JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 154/89

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (Ag.)

REGINA
vs.
AUDLEY MILTON

H. G. Edwards, Q.C. for appellant

Miss Carolyn Reid for Crown

July 10, 11 and 18, 1990

GORDON, J.A. (Ag.):

On 27th October, 1989, after a three day trial, the appellant was convicted on the capital charge at the Manchester Circuit Court in Mandeville.

The prosecution case was founded on the evidence of Mr. Edward Anderson and Mr. Cleve Gayle who operated shops on opposite sides of the road in the district of Surprise in the parish of Manchester. Mr. Anderson, in addition to being a shop keeper, operated video cinema on a lower floor of his shop and on Sunday the 11th April, 1989, both his shop and show business were in operation in the evening. At about 8:00 p.m. that day he saw the deceased, Desmond Thompson, standing in front of his shop. He went downstairs to check on the video cinema and returned upstairs shortly after. He stood at the door leading to the piazza and saw the deceased in a crowd of persons on the piazza

about 18 feet from where he stood at the door. In this crowd were Leroy Milton, Audley Milton and Basil Milton. Basil Milton was armed with a cutlass, Leroy with a stick and the appellant with a rachet knife. He saw Leroy hitting the deceased with the stick then he saw Audley (the appellant) lay hold on Desmond Thompson and stab him with the knife. After Audley stabbed Desmond he pushed him off and Desmond fell over the steps leading to the piazza. This witness then ran back into his shop and raised an alarm. He was on his way back to the piazza when the deceased passed him with blood gushing from a wound to his left elbow. He said Desmond's shoulder "hang down". Desmond asked him for some white rum to put on it and said "Look how Rat them chop me up". The appellant was known by the name "Rat". Desmond went on the server's side of the shop's counter; there he collapsed and Mr. Anderson assisted in obtaining transportation and took the injured Desmond to the Mandeville Police Station. He said that the piazza was well lit by a flood light, a street light nearby and moonlight. Desmond, under attack, retreated and was weaponless.

Mr. Gayle viewed the incident from the piazza of his shop some 50 feet across the road where he sat. He saw Desmond standing on Mr. Anderson's shop piazza. He saw the appellant with about five other persons approach Desmond and they began to strike him with sticks, something like a dog war broke out and he heard something "like a machete drop". He did not see a machete or anyone with a machete. He saw Desmond fall down the steps of the piazza and heard him say "Onu a go mek the man dem kill me" before he ran into Mr. Anderson's shop. The attackers then walked away from the scene.

Dr. Jackson Mailles, who performed a post mortem examination on the body of Desmond Thompson on 19th April, 1989, found two injuries. A severe laceration at the left elbow with destruction of the major blood vessels, muscles and fracture of both forearm bones and a puncture wound on the posterior side of the left chest. This latter wound penetrated the chest cavity and internally there was laceration of the left lower lung base. There was blood in the left chest cavity. Death was due to hypoxia caused by loss of blood and injury to the lung. The injury to the arm could have been inflicted by a machete and that to the body by a knife.

Detective Acting Corporal Maxan, who responded to the report, went to the Mandeville Hospital that night and in the emergency room on a bed he saw the appellant. He observed a wound to his right hand between his fingers down to the palm. Maxan spoke to the appellant, telling him of the report he had and the appellant responded:

> "Me hear say him a call out me name say me thief. And me go ask him bout it and him use machete to chop me."

On the 17th April, he arrested and charged the appellant for murder. Cautioned, appellant said:

> "We never go there fi kill him, me only go fi ask him what him a call out me name and him chop me and me dem charge for murder."

In an unsworn statement, the appellant said he went to Surprise to attend the video cinema, he saw Desmond leaning on the shop wall and he asked Desmond about his calling appellant's name. Desmond, he said, pulled a machete, wrapped in newspaper, from his back and attacked him. Appellant ran to the street light to pick up a stone, chased by Desmond, who chopped at his head and he lifted his

right hand to protect his head and was chopped on it. He saw a crowd, including his nephew, running down on Desmond, he heard a cutlass drop then he fainted and recovered in the Mandeville Hospital. He declared he was innocent.

Three witnesses were called by the defence. Mr. Norman Miller, a nephew of the appellant, was attending the cinema show when he was alerted to an incident on the road, he ran up on to the road, saw his uncle lying bleeding in the road and without asking a question he ran home to inform his aunt.

Mr. Austin Wright went to Surprise about 6:00 p.m. on that fateful Sunday evening and he saw Desmond Thompson there. Thompson asked him if he saw "Rat" (the appellant) and thereupon Thompson proceeded to tell him he had seen "Rat" breaking into a lady's house and that the appellant had threatened him so he was there awaiting his arrival. The deceased, he said, had a machete in his waist and on one occasion as a man approached he pulled the machete and expressed the wish that the man "could just change and become Rat". The witness said he entered the bar and "was in the bar drinking a couple rum". He heard shouts outside and saw the injured Thompson enter the bar.

Dr. Wilmot Hedgrinton, that night, saw the appellant in the Mandeville Hospital in a state of shock. He was suffering from a severe injury to his right hand which said injury could have been inflicted by a machete.

The grounds of appeal urged by Mr. Edwards condensed, amount to:

> (1) "In his summing up the learned trial judge did not hold the scales evenly with regard to the defence" (ground 4)

and

> (2) The verdict is unreasonable having regard to the evidence.

On ground (1), Mr. Edwards submitted that:

> "the comments of the learned trial judge on the absence of sworn evidence by the accused might have led the jury to believe that the accused did not give sworn evidence because his statement could not stand the test of cross-examination and this was his reason for resorting to an unsworn statement."

The passage of the summing-up on which he relied in support of the submission is on pages 158 and 159 and it reads:

> "So that was the case for the prosecution. And the accused man at the close of the case for the prosecution exercised a right given to him in law and he made a statement from the dock. That statement was not tested by cross-examination. The law doesn't permit you when a man makes a statement from the dock, to ask him any questions. You can't test the truthfulness or otherwise of it by cross-examination. He is protected from that type of exercise. The law gives him the right to do that and you must not use it adversely against him. That is his right. The law gives him that right. When a man exercises a right in law it cannot be adversely used against him. But because it was not tested by cross-examination, the law says you, the judges of the fact, must attach to it such weight as you think fit. You consider it and give it such weight as you think fit."

This passage was followed by a review of the appellant's statement. Thereafter at page 160 the learned trial judge addressed the jury thus:

> "If what he tells you, you believe him, you must acquit him. Because he would not have done anything at all to Mr. Thompson. If it leaves you in doubt, that is, you don't know whether or not to believe it, you must also acquit him. And even if you reject all of it, you don't convict him for that reason, only.

> "You would now have to go and look at the totality of the evidence, all of it, and say whether or not the prosecution has made you feel sure of his guilt. If you say yes, the prosecution has made us feel sure that he was the man, or one of the men who inflicted the injury upon Mr. Thompson resulting in his death, and that when he did so he intended to kill or to cause serious bodily injury, then in those circumstances you, it would be open to you to find him guilty as charged."

In the impugned passage, and that which follows above, the trial judge did not depart from the guidance given by Lord Salmon in **Leary Walker vs. The Queen** (1974) 12 J.L.R. 1369 at page 1373:

> "The jury should always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value, and, if so, what weight should be attached to it; that it is for them to decide whether the evidence for the prosecution has satisfied them of the accused's guilt beyond reasonable doubt, and that in considering their verdict, they should give the accused's unsworn statement only such weight as they may think it deserves."

A further complaint on this ground of appeal was that the learned trial judge's remarks on the evidence of the defence witness Austin Wright, "clearly indicated that he was not a witness of truth". The passage complained of is found at page 163 of the record and follows a review of the witness' evidence:

> "So, is that man really a witness of truth? Is he? Because if you believe what was happening, everybody who was on the premises that night knew that there was a fight going on out there, and the only thing he heard was 'woi, woi,' and then he saw the man covered in blood. So why did he not know like the others what was happening out there? His evidence is before you for your

> "consideration and you are the sole Judges of the facts. You are to find what witnesses you believe and what witnesses you disbelieve."

A similar submission was made on the trial judge's comments on Miller's evidence at page 162:

> "Did he see anything like that? Does his behaviour suggest that he saw anything like that? He run leaves the show to see what is happening and when he sees his uncle prostrate in a pool of blood, not a word to anybody. He just takes off and tells two ladies that they must go and find out what going on out there. Not even return with them. It's a comment which I make on the evidence."

We find the submissions that the learned trial judge did not hold the scales even with regards to the defence, without merit. The learned trial judge commented as he was entitled to on the evidence of these witnesses and he in no wise attempted to usurp the functions of the jury but scrupulously reminded them of their duty to decide the issues raised on the evidence.

We find, too, that there is no merit in a further submission that the trial judge failed to deal in detail with the evidence of Dr. Hedgrinton called by the defence. In this regard, Wolfe, J. said at page 164:

> "I am not going to review the doctor's evidence in detail because the prosecution is not saying, and has never sought to say, that this man didn't have an injury. The prosecution is not saying that. The prosecution called a witness who told you that he had an injury, the Detective Corporal Maxam.
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> .....
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> The fact that after he received the injury he was incapacitated, couldn't use his hand, is neither here nor there, because the prosecution

> "is not saying that is after he received the injury that he used his hand and stabbed the man."

Dr. Hedgrinton's evidence could not assist the jury to decide at what point during the incident the appellant received his injury or from whom. All that it showed was that after the appellant received the injury he was incapable of wounding the deceased by the use of his right hand.

The defence raised by the appellant in his unsworn statement was that he was attacked and injured by the deceased, he fell unconscious and had no part in any attack on the deceased. This defence arose only on the statement of the appellant. The testimony of Mr. Anderson and Mr. Gayle was not challenged in cross-examination in that it was never suggested to them that they were mistaken or untruthful. It was not suggested to either of them that the appellant was attacked by the deceased. In his summing-up Wolfe, J. dealt with this aspect of the evidence in this manner: (page 129)

> "The significant thing during this case is that the prosecution called witnesses who testified what happened. They were ably cross-examined by Mr. Ricketts, and it was never at any time suggested to any of them that the deceased ran down upon this man with a cutlass and chop him. We heard not one word of that until this man made his statement from the dock.
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> .....
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> Not one single opportunity was given to any of the prosecution witnesses to deny or to agree with the truthfulness or otherwise of the version given by the accused man that Mr. Thompson ran down upon him with a machete."

In Regina vs. Wayne Spence S.C.C.A. 202/88 dated 18th June, 1990, this Court per Rowe, P. stated:

> "If a defence is raised in the unsworn statement although it is unsupported by any evidence, that is to say sworn testimony or documentary evidence that defence must be left to the jury but the weakness of the supporting fact base must be highlighted"
> (emphasis supplied).

As we have said, the prosecution's evidence was not positively challenged in cross-examination and in reviewing the defence the learned trial judge highlighted the weakness of the supporting fact base. We hold that, in so doing, he did not fall into error. Ground (1) of the ground of appeal, therefore, fails.

The facts were outlined in some detail and the jury were given fair and balanced directions. They had to consider the unchallenged evidence of the prosecution witnesses on the one hand and the unsworn statement made by the appellant coupled with the evidence of his witnesses on the other. Identification was not in issue as on either account there was a confrontation between the appellant and the deceased. The regard the jury had for the defence was amply illustrated by the time they spent in retirement considering their verdict. They retired for seven minutes. We find that the second ground of appeal is also without merit. The application for leave to appeal is treated as the hearing of the appeal. The appeal is dismissed, the conviction and sentence affirmed.

If counsel responsible for the defence continue to ignore the caveat on unsworn statements given by the Privy Council in **Solomon Beckford vs. The Queen** (1987) 3 All E.R. 425, then they must be prepared to accept the verdict of the jury.