

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 100/95

**BEFORE: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.
THE HON. MR. JUSTICE HARRISON, J.A. (Ag.)**

WAYNE PUSEY vs. REGINA

Cecil J. Mitchell for the appellant

**Kent Pantry, Q.C., Senior Deputy Director
of Public Prosecutions, and Miss Janice Gaynor
for the Crown**

March 18 and May 6, 1996

WOLFE, J.A.:

The appellant was tried in the Circuit Court Division of the Gun Court holden at Kingston before McCalla, J. (Ag.), sitting with a jury, on the 5th, 6th and 7th days of July, 1995, for the offence of non-capital murder arising out of the death of Peter Robinson, which occurred on the 7th day of November, 1993.

He was convicted and sentenced to imprisonment for life and ordered not to be eligible for parole until after he has served a period of fifteen (15) years.

For the purpose of this judgment, only a brief summary of the evidence is necessary. On November 7, 1993, sometime in the afternoon, the applicant, accompanied by three other men, all armed with guns, in wild west style, kicked open the gate of premises 33 Waltham Park Road. All the men entered the premises. The applicant and one other man proceeded onto the verandah of the house and executed the deceased Peter Robinson who was standing at the doorway. Some five shots were fired at the deceased by both men. The execution was effected in the presence of June Elliot and Odette Goldspring, a young girl whose evidence was unsworn at the trial. Both Miss Elliot and Odette knew the applicant for some time prior to the incident. They knew him as "Sampleman".

Dr. Royston Clifford, Consultant Forensic Pathologist, performed the post mortem examination and testified that the deceased died from gunshot wound to the right upper anterior chest which was associated with massive bleeding.

Detective Sergeant Cecil Lewis arrested the applicant who, upon being cautioned, said: "Officer, mi neva de de".

The applicant in an unsworn statement raised an alibi. On the day in question he, along with his "baby mother" and daughter, had gone to Hellshire Beach from early morning. They returned home at about 4 o'clock in the afternoon. He denied being present at the home of June Elliot. He denied

participating in the execution of Peter Robinson. He ascribed malice, arising from a previous altercation with Miss Elliot, as the reason for her implicating him.

Before us, two grounds of appeal were argued, to wit:

"1. That the Learned Trial Judge erred in failing to administer a most necessary warning to the jury that the evidence of a child of tender years should be viewed with caution. Such a warning was of paramount importance and especially where the credit of the witnesses was a vital issue in the case.

2. That the Learned Trial Judge compounded the error as aforesaid when in dealing with the question of unsworn evidence at page 13 of the summing up the Learned Trial Judge failed to deliver or administer the necessary warning and left the clear view with the jury that Miss Elliot's evidence would or could corroborate the evidence of Odette Goldspring."

Both grounds may be conveniently addressed together.

It is settled law that where the evidence of a child of tender years is admitted during a trial the trial judge ought to warn the jury about the danger of acting upon the uncorroborated evidence of such a witness. See ***R. v. Henry and Manning*** [1969] 43 Cr. App. 155.

It is also well settled that a trial judge is required to warn a jury that the unsworn testimony of a child must in law be corroborated before such evidence can be acted upon. See section 54(1) of the Juveniles Act. In ***D.P.P. v. Hester*** [1972] 3 All E.R. 1056, the implications of section 38(1) of the Children and Young Persons Act, 1933, which is in pari materia to section 54(1) of the Juveniles Act, were considered.

In this case the learned trial judge gave a clear and sufficient warning that the evidence of Odette Goldspring had to be corroborated before it could be acted upon. She further pointed out to the jury, quite properly in our view, that the evidence of June Elliot, if they accepted it, was capable of corroborating the testimony of Odette Goldspring.

However, in respect of the warning required to be given in respect of children of tender years, the learned trial judge failed so to do. Mr. Pantry for the prosecution conceded that this was so but urged that the verdict of the jury was sustainable in that no miscarriage of justice had been occasioned to the applicant.

This was, indeed, a very strong case. The execution of Peter Robinson took place in broad daylight in the presence of June Elliot, an adult person, who knew the applicant very well. The applicant himself, in his unsworn testimony, acknowledged that June Elliot and himself knew each other well. He, however, said he was only being implicated because of malice on the part of Miss Elliot. Both the issue of identification or recognition as well as the credibility of Miss Elliot were fairly left to the jury for their consideration. The verdict was inevitable. We are of the view that had the required warning been given the jury would have arrived at the same verdict.

For the reasons stated, we conclude that this is an appropriate case in which to apply the proviso to section 14(1) of The Judicature (Appellate Jurisdiction) Act.

The appeal is accordingly dismissed. The conviction and sentence of the court below are affirmed.