

CRIMINAL APPEAL NO. 18 of 2009

BETWEEN:

BRIAN HERRERA

Appellant

AND

THE QUEEN

Respondent

BEFORE:

The Hon. Mr. Justice Mottley

-

President

The Hon. Mr. Justice Sosa

-

Justice of Appeal

The Hon. Mr. Justice Carey

-

Justice of Appeal

Hubert Elrington SC for the appellant.

Cecil Ramirez for the first respondent.

4 March, 14 June 2010.

MOTTLEY, P.

[1] On 17 July 2009, following a trial before Legall J and a jury, the appellant was convicted of murder and sentenced to imprisonment for life. He now appeal against his conviction. On 4 March 2010 his appeal was heard by this Court and allowed. His conviction was quashed, the sentence set aside and a verdict acquittal entered. At that time, we promised to give our reasons at a later date. These are those reasons.

[2] The appellant was charged that on 17 October 2005 he murdered Eugene Encalada who was also known as "Witch".

[3] The prosecution's case was entirely dependent on circumstantial evidence (including evidence of gun shot residue such as it was). None of the witnesses called gave any evidence identifying the appellant as the person who did the shooting.

[4] Sydney Adolphus, who gave his address as 80 Dean Street in Belize City, said that around 10.00 pm on 17 October 2005, he was in the downstairs part of the house at 80 Dean Street where he was watching television. Someone who was known to him by the name of "Witch", the deceased Eugene Encalada, came to the house and asked for Lisburn Peters. Peters left the house and went outside to talk to "Witch". While they were talking "someone passed by and fired some shots". This shooting caused him to look for some place to hide. While doing so he saw Peters run from the gate. At the time the shots were fired, "Witch" was by the gate leading to the house. Adolphus said that he did not see who fired the shots.

[5] Lisburn Peters, a taxi driver, who also resides at 80 Dean Street, was talking to "Witch" for about five minutes when a "young man" riding a bicycle came from Amara Avenue, stopped and fired two shots at "Witch". After the first shot, Peters ducked and ran to the baker shop to hide. He said that the young man who fired the shots had something pulled over his face and as a result he could not see it. Peters was unable to say how the young man was dressed.

[6] It is necessary to understand the layout of the road in that area. Amara Avenue runs at a right angle to Dean Street; Euphrates Avenue is to the east of Amara Avenue and runs parallel to it. Like Amara Avenue, Euphrates Avenue is at a right angle to Dean Street. Tigris Street is to the east of and runs parallel to Euphrates Avenue and crosses over Dean Street at right angle. West Street is to

the east of Tigris Street and runs parallel to Euphrates, Amara and Tigris and crosses Dean Street.

[7] Andrew Godfrey who resides at 51A Dean Street, was the manager of Salty Dog Cafe, a restaurant which is situated at the corner of Dean Street and Euphrates Avenue. About 10:00 – 10:05 pm while sitting on his verandah, Godfrey heard a gun shot which appeared to have come from the direction of Amara Avenue. He ducked down on his verandah, but was still able to see someone ride past the Salty Dog Café. He described that person as being of fair complexion and wearing a “ski mask with an oval opening just around the eye piece”. He said that when the cyclist was about 20 to 30 feet from the junction of Dean Street and Euphrates Avenue a grey police vehicle came down Euphrates Avenue and turned left on to Dean Street. Shortly afterwards, a white police vehicle arrived and stopped by the grey one. He came downstairs and went to Dean Street where he saw a person he recognized as “Witch”. He had been shot. The person who rode past him on the bicycle while he was sitting on his verandah was shooting in a backward motion in the direction where he later saw Witch on the ground. Although the person was 5 feet away when he rode pass him, he was unable to recognize him because he was wearing a ski mask.

[8] PC 157 Ivan Galvez was the driver of the police vehicle on Euphrates Avenue going in the direction of Dean Street. On reaching approximately 60 metres from the junction of Dean Street and Euphrates Avenue, he heard several gunshots coming from the direction of the Western area somewhere around the area known as Kick Down Fence. He increased the speed of his vehicle. On arriving at the corner of Euphrates Avenue and Dean Street, he saw a male person riding a black beach cruiser bicycle which had a red fork. The cyclist was wearing a grey T-shirt and a dark ¾ jean pants. He had a black warm cap like a mask over his face. The warm cap had holes through which you could see. The cyclist was riding along Dean Street going in an easterly direction. He pursued the cyclist and when he reached within 15 feet of him, the cyclist turned right onto Tigris. After passing about 2 to 3 houses, the cyclist rode into a yard, dropped

his bicycle and ran into a yard and jumped over a fence. He saw a person who was wearing the grey T-shirt and dark ¾ jeans pants. At this stage the person was not wearing a mask. He recognized this person as Brian Herrera and also knew him as Bido.

[9] PC No. 237 Henry Jemoth, Sergeant of Police, was travelling on West Canal Street heading in the direction of Dean Street. While at the corner of West Canal and Dean Street, he heard “what appeared to be the sound of gunshots being fired”. While on Dean going towards Euphrates, he saw a male person on a bicycle who turned left into Tigris. The male person was wearing a grey T-shirt and dark coloured pants. He observed this person put his left hand into his front pants pocket and removed a black object which he threw into a nearby yard. The male person was held by the Sergeant and DC #484 Camal. The Sergeant recognized him as Brian Herrera who was also known to him as Bido. Shortly after he was held a bag was found containing 40 gold Winchester brand 38 live rounds.

[10] Darlene Gabourel, a crime scene technician, took swabs from both hands of the appellant on the same night that he was arrested. The swabs were taken to ascertain whether any gunshot residue was on the hands of the appellant. The swabs were subsequently examined by Geneveva Marin, the Chief Analyst at the National Forensic Science Service. She found that the swabs from the appellant’s hands did not show any residue of lead and barium, components of gunshot residue. The analyst explained to the court that lead and barium are components of gunshot residue and are used to determine the presence of gunshot residue. Two particles of lead and barium were in fact observed on the grey T-shirt on the front sleeve and shoulder area. In cross- examination, the analyst conceded that lead is also a component of other household substances such as gasoline and paint. Hairs found on the mask which was recovered was recovered that night by the police were sent for DNA examination. This examination was not done. However, only a microscopic examination was

carried out on the hairs. It was determined that the hairs sent were insufficient to conduct a morphological comparison.

[11] This was the state of the evidence at the close of the case for the prosecution. Counsel who appeared on behalf of the appellant at the trial submitted that there was no evidence as to the identity of the person who did the shooting. She pointed out that the swabs taken by the police from the hands of the appellant did not show the presence of lead and barium which are essential for any finding of gunshot residue. Counsel submitted that the presence of lead and barium on the shirt was not by itself conclusive of anything as lead is a component of household substance such as gas and paint. She also relied on the failure of the forensic evidence to establish any link between the appellant and the hairs found on the mask.

[12] Mr. Ramirez, Crown Counsel, in his response readily conceded that there was no direct evidence linking the appellant with the shooting. He stated however that the prosecution's case was based on circumstantial evidence. This evidence, he said, came from Andrew Godfrey and police officers Galvez and Jemoth. Godfrey said that person he saw riding the bicycle had on a ski mask and was wearing a T-shirt and short pants. Mr. Ramirez submitted that the witness Godfrey said that as the cyclist rode the bicycle he was "shooting at Witch in a backward direction when he was riding away from the scene". Counsel said that when the police apprehended the appellant he was wearing clothes similar to that which the person he saw riding the bicycle was wearing. He submitted that there was sufficient evidence that a jury properly directed might convict.

[13] Legall J in giving his ruling indicated that "the question was whether the person who shot "Witch" was the same person who the police arrested". The judge went on to rule that in his view there was a case to go to the jury.

[14] In his sole amended ground of appeal Mr. Elrington SC submitted that the judge erred and was wrong in law when he overruled the submission made on behalf of the appellant that the appellant did not have a case to answer. He contended that the judge ought to have withdrawn the case from the jury as there was no evidence from which the jury could properly infer that the appellant was the person who shot Witch. Consequently, he argued that the judge's failure to accept the no case submission led to a miscarriage of justice within the meaning of section 30(1) of the Court of Appeal Act Cap. 90.

[15] This Court accepted that there was substance in Mr. Elrington's submission. The prosecution's case taken at its highest does not indicate who shot Witch.

[16] In **Teper v The Queen [1952] AC 480** at p. 489, Lord Norman pointed out:

“It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there were no other co-existing circumstances which would weaken or destroy the inference.”

[17] Godfrey saw someone riding a bicycle along Dean Street wearing a grey T-shirt and ¾ jean pants and shooting backwards along Dean. Godfrey's evidence does not show, as Mr. Ramirez stated in his reply to the submission of no case to answer, that the person riding the bicycle was shooting “at “Witch” in a backward direction”. This was not stated by Godfrey and could not have been as Godfrey did not see “Witch” until he left his verandah and went to where “Witch” was found on Dean Street. Godfrey did not say whether anyone was on Dean Street at the time when he saw the cyclist shooting “in a backward direction”. In addition no evidence was given as to the distance between the junction of Dean Street and Euphrates Avenue and the position where the body was found. The evidence given by Godfrey, Galvez and Jemoth, at its highest, shows that the

person riding the bicycle shooting on Dean Street may have been the appellant. It however, did not link the appellant with the shooting of "Witch".

[18] Neither Adolphus nor Peters gave any evidence as to the manner in which the person who did the shooting was dressed. In other words, the evidence does not link the appellant with the shooting of the deceased on Dean Street. Most telling was the absence of gunshot residue on the swabs which were taken from the appellant within 3 hours of the shooting had taken place. The appellant was taken in police custody shortly after the shooting. The prosecution offered no explanation why, if the appellant was the person who did the shooting and indeed if he was in fact shooting backwards on Dean Street, gunshot residue was not found on the swabs taken from the hands of the appellant shortly after the shooting. The prosecution did not lead any evidence from Adolphus or Peters to show that other persons were on Dean Street at the time of the shooting. Nothing in the evidence shows that the appellant was the person who did the shooting.

[19] These are circumstances which in the opinion of the Court destroy any inference of guilt.


MOTTLEY P


SOSA JA


CAREY JA