "Now I told you that the accused man has raised a defence of alibi, he was not there; he was somewhere else. So, I must tell you that in doing so, it is not for him to prove that he was not there. The burden of proving its case against the accused remains on the prosecution; it is for the prosecution to prove that the accused was where its witness says he was and doing what its witness says he was doing . So, it does not shift to him to prove anything; it is still the prosecution's

> burden to disprove his alibi defence. And, I have to say to you at this point, even if you reject his alibi defence, that must not leave you to the conclusion that this is supported (sic) for the evidence of his identification, and he is therefore, guilty. There may be many reasons for putting forward a false alibi. For instance, he may be genuinely mistaken about dates and times, so that it is only if you were satisfied that the sole reason for a false alibi was to deceive you, put you off track so you think it is not him, that you may find support for identification evidence. The mere fact that the accused has lied about his whereabouts does not of itself prove that he was where the prosecution witness said he was, doing what the prosecution witness said he was doing."

This direction clearly deals with the burden of proof and how the jury should approach the issue of a false alibi.

[28] Counsel for the Crown referred the court to other aspects of the summing-up where the learned trial judge also dealt with the issue of alibi and how the jury should approach the evidence adduced by the defence. The learned trial judge said on page 199 of the transcript:

> "Now you will recall I told you that the burden of proving the case against the accused is on the prosecution and that it remains with the prosecution. Even where he has raised the defence of alibi the accused has nothing to prove. So he can just sit there in the dock and say nothing but may simply wait to see if the prosecution is able to prove its case against him."

and on pages 204 and 205:

> "Having listened to the accused man and his witness, if you believe his alibi defence, then that

is really the end of it and you should return a verdict of not guilty. But, even if you reject his alibi defence, that still does not entitle you without more to say that he is guilty. You must return to the prosecution's case and see whether the prosecution's case satisfies you until you feel sure that the accused man is guilty. So, you go back to the prosecution's case, you consider it along with what the accused man and his witness have told you in this trial and make up your minds what you believe. If you believe the accused and his witness, what they said, and you accept that he was not among the four men who shot and killed Mr. Walker on that evening of the 29th of November, your duty would be to return a verdict of not guilty. If after considering all the evidence from the prosecution as well as the evidence of Mr. Lewis, and what the accused man had to say; you are not satisfied that Miss Kerr had enough opportunity to see and recognize the accused as one of Mr. Walker's assailant, and you are not satisfied that she has correctly identified him, then your verdict should also be not guilty.

If after considering all the evidence and what the accused and his witness had to say, you are left in a state of reasonable doubt about whether he was there, or about the correctness of the identification of Miss Kerr's evidence, of Miss Kerr's identification of him as one of the persons involved, then your verdict must be not guilty. However, if after considering and after bearing my warning in mind you are satisfied that Miss Kerr had ample opportunity to see and identify Mr. Morris; that she knew him before and it was really a case of her recognizing someone well known to her, and you accept that the prosecution has proved all the other factors, such as the death of Mr. Walker, by a deliberate act, with the intention to kill or cause serious bodily harm; that all four men, including this accused, shared that common intention, and by their action showed they were a common bit,

> to kill or seriously injure Mr. Walker, then your duty is to return a verdict of guilty of murder."

[29] These directions, in our view, were clear and adequate. The jury would have understood the defence of alibi, that the defence did not have to prove anything, and the fact that the burden remained with the prosecution throughout. In our view, this aspect of ground of appeal "A" has no merit.

Ground of appeal "A"

[30] "2. The Learned Trial Judge erred when she told the jury that the Appellant:

> '…has nothing to prove but that was his attempt at establishing his innocence along with the evidence of his witness…was misleading as they (sic) jury could have interpreted this to mean that the appellant's evidence was unsuccessful in her mind and consequently influence their subsequent conviction'."

[31] This is what the learned trial judge said on page 201, (lines 18-21) of the transcript:

> "So that is his statement but remember, he has nothing to prove but that was his attempt at establishing his innocence along with the evidence of his witness."

It was not counsel's complaint that the learned trial judge in her summation, had not accurately and fully recounted for the jury the unsworn statement of the applicant. In fact, counsel pointed out that the

learned trial judge had referred to the applicant's position that he said that he did not know Miss Kerr, that she had never worked for his mother, that his mother had died in 2003, and that he had never said any of the things that the arresting officer said he had said after caution. The learned trial judge had also dealt with the evidence of the applicant's witness, Earl Lewis, in detail with regard to the activities in respect of the reunion, which the witness said accounted for the whereabouts of the applicant for the entire day on 29 November 2004, the day Byron Walker was shot and killed. The complaint of counsel related to the reference by the learned trial judge to the word, "attempt", in line 19 (see above) in the summation, as counsel submitted that it had a pejorative implication suggesting that the case put forward by the applicant was not credible or capable of belief. It was further submitted that the word, "attempt" was not used by the learned trial judge in her summing-up of the case for the prosecution on page 205 of the transcript, which counsel said, underscored her submission.

[32] The words used by the learned trial judge on page 205 are set out above. In our view, the learned trial judge dealt with the evidence adduced by the prosecution and the defence in a fair, balanced and even-handed way and she cannot be faulted in this regard. The word "attempt" in the Concise Oxford Dictionary, (5th edition page 74) means

"to try" (thing , action, to do) which is what the applicant was doing, "trying" to convince the jury that he was not where the prosecution said he was and that he was not doing what the prosecution said he was doing at the material time. This aspect (2) of ground of appeal "A" is also without merit. This ground therefore fails.

Ground of Appeal "B" - The trial is unconstitutional

[33] Counsel for the applicant indicated to the court that she could not find any fault with the trial process and would not therefore argue this ground of appeal.

[34] **Ground of Appeal "C" – The learned trial judge gave the jury incorrect directions in treating previous inconsistent statements**.

> "4. The Learned Trial Judge erred when she advised and stated to the jury that "you must not concern yourself about what you have heard about another trial because…and further advised them that 'remember, what was said outside of this trial not being that evidence, her evidence before you is for your consideration…'(page 187 lines 12-15) as this could have led the jury to believe that they must ignore or disregard her inconsistent previous statement."

[35] The learned trial judge said at page 187, lines 5-18 of the transcript:

> "…To another court she had said it was five seconds from the time she saw the men coming to when she ran off. To you she had said thirty seconds from the time they were at arm's length to when she ran. To you she said she saw Jaffari's face for five seconds. In another court

> she said three seconds. Remember, what was said outside of this trial not being the evidence, her evidence before you is for your consideration and those questions were asked to assist you when you are coming to make up your minds as to whether she is a witness upon whose words you can rely."

Counsel complained that in the above passage the learned trial judge did not give the jury adequate directions with regard to how inconsistencies in the evidence of the main witness for the prosecution should be dealt with in respect of her credibility. Counsel maintained that the jury could have concluded that any statements made otherwise than in court were to be disregarded and if inconsistent with what was said in court were simply not to be relied on. This, counsel submitted, was inaccurate and confusing. Counsel for the Crown pointed out that the learned trial judge had dealt comprehensively with the issue of challenges to the witnesses with regard to previous inconsistent statements and that the complaint did not accurately reflect the full directions given by the learned trial judge.

[36] The learned trial judge in the summing up stated at pages 153 - 154, lines10-23 and 154, lines 1-2:

> "Now, during the course of this trial, you have heard questions put to a witness about things said to the police in a statement after the incident, which is the subject of this trial, or things said in another court. So, I must point out to you that anything said outside of this courtroom is not

> evidence in this trial; it is what the witness tells you from the witness box that is the evidence in the trial before you. However, questions are permitted about what was said outside of this courtroom in this trial in an effort to show you that at another time and another place the witness might have said something different from what the witness has told you in the evidence before you, and this is done in an effort to assist you when you are coming to your decision, when you are seeking to determine whether the witness is a witness upon whose words you can rely."

and then at page 155, lines 1-15:

> "You must bear in mind that it is what the witness tells you from the witness-box, here in this courtroom that is evidence in this trial, and you must not concern yourself about what you have heard about another trial because from time to time during the course of this trial it did crop up that you hear about another trial and another judge and so on because cases are retried for any number of reasons, none of which should be a matter for your consideration; none of which is a matter for your consideration. So do not concern yourself about any other trial but the one that is before you, the one in which you are involved."

[37] Miss Kerr in her evidence had said that she had known the witness from he was small, but in cross-examination she recalled that she had said in another court that she had known him for about six months before the incident and she accepted that both were different, but endeavoured to explain that it was the first time that she was attending court and she did not remember everything.

[38] On pages 181-182, the learned trial judge gave the jury directions as to how to deal with the evidence given in court which was clearly inconsistent with evidence given in the preliminary enquiry. Pages 181-182 read thus:

> "I should have told you Mr. Foreman and members of the jury, that when you are assessing discrepancies and inconsistencies as you find them, you also must have regard to any explanation which the witness gives for the differences, and indeed, if none is given, you have regard to that too; but if the witness gives an explanation, you see what you make of it. In this case, she is saying it was the first time she was attending court; she couldn't really remember everything, and she maintained that as far as her prior knowledge of the accused is concerned, her evidence in this court to you is that she knew him from he was small. You just remember what I told you is the reason for these questions being asked and just remember it is what the witness (sic) that you hear, that is evidence in this trial. As judges of the facts, it is for you to say whether you believe her that she knew him before. They were living in the same community; some of you may know the area. Remember she described how the two lanes were, or road; she lived on one road, he lived on another road; I think below. It is a matter for you to say whether it was six months before or when he was small; whether you accept that. At the end of it all, what she is saying is she knew him before sufficiently to be able to recognise him that evening on the 29th of November 2004."

We agree with counsel for the Crown that the directions were full and fair and there is no merit in this aspect of ground of appeal "C".

Ground of Appeal "C"

[39] "5. The Learned Trial Judge erred when she again advised the jury to follow her instructions on discrepancies and inconsistencies (page 189 lines 19-22)."

This was how the learned trial judge, instructed the jury, which was the subject of this complaint:

> "…Just remember my directions and the purpose about questions being asked about things being said outside of the courtroom and about these discrepancies and inconsistencies, just follow them."

[40] However, this statement was made in the summing up after the learned trial judge brought to the attention of the jury the evidence of Miss Kerr that she had known the last name of the applicant, yet at the preliminary enquiry she had said that the only name she knew was "Jaffari". At first she denied that she had said that at the preliminary enquiry but agreed when a document was shown to her. She was also asked if she had told the Resident Magistrate that she did not give a surname to the police, but she maintained that she did not even after the document was shown to her, and it was in those circumstances that the learned trial judge made the directions stated above.

[41] In any event, counsel for the Crown submitted that the learned trial judge gave exhaustive directions to the jury with regard to the issue

generally on how to treat with inconsistencies and discrepancies in the evidence as they occurred. In her summation at page 157 she detailed it thus:

> "And so because people are so different you will find that it often happens in these trials that when witnesses come to give their evidence differences are seen in their evidence. So that it may be a case that one witness may say something about a particular matter at one point in the evidence and that same witness may go on to say something different about this same matter; or it may be that a witness may say something on a particular point and another witness comes to say something different about the same point. We call these differences discrepancies and inconsistencies.
>
> Now, as judges of facts it is for you to say whether there are any of these differences in the evidence that you have heard and if you find that these differences exist then you must go on to assess them, you must go on to evaluate them. You must go on to decide whether they are slight or serious.
>
> Now if you decide that the discrepancy or inconsistency is slight, you would be well entitled to say to yourself it does not really affect the reliance you feel you can place on the evidence of the witness concerned and that you can still rely on the evidence of the other parts of that witness' evidence."

We agree with counsel. The directions to the jury were thorough and extensive and the jury would easily have understood their import. There is also no merit in this aspect of ground of appeal "C".

Ground of Appeal "C"

[42] "6. The learned Trial Judge erred when she advised the jury that "a difference in a witness' evidence does not necessarily means (sic) that the witness is lying…"(page 159 lines 12-14)

[43] The learned trial judge's complete statement is as follows:

> "Now, when you are assessing the differences, if you find any, you must bear in mind that a difference in a witness' evidence does not necessarily means (sic) that the witness is lying, although it could mean just that; so, you have to consider the evidence carefully."

But this statement was preceded by this direction:

> "On the other hand, if you feel that it is serious, you may feel it would not be safe to rely on the evidence of that witness on that particular point, or, it may be so serious that you feel you cannot rely on the evidence of that witness at all. It is for you to say whether any difference you find is slight or serious, and then you go on to deal with it as I have just directed you."

and it was followed by this direction:

> "When assessing discrepancies and or inconsistencies, you should take into account for instance, the age of the witness and the witness' level of intelligence as it appears to you, because you have seen and heard the witness, and you must form your own views about that as well as the witness' powers of observation, ability to express himself or herself in words and vividly recall the incident."

The directions, when examined in their full context, were very clear and the jury could have been in no doubt as to how to approach evidence

which may have appeared to be untrue. This aspect of ground "C" also has no merit.

[44] Counsel for the applicant had initially challenged the directions of the learned trial judge with regard to the discrepancies in the evidence of the arresting officer pertaining to the date of the warrant and the date of the statement taken from the sole eyewitness, and the inconsistencies between the evidence of the said sole eyewitness and the arresting officer, but these arguments were not pursued.

[45] As mentioned before, counsel had also been given leave to argue a supplemental ground of appeal "D", viz:

> "The learned trial judge failed to issue the appropriate warning to the jury on the issue of identification."

But this ground was not pursued as counsel conceded that the directions of the learned trial judge on the issues relating to identification were detailed, comprehensive, and accurate and could not be faulted.

[46] As also indicated previously, at the hearing of the application, counsel was invited by the court to address the issue of the adequacy of the directions given by the learned trial judge in respect of common design. Counsel therefore filed and argued ground "E".

Ground of Appeal "E"- Inadequate directions on Common design.

[47] "1. The Learned Trial Judge failed to give adequate directions to the jury on the issue of common design (pages 147-148 lines 24-25, 1-11; pages 170-171 lines 24-25, 1-14; page 199 lines 1-15; and page 205 lines 17-25).

2. Consequently, in light of the inconsistency of the witness on whether she saw the Appellant point a gun before she ran off and or saw fire coming from his gun, (page 179 lines 2-8; 185 lines 1-4) the verdict is unsafe and unreasonable."

[48] Counsel for the applicant submitted that the learned trial judge addressed the issue of joint enterprise/common design substantively twice in the summing up and tangentially twice also in the dying moments of her speech to the jury. She submitted that the directions were woefully inadequate in light of the guidance obtained from the opinions in the cases from the Privy Council and the House of Lords over the past decade.

[49] In her summing up on pages 147-148 the learned trial judge had this to say:

> "So the prosecution is saying that all four men, including this accused, were on a joint mission, that they were part of one mission to shoot and kill Mr. Walker, so that all of them would have played a part in the murder of Byron Walker. So although you didn't hear any evidence that Mr. Morris' bullet hit and killed him, the prosecution is saying that they were all there together and that they were a part of this one mission and that

> each one of them would be just as guilty as the others for the death of Mr. Walker."

and on pages 170-171 the learned trial judge said this:

> "Let's see what other directions I have for you. Well, at this time, Mr. Foreman and members of the jury, those are my directions in the law as it relates to this trial, except to say by way of a repeat really that in a situation such as the one that we have here where the accused is one of a number of persons who committed --- who the prosecution is alleging committed this offence, that you have to understand that when persons join together to commit an offence and the offence is committed, that each person who takes an active part in the commission of the offence is guilty of that offence and I need you to bear that in mind when you are considering evidence in this case."

and on page 199, this:

> "We are almost at the end so it is for you, Mr. Foreman and members of the jury, to say whether you are satisfied that the officer acted properly in these circumstances, in deciding that a parade was not necessary; whether you are satisfied that Miss Kerr knew the accused before the 29th of November, had named him to Sergeant Sirjue and that she had satisfactory conditions to be able to see and recognize him and properly and accurately identify him as one of Mr. Byron Walker's assailants, as one of the persons who shot and killed him. So that completes my review of the prosecution's evidence."

[50] In paragraph 28 above, excerpts of page 205 have already been set out. However, the relevant portion of the transcript for these purposes are lines 19-25, which state the following:

> "...that all four men, including this accused, shared that common intention, and by their action showed they were a common bit, (sic) to kill or seriously injure Mr. Walker, then your duty is to return a verdict of guilty of murder."

[51] Counsel for the applicant submitted that the deficiency in the summation is in respect of the failure of the learned trial judge to direct the jury that the criminal culpability lies in the participation in the venture with foresight. Counsel submitted that the "touchstone is foresight" and the jury must be satisfied and the prosecution must prove that each accused participated in the act which they contemplated and which occurred. She said that the learned trial judge could have left the matter as one only dealing with whether the jury believed Miss Kerr and not mention the issue of common design at all, but if she intended to give a direction on common design then it must be done properly so as not to confuse the jury.

[52] Counsel for the Crown also submitted that the directions were inadequate but submitted that notwithstanding that, had the jury been directed properly, the verdict would have been the same. Both counsel referred the court to and relied on the Privy Council cases of ***Nigel Neil v***

The Queen, PC Appeal No. 22 of 1994, delivered 6 April 1995, and ***Hayden Jackson, Addis Jackson & Altimont Jarrett v The Queen*** PC Appeal No. 81 of 2008 delivered 7 July 2009 and the decision of the House of Lords in ***R v Rahman and Others*** [2008] UKHL 45.

[53] The learned trial judge, as set out above in her summation, stated that the prosecution was saying that all four men were on a joint mission, and that although the jury would not hear that the applicant's bullet had hit and killed the deceased, they were all a part of one mission and each one of them was guilty of the death of Byron Walker. The evidence of Miss Kerr is that all four of the men had guns, so in our view, the common intention to cause grievous bodily harm to the deceased could be a reasonable inference. In fact, Miss Kerr testified on page 19 of the transcript thus:

> "**Q**. Now, when Ziggy pointed the gun at your uncle and shot him, did any of the other three men do anything?
>
> **A.** Yes, but when I see Jaffari hold up fi him gun den mi run off.
>
> **Q.** Now, when Jaffari hold up his gun, was it pointed anywhere in particular?
>
> **A**. Toward my uncle, miss."

On pages 20 (lines 8-23) and page 21(lines 4-14), the witness gave this evidence:

"Q. Miss Kerr, when you saw Ziggy hold up the gun and shot your uncle in his forehead, why you say he shot your uncle?

A. Because when he shot my uncle mi uncle fell to the ground.

…

HER LADYSHIP: Why do you say a shot was fired? Apart from seeing your uncle fall to the ground, if your uncle didn't fall to the ground would you still be able to say that it was a shot?

THE WITNESS: I was running. I heard shots still firing.

…

HER LADYSHIP: You were standing there. You see the man you say with a gun pointing it at your uncle. What happened; did anything happen with that gun why you say your uncle was shot?

THE WITNESS: I saw fire coming out of the gun.

HER LADYSHIP: And then anything else?

THE WITNESS: Repeat that for me please?

HER LADYSHIP: You saw fire coming out of the gun. What was the next thing that happened?

THE WITNESS: And when mi see fire coming from Jaffari, mi run."

[54] Counsel for the applicant argued that although in examination-in chief, as set out above, Miss Kerr said that she saw the applicant hold up his gun and point it at her uncle, and that she saw fire coming from his

gun before she ran off, in cross-examination she was challenged that she had not said these words in her earlier statement to the police, but instead had stated that after Ziggy walked up to her uncle, pointed the gun at him and shot him, she was so frightened that she had run off and gone home. She insisted that she had told the police the same words that she had given in evidence. She was confronted with the written statement and accepted that the words were not there in the statement, but explained that, "but it was not that important as how I would have to tell the judge".

[55] The learned trial judge treated with this evidence in her summation and she said this:

> "Defence attorney asked her if she had told this to the police and whether the police had read her statement over to her when she was finished and if she heard them read that back, to all of which she said yes. She answered yes for all of these questions and so the statement was read to her and after those parts were read to her by the registrar and when she was asked if she heard them she said no. What the witness is saying is that it fit in the statement, or that she didn't tell the police. When it was suggested to her that she never told that to the police she maintained in her evidence before you in this trial that she did."

In our view, her recounting of the evidence was accurate, she dealt with the alleged inconsistency and the jury was assisted with regard thereto.

[56] In dealing with this ground, it is important to look at the most recent authoritative pronouncement on common design. In his judgment in ***R v Rahman,*** Lord Bingham referred to the earlier decision of the House of Lords in ***R v Powell, R v English*** [1999] 1 AC 1, 21 in which the House had held that:

> "Participation in a joint criminal enterprise with foresight or contemplation of an act as a possible incident of that enterprise is sufficient to impose criminal liability for that act carried out by another participant in the enterprise."

One of the questions on that appeal had been whether the foresight of a criminal act which was not the purpose of a joint enterprise was sufficient to impose criminal liability formurder on the secondary party. Lord Bingham then concluded (at para. 11):

> "Thus, the House answered [this question]…by sayin that… 'it is sufficient to found a conviction for murder for a secondary party to have realised that in the course of the joint enterprise the primary party might kill with intent to do so or with intent to cause grievous bodily harm'."

On this basis, Lord Bingham therefore stated, as Miss Cummings pointed out, that "in this context the touchstone is one of foresight".

[57] In the Privy Council case of ***Hayden Jackson, Addis Jackson, Altimont Jarrett v The Queen*** from this jurisdiction, Lord Rodger of Earlsferry in delivering the decision of the Board confirmed that the most

recent guidance on the law of joint enterprise was to be found in ***R v Rahman.***

[58] In the instant case, both counsel are agreed that the learned trial judge's directions in this regard were deficient in that she gave no directions with regard to the joint contemplation of the crime and the foresight of the injuries which could have occurred. However on the facts of this case, which were that all four men approached the deceased with guns, and that at least two of them including the applicant pointed their guns at him and fired shots at him, and that subsequent to this, he fell to the ground and died having received eight gunshot wounds, it appears to us that the directions given by the learned trial judge were adequate for the purposes of this case and the jury would have had no difficulty concluding that each of the men had foreseen the harm which was ultimately caused. Furthermore, the applicant is in a special situation, for as the evidence disclosed, he had fired at least one shot in the direction of the deceased, so his liability could in any event arguably be assessed not as secondary, but as primary, in all the circumstances of this case.

Conclusion

[59] In light of all that we have said, the application for leave to appeal against conviction and sentence is dismissed. The sentence is to commence from 26 June 2007.