**(1) Christopher Brown and**
**(2) Everald Mclaughlin** *Appellants*

*v.*

**The Queen** *Respondent*

FROM

**THE COURT OF APPEAL OF JAMAICA**

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REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 2ND FEBRUARY 1995, Delivered the 23rd March 1995

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*Present at the hearing:-*

Lord Goff of Chieveley
Lord Jauncey of Tullichettle
Lord Slynn of Hadley
Lord Steyn
Sir Basil Kelly

*[Delivered by **Sir Basil Kelly**]*

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The appellants, Christopher Brown and Everald McLaughlin, were convicted of the murder of Derrick Barrett before Ellis J. sitting with a jury in the Gun Court Division of the Home Circuit Court, Kingston on 5th February 1988. They were sentenced to death. They appealed to the Court of Appeal of Jamaica which dismissed their appeals in a judgment delivered on 16th December 1988. Special leave to appeal as poor persons from the judgment was granted by Her Majesty in Council on 27th October 1993. At the conclusion of the hearing, the Board announced it would humbly advise Her Majesty that the appeal in each case be allowed and the convictions quashed for reasons to be delivered at a later date. These reasons now follow.

The Prosecution Case

At the trial the prosecution case was that the deceased Derrick Barrett ("deceased") lived with Martha Kelly ("Martha") and their

four children at IM Glasspole Avenue, in Kingston. About 5.00 a.m. in the morning of 14th February 1984 they were asleep when Martha heard knocking at the door and a voice said "Police, open police". She told the children not to open the door and the deceased hid under the bed. The door, however, was kicked in and three men entered the room carrying guns. They ordered that the light in the room be switched on and this was done by one of the children. Two of the gunmen were the appellants, Brown and McLaughlin, and the third was a man called Roman who has since died. McLaughlin draped Martha in her clothes and put a gun in her ear. He asked where the deceased was. At first she said she did not know but then said he was living down at Windward Road. The three men then left the house but, immediately after, one of them was heard to say outside "But you did not look under the bed". At this McLaughlin and Roman re-entered, found the deceased under the bed and McLaughlin, holding his gun, ordered him out. They told the deceased to get dressed and gave him a glass of water. McLaughlin asked him to take them to where his brother lived. The deceased said he could not do so as he had a grievance with his brother and he did not think he slept in his own house. McLaughlin said "Come, man, because we have to find him". Martha then gave McLaughlin $180 and begged the men not to kill the deceased. McLaughlin took the money and the men said: "Alright, we not going to kill him". McLaughlin, Roman and Brown, who had been standing at the door of the room, then went outside, taking the deceased with them. As they were leaving, McLaughlin told Martha to put back the door in place and not to make any noise. The time between the men's entry and their leaving was approximately half an hour.

After she closed the door, she talked with the children and then she heard shots which seemed to come from the street. About 6.00 a.m. on hearing the deceased's sister crying and saying "he is dead", she went outside. She went to the cross-roads of Glasspole Avenue and De Aguilar Road where she found the deceased lying dead. A post-mortem examination of his body showed twelve firearm entry wounds in his head, chest and abdomen which caused his death. After seeing the body, Martha went to Rockfort Police Station to report the death. Later on the same day she made a statement there to Detective Sergeant Ximines.

No eye-witness to the shooting was called by the prosecution and no evidence, forensic or otherwise was adduced to link either of the accused directly to the murder. The prosecution case was that the only reasonable inference to be drawn was that the armed men, who had taken the deceased away from his house a short time before the shots were heard, were the men who had committed his murder or who had at least aided and abetted it. It followed that the evidence of identification of the appellants as two

of the armed men who had entered the house and taken away the deceased, which Martha purported to give, was crucial to the prosecution case.

Both of the appellants were arrested on 20th October 1984. The trial did not, however, take place until 2nd February 1988.

The Course of the Trial

On the opening morning of the trial, McLaughlin's counsel was ill and did not appear. A second concern was that Dr. Venugopal, a Crown witness, who had conducted the post-mortem of the deceased, had other commitments on that afternoon and the following days. The learned trial judge, clearly anxious to facilitate all concerned, agreed that only the doctor's evidence, which was not in dispute, would be taken after the Crown opening that morning and the evidence to follow would begin the next morning. The evidence of Dr. Venugopal finished at 12.48 p.m. However, the trial was not adjourned as had been agreed. The judge, making the observation that the jury involved were busy people, expressed an intention to get on with the case and decided the trial would continue but that Martha would give only her evidence in examination-in-chief that day. Her cross-examination would await the arrival of defence counsel the next morning. Martha's examination-in-chief began at 12.55 p.m. and finished after a break for lunch until 2.00 p.m., at 2.40 p.m.

She gave evidence of the events of the morning of the shooting that accorded with the prosecution case outlined. It is necessary to refer only to those facts that touch on the issues raised in this appeal. Having pointed out McLaughlin in court as one of the three gunmen she was asked if she recognised any of the other two men in court. In reply she indicated the appellant, Brown, whom she referred to as Christopher.

Crown counsel asked her:-

"Q. What about Christopher Brown, had you known him before that morning when you saw him in your bedroom?

A. No.

Q. It was the first time you were seeing him that morning?

A. Yes."

She said that when the men came into the house the second time, Brown stood at the door with the shotgun he had been carrying on his first entry. Later Crown counsel returned to her identification and asked:-

"Q. Now, just taking you back to about five o'clock when this whole incident started. You said that you were seeing Christopher Brown for the first time that morning?

A. Yes.

Q. About how much time he actually spent inside the room?

A. Not at the door now, inside the room? About ten minutes.

Q. What part of him did you see at that time during that ten minutes period. What part of his body?

A. The entire body.

Q. His face?

A. Yes."

As for McLaughlin, she said she had known him from when she was eight or nine years and she was twenty-nine now. She passed his house going to and from school. She knew him by the name Tina. She could not recall the last time she had seen him before the shooting and that during the twenty year period she had known him, she saw him "not so regular".

At the outset of her cross-examination the following morning, Mrs. Harrison-Henry, Brown's Counsel, asked Martha if she had, after seeing the dead body, given a statement at Rockfort Police Station to Sergeant Ximines. She said she had and she had signed it. It was then put to her by Mrs. Henry that she had not named Brown in it as one of the three gunmen who entered her house. When Martha said she had, counsel sought to contradict her and called for the original police statement. The judge was told it could not be located. He then said that because the policeman would be coming to court counsel didn't need the statement. Counsel replied, "this is a very vital issue here". The judge said he didn't know if they could wait to find the statement and asked Crown counsel, Mr. Wright, if he had it. Crown counsel said he had a typed statement to which the name Martha Kelly had been signed but the taker of or the witness to the statement had not signed it. Again it was put to Martha she did not call Brown's name in the first statement she had made at the police station and Martha said she did. Counsel then showed her the typed statement and Martha agreed it contained her signature and that it was dated 14th February 1984. She asked Martha to look through the statement, whereupon Crown counsel objected on the grounds that the typist was unknown, and although Detective Ximines' name was at the bottom, he had not signed it. Mrs. Henry made clear to the judge the point of her cross-examination. She said:-

> "... I am merely wishing to put the statement to her as she has said in her evidence that Christopher Brown's name was called at the earlier opportunity. This is against the background, M'Lord, where my learned friend opened to the issuing of two warrants, and it would appear to me therefore that the first report which Martha Kelly gives at the police station, it is regarding the identification of the men, must be a vital matter for the Court, for the jury and for counsel. It is for that reason, because I might challenge in terms of her identification that issue to put, if the original statement can't be found, to put this statement which would be the second best to the witness. She has said to me 'I did call his name. I call the name Christopher Brown'. This is the statement that she is alleged to have given to the police, and I would like for her to look at it and show me where she called Christopher Brown's name."

The trial judge observed that although the witness' signature was there, one did not know the author. Then followed a lengthy discussion between the judge and Mrs. Henry. It is not clear from the transcript what ruling the judge was making then or intended to make. He did indicate that the matter would be resolved when Sergeant Ximines came to give evidence, and in the meantime, counsel could crossexamine on the signature, but he intended to rule the statement out in evidence because the author of it remained unknown. Mrs. Henry put it to the witness again that nowhere in the three pages of the typed statement was Brown's name. Martha said she hadn't read it. The judge intervened and elicited from Martha that the statement she gave at Rockfort was written down in Sergeant Ximines' hand. She said she did not remember signing any typewritten document but it was her signature on it.

Mrs. Henry left the matter but returned to it and asked Martha to look again at the typed document and to read through it to herself. The she asked:-

> "Q. And you called Christopher Brown's name in the statement?
>
> A. Yes, but I don't see where they mention it.
>
> Q. Did you call Christopher Brown's name in the statement?
>
> A. Yes, when I was giving the statement to the police I called the name.
>
> Q. So you are saying it was an omission by the police? Let me just take it ..."

The judge then intervened:-

"His Lordship: What omission? No, no, no.

Mrs. Harrison-Henry: My Lord, I am going to take it step by step.

His Lordship: You don't reach that part yet. Let me be fair to you and tell you how I am thinking. I don't know what is that. You have put a document in the witness's hand and she says that ... looking at it she now adheres to the story that she had given that she did speak to Brown. Now, I don't know, we don't know, what that is."

Defence counsel continued:-

"Q. Is this the statement that you gave to Mr. Ximines?

His Lordship: No, no, no. How can it be and it is defective in not having the signature of the maker of the statement.

Mrs. Harrison-Henry: Who is the maker, My Lord? My submission is that she is the maker.

His Lordship: No, no, no. She said something and she says that she saw him write ... which is a different thing. What you see there is a different thing. That is a typewritten thing; that's not the same thing, so you can't ask her if that is it.

Q. Is this a reproduction ...

His Lordship: No, no, no, no ... You can cross examine the witness on that document - nobody can stop you cross-examining - but whenever you ask a question or conclude that, what you put in her hand, is a replica or near to the original, you are going to be in problem."

Counsel's cross-examination went on:-

"Q. Did you see the name Christopher Brown appearing in what you just read?

A. No it is not there, they only mention about ...

Q. Just a minute. Let me just take it one by one.

His Lordship: The name Christopher Brown does not appear there in what you have just heard?

Witness: Yes, sir.

Q. Does the name Christ appear in what you have just read?

A. No.

Q. The answer is No?

A. Yes.

Mrs. Harrison-Henry: My Lord, I am going to state a question and see if your Lordship shall allow me.

Q. Does the content of this appear to be the statement that you gave on the 14th of February 1994?

His Lordship: Can't allow that ... You see, why I ruled against this question, the witness having looked at it - the first question you asked her, 'Do you still stick to what you said, that you called Brown's name?' 'Yes'. 'The name Christopher Brown, does not appear in what I have just read, neither does the name Chris appear'. So if you ask the question, 'Do the contents of that appear to be the statement you gave?; it is not fair, it not proper, because she is saying otherwise.'

Mrs. Harrison-Henry: But, my Lord, with respect, she is saying two things.

His Lordship: What two things?

Mrs. Harrison-Henry: She is saying that she called Christopher Brown's name when she gave the statement.

His Lordship: Yes?

Mrs. Harrison-Henry: She is saying having looked at it ...

His Lordship: No, that having looked at a document which you put in her hand.

Mrs. Harrison-Henry: But a document to which her signature is affixed.

His Lordship: The doesn't say a thing. It is different; it is not the same thing. Remember, she said 'I saw him write. I saw him'. Nothing about any typewriting. Different, different, different.'

Mrs. Harrison-Henry: Well, my Lord, I am going to maintain my submission. I know your Lordship will overrule me but I am asking for the document to be tendered in evidence.

His Lordship: That what?

Mrs. Harrison-Henry: This same one.

Mr. Wright: And I will be objecting.

Mrs. Harrison-Henry: Very well.

His Lordship: The objection is sustained, and let me give the reason so that we are not in the dark. The witness speaks of giving a statement which she saw the policeman take down and then she signed. What you have purported to put in her hand is a document, typewritten, and has her signature, and you said that this statement which she would have given, or which she gave, on the first occasion was witnessed by Ximines. This one had nothing other than her signature, so it is a different document altogether and that is the reason why I am excluding it.

Mrs. Harrison-Henry: My Lord, just on a point of clarification, it is indeed true, sir, that there is no witnessing signature, and my friend had outlined that first and I agreed because the document was there for all to see, but there is a note on it.

His Lordship: No, no, you cannot say anything that there is a note on it. It is not in Mrs. Henry; it is not in."

In his re-examination of Martha, Mr. Wright, Crown counsel asked her:-

"Q. Now, we turn to this statement, this so-called statement given to the police on the 14th February, 1987 (sic). The statement you said you gave to the police was taken down in writing by Mr. Ximines?

A. Yes, sir.

Q. Now, at the end, after Mr. Ximines had taken down that statement, did you read it?

A. Yes, I read it over, but I was in a tense position.

Q. You were in a tense position?

A. Yes.

Q. Now, that document which you were shown with your signature on by Mrs. Harrison-Henry, is that the same document ...

His Lordship: No, no, no, no. Well, why are you asking that?"

Crown counsel thereupon desisted.

It must have been plain to the trial judge that at this stage of the trial, with Martha in the witness box, defence counsel had in her hands a typewritten document signed by Martha, the content of

"Q. When you say then that you knew that the warrants were written up on the 15th and you know of it, that is how you know of it?

A. I gave instructions.

Q. You gave instructions, and you instructed them on the strength of the statement that you got from who?

A. Martha Kelly.

Q. From Martha Kelly?

A. Yes. "

Detective Corporal Green gave evidence. He had taken over office from Detective Sergeant Ximines at Rockfort Police Station on 13th August 1984, almost six months after the murder. On doing so, Detective Sergeant Ximines handed over to him all investigation files, including the file relating to the death of the deceased. Mrs. Henry asked him did he see on the file a statement from Martha and was it a handwritten or typewritten statement. He said he thought there were both handwritten and typewritten ones which were both dated 14th February 1984, and that each statement bore a notation at the end as to the officer who took the statement. She asked him the whereabouts of the handwritten one. He said he thought it should be with the files. He was the person, he said, who had handed in the file to the office and it included the handwritten document and the typewritten document. Mrs. Henry asked him to look at the typewritten statement which she had earlier put to Martha and which she had sought to cross-examine from and have admitted. Detective Green acknowledged that that was the typewritten copy he had handed in to the court's office.

Mrs. Henry, at the conclusion of her cross-examination of Green, applied to tender the typewritten statement, reminding the judge that the police officer had now identified it. The judge asked:-

"Q. What's the object of putting it in? What's the purpose of putting it in?

Mrs. Henry: Credit for Martha Kelly, M'Lord.

His Lordship: Martha Kelly admitted she made the statement already. I am refusing the application for it to go in and this man only see it on it, he can't do anything about it."

The fact was, of course, that Martha had not admitted in terms it was her statement, only that it bore her signature. This was one of the principal reasons for the judge's earlier exclusion of it when he had said:-

which was relevant and inconsistent with her identification evidence of Brown. It had been made equally plain to the judge that defence counsel considered it to be a crucial part of the defence and that she wished to cross-examine on it and, if necessary, to tender it in evidence. The trial judge would have known that for its effective use by the defence, Martha should be confronted with it and cross-examined on it. Counsel at first sought to have it admitted on the basis of the former evidential rule, that it was a copy of the original which had been called for and was lost. However, the typewritten document, not being a photographic copy of the manuscript statement was a freshly made document and was, in its own right, an original document. Its relevance was evident from the fact that it bore Martha's signature and the date of 14th February 1984 and it was implicit in her answers having read it that it dealt with the events of the intrusion into her house and the participants. Moreover it was shown to be inconsistent by Martha's admission on reading it that Brown's name was not on it. It was in these circumstances that the judge disallowed cross-examination on it and ruled out the question whether the contents appeared to be the statement she gave to the police on 14th February, with the comment "not fair it is not proper". If Martha had accepted its contents, then the document would have been receivable in evidence on that acknowledgement alone.

The manuscript statement from Martha was never produced at the trial, nor was its absence accounted for. When Detective Sergeant Ximines came to give evidence he was asked:-

"Q. Now did you at any later time that day, that same day, the 14th of February 1984, take a statement from anyone?

A. Oh, yes, sir.

Q. From whom was this statement taken?

A. Martha Kelly.

Q. Now, as a result of this statement taken from Martha Kelly, did you do anything?

A. Oh, yes, sir.

Q. What did you do?

A. On the 15th which was the following day, I prepared warrants of arrest for both accused men."

However, in cross-examination, he said that the warrants were not written up by him. The trial judge at the conclusion of his re-examination took up the matter. He asked the sergeant:-

"This one had nothing other than her signature, so it is a different document altogether, and that is the reason why I am excluding it".

Brown did not give evidence but elected to make an unsworn statement from the dock. He denied he had gone to Martha's house or that he knew her or her husband. He was innocent he said.

When it came to summing-up, the trial judge referred to the typewritten statement in this way:-

"Mrs. Henry made a submission as to a document. You remember that she has suggested that Martha Kelly did not tell any policeman about Brown and she said a certain document - cross-examined to suggest a document on which she cross-examined did not have it in. Now, Martha Kelly told you that she told the policeman and he wrote it down, didn't type it, he wrote it down. Now, as far as the case is concerned, that typewritten thing wasn't in evidence. You can't deal with that at all. And in any case, it could not have gone in because it was something different from what she said she saw the policeman do. So it couldn't have gone in, but you are still left with the idea that on the file that Zimroy Green obtained on the 13th of August, it had three warrants or had two warrants, one for McLaughlin and one for Brown."

The jury retired at 2.46 p.m. and returned at 3.00 p.m. with a verdict of guilty in each case.

The Court of Appeal dismissed both appeals in a judgment delivered on 16th December 1988. As to defence counsel's submission (Mr. Daly appeared for Brown in the Court of Appeal) about the typewritten document, the Court of Appeal's judgment reads:-

"Before us, Mr. Daly stated as a proposition that in cases where identification was in issue, the defence has a right to cross-examine on, and to tender in evidence statements to the police made by the prosecution witness for the purpose of challenging the evidence of identification. He conceded that there was no authority specifically on the point but said he relied on the broad sweep of *R. v. Oliver Whylie* 15 J.L.R. page 163 as embracing this proposition. He submitted that the learned trial judge erroneously ruled that the statement was inadmissible solely because it had not been signed by the policeman to whom the statement was given.

> We think that the learned trial judge was correct in ruling that the typewritten document was inadmissible in evidence.
>
> It is unnecessary for us to express an opinion in the proposition advanced by Mr. Daly because we are clearly of the view that even if he were correct, the document to be admissible in evidence, nonetheless had to satisfy the statutory requirements of sections 15 and 16 of the Evidence Act."

The court obviously intended this reference to be to sections 16 and 17 of the Evidence Act (Jamaica) 1973, which mirror respectively sections 4 and 5 of the Criminal Evidence Act 1865.

Mr. Kuldip Singh Q.C. who appeared for Brown before the Board, submitted that the Court of Appeal was, as was the trial judge, fundamentally in error in preventing cross-examination of Martha on the typewritten statement and in error in ruling that it could not be received. Moreover, he submitted, it was a gross misdirection by the trial judge in directing the jury to ignore it.

Their Lordships consider it is a well-established rule of the common law that a statement made by a witness on a previous occasion, which is inconsistent with his evidence, may be used in cross-examination to impeach his evidence and, if the statement is in writing and the witness is first shown it, he could be asked then whether he had said the different matters in the statement previously. The common law on the right to cross-examination was stated by Lawton L.J. in *R. v. Sweet-Escott* (1971) 55 Cr.App.R. 316 at page 320:-

> "Since the purpose of cross-examination as to credit is to show that the witness ought not to be believed on oath, the matters about which he is questioned must relate to his likely standing after cross-examination with the tribunal which is trying him or listening to his evidence."

This test was approved by the Court of Appeal in *R. v. Funderburk* (1990) 90 Cr.App.R. 466. It follows that if a witness' evidence is inconsistent with a previous statement made by him, that statement may be put to him to show that the inconsistency it raises may affect his likely standing with the jury.

However, the inconsistency alleged went beyond the collateral issue of credit. It went to the central issue in the case, namely, whether Brown was one of the three gunmen who entered the house and took the deceased away. For the same reason, it was also a previous statement "relative to the subject-matter of the indictment or proceeding" which is the phrase common to both sections 16 and 17 of the Evidence Act (Jamaica) 1973. Accordingly

both at common law and under these statutory provisions Brown's counsel had the right to cross-examine Martha on the document and not be bound by her answers as final. Further she had the right to use it if she thought fit, as a preliminary step to having it made evidence. Devlin J. (as he then was) in *R. v. Hart* [1957] 42 Cr.App.R. 47, said at page 50:-

> "The provisions under which that evidence was sought to be made admissible is now contained in Section 4 of the Criminal Law Procedure Act, 1865, which re-enacted the Common Law Procedure Act 1854. Before that it had probably been the common law that, quite apart from any statute, questions were admissible - certainly in the ordinary common law courts - whereby if a witness gave evidence of a fact that was relevant to the issue (and that is important, because if the question merely goes to credit, he cannot be contradicted) it could be put to him that on some earlier occasion he had made a contrary statement to somebody else and, if he denied it, that somebody else could be called. What was probably the common law was certainly made statutory by the Common Law Procedure Act 1854 and then, by Denman's Act, the Criminal Procedure Act 1865 ..."

Because section 4 of Denman's Act, which is in the same terms as section 16 of the 1973 Act, is "almost, if not entirely, declaratory of the common law" (Cross on Evidence, 7th Edn. page 305) and because section 17 deals expressly with previous statements made in writing, a short reference to these statutory provisions is justified. Section 16 applies to a witness who "does not distinctly admit that he has made such statement". Martha's answers to defence counsel would place her in that category and enable cross-examination under the section to be pursued and, if it was thought fit, lead to proof that she had made the typewritten statement. If, however, the trial judge was correct in stating, as he did at a later stage, that Martha had admitted she had made the statement, defence counsel could have invoked section 17 with, at her election, all the benefits that accrued from section 17. Cross summarised these at page 307:-

> "The witness can be asked whether he made a statement and be cross-examined on the general nature of the statement without being shown the document. The cross-examiner is not obliged to put it in evidence, even if he shows it to the witness, but he must do so if he wishes to use the document as a contradictory statement, and the witness must be given an opportunity of explaining the contradiction."

Brown's counsel then had the option of reading aloud to Martha those parts of the typewritten statement she considered telling and putting to her that those parts were true. Having put the statement in evidence in this way it could be given to the jury for their inspection. If this was the course Brown's counsel chose to adopt, then those parts which referred to McLaughlin could have been edited out by the trial judge on the grounds that they were not only highly prejudicial but inadmissible against him, or alternatively under the powers given him in the concluding parts of both sections 16 and 17 as to how the statement might be used when admitted.

Mr. James Guthrie Q.C. for the Crown helpfully made available to the Board the typewritten statement in question. It appeared to be, in accordance with the practice in Jamaica, a written statement of a potential prosecution witness taken by the police in the investigation of offences used to found the oral evidence of the witness at the committal proceedings (see *Berry v. The Queen* [1992] 2 A.C. 364 at page 373). It was a typewritten document of three pages, with a short addendum to the main statement on the third page. It began "Martha Kelly states". The body of the statement which then follows narrated the events of the early morning of 14th February from the entry of the three gunmen at about 5.00 a.m. until she found the deceased lying dead at the crossroads about 6.00 a.m. It included the following:-

> "I saw three (3) men come inside the room each with gun in their hands. Two (2) of these men I identified as 'Tina' and Roman."

It concludes with the following description of the men:-

> "Tina is known to me for the past eleven (11) years. His father is one Mr. James who lives at Hillside Crest. Address Kingston 2. Tina is of black complexion, medium built, about 5'4" tall, about 18-19 years old, large mouth. Roman is of fair complexion, slim built, about 18 years old, long face about 5'6" tall. I know him over five years.
>
> The third man is of light black complexion, white spots on face, medium built, height about 5'9" tall about 24-25 years old, was wearing a green army looking jacket and dark colour pants. He was carrying a long gun."

and the following:-

> "On Tuesday 14th February 1984 at about 11.00 a.m. I attended the Rockfort Police Station and gave this statement to the police it was read over by me and I signed as correct.
>
> Sgn Martha Kelly" (typewritten)

A short supplement followed, which began "Martha Kelly Further States" and ended:-

> "On Tuesday 14th February 1984 at about 11.45 a.m. I gave this further statement to the police at Rockfort it was read over by me and I signed as correct."

Then followed Martha's signature with "Martha Kelly 14/2/84" typed below it. At the end of the complete document was the following:-

> "Taken down by me this 14/2/84 at the Rockfort Police Station it was read over by maker who signed as correct.
>
> V. Ximines Det/Sgt 1951
> 14/2/84"

It was a revealing document. It contained no mention whatsoever of Brown. Indeed it described the third man in conspicuous and eye-catching detail, a man with "a light black complexion" and with "white spots on face" as well as his height and build. There was no indication in the statement as to how long she had known the third man or whether it was a first time identification.

The statement contained a number of other discrepancies, not so fundamental, but of some significance. It spoke of only one intrusion into the room by the three gunmen and not as she said in evidence a second one to look for the deceased under the bed. She did not mention in evidence as she did in the statement that the men were looking for guns or that Tina came back by himself, asked for money and having got it, whispered not to tell the others outside. In evidence she said the third man had a flat gun, but the typewritten statement referred to it as a long gun, and incidentally at the preliminary enquiry she had said "I did not see the accused Brown with anything in his hand".

Only Martha's evidence in the witness box implicated the accused Brown and thus its credibility was crucial to the prosecution case. The only serious challenge the defence had to that evidence was the content of the typewritten statement. They had little else to offer. A full cross-examination on this statement and its admission in evidence were, at best, capable of destroying the prosecution case and, at worst, casting serious doubt on the honesty and accuracy of her evidence. Their Lordships consider that the judge's rulings against a full cross-examination on the statement and its admission were major irregularities in the conduct of the trial. Moreover the instruction to the jury to ignore what had emerged from the limited cross-examination on the statement was a material misdirection.

irregularities in the conduct of the trial. Moreover the instruction to the jury to ignore what had emerged from the limited cross-examination on the statement was a material misdirection.

A further complaint relied on by Mr. Kuldip Singh was the treatment afforded by the trial judge to Martha's evidence on whether she had known the man she said was Brown before the morning of the murder. In the passage of her examination-in-chief previously set out, Martha said she had not known him before and saw him for the first time that morning. Mrs. Henry, in cross-examination, sought to underline this by asking her:-

> "Q. Do you remember that after that you said, 'I did not know Christopher Brown before. It was the first time I was seeing him'.?"

Martha's response, however, was:-

> "A. Well if I had said that it's a mistake because I had known him for about four to five years before the incident."

This was a marked change of stance. It turned a first time identification into a recognition situation with all its implications. And it occurred in the presence of the jury. It was a significant contradiction that bore directly on the central issue in the case. Accordingly it merited some attention from the trial judge and an adequate reference to it in his summing-up. However, he said to the jury:-

> "She said .... she was seeing Brown for the first time that morning. I may be wrong but the Bar is saying that she said that she was seeing Brown for the first time that morning. I won't quarrel with that because the witness Kelly went on to say that it's a mistake she made, she knew him before. She knew him before for about four to five years."

Later in his summing-up he referred to it again:-

> "But there is something you have to look at too, in relation to Brown here and it is a possible weakness and you have to deal with it in the identification is that Miss Kelly at one stage said that she was seeing Brown for the first time. I have it that she said she was seeing him for the first time the morning but the notes seem to be that she was seeing him for the first that morning. You have to look at that. If she is seeing him for the first time that morning, she could not have known him before. But you remember that she gave an explanation. She says it was a mistake that she made when she says so, so that is something you have to look at as a possible weakness. But, also, you have to remember that she did give the name Brown immediately, almost, to Sergeant Ximines, and the other supporting evidence ..."

Their Lordships consider that these passages gave too little weight to the contradictory nature of this part of Martha's evidence. The judge was unduly dismissive of its significance and his own interpretation of what she meant, which may well have influenced the jury, was, with respect, unlikely. Moreover he sought to support it with evidence which, if admissible at all, came from the same source, namely, herself.

Mr. Kuldip Singh, in his comprehensive and cogent presentation of Brown's case, advanced a number of other complaints, which may be summarised as follows:-

1. The evidence of Martha should not have been led in the absence of defence counsel. They were thereby deprived of hearing the manner in which she gave it and seeing her demeanour when giving it.

2. The identification of Brown was made in the absence of defence counsel. The trial judge failed to consider whether it was admissible and, if admissible, failed to instruct the jury as to the limitations of its evidential value.

3. The trial judge allowed Crown counsel in his opening to the jury to state, and evidence to be led, that Sergeant Ximines, on what he had been told by Martha, had obtained three warrants for the arrest of Brown, McLaughlin and Roman. Moreover, in his summing-up, he gave considerable emphasis to it and referred to it on a number of occasions as supporting evidence of Martha's identification. This, counsel submitted, was quite improper. It was inferential evidence based on inadmissible and prejudicial hearsay. (See *Glinski v. Mclver* [1962] A.C. 726; and *Delroy Hopson v. The Queen* (unreported Judgment of the Judicial Committee of the Privy Council delivered 13th June 1994).

4. The judge failed to direct the jury adequately in accordance with Turnbull principles, in particular, that an honest and convincing witness may be a mistaken one (see *R. v. Turnbull* [1977] Q.B. 224; *Scott v. The Queen* [1989] A.C. 1242 and *Reid (Junior) v. The Queen* [1990] 1 A.C. 363).

Their Lordships, however, do not think it necessary to give a decision on any of these additional complaints. They consider that the irregularities and misdirection affecting the typewritten statement when taken with the other complaints which their Lordships have addressed are sufficient to justify the conclusion that the accused Brown was deprived of a fair trial.

For these reasons, their Lordships have humbly advised Her Majesty that his appeal should be allowed, the conviction set aside and the sentence quashed.

Their Lordships now turn to the appeal of McLaughlin.

Counsel (Miss Alcott) attended the trial on the opening day and sought an adjournment because McLaughlin's counsel, Mr. McLean, was ill. The trial judge agreed to an adjournment until the following day after Dr. Venugopal had been heard but, as has been stated, Martha's examination-in-chief was carried out and completed following the pathologist's evidence. Accordingly McLaughlin had no legal representative present during it.

Martha, in examination-in-chief, identified McLaughlin in the dock and gave evidence of his participation in the events in her house on the morning of the shooting. The effect of her evidence was that he appeared to be the leader and spokesman of the gunmen. She said:-

> "I know him from I was about eight/nine, I am twenty-nine now. I had to pass his house going to school and from school."

She could not recall the last time she saw him before that morning and during the period she had known him she did not see him regularly. When McLaughlin came to give evidence he said that at the time of his arrest, (20th October 1984) he was eighteen years old.

On the second day of the trial when McLaughlin's counsel, McLean, appeared, he elicited from Martha (at the outset) that she had made an earlier statement that she did not know either of the appellants and never saw them at her home on the night or morning of the shooting. This earlier statement was not clearly identified but it appeared to have been part of Martha's oral testimony at the Gun Court. On more precise ground, McLean asked:-

> "Q. Did you give a written statement to the mother of the accused man, McLaughlin?
>
> A. Yes, she came and told me that you told her was to come to me for that ...
>
> His Lordship: Just one moment, Miss Kelly, you see, because Mr. McLean at the end of the day I want to ask what authority anybody have to take statement in a murder case like this. She gave a statement to mother of McLaughlin and what you say why you did that?
>
> Witness: She came to me and told me that Mr. McLean say I must write a statement contrary to the one before ... I must write a statement contrary to the one that I gave to the police."

Martha went on to say she gave the statement to McLaughlin's mother, Mrs. Rosalie Ramsay, because she was afraid and had been threatened because of the case. Counsel continued to ask about the statement when the trial judge intervened:-

"His Lordship: I am still questioning your line of cross-examination Mr. McLean. In the circumstances of this case so far you have heard you are founding a case to cross-examine on that.

Mr. McLean: I am founding a case, sir, I am saying that she made an earlier statement in connection with this matter ...

His Lordship: The fact that a murder or alleged murder has been committed, police have taken statements and the mother of one of the accused go and get something for her under threat, and you are founding your examination on it?

Mr. McLean: That is something to be decided by the jury, M'Lord, later on."

Counsel then asked Martha a further question about the statement but the judge again intervened:-

"His Lordship: I am going to ask the police to go and get that mother, too.

Mr. McLean: She is here, M'Lord.

His Lordship: Because she has dabbled in something that she ought not to have done."

In further cross-examination Martha said she had said in the statement that she didn't know McLaughlin because she was forced to write it. When counsel asked her did the statement mention the time of the incident, the trial judge said:-

"His Lordship: Don't answer that, don't answer that.

Mr. McLean: M'Lord, might I ask whether she will be allowed to answer whether it is her signature because I would like to ask that question?

His Lordship: She says she has made a statement already.

Mr. McLean: Speaking about her signature, sir, she can make it and yet not sign it.

His Lordship: What are you going to do with it after that?"

Then followed a long exchange between the judge and counsel in which counsel made it clear that he wished to put the statement in evidence, first by asking Martha if the signature to the statement was hers. The judge in his interventions effectively frustrated that and eventually prevented it, in this passage:-

"Mr. McLean: ... Might her signature be shown?

His Lordship: No. Don't know where that came from, nothing, no.

Mr. McLean: I will address you on that, sir.

His Lordship: You could address. I have ruled no. The witness is not going to be shown anything. Need no address, no."

In the cross-examination that followed, Martha admitted she had told the Gun Court that she did not know the accused men and had never seen them before. However, she said she did so because she was threatened and McLaughlin's mother had told her to do so. She admitted that, in the statement to Mrs. Ramsay, she had written that the men involved were not the accused, but she said she had no choice.

Mr. McLean made no further attempt to cross-examine Martha about the statement, save to ask her did she write it in her house with Mrs. Ramsay present, to which she agreed.

During the course of his cross-examination of Martha, Mr. McLean intimated to the judge that he would seek a voir dire to enable the admissibility of the statement to be decided. At the close of the prosecution case, he raised the matter again and applied to have either the statement admitted in evidence or that there be a trial within a trial for the judge's decision on whether it was voluntary. The judge replied:-

"His Lordship: Mr. McLean, I am going to refuse your application. The witness, Martha Kelly said yesterday 'I did write this' and she outlined the circumstances under which it was written. I am not holding any trial within any trial. It was alleged that it was taken by a person. You have the opportunity to, if you want, to put it in through that witness.

Mr. McLean: I will be so guided, M'Lord.

His Lordship: Don't be guided by me. You are conducting your defence, but as far as I am concerned with that piece of paper you have, I shan't be holding any voir dire to put it in for the witness. Martha Kelly says, "yes, I made it". Can a thing which has been admitted obtain any strong validity, according to your saying, by putting it in here? This is admitting it.

Mr. McLean: But in conviction the same principle applies when the ...

His Lordship: That's a different thing. You have a piece of statement there which you say the boy's mother - the evidence had been given to her. Call the boy's mother when your time come ..."

The appellant, McLaughlin, gave evidence. He said he did not go to Martha's house alone or with others shoot the deceased. He did not know the deceased or Martha. He could not remember where he was on 14th February 1984 between 4.00 a.m. and 5.00 a.m. in the morning.

His mother, Mrs. Ramsay, then gave evidence. She said she lived in Spanish Town from about 1983 and her son the appellant lived with her. She was a seller of fruit juice and other articles and had sold from the Gun Court gate for thirteen years. Martha Kelly came to see her there. Martha said that she had a conscience and would have to go by it. She gave her the names of three other men who did the killing. She said she didn't want to go back to court but the police kept on checking her and telling her to come. The trial judge properly reminded counsel that none of this had been put to Martha in cross-examination.

She said she had never been to Martha's house but at the place where she did her selling, Martha gave her "three pieces of paper with something on it, statement on it" which she, Mrs. Ramsay, took down to Mr. McLean's office. Counsel then sought to tender the statement of evidence. Crown counsel objected on the grounds that it was not known who took the statement or who wrote it or where it came from. Mr. McLean reminded the court that Martha admitted she had written it. The judge agreed. Defence counsel then sought to have the statement admitted on that basis. The judge refused and gave his ruling in the following terms:-

"His Lordship: Well, I have heard both of you and I will rule that the paper will not go in as evidence. I stick to my former statement that Martha Kelly has admitted that she has written something already and she has given to the court an explanation of the circumstances under which she did write it. Whether it is so, and you cross-examined her as to what it says, and she says whatever it is, it is contrary to what did happen. She explained that.

Mr. McLean: In other words, M'Lord, the effect of your ruling is that what has been elicited by cross-examination would be as efficacious as good as ....

His Lordship: Just exercising my discretion here and I am not admitting it in the light of the evidence that Martha Kelly has given in answer to your cross-examination."

In his summing-up the judge's only reference to the statement came when dealing with Mrs. Ramsay's evidence. It was in these terms:-

"She said that she gave her three bits of paper, and you remember again McLean sought to put these papers in evidence and I refused, because the witness Martha agreed that she made three statements but the circumstances under which she did it, and Mrs. Ramsay didn't run with it to the police, she ran with it to her lawyer. She ran with it to her lawyer. So you have to look at all that in the circumstances."

Their Lordships are of opinion that, for the same reasons stated with reference to the typewritten statement in Brown's case, defence counsel was entitled at common law and under statute, to cross-examine Martha on the statements and its contents, as a previous inconsistent statement and once she had been shown the statement and her attention drawn to the contradictory parts to have it admitted at common law and under section 17 of the Act.

The statement was both relevant and satisfied the words of section 17 as "relative to the subject-matter of the indictment". Martha did "distinctly admit she had made the statement" although under duress, and accordingly section 17, rather than section 16, was the more appropriate section. Under that section defence counsel had the benefit of cross-examining about the statement without showing it to her and then, having drawn her attention to the contradictory parts, was entitled to put the document to her and tender it in evidence.

Notwithstanding the fact that she had admitted at the outset she had made it, the judge indicated his disapproval of this line of cross-examination on the apparent grounds that it was improper for Mrs. Ramsay to take the statement and it was made under duress. Those matters, if proved, did not affect the admissibility of the statement, as defence counsel pointed out, but went to its weight. Counsel was not only precluded from an effective cross-examination on its contradictory parts, but also from asking those preliminary questions necessary to enable it to be admitted in evidence. He was prevented from asking her to identify her signature and from showing the document to her and from asking questions about it while it was in her hands.

Their Lordships consider that the rulings of the trial judge in the foregoing respects constituted major irregularities in the conduct of the trial.

There were however additional matters in the trial which have caused their Lordships unease. The judge, having refused to admit the statement at the end of the prosecution case, said in clear terms to defence counsel that he could prove it by calling Mrs. Ramsay. When that time came and counsel sought to do so, he ruled against its admission. Further, in that ruling he seemed to indicate, as defence counsel thought, that what had been elicited from the matter, favourable to McLaughlin, was as effective as the admission of the statement. But when it came to his summing-up, he made no reference to anything in the statement that might support McLaughlin's case. Instead he dismissed the statement as "three bits of paper" made in the circumstances which Martha claimed and that Mrs. Ramsay "ran with it to her lawyer".

Martha's exoneration in the statement of the two appellants as the men involved was, she said, made under threat. Any benefit there was in this qualified admission for the defence was virtually negatived by the judge in the following passage of his summing-up. He removed, in effect, from the jury the question whether threats had in fact been made to obtain it. He said:-

> "She said, 'person came and threaten me', and one thing you have to bear in mind in this case as far as Martha Kelly is concerned, it came out that they are in protective custody. Why are they in protective custody? So that they can watch television? They are in protective custody, and Corporal Zimroy Green told you - the investigating officer - that he is responsible or he had some responsibility for organising the protective custody. Martha Kelly tells you that she was threatened, how she escaped this threat by going and talking at the Gun Court and tomorrow morning she is wiped out. You consider that as responsible people because this has happened already, happened already and if that - even in this court last week, my brother judge had to cite a witness for contempt, the poor man was so frightened that he could not talk. He said 'I was threatened and I am not giving evidence'. The judge had to admonish and discharge him because his refusal to give evidence was excusable, he was threatened and it is about time we wake up to that fact that this is happening in Jamaica where people are holding the courts to ransom, they can go and threaten witnesses and all that. So what should the woman do, that is the explanation she gives, if you believe her, is it a reasonable explanation."

Yet another matter of disquiet was the judge's general comment in his summing-up about Mrs. Ramsay. He had said earlier, during Martha's cross-examination, on learning that Martha had given a statement to her, that he was going to ask

the police to go and get her "because she has dabbled in something that she ought not to have done". In his summing-up the judge referred to Martha's visits under different names to see the accused at the remand centre and reminded the jury of the reasons Martha gave for so doing. He continued:-

> "You have to look at Rosalie Ramsay in all the circumstances and look at Martha Kelly and decide who you believe in the circumstances."

Thereupon the judge broke off his summing-up and turning to Crown counsel, said:-

> "And Mr. Wright let me say it at this time here and now. I am putting it in this case I detest the behaviour of Rosalie Ramsay in this case. I am saying that you are to bring it to the attention of the DPP.
>
> Mr. Wright: Indeed, sir."

The judge then resumed his summing-up.

The Court of Appeal found that this comment merely referred to conduct that was undesirable, but not necessarily affecting Mrs. Ramsay's credit. Their Lordships, with respect, cannot agree. Having prefaced the comments with the question for their decision as to whom they believed, the comments made it difficult for the jury to do anything else but prefer Martha's evidence.

Their Lordships consider that these comments went beyond the bounds of legitimate comment by a judge and that, taken with the other matters, they were unfairly weighted, in their opinion, against the appellant and, resulted in an unfair and unbalanced trial.

Mr. Philip Engelman made a number of other complaints which were:-

(1) the trial should not have been permitted to begin without legal representation for McLaughlin;

(2) the judge unfairly permitted Martha to be called to give evidence in this situation;

(3) the judge should not have permitted a dock identification of McLaughlin;

(4) the judge's directions on identification and recognition were deficient;

(5) the judge's comments and interruptions of Mclaughlin's counsel before the jury were improper and amounted with the foregoing matters to an unfair trial.

Their Lordships are in no way dismissive of Mr. Engelman's well-assembled submissions on these complaints, but find it unnecessary to consider them, having regard to their conclusions on the other complaints.

Their Lordships recognise that, as Brown can rely on the irregularities and misdirections found in McLaughlin's case, that touch, in particular, on the truth and accuracy of Martha's evidence, so can McLaughlin benefit from their Lordships' conclusions on the complaints made in Brown's case.

For the reasons stated, their Lordships have humbly advised Her Majesty that the appeal of McLaughlin ought to be allowed, his conviction set aside and his sentence quashed.

Cases James 6

R. Sweet-Escott (1971) 55 Cr App R 316

R. Fundenburk (1990) 90 Cr App R 466

R. Hart [1957] 42 Cr App R 47

Berry v The Queen [1992] 2 A C 364

Chaulk v McIver [1962] A C 726

Bellay Hobson v The Queen (on appeal from the Judicial Committee of Privy Council 10th June 1991)

R. Turnbull [1977] Q B 224

Scott v The Queen [1989] A C 1242

Reid (James) v The Queen [1990] 1 A C 363