JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 57/95

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

R. v DEON McTAGGART

Dennis Morrison, Q.C. with Wayne Denny for the Appellant

Lloyd Hibbert, Q.C., Senior Deputy Director of Public Prosecutions and Grace Henry for the Crown

January 25, 26 & March 6, 2000

FORTE, P.

Having heard arguments of counsel, ending on the 26th January 2000, we dismissed the appeal, and promised to put our reasons in writing. The following are our reasons.

The appellant was convicted of capital murder in the Circuit Court Division of the Gun Court on 12th April 1995. His application for leave to appeal was refused on the 31st July, 1996. On the 20th March 1997 his petition for special leave to appeal to Her Majesty's Privy Council was dismissed.

A petition on his behalf was presented to His Excellency the Governor-General on the 11th May 1999 who in exercise of the powers conferred on him by Section 29(1)(a) of the Judicature (Appellate Jurisdiction) Act referred the "whole case" to this Court for determination.

Before embarking on arguments on the questions sought to be determined in the reference. Mr. Dennis Morrison, Q.C., on the basis that this was a rehearing of the whole case filed and argued a motion, seeking to adduce fresh evidence.

The fresh evidence sought to be adduced was contained in an affidavit of Mr. David Morris, who had been the main and sole identifying witness at the trial of the appellant. As the "fresh evidence" application was not a matter complained of or considered in the petition to His Excellency, the normal rules applicable to the admissibility of fresh evidence were applied.

The principles governing the admissibility of fresh evidence laid down by the Lord Chief Justice of England, Lord Parker of Waddington in *R. v. Parks* [1961] 46 Cr. App. R 29, were once again endorsed by this Court in the case of ***Samuel Lindsay and Henry McKoy*** SCCA 7 & 8/96 delivered on the 18th December, 1998 (unreported). Here follows the dicta of Lord Parker at page 32:

> "As the court understands it, the power under section 9 of the Criminal Appeal Act, 1907, is wide. It is left entirely to the discretion of the court, but the court in the course of years has decided the principles upon which it will act in the exercise of that discretion. Those principles can be summarised in this way: First, the evidence that it is sought to call must be evidence which was not available at the trial. Secondly, and this goes without saying, it must be evidence relevant to the issues. Thirdly, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this court to decide whether it is to be believed or

> not, but evidence which is capable of belief. Fourthly, the court will, after considering that evidence, go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial."

As Mr. Hibbert, Q.C. for the Crown, opposed the admissibility of the evidence sought to be adduced, it becomes necessary for our determination, to apply those principles, laid down in the ***Parks*** case (supra). The objection raised by Mr. Hibbert concerned the question whether the evidence sought to be adduced, was capable of belief and so this aspect of the appeal rested on arguments made in that regard. As a matter of interest, Mr. Morrison, Q.C. offered no response to the submissions of Mr. Hibbert, Q.C., on this point.

In determining whether the evidence is capable of belief applying the already stated principles, the testimony previously given by the witness must be reviewed. He had given first of all, a statement to the police outlining the details of the incident and implicating the appellant. He thereafter gave evidence at a preliminary examination implicating the appellant though in the appellant's absence, as he had not then been arrested. At the trial of the appellant, and four others with whom he was charged, the witness again gave details of the incident and identified the appellant once more as being a participant in the offence. Interestingly also at that trial counsel for the appellant actually suggested to the witness that he (the witness) was an active participant in the commission of the offence. Subsequently, the appellant and one of his co-accused appealed that conviction and this Court allowed the appeal of the co-accused and ordered a new trial.

At that trial the witness also testified, giving details of the incident. Mr. Hibbert has pointed out that at the first trial, the witness was cross-examined by five attorneys, giving evidence over the period of 29th March 1995, to the 4th April 1995. The transcript of that evidence covers two hundred pages. The second trial of the co-accused (Sewell) took place in 1998, when the witness again gave evidence which covered 110 pages of transcript and in which he again spoke to the details of the incident.

The above suggest that the witness is a person well informed of the particular happenings during the course of the commission of the offence, being able to endure the cross-examination of five counsel in the first trial and long cross-examination of counsel in the second trial in such a manner that convinced the jury of his credibility. This witness also attended five identification parades, identifying the suspect at four, and at the fifth was able to contend that the assailant was not present, even though another prisioner attended on the parade, using the name of the suspect. He subsequently identified that suspect in an informal identification in the cell block.

Against that background, the witness swore to a long affidavit, which now forms the subject of the application to adduce fresh evidence. The credibility of the content of that affidavit must therefore be assessed on the background of the previous testimony given by the witness. We look now on the content of the affidavit, which we must set out in some detail in order to determine its likely veracity.

In his affidavit the witness states that he worked for a Mr. Davey called "Jingles" in the stables at Caymanas Park in or around December 1992. In about July 1993 Jingles asked him at the stables to do a job for him. When the witness asked him what was the job, he replied "two men soon come deal with you." About an half an hour later a red car drove into Caymanas Park and two men alighted from it and spoke with Jingles. He was called by Jingles, who walked away leaving him to speak with the two men who introduced themsleves as Detectives Inspector Chippa Grant, and Reggie Grant. Chippa Grant showed him photographs of two 'youth' and said "Dem two youth I want you to send to prison". When he refused, 'they' said to him "Nothing too serious nah go gwan, just point pan dem two ya and say a dem kill Mr. Cann."

He told them he couldn't do it because he did not know the men but Jingles who was called back, took him aside and offered him J$1.5 million and to send him off the island so that no-one would know where to find him. Nevertheless he still refused. Jingles then said to him:

> "Yow juvenile, if you don't do it me a go kill yu' an yu' people dem, so if yu' waan tek it harder, mi a tek it di easier way."

The witness again refused but Jingles then threatened that his life and his family's life are in his hands so either he take the money and do it or he and his family were going to feel it. Jingles knew where his family lived. He agreed. He was then ordered by Jingles to go with the two detectives, who took him to the Caymanas Park Police Station. In a room there, he states:

> "The two men them wrote a statement and told me to sign it."

Asked why he should sign it, the two men told him "a dem man ya do the killing." He then told them he would not do it. In reply they said:

> "Jingles nuh done tell you 'bout wi, if yu' don't dweet a kill we a go kill you' and yu' people dem, a we have power ya so."

In spite of that threat he still insisted that he would not do it, but they thereafter shocked him with a radio cord, and beat him at the bottom of his feet, and when he "could not take the licks anymore" he signed the statement. After this Det. Reggie Grant informed him that he would have to go to Court. The Detective then gave him the following names -

> Happy, Ants-man, Kevin, Gary, Dave-Eighteen and
>
> Deon (the appellant)

and told him if he told the Judge that these men killed Mr. Cann, everything would be alright. They would give him the money and send him to "foreign." Thereafter he was kept in a cell at the Ewarton Police Station from July 1993 to sometime in 1995. For some time after his arrival at the Ewarton Police Station the two police officers visited him almost every day and told him what to say in Court. They showed him photographs of two persons "Dave-Eighteen," and the appellant.

After about a month at Ewarton, he was taken by the same officers to Central Police Station "on a weekly basis" for a total of about four (4) identification parades. He asserts that in all the parades the policemen told him which 'numbers' to identify. At these parades he pointed out Ants-man, Happi, Kevin and "a fat man whose name I don't know." Then in relation to the appellant he states:

> "About 2 weeks later, Chippa Grant drove me to the Gun Court, showed me a photograph of Deon amongst a number of photographs of other people that were in a blue covered book, told me that Deon was wearing a yellow shirt and directed to point him out in a room in the courthouse yard. Chippa Grant stayed in the car and another police officer took me to the room. I did as I was told and pointed out Deon."

In paragraph 20 of his affidavit he states:

> "One day in or around 1995, Chippa Grant and Reggie Grant came to me and said I have to go to court and when I go to court I should tell the judge everything as planned. I went to court and told the judge exactly what they told me. I told him that I knew the accused men and they are the ones who killed Mr. Candon. I was in the witness box for about 2 days. The evidence I gave was untrue. I was not in Spanish Town on the day of the murder. I was at the stables in Caymanas Park. I did not know the accused men and the first time I saw them was when I was shown their photographs or at court. I felt bad that I told lies in my evidence but I thought it was the only way that I could save myself and my family. The police had mashed up my mind and my life."

After the case, he was taken to Summerfield Boys Home in Clarendon, in protective custody. While there he got into an altercation with one of the other boys, and cut the boy with a knife. He pleaded guilty and was sent to the Hill Top Juvenile Correctional Centre in Brown's Town, St. Ann. While there in about February '98, Chippa Grant informed him that one of the men had been successful in his appeal, and a new trial would be held, and he would have to give evidence. He refused, but was again threatened that his life and the lives of his family were in danger if he did not. The police officer then promised to give him the money when he was released.

He stated that he went to the retrial and again gave evidence, saying the same thing he said in Court before. Then he said "though I felt badly about giving false evidence again, Chippa Grant had given me a choice between my life and my family's lives or Deon's." Although the witness states 'Deon' here, it was not the appellant who was tried a second time, but one of his co-accused.

After he was released in September 1998, he went to the offices of Errol Grant at Homicide to collect his money. The officer told him he had no money as 'Jingles' was dead and it was Jingles' idea and he was the one responsible for the witness. He then told the officer that they messed up his life and so he was going to tell the public the truth. The officer offered to put him in the witness protection programme but his mother said she had family with whom he could stay in St. James. He went to stay with relatives, but subsequently moved on his own to Montego Bay.

He then concluded his affidavit thus:

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> "I am living in fear of my life; I hardly sleep at nights. My family doesn't even know what is happening in my life. My life is in danger; I don't know when the police or friends of the convicted men will come and kill me because I don't know what they have planned. I give this statement because my conscience is bothering me to see that I have sent away innocent youths to prison and that I have been used in this way.
>
> I told some of my friends that someone I knew had given false evidence because the police had threatened him and offered him money. They advised that he should visit the Human Rights Council in Kingston to tell his story. I therefore asked around and came to the Human Rights Council.

> I do not know Deon, any of his friends or family and have not been offered any inducement or threat to give this affidavit."

The affidavit of Wayne Denny, attorney-at-law "employed to the London Panel of Solicitors (a collective group of solicitors dealing with death row matters)," given in support of this application may also be of importance. In that affidavit Mr. Denny avers that the sister of the appellant who had been in contact with the Human Rights Council told him of a Johnny who had made contact with the witness in Montego Bay. He then states:

> "The next time she saw Johnny was two weeks afterwards and he claimed to have seen David Morris who told him that he had done something wrong because he was being paid to do so and he wanted to go to the JCHR to tell all he knew. She then gave Johnny the address of the JCHR and the name of the Privy Council Legal Officer to whom he could give a statement."

He then states:

> "As a result David Morris came to the Human Rights office on the 21st October 1999 and gave his statement to myself and Mr. Ali Naseem Bajwa, a visiting barrister from England."

The grounds upon which Mr. Hibbert challenged the credibility of the affidavit of Morris have great merit. It is unbelievable that a young boy of thirteen years of age would be solicited by the police to undertake the onerous task of giving false evidence as the sole identifying witness against six accused persons charged with murder. The alleged method by which he was aided to identify these men is unacceptable given the rules and procedure that obtain at Identification Parades. The witness states that he was shown two photographs of two men – the appellant

and another accused " Davc". At each identification parade the witness attended in relation to the other four he alleged that he was given the number in line of each suspect and on that basis he identified those four men. In relation to the appellant, he was not only shown his photograph before the Parade but was told that he was wearing a yellow shirt. That information aided in the identification of the appellant. It is the rule at an identification parade that a suspect can change his position in the line as also his clothing at the last minute before a witness is called on a parade, and so information such as the witness said he was given as to the place in line of the suspects would not be known to the investigating and/or arresting officer. The same difficulty arises in respect of the colour of the appellant's shirt, as the police officer could not be sure that he would not change it before the witness was called on the parade. These obvious flaws in the proposed testimony of the witness, would also throw great doubt on his veracity in respect of his allegation that he was shown a photograph of the appellant.

The evidence that he gave at both trials was long and in detail, and his withstanding the thorough and exacting cross-examination of counsel at both trials in our judgment is demonstrative of a witness, who was very knowledgeable of the incident of which he was testifying. A young boy, of limited intelligence and education such as the witness, speaking to a script which he was given and without any personal knowledge of the incident of which he was speaking, would be in our view, destroyed by the long and detailed cross-examination of five experienced attorneys.

Of significance also is the time span of July '93 to April '98, a period of almost five years, in which the witness remained consistent in his evidence at every Court at which he testified. The witness was also able during the course of these trials, not only to identify the accused persons, but also to give background information on each of the accused, including the activities of each.

In view of all the above, we came to the conclusion that the evidence contained in the affidavit of David Morris, is incapable of belief and for that reason refused the application to adduce fresh evidence.

We turn now to the matters which formed the substance of the Petition to His Excellency the Governor-General, and consequently the reference to this Court.

The grounds as stated in the Petition reads:

> A. The fact that the Petitioner was in prison for part of the four years referred to by the witness Morris has now been confirmed. This has been confirmed to the instructing solicitors acting for the Petitioner. The details of this confirmation are set out in an affidavit attached.
>
> B. That since trial the witness who was handcuffed to the Petitioner just prior to the confrontation has been found and is prepared to give evidence for the Petitioner.

In respect to B – no argument was advanced before us, nor application made to adduce evidence of the person described in that paragraph.

Mr. Morrison, Q.C., however submitted in respect of the content of paragraph A, that the witness testified at trial that he had known the appellant for four years, and that when the specific dates are checked, it can be concluded that the appellant was in prison for part of the time in which the witness said he knew him.

The appellant was released from prison on the 20th September, 1991. The incident took place on the 10th June, 1993. The witness testified that he had known the appellant for four years before the incident. If that were so, then the witness would have known him since 1989, about two years before the appellant was released from prison. On that basis Mr. Morrison, Q.C., contended that if the jury had been aware that the appellant could not have been known to the witness for 'at least half of the period that the witness said he knew him' it may have had an impact on the decision to accept the evidence of the witness as truthful and reliable in relation to the identification of the appellant. The effect of this new information has to be judged on the background of the age of the witness at the time as also his illiteracy, and consequently his ability to assess passage of time. In any event the witness by saying "about four years" was not giving an exact period within which he knew the appellant. 'About' must imply more or less. During the course of the trial, there was at least one occasion that the witness gave an estimate of time when he stated that he was at Caymanas for three days, a period which was shown to have been really three and a half weeks. The witness could therefore have got to know the appellant, after he came out of prison, which would be a period of about two years, or before he went to prison. The information now revealed is information which must have been in the knowledge of the appellant, but he did not avail himself of it to challenge the credibility of the witness at trial. Significantly, the witness was able to name the sister of the appellant, and that evidence which suggested some knowledge of the appellant and his family was never challenged.

In addition some complaint was made that the learned trial judge in rehearsing the evidence to the jury indicated to them that the witness had said that he knew the appellant for four months. This also seems to have been of some concern to the Privy Council as the letter of reference from His Excellency spoke to only that point. It states as follows:

> "The Privy Council noted with concern the discrepancy between the evidence of the witness, Morris, and the reference in the Judge's Summing-up to the period of time Morris had known McTaggart and whether this in any way affected the jury."

As such a direction would have been in favour of the appellant, Mr. Morrison, Q.C., quite correctly, did not stress that point.

In our judgment, if the new evidence concerning the appellant's earlier incarceration during the period alleged, were before the jury, it is not such as in all the circumstances, would likely have had an impact on the jury's finding concerning the veracity of the witness.

Mr. Morrison, Q.C., did not advance any additional complaints, and consequently the appeal was dismissed.