JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 52/97

BEFORE: **THE HON MR. JUSTICE DOWNER, J.A.**
THE HON MR. JUSTICE BINGHAM, J.A.
THE HON MR. JUSTICE HARRISON, J.A.

R v MICHAEL STEWART

Jack Hines for appellant

Miss Gail Johnson for Crown

July 22, 2002 and February 26, 2003

HARRISON, J.A:

This is an application for leave to appeal against conviction and an appeal against sentence imposed on the 16th day of April 1997, at the Home Circuit Court. The appellant was convicted for the offence of sacrilege committed on 21st November 1993, and sentenced to eight years imprisonment at hard labour. After hearing the arguments herein, we treated this application as the hearing of the appeal. We allowed his appeal, quashed his conviction, set aside his sentence and entered a verdict of acquittal. We further ordered that he be released immediately.

These are our reasons in writing.

The facts are that on 21st November 1993, at about 11: 00 p.m. Det. A/Cpl Alphanso Myers was walking along Roosevelt Avenue towards Latham Avenue in the parish of St Andrew, when he observed a man two chains away walking along the gully bank coming from the direction of Swallowfield. The man had a green army-type bag slung over his left shoulder and a black bag in his right hand coming towards him. The man stopped and Myers hid behind a wall. The man then resumed walking and on reaching under a street light fifteen yards away, the witness Myers recognized the man as Michael Stewart, the appellant otherwise called Junior Barnes. Myers ~~walking towards the appellant~~, shouted; "Junior what you have there?" The appellant replied "a some kerchief sir". On his request to see it, the appellant dropped the bag he had in his right hand, ran across the road, jumped in the gully and ran along the bank dragging the other bag. The witness Myers pursued the appellant and fired one shot in the air. The appellant let go of the bag and escaped. He retrieved both bags. Other police officers came and he took the bags to the Stadium police station. In the black bag was a cash pan marked "New Dimension" and a paper marked "Swallowfield Chapel." The following day at about 11:00 a.m. he went to the house of the appellant. He called out the appellant and told him that he was investigating a case of sacrilege and asked the appellant about the things he dropped the night before. The appellant replied, after caution, "A me bed me did deh

last night wid me yout, a frame unno want fi frame me, why you neva shoot me?" The appellant was taken to the police station and charged.

Another prosecution witness Phyllis Hoe, the administrator of the Swallowfield Chapel, had locked up the Chapel with keys and padlocks on Sunday November 21, 1993, at 1:30 p.m. She returned the following morning at 8:30 a.m. and saw two aluminium blades at the back of the building twisted out, and the iron grill adjacent within sawn off leaving an opening. On entering she found that the rooms were ransacked. The witness Myers came and spoke to her. Later that day at the Stadium police station in the presence of the ~~appellant~~ ~~she~~ identified and claimed as the property of Swallowfield Chapel, a tape recorder, transformer, communion cups, cash pans and other articles, as well as the black bag in which the articles were, together exhibit 1. The appellant protested his innocence.

Det. Myers had known the appellant for about six months before the said night. He had last seen him the Friday night before the said Sunday.

The appellant made an unsworn statement in his defence. He said that he was getting ready to go to a football match at the National Stadium when it started to rain. He retired to bed at "around 6:30" and woke up the Monday morning. It was still raining. The police came, searched his house, found nothing and took him to the police station. He

protested his innocence. The witness Hoe, claimed the articles and he, appellant, was arrested and charged for sacrilege.

Mr. Hines for the appellant argued two grounds of appeal, namely, that the defence of alibi arose on the prosecution's case and the learned trial judge failed to leave the said defence to the jury, and that the sentence was excessive.

A trial judge has a duty to leave for the consideration of the jury every issue fairly arising on the evidence and this is so even where the accused does not rely on it (***R v Muir*** (1995) 48 WIR 262). An unsworn statement of an accused given in his defence, not being evidence on oath, is inferior to oral evidence (***R v Mills et al*** (1995) 1 WLR 511). Despite that, the learned trial judge is obliged to tell the jury that they must decide whether or not such a statement has any value and what weight they, the jury will attach to it: (***D.P.P. v Walker*** (1974) 12 JLR 1369). However, where a defence arises even on the prosecution's case, for example, one of alibi, the learned trial judge has a duty to leave it to the jury, with adequate directions. In ***R v Wiggan*** (1966) 9 JLR 492, this Court dealt with the failure of the learned trial judge to give directions to the jury concerning the treatment of the defence of alibi. The headnote reads:

> "It is the duty of a trial judge in every criminal trial to put to the jury any defence relied on by an accused, however weak that defence may be in the view of the trial judge."

The appeal was allowed and a new trial ordered.

The extra-judicial statement of an accused is not evidence unless the prosecution makes it so by using it as a part of its case against the accused (***R v Higgins*** (1829) 3 C&P 603). That is because of the self-serving nature of such a statement. Once the prosecution makes it evidence, it becomes evidence for and, in some instances, against the accused.

In the instant case, the statement of the appellant to the police officer Det. Myers, namely:

> "A me bed me did deh last night wid me yout, a frame unnoo want fi frame me, why you neva shoot me?"

was led by the prosecution as a part of the testimony of the said police officer and therefore is evidence in the case amounting to the defence of alibi. It was therefore incumbent on the learned trial judge to direct the jury specifically on the defence of alibi, its nature and effect and how it should be considered.

The learned trial judge in his direction to the jury, in respect of the appellant's case said:

> "Now, in our jurisdiction, in this court, the accused man, Mr. Stewart is charged with an offence. He says he is not guilty and in our law he is presumed to be innocent and he is only guilty if you by your verdict say that he is. He never has to prove his innocence. The law says that it is the prosecution who must prove the case against the accused man to your satisfaction so that you feel sure of his guilt, so that you have no reasonable doubt of his guilt."

and further,

> "On the other hand, what the accused man is saying is that, 'it wasn't me'. Simply, I wasn't on that road that night at all. I was in my bed from six p.m. on the 21st. Never came out of my bed because I was to go to a football match which was washed out because of rain. So although I was prepared to go to the football match, I didn't go anywhere because the match was washed out. I went to my bed and I was in bed. I stayed there until the following morning when the police came there and knocked me up. He said he went out to them and they accused him of breaking into the chapel."

and still further,

> "Now Corporal Myers was subjected to cross examination and defence attorney, as is his duty, no doubt, was putting ~~the case for the~~ defence very strongly and he accused Corporal Myers of trying to frame this man. He accused him of trying to frame him because he, Corporal Myers is friendly with the brother of the accused. He is saying that the accused and his brother have a house from which rent is collected and that Corporal Myers wants to put the accused man behind bars so that he, Myers can collect rent on behalf of the accused man's brother. The first thing to note is that the accused man never told you any such thing. These are all suggestions coming from the defence's lawyer, so they are not evidence."

and finally,

> "Now the accused man is saying two things. One, you are either deliberately framing me or you are mistaken as to who you saw on the night of the 21st of November, 1993, in the region of eleven p.m."

The above quoted passages from the learned trial judge's directions were the sum total of the defence for the consideration of the jury.

In dealing with the issue of identification and recounting the evidence that, on being asked by Cpl. Myers what he had in the two bags, the man refused to tell him and contend that "you have to shoot me Mr. Myers". The learned trial judge in his directions to the jury said:

> "What the police is also saying is that when he arrested the accused the following day the 22nd of November, 1993, the accused said to him is, 'why you didn't shoot me?' If you accept this then it corroborates, then it lends support to the evidence of the police that this is the man he saw the night before. ~~This is the man~~ who he fired a shot at when he was running in the gully but these are all matters for you, Madam Foreman and members of the jury."
> (Emphasis added)

Merely to recite to the jury a portion of the statement, namely, the phrase, "why you never shoot me?", as corroboration that the appellant was seen at the scene by Cpl. Myers, instead of the entire statement,

> "A me bed me did deh last night wid me yout, a frame unoo want fi frame me, why you neva shoot me?"

was unfortunately taking the former statement out of context and causing unfairness to the appellant. The learned trial judge failed to tell the jury that the full impact of the said statement when arrested and cautioned, was in the nature of an alibi. The appellant was in effect saying "I was not

there, I was elsewhere, if you say you saw me, why did you not shoot me?"

This totally exculpating statement was evidence in the case led by the prosecution, revealing the defence of alibi, which was not left with the jury for their consideration. Such an omission by the learned trial judge amounts to a misdirection, thereby making the conviction flawed.

We were made aware of the fact that the record of appeal before us, and in particular the transcript of the trial is incomplete, because the shorthand notes of one of the two court reporters cannot be located. She had resigned and left the Island. This information was communicated to the Registrar of the Court of Appeal only on 20th April 2001. Consequently, we are aware that it is possible that the missing notes could contain some reference to the defence of alibi. However, we think that that is unlikely, because of the manner in which the said exculpatory statement was segmented, taking it out of context, as we observed. In view of all this and the nature of the evidence, we considered the option of a new trial.

This offence was committed on 21st November 1993. The appellant was arrested on 22nd November 1993. He was tried, convicted and sentenced, on 16th April 1997 to eight years imprisonment at hard labour. He has been in custody since then pending the hearing of his appeal filed on 28th April 1997, a period in excess of five years. It would be unjust to

order a new trial in these circumstances. The appellant may justifiably think that due to an obvious bureaucratic blunder he has been unjustly treated and deserving of some redress. We cannot visualize the authorities being averse to such an approach.

In the circumstances, we allowed the appeal and made the orders previously stated.