JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 145/07

BEFORE: **THE HON. MR JUSTICE PANTON, P.**
THE HON. MR JUSTICE COOKE, J.A.
THE HON. MR JUSTICE MORRISON, J.A.

DAMION STEWART

V.

REGINA

Leroy Equiano for the Appellant.

Mrs Lisa Palmer-Hamilton, Senior Deputy Director of Public Prosecutions and Mrs Nadine Atkinson-Flowers, Crown Counsel (Ag.) for the Crown.

July 29, September 25, 2009 and March 26, 2010

COOKE, J.A.

[1] On the 25th September 2009, we announced our decision in this matter. It was that Damion Stewart's application for leave to appeal having been treated as the hearing of the appeal, the appeal was allowed, the conviction quashed, the sentences set aside and that in the interests of justice there should be a new trial. We promised to put our reasons in writing, which we now do.

[2] On the 20th November 2007, the applicant was convicted on counts 3 and 4 of an indictment which charged him and a co-accused, one Deneva Allen, with illegal possession of firearm and robbery with aggravation. In view of the decision that there should be a new trial, the case for the prosecution will be described in the merest outline. The virtual complainant Marvin McLean, was, at about 7:30 p.m. on the 27th October 2006, on his way to his house proceeding on foot in the Westbury area of Portmore in St. Catherine, when he was accosted by the applicant and his co-accused. The applicant was armed with a firearm. McLean was robbed of a quantity of cash and a cellular telephone. That same night Mr. McLean went to the Bridgeport Police Station to make a report. There he saw and identified both persons who had perpetrated the robbery. These persons had previously been brought to that station that night for reasons which were unrelated to the robbery. The case for the prosecution rested primarily on evidence of visual identification. In addition, the prosecution sought to rely on an admission made by the applicant.

[3] The ground of appeal which deserved the attention of the court was that:-

> "the applicant did not receive a fair trial as he was not represented by counsel in circumstances where the blame could not be attributed to him."

[4] The circumstances attendant to the learned trial judge's decision to proceed with the trial, with the applicant being unrepresented, is set out in his summing-up, which is now reproduced:-

> "Unfortunately, Mr. Stewart was forced to represent himself in this trial because on the 12th of November [2007], when the case was called up, Mr. Stewart said he had just come from his lawyer's office and that his lawyer, Mr. Lynden Wellesley was expected to attend court.
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> The Crown's civilian witness complained that she came to court previously without the case having been tried. The female witness, Miss Elliot, complained about having to spend more time from her job to attend the trial. Messages were sent by the Court to inform Mr. Wellesley that the case was about to be started. In the circumstances, the case was commenced.
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> However, when it was Mr. Stewart's time to cross-examine Miss Cooke (sic) it was clear that he needed assistance. The case was adjourned to allow him to have his attorney present. He was then on bail. On the adjourned date, Mr. Stewart reported that his attorney, Mr. Wellesley, said that he had some other court to attend. That was not acceptable to this Court and Mr. Vincent Wellesley was asked to communicate with Mr. Lynden Wellesley to inform him of the accused man's need.
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> Mr. Lynden Wellesley still did not attend and the trial proceeded that day, and was again adjourned part-heard to today's date. During the interval, I saw Mr. Lynden Wellesley who informed me that he had written to the Registrar requesting that his name be removed from the record.

> It is my understanding that that is not an appropriate way of having attorney's name removed from the records. Though the circumstances are very unfortunate, you found that - I find that an opportunity has been given to Mr. Stewart to have his own representation in place and [he] assured the Court that representation was in place. I find that there is no basis for halting the trial, especially, in light of the instances of the Crown's witness. I now return to the instance of this case."

[5] It is sufficiently clear that the learned trial judge gave the applicant adequate opportunity to have counsel who had been retained on his behalf to be present to participate in his trial. The learned trial judge was quite concerned about the ability of this applicant to conduct his defence. Hence, there was an adjournment from the 12th November, 2007, to the 17th November 2007. Mr. Lynden Wellesley (the counsel retained) still did not attend the court. The applicant in support of his application filed an affidavit dated 9th April 2009. The relevant paragraphs are set out below:-

> "3. To the best of my knowledge my father Mr. Marvin Stewart engaged the services of Mr. Lynden Wellesley, Attorney-at-law to represent me.
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> 4. I am not privy to the financial arrangements between my father and Mr. Wellesley, but Mr. Wellesley came to Court and represented me on several occasions and did state to the Court that he was my Attorney-at-law in respect of the case.

5. In April of 2007 I visited the office of Mr. Wellesley just before attending Court. Mr. Wellesley, told me that he needed more money to represent me. On that date, I attended Court and was remanded in custody. My bail was restored on my next court appearance when Mr. Wellesley attended.

6. On the 12th day of November 2007, the case was set for trial. I visited the office of Mr. Wellesley and reminded him of the date. Mr. Wellesley did not attend court.

7. At the end of the day I again visited Mr. Wellesley's office and informed his Secretary of the next court date being the 15th day of November 2007.

8. On the 14th day of November 2007, I again visited the office of Mr. Wellesley and he informed me that he has a case in the Half Way Tree Court and he will come to court after.

9. Mr. Wellesley did not attend Court on the 15th day of November 2007, and the case continued.

10. I was remanded in custody at the end of the day's hearing for the case to continue on the 20th November 2007.

11. On the 20th November 2007, Mr. Wellesley still (sic) absent again. I was tried without the benefit of having an Attorney-at-law present. I was found guilty on two (2) counts of the indictments and sentenced to 2 terms of ten (10) years imprisonment to run concurrently.

12. From the start of the case my father informed me that Mr. Wellesley would be representing me and as stated earlier it was confirmed by Mr. Wellesley in Court at

Spanish Town and at the Gun Court, King Street, in Kingston.

13. My father always gave me the assurance that all arrangements are made. Had I known that there was a problem with finance I would have asked the Court to assign me a Lawyer.

14. I am not familiar with court proceedings I never read the statements given by the witnesses and I had no materials pertaining to the case. I also do not possess the requisite skills to effectively represent myself in a case of this nature."

[6] The applicant asserts in paragraph 14 that he was not provided with "materials pertaining to the case". In trials in the High Court Division of the Gun Court, it is imperative for accused persons to be provided with the statements of the witnesses whom the prosecution intends to call. The practice is not to serve these statements on the accused personally, but rather on his retained counsel or counsel who has been assigned to conduct the defence. In this case the transcript does not reveal whether the learned trial judge made any enquiry of the applicant as to whether he had the requisite statements, nor was there any direction that if he had not, that they should be provided to him. This omission brings into focus section 20 (6) (b) of the Constitution of Jamaica. This section states as follows:-

"Section 20(6) Every person who is charged with a criminal offence —

(a) ...

(b) shall be given adequate time and facilities for the preparation of his defence;

(c) ...

(d) ...

(e) ..."

[7] In **Franklyn and Vincent v R** (1993) 42 WIR 262, their Lordships' Board considered section 20 (6) (b) in the context of summary trials in the Resident Magistrates' Court. Lord Woolf, who delivered the advice of the Board, said at page 271, d –f:-

> "While the language of that subsection does not require a defendant always to be provided with copies of the statements made by the prosecution witnesses, where the provision of a statement of a witness is reasonably necessary for such purpose, it should be provided as being a facility required for the preparation of his defence. This is in accord with the views of Forte JA expressed in the Court of Appeal of Jamaica in ***R v Bidwell*** (1991) (unreported) where he indicated that "facilities" could include a statement of a particular witness and added that "facilities must relate to anything that will be required by the accused in order to aid him in getting his defence ready to answer the charge". It follows that the present practice of refusing to provide to the defence statements of proposed witnesses to a prosecution, as a matter of course, is inappropriate."

[8] We are of the view that the non-provision of the witness statements to the applicant deprived him of "facilities" within section 20 (6) (b). The

applicant should not only be given the statements but also afforded reasonable time to study them. Reasonable time would of course take into consideration the nature of the allegations contained in those statements. It may be necessary for the learned trial judge to enlist assistance for the accused if he is unfortunately illiterate.

[9] It is for these reasons that we determined that the applicant did not receive a fair trial and hence our decision.