

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 136/95

**COR: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE BINGHAM, J. A.**

THURSTON POWELL vs REGINA

**Randolph L. Williams for the Appellant
Dwight Reece and Valerie Stephens for the Crown**

30th March, and 14th July 1998

GORDON, J.A.

At the conclusion of a five (5) day trial before Clarke J. on October 2, 1995, the appellant was convicted in the St. James Circuit Court for the murder of Logan Mendes on the 26th day of June, 1993 and sentenced to be imprisoned for life. The learned trial judge ordered that he should serve eight (8) years of that sentence before his eligibility for parole should be considered.

We heard submissions in his appeal against conviction and sentence on 30th March, 1998 and at the conclusion thereof we allowed the appeal, quashed the conviction and ordered that a verdict of acquittal be entered. We promised to place on record our reasons which now follow.

Logan Mendes received a stab wound five and a half inches deep that penetrated the sixth right intercostal space in the mid clavicular line passing through intercostal muscles, blood vessels, the pericardium, and the anterior wall of the right

ventricle of the heart. Dr. Bhatt the pathologist found that death was due to hypovolemic shock as a result of that stab wound.

Delores Grant the paramour of the appellant was the sole eye witness called by the prosecution. She testified that shortly after 10 o'clock on the morning of the 26th June, 1993 she and the deceased Logan Mendes stood on their verandah at Flankers in St. James. The appellant was then on adjoining premises and he called to the deceased and accused him of calling him names. The deceased told him to leave with his foolish accusation. The appellant then threw two stones at the deceased who had by then stepped down from the verandah into the front yard. One stone struck the deceased on his shin and he slid. The appellant then "jumped" the fence and rushed on the deceased and stabbed him in his chest with a knife. On receipt of the stab the deceased again slid to the ground and in the motion took up his machete which was on the ground and chopped at the appellant once. The blow caught him in his face inflicting a wound. She assisted the deceased by placing a bandage on his injury. He was taken to the emergency room of the Cornwall Regional Hospital. In that room she saw the appellant. She said that after the appellant threw the first stone at the deceased, the deceased retaliated by throwing a stone at him. After he was stabbed the deceased held the injured area before aid was rendered to him. She saw him chop the appellant once. She emphasized "if him get chop on him foot, I don't know nothing at all 'bout that one".

Delores Grant was cross examined and she said she saw the incident from the verandah which faces the front yard. She admitted that at the preliminary enquiry she told the Resident Magistrate that she did not see the appellant stab the deceased. She said what she told the Resident Magistrate is true. She was in the kitchen which is at

the back of the house when the incident occurred. She also admitted that she did not see when the deceased chopped the appellant.

Detective Corporal Junior Smallhorne in evidence said he received a report which caused him to go to the Cornwall Regional Hospital. There he saw the appellant who had a chop in his face and a cut on his foot.

The appellant in an unsworn statement said he was passing the home of the deceased when the deceased threw two stones at him. He took up a stone hurled it at the deceased and walked away. A sister of the deceased gave him a machete and urged him to chop the appellant as she could provide money to "back" him. The deceased came over the dividing fence confronted him and chopped him in his face with the machete. He (the appellant) took a knife from his pocket and lunged it at the deceased who thereafter chopped him on his foot and ran to his yard. The injured appellant said he was taken to the hospital. Dr. Tun a registered medical practitioner called by the defence said he examined and treated the appellant. He found him suffering from three injuries:

- 1) a facial wound seven centimetres in length involving the left temporal cheek region splitting the upper left side of the lip;
- 2) another wound, one centimetre long that went through the lower left lip; and
- 3) a third wound six centimeters by three centimetres bone deep lacerated wound to the upper third of the left shin fracturing the tibia. The doctor said severe force was used to inflict these injuries.

Mr. Williams with leave of the court urged three grounds of appeal namely:

1. The prosecution's case rested solely on the evidence of the paramour or common-law wife of the deceased. It was desirable in the circumstances of the case that the learned trial judge should give a clear

warning to the jury that it was dangerous to act on the uncorroborated evidence of a witness who had a purpose of her own to serve. It was submitted that the direction of the learned trial judge in this respect was vague and insufficient. (See Summing up page 3) ***R v Prater*** (1960) 44Cr App Rep 83 ***DPP v Kilbourne*** (1975) 57 Cr App Rep 381; per Lord Hailsham LC at pp 393 - 4.

2. The evidence of the main prosecution witness was so discredited and so manifestly unreliable that the verdict is unreasonable and cannot be supported.

3. The learned trial judge misdirected the jury on the evidence. The effect of this misdirection was that the analysis of inconsistencies in the evidence of the prosecution witness was inadequate and the jury was not adequately assisted in assessing the defence of the applicant.

In pointed submissions Mr. Williams addressed the grounds of appeal with reference to aspects of the transcript and the summing up of the trial judge.

Mr. Reece with candor conceded that there were discrepancies and inconsistencies in the evidence of the sole eye witness which the judge addressed in his summation. He agreed that the defence of the appellant was not properly explained to the jury.

The judge who granted leave to appeal directed that the transcript of the evidence of Delores Grant be provided for the hearing of the appeal. This transcript revealed that this witness was discredited in cross-examination. In examination in chief she witnessed the infliction of the fatal stab wound to the deceased and she saw the deceased chop the appellant in his face. Confronted with her deposition she admitted she said at the preliminary examination that she was in the kitchen at the back of the

premises and saw neither the stabbing nor the chopping. She further admitted that what she said at the preliminary examination was true. This witness contradicted herself and her evidence was unreliable. The Crown's case depended on her and as a witness she was totally destroyed. We were unhappy that the learned trial judge did not see fit to withdraw the case from the jury at the close of the prosecution evidence. See **R v Galbraith** [1981] 2 All E.R. 1060 and Practice Note [1962] 1 All E.R. 448 - Lord Parker.

The case having gone to the jury the judge had a duty to deal adequately with the defence. The appellant gave an unsworn statement and the jury could from that statement understand that the issue of self defence was raised. Following the guidelines given in **DPP vs Walker** [1974] 12 JLR 1369 the learned trial judge gave the required directions inviting them to consider the statement and give it the weight they thought it deserved. There was evidence independent of the appellant's statement which supported the defence of self-defence. The trial judge gave abstract directions on self-defence but he did not relate the evidence to the defence. After the incident the appellant was seen at the hospital with the injuries of which he spoke. Detective Smallhorne and Dr. Tun saw him. Dr. Tun gave expert evidence of the location and severity of the injuries. The wound to the face and that to the shin were inflicted with great force. Both injuries were to the front of the appellant's body hence the inference they were inflicted in a frontal assault. The evidence of Dr. Bhatt was that the stab wound to the heart resulted in hypovolemic shock which caused death. Assuming the jury were persuaded to accept the evidence of the witness Grant they would have to consider whether the deceased with the fatal injury to his heart could have summoned sufficient strength to deliver the blow to the shin of the appellant fracturing the tibia.

Where an accused person makes an unsworn statement the judge has a duty in directing the jury to give a **Leary Walker** direction. He is under no duty to review the statement for the benefit of the jury - **Cedric Gordon vs The Queen** Privy Council Appeal # 19 of 1995, **R v Oniel Williams** SCCA 27/95 delivered 27th January, 1998. Where there is evidence in the case whether called by the accused or otherwise arising, which supports a defence referred to in the unsworn statement, directly or inferentially, the trial judge is under a duty to deal fully with it as an issue for the jury's resolution.

The failure of the trial judge to deal adequately with the defence amounted to a misdirection leading to a miscarriage of justice.