J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL Nos. 92 & 96 of 1976

BEFORE: The Hon. Mr. Justice Swaby, J.A.
The Hon. Mr. Justice Zacca, J.A.
The Hon. Mr. Justice Henry, J.A.

REGINA v. ANTHONY ISAACS & MICHAEL MILES

Mrs. V. Gayle for the Crown.

Mr. B. Macaulay, Q.C. and Mr. Roy Taylor for the applicants.

February 14, 15; March 11, 1977

HENRY, J.A.:

On February 15, 1977, we granted the applications for leave to appeal in this matter and treated the hearing of the applications as appeals, allowed the appeals and quashed the convictions. In the interest of justice we ordered a new trial to take place at the current session of the St. Catherine Circuit Court. We now set out our reasons therefor.

The applicants were convicted in the St. Catherine Circuit Court for the murder of George Cooper. Doreen Byfield, the girl friend of the deceased, was the only eyewitness called by the prosecution. Her credibility was, therefore, a matter of vital importance. Her evidence was to the effect that at about 8.30 p.m. on September 26, 1975 while she and the deceased were standing beside a disused water tank two men, one of whom she knew before, passed on the road some distance from where she was standing. The men were the applicants and the applicant Miles was the one whom she knew before. A few minutes later the men

returned and came up to where she and the deceased were standing. The applicant Isaacs had a gun under his shirt. Miles held her by the shoulders, spun her around away from the deceased and shouted "Sky". Simultaneously she heard the sounds of a shot. She turned towards the deceased while the two men ran. The deceased had received a gunshot wound in the abdomen from which he died.

During the course of the cross-examination of Miss Byfield by counsel for the applicant Isaacs Miss Byfield denied having said at the preliminary enquiry "shot could have come from across the road". The following dialogue then ensued between counsel and the learned trial judge -

MR. MORRIS: M'Lord, I wish to tender this statement made by the witness.

HIS LORDSHIP: Are you tendering the depositions of the witness?

MR. MORRIS: Just the sentence, M'Lord.

HIS LORDSHIP: No, Mr. Morris, that is why I asked you if you had read it. You cannot tender just one line or one sentence of a deposition.

MR. MORRIS: I think I have ...

HIS LORDSHIP: Not what you think, it is what I rule. You look in "Cross". I am not preventing you from tendering any document but in view of the fact that you have said you have read it, I will not excise a part to suit your purpose.

MR. MORRIS: Very well, M'Lord, I won't tender it.

HIS LORDSHIP: Now, Mr. Morris, let me make my point quite clear. My ruling is not that you are not to pursue a line which you think is most beneficial to the conduct of your case; what I am saying is, I am not going to say that only a part of what you are telling

HIS LORDSHIP
cont'd.... the jury is to be tendered. If you wish to tender it, you can tender it but it won't be on the basis that one sentence is tendered."

It seems clear that the learned trial judge was indicating that the entire deposition and not merely one sentence from it had to be put in evidence. In so doing the learned trial judge fell into error. The only purpose for tendering the exhibit was to contradict the witness and the only part of the document which was relevant for that purpose was the disputed sentence. Section 17 of the Evidence Act provides as follows:

> " A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the cause, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him. "

The effect of the ruling of the learned trial judge was therefore effectively to deprive the applicant of the opportunity to attack the credibility of the witness in this particular way. His error was compounded when in his summing-up he dealt with the matter in the following way -

> " She was asked if she said anything about a shot could have come from across the road and she said the shot she heard could not have come from across the road. She denied she ever said it came from across the road even when she was shown a document which she said she signed at the Preliminary Enquiry. She said she did not say so and that document was not put in evidence so you have no evidence to contradict her as to whether she spoke the truth or not regarding what she is supposed to have said at the Preliminary Enquiry. "

Counsel for the Crown referred us to the depositions in which, soon after the disputed passage, there appears a statement by the witness to the effect that if the shot had come from across the road it would have hit her. In the light of this statement it is argued that the learned trial judge was entitled to deal with the

matter in the way that he did by virtue of the proviso to section 17 of the Evidence Act. That proviso is as follows:

> " Provided always, that it shall be competent for the Judge at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purpose of the trial as he shall think fit. "

We do not consider that the proviso to section 17 justified the course adopted by the learned trial judge. In our view his first duty was to admit the disputed sentence in evidence. Thereafter if in his view the later statement by the witness at the preliminary enquiry was capable either of modifying or refuting the earlier disputed statement or of explaining her denial at the trial that she had made the disputed statement he could then make such use of it as he thought fit. In any event there could be no justification for putting the entire deposition in evidence.

It was for the jury to decide whether the witness had made an earlier statement inconsistent with her evidence at the trial and, if she had, whether they would accept her evidence at the trial. In our view the ruling of the learned trial judge excluded from the jury's consideration evidence which may have assisted them in this regard and his subsequent direction restricted them in their consideration of the credibility of the witness.

In all the circumstances and in the state of the other evidence we did not consider this to be an appropriate case for the application of the proviso, but in the interest of justice having, for the reasons set out, allowed the appeals we ordered a new trial.