

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.1994/M-140

SUIT NO. C.L.1993/S-321

BETWEEN	ALVA MILLER (Near Relation of Desmond Miller, deceased)	PLAINTIFF
AND	KARLENE SINCLAIR (Near relation of Rupert Sinclair, deceased)	PLAINTIFF
AND	LANCE CORPORAL RICHARD MAXWELL	1ST DEFENDANT
AND	THE ATTORNEY GENERAL OF JAMAICA	2ND DEFENDANT

Mr. Ernest Smith and Miss Nesta Smith for Plaintiffs.

Miss Nicole Foster and Mrs. Susan Reid-Jones for Defendants.

**HEARD: 20th, 21st, 22nd, 27th, 28th, 29th and 31st July, 29th, 30th,
September, 1998, 15th and 19th July, 1999 and 19th April, 2000.**

F.A. SMITH, J.

Three days before the General Elections set for the 30th March, 1993 tragedy struck at the Jamaica Labour Party's Constituency Office for North West St. Ann.

Mr. Ernest Smith, Attorney-at-Law was the Jamaica Labour Party Candidate for this Constituency. His Constituency Office was located on the upper floor of a two storey building on premises No. 13 Main Street, Brown's Town.

The upper floor was accessible by means of stairways from both sides, one stairway was blocked off by a door. The other was on the outside and led to a rear verandah with

access to 8 rooms. These rooms were arranged in two rows of four. Some of the rooms were accessible from the verandah while some could be entered from the main entrance others only through other rooms. The deceased Rupert Sinclair was a member of the Jamaica Constabulary Force. He was assigned to Mr. Ernest Smith as his Body Guard. The deceased Desmond Miller was a Security Guard.

On 27th March, 1993 Lance Corporal Richard Maxwell the first defendant was one of three members of the Jamaica Defence Force who were doing a reece (the military term for reconnaissance) of the Polling Stations in the Brown's Town area. The others were Second Lieutenant T.A. Henry (now deceased) and Private Clement Jones (also now deceased). While driving along Main Street the soldiers called out to a man they saw wearing a camouflaged jacket, the man ran up the steps leading to the Constituency Office of Mr. Ernest Smith. As to what took place thereafter the parties are poles apart. However what is not in dispute is that at the end of it Constable Sinclair was shot by the soldiers and later succumbed to the injuries; Mr. Desmond Miller lay dead and Miss Antoinette Graham was seriously injured.

The soldiers were charged with murder but were acquitted by the jury. Arising out of this incident near relatives of Rupert Sinclair and Desmond Miller sued Lance Corporal Maxwell and the Attorney General. The Court was told that Miss Graham had recently died consequently the action brought by her was adjourned.

The plaintiffs are contending that the deceased Sinclair and Miller were deliberately and without lawful excuse shot by the soldiers.

The defence is claiming that Constable Sinclair pulled his .38 revolver and was shot in self defence.

Before embarking on a detailed consideration of the contentions of the parties and the evidence in support thereof I think it will be convenient to deal with two matters which were raised during the trial.

(1) The admissibility of a statement allegedly made by deceased Constable Sinclair

Corporal Anthony Linton of the Moneague Police Station testified that on the 29th March, 1993 about 4:00 p.m. whilst driving along Main Street in Brown's Town he came upon an army jeep with four uniformed soldiers. In the back of the jeep he saw Constable Rupert Sinclair whom he knew before, lying on his side.

Constable Sinclair, he said, came out of the jeep. He was bleeding "profusely from several wounds to the abdomen" and was "holding up" his protruding intestines.

It is Corporal Linton's evidence that he eventually got Constable Sinclair into his vehicle and was taking him to the St. Ann's Bay Hospital when Sinclair made a statement. According to Corporal Linton, Sinclair's "voice was slurred" and he was weak. He then proceeded to tell the Court what Constable Sinclair said.

Miss Foster submitted that a dying declaration is not admissible in a civil case. She made reference to Cross and Tapper 8th Edition pp.717-719.

Mr. Ernest Smith contended that a dying declaration is admissible in any proceedings which relate to the cause of death of the declarant. Counsel for the plaintiffs could find no authority to support his contention.

In my research I have not been able to find one recent civil case in which a dying declaration has been received in evidence.

The statement of this exception to the rule against hearsay is:

“The oral or written declaration of a deceased person is admissible evidence of the cause of his death at a trial for his murder or manslaughter provided he was under a settled hopeless expectation of death when the statement was made and provided he would have been a competent witness if called to give evidence at that time.”

As stated by the learned Author of Murphy on Evidence 6th Edition p.222, the rule is a specific one applying only to criminal prosecutions for murder or manslaughter. It is allowed in evidence only for the limited purpose of proving the cause of the death. Attempts to extend the rule to other offences have been rejected, see for example **R. V. Hind** (CCR) 1860 8 Cox CC 300 (procuring abortion).

The general principle on which the **dy**ing declarations of the victim are admissible was stated by Eyre CB in **R. V. Woodcock** (1789) 1 Leach 500 at 502:

“they are declarations made in extremity when the party is at a point of death, and when every hope of this world has gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth.”

The rationale of the rule does not suggest any reason for restricting the rule to criminal trials for the victim’s murder or manslaughter. But then “the life of the law is not logic but experience.” In Halsbury’s Laws of England 3rd Edition Vol. 15 page 32 the grounds of admission of such statements are stated as:

- (i) Death
- (ii) Necessity – since if the evidence of the victim is excluded such crimes might often go unpunished.
- (iii) The sense of impending death which provides a potent incentive to speak the truth.

Whereas (i) and (iii) above would apply to civil cases as well as criminal matters probably (ii) would not apply to civil matters. It seems to be doubtful whether admitting dying declaration in civil cases would cause greater mischief than advantage in the investigation of truth. It might well be that dying declarations may be received in evidence now by virtue of S.31 (E) of the Evidence Act, provided, of course, that the requirements specified therein are complied with. It was not sought to have the “dying declarations” received pursuant to the S.31(E) of the Evidence Act.

I must therefore hold that at common law a dying declaration is not admissible in a civil case. Accordingly I will expunge from the record the evidence of Corporal Anthony Lindsay in so far as it relates to the alleged declarations of the deceased Constable Sinclair.

I am constrained to say that even if a dying declaration was admissible in a civil case, I would have great difficulty in accepting the evidence of Corporal Lindsay that Constable Sinclair gave him such a detailed account of what transpired at the Constituency Office of Mr. Smith. I must confess a reluctance on my part to accept a long detailed statement as one made in extremis. I agree with Miss Foster that Corporal Lindsay’s evidence that Constable Sinclair declared that he was dying should not be accepted as accurate.

I regret to say that Corporal Lindsay did not impress me as a reliable and/or credible witness. I say, without relish, that I would not be inclined to find on the balance of probabilities that Constable Sinclair made the “declarations” attributed to him.

STANDARD OF PROOF

What is the standard of proof required in civil matters to establish a felonious killing or any other grave crime? Must a plaintiff establish a higher degree of probability

in such cases than in other civil matters?

A good starting point, I think, is **Bater v. Bater (1950) 2 ALL E.R. 458**. In dismissing a divorce petition brought by the wife on the ground of cruelty, the commissioner said that she must “prove her case, beyond reasonable doubt.” The Court of Appeal (Bucknill, Somervell and Denning L.J. J) held that this was a correct statement of the law and the commissioner had not misdirected himself.

Lord Denning Spoke of degrees of proof within the same standard:

“The difference of opinion which has been evoked about the standard of proof in these cases may well turn out to be more a matter of words than anything else. It is true that by our law there is a higher standard of proof in criminal cases than in civil cases but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear, so also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject matter. A civil court when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence was established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the the occasion. Likewise a divorce court should require a degree of probability which is proportionate to the subject matter. I do not think the matter can be better put than Sir William Scott put it in **Loveden v. Loveden**:

“The only general rule that can be laid down upon this subject is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion.....”

This case (**Bater v. Bater**) was considered in **Hornal v. Neuberger Products Ltd.** (1957) 1 Q.B. 247 an action for damages for breach of warranty and fraudulent misrepresentation. Lord Hudson quoted Lord Denning in **Bater v. Bater** and said at p.264:

“The House of Lords has now held in **Preston-Jones v. Preston-Jones** [(1951) A.C. 391] that the words of the Matrimonial Causes Act, 1950 produce the same result on the rule in criminal cases although divorce cases are civil actions. Nevertheless, on the general question of the standard of proof in criminal and civil cases, I would like to express my complete concurrence with the words used by Denning L.J. in the passage I have cited.”

Lord Morris had this to say at p.266:

“But in truth no real mischief results from an acceptance of the fact that there is some difference of approach in civil actions. particularly is this so if the words which are used to define that approach are the servants but not the masters of meaning. Though no court and no jury would give less careful attention to issues lacking gravity than to those marked by it, the very element of gravity becomes a part of the whole range of circumstances which have to be weighed in the scale when deciding as to the balance of probabilities.”

In Re: **Dellow’s Will Trusts** (1964) 1 WLR 451 where the question arose whether the wife had feloniously killed the husband, Ungood-Thomas J. observed that “there can hardly be a more grave issue than that and its gravity weighs very heavily against establishing that such a killing took place even for the purposes of deciding a civil case.”

The learned Judge referring to the judgment of Morris L.J. in **Hornal** said at pp.454-5:

“It seems to me that in civil cases it is not so much that a different standard of proof is required in different circumstances varying according to the gravity of the issue, but as, Morris L.J. says, the gravity of the issue becomes part of the circumstances which the court has to take into consideration in deciding whether or not the

burden of proof has been discharged. The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it. This is perhaps a somewhat academic distinction and the practical result is stated by Denning L.J.: “The more serious the allegation the higher the degree of probability that is required: but it need not, in a civil case, reach the very high standard required by the criminal law.”

In re: H and others (Minors) (1996) A.C. 563 – The mother had four children, all girls, the elder two by her husband, from whom she was separated and the younger two by R., with whom she was living. The eldest girl, then aged 13, alleged that she had been sexually abused by R since she was 7 or 8 years old. R was charged with rape. The local authority was granted interim care orders in respect of the younger children.

R was tried on an indictment containing four counts of rape of the eldest girl. The jury acquitted him on all counts. The local authority proceeded with the application for care, orders based solely on the alleged sexual abuse of the eldest girl by R.

The local authority relying on the different standard of proof in civil and criminal matters asked the Judge to find that R had sexually abused the girl or that there was substantial risk that he had done so pursuant to the Children Act 1989 which empowered the Court to make a care order if it was ‘satisfied’ that the child was “likely to suffer significant harm.” The issue of the appropriate standard of proof arose.

The Judge dismissed the application of the local authority holding that he could not “be sure to the requisite high standard of proof that the girl’s allegations are true.”

The Court of Appeal dismissed the local authority’s appeal.

On appeal to the House of Lords by a majority (3-2) the appeal was dismissed. The majority held that the standard of proof should be the ordinary civil standard but subject to the observation that the more serious or improbable the allegation of abuse, the stronger

should be the evidence adduced to support it. Lord Nicholls of Birkenhead in his majority speech had this to say (p.586 D-H):

“The balance of probability standard means that a Court is satisfied an event occurred if the Court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the Court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the Court concludes that the allegation is established on the balance of probability. Fraud is less likely than, negligence. Deliberate physical injury is usually less likely than accidental physical injury. A step-father is usually less likely to have repeatedly raped and had non-consensual oral sex with his under age step-daughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.

Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before on the balance of probability, its occurrence will be established. Ungood-Thomas J. expressed it neatly in: *In re Dellow's Will Trusts* “The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is Alleged and thus to prove it.”

In the matter before me I am called upon to decide whether the plaintiffs have established on a balance of probability that the first defendant, Lance Corporal Maxwell and Lieutenant Trevor Henry (now deceased) feloniously shot and killed Rupert Sinclair and Desmond Miller.

In applying the balance of probability standard I will bear in mind the observation of their Lordships in re: H and Others (Minors) that the more serious the allegation the stronger should be the evidence adduced to support it.

THE PLAINTIFF'S CASE

The only eye witness called by the plaintiffs is Mr. Ashton Barrett. Mr. Barrett is a 65 year old farmer of Sturge Town, St. Ann. He knew the deceased Constable Rupert Sinclair and Desmond Miller. He told the Court that on the 27th March, 1993 at about 3:40 p.m. he was in Brown's Town, St. Ann at the Constituency Office of Mr. Ernest Smith, the Jamaica Labour Party candidate for North West St. Ann. He was an organiser for the campaign for general election.

About seventeen other persons including Constable Sinclair and Desmond Miller were also there. He said that the office had three sections which are connected by doors. Constable Sinclair and three others were in the middle section. Miller was in the first section where some persons were playing dominoes. In the third section there were persons writing up voters' guides.

Mr. Barrett left the office and went to the verandah at the back. Whilst there he said he saw a soldier dressed in uniform and armed with a long high powered rifle coming towards him. He later identified lance Corporal Richard Maxwell as this soldier.

The soldier asked: "where is the boss?" Mr. Barrett said he did not answer because he did not know to whom he referred. The soldier then asked "where is Mr. Smith?" "I don't know," replied Barrett.

Lance Corporal Maxwell was joined by another soldier who was also armed with a high powered rifle. Both soldiers entered the first section of the office that is, the section where dominoes were being played.

Lance Corporal Maxwell, the first defendant, went to a corner of the room and removed a camouflaged military jacket from a broom stick. At this stage Mr. Barrett said he realized that a third soldier was behind him. The third soldier had a short gun which appeared to him to be a submachine gun.

Lance Corporal Maxwell asked the persons in the room whose jacket it was. Constable Sinclair who was standing at the door between the two sections replied saying that the jacket was his and that he was the body guard of Mr. Ernest Smith.

Constable Sinclair was wearing a T-shirt and trousers. Lance Corporal Maxwell asked him where he got the jacket. Constable Sinclair said he got it from a friend. Mr. Barrett told the court that Lance Corporal Maxwell threatened that “any b.....c.....(expletives) one of you we see in any of these kinds of uniforms will see what happen.” Constable Sinclair’s response was “a whey you a say?” “Whey you get so much argument from?” the soldier asked. There was no response from Constable Sinclair. According to Mr. Barrett, the soldier stepped up to Sinclair and boxed him twice – on both sides of his face. Mr. Barrett swore that Constable Sinclair “did not react.” Instead he turned away covering his face with his hands. The soldier who boxed him stepped back. Constable Sinclair was “still crouched with his hands covering his face.” Both soldiers who had entered the ‘domino’ room started firing at Constable Sinclair whom he said was “straight before them, still crouching and covering his face with his left side towards them.” He was about 6 feet from the soldier nearest to him.

It is Mr. Barrett's evidence that Constable Sinclair "tried to wriggle away, he quickly shifted trying to roll away from the bullets." He went towards the second room. Mr. Barrett testified that the deceased Desmond Miller said "soldier, a police you know." He said that the second soldier (Lieutenant Henry) turned to Mr. Miller and shot him, he fell immediately.

He went on to say that Constable Sinclair fell on his hands and knees into the second room. Lance Corporal Maxwell went into the room where Constable Sinclair fell and took Sinclair's firearm from his waist.

The witness said he knew Constable Sinclair had a gun because he saw the "impression of the gun at his side through the T-shirt." When Sinclair fell the gun was exposed.

After removing Sinclair's gun the soldier stepped back and fired one shot to the mid section of his back. The gun was about 4-5 feet from Sinclair. Constable Sinclair was still on his hands and knees when he was shot in the back. He did not see Constable Sinclair pull his gun which looked like a .38 revolver.

The two soldiers who entered the room went towards the third room. He stated that the persons who were at the Constituency Office fled – some fled when Sinclair was boxed and others when the shooting started. He did not run, he swore, because he was responsible for the office.

In cross-examination he told the court that his last position before the shooting started was on the verandah. When the soldier asked about the jacket he (the witness) was at the door to the first room. Sinclair he said, laughed when the soldier used bad words.

He insisted that when the soldiers fired from the doorway Constable Sinclair was on the floor.

I will return to the evidence given by Mr. Barrett under cross-examination when dealing with his credibility.

Inspector Linton Wilson, was in March 1993 a Detective Sergeant of Police attached to the Brown's Town Police Station. He knew Constable Sinclair.

About 3:45 p.m. on 27th March, 1993 he received a report and went to the Jamaica Labour party Constituency Office on North Street, Brown's Town. There he saw a crowd. Aston Barrett was there. He entered the office. The office comprised of three rooms. In the first room he observed a small table with dominoes thereon. There were chairs inside.

There was bloodstain on the floor. Panes of glass were missing from a window. He went into the next room by way of a "doorway." Did not notice anything in particular about the door jamb.

In room two he observed a pool of blood and flesh on the floor. He observed that the board partition between the first and second rooms was damaged by bullets. In the second room there was damage to concrete wall. There was damage to door jamb between the second and third rooms. There was also damage done by bullets to the wall in room three. The partition between rooms two and three was of concrete. To his knowledge Constable Sinclair was armed with a .38 revolver. He did not recover any .38 bullet from this scene. SLR warheads were recovered from the building. The damage he saw, was not, in his opinion, done by a .38. To his certain knowledge bullets from a .38 have lodged in bodies of victims on many occasions.

Mr. Rupert Linton is a retired Superintendent of Police. He was attached to the Police Forensic Laboratory. He has been engaged in the use and handling of firearms for the past forty-four (44) years and was appointed and gazetted a Government Ballistic Expert.

On the 28th March, 1993 about 4:00 a.m. he went to Madden's Morgue on North Street. He examined the body of Sinclair. He told the Court that the body was in a bloody condition with wounds to the chest – front and rear, the intestines were protruding through some of the wounds. His examination revealed the following injury:

- (i) Exit wound located in upper right side about 5" in diameter through which intestines were protruding.
- (ii) Small hole about 1" in diameter located in the right side below the large hole which appeared to be an entry hole.
- (iii) Large exit wound in the left side about 1" x 7" with fat and flesh protruding.
- (iv) Large entry wound about 6" x ½" in the left side rear of hole number 3.
- (v) One long burn mark about 8" long across the front of upper chest under the neck apparently made by a fired bullet.

He could not say whether the bullet traveled left to right or right to left. The injuries, he said were consistent with being inflicted by bullets from high powered weapons such as SLR assault rifles.

Superintendent Linton took swabs from (i) the front of right hand and (ii) rear of right hand. The same was done in respect of the left hand making a total of four swabs. There was nothing remarkable about the hands.

He said he could see particles of dirt in the swabs. He opined that if the deceased's hands had been washed with water or reagent he would not see particles of dirt in swabs.

In cross-examination he admitted that several factors might remove gun powder from the hands such as washing of the hands, blood on the hand, touch of other persons' hands and ice on the hand over a long period. However he said that these factors should not completely remove gunpowder residue. He also admitted that the swabbing tests have shortcomings, but to overcome these he had it done at the chemistry section of the laboratory where a concrete examination could be carried out.

On the 5th April, 1993 he handed over swabs to Mr. Fitzmore Coates at the Government Forensic Laboratory. In answer to Miss Foster, he said that the SLR has a killing distance of over 1 mile. The total length of SLR is about 41-45 inches. A distance of 20 feet would be close range in relation to a SLR. An exit wound caused by a SLR within close range would most likely be large.

Mr. Fitzmore Coates is a Government Analyst attached to the Government Forensic Laboratory. He holds a B.Sc. Degree in Chemistry and Biochemistry and has 21 years experience as Forensic Analyst.

On the 5th April, 1993 he received four envelopes from Superintendent Rupert Linton. Each of these envelopes had a swab. These swabs were allegedly taken of the hands of deceased Rupert Sinclair.

He carried out examinations and tests on these swabs. His examinations and tests reveal that there was no evidence of gun powder residue on any of the swabs. He prepared a certificate which was received in evidence as exhibit 16, by consent.

In answer to Miss Foster he agrees that there are factors which would affect the preservation of gun powder residue on the hand. These factors depend on whether the person is alive or dead. The only factor he could think of which was common to both circumstances would be the scrubbing of the hands. In the case of a live person if the hands came into contact repeatedly with rough surfaces over a period of up to three (3) hours then there is a possibility that gun shots residue will not be found. Casual washing of the hands would not remove all gun powder residue.

Gun powder residue remains indefinitely on hand of dead person unless hand is repeatedly scrubbed or if it is kept in a moist condition over a long period. If the moisture is being removed over a period of time the residue would be removed with the moisture.

In respect of a live subject the generally accepted period for testing would be up to three (3) hours. If the person was alive for a period of time and then dies it would depend on his activities after the gun was fired.

In his opinion blood on the hand would not remove all gun powder residue. Gun powder residue, he stated, could be transferred if someone else held his hand. So too, if the hand with residue held unto something, residue could be transferred, but when a firearm is fired most of gun powder residue is deposited on the back of the hand.

He did not agree that three (3) hours would be optimal time for taking swabs in respect of a dead person.

Once the person was alive after the incident it would be best to take swabs within the three hours. If the hand was not protected whilst the person was alive the result would be affected depending on how active the person was during that time.

When asked if he would agree that the fact that gun shot residue was not found is not conclusive that the person did not fire a firearm, his answer was that several factors would have to be taken into account such as the type of weapon. He concluded by saying that having carried out the tests and having found them negative he would say that he was sure the person did not fire unless it had been shown that some measure was taken to conceal the fact such as wearing a pair of gloves or covering the hand with some object.

Dr. Ademola Odunfa is a registered Medical Practitioner and Consultant Pathologist. He has been performing post mortem examination on bodies with gun shot wounds from 1990.

On the 31st March, 1993 he performed the post mortem examination on the body of Rupert Sinclair at the Kingston Public Hospital Morgue. This was done about 96 hours after his death.

On external examination there were two (2) gun shot wounds.

- (1) A through and through gun-shot wound without damage to underlying bone, located on the left elbow.

A re-entry gunshot wound of 1 inch in diameter without gun powder deposition located at the abdomen 26 inches below top of head and 8 inches from the anterior midline to the left of midline. The bullet exits through a 2 inch diameter wound located on the right side of the abdomen 25 inches below top of the head.

- (2) A ½ inch diameter entry gun shot wound without gun powder deposition located on right side of back 26 inches below top of the head and 3 inches from the posterior midline. The tract of the wound travels through the skin and underlying tissues with associated wounds to right of kidney and large bowel.

The bullet exits from the front of the abdomen 28 inches

Below the top of the head and 5 inches from anterior mid-Line through a 1 inch wound.

The cause of death was the multiple gun shot wounds to Abdomen. No projectiles were recovered.

The Doctor stated that if the left arm of the deceased was to his left side, it is possible that it is the same bullet that went through the elbow that entered the left side of the abdomen. The locations of the injuries to elbow and abdomen appear to overlap.

The first injury he said, went across the abdomen. It is his opinion that this is not consistent with the muzzle of the gun pointing to the front of the person injured. It is more consistent with the muzzle of gun pointing to the side of the person.

On the 7th April, 1993 he performed a Post Mortem examination on the body of Desmond Miller at the Kingston Public Hospital Morgue. This was done 312 hours after death. Two gun shot wounds were observed.

- (i) A 1 inch diameter entry gun shot wound without gun powder deposition located on left lateral chest 14 inches below the top of the head and 6 inches from posterior midline. The tract of this wound travels through the skin and underlying tissues to penetrate the left chest cavity with lung perforation.

The Doctor did not find any point of exit.
Did not find any projectile in the body.

- (ii) A 1 inch diameter entry gun shot wound without gun powder deposition located on the left lateral chest 19 inches below the top of the head and 5 inches from the mid-line. Tract of wound travels through skin and underlying tissues to penetrate left chest cavity with perforation of lungs.

No projectile recovered. No exit wound

found. Death was due to gun shot wounds to chest.

On 31st January, 1994 the doctor performed a further Post Mortem examination on the body of Desmond Miller at the funeral home, Brown's Town, St. Ann. The body was exhumed on the 31st January, 1994.

The doctor did not find any bullet or fragments thereof.

He supposed that it is probable that there were exit wounds but he did not find them. In his opinion the wounds he saw on Miller's body were more likely to have been caused by a high powered rifle than by a handgun.

It is his evidence that if muzzle of the gun were 36 inches or less from the body of victim he would expect to see gun powder deposition, tattooing, blackening and burning. He found none of these.

The injuries on Miller he said could be described as located below the armpit. The positions of the wounds would not be consistent with the muzzle of the gun pointing to the front of the victim Miller. It would be more consistent with muzzle of gun pointing to the side of the victim.

Daniel Wray a Ballistic Expert and retired Assistant Commissioner of Police is now on contract with Government. He is attached to the Forensic Laboratory. He has over 32 years experience in the forensic science of firearm's identification and ballistics. He is a member of the International Association for the identification of firearms. Mr. Wray has 42 years experience in elementary surveying and forensic plan drawing.

On the 3rd August, 1993 Assistant Commissioner Wray with others went to premises No. 13 Main Street, Brown's Town. He carried out a survey and prepared a plan of the premises. Unfortunately this plan was not made available to the court. The premises

he said consisted of two floors – a ground floor and an upper floor which was in part at ground level and in part split level with ground floor. The upper floor was accessed by stairways from both sides.

While doing survey of upper floor he saw bullet impressions in three rooms. Presumably these rooms constitute the Constituency Office of Mr. Ernest Smith. The rooms were about 12 x 12 feet, one could have been 12 x 8. Room one was the largest.

In room one he observed the following:

- (a) a bullet hole in the window frame on the eastern wall of room.
- (b) a bullet hole in the eastern masonry wall of room.
- (c) three holes, close together, on the northern wall which was a board partition; these holes were probably made by a single fragmented bullet.

The bullet hole in the window in this room was approximately 4 feet from the ground.

The window itself was about 3 feet from the ground.

In room 2 he saw:

- (a) A bullet hole through the wooden door jamb of the northern wall. This is a masonry wall and the door is between rooms 2 and 3.
- (b) A bullet hole on northern masonry wall of room and this was in line with one of the three holes in the northern wall of room 1.
- (c) Bullet hole on the eastern wall of room and this was in line with the hole on northern wall of room 1.

In room 3 –

- (a) A bullet hole in the masonry wall, that is, the western wall of room 3, this was in line with the hole in door jamb of the northern wall of

room 2.

- (b) A bullet hole on northern masonry wall of Room 3.

It is Mr. Wray's evidence that some of the impressions were consistent with having been made by bullets of the calibre 7.62 mm or .30. The impression made in window frame in room one is consistent with the 7.62, so also is the impression on wooden door jamb in room 2. The others in the masonry wall were "chipped out" and were larger than the calibre 7.62 or .30.

He did not hold the view that any of the impressions was made by .38 bullets. However he admitted that only in two instances he could say that the impressions were caused by 7.62 calibre bullets.

It was his opinion that gun powder residue can be removed from the hand by washing it and this would include wiping hand with reagent.

DEFENCE

The Defendants contend that the deceased Constable Sinclair drew his gun pointed it in the direction of 2nd Lieutenant Trevor Henry and fired. The first Defendant and 2nd Lieutenant Henry in an act of necessary self defence, returned the fire.

The defendants further contend that Desmond Miller deceased, was shot and killed by the weapon of Constable Rupert Sinclair. If Desmond Miller was shot by the weapons of the first Defendant and Lieutenant Henry, the Defendants contend that he was shot during an act of necessary self defence.

Two witnesses, the first Defendant – Richard Maxwell and Major Garfield Prendergast gave evidence for the defence. Written statements made on the 2nd April, 1993 by Lieutenant Trevor Henry (deceased) and on 29th march, 1993 by Private Clement Jones

(deceased) were received in evidence by virtue of section 31 (e) of the Evidence (Amendment) Act, 1995.

The first defendant is a serving member of the Jamaica Defence Force and Section Commander of Alpha Company 2 JR. At the time of the incident he was a Lance Corporal and up to that time was in the force for four years.

He told the court that on 23rd March, 1993 he was dispatched from Moneague to work in the general elections. Major Prendergast was in charge of his company. He was told to be on the look out for persons using camouflaged military clothes or uniform. His election duties, he said, were to assist the police in maintaining law and order.

On the 27th March, 1993 he was sent to Brown's Town. Sometime after 3:00 p.m. he was on a recce with 2nd Lieutenant Henry and Private Jones. 2nd Lieutenant Henry was the highest in rank among them.

He was clad in military dress and wore a blue beret with badge. The others were dressed in like manner. He was armed with a SLR weapon and so was Lieutenant Henry. Private Jones had a submachine gun (SMG). His SLR was 45 inches in length. To fire this weapon he had to use both hands. Whilst travelling along Main Street in Brown's Town he observed a man wearing a camouflaged military jacket. 2nd Lieutenant Henry called to the man who ran and entered an upstairs building. Private Jones stopped the vehicle at the request of Lieutenant Henry.

He and Lieutenant Henry climbed the stairs of the building in search of the said man. The stairs led to a passage. From this passage they entered a room about 12' x 10'. A number of persons about 10 were in this room playing dominoes and cards. From this first room he saw people in an adjoining room. He did not see anyone wearing

camouflaged jacket in the first room. He entered the second room. There he saw a camouflaged jacket on a chair. He took it up and handed it to 2nd Lieutenant Henry.

Lieutenant Henry held up jacket and asked whose it was. The question was repeated. A tall sturdy man wearing a T-shirt came forward and said "my jacket". Lieutenant Henry asked him where he got the jacket. The man said "camp". Lieutenant Henry further asked him from whom at Camp he got it. Man replied, "my brethren". Lieutenant Henry told him that he ought not to have been in possession of it and that he was going to seize it.

The man became 'aggressive' and said "you can't tell me that". Lieutenant Henry told him it was illegal and that he was confiscating it. The man used expletives and was abusive. Lieutenant Henry turned away from the man, and was moving towards the door. The man pulled a firearm from his waist and pointed it in the direction of Lieutenant Henry.

The second defendant, Maxwell, said he was frightened and shouted to Lieutenant Henry to watch out. The persons in the room scattered. An explosion was heard. Lance Corporal Maxwell crouched and fired two shots and then took cover behind the door which leads to the passage. The firearm fell from the man's hand. Private Jones entered the room and took up the man's firearm. The man went into the second room and fell. Shortly after this the man was escorted downstairs by Second Lieutenant Henry and Private Jones and placed in the jeep. Private Jones drove off with the man in the jeep. It was only at this stage the second defendant heard that the man shot was a police.

The second defendant and Second Lieutenant Henry returned to the building and entered the domino room.

In this room another man (deceased Desmond Miller) was seen lying on the floor. This other man was taken downstairs. By this time other soldiers had arrived. They helped to place man in the service vehicle. This man was taken to the St. Ann's Bay Hospital.

The man who was placed in the vehicle before (Constable Sinclair) was not in it when Miller was placed therein.

The second defendant remained at the Hospital until Major Prendergast arrived.. Private Jones handed over to Major Prendergast the firearm which had dropped from Sinclair's hand.

Major Prendergast told the court that in March 1993 he was platoon commander of the Alpha Company 2 JR.

The second defendant and Lieutenant Henry were serving in his company at the time. During the time leading up to the election his company was deployed to assist in maintaining law and order in certain 'troubled areas.' He said that his company was informed by Superintendent Russell and Assistant Superintendent Waite that firearms and camouflaged military fatigue were recently distributed to criminal elements in these areas.

They were instructed that it was a criminal offence for a civilian to be in possession of Jamaica Defence Force military fatigue. They were also instructed that if a civilian was seen in camouflaged military fatigue they should either confiscate the fatigue or hand the civilian over to the police.

Second Lieutenant Henry was a platoon commander. Lieutenant Henry he said was given specific instructions on the tasks they were to perform. He was to set about identifying all the polling stations within his assigned area. To this end he was provided with a list of all polling stations and counting centres.

On the 27th March, 1993 he received a telephone call from Second Lieutenant Henry and went to the St. Ann's Bay Hospital. At the Hospital Private Jones handed him a .38 Special Smith & Wesson revolver. From this revolver he recovered four live rounds and two empty cases. This firearm and ammunition were eventually handed over to Assistant Superintendent Webber.

The Statements of Second Lieutenant Henry and Private Jones

The statements given by these persons support the evidence given by the second defendant.

I must bear in mind the fact that I have not had the benefit of hearing the evidence of these persons tested in cross-examination.

When considering how far they can safely be relied on I must also take into account the submissions of Mr. Ernest Smith in respect of discrepancies. Reference will be made to these statements later.

Was the Shooting of Constable Sinclair Felonious?

The question for the court is whether or not the plaintiffs have established on the balance of probability that Lance Corporal Maxwell and Second Lieutenant Henry were not justified in shooting at Constable Sinclair.

As already stated the defence is contending that the shooting was done in self defence and in defence of another. The defence also contends that the shooting of Desmond Miller was not intentional.

Mr. Ernest Smith for the plaintiffs submitted that "the evidence of Ashton Barrett should be accepted as the truth of what happened because his testimony has been

corroborated in every material particular by the forensic evidence of Fitzmore Coates, Daniel Wray, Rupert Linton, Dr. Odumfa, Anthony Lindsay and Inspector Linton Wilson.”

Miss Foster for the defendants submitted that Mr. Barrett is not a disinterested witness and has been discredited in cross-examination.

It is her contention that the evidence of Assistant Commissioner Wray and Dr. Odunfa in part support the defence.

According to Mr. Barrett the soldiers boxed Constable Sinclair twice after he had identified himself as a police. Constable Sinclair, he said did not ‘react’ he only covered his face with his hands and turned away. It was then he said that the soldier stepped back and fired at the crouching constable. Then both soldiers fired at Constable Sinclair who was right in front of them still crouching and covering his face with his hands.

At the outset I must confess that I find this difficult to accept. Why would both soldiers open fire on a man who identified himself as a policeman and who having been boxed twice simply turned away and covered his face?

Counsel for the plaintiffs submitted that they would for the following reasons:

- (i) The soldiers were briefed about gunmen wearing camouflaged clothing impersonating members of the security forces.
- (ii) Sinclair did not have the time to show his identification as a police officer.
- (iii) They thought they were chasing a wanted man and were prepared to counter any attack from him.
- (iv) The ‘wanted man’ fitted Corporal Maxwell’s description of persons whom they were briefed to be on the look out for.
- (v) Sinclair’s gun may have been exposed when he bent or leaned sideways when boxed by Henry.

He argued that it would be inconceivable that Sinclair would have attacked soldiers with high powered weapons.

Miss Foster for the defendants on the other hand submitted that Constable Sinclair might have felt insulted and powerless after the soldiers confiscated his jacket in front of the persons in the room.

I have thought long and hard over this matter. Mr. Smith's third point above, if I understand well, seems to be pointing to the probability of the soldiers acting in self defence.

It is not in dispute that Constable Sinclair had a firearm on his person. Indeed the 5th point (supra) made by Counsel for the plaintiffs recognises this.

What use, if any, did he make of it? Did he 'draw' his firearm? Did he fire it?

The only evidence that he fired it came from the first defendant, Corporal Maxwell.

Miss Foster for the defendants contends that the evidence of Corporal Maxwell is supported by the following:

- (i) Dr. Odunfa's evidence is that he did not find any exit wound on the body of Desmond Henry. According to the evidence of Assistant Commissioner Wray a 7.62 mm cartridge used in the SLR, if fired at close range (as in the room) would exit the body whereas the bullet from a .38 firearm fired at close range might lodge in the victim's body.
- (ii) Assistant Commissioner Wray's evidence is that a SLR weapon, if fired at close range would cause a huge entry and exit wounds. This is not necessarily so, he said, in the case of a .38 firearm.
- (iii) Major Prendergast testified that he removed two empty cases from the .38 firearm (that is the firearm which Constable Sinclair had).

Counsel for the defence also contends that the absence of gun powder deposits on Sinclair's hands can be explained by the fact that:

- (i) Constable Sinclair was in a bloody state and used his hands to support his protruding intestines. He was in hospital for sometime before swabs were taken. There is no evidence as to what happened at the hospital and the morgue during the 12½ hours before the swabs were taken.
- (ii) The evidence is that various factors could affect the gun powder deposit, such as the touch of other hands, ice on the body in the morgue etc.

Mr. Smith for the plaintiffs submitted that the plaintiffs have established beyond a balance of probabilities that Constable Sinclair had not fired a gun at the time of the incident. He relied on the following inter alia:

- (1) The evidence of Superintendent Rupert Linton is that swabs were taken from the hands of Constable Sinclair within 12 hours of the incident.
- (2) Mr. Fitzmore Coates, tested the swabs and found no gun powder deposits. He therefore concluded that Constable Sinclair had not fired a gun prior to 48 hours of the taking of the swabs.
- (3) The evidence of Superintendent Linton is that dirt particles were found in the swabs and that this indicates that the hands were not washed at all.
- (4) The only war heads or expended bullets recovered from the scene of the shooting were consistent with those discharged from high powered weapons.
- (5) The damage done to the structure of the office was consistent with damage done by high powered weapon.
- (6) Neither Second Lieutenant Henry nor Lance

Corporal Maxwell at whom Sinclair is alleged to have pointed his firearm and fired received any injuries.

Having considered carefully the evidence and the submissions of Counsel, in my view, it is reasonable to conclude that on the balance of probabilities, Constable Sinclair did not discharge his firearm at the time of the incident.

However I cannot stop here. I must go on to consider whether or not Constable Sinclair, on the balance of probabilities, drew his firearm.

I have closely examined the evidence in light of Mr. Smith's submission that it is highly improbable that Constable Sinclair would draw his firearm at soldiers with high powered weapons.

Mr. Smith urged the court to accept the evidence of Mr. Barrett that Constable Sinclair did not remove his firearm from his waist.

He pointed to certain inconsistencies and discrepancies in the evidence and statement (Exhibit 19) of Corporal Maxwell and the statement of Lieutenant Henry and asked the court not to accept Corporal Maxwell as a witness of truth.

I see no material discrepancy between the evidence of Corporal Maxwell and the statements of Lieutenant Henry and Private Jones in so far as they speak to Constable Sinclair removing his gun from his waist.

Corporal Maxwell's evidence is that Constable Sinclair pulled his gun from his waist and pointed it at Lieutenant Henry who had turned away from him to go to the door. Maxwell said he was frightened and shouted out to Lieutenant Henry. He heard explosion, took cover and fired at Sinclair.

In his statement (Exhibit 17) Lieutenant Henry said "As I was about to step off, Corporal Maxwell who was still in the room shouted 'watch out'. I turned to look in the man's direction in time to see him pulling a weapon and pointing it at me.

I then dashed out of the room and took cover behind a wooden partition in the building. Soon after I had taken cover I heard an explosion. I then pointed my weapon at the man and fired twice, I then pulled back behind the partition just in time to hear another explosion.

I then pointed my gun back at the man and fired another round. The man who was still holding the weapon, dropped it."

Private Jones in his statement (Exhibit 18) said that just as he was about to enter a room he saw a man "pull a gun from his waist and point it at Lieutenant Henry whose back was turned to him as though he was walking away."

He heard Lance Corporal Maxwell who was standing in the same room where the man was say "look out". Private Jones said he took cover behind the door jamb and then heard explosions.

Of the three soldiers, only Maxwell said that he saw Sinclair actually fire.

In my view, in the circumstances of what took place in the room that fateful day, the fact that the court finds that on the balance of probabilities Sinclair did not discharge his firearm, does not destroy the credibility of Corporal Maxwell. He might honestly have thought that Sinclair was firing at Lieutenant Henry.

As I said before the account of the incident given by Mr. Barrett, the only eye witness for the plaintiff, is far-fetched.

The evidence of Assistant Commissioner Wray as to the bullet holes and impressions found in the three rooms is not consistent with the account given by Mr. Barrett.

According to Mr. Barrett when Constable Sinclair fell the soldier took Constable Sinclair's gun from his waist, then stepped back and fired one shot from his SLR weapon to the mid section of Mr. Sinclair's back.

I agree with counsel for the defendants that if this were true one would expect to find a bullet hole or impression in the floor. Mr. Wray found no such hole or impression.

On the evidence before me I am convinced that Constable Sinclair's gun was brought into play. I find on the balance of probabilities, that Constable Sinclair drew his .38 revolver.

As I said before I also on the balance of probabilities find that he did not discharge his firearm.

However, in the circumstances Corporal Maxwell and Lieutenant Henry would be entitled to act in self defence. I find therefore that the plaintiffs have not shown on the balance of probabilities that Maxwell and Henry were not justified in firing at Constable Sinclair.

The Shooting of Desmond Henry

Two questions must be addressed in this regard:

1. Was he fatally injured by either Maxwell or Henry or both?
2. If yes, was the shooting deliberate?

If he was shot accidentally, that is to say his shooting was not intentional, but due to the shooting of Constable Sinclair, then such shooting would not be an assault if the shooting at Sinclair was justified.

Bearing in mind my earlier finding, I need only address the second question – was the shooting deliberate?

According to Mr. Barrett, when the soldiers were firing at Constable Sinclair, Mr. Miller said “soldier, a police you know”. Whereupon “the second soldier (Lieutenant Henry) turned to Mr. Miller and fired his gun at Mr. Miller, who immediately fell.”

In answer to Miss Foster, Mr. Barrett said in all of this he was still standing at the door when Miller was shot. The soldier who shot Miller, he said, was about 5 feet from him (Mr. Barrett). He insisted that he was there and saw when the soldier shot Miller. Only one soldier (Lieutenant Henry) he said fired at Miller.

Corporal Maxwell denied hearing anyone say “soldier a police, you know” Lieutenant Henry in his statement said he fired at the man with the gun in his hand.

According to the defence, after the shooting, another man (Desmond Miller) was found with injuries.

In light of the serious misgivings that this court has in respect of Mr. Barrett’s evidence, the court is driven to the conclusion that the plaintiff has not discharged the burden of proof. The gravity of the issue is part of the circumstances which the court has to take into consideration in deciding whether or not the burden of proof has been discharged.

As was said in Hornel v. Neuberger Products Ltd. “the more serious the allegation, the higher the degree of probability that is required.”

Mr. Barrett's evidence in my view falls far short of satisfying the required standard of proof. On the evidence it is in my view highly probable that the deceased Miller, was accidentally shot by the soldier when firing at Constable Sinclair, in self defence.

CONCLUSION

Judgment for the Defendants in both suits. Costs to the defendants to be taxed if not agreed.