JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 101/2003

BEFORE: THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MRS. JUSTICE McCALLA. J.A. (Ag.)

CHRISTOPHER BELNAVIS V. R.

Arthur Kitchin for the appellant

Mrs. Suzette Rogers for the Crown

November 22, and 26, 2004 and May 25, 2005

PANTON, J.A.:

1. Our decision herein and the reasons were delivered orally on November 26, 2004. This is the formal written record of same.

After a trial lasting three days in the High Court Division of the Gun Court presided over by Donald McIntosh, J., sitting in Kingston, the appellant was convicted on April 28, 2003, on an indictment charging him with Illegal possession of firearm, Wounding with intent and Assault with intent to rob. He was duly sentenced to fifteen years, thirty years, and three years imprisonment respectively. The single judge gave him leave to appeal. The single judge thought that the question of the fairness of the trial required consideration by the Court.

2. Briefly stated, the facts are that the complainant Joseph Lawrence, a businessman, who lives in Linstead, Saint Catherine, was sitting on a couch in his bedroom on the night of March 26, 2002, when a man armed with a gun invaded his privacy and shot him in the chest. The gunman ordered him to give him money but apparently could not wait to receive same as he left in a hurry when Mr. Lawrence's neighbour approached on the outside of the house. Mr. Lawrence went to the Linstead Police Station, then to the Linstead hospital, and finally to the Spanish Town hospital where he spent eight days. Notwithstanding the apparent speed with which the incident occurred, Mr. Lawrence said that he had four to five minutes to observe his attacker. According to him, he had seen the gunman "a couple of times but not to talk to" before the incident. He identified the appellant as the person, and added that he knows his father very well.

3. On July 22, 2002, Mr. Lawrence went to the Linstead hospital where he saw the appellant. He then went to the police station and reported his sighting. The police accompanied him to the hospital premises and he pointed out the appellant to them. It is common ground that the appellant is called "Pele", in an apparent comparison with the legendary master of the game of football. Mr. Lawrence asserted that he gave this name to the police. However, that fact was not recorded in his statement and the police officer who received the report and recorded the statement said that Mr. Lawrence did not give him a name, nor did he inform him that his attacker was someone whom he had seen or known before.

4. The appellant gave evidence at the trial. He denied the accusation. He admitted that he knows the complainant, and said that when he learnt that he (the appellant) was being linked to the crime, he went to the Linstead police station to make enquiries. There, he said, he was told that he was not the person the police were looking for.

5. ***The grounds of appeal against conviction***

> "(i) The learned trial judge misdirected himself on the evidence and/or erred in law by finding that the appellant remained silent when he was confronted with and accused by the virtual complainant in the presence of the police, contrary to the evidence of Constable Derron White (see page 66); and, a fortiori, that the silence of the appellant by itself made the appellant guilty.(see page 130, middle of page):
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> > "There is no issue that when they picked up the man and told him why they were picking him up the police said the complainant identified him in their presence and said, 'this is the man who shot me', and the police said the accused man said nothing. Of course, there is no duty on him to say anything, but one would have expected in the circumstances that the accused man would like us to have believed that he would have been the first to say, 'but I went to the police station already and the police told me I am not the man or to say a nuh mi, I don't know anything about this matter'. I would have thought that this is how an innocent person who knows nothing about a situation would have reacted. That by itself **makes him guilty** because as I have said before, he has nothing to prove, he does not have to say anything and if later on when he is arrested

by the investigating officer he then says he knows nothing about it, it is really not a matter of too great a moment".

We are prepared to accept that there may have been a misreporting in relation to the words emphasized in the paragraph quoted above; and, accordingly, substitute the following words: **"does not make him guilty".**

(ii) The learned trial judge's unwarranted threat to cite defence counsel on at least two (2) occasions during the cross-examination of Mr. Lawrence (see pages 45 – 46); his frequent and unnecessary interventions especially during the evidence of the appellant and his witness (see pages 31, 33, 34, 44, 47, 51, 52, 76 -79, 86 – 98, 101 – 103, 105 – 109, 113, 119); his discourteous and disparaging remarks to defence counsel (see page 14 – 16, 23 – 24, 29, 31, 33 – 35, 37 – 39, 42 – 46, 58 – 61, 79 – 80) demonstrated bias and hostility towards defence counsel and/or the appellant, which must have fettered, hampered and obstructed defence counsel in the conduct of the defence case, as a consequence whereof the appellant was denied a fair trial.

(iii) The learned trial judge failed to appreciate and/or direct himself on the weaknesses of the complainant's purported identification of the appellant; to wit:

(a) the length of time the complainant claimed he saw the appellant when compared with his narrative of the incident (see pages 3 – 4 and 6, 27);

(b) the complainant's failure to tell the police that:

(i) he knew the appellant before the incident and his alias 'Pele' (See page 14, 20, 22, 32);

(ii) he knew the appellant's usual whereabouts (See Pages 12 – 13);

(iii) the appellant was a good friend of his son (See Pages 17, 30)".

6. In respect of ground (1), Mr. Kitchin submitted that the judge had eroded the right to silence. He said,

> "it is either the right to silence means something or nothing".

Mrs. Rogers was hard put to deny that the learned judge had committed a grave breach. She said she was "having difficulty" with that aspect of the judge's summation, and in the end she conceded that the passage was indefensible. We are of the firm view that the concession was appropriate. There is no room in the law for anyone to attempt to whittle down the right of an accused person to remain silent in circumstances where he is not on equal terms with his accuser. In the instant situation, the silence was in the presence of a person in authority, and the right in such circumstances is inviolable. Where a judge fails to respect the right, and uses the exercise of that right against an accused, the conviction ought not to be allowed to stand.

7. It is not inappropriate to remind trial judges of the following decisions, and it is hoped that they will be heeded.

Dennis Hall v. R. (1970) 12 J.L.R. 240. In this case of possession of ganja, a building said to be occupied by the appellant and two women, was searched in the presence of the women, but in the absence of the appellant. A shopping bag with ganja was found. Later, when the appellant was brought to

the premises, he was informed by the police officer, who had conducted the search, of a statement made by one of the women to the effect that the shopping bag with ganja had been brought into the building by the appellant. There was no comment by the appellant on this information. The appellant made the customary unsworn statement at the trial before the Resident Magistrate. In it, he denied knowledge of the matter. He was convicted. On appeal to the Court of Appeal, it was held that the appellant's silence in the face of the allegation made against him amounted to an acknowledgment by him of the truth of the statement made by the female occupant. On further appeal to the Privy Council, Lord Diplock, delivering the judgment of the Board, said:

> **"It is a clear and widely known principle of the common law in Jamaica, as in England, that a person is entitled to refrain from answering a question put to him for the purpose of discovering whether he has committed a criminal offence.** A fortiori, he is under no obligation to comment when he is informed that someone else has accused him of an offence. It may be that in very exceptional circumstances an inference may be drawn from a failure to give an explanation or a disclaimer, but in their Lordships' view silence alone on being informed by a police officer that someone else has made an accusation against him cannot give rise to an inference that the person to whom this information is communicated accepts the truth of the accusation."

In **Donald Parkes v. R.** (1976) 14 J.L.R. 261, Lord Diplock elaborated on this principle of the common law. The facts in that case were that the mother of a female deceased had asked the appellant, "What she do – why you stab her?". The appellant and the deceased had been living in separate rooms in a

house owned by the mother of the deceased. The latter's question was posed to the appellant a few minutes after she had received information of the stabbing of her daughter, and had actually seen her bleeding from the wounds in her room. The appellant did not respond to the question. At a trial in the Circuit Court for the parish of Kingston, presided over by the Chief Justice, the appellant made an unsworn statement. The Chief Justice instructed the jury that the failure of the appellant to reply to the accusation twice made against him by the mother of the deceased that he had stabbed her daughter, coupled with his conduct immediately after the accusation had been made, were matters from which the jury could if they thought fit, draw an inference that the accused accepted the truth of the accusation. It should be added that there was evidence that the appellant had been held in the waist-band of his trousers by the mother, and there was a tussle between them which resulted in the appellant using a blood-stained knife that he had in his possession to cut the finger of the mother. In his unsworn statement, the appellant had said that there was a knife in his pocket, the mother of the deceased had searched and removed it, stating an intention to stab him because he had stabbed her daughter.

Before the Court of Appeal, it was argued that the Chief Justice was wrong to have so instructed the jury, and the appellant relied on **Dennis Hall v. R.** (supra). The argument was rejected. Before the Privy Council, it was repeated. Lord Diplock reminded of the context in which the pronouncement was made in **Dennis Hall v. R.** He referred to Lord Atkinson's speech in **R. v.**

Christie (2) [1914] A.C. at page 554, in which it was said that when a statement was made in the presence of an accused person:

> "He may accept the statement by word or conduct, action or demeanour, and it is the function of the jury which tries the case to determine whether his words, action, conduct or demeanour at the time when the statement was made amounted to an acceptance of it in the whole or in part".

Lord Diplock continued:

> "In the instant case, there is no question of an accusation being made by or in the presence of a police officer or any other person in authority or charged with the investigation of the crime. It was a spontaneous charge made by a mother about an injury done to her daughter. In circumstances such as these, their Lordships agree with the Court of Appeal of Jamaica that the direction given by Cave, J. in R. v. Mitchell (3) [1892] 17 Cox, C.C. at page 508 (to which their Lordships have supplied the emphasis) is applicable:
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> "Now the whole admissibility of statements of this kind rests upon consideration that if a charge is made against a person in that person's presence it is reasonable to expect that he or she will immediately deny it, and that the absence of such a denial is some evidence of an admission on the part of the person charged, and of the truth of the charge. ***Undoubtedly, when persons are speaking on even terms***, and a charge is made, and the person charged says nothing, and expresses no indignation, and does nothing to repel the charge, that is some evidence to show that he admits the charge to be true".

The appeal was accordingly dismissed. In the case before us, it bears emphasis that the appellant and the officer were not on even terms. In **R. v.**

Latty and Smith (1988) 25 J.L.R. 119, the Court of Appeal revisited the principle, with Campbell, J.A. expressing himself thus at page 123 F:

> "It is made abundantly clear in Donald Parkes v. R. (supra) that the only circumstances in which mere silence can give rise to the inference of an admission of the truth of a charge, is where the accuser, and the accused are so circumstanced that no police officer or other person in authority charged with the investigation of the crime, is, to the knowledge of either of the parties, present, or within hearing distance and the accusation is spontaneous, that is to say, not made for and on behalf, and on the promptings of a police officer or other person in authority aforesaid".

8. In the case before us, the learned trial judge said that an innocent person who knows nothing about the situation would have reacted by saying:

> (a) he had already been to the police station and had been told he was not the man ; or
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> (b) he was not the person who committed the crime, and knew nothing about it.

Having delivered himself thus, there was nothing that the learned judge may have said before, or said thereafter that would have been able to correct the error. It was clear at that stage that the silence of the appellant was a dominant feature in his mind, and the conviction was inevitable.

We have no choice but to quash a conviction that has been recorded in such circumstances.

9. The second ground of appeal complains of "frequent and unnecessary interventions" by the learned trial judge, as well as "discourteous and disparaging remarks to defence counsel". These, the appellant claims,

demonstrate bias and hostility towards defence counsel and or the appellant and must have hampered the conduct of the case for the defence. Mr. Kitchin, in submitting that there was an appearance of bias against the appellant, pointed to the fact that the learned judge posed one hundred and twelve questions to the complainant during the cross-examination by the defence attorney, whereas he had asked the witness a mere five questions during the examination- in- chief done by counsel for the Crown. We were also asked to note that the learned judge asked forty-five questions of the appellant during the cross-examination by counsel for the Crown who had asked only twenty-eight questions. So far as the witness for the defence was concerned, the learned judge posed seventy-one questions to him, whereas counsel for the Crown asked only twenty-eight.

10. It is obvious that the judge asked many questions. That by itself is not an indication of bias, and does not necessarily detract from a fair trial. There are so many factors that have to be taken into consideration, for example, the importance of the content of the question in the context of the case. There are questions that are necessary for clarification of what a witness is saying, in order that the judge may get a proper appreciation of the case that is being put forward. Having said that, although a judge is not expected to remain mute throughout a trial, he should be careful to ask only necessary questions, and not give the impression that he has descended into the arena.

11. In this case, notwithstanding the many questions asked by the learned judge, we are more concerned about his manner towards counsel for the

defence. We do not propose to list all the instances that have been pointed out to us as indicating hostility to the defence. However, we note the following:

(a) On page 42, during the cross-examination of the complainant, the following exchanges took place -

"Q: I understand. You care to have a seat Mr. Lawrence, with your Lordship's leave of course?

HIS LORDSHIP: He didn't say he wants to. What is wrong with you?

MR. KITCHIN: M'Lord the witness to me . . .

HIS LORDSHIP: What is wrong with you?

MR. KITCHIN: As Your Lordship pleases."

(b) On pages 44 and 45, the following transpired -

"MR. KITCHIN: M'Lord, may I be permitted to ...

HIS LORDSHIP: To what?

MR. KITCHIN: To recall that part of the evidence relating to Fletchers Avenue and which police he told where this accused could be found.

HIS LORDSHIP: Mr. Kitchin, rest assured, I am not going to get to the stage where you would like me to get to and before I get there I will cite you first, you understand me?

MR. KITCHIN: I am not certain of your Lordship's meaning.

HIS LORDSHIP: I know you are not understanding, you are patently lacking in understanding.

MR. KITCHIN: Well, I trust Your Lordship might enlighten me because this is a simple issue M'Lord, which I believe ...

HIS LORDSHIP: Mr. Kitchin . . .

MR. KITCHIN: Yes, M'Lord.

HIS LORDSHIP: Witness go outside please.

(Witness leaves courtroom)

You are lacking in understanding. You are running two defences.

MR. KITCHIN: One M'Lord.

HIS LORDSHIP: You are running two defences; one is that he never had an opportunity to see the person who shot him and the other is that he does not know who shot him and thirdly, it is somebody told him who shot him. Think about it. You are saying he does not know who shot him, then the question that you are asking, some of the questions you are asking really do not indicate this. The witness is outside. I have already told you that you are lacking in understanding."

We have examined the transcript thoroughly, and have concluded that there was absolutely no basis for this charge that had been leveled at Mr. Kitchin. Later, at page 60 of the transcript, we observed the following -

"HIS LORDSHIP:	That is why, and it comes straight out of the Bible. If you read your Bible, you would know it has nothing to do with truth.
MR. KITCHIN:	That part escapes me M'Lord.
HIS LORDSHIP:	I knew it would because you are lacking in understanding."

(c) On page 80, the learned judge on three occasions, described counsel for the defence as "puerile".

In our view, the judge's attitude and the words he used were most unfortunate. Mr. Kitchin submitted that this case was no different from that of **Hulusi and Purvis** [1973] 58 Cr. App. R.378 , where counsel's cross-examination was frequently interrupted, suggestions were made to him that he was not performing his duty as counsel as he should have performed it, and questions were asked of the witnesses from time to time which indicated that the judge was acting so to speak as an additional prosecuting counsel.

We are of the view that the interruptions and the disparaging remarks, coupled with the threat to cite the attorney for contempt of court, taken cumulatively resulted in the appellant having been deprived of a fair trial.

12. In light of the foregoing, we quash the convictions, set aside the sentences and enter a verdict of acquittal. We considered the question of a new trial, as suggested by Mrs. Rogers, and we concluded that it would be unfair to put this appellant through the ordeal of another trial, especially when we looked at the failure of the complainant to give obvious information to the police which

he claimed he had - a failure which the learned judge did not deal with in his reasons for judgment.