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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 55/2001

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

RUDOLPH FULLER V. R.

Ian Wilkinson and Ms. Shawn Steadman for the appellant

David Fraser, Deputy Director of Public Prosecutions, and Mrs. Anne Marie Lawrence- Granger for the Crown

February 24, 25, 26 and December 19, 2003

PANTON, J.A.

1. Between February 24 and 26, 2003, we heard an application for leave to appeal in this matter. We granted the application and treated the hearing as the hearing of the appeal, which we dismissed. At that time, we affirmed the conviction and sentence and promised to put our reasons in writing. We now keep that promise.

2. The appellant was convicted on March 20, 2001, of the offence of capital murder. The particulars of that offence were that he on either the 27th or 28th October, 1998, in the parish of Saint Catherine, in the course or furtherance of

burglary or housebreaking murdered Mrs. Irene Hunter. The trial was conducted by Miss Justice Smith, and lasted from March 12 to 20, 2001.

3. The deceased who was a mere 4ft 8 inches in height and weighed approximately 120 pounds was the recipient of several chops that were clearly intended to cause no less than death. She received the injuries in her house at Riversdale. The evidence of Royston Clifford, consultant forensic pathologist, showed the following injuries, among others:

(a) three incise wounds to the right frontal parietal scalp;

(b) a gaping chop six inches long extending from the right side of the cheek to the right side of the neck;

(c) a gaping chop six inches long extending from the left cheek to the left side of the neck;

(d) a laceration two inches long to the left side of the back of the head, fracturing the underlying skull; and

(e) several incise wounds, each half an inch long, across the 2nd, 3rd and 4th fingers of the right hand.

Death was due to multiple sharp force as well as blunt force injuries. A sharp instrument, used with moderate to severe degree of force, had been used to inflict these injuries.

4. The deceased lived alone in the rear section of a building that housed her bar and grocery in the front. She had operated this business for over thirty-five years. On the night of October 27, 1998, she had been engaged in the selling of

drinks to several persons who were in the bar until at least 9 p.m. Her house was burgled thereafter as evidenced by the removal of three glass louvre blades from a window in a room, and shoe-prints on a bed directly below that window. In another room, there was another bed, the sheets on which had been disturbed and were bloodstained. There were bloodstains also on the mattress and on a settee. In a passage leading through the kitchen to the shop, the body of the deceased was found lying face down in a pool of blood. The dwelling-house as well as the shop had been ransacked. In the shop, grocery items were strewn on the floor. Apart from one $20 note seen on the floor of the shop, there was no other money found in the building. This was so, notwithstanding that the shop had been opened for many hours earlier and the price of the cheapest drink was $20.

5. The appellant who lived about 100 metres from the bar was seen with his girlfriend outside the bar at about 9 p.m. On the next day, at about midday, the appellant presented for lodgment at Workers Bank, Linstead, the sum of $24,500 which included 494 $20 notes. Two of those notes were bloodstained and, to the teller, the blood appeared to be fresh. The blood was duly analysed and when compared with a sample of blood taken from the deceased, the expert's finding was that the blood on one of the notes was that of the deceased. This conclusion was arrived at after DNA tests had been conducted. The prosecution also presented in evidence a cautioned statement given by the appellant to the police. In it, he attributed the money he lodged at the bank to his winnings from

bets on named horses on a specific date as well as to his earnings from his occupation. However, the prosecution presented other evidence which showed that the winnings he claimed to have had from the races were fictitious.

6. In the face of the evidence presented by the prosecution, the appellant chose to make an unsworn statement. He said that he had gone to work on the morning of the 28th October, but due to rain he was forced to return home. He then took the money which he had at his home to the bank for lodgment. He had worked and saved some of the money, he said, and had won some "off race horse". He denied giving the teller any note with blood thereon. He said that he had killed no one; and added that, as a result of intimidation by the police, he had erred in relation to the date he had given to the police in respect of his winnings.

7. **The grounds of appeal**

The appellant's attorney-at-law, Mr. Ian Wilkinson, filed twelve supplementary grounds of appeal. He requested that those numbered 11 and 12 relating to sentence be deferred pending the determination of a matter that is before the Privy Council. This request was granted. He sought and was granted leave to argue the remaining ten supplementary grounds. However, he subsequently abandoned grounds 9 and 10.

8. **The deposition of Tracey-Ann Brown**

Grounds 1 and 2 were argued together. **Ground 1 reads:**

> "The learned trial judge erred in law in admitting into evidence the deposition of Tracey-Ann Brown (exhibit three) pursuant to the Evidence Act (pp.123 and 168 of the transcript)".

Ground 2 reads thus:

> "The learned trial judge erred and/or misapplied the law in stating "On the question of the accused being deprived of the opportunity of cross-examining the witness, all that, he had and (sic) opportunity to do at the preliminary enquiry, he was justly represented by counsel of many years experience and to come and say at this forum that he was deprived, is not really something that I would seriously take into consideration based on the position of the Act" (vide page 123 of the transcript)

At the trial learned counsel for the Crown applied for the deposition of Tracey-Ann Brown to be admitted in evidence under section 31D of the Evidence Act. The section provides thus:

> "....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;
>
> (b) is unfit by reason of his bodily or mental condition, to attend as a witness;
>
> (c) is outside of Jamaica and it is not reasonably practicable to secure his attendance;
>
> (d) cannot be found after all reasonable steps have been taken to find him; or
>
> (e) is kept away from the proceedings by threats of bodily harm and no

> reasonable steps can be taken to protect the person".

The application was specifically under paragraph (c) above. In the absence of the jury, the learned trial judge heard evidence from Dianne Brown, sister of the witness Tracey-Ann Brown. Dianne Brown testified that Tracey-Ann had given evidence at the preliminary hearing into this charge of murder against the appellant, but had left the country on August 21, 2000 to attend university in the United States of America. She said that she did not know the address of Tracey-Ann, nor did she have a telephone number for her although Tracey-Ann had been in touch with her by telephone several times. She also said that she did not know of her sister returning to Jamaica in the near future.

9. In a matter of this nature it is desirable that evidence be given to show that efforts have been made by the prosecution to secure the attendance of the witness. There was no such direct evidence in this case. However, in cross-examination, the following questions and answers were noted:

> Q. Are you aware of ....any communication with your sister of her attending court?
>
> A. Yes.
>
> Q. And are you aware of her having any plans to return in the near future?
>
> A. Not that I know of.

This quotation from the record suggests that the witness was aware of an effort having been made to secure the attendance of her sister, but that the

effort failed. In our view, there being no compulsory process available to the prosecution, and the Supreme Court not having extra territorial jurisdiction in this regard, the learned judge was correct in holding that it was not reasonably practical to secure the attendance of the witness at the trial. Hence, the deposition was admissible if it is assumed that learned counsel for the Crown was correct in relying on section 31D of the Evidence Act for the admission of the deposition.

11. Mr. Wilkinson, in his challenge of the ruling that the deposition was admissible, relied on two recent decisions of this Court, namely, **R. v. Michael Barrett** (Supreme Court Criminal Appeal No. 76/97 - delivered on July 31, 1998), and **R. v. Barry Wizzard** (Supreme Court Criminal Appeal No. 14/00 - delivered on April 6, 2001). Both cases dealt with admissibility of statements under paragraph (d) of section 31D of the Evidence Act quoted above. That paragraph relates to the inability to locate a witness after taking reasonable steps to find him or her. The instant situation is in respect of a witness who is overseas. The two situations are clearly different. In the former, the Court has to consider whether efforts have been made to find the witness whose whereabouts are uncertain or unknown whereas in the latter it is a question of whether it is reasonably practical for the witness to attend. There is an added factor which ought not to be ignored. Section 31D is aimed primarily at out of court statements. The marginal note supports the literal reading and interpretation of the section. At the time of its enactment the legislature would

have been conscious of the provisions of section 34 of the Justices of the Peace Jurisdiction Act which reads:

> "...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, or so ill as not to be able to travel, or is absent from this Island or is not of competent understanding to give evidence by reason of his being insane, and if also it is 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".

As seen from the above, the deposition of a witness is admissible with the court's consent if the accused person has had full opportunity to cross-examine the witness. This is the primary relevant legislative provision so far as the admissibility of the deposition of Tracey-Ann Brown was concerned. The learned trial judge seems to have been of that view also when her words quoted in ground two are taken into consideration. She was there clearly enunciating the fact that the appellant was represented at the preliminary enquiry and had had the opportunity to cross-examine the witness. Consequently, the deposition was

admissible under section 34 of the Justices of the Peace Jurisdiction Act. So, although Mr. Wilkinson may have been right in his contention that the evidence should not have been admitted under the Evidence Act, that would avail him not as it was admissible under the Justices of the Peace Jurisdiction Act.

12. **Ground 3** reads:

> " The learned trial judge erred in law in allowing the witness Michael Sibbles to give hearsay evidence of, or based on, information contained in computer-generated documents pursuant to section 31D (sic) (section 31G) of the Evidence Act, although the said documents had not been admitted into evidence (vide p.162 of the transcript)".

Mr. Wilkinson's main complaint in respect of Mr. Sibbles' evidence was that there was non-compliance with section 31G(a) of the Evidence Act which reads:

> "A statement contained in a document produced by a computer which constitutes hearsay shall not be admissible in any proceedings as evidence of any fact stated therein unless –
>
> (a) at all material times –
>
> (i) the computer was operating properly;
> (ii) the computer was not subject to any malfunction;
> (iii) there were no alterations to its mechanism or processes that might reasonably be expected to have affected the validity or accuracy of the document".

In any event, according to Mr. Wilkinson, the witness Sibbles was unreliable as he was confused as to the names of the horses and gave incorrect

evidence in relation to a particular horse, Jason's Dream. Mr. David Fraser for the Crown painted a different picture. He submitted that the evidence of Sibbles was accurate, and that it was not necessary for the print-out to be admitted in evidence for the witness to speak of its contents. The print-out, he said, was an aide memoire. If there was an error in admitting Sibbles' evidence, he submitted that the defence suffered no prejudice as there had been no reliance placed by the prosecution on that witness. The prosecution was more reliant he said on the evidence of Desmond Riley which stood on its own in rebutting the appellant's statement as to his winnings.

13. The appellant's statement which was put in evidence by the prosecution stated that on Saturday, October 10, he had bought bets at Chris Armond's betting shop in Linstead on two horses, namely, Sloopy's Valley, and an unnamed one ridden by Peter Bryan. The first was bought for $100. It won and paid $40 giving a total winning of $10, 000. The other horse was bought for $700. It won and paid a dividend of $30, giving him winnings of $7,500. He took home $15, 000, and he already had $10, 000 at his house. He also said that he worked for Mr. Chance for $2,500 per week. He never touched the $25,000 (that is, the winnings from the races together with his savings) until the Wednesday morning when he took the sum to the bank. He also said that nobody else had touched the money as he lived alone.

14. The witness Sibbles had been examined on the voir dire with a view to presenting a computer print-out in respect of the races and the dividends

declared. Although the learned judge ruled in favour of the print-out being admitted, the prosecution did not produce it. Instead, Mr. Sibbles gave evidence that came in part from his research of the records. It is this evidence that was challenged by Mr. Wilkinson as being in the category of hearsay. So far as this evidence did not come from Mr. Sibbles' own knowledge, it was indeed hearsay. Such evidence consisted of the names of horses, the riders and the dividends paid on October 10, 1998. However, there was much relevant evidence that he gave which was not in that category. For example, he gave evidence as to the system involved in the placing of bets and the declaration of dividends. In October, 1998, he was an off track co-ordinator whose duties involved the supervision of off track betting. He had the task of ensuring that accounting records were kept up-to-date, and that the net proceeds of bets transacted were consistent with the accounts receivable. Among the things he said was that the cost of a single bet in October, 1998, was $4. This evidence would have assisted the jury in doing their own mathematical calculations and arriving at the likely winnings earned by the appellant, on the basis of his own statement as to the amount he placed as bets on the horses, and the dividends that were declared on them. The jury did not need anyone to inform them that on the basis of the appellant's own statement, his total winnings did not amount to more than $6,250 if it was accepted that each bet was sold at $4.

15. Mr. Desmond Riley's evidence was not in the category of hearsay. He was an operations steward employed by the Jamaica Racing Commission. A panel of

three stewards oversees the operations of each race day. On October 10, 1998, the date on which the appellant said in his cautioned statement that he had placed the bets which rewarded him so handsomely, Mr. Riley happened to have been the chairman of the panel of stewards on duty. The panel was responsible for declaring the winners as well as the horses that placed in each race. Each member of the panel makes notes of what transpires on a race day, and the chairman makes a comprehensive report at the end of the day. The notes are made on a race card and such notes include the names of the horses and their jockeys, the positions of the horses at the end of a race as well as the dividends.

Mr. Riley gave evidence from the records and his memory. He told the jury that Sloopy's Valley did not participate on the racing programme for October 10, 1998. Peter Bryan, the jockey, had six mounts on that day. He won on one of those mounts, Juliet's Dream.

16. Mr. Riley's evidence, if accepted, would show that the cautioned statement was false so far as it purported to say that Sloopy's Valley raced on the date in question and paid handsome dividends. So, the winning of $10,000 on this horse would fall in the category of fiction. The hearsay evidence given by Mr. Sibbles was to the effect that Sloopy's Valley did not run on October 10, and that Juliet's Dream ridden by Peter Bryan paid $8.40 to win. Mr. Sibbles' evidence also challenged the appellant's claim that he won S7,500 on Juliet's Dream. The winnings would have amounted to no more than $1,470, he said. So far as the hearsay evidence on the non-running of Sloopy's Valley is concerned,

the effect on the appellant's case can hardly be described as prejudicial when it is considered that Mr. Riley gave evidence which confirmed what Mr. Sibbles had said.

17. Mr. Wilkinson indicated an intention to argue grounds 4 and 5 together.

Ground 4 reads:

> "The applicant was denied a fair trial, and consequently a substantial miscarriage of justice occurred, as the learned trial judge failed to assist the jury specifically or sufficiently in relation to the several inconsistencies and/or discrepancies in the evidence on the prosecution's case." (see pp. 421 - 422 and 444-446 of the transcript).

Ground 5 states:

> "The learned trial judge misdirected the jury when she said 'I will just remind you that what a witnesses (sic) said on a previous occasion else where is not evidence in this court except for those parts which the witness has told you are true.' (p.446 of the transcript)".

Mr. Wilkinson commenced his challenge in respect of these grounds with a submission that the judge had a duty to itemize the discrepancies. When it was pointed out to him that the learned judge had indeed adequately dealt with the material discrepancies, he did not pursue the matter. However, it should be added that Mr. Fraser cited the case **Regina v. Fray Deidrick** an unreported judgment of this Court (Supreme Court Criminal Appeal No. 107/89 - delivered on March 22, 1991) which shows the error in Mr. Wilkinson's argument. At page 9 thereof, Carey, J.A. said:

> "The trial judge in his summation is expected to give directions on discrepancies and conflicts which arise in the case before him. There is no requirement that he should comb the evidence to identify all the conflicts and discrepancies which have occurred in the trial. It is expected that he will give some examples of the conflicts of evidence which have occurred in the trial, whether they be internal conflicts in the witness' evidence or as between different witnesses".

18. **Ground 6** complained of the failure of the judge to give directions on the evidence of identification.

Mr. Wilkinson submitted that the prosecution's main witness, Garnett Williams, placed the appellant on the spot, that is, in the vicinity of the bar at about 8.30 to 9.00 p.m. whereas the appellant raised an alibi. That being so, according to Mr. Wilkinson, directions should have been given on identification. On the other hand, Mr. Fraser submitted that in the circumstances of the case, there was no need for any such direction. His reason for so saying is that it could not be said that the case rested wholly or substantially on the evidence of Williams' identification of the appellant because -

(i) the murder did not occur at the time Williams said that he saw the appellant;

(ii) the prosecution would not have lost any substantial evidence if Williams had not testified;

(iii) the appellant placed himself in the area, being at home ninety metres from the shop (had he placed himself elsewhere the situation would have been different); and

(iv) the identification evidence in the deposition of Tracy -Ann Brown was not challenged by the appellant.

As an alternative submission, Mr. Fraser contended that even if the warning was required, there has been no miscarriage of justice as the evidence of identification was exceptionally good. The appellant, he said, was well-known to Williams. Mr. Wilkinson relied on the Privy Council judgment of **Karl Shand** (P.C. No 8 of 1994 - delivered on November 27, 1995) which applied **Freemantle** (1994) 1 W.L.R. 1437.

We are of the view that Mr. Fraser's submission is sound. Whether or not the appellant was seen outside the shop at the time Williams said he saw him was of no importance to the case considering that the murder was not committed at that time or place. Furthermore, the appellant was not saying that he was not in the neighbourhood that night. Indeed, in his cautioned statement, he said he was at his house throughout the night. And it is agreed that he lives near to the deceased.

19. Grounds 7 and 8 were taken together.

Ground 7 reads:

> "The learned trial judge erred in law in failing to uphold the submission of no case to answer made by defence counsel on behalf of the applicant. (p.415 of the transcript)."

Ground 8 reads:

> "The verdict is unreasonable and cannot be supported having regard to the evidence".

In his skeleton arguments, Mr. Wilkinson said that there were "glaring defects and gaping holes in the prosecution's case" which amounted to there being no case for the appellant to answer. He relied on the well-known case **Galbraith** (1981) 2 All E.R. 1060. In his oral arguments, he stressed that the complaint was due primarily to the improper admission of the evidence of Sibbles, which, he said, was riddled with inconsistencies, and of Tracey-Ann Brown. As already demonstrated, the evidence of Sibbles was not relied on and no prejudice resulted from its admission, considering the impact that Riley's evidence would have had on the minds of the jurors, he being chairman of the panel of stewards that watched over the proceedings of the raceday on which the appellant claimed to have won handsomely. Further, the evidence of Tracey-Ann Brown was admissible by virtue of the Justices of the Peace Jurisdiction Act.

20. **Conclusion**

The case for the prosecution rested on the evidence of the identification of the blood of the deceased on one of the notes presented by the appellant at the Workers Bank within hours of the death of the deceased. The identification of the blood by DNA profiling was done by the use of seven markers, resulting in a match for six markers. As the Privy Council has confirmed in **Pringle** (P.C. Appeal No. 17 of 2002 delivered on January 17, 2003) a case from this jurisdiction:

> "the more markers that are used, the less likely it is that the same profile will be obtained from samples taken from two individuals."

In that case, only two markers were used. There has been no challenge to the DNA evidence in the instant case. That evidence ruled out the possibility of the blood on the $20 note being someone else's apart from that of the deceased. In addition, the appellant was found to have been lying in material aspects of the case.

In view of this unchallenged evidence and the failure of the appellant to succeed in respect of the grounds argued, we affirmed the conviction and sentence.