The Court of Appeal for Bermuda

CRIMINAL APPEAL No 11 of 2011

Between:

KEVIN ANDRE WARNER

Appellant

-v-

THE QUEEN

Respondent

Before: **Zacca, President**
Ward, J.A.
Auld, J.A.

Appearances: Ms E Christopher for the appellant
Mr C Mahoney and Ms M Sofianos for the Respondent

JUDGMENT

Date of Hearing: **11, 12, June 2012**
Date of Judgment: **22 November 2012**

ZACCA P.

1. The appellant was convicted by a jury of one count of premeditated murder and a second count of carrying a firearm with intent to commit an indictable offence.

2. On the first count the appellant was sentenced to life imprisonment with a recommendation that he was to serve thirty five years before being eligible for release on licence. On the second count he was sentenced to ten years imprisonment. The sentences were made concurrent. From these convictions the appellant has appealed.

Case for the Prosecution

3. The deceased Dekimo Martin (Dekimo) was residing with his sister Danielle Martin in an upstairs apartment at 8 Peacock Lane in Sandy's Parish for about one week prior to the 27th May 2010.

4. Robin Lewis (Robin) lived in the lower apartment with his ex-wife Jan Martin (Jan) who was Dekimo's Aunt. Also living there was Jan's boyfriend, Tony Seymour, and Jan's daughter, Chelsy Lewis (Chelsy).

5. The appellant was a frequent visitor through his friendship with Chelsy and her brother Kellen Lewis. She knew that the appellant had an older brother Kavon and that the appellant was a friend of Dekimo.

6. At about 2.00 p.m. to 2.30 p.m. on the 27th May 2010, the appellant came to the apartment and knocked at the main door which was locked. He called out for Chelsy and Jan who was having a bath stated that she recognized his voice and told the appellant that Chelsy had gone to Cambridge Beaches.

7. At about 6.30 p.m. Robin arrived on a motor cycle belonging to the appellant and driven by Dekimo who left at about 7. 30 p.m. to 8.00 p.m.

8. Later the appellant returned and asked for Dekimo. On hearing that Dekimo was not there, the appellant went upstairs in the direction of Danielle's apartment. This was about 10.00 p.m. and he enquired about Dekimo. She told him that he was not there. Danielle stated that she recognized the appellant and also his voice. She was able to see him through her screen door from the waist up including his face. The neighbours' lights were on and she said that he was wearing a black jacket and a white tee shirt. The appellant then rode away by the Peacock Crescent route. The sensor lights downstairs were on and all were working. Danielle was awakened by gun shots. She ran outside and saw someone running along Butterfield Lane from the direction of her house. The person was wearing a black jacket and white tee shirt. He was about 5 ft. to 5ft 2 inches, not tall, not skinny and not a big person. She stated that the appellant was about 5ft. 2" and the person was about 75 ft. away when she saw him.

9. Tony and Robin were in the yard when Dekimo returned and joined them. Sometime later the appellant returned and told Chelsy that his motor cycle was up the hill. She found this strange as he would normally ride his motor cycle through Peacock Crescent.

10. Robin, Tony, Dekimo and the appellant were together outside in the back yard. At around midnight Robin went inside and fell asleep on the couch. About 15 or 20 minutes later Chelsy woke him and Robin went outside and rejoined the other three men.

11. Sometime later Robin and Tony went inside leaving Dekimo and the appellant in the backyard. Shortly after Robin went outside for a cigarette. On going outside, Robin heard Dekimo and the appellant talking. He decided against the cigarette and went back inside. Whilst inside Chelsy heard Dekimo and the appellant outside as they were talking close to the bathroom window.

12. Within seconds, Robin heard three gun shots coming from the Butterfield Lane side. This was the same area where Dekimo and the appellant were heard talking by the bathroom window.

13. Michael Darrell who lived close to Peacock Crescent and Butterfield Lane rushed outside on hearing gun shots. He returned inside. Minutes later he went back outside and heard a motor cycle start up and riding off. He knew the appellant and his motor cycle. He stated that the motor cycle sounded like a 4 stroke motor cycle similar to the appellant's motor cycle and that it came from the direction of the gun shots.

14. On hearing the gun shots Robin and Tony went outside. The sensor lights outside of the bathroom had not come on. They heard a moaning and saw Dekimo lying on his back with his pants down by his ankle. His head was at the bottom of the stairs and his feet going up the stairs. Dekimo's black jacket was also on the stairs. The appellant was not seen. Robin later discovered that the new bulbs which he had put in the sensor lights were gone and one large bulb left was unscrewed and left slack.

15. The police and E.M.T attended the scene. Dekimo was taken to the hospital and was pronounced dead on arrival.

16. A Post Mortem on the body of the deceased was performed by Dr. Chitra Raoo who concluded that the cause of death was from gunshot wounds.

17. At approximately 2 a.m on the 28th May 2010 D.S. Thompson and D.C. Sealy from the Police Forensic Support Unit attended the scene. They took photographs and retrieved certain items, including casings. A driver's licence belonging to the appellant was seen nearby a boat on Butterfield Lane. This location was one that the man Danielle saw running along Butterfield Lane would have had to pass.

18. Charlita Campbell (Charlita) received a telephone call from the appellant on the 28th May 2010. She had known the appellant for a short time having met him on Facebook. He asked her if he could stay with her for the weekend.

19. The appellant arrived at her home at about 7.30 p.m. She enquired from him if he knew about a shooting which took place in the early hours of the morning. He replied "They think I killed him". By "they" he meant the people at Peacock Lane because he was the last one to see Dekimo alive. The appellant was crying having lost his friend. He indicated that he was at the yard and when everyone went inside, he left and went to his brother's house. This was prior to the shooting.

20. He asked Charlita if he could have a bath as he was going to turn himself in to the police. Appellant went into the bathroom and Charlita went to the bathroom and saw that the appellant instead of using soap was pouring vinegar on his body. She also stated that she saw a bottle of Clorox bleach to his right which was uncorked. He later told Charlita that he may have been in contact with someone who had gunshot residue on him. There was no vinegar or Clorox bleach in the bathroom prior to the appellant going there.

21. The appellant asked Charlita to tell the police that he had been at her house at the time of the shooting. She suggested that if he had been at his brother's house, he could provide him with an alibi. The appellant replied that he did not wish to bring heat to his brother's house because his brother had drugs, money and guns on his property. She later learnt that Kavon Hart was the appellant's brother. The appellant left his motor cycle at Charlita's house and subsequently went to the Hamilton Police Station on the 29th May 2010.

22. The appellant told D.C. Mathurin that he was with Dekimo on the night he was murdered but was not present when the murder occurred but was on his way to his girlfriend's house. The appellant gave Charlita's name and telephone number to the police as his alibi. She informed the police that the appellant had been with her on the 27th and 28th of May 2010.

23. In a conversation with one, Inez Dill, which was covertly recorded at the police station, the appellant told her that he had no motive for the murder, stating "nothing ain't pointing to me". He mentioned Charilita's name several times and said that she could be trusted and that he had slept over at Charlita's house.

24. Charlita was interviewed by the police on 30th May 2010 and on that occasion said that the appellant was not with her on the night of the murder. She insisted that this was the truth.

25. Charlita was cross-examined by Counsel for the appellant. She admitted that when the police came to her home on the 29th May 2010 she had told them that the appellant had been with her in the night of the 27th May 2010. She stated that she decided to speak the truth because she was no longer a friend of the appellant. During the night the appellant was emotional and crying and saying that Dekimo was his close friend and he would never kill his best friend.

26. Charlita admitted that she was arrested on the 30th May 2010 and subsequently charged with the offence of perverting the course of justice. She remained in custody at the police station for nine days. She contacted the police and she was interviewed. On 30th May 2010 she did not tell the police about the Clorox and vinegar. She admitted that the first time she mentioned that she had seen the appellant pouring Clorox and vinegar on himself was at the interview on 27th August 2010. At that time she was a defendant. She stated that she was willing to give evidence in the case against the appellant but this would be after she had been sentenced

27. On 5th May 2010 she gave a witness statement to the police. It was suggested to her that for the first time she was saying that the appellant told her that someone would come looking for her if she did not lie to the police. She did not mention it either on the 30th May 2010 or in the interview of the 27th August 2010. In this witness statement she said that she saw the appellant pouring vinegar on his body and saw the bottle of Clorox on the side of the tub with the top off. Charlita

denied that the reason she gave the evidence that she did was because a promise was made to her. She also denied that she gave the evidence for her own purposes.

28. The appellant's brother Kavon Hart (Kavon) was arrested on the 24th July 2010 for an unrelated matter. His Blackberry cell phone was seized and analysed. Several photographs were extracted from the cell phone and one showed a child holding a gun with an adult male present. The adult male was identified as Kavon Hart. Evidence was given that Kavon was an associate of the M.O.B. gang.

29. The statement of John Kirkpatrick, a firearm expert, was read in as part of the prosecution's evidence. He stated that he examined the photographs which showed a child holding a gun. He was able to identify the gun by observing the different angle of the gun. It appeared to him to be a 9 mm semi automatic pistol, the type of firearm which was used to commit the murder of Dekimo.

30. Evidence was also given that the unrecovered firearm used in the murder of Dekimo had been used in several shooting cases before and after the murder, all of which were connected to the M.O.B. gang.

31. Allison Murtha, a gun powder residue expert stated that she determined that the shooter was about three feet away when he shot Dekimo. The handle bars of the appellant's motor cycle were tested and she found at least six two component particles connected with G.S.R. and nineteen single component particles. She did not find any three component particles. When there are three component particles (gunshot residue) the only explanation is that it came from the discharge of a firearm. Whenever gunshot residue (three component particle) is found there are three possible explanation as to why it is there:

(i) The person discharged the firearm

(ii) The person was in close proximity when the firearm is discharged.

(iii) The person came into contact with an area or an environment that contained gunshot residue.

The expert also stated that the finding of two component particles was not necessarily gunshot residue. It would be speculation to say that it was gunshot residue as opposed to anything else. Also, sources of one component particle could be from fireworks, pyrotechnics or paint. The presence of gunshot residue (three component particles) does not necessarily mean that the person upon whom it was found discharged a firearm.

32. The appellant did not give evidence nor did he call any witnesses. His defence was a denial that he had committed the murder or that he was involved in any way with Dekimo's death. In his interview with the police on 29th May 2010, the appellant denied that he had shot Dekimo, that he had planned the shooting or that he had seen who did the shooting.

33. Four grounds of appeal were advanced on behalf of the appellant. These were:

(1) That the learned trial judge failed to direct the jury fully as far as a Turnbull/Identification direction was concerned as is settled and required by law. It was submitted that an examination of the transcript in this case, where identification was clearly an issue and indeed was the main issue for the jury to decide, will demonstrate that the direction that was given was fundamentally flawed in that it omitted key essential elements of the Turnbull direction. This failure, it was submitted, is in itself fatal to the safety of the conviction in this case.

(2) Secondly, and similarly going to the issue of identification is the gunshot residue evidence. The gunshot residue

evidence as it stood should not have advanced the prosecution's case. There were no three component particles such as could properly be described as gunshot residue. Instead there were two component particles and single component particles. It was submitted that the learned trial judge summed up in such a way as to leave the jury with an impression that the two component particles meant that the appellant must have fired a gun. This, it was submitted, was reinforced by the learned trial judge's reference to the gunshot residue being on the handlebars. It was speculation to say that the two component particles are gunshot residue as opposed to anything else. Furthermore, he erroneously stated that you could distinguish between two component firearm sourced particles and other particles by reference to their shape.

(3) Thirdly, that prejudicial evidence was wrongly admitted as part of the evidence in the case against the appellant. Such evidence was of limited evidential value to the Crown and the prejudicial nature of that which was placed before the jury far outweighed its probative value. Reference was made to the photograph's exhibits which were before the Court in the bundle submitted on behalf of the appellant as well as the evidence of officer Rollins to be found in the transcripts.

(4) That the summing-up was unfairly weighed in favour of the prosecution and unbalanced as far as the appellant's case was concerned, the learned trial judge failed to "hold the balance between the prosecution and defence cases", in particular raising matters in favour of the prosecution's case that had not been previously placed before the Court by Counsel for the prosecution depriving the appellant of the right to respond. The most stark example, it was submitted,

was the introduction of the appellant's character by the trial judge during the summing-up.

Identification

34. Ms. Christopher for the appellant submitted that Danielle Martin's evidence required a full Turnbull direction from the trial Judge. The appellant was a frequent visitor to 8 Peacock Lane. There was evidence that prior to the shooting the appellant had come to the premises. The appellant himself admitted that he had visited the premises but had left and was not present during the shooting.

35. At the trial Danielle Martin did not identify the appellant as the person running away after the shooting. She did give a description of the height and build of the man and stated that the appellant was similar in height. The prosecution did not rely on Danielle's evidence as identifying the appellant as the man running away. The prosecution's case as to identity was one of circumstantial evidence. There was also evidence that the appellant was heard talking to the deceased prior to the shooting. The trial Judge said at p. 70:

> *"People do not generally commit crimes where everybody can see. Things tend to be done in secret. And therefore although one – direct evidence would be nice to have, it is not always that you have it and the Crown has to rely on circumstantial evidence."*

36. In his directions to the jury the trial Judge at p. 1044 stated:

> *"The issue as to whether he was the person talking to the deceased, immediately before the shooting is still in dispute. That's an issue that you will have to deal with.*
>
> *As for Miss Danielle Martin who was upstairs, she never said definitely that the person she saw running away was him.*

That is a circumstantial evidence situation that you have, for you to determine that it was him. She said – she gave a description that you will – can conclude, tended to fit him".

37. The issue may arise as to whether in view of the evidence, it was necessary to give a full Turnbull direction. In any event the trial judge at p. 1045 directed the jury as follows:-

"It is said that care – when it comes to the identification of a person or the recognition of a person, you should consider for how long that person said that they saw the person, knew the defendant, how long they kept him under observation, at what distance and what light, did anything interfere with the observation, had the witness ever seen the person he or she observed before, if so, how often, if only occasionally had he or she any special reason for remembering him, how long was it between the original observation and the identification and the identification to the police, is there any marked difference between the description given by the witness and the person who they referred to or the appearance of the person to whom they referred to.

So those are factors that you will take into account. It has also been known that even in cases where persons have known persons for a long time, mistakes have been made; because you can remember those many times when you have heard the statement, "I could have sworn it was you". But as I said in this case, there does not appear to me to be any dispute that the defendant was at 8 Peacock Crescent on that night for some time.

That he was in conversation at some point there and in association with Dekimo Martin. The issue is whether he was there at the time of the shooting".

38. As to voice recognition the trial Judge directed the jury at p. 1047 as follows:

"So when it comes to voice identification, I must say that you must be careful before accepting voice identification, because research has shown that voice identification is even more difficult than visual identification. You should only accept that evidence if

you are sure, in the circumstances, that the witness, whose evidence you are considering, really knew that voice to which he or she was referring and correctly identifying it.

Remember Miss Chesy said he can change that voice if he wants, but I knew him. I knew his pitch. I knew it well.

That is one of the considerations, but you will remember also that under cross-examination the defence counsel got her to say that it was muffled.

You should consider all the evidence relating to that issue, that is the issue of the voice I.D., the length of time the defendant has known and has heard – sorry, the length of time the witness, whose evidence you are considering, has known and heard the defendant, the amount of time he or she heard that defendant before and at the scene, the number of persons speaking of it at the time, the number of persons who were speaking at the time, that is the defendant, as they said it was of ... and Dekimo and so on. And you should also consider why the witness said he or she knew the voice or why they did not say. In this case you had reasons given why they said they knew the voice".

39. Further directives were given by the trial judge at p 1070:

> *"I also gave you a direction about the kind of difficulties one could have sometimes in identification or recognition of persons they say they knew and the caution you must take in those circumstances, and the things you must – you should look for to assist you in determining whether a person has correctly identified or recognized a person including visual identification and by way of voice identification".*

40. Ms. Christopher referred the Court to the case of Aurelio Pop, Privy Council Appeal No. 31 of 2002. In that case the prosecution's case against the accused depended solely on the identification of one witness. It was in fact a dock

identification. No Identification Parade had been held. In those circumstances it was necessary for the trial judge to give a full Turnbull direction.

In the case before the Court, the prosecution relied on several pieces of circumstantial evidence for the consideration of the jury as to whether it was the appellant who shot the deceased.

41. Having regard to the evidence in this case, we are satisfied that the directives given by the trial Judge were adequate in the circumstances. This ground of appeal fails.

42. **Gun Powder Residue**

Ms. Christopher submitted that the trial Judge misdirected the jury in that he told them that the finding of two component particles indicated that the appellant discharged the gun.

43. In his directions to the jury the trial Judge at p. 1182 said:

> *"I think what is essential is that she reconfirmed, you may recall, through a series of questions put by the Judge, that in the absence of other evidence, the presence of GSR or two component particles consistent with GSR, or even single component particles, do not by themselves necessarily mean that the person to whom they are attached or the items to which they are attached if his, means that he discharged a firearm. Nor does the absence by itself mean that they did not discharge a firearm".*

44. In dealing with the case for the defence the trial judge identified several points which he said formed the basis for the defence. At p.1228 the trial Judge stated:

> *"Eleven, as for the consistent with GSR particles found on the bike, they really add nothing to the case at all. In light of the recognition of the other evidence anyway you heard their presence do not necessarily mean the defendant fired any gun. And he is saying he never did. Those particles could have come from anywhere".*

45. We are satisfied that this complaint is not valid and found that there was no misdirection on the part of the trial Judge.

46. **Photographs:**

Ms. Christopher submitted that the learned trial Judge was in error in admitting the photographs. These were the photographs showing a child holding a gun with an adult standing behind the child. The adult was identified as Kavon Hart, the brother of the appellant. Counsel argued that the evidence was prejudicial and of no probative value. Objection was taken at the trial as to the admissibility of the photographs by Ms. Hollis Q.C. on behalf of the appellant.

47. Mr. Mahoney for the Crown submitted that the photographs were admissible to show that the appellant would have access to the firearm through his brother. The firearm was identified as one similar to the firearm which the Crown alleged was used in the incident. A firearm which the prosecution alleged was a firearm which was used in other shootings which involved members of the M.O.B. gang. The evidence would also support the evidence of Charlita Campbell who stated in evidence that when the appellant came to her he said that he could not go to his brother's house, because he did not want to put the heat on him as his brother had guns and drugs at his house. The defence at trial suggested to Charlitta that her evidence was a lie. The evidence was not led to infer or link the appellant as a member of the M.O.B. gang.

48. In making the photographs admissible the trial Judge stated in part.

> *"So to make it clear, what I am saying is I'm satisfied at this point that there is a sufficient link of those photographs to ....To a factor in issue.*
> *Two matters in issue for that matter; one goes to the credibility of Ms. Campbell in respect of her assertion that the defendant told her that he could not use his brother as an alibi because of the presence of guns on his property.*

Two, he had told her, according to her, that he had left the Lewis' home on the night of the shooting and he had gone to his brother's house, and now could not use his brother because it will put his brother in trouble, put the heat on his brother because of his guns.

Three, she has been attacked by the defence as a liar, embellisher and a make-up of stories and a deal maker with a personal interest to serve; and therefore this evidence is relevant in that it tends to support her assertions and negative the assertions that she is, as described by the defence.

Four, I am satisfied that the experienced armourer in these circumstances could identify a firearm of that sort shown in the photograph, as to whether it appears to be a 9 mm or not, the type of firearm that is alleged to have been used in this incident.

And the other relevant point, or issue, is access to a firearm by a defendant, in this case who says he was not the shooter".

49. The trial Judge made it clear that he had not ruled that the evidence was admissible on the basis of any motive connected with any gang or membership of the gang either by defendant or anybody else, especially by the defendant. Mr. Mahoney submitted that no complaint was raised by Counsel for the appellant in respect of the directions to the Jury in relation to the photographs and the M.O.B. gang.

50. We find that there was relevant evidence before the Court to enable the trial Judge to come to the conclusion that the photographs were admissible.

51. Ms. Christopher also submitted that the evidence of Sgt. Kenneth Rollins should not have been allowed in evidence and that Ms. Hollis had also objected to the admissibility of his evidence when objection was taken to the admissibility of the photographs.

52. A transcript of the submissions made by Ms. Hollis was ordered by the Court. We have reviewed the transcript and it does not disclose any objection taken by Ms. Hollis or any submissions made as to the admissibility of the evidence of Sgt. Rollins. Ms. Hollis is quoted as saying at p. 25 that the transcript "and that's why I take issue with the admission of the photographs into evidence".

53. In fact when Sgt. Rollins was called to give evidence, before he gave his evidence, Ms. Hollis informed the Court " My Lord I don't object to the evidence that this witness is about to give, it's just the use of the word "expert". At the conclusion of his evidence-in-chief, Ms. Hollis informed the Court "I have no questions". She did not cross-examine the witness.

54. Mr. Mahoney submitted that the evidence of Sgt. Rollins was admissible and that no objection was taken to his evidence. He referred to the case of ***Quincy Brangman v The Queen Cr. A. No.1 of 2011***.

55. We can find no basis on which it could be said that the trial judge was in error in admitting the evidence of Sgt. Rollins.

Ground 4.

56. Ms. Christopher submitted that the summing-up was unfairly weighed in favour of the prosecution and unbalanced as far as the appellant's case was concerned. The appellant did not call any evidence. We are satisfied that the trial judge's summing-up was fair and that the case as put forward by the appellant was clearly articulated to the jury. The trial judge directed the jury to all the points which were raised or apparent from the cross-examination of the witness for the prosecution. This included the interview given by the appellant to the police in which he denied that he was involved in the shooting.

57. Mr. Mahoney referred the Court to the case of ***R v Hillier and Farrar 97 CR App 349.*** In that case Watkins L.J. stated:

> *"It is in our experience often, too often, we think, argued unavailingly almost always, in this court that a judge has not presented properly in summing-up a defendant's defence, after that person has not given evidence. We must make this clear yet again, namely that it is no part of a judge's duty to build up a defence for someone who has not chosen to give the jury the benefit of his version of material circumstances and events. The Judge's obligation is limited to reminding the jury, in summary form, of what the defendant is said to have stated as to those matters at some time or another pre trial and what assistance, if any the crown's witness have provided".*

58. The trial Judge fairly left the issues to be decided by the jury. Having examined the directions as a whole we are unable to say that the Judge failed in his duty to properly and fairly direct the jury. The Judge's directions were based on the evidence presented to the jury. This ground of appeal fails.

59. The circumstantial evidence presented by the prosecution was a strong case and the jury's verdict cannot be faulted.

60. It was for these reasons the Court dismissed the appeal and affirmed the convictions.

Signed

Zacca, P

Signed

Ward, JA

Signed

Auld, JA