IN THE COURT OF APPEAL OF BELIZE, A.D. 2006

CRIMINAL APPEAL NO. 25 OF 2005

BETWEEN:

SHERWOOD WADE	**Appellant**
AND	
THE QUEEN	**Respondent**

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BEFORE:

The Hon. Mr. Justice Mottley	**-**	**President**
The Hon. Mr. Justice Sosa	**-**	**Justice of Appeal**
The Hon. Mr. Justice Carey	**-**	**Justice of Appeal**

Mr. Simeon Sampson, S.C. for appellant.
Mr. Kirk Anderson, Director of Public Prosecutions, for respondent.

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29 June & 27 October 2006.

CAREY, JA

1. We heard submissions in this appeal from Mr. Sampson, S.C. and Mr. Kirk Anderson, Director of Public Prosecution on 29 June last, which we dismissed and promised reasons. We now fulfill that promise.

2. The appellant was convicted before Arana J sitting with a jury on a charge of manslaughter by negligence and sentenced to pay a fine

of four thousand dollars and in default a warrant of distress was to issue.

THE TRIAL

3. The incident which resulted in the trial involved a member of the police force who, it is alleged, shot an unarmed civilian in circumstances the salient aspects of which, we now rehearse. The prosecution called three witnesses, to the event, namely, Clive Jones, Patrick Palma and Selvyn McDonald.

4. In the early morning of 13 June 2003, police officers were attempting to arrest a man, known as "Crazy", outside Celina's Night Club in Ladyville Village, an occurrence which attracted a number of persons who were leaving the club which had closed about that time. Upon the arrival of a police vehicle on the scene, attempts were made to put the man in the back of the vehicle. Some members of the crowd were hostile to the police action and some young women in the crowd armed themselves with sticks and stones. From the vantage point of the back of a pick-up truck onto which he had climbed, Clive Jones was able to see what took place. He stated that he saw the appellant whom he knew before, pull out his "rifle" and "burst a shot in the air". He amended this reference to a rifle by saying it was "a 9mm gun". The discharge of the firearm, caused the crowd to move backwards momentarily but it as quickly resumed its former position. At this point, the officers finally succeeded in placing the man whom they were attempting to arrest, onto the police vehicle, which began moving away slowly. The crowd began immediately to throw stones at it. The police vehicle did not hasten away but stopped. Jones said he saw the appellant pull his hand gun, at which time he jumped from the pick-

up and as he did so, he heard a gunshot and he was shot in his left leg. The police vehicle then drove away. Although he heard some three or four shots, he saw no person other than the appellant with a gun. He was taken to the hospital.

5. The second witness was Patrick Palma who was among the crowd of persons who left the club after it closed. When he emerged, he saw police officers struggling with 'Crazy" who had a knife which they were attempting to take from him. A police vehicle came on the scene and reversed by some bleachers. He saw the appellant fire a shot in the air. At that time, persons were around the truck and the participant in the struggle, Crazy, was eventually placed in the police vehicle which drove away. The appellant fired three more shots from the back of the police vehicle towards the crowd. He saw no other officer with his gun drawn. There was a white van which drove off behind the police vehicle. He heard "a last shot" but, he did not see who fired it. The van immediately turned off the road after the shot was fired. He rode his bicycle after it "to see who was injured". He saw one of the men in the van being removed. That man was injured; he was bleeding from his face.

6. The final eye witness was Selvyn McDonald, the brother of the slain man. He too had gone to Celina's that night with his brother. In the early hours of the morning, while they were outside the club waiting on two of his brother's friends to join them to go home, he noticed some police officers including the appellant taking a man from the Club, whom they placed in the police vehicle. During this exercise, his brother returned without his friends. In the event, they decided to await their return in their van. After a while, his brother's friends arrived but they were unable to drive away because the police vehicle blocked their path. The crowd which had gathered to watch

the police activity, approached the police vehicle. McDonald said he saw the appellant fire a shot which caused the crowd to withdraw for a little distance. The police vehicle which then began moving away was stoned by some persons in the crowd. As the police vehicle pulled away, his brother drove behind it. His truck had its headlights on illuminating the police vehicle ahead. The appellant fired shots from the back of the police vehicle, one of which shattered the windscreen and hit his brother Darnell McDonald in the nostril. He was able to steer the vehicle as his brother had slumped in the seat beside him: his brother was dead.

7. In the course of being cross examined, this witness admitted that he did not mention to the police the name of the police officer who shot his brother. He said that he told the police officer to whom he gave a statement that the shots were fired by a policeman – "from a police". His explanation which the jury had before it for its consideration, was – "I was frustrated and angry. It was really shocking, you know. Just watch your brother died right in front ah you. It was really sad. I no even wanted to give any statement that morning".

8. We can now complete the picture by mentioning other evidence in proof of the charge against the appellant. First, the medical evidence confirmed that the victim had been shot in the face and neck by a bullet which had fragmented before hitting him. Accordingly, there were two entry wounds, one immediately to the left side of the wing of the nose, the other, in the left side of the neck. Death was due to subarachnoid and cerebellum haemorrhage. The second entry wound had no direct relationship to the cause of death. In the doctor's opinion, the injury could have been caused by a medium caliber projectile, expanded to mean, in

reference to hand weapons, as between a .38, .380 or 9mm gun. A fragment of the bullet which the doctor removed from one of the wounds, he handed over to the police.

9. The final significant witness from whom evidence was adduced on behalf of the prosecution, was the Police Armourer, Mr. Albert Ciego. The main point of his evidence was that four spent shells recovered from the vicinity of the shooting, were fired, in his opinion from the appellant's 9mm Glock, that the "slug" retrieved from the body of the deceased was a damaged 9mm round. In reply to Mr. Sampson, S.C. who also appeared at trial, he stated that he could not say what gun fired it.

10. The appellant made an unsworn statement in which he emphatically denied that he unholstered his firearm and discharged it on that night. He heard shots fired: others of his colleagues did.

11. It is clear that by its verdict, the jury did not give any credence to that tale.

THE APPEAL

12. Two grounds of appeal were filed and argued on behalf of the appellant by Mr. Sampson, S.C. They related to the identification evidence adduced at the trial. The first ground was in the following form:

> "The learned Trial Judge erred by not withdrawing the case from the jury because (i) The quality of identification by the sole witness could not be described as good have been made in difficult (dark) conditions; and there was no other

supporting evidence, or any other special attendant circumstances.

(ii) the testimony of the last prosecution witness, that is, Selvyn McDonald given on 12 July 2005 about the appellant shooting was virtually a "dock identification" not normally permissible as he gave no description of the assailant to the police immediately after the incident on 14 June 2005 … not in the previous trial October 2004 (in the Supreme Court)

GROUND II

"In all the circumstances the verdict of the jury was unreasonable or cannot be supported having regard to the evidence".

13. It is, we think right to note that the live issue in this case was not identification having regard to the defence which was raised. The appellant was not disputing his presence on the scene, he was denying that he had discharged his firearm that morning, and caused the death or injury to anyone. In these circumstances there was no possibility of the "ghastly" risk of mistaken identity and accordingly, a full Turnbull warning would not be necessary. We commend the observations of the Board in *Mark Anthony Capron v. R. (unreported) P.C. Appeal No. 32 of 2005*, delivered 29 June 2006. These are not to be understood as suggesting that the evidence of the circumstances in which the shooting occurred was of no importance. The prosecution had to satisfy the jury that the eye witness spoke not only accurately as to the identity of the shooter but also truly. Further, that the prevailing conditions gave him an opportunity for recognizing and identifying the shooter. There is an obligation cast upon a trial judge to withdraw a case from the jury and direct an acquittal, where, "in the judgment of the

trial judge the quality of the identifying evidence is poor, for example, where it depends solely on a fleeting glance or on longer observations made in difficult conditions…" per Lord Widgery in *R. v. Turnbull [1977] 1 Q.B. 224 at 229 – 230*.

14. We turn then to consider whether Mr. Sampson's submission that the identification was in difficult conditions, so that it rendered the quality of the identification poor, is supported on the evidence. There was no question but that when the fatal shooting occurred, the roadway being traversed, was dark. The prosecution witness Patrick Palma, admitted that – "traveling in the direction of Belize City from that spot there are no more electric light, no more lights until you get to the other gas station going to the Phillip Goldson Airport…"

"…and the surface of the highway is black tar…"

The other witness to speak off the conditions, accepted the defence suggestion that:

- "there are no more street lights on any side of the road.
- No lights at all. And on the right hand side of the road as you travel towards Belize City is grass, mangrove and bush.
- And the road at that spot is pitch black, at that time was tar black.
- Under the darkness from the vegetation, the grass, the bush on the right hand side, the grass and the bush throw darkness on the road…"

These admissions encouraged and emboldened Mr. Sampson, S.C. to argue that the conditions were difficult.

15. This picture of unrelenting pitch blackness being advanced by learned counsel was a visual fallacy. Both witnesses who spoke to the surrounding and background conditions indicated to the jury that the appellant when firing after the police vehicle pulled away, was sitting at the back of the police vehicle. The vehicle in which Selwyn McDonald was a passenger, and his brother, the slain man the driver, was driving a distance of some 70 to 80 feet from the police vehicle with its headlights on. The witness McDonald stated:- "I could have seen exactly who was firing the shot because my brother vehicle lights were right on behind the police truck…"

When pressed by Mr. Sampson in course of cross examination, regarding his ability to see, the witness responded:-
"Not really because the van light, the van light was in the back of the pick-up, yes, sir".

The distance between the vehicles, he estimated at fifty feet.

We are quite unable to accept the submissions that the evidence to which we have referred and which Mr. Sampson chose to ignore, would amount to identification "in difficult (dark) conditions". We do not suggest that the conditions were ideal but the distance between the two vehicles was not great, and the lighting was directly on the appellant who was known to the witness.

16. It is apposite to mention that contrary to the contention that there was an absence of "other supporting evidence or any other special attendant circumstances", there was in our opinion some such evidence. The prosecution led evidence from the armourer that the Glock firearm which admittedly belonged to the appellant, had been discharged at the scene of the occurrence; four shells retrieved

from the scene had been discharged from that firearm. This fact would have given the lie to the appellant's statement that he had not fired on that night. That lie was, in our view, capable of amounting to corroboration because it satisfied the conditions laid down in *R. v. Lucas [1981] 2 ALL E.R. 1008* , that is, (i) it must be deliberate, (ii) it must relate to a material issue, (iii) the motive for the lie must be a realization of guilt and a fear of the truth. It thus supported evidence that the gun was fired and identified the appellant as its user in the crime.

17. Part (ii) of the first ground addresses the question of the validity of the dock identification of the appellant by Selwyn McDonald. There was no question that the witness' identification was in the dock. No identification parade was held. None was held because the appellant refused to participate in one. Howsoever, that might be, we do not consider that an identification parade was, at all events, necessary: McDonald gave unchallenged evidence that both the appellant and himself were at school together and after those days, he had often seen him on the streets. In the interest of completion, we note the witness Palma also knew the appellant before the incident. Mr. Sampson did not mention Palma as also making a dock identification, but his skeleton arguments made the point. We point out that this witness' evidence was not challenged in cross examination. The absence of a parade has already been noted. We doubt that the appellant's refusal to participate in a parade, can be expected to tell in his favour.

18. Mr. Sampson took some time to argue that because McDonald had admitted that he had not disclosed the identity of the shooter when he was first interviewed by the police, that was proof that the witness' credit had been completely destroyed. In course of re-

examination, however, the witness had proffered an explanation which, it was for the jury to consider and give such weight as they thought fit. We do not think that from any rational standpoint, it could be said that the failure or reluctance of the witness, to disclose at the first occasion, rendered the identification of poor quality. In the result, we are not persuaded that the trial judge erred in not withdrawing the case from the jury's consideration.

19. Mr. Sampson did not press ground (ii). His main point was that the fragmented bullet recovered from the body of Darnell McDonald was not conclusively linked to the appellant's gun. That was indeed the effect of the Police armourer's evidence. The only definitive evidence he gave in relation to this fragmented bullet, was that it was of 9mm caliber. The evidence implicating the appellant on the charge was to be found in the eye witness account and the inference to be drawn from the fact his gun was found to have been fired and bullets were recovered. Having reviewed the evidence in the early part of this judgment, we do not propose to reiterate what we have already said. There was in our judgment, a case to go to the jury and overwhelming evidence to support the verdict of the jury. We are satisfied that the verdict was not unreasonable, and was supported by the evidence.

MOTTLEY P

SOSA JA

CAREY JA