AMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO.28/2003

BEFORE: **THE HON. MR. JUSTICE FORTE, P.**
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A. (Ag.)

Richard Brown v R

Mr Delano Harrison, Q.C., for the applicant

Miss Paula Llewellyn, Senior Deputy Director of Public Prosecutions for the Crown

October 25, 2004 & March 11, 2005

McCalla, J.A. (Ag.):

1. The applicant Richard Brown was tried and convicted in the Home Circuit Court for non-capital murder. On January 23, 2003, he was sentenced to life imprisonment and the Court ordered that he should not be eligible for parole before he has served a period of twenty-five years.

2. A single judge of appeal refused his application for leave to appeal. On his application to this court, leave was granted for counsel Delano Harrison Q.C. to argue three supplementary grounds of appeal filed on 20th October 2004, as set out herein.

3. The prosecution's case was that on September 22, 1998, the applicant and two other men went to the home of the deceased Errol Lynch, on Swallowfield Road in St Andrew, where they shot and killed him. The sole witness as to fact on whom the prosecution relied was Artheram White. Mr. White gave evidence at the preliminary inquiry but died before the trial. At the trial, during a voir *dire,* the prosecution led evidence as to the death of Mr. White and the learned trial judge admitted his deposition into evidence under the provisions of section 34 of the Justices of the Peace Jurisdiction Act. A written statement given by Mr. White to the police was also admitted in evidence pursuant to section 31 (D) of the Evidence (Amendment) Act although Defence Counsel had objected to both documents being admitted.

4. There is no dispute that the statement and the deposition of the deceased White are substantially the same with regard to the circumstances in which Errol Lynch was shot and killed.

Section 34 of the Justices of the Peace Jurisdiction Act reads in part as follows:

> "...and if upon the trial of the person so accused as first aforesaid, it shall be proved by the oath or affirmation of any credible witness that any person whose deposition shall have been taken as aforesaid is dead... and if also it be proved that such deposition was taken in the presence of the person so accused, and that he, or his counsel or solicitor had a full opportunity of cross-examining the witness, then, if such a deposition purport to be signed by the justice by

> or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not, in fact, signed by the justice purporting to sign the same:
>
> Provided that no deposition of a person absent from the Island or insane shall be read in evidence under the powers of this section, save with the consent of the court before which the trial takes place."

Section 31(D) of the Evidence Act provides in part as follows:

> "Subject to section 31G, a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if it is proved to the satisfaction of the court that such person-
>
> (a) is dead ..."

5. Grounds 1 and 3

These grounds of appeal, which were argued together, were as follows:

> "(1) That (a), in light of the fact that the statement and depositions of deceased prosecution witness, Artheram White gave essentially the same, consistent account of the offence with which the Applicant was charged, and, moreover, were not merely complementary the one to the other, the reception into evidence under the Evidence (Amendment) Act of both such statement and depositions constituted a material irregularity.
>
> (b) Alternatively, the learned trial judge erred in his failure to warn the jury, in scrupulously careful language, that neither statement nor depositions

were, or could provide, corroboration of, or support for, each other.

(3) That the admission into evidence of both depositions and police statement of prosecution witness, Artheram White, purportedly by virtue of S. 31D of the Evidence (Amendment) Act, was wrong in law as, it is submitted, that provision does not contemplate the admission into evidence at trial of both depositions and statement of the same witness "as evidence of the truth of the matters asserted in them."

6. Counsel submitted that in all material respects witness White's statement and deposition are consistent with each other as to the account of the circumstances of Errol Lynch's death. The only conceivable purpose for which these two consistent statements (unsworn and sworn) could have been placed before the jury was to sustain witness Artheram White's credit, to impress the jury as to his unquestionable credibility born of the consistency with which he repeated his account of the material events.

7. He argued that the prosecution presented the statement and deposition as a composite whole – that both jointly constituted the prosecution case against the applicant and it was not clear which of the two, telling effectively the same story, was relied on to prove the case. Since the statement and deposition were materially the same in content he questioned why it was that the deposition, given on oath with the witness duly cross-examined, was not selected, as more likely than the statement, to serve the interests of justice.

8. Counsel submitted further that had the witness been alive and had he given "direct oral evidence" in the trial proceedings, it would not have been competent in law for the witness to make any reference to any previous statement of his, save and except in cross-examination, under section 17 of the Evidence Act, to prove inconsistency. Even in that event, only the disputed portion and not the entire statement could have been legitimately placed before the jury: **(R. v. Anthony Isaacs & Michael Miles** [1977] 15 J.L.R. 100.)

9. Counsel relied on the case of **Beattie** [1989] 89 Cr. App. R. 302 at pages 306-307 to support his submissions that to place before the jury the entire statement as well as the deposition of the witness, constituted a violation of the rule against self corroboration and was a material irregularity. He said that it must have been that the prosecution regarded both as one body of evidence or, as he contends, statement and deposition were calculated to separately corroborate each other.

10. Further, he said that the learned trial judge failed to point out to the jury that statement and deposition could provide no corroboration for each other. Far from issuing any such warning, the learned trial judge directed the jury in terms suggesting the cogency of White's statement, depicting him as a credible "eyewitness", where at page 221 of the transcript he directed them as follows:

> "You see it was suggested in counsel's address to you that Artheram White was not a witness, he must have heard what had happened, because people were talking about it. But the officer told you that he collected the statement from him as an eye witness. And you will be able to see the statement which was collected from him and then you will have an opportunity to look at the date he gave in the statement and what he said in the statement."

Counsel said that from the above statement the learned trial judge saw the witness' statement as solidly sustaining his credit and was inviting the jury to do so as well. Further, he failed to warn the jury against a most readily understandable inclination that the two obviously consistent accounts by the witness could corroborate each other and thereby prove his creditworthiness.

11. Is there merit in Counsel's submission that the admission into evidence of statement and deposition and learned trial judge's failure to warn the jury were sufficiently grave to vitiate the applicant's conviction?

12. The Crown conceded that both documents essentially are the same with regard to the material facts. Miss Llewellyn argued relying on the case of ***R. v. Sang*** [1979] 2 All E.R. 1222 that once the evidence is relevant it is admissible and provided that the prerequisites for admissibility of both documents have been satisfied, the prosecution ought not to be restricted.

13. Although the prosecution would be entitled to adduce evidence under the Evidence (Amendment) Act as well as the Justices of the

Peace Jurisdiction Act, if the conditions for admissibility are satisfied, it would not, in our view, be desirable for the prosecution to seek to adduce evidence from two or more documents which are consistent in every respect. In such a case a trial judge would be expected to exercise his discretion to admit only one document.

14. The question arises as to whether in the instant case the deposition of the witness having been admitted, it was permissible for the statement to be admitted in evidence and whether the learned trial judge wrongly exercised his discretion in admitting it.

15. The prosecution's case was that the deceased was murdered on September 22, 1998. Artheram White purported to have witnessed the applicant and the deceased facing each other talking, during which time, the applicant pulled a gun from his waist. The deceased held onto the applicant and a shot went off. He then saw them struggling after which the deceased fell to the ground and one of the men who had come with the applicant stood over the deceased and fired a shot at him. The witness White was an eye witness and he gave a statement to the police the following day.

16. In order to determine whether the learned trial judge was correct in exercising his discretion to admit both statement and deposition in evidence, it is necessary to examine certain circumstances relating to both documents. Miss Llewellyn drew the court's attention to certain

dates (emphasized in portions of the statement and deposition quoted below) in support of her submissions that the learned trial judge was correct in admitting both documents into evidence.

17. At the preliminary enquiry held on June 17, 1999 the witness Artheram White began his deposition as follows :

> "I am self-employed and I am living in the parish of St Andrew. I have been living in St Andrew all my life and I am 37 years old. I do remember the **22nd of November 1998.** At about 8:00 p.m. I was at Swallowfield Road in front of number 24 Swallowfield Road...Less than ten minutes later I saw three men walking up Swallowfield Road and they were coming towards me..."

18. The witness White deponed further that he saw the three men, including the applicant, known to him as "Romy", go to the gate of the deceased who was known to him as" Burru". The deceased came out of a nearby house and walked to his yard. The applicant and the other two men followed. Burru then turned around and faced the applicant. They spoke to each other and he saw the applicant pull a gun from his waist. Burru then held onto the applicant. A shot went off and he then saw Romy and Burru struggling, after which Burru fell to the ground. One of the men who had come with the applicant went up to and fired a shot at Burru while he was on the ground. He had known the applicant for over six years before and had seen him the day before on the same road. On the night of the shooting he had seen the applicant's face as he was right

under the street light. He gave a statement to the police the following day.

19. Under cross-examination he stated that:

> "It is true that this incident happened in **November of 1998.**The statement I gave to the police I sign it. The date was one or two week left in the month of **November** and I am positively sure it was In the month of **November.** It was a Tuesday night when the incident happened. I can't recall what date of the week I gave the statement. I gave the statement between Wednesday Thursday but not the Friday..."

Under further cross-examination It was suggested to the witness that the incident did not happen in November to which the witness replied that he was positive that the incident happened in November. The witness said also that he would be surprised if told that Romy was in custody before November. It was also suggested to him that he did not see Romy that night. The witness replied that he had seen him. On being shown his statement, dated **3rd. October 1998,** he identified his signature on page one, as also page two. The statement begins thus:

> "On Tuesday the 22nd **of November, 1998** about 8:00 p. m. I was standing at my gate which is opposite to Burru's house..."

The statement goes on to give an account of his observations in terms similar to his deposition and concluded as follows:

> "On Saturday the **3rd of October '98** about 1:00 p. m. whilst at 23 Swallowfield Road I made this statement. It was read over to me and I signed it as true and correct."

The statement was signed by witness White and the following words appended:

> "This statement consisting of three pages each signed by me is true to the best of my knowledge and belief and I make it knowing if it is tendered in evidence I should be liable to prosecution if I have willfully stated in it anything that I know or don't believe to be true." It was then signed and dated **3rd October, 1998"**

At page 131 of the transcript during cross-examination of the witness Kenneth Ferguson, through whom the deposition was admitted, there appears the following:

> "Q. Mr. Ferguson, you would have led evidence when you are marshalling the evidence from a police statement, that the witness would have given the police...
>
> A. More or less
>
> Q. That would have been your basis?
>
> A. Yes sir."

20. The evidence of Detective Cpl. Richard Scott, the investigating officer, revealed that he had taken a statement from Artheram White on **October 3, 1998, i**n relation to the murder which occurred on **September 22, 1998.** He visited the scene on September 22 1998, on which date the incident had taken place, and not in November 1998. He had taken the applicant, known to him as Romy, in custody on September 30, 1998. He

cautioned the applicant and told him about the murder but he denied knowledge of it.

The applicant subsequently gave a caution statement which was admitted in evidence, without opposition. In that statement he said inter alia:

> "On Tuesday the 22nd of the 9th, 1998, about 8:00 p. m. I was walking along Swallowfield Road, when I was met by two men who, we all went to Burru's yard.... I then saw when one of the men pull a barrel gun and fire two shot at Burru...I ran from the yard, the men also ran... I was wearing a long khaki colour winter jacket...I threw away the jacket I had on because it had on blood. When Burru got shot he was about three feet..."

Questions and answers were also admitted in evidence, attributed to the applicant, that Burru had threatened him.

21. At the trial the applicant admitted that he had gone to Burru's yard and witnessed an argument and struggle between Burru and another man; then there was a wrestling and both men fell behind a parked car and he heard a gunshot explosion. He had no gun and he denied that he had given a statement in which he had said that he had been accompanied to the yard by two men.

22. In this case, the witness being dead, his memory could not have been refreshed prior to the commencement of the trial, nor could portions of his deposition or statement be put to him. He could not have been questioned in relation to the dates appearing in both documents. We are

of the view that the learned trial judge correctly exercised his discretion in admitting the witness' deposition as well as his statement, which was admissible under the Evidence Act. We do not agree with counsel for the defence that the only conceivable purpose for adducing the statement was to sustain witness White's credibility. The prosecution's case was that Errol Lynch was murdered on September 22, 1998. Artheram White was an eye witness who had given a statement to the police but died before the trial commenced.

23. Having regard to the differing dates in deposition and statement, as well as the suggestions made to the witness at the preliminary inquiry, the prosecution was obliged to place before the jury the statement which it contended the witness had given to the police. The purpose must have been to seek to show that the witness could have been mistaken as to the date of the incident.

24. It must also have been apparent to the jury from Defence Counsel's cross examination of the witness Kenneth Ferguson, that at the preliminary enquiry he had marshalled evidence from a statement given by Mr. White. The learned judge reminded the jury of the contents of the deposition and directed them at page 239 of the transcript that "the Crown's case essentially is based on the depositions containing the evidence of Mr. Artheram White who is now dead."

Having admitted the statement, the learned trial judge ought to have warned the jury that neither statement nor deposition were, or could provide, corroboration or support for each other, as to the material facts. However, in the circumstances of this case we find that his failure to do so is not sufficiently grave to disturb the verdict of the jury.

25. Ground 2

Ground 2 reads thus:

> "That the learned trial judge's directions to the jury (a) describing the Applicant's cautioned statement as a "confession" (page 213 line 17 to page 215 line 5)and (b) plainly assuming the truth, for the jury, of the applicant's assertion in that statement, that there was blood on his jacket after deceased was shot (page 238 line 8 to page 239 line 3), unfairly prejudiced the Applicant's chance of acquittal."

Counsel argued that although there were certain admissions in the caution statement, those admissions did not constitute a confession, as the applicant did not admit to shooting the deceased nor did he admit, in the circumstances he described, to acting in concert with the man who fired the gun. Having regard to what was admitted by the applicant, the use of the word "confession" in such a context would have unduly prejudiced the jury. Mr. Harrison, Q.C., also referred to a passage in the transcript where, just before the jury retired, the learned trial judge directed them in the following terms:

> "You will recall that Detective Corporal Scott told you that when he went to the scene he saw blood. You will also recall that in the deposition of Mr. Artheram White he spoke to seeing the deceased's mouth filled with blood. Now, in the cautioned statement the accused spoke to his having blood on him- his coat having blood on him. You will have to ask the question, what is blood doing on his coat? Because this is what he admitted. He tells you in the caution statement that he threw away the coat because blood was on it. Now, why did he throw it away? Why did he want to get rid of it? Is it that he recognized that this blood would be incriminating.....?"

26 Counsel contends that it is obvious that from the above directions, the learned trial judge had in his own mind determined that the applicant did say that his "coat" had on blood and that when he said so, it was true. Counsel said it was for the jury to make those determinations and it was only then that they could properly have been invited to ask themselves the questions posed by the learned judge.

27. At page 214 of the transcript, immediately after the learned judge made reference to the caution statement, he directed the jury that "the accused is admitting to being on the scene at the time of the killing", and he went on to direct them thus:

> "So it is your function members of the jury, to decide whether or not the accused actually made these statements. In fact he did say he made them, albeit under cross-examination he denied certain contents of the statement , or certain parts of the statement. If you are sure that he did make them, you go on to consider whether or not what he said was true,

> what it means and what weight and value is to be attached to it. And when determining that you should take into consideration all the circumstances in which it was made. And there is no suggestion that this **confession or this caution statement** was obtained ..."

28. The jury had been properly directed that the admission made in the applicant's caution statement, if accepted, was an admission to being on the scene at the time of the killing. The questions posed by the learned judge must have been for them to answer in light of the above directions. Having referred to the applicant's statement as a caution statement throughout his summation, his use of the word "confession" only once, immediately followed by his use of the words "caution statement", could not have affected the jury's verdict. There is therefore no merit in ground 2.

29. In the circumstances of this case, we find that there was ample evidence to justify the jury's verdict and accordingly, we refuse the application.

The conviction and sentence are affirmed. We order that the sentence commence as of April 23, 2003.