JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 45/90

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

R. v. EGBERT WHITE

Glen Cruickshank for Appellant

Hugh Wildman for Crown

7th & 8th April & May 11, 1992

FORTE, J.A.

The appellant was tried and convicted in the St. Elizabeth Circuit Court on the 13th March, 1990 for the murder of Melville Saunders committed on the 10th October, 1987. On the 8th of April, 1992 having completed hearing the arguments of counsel, we treated the application for leave as that of the appeal, allowed the appeal, quashed the conviction, set aside the sentence and in the interest of justice ordered a new trial to take place in the next session of the St. Elizabeth Circuit Court. Consequently, these reasons, which we had promised to put in writing will be confined as far as possible, to the single ground of appeal which, in our opinion, rendered the conviction unsustainable.

The deceased was found killed, at his home, on Crane Avenue, in Black River on the morning of the 11th October, 1987. His body was lying on the floor of the living room, and there were wounds to his face, head and throat. At the back of the house, two louvre blades were missing from a window, leaving a space large enough to admit an adult. A search of the house was made, but the only

significant factor arising therefrom was the absence of the deceased's firearm, which later became an important element of the prosecution's case, and which will be again alluded to later.

On post-mortem examination of the body, the doctor discovered a total of fourteen wounds, the most serious of which were as follows:

1. Four to the right side of the forehead which were:

   (a) a one and a half inch wound that was down to the bone;

   (b) a two inch wound down to the bone;

   (c) a two inch wound down to the bone.

2. A two and a half inch laceration of the right parietal area of the scalp, down to the bone and,

3. A two inch laceration of the front of the neck, the right side of it being higher than the left. This wound went through the trachea or windpipe.

The body was "blood spattered", and all the wounds were to the upper half of the body. On internal examination, the skull was found to be fractured in several places. In the doctor's opinion death was caused by shock due to haemorrhage which was due to multiple wounds and fractures of the skull. These injuries, the doctor testified were consistent with infliction by "a very heavy instrument such as a hatchet."

In the absence of any direct evidence, the prosecution relied, in proof of it's case, on circumstantial evidence and on certain admissions allegedly made by the appellant to two prosecution witnesses. The evidence in brief against the appellant was as follows:

On the evening, when the deceased was killed, the appellant was seen by Mrs. Elsie Lewis walking on Crane Avenue, coming from the direction of the home of the deceased, and he then enquired of her whether the road ahead of him, and from which she was coming, was clear. In response, she informed him that a Constable Brown was standing by "Revere Gate." The appellant then turned back in the direction from which he was coming, and on reaching the end of the bridge on which they both were, again turned back. In his hand was a red bag with a string at "the mouth", which can be "drawn up".

The Crown, sought by this evidence to put the appellant in proximity to the deceased's house, on the night of the murder, and acting suspiciously.

Patricia Johnson, saw the appellant on the morning of the 11th October, 1987 going over the wall of the cemetery with a machete in his hand. About one hour later he returned from the cemetery and requested from her, water with which to wash his hands. The witness Howard Vassell, who was in custody of the police at the Black River Police Station, at the same time as the appellant, established the relevance of the evidence of Johnson when he testified, that the appellant asked him then to 'do something for him.' When asked 'what?' The appellant asked him to go to the cemetery and take up a gun for him. Vassel described the appellant's directions thus:

> "Him say when me go look for it fi look two rock stone and a old chimmey and me to search from the rock stone up to the chimmey and me will see it in a scandal bag wrap up in a shirt, me must take it up and hide it fi him, because if dem find it him good fi no see back road fi now. Him say me look after me come over the cemetery me wi see a big guango tree and I will see the rock stone and then me will see the chimmey."

He understood the appellant to be speaking of the Black River Cemetery.

On the 24th December, 1987 Det. Cpl. Novelette Grant went to the Black River Cemetery and there discovered under an old chamber-pot, a plastic bag (otherwise called a scandal or lada bag) in which there was a white "T" shirt wrapped around a gun, which she took with her to the Black River Police Station. This gun was later identified as a gun which was owned by the deceased which was not at his home when searched by the police on the morning of his death.

John Legister testified to seeing the appellant about a week before the death of the deceased, when he (the appellant) told him that he was going "on a move" at the home of the deceased. He refused an invitation to go with the appellant. Then, on the 10th October, 1987 about 7.30 - 8.00 p.m. the appellant visited his house and told him that he had "made the move at the deceased home" showed him a "hand gun" which he had got therefrom, and asked him to dispose of a hatchet for him. The witness refused, went next door for a while, and when he returned the appellant told him that he had thrown the hatchet into his toilet. Subsequently, the hatchet was recovered by the police from the same toilet.

After testifying as to the appellant's request re the gun, the witness Vassell also stated that he asked the appellant if he "really killed the deceased" whereupon the appellant after he "if and but" told him that he (the appellant) did not really go to kill. Thereafter, the appellant admitted his role in the killing of the deceased, which is disclosed in the following extract from the transcript:

A. Him tell me say him and John was inside.

His Lordship: John was inside?

A. Yes, sir, and 'P' was outside watching. After him tell me that now, me ask him say, 'Why you kill him?'

His Lordship: You asked him what?

A. Me ask him 'Why you kill him'?

His Lordship: Yes

A. Him say him have something whey him want.

His Lordship: Yes?

A. And him never really tell me what him did want.

Mr. Sykes: So after him say this to you now, you say anything else to him?

A. Yes, me ask him say 'What'?

His Lordship: You have to speak louder.

A. Me ask him say whey him did want?

Mr. Sykes: Did he answer?

A. Him did answer after that and him say him want the gun. Him say if him never kill Mas Mell, might be him would ah dead or John.

His Lordship: Yes

Q. Did he say anything else to you?

A. Yes.

Q. Tell us.

A. Him say to me say, 'Old boy hard fi dead."

His Lordship: Old boy hard fi dead?

A. Old boy hard fi dead.

His Lordship: Yes?

Mr. Sykes: Did he say anything else to you?

A. After that him tell me say him just a beg me fi do that fi him as a good friend."

The evidence if accepted by the jury was clearly such upon which they could properly convict the appellant.

During the course of the argument before us, two passages in the summing up which we will mention hereafter were pointed out and formed the basis for the complaint of Mr. Cruickshank that the appeal ought to be allowed.

In order to understand the significance of the direction given by the learned trial judge in those two passages, the content of a caution statement given by a co-accused Pervis White ought to be disclosed. The statement in so far as is relevant states:

> "Him say him haffi go take the gun off a Ma Mel. Me tell him say it can take off. Me say we haffi think of a way how fi do dat.
> ...
> Me tell him say him haffi find a way to do dat without killing. After dat me never have any argument differently till the Saturday him come back. Him say him come fi the hatchet and say him a go pon the move a Ma Mel. Him take the hatchet and ask me if me nah come too; me tell him say me nuh deh pon the move. Me give him a spliff and him leave. Mi baby mother come see me and him a talk and ask me whey me and him a talk say. Me tell her say a one spliff him come beg me. I put the hatchet in a one blue and red bag.
>
> About 9:30, when him come back in a the night, him come check me up a Miss Wilhel. Me did a watch McGyver. Me beg him a draw off a di cigarette and him give me a whole one. Him whisper to me same time say him buss the move. Me ask him whey him get and him say him get the gun and three hundred dollars, and say him get spare shot too. Me ask whey the gun deh, him say it down a John yard. Me ask him whey the hatchet deh and him say it down a John yard. He go down a John yard. Him fling the hatchet in a toilet down a John yard."

This statement contained material highly prejudicial to the appellant, as it clearly amounted to an admission by him, as to the commission of the offence.

The principle that an extra-judicial statement made by one accused is not evidence in the case against a co-accused is so well established that there is no need to refer to any authorities to support it. That this principle was apparently in the knowledge of the learned trial judge, is disclosed in the following directions given to the jury at page 345:

> "Now, whatever one accused says in a statement, cannot be used as evidence against the other accused. You use that statement of an accused purely in considering the statement against him; and so the statement as given by Pervis White as led by the prosecution, it is for you to say how you view that statement and what is contained in it in respect of the accused man Pervis White. You do not use it in considering what is the evidence in respect of Egbert White."

However, earlier in his summing-up, he directed the jury in a manner contrary to the above passage, when he told them that they could use the content of the caution statement of the co-accused to support the evidence of John Legister and Howard Vassell. This is disclosed in the following extracts from the summing-up, which formed the basis for the appellant's complaint. In dealing with the evidence of John Legister whom he invited the jury to treat as a witness who had an interest to serve, he stated thus:

> "Now this (sic) is evidence in this case, if you accept it, from an independent source that goes along to support the evidence of John Legister, if you accept it, and that is contained in his statement that is led by the prosecution to you in respect of what the accused Pervis White is alleged to have said, because Pervis White mentioned in his statement, if you accept it, that the hatchet was his, he had in fact loaned it to Egbert White, Egbert White told him that he wanted it and Egbert White

> "paid him for the hatchet, and you have the evidence of Detective Bennett who told you that he found the hatchet in the toilet of John Legister. Here is evidence, if you accept it that may go along to support the evidence of John Legister who is a person that you must examine carefully, but whose evidence, if you accept it, you may use it in coming to your final verdict."

In respect to the witness Howard Vassell this is what he told the jury:

> "But you can look elsewhere also if you wish to see support, if you accept it, for the evidence of Howard Vassell, because in the statement that the prosecution said Pervis White gave to the police, this is evidence, there is a statement there, that if you accept it, it may well go toward supporting what Howard Vassell has said, and this is how you examine the evidence to say whether you find the tying up as far as the prosecution is projecting the case to you. In any event as I told you before, you have to examine the evidence of each accused man separately in coming to your final verdict, but in examining the evidence of the witnesses for the prosecution, you may look to see whether or not there is support in the statements of the accused towards supporting what the prosecution witnesses have said. Because in the statement of Pervis White, Pervis White told you that: 'Maa Mel hear a little sound, get up, fire a shot and we run.' And then Egbert White said to him, 'You see Maa Mel have gun, and then him say, we have to go tek the gun off a Maa Mel. Me say we have fi think about a way to do that. Me tell him say it hard fi tek it off. Me tell him we have to find a way to do it without killing'. And that was the statement of Pervis White that Howard Vassell told you that Egbert White told him: 'That him never really go fi kill.' He asked him why he killed him, and he said he had something he wanted, the gun. He told you that Egbert White said to him, that if he did not kill Maa Mel, 'it might be that he and John would be a dead; and the old boy hard fi dead.' "

In these two passages, the learned trial judge fell into error as he indicated unequivocally to the jury that the caution statement given by the co-accused Pervis White, could be used in determining the truth of the two prosecution witnesses who were the two most important witnesses for the Crown. In our view, this was a most serious misdirection, which left us with no option but to allow the appeal and quash the conviction.

Mr. Hugh Wildman for the Crown though conceding that the learned trial judge was in error, however argued very strongly that in the interest of justice, the Court should by virtue of section 14 (1) of the Judicature (Appellate Jurisdiction) Act apply the proviso, and dismiss the appeal. He maintained that when the evidence contained in the caution statement of Pervis White, was removed from the case against the appellant, there was still a strong case existing in the evidence of the other witnesses upon which, the jury could properly have convicted. In support of this submission, he relied on the following dicta of Mustill, L.J. in the case of **John Stewart** v. R. [1986] 83 Cr. App. R. 327 at page 336:

> "... A useful working guide is to look at the totality of the evidence, and then consider whether, after substracting the evidence of the impugned witness there would be sufficient left to make the jury sure that the defendant was guilty."

This submission, however, presupposes that that sort of mathematical subtraction could be successfully accomplished in the circumstances of this case. In our view that is not a possibility. The directions sought to fuse the content of the caution statement with the testimony of Legister and Vassell, and consequently we would be unable to come to the conclusion that the jury would not have been influenced by the content of the statement in determining whether to accept the evidence of those two witnesses. In those circumstances, it would be wrong to apply the proviso as requested by

Mr. Wildman. For these reasons we came to the conclusion, that in the interest of justice a new trial ought to be ordered, and accordingly made that order.