

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 168,169/2000

**BEFORE: THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE COOKE, J.A. (Ag.)**

**R. v. ALEXANDER HUTCHINSON
DAVID HUTCHINSON**

**Valerie C. Neita-Robertson for Alexander Hutchinson
Delborah Martin for David Hutchinson
Suzette Rogers for the Crown**

23rd 24TH June, and September 29, 2003

COOKE, J.A. (Ag.)

The Case for the Prosecution

The factual basis of the case for the prosecution was provided by the sole witness, Norman Wilson, the virtual complainant. On the 30th October, 1999, at about 9 a.m., Wilson was walking on his way from Gravel Heights proceeding to St. Jago Gardens in the parish of St. Catherine. He met Alexander Hutchinson (Alexander) who was walking towards him from the opposite direction. As they met, Alexander accused Wilson of being a "tiefing bowy" (sic) and that he, Wilson, "use to tief out officer Harvey corn". "Yuh use to tief dis and yuh use to tief dat." Wilson denied the accusation. Then Alexander passed him and ran to a stone heap and took up two stones and started shouting to his little son –

"Boysie, Boysie, bring mi machete come." At this stage Wilson continued on his way "cause I say a not facing him, let him feel I was looking at him." Next Alexander started coming towards Wilson at a fast pace, and passed him with two stones in his hand. Wilson continuing on his way was stopped by one Jackie and they had a conversation in Jackie's yard. While having this conversation, Alexander "appear up", and said to him, "whey yuh nuh come out a Jackie yard. Whey yuh a do in a Jackie yard?" - to which Wilson replied, "I don't into no war with you so, I don't know why you come wid cutlass." Alexander then swung the machete at the neck of Wilson who took evasive action and started to run. The wet conditions underfoot caused him to slide and he fell.

As he got up to run again, "there comes Dave Hutchinson, (David) wid a cutlass." (David is the son of Alexander). Then David "chop mi on the shoulder here (indicating). This chop slow mi up mek the father come." After he was chopped by David, Wilson "glimpse Mr. Hutchinson (Alexander), a shadow coming down with him hand in the air with the cutlass". All Wilson could do was to hold up his left hand and "block the chop." He next runs off and jumps over a cliff. "And when time a drop into the cliff a saw his two daughter fling some big stones hitting me all over mi body." Wilson then runs into the yard of a Miss Beckford. While he was there David and Alexander tried to enter the yard but were prevented by Miss Beckford. David said to him "you tink a yuh hand wi

did waan, a yuh head." By this his "hand middle" "was leaking blood hard". Wilson walked away from Miss Beckford's yard and after he had gone about a chain from there he fainted and he next found himself at the Spanish Town Hospital.

At the hospital after he regained consciousness he saw David and Alexander and he felt afraid so he shouted, "Nurse, nurse si di two man dem way chop mi up a come like dem a come fi come finish kill me." David spoke to him and said "you give yourself too much trouble." When Wilson saw Alexander in the hospital – he saw blood on the back of his shirt. Wilson knew not how that blood came to be there. He spent about three weeks in the hospital and the injury he received resulted in an amputation of the left upper limb above the elbow. During his evidence Wilson showed the jury where he got the chop on his shoulder. The record does not reveal any description of what was seen by the jury.

Constable Everton Roberts is the investigating officer. On the 1st of November 1999, he went to the Spanish Town Hospital where he saw Wilson. He noticed that Wilson had a bandage to his left hand at the elbow and the lower part of that hand was missing. He collected a written statement and commenced his investigation. On that same day he saw Alexander in the guard room. He told him of the report against him to which Alexander replied, "Officer a him fuss attack mi, use one stone buss up mi head and jook me under mi left eye wid a ice-prick, and

mi use mi machete and chop him". At that time he noticed that Alexander had a bandage to the side of his head and a wound under his eye. Previously on the 30th, Alexander and David had come to the station at about 12 noon and at that time he observed that Alexander was bleeding from a wound to his head and there was a wound underneath his eye.

Dr. Dean Wright saw Wilson on the 30th October, 1999. His findings on the examination of Wilson were that the latter had a deep laceration to the left hand that traversed the palm of the hand in a longitudinal position along the line of the palm. ~~There was the development of a very~~ serious infection called gangrene which necessitated an amputation above the elbow. The wound in his view was consistent with being inflicted by a machete. It was also the opinion of the doctor that the injury was "a defensive injury". He described defensive injuries as "injuries that are sustained during the act of interpersonal violence, when the victim makes evasive – when the victim attempts to evade blows."

**The defence of Alexander and David
as projected through cross-examination**

In respect of David the stance was that he was never present at the scene and therefore was in no way a participant. As for Alexander, Wilson, was the aggressor. Alexander's daughter, Megan, was in a relationship with Christopher, the younger brother of Wilson, and both lived at the family home. Wilson wanted her to leave. At the scene in an

aggressive manner Wilson demanded, in language peppered with expletives that he take his daughter from his house. Further, Wilson flung a stone which caught Alexander and felled him. As Alexander got up, Wilson "jam the ice pick underneath his eye". As to the circumstance which obtained resulting in the injury to the left hand of Wilson the record reveals as follows:

"Q. And Mr. Hutchinson, after you had the ice pick like that in the stabbing position, Mr. Hutchinson pulled his cutlass from the bag, from the travelling bag that he had and in pulling it out, the sharp end of the machete caught you on your hand.

A. No, is chop him chop me.

HIS LORDSHIP: Just one moment,
Pulled?

MR. CLARKE: Pulled the machete
out of the bag.

HIS LORDSHIP: And the?

Q. And the machete, the sharp machete caught you in the palm of your left hand.

A. How him fi pull it out a him bag and it caught me in the palm - my left hand?

Q. That never happened?

A. That never happen, no.

Q. You were still stabbing at him with the ice pick.

A. No, sir, no, sir

Q. And poor Mr. Hutchinson fanning you away with his machete to protect himself.

A. No man, him just come dung like a 'guinegog' and chop off a mi neck and a bad man yuh nuh, a wicked man dung deh.

Q. And in fanning you off, the machete caught you on your shoulder, your left shoulder.

A. No, Dave Hutchinson chop me, two of them chop me, two chop a get from two separate cutlass."

Wilson did not deny the relationship between Christopher and Megan and that they lived in the family home. However he was adamant that he did not come to court to give evidence about that. He refused to be drawn into any discussion pertaining to this aspect. He insisted he came to court about his hand.

Defence of Alexander Hutchinson

Alexander affirmed. He said at the relevant time he was on his way to his farm at Point Hill. He had with him a brown bag over his shoulder. This bag contained a machete. He recounted how Wilson confronted him demanding that he remove his daughter, Megan, from his house. He described the aggressive posture of Wilson. He said Wilson picked up two stones. Both were flung at him. The first one missed its mark. Then the record states as follows:

"Q. After he flung the first stone, what is the first thing he said or did?

A. He shub the next stone in his right pocket and he took out an ice-prick.

Q. After he took out the ice-pick, did he say anything?

A. "You seem like you come to kill this morning."

Q. You said what?

A. "You seem like you come to kill this morning".

Q. What was the next thing – did he say anything to that?

A. Yes, sir.

Q. What he said?

A. Him say, "I come to kill off di whole rass cloth family a unnuh."

Q. What was the next thing that he did, if anything?

A. Him fling the next stone now, sir.

Q. Did it catch you?

A. Yes, sir

Q. Where did it catch you?

A. In my head, sir.

A. In my head, sir.

Q. When that stone catch you in the head, did you see anything coming from your head?

A. I did fall on the ground. Blood coming from it.

Q. How you fall on the ground?

A. I still fell on my face, sir.

Q. After you fell on your face what is the next thing that happened?

A. I could only saw the foot coming down to me, I jumped up in fright.

HIS LORDSHIP: You saw what?

WITNESS: Saw him foot coming down to me, sir, and I jumped up in fright.

Q. Yes. ~~You~~ said what?

A. After I jumped up off the ground, shake my head like this (indicating) by time I shake my head him stab me with the ice-pick under my right eye (indicating.)

Q. Yes. He stabbed you with the ice-pick under your right eye?

A. And ...

Q. Anything come from under the eye?

A. Blood, sir, he was in rage, I felt like he was going to kill mi.

Q. When he stabbed you, how you felt?

A. He was in a rage. My life was in danger. I couldn't run, I just did two operation from the Spanish Town hospital.

Q. What you did, sir?

A. I pull my cutlass.

Q. What you did, sir?

A. I chop after him, sir.

HIS LORDSHIP: What you did?

WITNESS: I chop after him, sir.
(indicating)

HIS LORDSHIP: Just one minute

Q. All right. So, you chopped him. After you chopped him, did you see what happen to him?

A. Blood ~~was coming~~ from the ~~hand~~

Q. What he did?

A. He run off.

HIS LORDSHIP: You chopped him where?

WITNESS: It ketch him on the hand, sir, on the hand.

HIS LORDSHIP: Yes.

Q. Did he run off? What next you did, if anything?

A. Him say, "Ole boy you win."

Q. Who said what?

HIS LORDSHIP. What?

WITNESS: He said, "Ole boy you win."

He then turned back bawling for murder and after he "reach a distance" he met his sons David and Boysie and he was taken to the Spanish Town Police Station by the former. At the station he lodged a complaint and he received a letter to attend the Spanish Town Hospital. There he received eight stitches to his head and two injections. There was the usual complete denial of the allegations put forward by the prosecution.

Defence of David Hutchinson

David at that time was a police officer and had been for some six years. He was at home lying on his bed with his child's mother and his child. He heard his mother calling "Dave, Dave". He put on his shoes and he and his little brother, Boysie ran out of the yard and after they had covered about four chains he saw his father coming towards them "with blood flowing profusely from the head and a wound under the right eye". He took his father's bag and machete and sent Boysie to take them home. He then accompanied his father first to the Spanish Town Police Station and then to the hospital. At the hospital he saw Wilson and suggested that Wilson should make a report to the Police Station to which Wilson replied "mi naah goh a no police station. Hey police bwoy, merri ba say is you chop me and chop yuh own father." Like his father he denied in its entirety the allegations of the prosecution.

After their trial in the St. Catherine Circuit Court both Alexander and David were convicted of wounding Wilson with intent to cause him

grievous bodily harm contrary to section 20 of the Offences Against the Person Act. Alexander was sentenced to a term of imprisonment for four years and David to three years which was suspended for three years. Both have now challenged the correctness of their convictions.

The appeal of Alexander Hutchinson

The central issue in respect of Alexander was that of self defence. In this regard the general directions of the learned trial judge could not be faulted. However, the burden of this appellant's first complaint was that the learned trial judge failed to adequately direct the jury as to how they should treat "the discrepant evidence of the injury to his shoulder by the complainant." This failure, it was submitted, precluded the jury from considering relevant material in the assessment of the critical determination as to the credibility of the complainant Wilson. The "discrepant evidence" of which the appellant speaks were:

- a) Dr. Dean Wright when asked to relate the injuries he saw on Wilson spoke only of the injury to the left hand. Dr. Wright saw Wilson on the same day. The medical certificate makes no mention of any injury to Wilson's shoulder.
- b) The investigating officer, Constable Everton Roberts, saw Wilson on the same day he received his injuries. He too makes no mention of any sign of injury to Wilson's shoulder.

It was sought to be argued by counsel for the Crown that firstly Wilson showed the injury to the shoulder to the jury and secondly that the

case was conducted within the context of Wilson having received an injury to the shoulder at the scene of the incident. As to the first it was necessary for the jury to determine whether what they saw bore a direct relationship to the chop, Wilson said he had received from David. This is so especially as the defence of David was that he was not present at the scene so he could not have inflicted any wound. As to the second, the transcript reveals that during the cross examination of Wilson this exchange took place.

"Q. And in fanning you off, the machete caught you on your shoulder., your left shoulder.

A. No, Dave Hutchinson chop me, two of them chop me, two chop a get from two separate cutlass."

Then when Alexander was being cross examined the transcript records as follows:

"Q. So the chop that he got on the shoulder, the chop that Mr. Wilson got on the shoulder, he didn't get that chop when you were fanning him off with the machete?

A. Quite likely he could have, but I didn't know about that one, sir.

Q. Didn't know of him getting that one?

A. No, sir.

Q. Didn't know of him getting one when you were fanning him off with the machete?

A. No, sir.

Q. Suggesting to you, that your were not that one because is not you inflicted that one on him.

A. No, sir, is when the two of us on the scene as I tell you, sir.

Q. Suggesting to you, that it was your son David, in your presence, that inflicted that chop to Mr. Wilson's shoulder.

A. I remember that I am under oath, I am not telling no lie."

It is these two passages that crown counsel relies on to say that since the defence accepted there was an injury to the shoulder, there was no necessity for directions as to whether there was a wound inflicted at the scene. The second passage does not demonstrate any such acceptance. Alexander is saying that Wilson could have received an injury to the shoulder in his confrontation with him "but I didn't know about that one." In respect of the first passage it is true that there was a suggestion as to how Wilson received injury to his shoulder. However suggestions are not to be equated with evidence. The importance of suggestions are that they telegraph the defence which is to come. They may go to the genuineness of the case being put forward. In a proper case the trial judge may find it necessary to comment on suggestions which have been put to assist the jury in the resolution of the issues which the jury has to determine. However, it is always incumbent on the trial

judge to fairly review the relevant evidence and to give directions thereto. In this case Wilson swore that a chop from David so immobilised him that Alexander was able to wound him. It is therefore a very significant issue as to whether he did receive a chop from David at the scene. The learned trial judge fully recognized the critical importance of the issue of credibility. During the summing-up, the jury was reminded of this consideration on a number of occasions. However, at no time in the review of the evidence did the learned trial judge mention that neither Dr. Wright nor Constable Roberts saw any injury to the shoulder of Wilson. The defence considered this absence ~~from the evidence~~ of those two witnesses for the prosecution quite important as that absence was the grounding of a no case submission which was unsuccessful. This omission by the learned trial judge to deal with this aspect of the evidence resulted in the critical issue of credibility not being fairly put before the jury. This non-direction must be regarded as a mis-direction in law. There is merit in this complaint.

The second complaint of substance is that the prosecution failed to disclose to the defence two statements of the complainant Wilson, which had been given to the Complaints Division of the Jamaica Constabulary Force pertaining to his account of the incident. It was contended that those statements "contained a number of material inconsistencies in respect of the sworn evidence of Wilson". The submission was that the

defence was wrongly deprived of cross-examining to the inconsistencies in those statements at the trial. Such cross-examination it was argued "would undoubtedly have been utilised to weaken the credibility of the complainant that he would have been rendered completely unreliable." Counsel for the crown who was not the prosecuting counsel at the trial cannot deny that the two statements were not given to the defence. This court proceeded on the basis that the prosecution had these statements in its possession and the defence was not made aware of them.

It would seem that there were two investigations into the case. There was the usual investigation associated with a criminal matter. Here Constable Roberts was the investigating officer. There also appears that there was another investigation which was conducted by the Complaints Division of the Jamaica Constabulary Force. The involvement of the Complaints Division apparently arose because David was then a police officer. It is unclear if these two investigations were brought within one fold.

The first statement was taken on the 19th of November, 1999. The incident was on the 30th October, 1999. The material in this statement which the appellant contends are inconsistencies are:

- (1) In this statement Wilson stated that when he first saw Alexander the latter was walking towards him with one of his daughters. In his evidence at the trial Alexander was walking alone. It was after he went over the cliff that he "saw his two daughters flung some big stones hitting me all over mi body."

(2) In this statement the initial encounter with Alexander was at Jackie's yard. "On the 30th October, 1999, when I saw Mr. Hutchinson I had stopped to talk to Jackie who is a friend of mine. Mr. Hutchinson stopped and asked me, 'Whey you a do in a Jackie yard'." In his sworn evidence Wilson's account was that he stopped at Jackie's yard after the exchanges between himself and Alexander about him being a "thieving bwoy" ... He stopped at Jackie's yard after Alexander had taken up two stones and called for his machete.

(3) In this statement Wilson states:

"I began walking out of the yard when he used a machete he had to chop at me. I ran away into another yard where I saw Dave Hutchinson who is Mr. Hutchinson's Police son. He also had a machete which he used to chop me on my upper left arm and then slapped me with it. I was trying to get away from him when I spin around and saw his father with his machete ~~raised to chop at my head.~~ I lift my left hand to guard my head and the machete chopped the palm of my hand."

In his sworn evidence, Wilson's account is that after Alexander had swung the machete at his neck he slid "and drop". When the learned trial judge asked him "was this in another place, yard or where?" his answer was "just the track". So it was in a track that David chopped him. In his statement there is the absence of any sliding and dropping.

The second statement was given on the 26th November, 1999. It was given on the initiative of Wilson. He said that on reaching home and having read his statement of the 19th November, 1999, he realized that "some things were missing." This statement is produced hereunder:

"On the 19th November, 1999, I gave a statement against Mr. Alexander Hutchinson and his son

Dave Hutchinson both of who had chopped me with machetes.

On reaching home I read over the copy of my statement I realized that some things were missing. Meaning that the incident was not properly explained.

On the 30th October, 1999 before reaching Jackie's house, I met Mr. Alexander Hutchinson along the main road in St. Jago Gardens. We were walking in opposite direction. We passed each other then looked back at each other and he asked me why am I looking at him for. I asked him how him mean and he said "yu a thieving bwoy and then walked back to me and said "yu nu si sey you hungry, you mout lip white and at the same time pointing his finger in my face. He then took up two stones and I took up one too. He began shouting for Boyzie, one of his sons saying "bring me machete come."

I began walking away and he walk passed me in my direction with his stones. Because I saw that he did not use the stones I threw away mine. Mr. Hutchinson continued quickly towards his home. I continued walking and stopped at Jackie's house. In a few minutes after I was talking to Jackie I saw Mr. Hutchinson coming back. This was when he stopped and asked me what I was doing in Jackie's yard.

Also when Mr. Hutchinson chopped at me and I ran into another yard I took up a stone and flung it at him and began to run again when Dave chopped me. While I was running into Michelle's yard Mr. Hutchinson's two daughters flung stones hitting me. I do not know if anyone saw the chopping incident."

- (1) This second statement if it had been utilized could have blunted the force of the inconsistency pertaining to the genesis of the altercation.

However Wilson would have been called upon to explain the absence of the prior encounter in his statement of the 19th November 1999. He may well have given a quite credible explanation. But there was no opportunity to tax him.

- (2) In this statement he not only says he took up a stone but "flung it at him (Alexander) and began to run again when Dave chopped him. In his sworn evidence, he denied having anything at all to do with stones as "no such chance" was presented to him.

The appellant is of the view that the inconsistency as regards the taking up and throwing of a stone is very material to the issue of self defence on which Alexander relied.

The legal position as to non-disclosure of statements collected in the course of investigation leading to the trial of an accused

In **Linton Berry v The Queen** [1992] 2 A.C. 364; [1992] 41 W.I.R. 244 this issue received the attention of the Judicial Committee of the Privy Council. The advice of the Board was delivered by Lord Lowry. The starting point and bedrock consideration is fairness to the accused. At page 373, h, it is written:

"In relation to the disclosure to the defence of material in the possession of the prosecution, the key is fairness to the accused ..."

At page 376, g, His Lordship said:

- 3) It is open to the defence to invite the learned trial judge to examine witnesses' statements if the defence is not convinced that counsel for the crown is performing the role as minister of justice. This is an invitation for the judge to exercise the discretion given by section 18 of the Evidence Act whereby he (she) could direct what use should be made of such statement as the justice of the case demanded. **R.v. Barrett** 12 J.L.R. 180-181."

In **Berry**, the prosecution did not disclose to the defence a statement of one witness and two statements of another witness. These statements contained inconsistencies vis-à-vis their evidence in court. Non-disclosure resulted in the defence having to "labour under an unfair disadvantage".

(page 380, g). Further at 380 h the view is expressed that:

"... Had the statements been supplied, the defence could have planned their campaign, prepared a more effective cross-examination, been ready to object, if challenging admissibility, and been prepared to let the judge and jury see the statements if that course appeared to offer prospects of success."

In **Berry** there were also complaints that there were inadequate directions in respect of the evidence of the good character of the accused, and that the learned trial judge failed to ascertain what was the problem which bothered the jury. Lord Lowry said at page 385 b-c:

"...The case against the defendant was indeed a strong one and for that reason their Lordships would not be prepared simply to recommend

that an acquittal be ordered, but they do not feel able to say that the jury would inevitably have convicted, if the defence had been furnished in advance with the three statements in question and if the jury had received the accepted direction on evidence as to character and guidance from the trial judge on the problem, whatever it was, indicated when they first returned to court."

In **Richard Hall v. The Queen** Privy Council Appeal No. 13 of 1996 (unreported) the issue of non-disclosure was again considered by the Judicial Committee of the Privy Council. In this case the statement of a witness, Noel Woolery who was present at the scene of the incident but not called by the prosecution was ~~not disclosed to the defence~~. Further, the police statement of Mrs. Woolery, the only witness as to identification was also not given to the defence. Lord Hutton who delivered the advice of the Board said at page 20:

"Applying the approach stated by the Board in **Berry v. The Queen** and recognising that the rules of disclosure developed in recent years by the courts in England may not be appropriate to apply in Jamaica because of the different circumstances there, including (as their Lordships have been informed) the serious and real danger of witnesses being killed or wounded or intimidated, their Lordships consider that in the particular circumstances of the case where the only evidence against the appellant was that of Mrs. Woolery, fairness required that the entirety of her statement should have been disclosed to the defence (preferably by a copy being given) before the commencement of the trial so that defence counsel would have had the opportunity to make use of the statement in his cross-examination of Mrs. Woolery.

Their Lordships also consider that as Noel Woolery was present at the scene of the robbery and witnessed a substantial part of it, his statement should also have been disclosed to the defence (preferably by a copy of it being given) before the commencement of the trial, so that defence counsel could also have made use of it in his cross-examination of Mrs. Woolery."

However, the Board concluded at page 22:

"In this case, having regard to the strength and quality of Mrs. Woolery's evidence, their Lordships are satisfied that disclosure before trial of the statements giving rise to the inconsistencies to which Mr. Thornton referred would not have materially undermined or weakened the evidence of Mrs. Woolery or strengthened the defence case so as to lead to a different result at the trial, and accordingly no miscarriage of justice occurred."

Since the judgment of the Privy Council in **Berry** the general practice in respect of trials in the High Court is for all statements to be furnished to the defence.

Application of the principles to this case

As earlier mentioned there were two investigations. The statements which the appellant complains were not disclosed to him were not statements which came into existence as a result of the primary investigation leading to the matter being placed before the court. The other investigation was a parallel one. However, since both investigations concerned the same incident and were conducted by the police the fact that the two statements given by Wilson were not in the course of the

primary investigation does not matter. Both investigations were of an official nature. The prosecution has the responsibility of ensuring that it is in possession of all statements obtained through official investigations and thereafter to perform the role of minister of justice as regards those statements. In this case it is not being said that prosecuting counsel at the trial willfully withheld those statements. The fact is that they were not disclosed to the defence.

This was a case in which, as has already been emphasised, a critical issue was that of the credibility of Wilson. The inconsistencies present in those two statements and ~~the evidence of Wilson~~ at the trial has been earlier demonstrated. These inconsistencies were material to the issue of the credibility of Wilson. The defence was therefore denied the opportunity of demonstrating to the jury that because of these inconsistencies the credibility of Wilson was subject to serious challenge. It cannot be said that the portrayal of Wilson as less than sincere would not have led to a different result at the trial. These statements, having not been available to the defence has resulted in this appellant not having had a fair trial. A miscarriage of justice has occurred.

For the reasons stated above the appeal of Alexander Hutchinson is upheld. The conviction is quashed and the sentence is set aside. A verdict of acquittal is entered.

The appeal of David Hutchinson

The submissions on behalf of this appellant were essentially the same as those advanced on behalf of Alexander Hutchinson. It is inevitable that his appeal also succeeds. His conviction is quashed and the sentence is set aside and a verdict of acquittal is entered.