JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS. 68, 69, 70 of 1991

BEFORE: THE HON. MR. JUSTICE RATTRAY, PRESIDENT
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.

REGINA
vs.
GARTH WILSON
MICHAEL VINCENT
HOWARD GREEN

Miss Paula Llewellyn, Deputy Director of Public Prosecutions, and Miss Gina Morley for the Crown

Jack Hines for Garth Wilson

C. J. Mitchell for Michael Vincent

Dennis Morrison for Howard Green

December 6, 7, 1993 and February 7, 1994

WOLFE, J.A.:

These applications for leave to appeal against convictions and sentences of death were treated as the hearing of the appeals on the basis that questions of law were involved. At the close of the arguments, we dismissed the appeals of Garth Wilson and Michael Vincent and affirmed the convictions. However, we set aside the sentence of death recorded against each and substituted for such sentences the sentences of life imprisonment, having classified the offence as non-capital murder, with a recommendation that they be not considered for parole until each has served a sentence of twenty years from the 7th day of December, 1993. In the case of Green we allowed the appeal, quashed the conviction and set aside the sentence. At that time we promised to reduce our reasons into writing. This represents the fulfilment of that promise.

The appellants were tried in the Hanover Circuit Court before Patterson, J. and a jury. They were jointly indicted with one Audley Holness who was acquitted. The charge arose out of the death of Hugh Donaldson who was shot to death on the 3rd day of July, 1989.

Wellesley Donaldson, a brother of the deceased, testified that on the early morning of the 3rd July, 1989, he was at home in Cascade along with his brother. Both of them lived together. He was awakened from his sleep by his brother who was screaming for help. The screams came from his brother's room. Amidst the screaming he heard an explosion, like that of a gun, and he made his escape from the house into nearby bushes where he remained until about 4:00 a.m. Several explosions were heard by him. When eventually he returned to his home he entered his brother's room and saw the dead body of his brother lying in a pool of blood on the floor. The room was ransacked.

Eaton Marks gave evidence that on the morning of the 9th August, 1989, he was housed in a cell at the Sandy Bay Police Station in the parish of Hanover with the applicants, Audley Holness and two other men. He had been taken into custody on the previous day. After the occupants of the cell had been assured that he was "one a we" a dialogue ensued between the applicants. "Ticks", who is Michael Vincent, said to Garth Wilson, "Is one thing mi know, mi don't own nuh murder. When it come to murder mi disown up to mi mother and father." Wilson, by way of response, said, "John Morris know sey a wi kill the man up a Cascade cause him a work obeah." Howard Green thereupon said, "A one thing, him work too cause him ketch a fi him man." The witness at that stage observed that Green had a piece of black string tied around one of his feet. Audley Holness is alleged to have said, "Him have dem pay for after the death of the man he report himself to the station." Wilson then said, "The only thing can happen toward this charge is to escape."

The deposition of Richard Burnett was read into evidence after the Statutory Provisions were satisfied. Burnett's evidence disclosed that he and Garth Wilson on the 29th day of July, 1989, were cellmates at Kingsvale Police Station in Hanover. He overheard the applicant Wilson talking to himself. He was saying, "Is de bwoy 'Silver Ticks' talk and let dem hold him for no witness was not there." Whereupon the witness said he questioned him by asking him, "If is him really kill the man." The evidence of the witness is set out hereunder:

> "He said the police dem sey he is a murderer. He went on to say that the man in Retrieve or Cascade get ten shots. I asked him why he had to give the man ten shots. He replied, 'When him killing someone, he just want to kill you, kill you.' He also said the man chop 'Silver Ticks' on his hand. He showed me where on the palm of his hand and he was going through the window after 'Silver Ticks' when he spun around and started to shoot the man. Garth also said them wont find any fingerprint because he used his ganzie shirt to hold the windows when they took them out and when he went inside and start to search. He also said he told 'Silver Ticks' that if dem hold him, he must say is at a dance he got the chop on his hand. He went on to say, is trick dem trick 'Silver Ticks' by talking to him and telling him to tell them who do the shooting and they will do something for him and that at the moment they were taping him and he didn't know."

Winston Walker, Detective Superintendent of Police, said that in July 1989 he was the officer in charge of criminal investigations for Police Area 1 which includes Hanover. On the 25th July, 1989, he received a telephone call from Detective Inspector Morris of the Lucea Police Station. As a result of this call he went to the Lucea Police Station where he recorded a statement which was dictated to him by Michael Vincent in the presence of Mr. Ronald Young, Justice of the Peace for the parish of Hanover. There was no real challenge to the statement being admitted into evidence; and it was duly admitted.

"25/7/89, 10:30 a.m. at Lucea C.I.B. office, Hanover. Michael Vincent was cautioned by me, W.D. Walker, SP, as follows: You are not obliged to say anything unless you wish to do so and that whatever you say will be put into writing and given in evidence. Signed, R. E. Young, J.P. Hanover, 25/7/89. I, Michael Vincent wish to make a statement and I need someone to write down what I have to say. I have been told that I need not say anything unless I wish to do so and that whatever I say will be put into writing and given in evidence. Signed R. E. Young, J.P. Hanover, 25/7/89. 'Dem tell mi say dem a go carry mi go a country and dem ask mi fi buy gas fi the car through mi mother just come and give mi some money and we have money a spend, and dem drive mi in the car sey will go to Montego Bay go look fi dem family. Dem drive go one dark road and stop and say a yah dem family live. Dem come out of the car go up to a house. Bull start to push mi through a window and just as mi push mi hand inside a feel a get chop pon mi right hand and run back to the car and say, a so your family treat people. Mi see all four, Roy, Blacka, Bull and Carl with guns. Dem carry the guns in the car trunk. Is Carl car, a yellow Corolla. Carl drive and after mi get chop now dem never want mi fi come back in the car. Dem drive to Spanish Town and stop at the hospital and let me off. Mi go a the hospital. Mi nuh get through so mi call Doctor Ford office. Bull gave mi the number and sey if mi nuh get through mi should call and mek appointment. So I go a Doctor Ford office and mi get treatment as him work down by the hospital, K.P.H. Bull take mi to K.P.H. to Doctor Ford. When mi get chop down the country mi see dem come out the yard with tape and money. Mi tell mi lawyer, Mr. McCalla how it go after mi got treatment. When mi get chop Blacka and Holness go into the house and bus' shots. Bull and Carl was on the verandah. The above statement was read over to me. It is correct. It is the truth but I am not signing it as my lawyer, Mr. McCalla, say I must not sign no form of statement in the matter to the police.' Signed, R. Young, J.P. Hanover. Time 11:10 a.m., 25/7/89. Taken by me this 25/7/89, at Lucea police station. It was read over to the maker in the presence of Mr. Ronald Young, Justice of the Peace for the parish of Hanover. The maker refused to sign same saying that he told his lawyer, Mr. MaCalla, about the murder after he left K.P.H. and the lawyer said he should not sign any statement to the police in the matter. Started 10:30 a.m. and ended 11:10 a.m., 25/7/89. Signed W. D. Walker SP, 25/7/89."

Detective Corporal Cecil Clarke visited the scene of the offence on the morning of July 3, 1989. In the room where he saw

the body of the deceased he found three spent 9 millimetre shells about eight inches from the body. Two louvre windows were missing from a front window of the living room of the house. An interior door leading to another room was broken from its hinges.

At the close of the case for the prosecution both Michael Vincent and Garth Wilson made unsworn statements. Howard Green gave evidence on oath. The unsworn statements of Vincent and Wilson are set out in extenso.

MICHAEL VINCENT

"My name is Michael Anthony Vincent. I live at Duhaney Park, Brooke Avenue, Apt. 20. I was at Brooke Avenue on July 7th when three policemen tek me to Hunts Bay Station saying that I was detained for a parade. Few days later, I went on the parade and no one point me out. Around a week after, I saw three policemen introducing themselves as Sergeant Morris and Mr. Walker. They turned to me and said, 'You know Hanover?' My reply was yes. They looked at me and see a white something on my hand and asked me where I get cut. I tell them that I was at a dance at Spanish Town at the Skateland. While I was at the dance dancing with a lady, her husband came and shove mm away and rush with a cutlass and cut me. They then tek me to Hanover at Sandy Bay and couple days after they tek me to Morris District. I saw my grandfather. They asked me if I knew them. My reply is yes. They tek me back to Sandy Bay. Couple days after, a policeman Mr. Morris, said that I was charged for murder. I told him that I know nothing about murder. I am an innocent man. That's all, m'Lord."

GARTH WILSON

"My name is Garth Wilson. I work as a steel fixer on a construction site. I live at Catherine Hall in St. James. On the 29th day of July, 1989, I went to the Lucea Police Station at about 10 a.m. I saw Mr. Inspector John Morris and Mr. Corporal Lawrence. Mr. John Morris said that he is going to lock mi up. I asked him for what. He replied, I will soon know. He turned to Mr. Lawrence and tell him to take me to the Kingsvale Lock-up which he do. He take along with himself, another police officer. Mr. Lawrence drive the jeep. I arrived at Kingsvale at about 11:30 a.m. A district constable lady was at the station, m'Lord. Mr. Lawrence

"advised her not to let me talk to no one at all. I was placed into a single location behind a board door. I spoke to no one at the Kingsvale Station about no murder or no other conversation. The only time when my cell door open is when I come to catch food when the police escort took the food. The next time I saw Mr. Morris and Mr. Lawrence is when dem come to charge me. A D.C. who work at the station open the cell door for me to come out and talk to him. Mr. Lawrence charged me, m'Lord. He asked me if I have anything to say. I told him I will tell the Judge what I have to say. On the 9th of August, 1989, in the morning, I was taken from Kingsvale to the Sandy Bay lock-up. I was placed in the number one cell by Mr. Jacobs. I did not speak with no one about no murder at the Sandy Bay lock-up, m'Lord. Mr. Eaton Marks was not in the number one cell while I was there, m'Lord. I did not move from the number one cell until I was brought to court. I don't kill no one, m'Lord. I don't involve in no murder. I don't involve in no murder whatsoever, m'Lord. That is the truth, m'Lord. M'Lord, the reason why I did not swear on the Bible today is because I read Matthew 5 verse 34 that say, 'Swear not at all.' I am a true believer of the Bible. That's all, m'Lord."

ARGUMENTS

Re Garth Wilson:

Mr. Hines for the applicant Wilson sought leave to abandon the original grounds filed and to argue the three supplemental grounds filed on December 2, 1993. Leave was granted as prayed.

Ground 1:

"That the learned trial judge erred in ruling that the deposition of RICHARD BURNETT should be read into evidence in that the witness PAULINE BURNETT who gave evidence of the death of her brother (see pages 90-93) together with that of PAULELLA REID (Acting Clerk of Courts) who gave evidence of a witness giving a deposition at the Preliminary Enquiry had failed to prove in accordance with the provisions of section 34 of the Justice of the Peace Jurisdiction Act that the person who died was the same person who had given the aforesaid deposition."

In an effort to satisfy the provisions of section 34 of the Justice of the Peace Jurisdiction Act the prosecution called two witnesses in the persons of Pauline Burnett, a sister of the

deceased, to prove that he was dead and Paulella Reid, the Acting Clerk of the Courts, who marshalled the evidence at the Preliminary Enquiry to prove that the said witness had deposed at the Preliminary Enquiry.

When the prosecution sought to tender the statement into evidence for the purpose of having it read objection was taken on the basis that it had not been proved that the man who had died and the man who had testified at the Preliminary Enquiry was one and the same person. Patterson, J. thereupon recalled the witness Pauline Burnett and asked of her the following questions:

"Q. Miss Burnett, your brother went to school?

A. Yes, sir.

Q. He could write?

A. Yes, sir.

Q. He could sign his name?

A. Yes, sir.

Q. You ever see him write?

A. Yes, sir.

HIS LORDSHIP: Show her the deposition, please.

(Witness shown deposition)

Q. Look at that signature down there, whose signature is it?

A. My brother."

After further cross-examination of the witness the learned trial judge ruled that he was satisfied that the witness had died and that the witness who had made the depositions and the one who had died were one and the same person and ordered the depositions to be read under the provisions of section 34 of the Justices of the Peace Jurisdiction Act.

Such action on the part of the learned trial judge has brought the criticism that he assumed the role of prosecutor by "questioning the witness (exclusively)" and establishing for the

prosecution and to his, the learned trial judge's, own satisfaction that the nexus was now established.

This submission, in our view, is wholly misconceived. It demonstrates a lack of understanding of the role of a trial judge. His function is to keep the scale evenly balanced. He has a duty to ensure that all credible and admissible evidence is put before the jury. Absolutely nothing was wrong with questions asked by the trial judge. The questions were more technical than anything else. The judge in asking the questions did not, in our view, assume the role of a prosecutor. No miscarriage of justice was occasioned by asking the questions. The depositions were properly ordered to be read under the provisions of section 34 of the Justices of the Peace Jurisdiction Act. The complaint lacks any merit whatsoever.

Ground 2:

> "That the learned trial judge erred in allowing part of the evidence of the witness EATON MARKS despite the objection of Counsel for the Defence which part showed or tended to show that the accused committed the offence of attempting to escape from Custody for which offence he was not charged the obviously great prejudicial effect of which far outweighed its probative value."

Eaton Marks testified that the applicant said, "The only thing can happen toward this charge is to escape." Thereafter he was allowed to give evidence that bars to the cell had actually been cut and camouflaged with chewing gum. The fact of the bars having been cut was supported by Detective Corporal Wayne Jacobs.

In our view, this evidence was most relevant in assisting the jury to assess the credibility of Eaton Marks as to whether or not the applicant had used the words, "The only thing can happen toward this charge is to escape." There was no complaint that the words per se are prejudicial. We cannot agree that the evidence was prejudicial at all and moreso that its prejudicial value outweighed its probative value.

Ground 3:

This ground was abandoned by learned counsel for the appellant.

MICHAEL VINCENT

Mr. Mitchell was granted leave to argue six supplemental grounds of appeal.

Grounds 1 - 3:

These three grounds, which are set out below, were argued together:

> "1. That there was no proper evidence adduced by the Crown to support directly or inferentially the contention of the Crown that the applicant was acting in concert with others to rob and/or to kill the deceased.
>
> 2. That there was no evidence adduced whereby it could reasonably be said that the applicant knew or ought to have known that there was a plan by those persons he was alleged to have accompanied to rob and/or kill the deceased.
>
> 3. That the unsigned statement attributed to the applicant and which was admitted into evidence by the learned trial judge did not provide the basis for a finding of fact that the applicant was part of a common design plan to rob and/or kill the deceased."

The cautioned statement having been admitted into evidence, if the jury was satisfied that the applicant made the statement and if they accepted the contents of the statement, that the applicant had travelled with these men from Kingston to Hanover, men armed with guns, and that he was attempting to enter another person's house in the dead of the night through a window from which louvre blades had been removed it would clearly have been open to them to find that he was acting in concert with the other men and that the concerted plan included the use of violence having regard to the fact that at least four of the men were armed with guns. It is clear on the evidence that these men were pursuing a common purpose and that the use of violence was part of the common purpose and ought reasonably to have been

contemplated by the applicant. These grounds, we are convinced, have no merit.

Ground 4:

> "That the learned trial judge failed to give proper assistance to the jury in making a fair analysis of the unsigned statement attributed to the applicant. That it was important for the learned trial judge to have done so as the statement comprised the Crown's case against the applicant virtually."

In dealing with the statement at page 283-4 of the records, the trial judge said:

> "Madam Foreman and members of the jury, I have already told you how to assess the statement if you accept that it was made because you will remember that what the accused man is saying is that, at no time did he dictate any statement to Mr. Walker. He didn't see him on the 25th at the police station in Lucea. He is saying that he was taken from Hunts Bay Police Station on the night of the 24th of July and taken straight to Sandy Bay Police lock-up and that was where he remained. At no time did he come to Lucea Police Station. At no time did he tell anyone that he wanted to make a statement. At no time did he give any statement, did he dictate any statement to Mr. Walker in the presence of any Justice of the Peace or in the presence of Inspector Morris or anybody at all.
>
> So, Madam Foreman and members of the jury, as I told you, it's a question of fact for you to find where the truth lies - whether or not Superintendent Walker, Inspector Morris and Justice of the Peace, Ronald Young, have come here and told you a deliberate lie that this accused man dictated this statement.
>
> If you find that they lied, you would have to disregard the statement completely; it would have no use. If you find that the Superintendent and the Justice of the Peace fabricated the statement, they got together and sat down, wrote up this statement, signed where the J.P. is to sign and Mr. Walker signed where he is to sign, that this accused man didn't dictate anything at all to Superintendent Walker, that Superintendent Walker didn't write anything at his dictation, throw out the statement. If you find that that is so, throw it out, it has no use, but if you find that it was made in the way that the police said

> "it was made then, Madam Foreman and members of the jury, you will have to consider what the accused man is saying, what it does mean, whether it was given voluntarily and see what weight you are going to put on it."

In the above statement the learned trial judge directed the jury how to approach the cautioned statement in their assessment of the evidence. The statement was simple and uncomplicated, and easily understood. There was absolutely no need for the trial judge to go through it line by line in an attempt to analyse what each line meant. A jury of average intelligence would certainly have had absolutely no difficulty in understanding the statement.

Ground 5:

> "That the learned trial judge erred in constantly failing to instruct the jury that if they were in doubt about the Crown's case or any part thereof then the jury should give the benefit of the doubt to the applicant."

Suffice it to say, the learned trial judge told the jury in unmistakable terms that they could only convict the applicant if the prosecution, upon whom the burden of proof rested, satisfied them of the guilt of the accused to the extent that they feel sure. A judge does not have to repeat this direction in parrot-like fashion throughout his summation. The question is, did the trial judge properly convey to the jury a direction which made it clear upon whom the burden of proof rested and what was the standard of proof required before the burden could be regarded as having been discharged? We are of the view that he did so and that the complaint is without merit.

Ground 6, which complained that the verdict of the jury was unreasonable having regard to the evidence, was abandoned by counsel for the applicant.

HOWARD GREEN

Mr. Morrison argued with the leave of the court two grounds on behalf of this applicant.

> "1. That the learned trial judge erred in law when he ruled that the Crown had made out a prima facie case

" against the applicant and called upon him to answer.

2. That the verdict of the jury was unreasonable, having regard to the evidence."

Both Grounds 1 and 2 will be dealt with together.

There were three bits of "evidence", if we may so refer to them, adduced in the case against Green, viz:

1. When he was advised by Detective Inspector Morris that he was a suspect and that he may be charged with the murder of Donaldson, he is alleged to have said, "You can gwaan talk. You think a so dem charge man fi murder. You have fi have eyewitness fi convict man at court."

2. Eaton Marks in his evidence said that when one of the men who was housed in the cell with him said, "John Morris know sey a wi kill the man up a Cascade cause him a work obeah." The applicant Green is alleged to have said, "A one thing, him work too cause him ketch a fi him man." Green was then seen wearing on one foot a piece of black string.

3. Garth Wilson, one of the applicants herein, is alleged to have pointed out Green to the witness Marks and said, "See one of the youth there."

That was the full extent of the evidence against Green. Miss Llewellyn sought to rely upon the second limb of **R. v. Galbraith** [1981] 73 Cr. App. R. 124, but to arrive at the second limb one must first overcome the first limb which lays down that where there is no evidence that the crime alleged has been committed by the defendant, the judge should stop the case. In this case, there was no evidence that Green had committed any offence or participated in any way in the commission of the offence. The learned trial judge ought, therefore, to have acceded to the submission that there was no case to answer and withdraw the case against Green from the jury's consideration.

It is for the reasons stated herein that we came to the decision indicated earlier on in this judgment.