JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 80, 81 & 82/2001

BEFORE: **THE HON. MR. JUSTICE PANTON, J.A.**
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A.

SEBERT MORRIS
ROHAN GRAHAM
DAVE BATLION MORRISON

V. REGINA

Ian Wilkinson for Sebert Morris

Earl Witter for Rohan Graham

Jack Hines for Dave Morrison

Ms. Meridian Kohler & Ms. Anne-Marie A. Nembhard for the Crown

May 4, 5, 8, 2006 & December 20, 2007

PANTON, P.

1. These applications for leave to appeal arose from the conviction of the applicants for the offence of murder. They were tried before Reckord, J. and a jury of twelve between April 3 and 12, 2001. Each was sentenced to life imprisonment and ordered to serve twenty years imprisonment before becoming eligible for parole. The applicants had been charged jointly on two counts of murder. The first count charged them with murdering Andrew Wright on the 4th March, 1999, and the second count charged them with murdering Paul Reid on

the same date. The jury, after retiring for fifty minutes, returned a verdict of guilty on the first count, but not guilty on the second.

2. The deceased Andrew Wright died as a result of multiple gunshot wounds. A post mortem examination showed that he received four gunshot wounds as follows:

(i) to the right flank of the chest, exiting on the left flank of the chest, travelling through the thoracic cavity, both lungs and the heart;

(ii) over the right anterior chest, directed upwards forward and to the left, travelling through the right lung and the heart exiting on the left anterior chest;

(iii) in the right anterior abdomen over the lumbar region, through the abdominal cavity, intestines, liver and stomach, exiting at the left anterior abdomen; and

(iv) on the right upper buttock, travelling through the pelvic cavity and intestines, lodging in the sacrum.

3. Mr. Wright was thirty years old at the time of his death. He was a construction worker living at 16 Third Avenue, Vineyard Town. The main witness for the prosecution, Ricardo Leslie, had lived at this address sometime earlier, was the nephew of the deceased and is a relative of the applicant Graham. At the time of the killing, Leslie was living at the residence of Miss Aiesha Burnett at Goodridge Lane near to the scene of the crime. Miss Burnett confirmed that Leslie was in the yard at the time of the shooting.

4. When the matter came on for trial, Mr. Leslie was absent. The learned trial judge held a *voir dire*, after which he decided to admit the deposition of Mr. Leslie. This decision has been criticized by the applicants who have contended that the conditions were not fulfilled for the admission of the deposition.

5. The evidence of Mr. Leslie, as contained in his deposition, was read to the jury by the Clerk of the Courts who had examined the witness at the preliminary examination conducted by the late Resident Magistrate, His Hon. Mr. Errol Webber. The evidence was to the effect that he was seventeen years old and a student at Vauxhall Comprehensive School. He was sitting under a tree in his yard while listening to music at about 4.00 p.m. on the 4th March, 1999, when he heard someone say something which caused him to go to a brick wall at the side of the house. He looked over the wall and saw the three applicants "round" his uncle (the deceased Wright) who was standing in front of a shop. Each applicant was armed with a long gun. The guns were trained on the deceased who was pleading with them "not to shoot him". The deceased asked the applicant Morris if he did not know him. There was no answer to that query; instead, there was an order from one of them to "shoot him". Mr. Leslie then heard an explosion. He bent down in order to avoid being seen. He heard more explosions while he was in the bent position. The men went "up the lane" and, one who was not identified, fired more shots that apparently resulted in the injuring of a man and the fatal shooting of the deceased who was the subject of count two of the

indictment. Meanwhile, the deceased Wright was lying in a pool of blood in front of the shop.

6. The witness Leslie was extensively cross-examined at the preliminary examination. Among the things he said in cross-examination was that he was on 'job experience' for that particular week, and had been so engaged earlier in the day at Waltham Park and Queensbury. He said:

> "It is true that a war was going on between Jacques Road and Backbush. Where I am living is the Jacques Road side and where Rohan [Applicant Graham] live is Backbush side".

He insisted that he witnessed the incident and was not told by anyone what he should say in evidence. He did not report the matter to the police on that day; nor did he of his own free will go to the police. However, about two weeks after the incident, he was approached by one of the investigators in the case, Det. Sutherland. It was this approach that resulted in his giving evidence in the matter.

7. The applicants Morris and Morrison specifically abandoned their original grounds of appeal, and were granted leave to file and argue supplementary grounds of appeal. The arguments advanced by these applicants found favour with the applicant Graham who, through Mr. Earl Witter, his counsel, announced that he did not propose to argue any of his original grounds but was sufficiently attracted to grounds two to six advanced by Mr. Wilkinson for the applicant Morris, and grounds one to four argued by Mr. Hines, for the applicant Morrison.

8. Grounds of Appeal

The grounds argued on behalf of the applicant Morris were:

> "1. The learned trial judge failed to direct the jury as to the course of action to take in relation to any of the accused men (in particular the First Applicant) if the jury was not sure that they were part of a common design to kill the deceased.
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> 2. The learned judge erred in allowing the prosecution witnesses Marcia Fortella and Det. Cpl. Daniel Walters to give hearsay evidence during the voir dire held to determine whether to admit the deposition of Ricardo Leslie dated the 29th July, 1999 into evidence.
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> 3. The learned trial judge erred in law when he descended into the arena and elicited irrelevant and prejudicial evidence by asking Det. Cpl. Daniel Walters questions on the voir dire regarding whether or not Ricardo Leslie had expressed any fears to him? (sic)
>
> 4. The learned trial judge erred in law by taking into account irrelevant evidence or material (namely, hearsay evidence of Ricardo Leslie being afraid) in exercising his discretion whether or not to allow the deposition to be admitted into evidence.
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> 5. The learned trial judge erred in ruling on the voir dire in the presence of the jury.
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> 6. The learned trial judge erred in law in exercising his discretion to admit the deposition of Ricardo Leslie into evidence pursuant to the Evidence Amendment Act as the prejudicial effect of the deposition far outweighed its probative value. This was particularly so having regard to the fact that the case involved visual identification evidence, the quality of which was adversely affected by a number of factors and the witness was not present to be cross-examined.

7. The learned judge failed to assist or direct the jury adequately or sufficiently in relation to the weaknesses affecting the visual identification evidence. More particularly, the learned trial judge failed to adumbrate fully the strengths and weaknesses of the visual identification evidence and establishing a nexus between the evidence adduced and the germane principles of law.

8. The evidence is unreasonable (sic) and cannot be supported having regard to the evidence."

9. The grounds of appeal argued on behalf of the applicant ***Morrison*** read:

" 1) The learned trial judge erred in allowing evidence of second hand hearsay of purported threats to the absent witness Ricardo Leslie (see lines 12 – 14 of page 40-41 (sic) of the Voir Dire viz 'Yes him (Ricardo Leslie) tell me seh someone keep on calling him on the phone seh if him go to court dem going kill him' in breach of the exception to the hearsay rule under section 31 (D) of the Evidence Act 1995.

2) The learned trial judge erred in allowing evidence of the purported fear of the absent witness Ricardo Leslie on the application of the prosecution for the following reasons:-

(i) Such evidence is not in accordance with section 31D(e) of the Evidence Act of 1995 in that this section speaks specifically of bodily threats etc. and not fear unlike the Criminal Justice Act 1988 section 23(b) of England.

(ii) Even if it were permissible each paragraph of our Evidence Act has to be read rigidly and disjunctively and one cannot use one section to prove or support another for the failure of reasonable steps in getting him to attend – see lines 14 – 25 on page 36.

(iii) Further the prosecutor submitted (in lines 8 – 13 on page 36) and the learned judge allowed the submission that he was not seeking to rely particularly in (sic) section 31 (d) of the evidence

(sic) when this section 31 (D) and all its sub-sections is (sic) all our law permits him to rely on in particular or otherwise to admit hearsay statements in criminal proceedings.

(iv) He further advanced that he was seeking to elicit evidence that he anticipated fear (which "fear" even if it were stated in section 31 (D)(e) and it is not) to seek to explain or strengthen the failure of the purported reasonable steps in getting the witness to attend under section 31 D(d) a different section which must be read disjunctively and the learned trial judge likewise wrongly allowed this.

3) The learned judge erred when he stated in lines 10 to 5 on page 37 viz. 'We are aware that we are not hearing evidence in front of a jury. So in the circumstances I will permit discretion to admit this evidence of the witness'. – referring to the evidence of fear; which observation is a flagrant breach of trial procedure as a voir dire is nothing more or nothing less than a trial within a trial and inadmissible evidence is not permissible.

(4.) The learned judge erred in admitting the deposition of Ricardo Leslie into evidence under Section 31(D)(d) of the Evidence Act 1995 on the basis that he could not be found after all reasonable steps had been taken to find him in that in the overwhelming majority of the several steps purportedly taken to find him the evidence patently lacked quality or reliability to make the court feel sure (the criminal standard of proof) that these steps were indeed reasonable or were even taken at all."

10. Notwithstanding the listing of the grounds of appeal in detail above, the appeal may best be dealt with by grouping the areas of complaint thus: common design, second-hand hearsay evidence, the admission of the statement of the

absent eye-witness, the ruling of the judge on the voir dire in the presence of the jury, and the directions on identification.

11. Common design

Mr. Wilkinson submitted that the learned judge, in giving directions to the jury on common design, "failed to make it clear that if they were unsure or had any reasonable doubt that the three men were acting in concert, or either (sic) of them, then the doubt had to be resolved in favour of that person or the men, that is, to acquit". He made this submission after referring to directions which were recorded at pages 561 and 562. We have examined the directions, and do not agree with learned counsel. In fact, further directions were recorded on pages 563 and 637, and on the latter page, the learned judge left no doubt that the evidence against each accused was to be evaluated. He said:

> "I am going to ask you to go into the jury room shortly but I must warn you that we have three accused persons. You have to evaluate the evidence against each of them in each count ..."

12. Hearsay evidence being admitted on the voir dire

In this regard, Mr. Wilkinson adopted the submissions advanced by Mr. Jack Hines for Morrison. The complaint on this aspect of the case was that the evidence of Maria Fortella at page 40 lines 12 – 14 of the transcript was second-hand hearsay which breached the hearsay rule under section 31D and its subsections in the trial within a trial. It is perhaps appropriate at this stage to set

out the relevant provisions of section 31D of the Evidence Act, followed by the evidence which formed the subject of the complaint.

The Evidence Act

13. Section 31D reads:

> "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)...;
> (b)...;
> (c)...;
>
> (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 evidence of Miss Fortella was as follows:

> Lines 7 and 8 "His Lordship: You know if any call came to him?
>
> Line 9 Witness: To Ricardo?
>
> Lines 10 & 11 Q. Yes, did he say anything to you about any phone call?
>
> Lines 12 – 14 A. Yes, him tell me seh someone keep on calling him on the phone seh if him go to court dem going to kill him."

14. Mr. Hines said that he had no objection to the policy enacted by Parliament, but submitted that section 31D of the Evidence Act must be adhered

to rigidly and strictly. He pointed out that the short title to the Act refers to the admission of first-hand hearsay, and said that anything other than first-hand hearsay is inadmissible. He said that no evidence was brought under section 31D(e), but there was evidence under section 31D(d). Evidence of fear, he submitted, was wholly irrelevant to the question of reasonable steps, and there is no evidence as to "no reasonable steps can be taken to protect the person". The judge, he said, gave no reason why he admitted the evidence. However, at page 654, at the time of sentencing, it appears that there was a combination of all the factors. That being so, Mr. Hines concluded, the admission of the second-hand hearsay evidence was of major significance. Mr. Wilkinson described the situation as one in which the learned judge erroneously co-mingled section 31D(d) and section 31D(e) and proceeded with the application under two headings. The judge, he said, should have made it clear that section 31D(d) was fulfilled and that that was the basis of the application. To that effect, he said, there was a plethora of evidence in respect of the steps taken by Cpl. Walters. The judge started the journey properly, Mr. Wilkinson said, but veered during the journey and there was nothing to indicate that he got back on track.

15. We are surprised that this ground was seriously advanced. It is contemplated by the Act that evidence which is being called second-hand hearsay may well have to be admitted. There can be no argument, for example, that an investigator who visits places such as hospitals searching for a witness

may give evidence that he made such visits and came away empty-handed. Such evidence implies at least that he was told (by hospital administrators, for example) that the witness being sought was not at that location. Criminal trials that are facilitated by the use of section 31D of the Act would become impossible if it were to be required that all persons consulted in the search for witnesses had to attend in person, in order that the judge may have first-hand evidence from them to decide whether the evidence of the missing witness may be read. Further, as in this case, it would not be possible for a statement made by the missing witness to be adduced through the very person to whom the statement was made. Clearly, the Court cannot, if the Act is to function effectively, be placed in a straight-jacket when a voir dire is being conducted for the purposes of the Act.

16. In the instant case, in any event, it is conceded that there was evidence that section 31D(d) had been satisfied. That being so, the complaint is pointless unless it can be said that the evidence of Miss Fortella has so tainted the proceedings that it has nullified the verdict. We cannot say it has. There was evidence which allowed for the admission of the deposition. The fact that some additional evidence was given which went partially towards qualifying the deposition for admission under another paragraph of section 31D is irrelevant. There has therefore been no discernible prejudice to the applicants.

The ruling of the judge delivered in the presence of the jury

17. The applicant Morris in particular complains that the making of the ruling on the voir dire by the judge in the presence of the jury has prejudiced him. There is no indication of how this could have been so. The record shows the learned judge saying:

> "Since the start of the case you must have been wondering why you have been asked to remain out of hearing, what the exercise was all about. To be quite brief about it, I had to determine whether the evidence of a certain witness should be read before you because the witness has not been found. So the prosecution has applied to me to allow his evidence at the preliminary enquiry to be read to you. I had to inquire whether the circumstances allow such reading to be done to you, because when witnesses are called to give evidence, you look at them.
>
> In this case the prosecution alleges that the witness cannot be found and that the witness gave evidence at the preliminary and has asked the court to allow it to be read to you. I have to go through now and look at all the facts and determine whether the circumstances warranted such decision." (p.214 line 9 to p.215 line 3).

Clearly, there was no reason for the judge to communicate this information to the jury. However, this communication could only have resulted in the enlightenment of the jury so far as it concerns the fact that they were going to have to decide the case on the contents of a deposition in the absence of the maker. There was nothing that was even mildly prejudicial to any interest of the applicants that required protection. The situation here is not to be confused with the making of a ruling on a no case submission in the presence of the jury. In that scenario, there is the likelihood that the jury may misread the effect of the

judge's refusal to accede to a no case submission, whereas that was unlikely in the instant situation as the case was at a stage when the judge was not expressing any view on the value of the deposition of the absent witness. He was merely explaining to the jury that he was considering whether he should allow the deposition to be read to them.

Identification

18. The applicants complained that the learned judge failed to assist or direct the jury adequately or sufficiently in relation to the weaknesses affecting the visual identification evidence. In this regard, Mr. Wilkinson relied on the judgment of the Privy Council in ***Garnett Edwards v. The Queen*** (Privy Council Appeal No. 29 of 2005 – delivered the 25th April, 2006). His main point, he said, was that there was a major discrepancy as to the height of the wall; "the wall was taller than seven feet, even if the gravel was four feet". In his skeleton arguments, he listed several areas which he termed weaknesses, and in his oral arguments he stressed the following:

1. there was no evidence as to how long each applicant was seen for;

2. there was no evidence as to what part of the first applicant's face he saw, which he said was unlike the situation with the third applicant Graham whom the witness said he had seen frontally; and

3. there was no evidence as to how the men were positioned in relation to each other.

19. The evidence of Ricardo Leslie was buttressed by photographs of the scene of the killing. The learned judge referred to them in his summation on the question of identification. His directions on this area of the law, and on the evidence of Leslie are recorded at pages 619 to 627 of the transcript. In those directions, he followed the ***Turnbull*** guidelines faithfully. The length of time for the observation by the witness, the presence of a wall, the distance between the witness and the applicants, the fact that it was broad daylight, and the fact that the applicants, the witness and the deceased were all well known to each other were put fairly and squarely for the consideration of the jury. The jurors clearly accepted that the distance between the parties was a mere fourteen feet, and that the parties were well known to each other. They would have also accepted that although the wall at which the witness was positioned was about seven feet high (p.229, lines 24 and 25), he was standing on gravel and sand that were leaning on his side of the wall, and looking down at what was transpiring before the shop (p.236, lines 8 to 10). In the circumstances, the evidence of identification was good.

20. The applicants have no proper basis for complaint in respect of the convictions or sentences. Their applications are refused, and the sentences are to commence from July 12, 2001.