

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 69/88

BEFORE: The Hon. Mr. Justice Carey, P. (Ag.)
The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Wright, J.A.

R. v. LINTON BERRY

Dr. Lloyd G. Barnett, Richard Small, Miss Millicent Rickman,
Gayle A.V. Nelson and Mrs. Sandra Minott-Phillips for Appellant

Kent Pantry and Bryan Clarke for Crown

ALLIGATION TO ADDUCE FURTHER EVIDENCE

October 30, 1989 & March 12, 1990

CAMPBELL, J.A.

Application for leave to call further evidence was made under section 28 of the Judicature (Appellate Jurisdiction) Act at the commencement of the hearing of the application for leave to appeal the murder conviction in the above case. The further evidence which the appellant sought to adduce consisted of:

1. The record of appeal in Resident Magistrate's Criminal Appeal No. 40 of 1989 relating to the appeal of two co-accused of Joseph Ziadie a material witness in the above case which record disclosed that this witness had on September 8, 1988 pleaded guilty to the offences of conspiracy to defraud and larceny.
2. The record of the decision of the Jockey Club of Jamaica which decision was the subject matter of proceedings in the Supreme Court in Miscellaneous Suit No. 40 of 1988 and the judgment of the Supreme Court in those proceedings wherein it is recorded that Joseph Ziadie -

- (a) was 'warned off' the track for attempting to start a horse with racing plates though he had declared the horse with exercise plates;
- (b) was found guilty by the racing stewards for assaulting a security guard.

For the appellant, it was submitted that the above documents were not available at the time of trial which ended on March 22, 1988. It was further submitted that the interest of justice dictates that the evidence disclosed in these documents be adduced, because the issue of the credit-worthiness of Joseph Ziadie and his propensity for the use of violence were central issues raised by the defence at the trial and the evidence sought to be adduced, credibly confirmed his general bad character and lack of credibility as well as his propensity to violence.

Regarding the first record, the application to have it admitted in evidence is plainly misconceived. Though it could establish a conviction, it was not a "previous conviction" which latter is admittedly admissible to prove bad character of a witness who in cross-examination has not admitted such "previous conviction". The conviction in this case was on September 8, 1988 whereas the trial in relation to which it is sought to be admitted ended on March 22, 1988. The witness could not be asked about this conviction which at the time of trial did not exist and its subsequent occurrence is thus wholly irrelevant for the purpose for which alone the appellant now seeks to use it. The record thus fails both tests postulated by Dr. Barnett namely that the fresh evidence must be admissible and must be in the interest of justice for the same to be admitted. It is inadmissible as it is not a previous conviction and it is not in the interest of justice to admit it because the

witness was not given the opportunity to give answer to it before it is sought to be used against him. Its proposed attempted use is predicated on the erroneous principle that a witness can be condemned as dishonest and lacking in credit because of some dishonest act done by him subsequent to the time when his credit was in issue.

In relation to the second record, we do not consider decisions of the Jockey Club as amounting to convictions. The convictions which are admissible in proof of bad character are in our opinion convictions pronounced by a Court for public wrongs whether they be indictable or summary offences. Dr. Barnett admitted this, because he conceded that the proceedings before the Racing Tribunal did not stand on the same ground as the conviction in the Resident Magistrate's Court. He however submitted that the evidence sought to be admitted, made more probable the inference sought to be relied on namely that Mr. Ziadie's record indicated not only that he would and did commit acts of dishonesty as a racehorse trainer but that he was a person who lied and would lie before an adjudicating tribunal and pervert a court of justice. These matters he submitted were likely to affect the assessment by the jury of the evidence of this witness.

The short answer to this submission is that Mr. Ziadie was cross-examined on the incident resulting in his being "warned off". He admitted this at page 222 and pages 395-396 of the record. The record of proceedings in which this decision "warning off" the witness was incorporated, was thus no longer relevant and/or necessary and would not have been admissible at the trial even if it had then been located. Further, it must be remembered that since the matters contained in the record were directed solely to the moral character of

Mr. Ziadie, the applicant would not have been entitled to have the record admitted in evidence to contradict Mr. Ziadie even if he had denied that he had been "warned off" or even if, having been asked whether he had been found guilty by the stewards of assaulting a security guard, he had denied having done so. Evidence of the bad reputation of a witness for veracity cannot be adduced in this manner. If such evidence is to be given it must be by calling a witness or witnesses to testify that the impugned witness is not to be believed on oath and not by the adduction of a document in which a person not before the court has recorded statements reputedly made by the witness which even if believed goes only to his credit and is not relevant to an issue in the trial. The fact that the defence feels disposed to elevate the credit of a witness to the level of a central issue and so asserts to the court, does not affect the rules of evidence governing the admissibility of evidence relative to credit.

In this regard Dr. Barnett was unable to cite to us any case in which fresh evidence directed solely to credit had been admitted on appeal. In the case of R. v. Herbert Lionel Hamilton (1919) 13 Cr. App. R. 32 cited by him, application was made on appeal to call further evidence to establish that one Jarvis a prosecution witness on whom the prosecution mainly relied to secure the conviction of the appellant had told lies about his true name, the business he carried on and his social status. This evidence admittedly went solely to credit. The Court of Appeal declined to decide whether such evidence could be called, describing it as a difficult question which they did not wish to decide but that leave would be granted if sought to recall Jarvis for him to be cross-examined on those matters.

In this case leave was not sought to have Ziadie recalled and in our view had application been made it would equally have been refused because he could not be cross-examined on his alleged conviction in September 1988 as this would be irrelevant and inadmissible relative to his credit at the prior time when he was giving evidence. As regards his being "warned off", he had already been cross-examined about this.

As the application could not be justified on any legitimate ground consistent with advancing the interest of justice we refused the same on October 30, 1989 and promised then to put our reasons in writing which we have now done.