JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 7 & 8/96

BEFORE: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.

SAMUEL LINDSAY and HENRY MCKOY
vs. REGINA

Ian Wilkinson for Lindsay

Dennis Morrison, Q.C. and Garth McBean for McKoy

Ms. Lorna Shelly for the Crown

November 16-19 and December 18, 1998

PATTERSON, J.A.:

The appellants were convicted in the Home Circuit Court on the 15th January, 1996, of the murder of Richard Forbes and Suzette Brown and sentenced to death. On the 20th December, 1996, we dismissed their appeals against conviction. Both applicants petitioned Her Majesty in Council for special leave to appeal from the Judgment of this Court. On the 11th February, 1998, on the advice of the Judicial Committee of the Privy Council, Her Majesty ordered as follows:

> "(1) Special leave ought to be granted to the Petitioners to enter and prosecute their Appeals as poor persons against the Judgment of the Court of Appeal of Jamaica dated 20th December 1996 (2)the matter ought to be remitted to the Court of Appeal of Jamaica (i) to consider the issues raised in the Petition and any other issues in respect of which the Court of Appeal might grant leave (ii) to hear such evidence as the Court of

> Appeal thinks fit and (iii) to decide whether (a) the Petitioners' conviction should be quashed (and if so whether or not an alternative verdict should be substituted or whether or not a re-trial should be ordered) or (b) the Petitioners' convictions should be affirmed and (3) for the avoidance of doubt if the Petitioners' convictions are affirmed (or an alternative verdict is substituted) the Petitioners are entitled to petition for special leave to appeal as poor persons to Your Majesty in Council from the Judgment of the Court of Appeal."

The issues raised in the Petition were encapsuled in the following grounds which both petitioners relied on:

> **A.** The learned judge erred in refusing to permit counsel for Lindsay to adduce evidence of a visit made to Lindsay made on 20th March 1995 by a person giving the name Markland, which evidence was relevant, admissible and went to the credibility of the principal prosecution witness, Cecil Markland.
>
> **B.** Counsel for your Petitioners has obtained an Affidavit from Selvin Thorpe concerning the witness Markland which, if accepted, would wholly undermine the prosecution case against them. It is submitted that this case should either be stayed pending application to the Governor-General to consider that evidence (pursuant to Section 29(1)(a) of the Judicature (Appellate Jurisdiction) Act (Jamaica), or be remitted to the Court of Appeal of Jamaica pursuant to section 8 of the Judicial Committee Act 1833.
>
> **C.** Inadmissible hearsay evidence was left by the learned judge for consideration by the jury, which evidence was prejudicial to the case for your Petitioners.

Those issues were not raised in the appeal to this court and undoubtedly Her Majesty's Board formed the view that this court ought to consider and determine those issues before any further step is taken by the appellants. In the appeal before us, counsel for the appellants who appeared then had only two complaints, namely, the inadequacy of the learned trial judge's directions to the jury,

firstly, on the issue of visual identification and secondly, on the issue of the defence of alibi. The court gave full consideration to those issues and in a reserved judgment delivered on the 20th December, 1996, dismissed the appeal. Those issues were not raised in the petition to the Queen's Most Excellent Majesty in Council.

Mr. Wilkinson supported by Mr. McBean moved the court for leave to adduce fresh evidence pursuant to the provisions of section 28(b) of the Judicature (Appellate Jurisdiction) Act ("the Act"). The relevant section reads as follows:

> "**28.** For the purposes of Part IV and Part V, the Court may, if they think it necessary or expedient in the interest of justice--
>
> **(a)** ...
>
> **(b)** if they think fit, order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court,..."

The evidence that the appellants sought to adduce was contained in an affidavit sworn by one Selvyn Thorpe on the 8th December, 1997. The motion was supported by affidavits filed by Mrs. Valerie Claire Neita-Robertson, the attorney-at-law who appeared for the appellant Lindsay at the trial; by Ian Godfrey Wilkinson, the present attorney-at-law appearing for the appellant Lindsay and by Dennis Morrison, Q.C. on behalf of the appellant McKoy. The supporting affidavits clearly established that the evidence sought to be called was evidence which was not available at the time of the trial on the 15th January, 1996. Mrs. Neita-Robertson deposed on the 8th December, 1997, as to how the affidavit of Selvyn Thorpe was obtained. These are the relevant paragraphs:

> "**28.** Following upon the request of the Attorney-at-Law appearing for the Appellant Samuel Lindsay in the Privy Council, I tried again to locate one 'Dave' who was, on the

> evidence of the witness Cecil Markland, in the house that night and ran from house.
>
> **29.** That during my search I received information from Sandra Cherrington, a citizen of the August Town community and subsequently Eulalee Hamilton that Selvin Thorpe might be able to assist me.
>
> ...
>
> **33.** That no favour or promise was held out to Selvin Thorpe by me, a (sic) the information he gave as contained in his Affidavit was freely, and voluntarily given by him."

Further, the affidavits disclosed the relevance of the evidence to the issues in the case, that the witness was compellable and that his evidence was well capable of belief. We were mindful of the principles laid down in the case of ***R. v. Parks*** (1961) 46 Cr. App. R. 29, upon which the court acts in the exercise of its discretion under section 28 (supra) to hear additional or fresh evidence. This is what the Lord Chief Justice, Lord Parker of Waddington, said (at page 32):

> "As the court understands it, the power under section 9 of the Criminal Appeal Act, 1907, is wide. It is left entirely to the discretion of the court, but the court in the course of years has decided the principles upon which it will act in the exercise of that discretion. Those principles can be summarised in this way: First, the evidence that it is sought to call must be evidence which was not available at the trial. Secondly, and this goes without saying, it must be evidence relevant to the issues. Thirdly, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this court to decide whether it is to be believed or not, but evidence which is capable of belief. Fourthly, the court will, after considering that evidence, go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial."

Those principles have been adopted and followed by this court (e.g. in R. V. Page [1967] 10 J.L.R. 79). The Crown did not oppose the motion and we thought it necessary in the interest of justice that the witness should attend and be examined before the court. On the 16th November, 1998, we gave leave to call the fresh evidence, and ordered that the witness attend before the court.

Selvyn Thorpe appeared before the court on the 18th November, 1998, and in the presence of both appellants, we heard his viva voce evidence. He testified that he was a good friend of Cecil Markland, the only witness that the Crown relied on to prove the case against both appellants. The salient parts of his evidence disclosed:

> **(1)** That Markland had told him before the trial that it was not "Sammy Dread" (Samuel Lindsay) who shot up the house, but was "Slaughter", "Tommy T", "Jeronimo", "Juicy" and "Waggy" who did it.
>
> **(2)** That before the trial he tried to persuade the witness Markland to tell the truth, so that the appellants could be released from prison.

Thorpe's evidence that Markland told him that none of the appellants were present at the incident would, if believed, give credence to the evidence of the appellant Lindsay that the witness Markland had visited him in prison and told him that if he gave him $20,000 he would not attend the trial.

Markland testified at the trial that it was both appellants who came to his home and shot and killed two persons, and shot and wounded him. Both appellants denied shooting anyone and raised alibi in their defence. The report of the incident made to the police by Markland shortly after the shooting took place was that

five gunmen were involved. This report was written up in the station diary - no names were called.

Having seen and heard the witness Thorpe, we concluded that his evidence was well capable of belief, and when considered with the other evidence given at the trial, that there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellants, had they heard that evidence. The evidence gave credence to the defence, and cast grave doubt on the veracity of the only witness for the prosecution.

Counsel urged other issues which were mentioned in the petition, but having regard to our decision on hearing the fresh evidence, we do not think it necessary to advert to those issues. Suffice it to say that we paid due respect to the arguments put forward by counsel for the Crown and for the appellants.

The question as to the determination of the appeal in light of the fresh evidence adduced, now came into full focus. It should be noted that section 28 of the Act does not prescribe how appeals should be determined when fresh evidence is admitted. We were guided by the provisions of sections 14(1) and (2) of the Act which read as follows:

> "**14.--(1)** The Court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:
>
> Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no

> substantial miscarriage of justice has actually occurred.
>
> **(2)** Subject to the provisions of this Act the Court shall, if they allow an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial at such time and place as the Court may think fit."

These provisions make it quite clear that, in the instant case, the first question to be determined was whether, in the light of the fresh evidence, the appeals should be allowed. We were firm in our decision that the evidence adduced was of such quality that had it been presented to the jury at the trial, they would possibly have had a reasonable doubt as to the guilt of the appellants. Accordingly, we concluded there was a miscarriage of justice, and that the convictions should not be allowed to stand, and that they should be quashed.

The next question to be determined was whether or not an alternative verdict should be substituted or whether or not a re-trial should be ordered. The nature of the fresh evidence, taken with that at the trial, did not give rise to an alternative verdict being substituted. However, the question of a re-trial was canvassed. We considered whether the interest of justice would be served by ordering a new trial. It was plain that in order for such a trial to be fair, then the defence should be given the opportunity to confront the only prosecution eyewitness, Cecil Markland, with allegations made by Thorpe in the fresh evidence adduced before us. However, we were told that that was not possible, since Cecil Markland had been shot and killed in 1997. There is provision for the evidence of a deceased witness to be read at a re-trial, but in the circumstances of this case, it was quite obvious that the ends of justice would not be served if such a course was adopted.

Accordingly, the court came to the conclusion that the appeals of each appellant against conviction must be allowed, the verdict of the jury set aside and the conviction quashed. We directed a judgment and verdict of acquittal to be entered in each case.