NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL N0.176/00

ON REFERRAL PURSUANT TO SECTION 29 OF THE JUDICATURE (APPELLATE JURISDICTION) ACT.

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE MORRISON, J.A.

ORVILLE MURRAY
v
REGINA

**Lord Anthony Gifford Q.C. for the Appellant.**

**Miss Kathy-Ann Pyke for the Crown.**

**21st, 22nd, 23rd July and 19th December 2008**

**HARRISON, J.A:**

1. On October 10, 2000, in the Home Circuit Court, Kingston, following a trial before Mc Calla J., (as she then was) and a jury, the appellant was convicted on two counts of an indictment which charged him with murder. He was sentenced to death on October 13, 2000. The appellant's appeal against his conviction was dismissed by the Court of Appeal on April 8, 2002. His petition for special leave to appeal to their Lordships Board, sitting in the Judicial Committee of the Privy Council was dismissed on June 18, 2003. As a result of the Privy Council ruling in Lambert Watson v Regina (2004) 64 WIR 241

the appellant's case was remitted to the Court of Appeal for re-sentencing. He was sentenced to life imprisonment with a stipulation that he had to serve forty-five years before he could become eligible for parole.

2. The appellant petitioned His Excellency the Governor-General on October 31, 2007 for fresh evidence to be considered in his case. As a result of this petition, the matter was referred to the Court of Appeal by the Governor General under section 29(1) (a) of the Judicature (Appellate Jurisdiction) Act ("the Act"). Having read the affidavits and heard the submissions we decided to hear the evidence to see whether it was capable of belief. We are indebted to Lord Gifford Q.C for his written submissions and the precise and careful way in which the oral submissions were made by him. We are also indebted to Miss Pyke for her oral submissions..

3. The issues raised in the appeal are encapsulated in the following grounds which the appellant relies on:

> "1. There is now available fresh evidence from witnesses who state that they were at the scene of the crime and saw the appellant at the time of the shooting; that the appellant was up the road, dressed in his underpants and not carrying a gun, and that the appellant was not a member of the group which shot the deceased.
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> 2. In view of the fact that (a) the conviction of the appellant depended on a single eye-witness; (b) the evidence of the said eye-witness was admitted in the form of his deposition at the preliminary enquiry; (c) the jury did not accept the evidence of the said eye-witness in relation to his identification of the co-defendant; (d) the appellant was a man of good character: the emergence of new evidence creates at least a doubt as to whether a miscarriage of justice may have occurred; so that in the interests of justice a new trial should be ordered.

In the circumstances, the appellant prays that his conviction be quashed and his sentence set aside".

4. It is necessary first, to set out a summary of the evidence presented at the trial and thereafter to examine the fresh evidence which has been adduced in this Court.

5. The prosecution's case at the trial rested substantially on the deposition evidence of Carlos Allwood who had given viva voce evidence before the Resident Magistrate at the Preliminary Enquiry but could not be found to testify at the trial. In his evidence Allwood said that between 5:00 p.m. — 5:30 p. m. on December 28, 1996 he was at home on his verandah facing the gate to the premises. He was 24 feet to 25 feet away from the gate. At this time his son, (Michael Allen) and John Scott were conversing among themselves at the gate. The appellant and another man called Glitterous came up and shot both of them resulting in their deaths.

6. Allwood testified that he had previously known the appellant from he was a baby growing up. He was known to him as Ricie and had seen him on a regular basis on Texton Lane. He also knew his father who was called "Bump". He said he had seen the appellant from head to toe. The shooting incident had lasted for approximately five seconds. A third man who was unknown to Allwood also had a gun but he fired no shots during the incident.

7. The appellant's defence was one of alibi. He testified that he did not go to the premises of Carlos Allwood on the day in question, and did not shoot, or shoot at, either Allen or Scott at the gate of those premises on that day. He testified also of ill-will on the part of Carlos Allwood towards him and that he had refused to sell drugs for Allwood

who was, himself, a dealer in drugs. He said Allwood had expressed an intention to get rid of him saying "me (meaning the appellant) fi dead because me a stop him from eating food because I am an informer". The appellant further testified that he was a person of unblemished character and a member of a youth club which counselled young people "fi do the right thing and try to say things, to say good things to the youths dem so that they can go learn a skill or something".

8. The record before the Court contains an affidavit sworn to by the appellant on the 30th January 2008. Affidavits sworn to by Carmen Davis and Alethia Goldson on January 30, 2008 and Gabriel Harnett sworn to on May 16, 2008 were also part of the record of appeal. The appellant did not testify but the other deponents testified and were subjected to cross-examination.

9. Carmen Davis and Alethia Goldson (who are mother and daughter) testified that they were standing opposite Carlos Allwood's house when "Burro", "Scotty" (both deceased), "Dundun", "Parson" and others were standing at a gate facing Allwood's premises. Each of them said that the appellant known to them as "Ricie" was walking down the road towards a corner known as Fourways and that he was wearing only a pair of underpants with a rag and towel tucked in the front of the underpants.

10. A group of men approached from the other direction to where the appellant was and when they got to where Burro, Scotty and the other men were standing, Glitterous (one of the men) asked Burro, "who you?" Before he could answer, Glitterous fired shots from a gun he had in his hand. The other men were also armed and both witnesses said they ran when the firing began. They returned to the scene shortly after

the firing had ceased and saw "Burro" and "Scotty" lying on the ground. They were fatally injured.

11. Davis also testified that at the time she saw the appellant walking down the road he had nothing in his hands. She did not see him fire any shots and he was not among the group of men who had gone to where Burro and the other men were standing when the firing began. Goldson also supported this account given by Davis and said that four of the gunmen were known to her. They are "Glitterous", "Frenny", "Signal" and "Teeth".

12. Under cross-examination Davis said she had moved out of the area in 2007. She also knew Glitterous and his "baby mother" Tracey. She did not know where he was living at the present time but she knew that he was still living in Jamaica. It was recently that she knew of Crime Stop. At the time of the incident, she said that "people were calling Glitterous name", but she was afraid of him and the group of men.

13. In response to a question asked by the Court, Davis said that when she had gone back to the scene of the shooting she had seen the applicant up the road not too far from the Four Ways. She also said that when the police arrived on the scene he was still there.

14. Under cross-examination Goldson said she had not heard any explosions on her return to the scene. She said that while she was running to her house she did hear gunshots. Burro had appeared dead to her when she returned to the scene. She did not see the gunmen and neither did she see the applicant. She remained there until the body of Burro was removed. She said that when she returned to the scene she had

seen her mother and other sister. But under further cross-examination she said her mother had returned with her.

15. Goldson said she knew Gabriel Harnett but she did not see him when she was standing at the light pole.

16. Davis and Goldson said they did not know that the appellant had been charged or convicted for the killings. They only became aware of this in 2004 when they were interviewed by a Miss Juliet Oury, a Solicitor from England and statements taken from them. They knew however, that he had been detained but thought that this detention was in connection with the murder of those persons who had killed his father soon after the incident. They also said that they did not go to the police to make a report because they were fearful for their lives.

17. Goldson also said that she was still afraid. It was also her evidence that the appellant was her good friend. They had attended different schools but he would visit her regularly at her home (sometimes twice per day). She also said that his father and sister "Ratty", knew that they were friends. She had spoken to "Ratty" when she eventually learnt that the appellant was locked up but she did not visit him in the lock-ups. She maintained under cross-examination that she only came to know of the trial with respect to the murder of Burro and Scotty after the lawyer from abroad spoke to her. She never called the police although she knew of the witness protection programme. She said she was no longer afraid of Glitterous because he was not living in the community any more and the others were dead.

18. Gabriel Harnett was another witness called by the appellant. He recalled seeing the appellant and that he was dressed in underpants and was dancing as he came down the road. He heard gun shots and he "got down". After the firing ceased he saw two dead men lying in the road.

19. He did not know that the appellant was arrested and charged for the murder of Burro and Scotty until a couple of years ago. He learnt of this after he had spoken to a lawyer and he gave her a statement.

20. Under cross-examination he said that the appellant had passed him and when the shots were fired he saw him lying on the ground in front of him. He could not recall if there was anyone else on the roadway at the time when the shots were fired. He said that after he stooped down the shooting continued. He saw three persons at the point where the shots were fired but he was unable to recognize any of them. He also said that he could not recall seeing the appellant after the shooting ended because he was "penetrating" what happened down the road. He left the community after the incident and although he knew the appellant's father and sister, he told no one of the incident.

21. Lord Gifford Q.C. submitted that if the fresh evidence adduced were to be accepted by this Court it might well turn the scale because by reason of the new evidence, a miscarriage of justice may have occurred. He submitted that it is apparent from the evidence of the persons called on behalf of the appellant, that the appellant was not part of a group of men who were seen with guns and who opened fire on the deceased men.

22. Miss Pyke, Counsel for the Crown, submitted on the other hand, that the evidence ought not to be accepted by the Court. She submitted that there were discrepancies between the evidence of Carmen Davis and her daughter Alethia Goldson. In relation to Harnett, she submitted that doubts ought to be raised as to whether he is a reliable witness. She also submitted that the witnesses could be considered witnesses of convenience.

23. The reference by the Governor General was done pursuant to section 29(1) (a) of the Judicature (Appellate Jurisdiction) Act ("the Act") which reads inter alia:

> "29. (1) The Governor- General on the consideration of any petition for the exercise of Her Majesty's mercy or of any representation made by any other person having reference to the conviction of a person on indictment ... may, if he thinks fit at any time, either-
>
> (a) refer the whole case to the Court and the case shall then be heard and determined by the Court as in the case of an appeal by a person convicted".

24. The Court is guided by sections 14(1) and (2) of the Act when it comes to the determination of an appeal in light of the fresh evidence adduced. The provisions 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.
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> (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."

25. The principles upon which this court should act in appeals involving fresh evidence are clearly set out in **R v Pendleton** [2001] UKHL 66; [2002] 1 Cr. App. R. 34 (p441); [2002] 1 WLR 72 by Lord Bingham of Cornhill (see in particular paras [18] [19]). They were repeated by Lord Brown of Heaton-under-Heywood in the Privy Council in **Dial and another v State of Trinidad and Tobago** [2005] UKBC 4; [2005] 1 WLR 1660. In that case Lord Brown said (see paragraphs [31] and [32]):

> "[31] In the Board's view the law is now clearly established and can be simply stated as follows. Where fresh evidence is adduced on a criminal appeal it is for the Court of Appeal, assuming always that it accepts it, to evaluate its importance in the context of the remainder of the evidence in the case. If the court concludes that the fresh evidence raises no reasonable doubt as to the guilt of the accused it will dismiss the appeal. The primary question is for the court itself and is not what effect the fresh evidence would have had on the mind of the jury. That said, if the court regards the case as a difficult one, it may find it helpful to test its view by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict' (*Pendleton* at p. 83 para. [19]. The guiding principle nevertheless remains that stated by Viscount Dilhorne in *Stafford v DPP* (at p.906) and affirmed by the House in *R v Pendleton:*
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> "While... the Court of Appeal and this House may find it a convenient approach to consider what a jury might have

> done if they had heard the fresh evidence, the ultimate responsibility rests with them and them alone for deciding the question [whether or not the verdict is unsafe]"
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> [32] That is the principle correctly and consistently applied nowadays by the criminal division of the Court of Appeal in England; see, for example, *R v Hakala* [2002] EWCA Crim 730 (unreported), *R v Hanratty* [2002] EWCA Crim.1141, [2002] 3 All ER 534 and *R v Ishtiaq Ahmed* [2002] EWCA Crim 2781 (unreported). It was neatly expressed by Judge LJ in *R v Hakala*, at [11], thus:
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> "However the safety of the appellant's conviction is examined, the essential question, and ultimately the only question for this court, is whether, in the light of the fresh evidence, the convictions are unsafe"

26. It is abundantly clear, that the affidavit evidence with which this Court has been furnished, and the testimonies of the deponents in this Court, provide a different version of what was said at the trial and which Carlos Allwood testified about at the Preliminary Enquiry. It is also quite evident that the evidence of the persons called on behalf of the Appellant in this Court is plainly at variance with the evidence given by the appellant himself at the trial as to the events which took place on the 28th December 1996.

27. Interestingly, the appellant swore in his affidavit of January 30, 2008 (which forms a part of the record of appeal) that:

> "... I lied when I gave evidence to the court and said that I was at my home when I heard gunshots and that I did not know my accused Glitterous. I was too much afraid to tell the truth, namely that I witnessed the murders and knew who had done them".

28. We are of the view that the dicta of Lord Steyn in the dissenting judgment in **Kenneth Clarke v Regina** Privy Council Appeal No. 93 of 2002 delivered 22nd January 2004 is pertinent when he said at paragraph 55 of the judgment:

> "[55] I accept, of course, that where a witness wishes to retract the evidence which he gave at trial the Court of Appeal is entitled to look at the new evidence with some scepticism. Common sense so dictates. But this is no warrant for an excessively robust approach of condemning new exculpatory evidence contained in an affidavit as incapable of belief without allowing it to be explored de bene esse... "

29. The appellant was not called upon to testify before this Court but there is no burden on him to do so. The law makes it clear under section 28 (c) of the Act that he is a competent but not a compellable witness. It is therefore our view that the explanation he gave in the affidavit for the lie he told, can only go to weight. We are further of the view that the appellant by his own admission that he is a liar would certainly render any version which he now gives as unreliable.

30. There are a number of reasons why we regard the fresh evidence proffered from the appellant's witnesses as incapable of belief and therefore inadmissible to undermine the safety of his conviction. First, the new version of events is totally different from the account given by the appellant at trial. Secondly, the new account did not emerge until some four years after the appellant's conviction. Thirdly, there are obvious difficulties in accepting as capable of belief the evidence of Carmen Davis, Alethia Goldson and Gabriel Harnett. It is questionable that they did not know that the appellant was on trial. Having seen and heard them, it is our belief that their fresh evidence could not be

regarded as truthful. It is also our view that the witnesses could be considered witnesses of convenience. We were unimpressed by Lord Gifford's submission that "the appellant's case, involves an admission of perjury, but the reasons which he gives for lying on oath are compelling..."

**Conclusion**

31. We have very carefully considered the effect that the fresh evidence might have had on the trial and have concluded that the fresh evidence is not capable of belief. In our opinion the verdict which the jury arrived at is not unreasonable and there has been no miscarriage of justice. We therefore conclude that the appeal must be dismissed. The sentence is to run from January 13, 2001.