JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 85/1994

ON REFERRAL FROM THE GOVERNOR-GENERAL

BEFORE: **THE HON. MR. JUSTICE PANTON, P.**
THE HON. MRS. JUSTICE HARRIS, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A. (Ag.)

PATRICK TAYLOR v REGINA

Jack Hines & Wayne Denny for the appellant Patrick Taylor

Ms. Paula Llewellyn, Senior Deputy Director of Public Prosecutions, Ms. Claudette Thompson & Ms. Dahlia Findlay for the Crown

July 25, 26; November 12, 15, 2007; July 31 & October 24, 2008

PANTON, P.

1. The appellant was convicted on July 22, 1994, on four counts of non-capital murder. The hapless victims were Horrett Peddlar, his common-law wife Maria Wright, and their children Matthew Nelson and Useph Peddlar. The appellant's brother Desmond Taylor and one Steve Shaw, who were jointly charged with the appellant, were convicted on four counts of capital murder in respect of the said deaths which occurred between March 18 and 27, 1992. The three convicts were sentenced to suffer death in the manner authorized by law. In the case of the appellant, the sentence of death was warranted by virtue of the multiple killings.

2. The appellant's appeal against his conviction was dismissed by the Court of Appeal on July 14, 1995. He petitioned the Privy Council for special leave to appeal, but this petition was dismissed on June 6, 1996. A similar fate befell the petitions of his fellow convicts. However, on September 12, 2000, the death sentences were commuted to imprisonment for life, and subsequently (on July 23, 2001) the appellant was ordered to serve thirty-five years imprisonment before being eligible for parole. His sentence was ordered to commence on October 25, 1994.

3. The appellant petitioned His Excellency the Governor-General for "fresh evidence" to be considered in his case. His Excellency referred the matter to the Court of Appeal for re-hearing pursuant to section 29(1) of the Judicature (Appellate Jurisdiction) Act. Having read the affidavits and heard preliminary submissions, we decided to hear the evidence to see whether it was capable of belief. Having heard the evidence, we concluded that there was nothing to suggest that the verdict of the jury was other than reasonable. We saw nothing to even hint at a miscarriage of justice. As a result, on July 31, 2008, we ruled that the appeal remains dismissed and the sentence is to run as ordered, following on the commutation of the death sentences on September 12, 2000. The position, therefore, is that the appellant's sentence runs from October 25, 1994.

The material that was before the jury

4. The prosecution's case was a mixture of circumstantial evidence and admissions by the appellant, his brother Desmond and Shaw. It was accepted that the appellant was also known as "Mark", his brother Desmond as "Boxer" and Steve Shaw as "Curly". There was ample evidence of motive as there was bad blood between the Taylors and the Peddlars. On November 21, 1990, a civil suit was filed by the deceased, Horrett Peddlar against Benjamin and Desmond Taylor. Judgment was entered in favour of Mr. Peddlar on September 5, 1991, in the sum of $6,000.00. There had been part payment, and on February 24, 1992, a warrant of levy was issued to collect the balance of $3,000.00. In addition to the civil suit, there was an incident on January 26, 1991, which gave rise to a criminal prosecution against the Taylor brothers (including the appellant) for causing swellings and bruises all over Mr. Peddlar's body, and a wound to his upper lip.

5. The prosecution alleged and proved at trial that the appellant was voluntarily present at the scene of the murders. He knew that his brother Desmond and Steve Shaw were going to the Peddlars' premises armed, with the intention to do them harm. He was part of a joint enterprise whereby his role was to keep watch, to give encouragement and support, and to come to the assistance of the actual machete wielders, if necessary. The base on which the prosecution's case stood was the acceptance by the appellant of a statement

made by Shaw in his presence. Shaw had stated that he (Shaw), Desmond Taylor and one "President" and the appellant had gone up to the Peddlars' residence, and that he and the appellant had watched the killings. Upon the making of this statement by Shaw, the appellant began to cry and admonished Shaw for going contrary to Desmond Taylor's instruction by speaking of the incident. The appellant admitted to Superintendent Morris that he was at the scene, but he never knew that they were serious in their intention to kill the Peddlars.

6. For completeness, it should be mentioned that the evidence at trial was that while Superintendent Morris was interrogating Desmond Taylor, Shaw was brought into the room. Taylor, when asked if he knew Shaw, replied in the negative. Thereupon, Shaw protested by saying to Taylor that he should not tell the officer that he did not know him as he Taylor had checked him at Tucker, and that "President" and Taylor had gone up to his community to kill a man. Shaw also said that he and the appellant had gone and watched. He said he saw Taylor chopping the adult female victim. Taylor then grabbed Shaw by his shirt and said, "Officer him tell you what me do; him no tell you say a him chop up the little boy". There was evidence also from Special Constable Gabbelin Wright and one Carla Sutherland that Shaw had made statements that he had chopped Useph Peddlar because Desmond Taylor had instructed him to do so.

7. In the face of the sworn evidence from the prosecution witnesses as to the circumstances of the murders, the appellant and his co-convicts chose to make unsworn statements to the jury. This practice of making unsworn statements, one would have thought, has become anachronistic; yet, it is persisted with in Jamaica. In his statement, the appellant confined himself to telling the jury that he did not go up to Mr. Peddlar's premises, and that he did not tell the police that he had gone up there.

8. In his unsworn statement, Desmond Taylor said he had no reason to kill the Peddlar family. He denied telling Superintendent Morris that Shaw had killed the little boys. He said Mr. Peddlar used to plant ganja, and had fallen out with some men who had sworn to kill him, and that Mr. Peddlar had sought police protection. Steve Shaw in his statement said he never gave a statement to the police, he was not at the scene and knew nothing about the murders. He then added that he signed the statement because the police beat him and forced him to sign. He denied saying anything to Carla Sutherland, and denied knowing his two fellow convicts.

9. The jury took an hour and fourteen minutes to arrive at their unanimous verdict of guilty. They obviously accepted Superintendent Morris and the witnesses Wright and Sutherland as credible witnesses.

The evidence in the Court of Appeal

10. Before us, the appellant and his co-convicts gave evidence on oath. Well, there was no alternative. In saying how the "fresh evidence" had come about, the appellant confirmed the contents of his affidavit dated 2nd July, 2007, which was admitted as exhibit one. Although it contains 29 paragraphs, the important paragraphs number no more than five, namely paragraphs 7 to 10 and 25. They read thus:

> "7. That on a day in December 2004 Desmond and I were on A1 Block at the St. Catherine Adult Correctional Centre, and I was talking to him of parole and reprieve and being free one day.
>
> 8. That my brother was quiet for a while and then said 'All you shouldn't de yah you know star'.
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> 9. I then asked him what he meant since he had used those words several times before except that he would always use the word 'we'.
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> 10. It was then that he said it was he and Curly (Steve Shaw) who did it ....
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> 25. That on the day when Desmond admitted that he and Steve Shaw did it, I told him I would contact my London Solicitor, Paula Hodges and give her the information. I asked him if he would be willing to tell the authorities what he had told me and he said he would do anything."

11. The remaining paragraphs of the affidavit can hardly be described as "fresh evidence" as they:

> (a) relate to matters that were within the appellant's knowledge at the time of the trial; or

(b) repeat the defence advanced at trial; or

(c) amount to a commentary on the attorney's conduct of the defence.

12. The appellant's evidence under cross-examination before us was also not in the "fresh evidence" mode. However, he confirmed that he never knew Superintendent Morris before, and had not previously had any issues with him. The appellant also confirmed the existence of a close relationship between himself and his brother Desmond.

13. In his affidavit, which was admitted as exhibit two, Desmond Taylor said that he and Steve Shaw had committed the murders. He narrated a history of the relationship between himself and the Peddlars, including his conviction for raping Mrs. Peddlar. He also related the Judge's warning in open court that he (Desmond Taylor) would be sent to prison if convicted of wounding the Peddlars. He said that the Judge's remark caused him to decide "to get rid of (his) problem once and for all".

14. Under cross-examination before us, Desmond Taylor admitted to the name "Boxer". He said that all four Taylor brothers were before the Court for wounding Mr. Peddlar. He said he knew that Mr. Peddlar was not coming to Court on the 19th March, 1992, as he "had chopped him up". However, he said nothing to his brother Patrick. He feared being hanged, he said, so he never told his or the appellant's attorney-at-law as they would have told the police and he

would have been sentenced to hang. He further said that even up to when the matter went before the Privy Council, he never told the attorneys about the appellant's innocence. In relation to the conversation referred to in paragraphs 7 to 10 of the appellant's affidavit, this is what Desmond Taylor said in answer to Miss Llewellyn:

> "Some words dropped from my mouth. I never really intended to say what I said. I am trying to help him by telling the truth now. I should have said it long ago. I told Steve Shaw not to say anything about the crime".

15. Steve Shaw's affidavit was admitted as exhibit three. In it, he related an account of the killings, which he said was done by Desmond Taylor and himself. He said he called the appellant's name to the police, but that he had lied in saying that the appellant watched the commission of the murders. In paragraph 23, he said that the appellant did not say to Superintendent Morris:

> "Curly, Boxer no tell you fi say nothing, alright sir mi did go up dey but mi never know sey dem been serious sey dem a go kill the people dem".

Under cross-examination, he said that Desmond Taylor had told him not to say anything to anybody about the killings. He, however, spoke to the police about it because he couldn't keep it. "I wasn't able to keep it in over the years", he added. In answer to the Court, he said:

> "I only called the names dem to get myself out of it. I called Patrick and Desmond to get myself out of it".

Under cross-examination, he said further:

> "I got converted to my Christian belief in prison in about 2000. I was unsure how to approach Patrick Taylor. That is why it took me until 2004 to mention the matter. I said nothing to Desmond Taylor in 2000. My conversion did not compel me to speak to either of the Taylors. This was a real conversion. If the lawyers had not contacted me in 2004 I don't know if I would have said anything to anybody."

16. Superintendent Morris also gave evidence. He reaffirmed that the evidence he gave at the trial was truthful. He particularly recalled the utterance of the appellant quoted in the immediately preceding paragraph:

> "Curly, Boxer no tell you no fi say nothing. Alright sir. Me go up dey but me never know sey dem been serious sey dem a go kill de people dem".

The law

17. The reference by the Governor-General was done under section 29(1) of the Judicature (Appellate Jurisdiction) Act, which reads in part:

> "29.-(1) The Governor-General on the consideration of any petition for the exercise of Her Majesty's mercy or of any representation made by any other person having reference to the conviction of a person on indictment ... may, if he thinks fit at any time, either –
>
> (a) refer the whole case to the Court and the case shall then be heard and determined by the Court as in the case of an appeal by a person convicted."

In determining appeals in ordinary cases, the Court is bound by section 14 of the said Act, which reads:

> "14.-(1) The Court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:
>
> Provided that the Court may, notwithstanding that they are of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.
>
> (2) Subject to the provisions of this Act the Court shall, if they allow an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial at such time and place as the Court may think fit.
>
> (3) On an appeal against sentence..."

18. In deliberating on this matter, we gave due consideration to the judgment of this Court in ***Brian Bernal v The Queen*** (RMCA Nos.30 & 31/95 – delivered November 6, 1997). At page 27 thereof, Patterson, J.A., having quoted sections 14(1) and (2) of the Judicature (Appellate Jurisdiction) Act, said:

> "These provisions make it quite plain that the Court, in light of the fresh evidence, must consider and decide whether under all the circumstances the verdict of the Resident Magistrate should be set aside on the ground that it is unreasonable, or if on any ground there is a miscarriage of justice. The decision must be made by the Court itself on a review of the relevant evidence, and in the circumstances of the instant case, also on the findings of fact by the Resident Magistrate. The Court is not obliged to come to its decision on the basis of what conclusion the Resident Magistrate would or might have arrived at if he had heard the fresh evidence. If the Court concludes that the verdict is unreasonable in light of the fresh evidence, or that there is a miscarriage of justice in the circumstances, then the conviction should be quashed".

At page 36, Patterson, J.A., concluded thus:

> "Having heard and considered the fresh evidence, it was incumbent on us to say whether, in the light of that evidence, the verdict of guilty should be set aside on the ground that it was unreasonable, or that it could not be supported by the evidence or if there was a miscarriage of justice. On the evidence that the Resident Magistrate heard, there could be no doubt that the verdict of guilty pronounced against Bernal was correct. In our view, the fresh evidence would have had no effect on his verdict. But it was for us and us alone to decide what effect, if any, that evidence had on the case as a whole. We saw no reason to find that the verdict was unreasonable, nor that there was a miscarriage of justice. We were satisfied, therefore, that the additional evidence had not affected in any way the final decision as to the guilt of Brian Bernal. For these reasons, we ordered that the dismissal of the appeal against conviction and sentence should stand".

Prior to arriving at that conclusion, the Court had expressed its view as to the lack of credibility of the main witness whose evidence had been received.

19. Since that decision, there have been decisions by the Judicial Committee of the Privy Council and the House of Lords which have provided further guidance as to the approach to be taken in situations such as the instant one. In ***R. v. Pendleton*** [2002] 1 All ER 524, the House of Lords held that where fresh evidence had been received on an appeal against conviction, the correct test to be applied by the Court of Appeal in determining whether to allow the appeal was the effect of the fresh evidence on the minds of the members of the Court, not the effect that it would have on the minds of the jury, so long as the Court bore very clearly in mind that the question for its consideration was whether the conviction was safe, and not whether the accused was guilty.

20. The Court's first task, according to the reasoning in ***Pendleton***, is to decide whether or not to receive the fresh evidence. If it decides to receive the evidence, or hears it *de bene esse*, it must then undertake the task of deciding whether or not to allow the appeal (see p.531c-d). In executing this latter task, the English Court of Appeal was reminded that it "is entrusted with a power of review to guard against the possibility of injustice but it is a power to be exercised with caution, mindful that the Court of Appeal is not privy to the jury's deliberations and must not intrude into territory which properly belongs to the jury" (see p.534e). Where the Court of Appeal has heard oral evidence (in-chief and under cross-examination), and has had the benefit of submissions being addressed to it by counsel, it will be in a position to conclude without doubt that

the evidence cannot be accepted or cannot afford a ground for allowing the appeal (see p.534f-g).

21. Lord Hobhouse, in stating his reasons for agreeing that the appeal should be allowed, advised the Court of Appeal against indulging in speculation. He said:

> "Where the conviction is after a trial, it is the trial and the verdict which are relevant. But, in my judgment it is not right to attempt to look into the minds of the members of the jury. Their deliberations are secret and their precise and detailed reasoning is not known. For an appellate court to speculate, whether hypothetically or actually, is not appropriate. It is for the Court of Appeal to answer the direct and simply stated question: do we think that the conviction was unsafe?" (p. 542b)

In relation to the question of the status of the jury's verdict, he said:

> "Unless and until the Court of Appeal has been persuaded that the verdict of the jury is unsafe, the verdict must stand. Nothing less will suffice to displace it. A mere risk that it is unsafe does not suffice: the appellant has to discharge a burden of persuasion and persuade the Court of Appeal that the conviction is unsafe. It is ironic that the appellant has, under the banner 'the supremacy of the jury', sought to undermine that supremacy and the finality of the jury's verdict ...
>
> In a 'fresh evidence' case, there has been no irregularity or error of law at the criminal trial. The verdict of guilty has been returned by a properly directed jury after a properly conducted and fair trial. The mere production on a later appeal of additional evidence which would have been admitted at the trial had it then been adduced demonstrates no unsafety of the verdict. It merely raises for the consideration of the Court of Appeal the question whether the Court

> of Appeal thinks that, taking into account the new evidence, the verdict has become unsafe".(p.541e - g)

22. In ***Dial and Dottin v The State*** (2005) 65 WIR 410, the Judicial Committee of the Privy Council, in applying the principles stated in ***R. v. Pendleton*** (supra), said:

> "[31] In the Board's view the law is now clearly established and can be simply stated as follows. Where fresh evidence is adduced on a criminal appeal it is for the Court of Appeal, assuming always that it accepts it, to evaluate its importance in the context of the remainder of the evidence in the case. If the court concludes that the fresh evidence raises no reasonable doubt as to the guilt of the accused it will dismiss the appeal. The primary question is for the court itself, and is not what effect the fresh evidence would have had on the mind of the jury. That said, if the court regards the case as a difficult one, it may find it helpful to test its view 'by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict' (***Pendleton*** at p 83, para [19]. The guiding principle nevertheless remains that stated by Viscount Dilhorne in *Stafford* (at p 906) and affirmed by the House in ***Pendleton***:
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> 'While ...the Court of Appeal and this House may find it a convenient approach to consider what a jury might have done if they had heard the fresh evidence, the ultimate responsibility rests with them and them alone for deciding the question [whether or not the verdict is unsafe].'

Assessment and conclusion

23. We were unimpressed by the evidence of the appellant and his co-convicts as to the non-involvement of the appellant in the murders. We formed the view that they were not speaking the truth and were trying to pull the wool

over the Court's eyes. It is accepted that they all lied at the beginning, and it was clear to us that they were still lying at the end. In the year 1996, the Privy Council dismissed the appellant's petition. He was then under sentence of death. His brother Desmond Taylor professed his love for him, and added that when he and his brothers were growing up, they all looked out for one another. Upon the dismissal of the petition to the Privy Council, Desmond did not at that stage see it fit to speak the "truth" and so spare his beloved brother from the death penalty. He had a fear of being hanged. That, he said, was his reason for not saying that the appellant was not present at the commission of the murders. However, in the year 2000, the death sentences were commuted to life imprisonment. One would have thought that Desmond would then feel comfortable to speak. Yet, he waited until 2004 to do so. Alas, it seems that even at that late stage, he was not minded to unburden himself of his mental load, as, while being cross-examined by Ms. Llewellyn, he said that the words "dropped from his mouth" when he had that conversation with the appellant. He added that he never really intended to say what he said. In the case of Shaw, he claims to have been converted to the Christian faith in 2000. However, it took him another four years to mention his discomfort with the appellant's situation.

24. Desmond Taylor said that he had told Steve Shaw not to say anything about the murders. This was confirmed by Shaw, who said that he had nevertheless told Superintendent Morris about the incident. He also said that he

(Shaw) called the appellant's name to the superintendent. These statements merely in our view give support to the evidence of Superintendent Morris.

25. We found that the fresh evidence was not capable of belief. The verdict at which the jury arrived is not unreasonable, and there has been no miscarriage of justice. Accordingly, we ordered that the conviction would remain intact, and the sentence is to run from October 25, 1994.