IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Criminal Appeal No. 19 of 2011(further grounds)
(Indictment No.084/2010)
C#08844/2010

Before:

The Rt. Hon. Sir John Chadwick, President

The Hon. Elliott Mottley, Justice of Appeal

The Rt. Hon. Sir Anthony Campbell, J.A.

In the presence of Mr Malcolm QC instructed by Clyde Allen for the appellant and Trevor Ward for the Director of Public Prosecutions

Between:

HER MAJESTY THE QUEEN

Respondent

- and -

LEONARD ANTONIO EBANKS

Appellant

Hearing and Judgment: 26 November 2012
Reasons for judgment released: 16 September 2014

Mottley J.A.

1. On 30 September 2011, the Appellant was convicted by Mr. Justice Quin, sitting without a jury, of the murder of Tyrone Burrell on 8 September 2010. The Court has previously dealt with the ground of appeal relating to the allegation that the trial judge was biased. The judgment deals with the other grounds of appeal.

2. The Crown's case was that Arlene White ("Ms. White") was living at 177 Birch Tree Hill Road in West Bay (177 Birch Tree). She was residing there since 22 January 2010, the date she commenced working for Tishara Webster as a live-in domestic and baby sitter. A number of other persons resided at the property. Ms. White knew the Appellant who she called "Tonio" since June 2010. She knew the Appellant very well as he virtually lived at 177 Birch Tree as he was there late at night and also early in the morning; sometimes he had breakfast and was just like a family member.

3. On 8 September 2010, the Appellant was at 177 Birch Tree in the morning and remained there for almost the entire day, leaving at sometime but returning. Around 4:00pm the Appellant left; at that time, he was wearing a short jeans pants and a white merino.

4. About 5:00pm, Tyrone Burrell, the deceased, was at 177 Birch Tree. The deceased purchased a hamburger from Ms. White who was in the kitchen making burgers and fries. Around 6:00pm, Ms. White gave the deceased the burger and told him that he should leave as it was getting dark. Ms. White said that she told the deceased to leave because every time she saw him she could "*see trouble for him*". She explained that she had a promotion that something bad was going to happen to the deceased. The deceased left the premises going to the right side of the house in the area of a mango tree.

5. Around 7:00pm, Ms. White's attention was attracted by a noise outside the house which sounded like something falling on the ground. She decided to go and see what was happening outside. On her way through the door leading to the outside of the house, Ms. White saw the Appellant moving swiftly. She saw the Appellant's bicycle on the ground outside near to the living room window. When she saw the Appellant passing the kitchen

door swiftly, he was wearing a black "*tall sleeve shirt*" and short black pants; he had a black baseball cap on his head. He had a black and white handkerchief wrapped around his hand. When the Appellant passed by the kitchen door he was approximately 2 to 3 feet away from Ms. White. She stated that nothing impeded her view of the Appellant as he headed in the direction of the mango tree. After she saw the Appellant go pass her, she returned to the kitchen and continued what she had been doing. Shortly after, approximately five seconds after, seeing the Appellant swiftly going pass in the direction of the mango tree, Ms. White heard what sounded like a gun shot.

6. Ms. Webster joined to Ms. White and they both went outside where they found Tyrone Burrell lying on the ground beside a boat. He appeared to be dead. Approximately 10 to 15 minutes after finding the body of the deceased, Ms. White and Ms. Webster, along with her baby, went to the West Bay Police Station where Ms. Webster made a report to the police about the shooting of the deceased.

7. Around 10:00am on 10 September 2010, the Appellant went to 177 Birch Tree. The Appellant spoke with Travis Bodden in his room. After they left the room, Ms. White started to tidy Travis's room. While doing this, the Appellant returned to the room and spoke to her asking her "*what was happening*". Ms. White responded that she was "*here on repentance ground*". She explained that she meant she was "*trying to be a Christian and trying to live for the Lord*" and that was why she used the word. The Appellant then asked Ms. White if she knew "*who killed the little boy*". She responded that she did not know. The Appellant said that "*him kill the pussyhole*". Ms. White told the Appellant "*The blood of Jesus against you why you kill the youth*". The Appellant responded "*Tyrone shoot up the old lady's house up the road*". He said it was Devon's mother's

house. He further said that the deceased was a spy who "*goes from Logwood to Birch Tree Hill carrying news back and forth*". Ms. White explained that there was "*violence between Logwood gang and the Birch Tree Hill gang*".

8. On 21 September 2010, Ms. White asked the Appellant to get her a bottle of bleach. He told her she would have to wait. When she asked him why, the Appellant lifted his shirt and showed her a gun in the front part of his waist. She had previously seen the Appellant with the gun even before the shooting of the deceased. She described the gun as a .38 handgun. Ms. White explained that she had worked at the Spanish Town Police Station in Jamaica for several years and as a result she knew a little about guns. The Appellant told Ms. White that he carried the gun because "*they wanted to kill him so he had to walk with it to protect himself*". A few days later the Appellant spoke with Ms. White and told her that his alibi is good because he and his wife were having a shower together at the time of the shooting. He had been told not to come out of the house because Tyrone had been shot and had died.

9. Ms. White continued to live at 177 Birch Tree up until 3 October 2010. The last time she saw the Appellant was on 2 October 2010. She stated that she and the Appellant continued to maintain a good rapport. On 15 October 2010, the Appellant called Ms. White who was now then in Jamaica on her cell phone and told her that the police had held him in connection with the death of Tyrone Burrell; he asked her to pray for him and "*do what you can do for me*". On 26 September 2011, Ms. White attended the police station where she identified the Appellant from a set of photographs which had been shown to her.

10. Nora Ebanks, who lived with her brother, Archie Ebanks, at Canary Lane in West Bay which is close to 177 Birch Tree said that at on or about 7:30pm on 8 September 2010 she was talking to her brother outside the house when she heard a noise which sounded like a firework or gunshot. Some ten seconds later, the Appellant came up behind her and they exchanged a few words. She thought the Appellant looked frightened.

11. A post mortem was conducted on 11 September 2010 by Dr. March Schuman. This showed that the deceased died of a gunshot wound to the head. The bullet was a .38 calibre.

12. The Crown's case relied on circumstantial evidence relating to the presence of the Appellant in the area of 177 Birch Tree and Arlene White's evidence of the statement that the Appellant made to her some two days later on the morning of 10 September 2010 that he had killed Tyrone Burrell.

13. The Appellant did not give evidence but relied on the answers he had given in three interviews by the police. On 5 October 2010 during an interview without an attorney-at-law, the Appellant stated that he had nothing to do with the unfortunate death of the deceased. He knew the deceased but he did not have any animosity or ill will towards the deceased. He expressed the view that it was unfortunate that it happened while he was nearby in the vicinity. He stated that on the day of the murder he was at home taking a bath with his wife.

14. He was again interviewed by the police on 7 October 2010. He said that on 8 September 2010 he was at 177 Birch Tree Hill when he met the deceased. He denied that the premises werethe headquarters of a gang.

15. In the third interview, which took place on 10 October 2010, the Appellant said that he had left his bicycle at 177 Birch Tree Hill on 8 September 2010 but did not go back for it until the 9 September 2010. He stated that Ms. White was a very nice lady.

16. His defence put shortly is that he is not guilty of the murder of the deceased.

17. In Ground 2, the Appellant alleged that the evidence of Arlene White who purported to identify the Appellant was nothing more than a "*fleeting glance*" and in the absence of independent evidence to support the correctness of the identification, the judge was under a duty to stop the case with the submission of no case to answer.

18. In his judgment Quin J stated:

> "…I must examine with some caution the evidence of the witness providing the identification and consider whether the identification is reliable. In order to do this I must review how long, and under what circumstances, the suspect was under observation. At what distance? In what light? Was the observation impeded in anyway? Has Ms. White seen the suspect before, and if so, how often and in what circumstances? I find that Ms. White was only a short distance from the Defendant – merely a matter of a few feet. I also accept Ms. White's evidence that there was good light coming out of the kitchen, and from the two lights under the corner eaves. I find that there was nothing to impede Ms. White's view of the Defendant, and, in addition, Ms. White knew the Defendant very well. I find Ms. White's evidence of identification to be accurate and reliable, and I have no hesitation in accepting it."

19. It is submitted on behalf of the Appellant that Ms. White was purporting to identify someone she recognized. While the lighting was said to be good, she was nonetheless purporting to recognize a person who was moving swiftly in the dark and was side on and walking away from her. It was contended that such identification could be properly categorized as a "*fleeting glance*".

20. At the close of the case for the prosecution, a submission for no case was made under the principle set out in *R v Galbrath* [1981] 2 A11 E R

21. Complaint is now made that at the end of the prosecution the judge was under a duty to withdraw the case from the jury even if it was not raised by the defence counsel.

22. This submission is based on *R v Turnbull & others* [1976] 2 A11 E R 549, Lord Widgery CJ giving the judgment of the Court said:

> "When in the judgment of the trial judge, the quality of the indentifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. This may be corroboration in the sense lawyers use that word; but it need not to be so if its effect is to make the jury sure that there has been no mistaken identification."

23. The evidence of Ms. White that when she went to the door she saw a person moving swiftly away from her was evidence which could be characterized as a fleeting glance. That being so it is necessary to examine the evidence to ascertain whether this was the

only the evidence upon which the prosecution's case was based. The answer to this is no. The prosecution's case was not solely based on evidence of a fleeting glance. In addition to the evidence of seeing the person moving swiftly, the prosecution's case was based on the admission or confession which the Appellant made during the conversation with Ms. White which took place on 18 September 2010 at 177 Birch Tree Hill when the Appellant came to the room of Travis Bodden while Ms. White was tidying the room. The Appellant asked Ms. White "*Do you know who killed the little boy*". After she replied that she did not know, the Appellant said "*him kill the pussyhole*". This was clearly evidence which went to support the correctness of the identification. It was, in our view, evidence which could have the effect of making the jury sure that there was no mistaken identification.

24. It follows that we do not consider that the judge was under any duty to withdraw the case from the jury on the ground that the quality of the identifying evidence was poor.

25. The Appellant further complained about the reliability of Ms. White. Counsel for the Appellant referred to the evidence of Ms. White who said that she had a premonition that the deceased was in danger. She stated what while reading her Bible she saw an image of a young man who appeared to her to be in trouble. She had similar experiences previously when she saw images of persons who were sick. Under cross-examination she insisted that she did not just imagine it. She explained:

> "*When you are a Christian you don't imagine. When you are blessed from God, you can't play tricks with your hear, or you are not a true Christian*."

26. In respect to her inconsistencies relating to the length of time she had known the Appellant, Ms. White said she first met the Appellant in June 2010. In cross examination, it was put to her that in her witness statement dated 22 September 2010 she had stated that she knew the Appellant since March 2010. She however explained that when she made her statement she was "*shooked [sic] up*" and it was only sometime after making the statement she recalled that she did not know the Appellant in March, April or May 2010. In response to a question from counsel for the Appellant what made her say March, she said "*I just didn't remember that it wasn't March*" Counsel reminded Ms. White that in her statement she said "*start [sic] seeing Antonio since March when he come from prison*" She replied "*I am not telling a lie on Tonio. I did not remember that clearly, but I do know it was June*" She indicated that she was "shooked up" at the time of making the statement since there were two murders at 177 Birch Tree Hill. Pressed further on this issue, Ms. White eventually acknowledged that she made a mistake when she said she knew the Appellant from March 2010 instead of June 2010.

27. Complaint is also made of Ms. White's failure to tell the police that she knew anything about the killing on the night when she went along with her employer to the West Bay Police Station. In cross examination she agreed that it was Ms. Webster who made the report to the police and that she did not speak to the police. She did not make a deliberate decision not to tell the police what she had seen. She was outside of the police station with the children when the police visited 177 Birch Tree Hill after the shooting, she did not speak with them because she was "shooked up". She also said she was afraid because this was the second shooting which had taken place at the premises. On 13 or 14 September 2010 , she again went to the police station to provide finger prints but did not

tell the police what she had seen. However, in her taped interview and written statement on 22 September, she told the police what she had seen. It was submitted on behalf of the Appellant that her silence in these circumstances undermines her credibility. And that this is so in the light of her evidence that before the deceased was killed, the Appellant had confessed to another murder and also confessed to the deceased's killing. This was stated by Ms. White in a statement made to the police on 3 October 2010. In the statement, Ms. White indicated for the first time that the Appellant had made a confession to her about another killing. He had confessed to her about this earlier killing on the same occasion that he had confessed to the killing of the deceased. It is submitted by counsel on behalf of the Appellant that this confession is true, it is inconceivable that she would not have mentioned it to the police when she made her statement on 22 September 2010.

28. During her cross-examination, she was asked why would the Appellant confessed to her when "*everyone knew that you had worked at the police station in Jamaica*". She replied that the Appellant had confided in her. She indicated that the Appellant had a lot of confidence in her and told her a lot of things. When pressed by counsel Ms. White said that the Appellant had confessed to her about "*a white man who died in West Bay and how he dropped a block in his head and put him in the back of his own car and drove him and burned him*". She said that after the Appellant had come out of prison he had confided in her. In response to a question why she had not gone to the police when she heard about the killing of the white man, she said that she did not go to the police and was not thinking about going because she did not take what the Appellant had said seriously. She said that she did not go to the police as soon as he had made the confession but instead went on 3 October 2010. Asked why she did not go to the police, she

responded that "*I told the police on the 3rd*" Counsel pressed her to find out why she did not go to the police as soon as the Appellant told her or within a day. She responded that she was shooked up as she did not know that "*this little island had someone like that*". She explained that she did not go to the police about the killing of the man with the concrete block because she "*did not take him to be so dangerous*". Ms. White rejected the suggestion by counsel for the Appellant that what she said was nonsense since the Appellant had never confessed to her on any occasion about killing anybody. She insisted that it was not nonsense as it was true. She also rejected a suggestion by counsel for the Appellant that the Appellant had never shown her a gun. She insisted that the Appellant did in fact show her a gun but she did not count the number of times that he had shown her because he had the gun on a daily basis. She reiterated that the Appellant said he walked with the gun because as he said "*they want to kill hum and that's his protection*". Counsel for the Appellant put her deposition to her in which she told the police that she had seen the Appellant with the gun about four times. When asked if it was more than four times that she saw the gun, she responded that it was.

29. In his reason for his decision, Quin J stated:

> "I accept the evidence of Ms. White that she saw the Defendant some 5 seconds before she heard the solitary gunshot and I accept the evidence of Ms. [Ebanks] that she saw the Defendant some 10 seconds after hearing the loud noise. Accordingly, I find that the Defendant's statement to the police that he was having a bath with his wife outside at his residence when he heard the noise is a lie and I reject it. I also find that the Defendant did not lie for any innocent reason

but I find that his lie was deliberate and can therefore be regarded as evidence supporting the case for the prosecution."

The judge had earlier reminded himself that he had to look at the evidence carefully and even if he reached the conclusion that the Appellant was lying it did not inevitably mean that he was guilty of murder.

30. In dealing with the issue of the confession which the Appellant made to Ms. White, the judge observed:

> "The Defendant denies that he made a confession to Ms. White. Consequently, Ms. White is either lying or she had made what can only be described as a grotesque mistake. Accordingly, I must examine the evidence relating to the confession very carefully. I have to ask myself "Is there anything outside it to show it was true?" Is the confession purportedly made by the Defendant to Arlene White a fact, and so far as I can test it, true?" "Did the Defendant have the opportunity to commit the murder?" Is the confession consistent with other facts which have been ascertained and proved before me?"

31. Later the judge, dealing with the inaccuracies, inconsistencies and contradictions of Ms. White's and Ms. Ebanks' evidence as compared with what they had told the police stated that he could not find any of these issues were serious or central to the prosecution's case. The judge went on to indicate:

> "I accept that Ms. White was shaken by the shooting and confession. Ms. White knew she was in a very difficult position. She valued her job and she knew that she had to inform the police that a man who was seen as part of the family at 177

was guilty of the murder of young Tyrone Burrelll. That is why Ms. White told the Court that she had "*no space*" to tell the police. And, that is why Ms. White contrived to only see the police when she was supposed to be at church, so that, neither the family nor the Defendant would be alerted to her actions. It is quite understandable and conceivable that the inaccuracies and inconsistencies and contradictions that she made did occur. However, none of the discrepancies alter the material evidence that Ms. White saw the Defendant dressed all in black, rushing to the side of the house without speaking to her, and then heard the gunshot some 5 seconds later. Ms. White did not see anybody else in the yard at that time. Ms. White did not see the Defendant again that night, nor did he return to 177 to collect his bicycle."

The Court accepts that these findings were open to the judge on the evidence that was before him.

32. The judge had the benefit of seeing and hearing Ms. White give evidence. In reaching his decision, the judge was able to observe the demeanour of Ms. White, something which was not available to the Court. The Court is mindful that if the estimate of a witness forms a substantial part of the reasons for the judge's decision, the Court of Appeal ought not to interfere with the judge's findings.

Quin J.made it clear that he had:

"observed and listened to Ms. White give her evidence over four days. She has been subject to quite proper but extensive cross-examination. I have been very impressed by Ms. White as a courageous woman who told the police and the

Court the truth about how young Tyrone Burrell was murdered and about who committed the murder. I found her to be an honest and reliable witness."

33. We have not had the advantage of hearing Ms. White give her evidence or of observing her deameanour when she was so doing. It is clear that the judge formed a positive opinion of the witness and this led him to conclude that she was an honest and reliable witness. The judge pointed out that "*the inaccuracies, inconsistencies and contradictions whether taken individually, or cumulatively, do not have any material effect on the case for the prosecution*." It has not been demonstrated that this conclusion is wrong and that the inaccuracies, inconsistencies and contradictions did not in fact affect the case for the prosecution. The findings of fact and conclusion reached were dependant on the view which the judge took of Ms. White and this led him to conclude that she was an honest and reliable witness. In these circumstances, it is not open to the Court to interfere with his findings and conclusion.

34. The final issue raised in the appeal is the fact that Ms. White received money from the authorities in Cayman Island. In cross-examination, Ms. White admitted that she hadC.I. $400.00 per month which came from the authorities in Cayman Islands. The money came to her via Western Union on a monthly basis. She received approximately C.I.$5,000.00. Ms. Ebanks agreed that she told he police that she wanted $100.00 before making her statement. She said that she had no food in her fridge because the government cheque was not ready. However, she said the police did not give her money. She received $600.00 per month starting 6 November 2010. She did not know how long it would end when the case was over. She is unable to confirm that she had received $6,500.00 in total.

35. The Deputy Director of Public Prosecutions in his written submission stated that implicit in the ground of appeal is the suggestion that the evidence of the witnesses may be tainted because of payment received for living expenses while in the witness protection programme. He said that the evidence showed the payments were made in respect of the living expenses and commencing only after the witnesses had given their statements. He further submitted that there was no evidence or any suggestion of improper inducement to procure false or tainted testimony. The Court agrees that there is no rational basis for concluding that the fact that a witness under a witness protection program received payment in respect of living expenses gives rise to the presumption of improper inducement. The Court does not find any merit in this ground.

36. Having reviewed the evidence and the several issued raided by the Appellant, we do not consider that the decision reached by the judge should be set aside on the ground that in all the circumstances, it is unsafe.

37. It was for these reasons that the appeal was dismissed.

Chadwick, P.

Mottley, J.A.

Campbell, J.A.