BARBADOS.

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 12 of 2007

BETWEEN:

ELI ANTHONY BYRON **Appellant**

AND

THE QUEEN **Respondent**

BEFORE: The Honourable Frederick L. A. Waterman, CHB, Chief Justice (Ag.) The Honourable Peter D. H. Williams, and The Honourable Sandra P. Mason, Justices of Appeal.

2009: February 24, December 10

Mrs. Angella Mitchell-Gittens for the Appellant.

Ms. Manila Renée for the Respondent.

DECISION

Introduction

MASON JA: On 22 June 2007 the appellant, Eli Anthony Byron, was convicted by the jury of the offence of manslaughter following a charge of murder. He was sentenced by **Kentish J** on 29 June 2007 to a term of imprisonment of 15 years and now appeals the conviction.

Facts

[2] The deceased, Ryan Evelyn, who lived at Paradise Alley in the environs of Nelson Street in Bridgetown, was in the habit of selling narcotic drugs from his house.

[3] On Saturday 5 June 2004 around 3.00 a.m. he was at home when a loud explosion was heard. He sustained a bullet wound to his neck. The police and an ambulance were called and Evelyn was taken to the Queen Elizabeth Hospital where he later died.

[4] The appellant was arrested and charged with murder.

The Prosecution case

[5] P.C. Wayne Griffith of the Forensic Scenes of Crime Unit of the Royal Barbados Police Force produced several photographs detailing the scene at Paradise Alley where the house of the deceased was located and more particularly a wooden and glass window with a hole in one of the window panes, blood stains in the area and a shoe print.

[6] The evidence of Judy Hoyte, the girlfriend of the deceased, and that of her son, Desmond, was that on the morning in question they were awakened by the sound of someone "tumbling in the house". When they got up and looked, they saw the deceased bleeding from the neck and he was later taken away by ambulance.

[7] Station Sergeant Michael Murray told the court that on 6 June 2004 while at the Criminal Investigation Department he saw the appellant who he informed of his intention to conduct an identification parade in order for a witness, Cathy Hazelwood (later James) to state whether she could recognise him. Murray stated that Ms. James pointed directly at the appellant and said, "This one here". When the appellant was cautioned he said, "Cathy, when I went to you, you wasn't sleeping?" and she replied, "No I wasn't sleeping".

[8] The sole issue in cross-examination of this witness related to an identification parade being held in circumstances where the person making the identification knows the person by an alias. The witness was not cross-examined on the oral statements.

[9] Sergeant Greenidge and Police Constable Olton gave evidence that when they took the appellant into custody and informed him of his right to a lawyer he said:

> "I ain't want no lawyer cause I wasn't there. I was in Grazettes last night. When you see me this morning I did just come from Grazettes."

[10] The officers also spoke of having received from the appellant the clothes he had been wearing on the night in question. When told that he was suspected to be the person who had shot the deceased, the appellant said, "I squeeze off a shot but I didn't know that I hit he". When asked if he wanted to give a written statement, the appellant responded, "Yes I want to tell you what happened 'cause I gone and get tie up." The appellant also pointed out the deceased's house and said, "This is Yank (the deceased) house there" and "I knock 'pon de window and come back here and I shoot at the shadow".

[11] Cathy James testified that on 5 June 2004 she was at her house in Grazettes when at about 4.20 a.m. she heard a knock on her door. When she looked out she saw a man by the name of Lerius who asked her to call her son. She woke up her son, Damien, who went outside at which time she saw another man called "Bhana". That is the name by which she knew the appellant. While her son was outside she heard "Bhana" say that he had killed Yank. She said she also heard the appellant say, "I shoot he. I shoot he in he head." At that point she called her son inside. She subsequently identified the appellant in a "line up" at the police station.

[12] A written statement by the appellant amounting to a confession was admitted into evidence following a voir dire. In the statement the appellant gave a history of an ongoing feud between himself and the deceased. He also spoke of going to the home of the deceased after having been convinced to do so by Lerius who gave him a gun and reminded him of an issue which he (the appellant) had to settle with the deceased. The statement continues at page 181 of the record:

> "Lerius tell me I got to do something or I gwine get hurt in the deal. I tell he I ain't feel like. Lerius tell me it ain't what you feel, you got to do things for yourself, 'Top man'. We went back in the alley,

> Leruis give me the gun and tell me knock 'pon the window. I knock 'pon the window, and I see a shadow coming, Lerius tell me to shoot at the shadow and move. I squeeze off a shot at the shadow and move. Me and Lerius end up walking down Nelson Street. I give back Lerius the gun. I walked behind two girls. I tell myself that I miss and I glad. Me and Lerius catch a taxi and went in Grazettes by Damien and we catch a van and come home in the morning."

The Defence

[13] In his defence the appellant made an unsworn statement in which he maintained his innocence. He denied going to the deceased's premises on the night of the incident. He said that the morning after the incident he was taken to the police station. He denied to the police knowing anything about the deceased. In response to their questions he told them that he did not know who had shot the deceased. He denied that he made the oral statements. He said that he did not voluntarily make the written statement, that it was obtained as a result of a brutal beating by the police and was a fabrication by the police officers.

Grounds of Appeal

[14] Five grounds of appeal were filed on behalf of the appellant.

Ground 1

[15] Counsel contended that the judge failed to give the warning as provided for in s. 137 of the ***Evidence Act, Cap. 121.***

[16] Counsel accepted that the Court in ***Gill (Ian) v. R***. ***(2003) 66 WIR 40*** determined that the requirement for a warning to be given under s. 137 is not mandatory but directory.

[17] This Court has since ***Gill*** reiterated that determination in numerous cases: ***Wayne Adrian Lovell v. R. (Criminal Appeal No. 21 of 2001, unreported decision of 28 June 2005); Wayne Tyrone Brathwaite v. R. (Criminal Appeal No. 29 of 2000, unreported decision of 1 March 2006); Oliver Jefferson Paul and Damien Lon Alfay v. R. (Criminal Appeals Nos. 30 and 31 of 2000, unreported decision of 1 March 2006).***

[18] We accept that although the judge directed the jury that they must be satisfied that the oral statements attributed to the appellant were in fact made, she did not give them the s.137 warning.

[19] We are however satisfied that in light of the overwhelming evidence against the appellant, apart from the oral and written statements, he suffered no injustice by the failure of the judge to give the s. 137 warning.

Ground 2

[20] This ground is that:

> "The Learned trial judge erred in law by directing the jury in the following terms: so it is open to you, Mr. Foreman and members, to find on the basis of the identification evidence, that the accused was the person who shot and killed the deceased in as much as this constitutes a misrepresentation of s. 102 of the ***Evidence Act***."

[21] Counsel for the appellant submitted that this was a misdirection, that it was tantamount to a direction to convict because it constituted a direction on the law which the jury were bound to accept. Counsel submitted that it would have been an appropriate direction only if Cathy James had seen the appellant actually shoot and kill the deceased. There were no "special circumstances" in this case to make s. 102 of the ***Evidence Act*** applicable.

[22] A similar issue arose in the case of ***George Christopher Oliver, Wayne Adrian Lovell and Richard Herbert Jones v. R. (Criminal Appeal Nos. 21, 22 and 23 of 2004, unreported decision of 18 December 2007)*** where the witness did not see the commission of the crime but saw the appellant Oliver running on the road some time after the crime had been committed. That witness had known the appellant for a number of years. This Court held that the conclusion which the judge directed the jury to draw from the identification evidence was flawed and highly prejudicial.

[23] Similarly in the instant case the evidence of Cathy James did not indicate that she saw the appellant shoot the deceased but merely that she heard him make the statement: "I shoot he in he head". Although it was her evidence that she had known the appellant before she heard him make this statement, we are satisfied that that evidence does not support the judge's direction that it was open to the jury to find that it was the appellant who had shot and killed the deceased.

[24] While the Court accepts that there is merit in the submission of counsel for the appellant, we are of the view that this defect in the summation is not fatal to the conviction.

Ground 3

[25] On ground 3 counsel for the appellant submitted that the judge erred in law when she categorised the discrepancy in the oral statement attributed to the appellant and the unsworn statement of the appellant with respect to his whereabouts at the time of the murder as a lie and proceeded to give directions thereon.

[26] Counsel contended that the judge's characterisation of the appellant's evidence as to his whereabouts on the night in question as a lie would have had substantial weight with the jury and affected the way the defence was perceived by the jury. Counsel also argued that a direction in respect of discrepancies and inconsistencies ought to have been given instead of a direction on lies.

[27] The judge in recounting to the jury the differences in the statements given by the appellant about his whereabouts, expressed her opinion as it was open to her to do, about these statements while emphasising to the jury that they must determine this for themselves. At page 339 the judge stated:

> "Now, Mr. Foreman and your members, you will recall that the accused when first interviewed by Officers Greenidge and Olton said "I ain't want no lawyer because I was not there I was in Grazettes that night and when you see me this morning I had first come from Grazettes." And in his statement from the dock, he told you, "I was not on the scene. I was at Combermere Street on the night of the scene." Now those two statements cannot be true, either one is true and the other is false, but they cannot both be true, and this, of course, is only my opinion but you must determine this for yourselves.
>
> However, I must tell you, Mr. Foreman and your members, it is open to you to find that the accused was lying when he made one of those statements. And I am now going to give you a direction on lies. A lie told by an accused can only strengthen or support evidence against the accused, if you the jury are satisfied that, (a) the lie was deliberate, (b) it relates to a material issue, and in this case I can suggest to you that it does relate to a material issue, the question of the alibi, and (c) there is no

innocent explanation for it. I must remind you that people sometimes lie, for example, in an attempt to bolster up a just cause or out of shame, or out of a wish to conceal disgraceful behaviour, and you will bear that direction in mind when you come to consider the testimony of the accused in this matter."

[28] In the case of ***Darie Jackson Smith v. R. (Criminal Appeal No. 29 of 1999, unreported decision of 5 March 2003),*** this Court referred to the case of ***R. v. Goodway (1993) 98 Cr. App. R. 11, CA*** where it was held that whenever lies are relied on by the prosecution or might be used by the jury, to support evidence of guilt as opposed to merely reflecting on the defendant's credibility, a judge should give a full direction in accordance with ***R. v. Lucas (1981) Q.B. 720*** to the effect that a lie told by a defendant can only strengthen or support evidence against that defendant if the jury are satisfied that (a) the lie was deliberate (b) it relates to a material issue, and (c) there is no innocent explanation for it.

[29] In ***R. v. Burge and Pegg (1996) 1 Cr. App. R. 163*** the Court of Appeal further stated that a Lucas direction is not required in every case where a defendant gives evidence, even if he gives evidence on a number of matters, and the jury may conclude in relation to some matters at least that he has been telling lies. It is only required if there is a danger that they may regard that conclusion as probative of his guilty of the offence which they are considering. How far a direction is necessary will depend on the circumstances. The direction will usually be required (a) where the defence has raised an alibi or (b) where the judge considers it desirable or necessary to suggest that the jury should look for support or corroboration of one piece of evidence from other evidence in the case, and among that evidence draws attention to lies told, or allegedly told, by the defendant or (c) where the prosecution seek to show that something said, either in or out of court in relation to a separate or distinct issue was a lie, and to rely on that lie as evidence of guilt in relation to the charge which is sought to be proved; or (d) where, although the prosecution have not adopted the approach in (c) above, the judge reasonably envisages that there is a real danger that the jury may do so.

[30] This Court therefore accepts that a direction on lies was not required, but is of the view that the direction having been given, the appellant suffered no prejudice.

[31] Contrary to Counsel's submission, it is clear from the record of the appeal that the judge gave a direction on discrepancies and inconsistencies at pages 287 to 288 and later reminded the jury at page 331 that discrepancies raise the issue of credibility and emphasised that "you must resolve that (discrepancies) having regard to the direction I gave you on discrepancies".

[32] This ground accordingly fails.

Ground 4

[33] The appellant complained that the judge did not adequately put his defence to the jury.

[34] In her written skeleton arguments, counsel for the appellant submitted that the judge had a responsibility to put the case for the defence as well as to direct the jury on all defences available to the appellant and to analyse the relevant portions of the evidence with respect to each issue.

[35] In her oral submissions to the Court, counsel made no specific complaint of the judge's direction.

[36] It is our view that the judge dealt fully with the defence of the appellant. The judge directed the jury that no inference adverse to the appellant ought to be drawn from the fact that he elected to make an unsworn statement. The judge then reminded the jury of the contents of that statement after which she fully analysed it (pages 329 to 333).

[37] She then told them:

> "Now, this statement is critical to the case of the accused. It contains his defence that he did not kill Ryan Evelyn. He was not on the scene and he knows nothing about the killing, and the written statement is a fabrication obtained by force and in such improper circumstances that you must reject it. And it is in keeping with defence counsel's cross-examination of the offence that the accused at first denied any involvement in the killing, and it was only after the beating that he went from a complete denial to signing a statement admitting he shot the deceased.
>
> So it is a matter for you, Mr. Foreman and members, what weight you attach to that unsworn statement, but you must consider it because it is evidence in this case. Simply put, Mr. Foreman and members, the case for the accused is that he is innocent."

[38] The judge also reviewed the evidence of the appellant's witness.

[39] We are of the opinion that the judge adequately put the appellant's case to the jury. There is no merit in this ground.

Ground 5

[40] Counsel for the appellant quite succinctly stated that in light of her submissions the verdict was unsafe and unsatisfactory.

[41] This Court is satisfied that despite the merit accorded to ground 2 there is ample and substantial evidence connecting the appellant with the offence. The verdict was safe and satisfactory.

Disposal

[42] Accordingly the appeal is dismissed and the conviction hereby confirmed. The sentence is ordered to run from 29 June 2007.

Chief Justice (Ag.)

Justice of Appeal. Justice of Appeal.