JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 278/77

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE WHITE, J.A.
THE HON. MR. JUSTICE ROSS, J.A.

REGINA

VS.

BARRINGTON HOUSEN

Noel Edwards, Q.C., Horace Edwards, Q.C., and Delroy Chuck for the appellant.

Howard Cooke, Jnr., for the Crown.

May 20-22, 24, & July 5, 1985

KERR, J.A.:

The appellant was convicted for the murder of one Sydney Hemmings in the Home Circuit Court on November 29, 1977, before Carey, J., and a jury and sentenced to death.

His appeal to this Court (Robinson, P., Zacca and Carberry, JJ.A.) was dismissed on November 23, 1978.

About five years after, a Petition by the appellant seeking special leave to appeal to Her Majesty in Council was dismissed by the Judicial Committee of the Privy Council on March 14, 1984. Now the matter again comes before this Court

on a reference from His Excellency the Governor General under Section 29(1) (a) of The Judicature (Appellate Jurisdiction) Act.

The Governor General was apparently moved to make the reference by a Petition presented by the appellant therein praying, inter alia, that consideration be given to the evidence contained in the exhibited affidavits of Hope Sterling, Sonia McFarlane and Celeste Robinson, all dated 5th November, 1984.

Although the evidence in these affidavits was not "fresh evidence" in the sense that it could not be described as unavailable at the trial, yet consistent with the approach advocated in R. v. McGarth [1949] 2 All E.R. 495 and approved by this Court in R. v. Roosevelt Edwards - Supreme Court Criminal Appeal No. 12/75, judgment delivered December 3, 1982, we gave a patient hearing and careful consideration to all the evidence tendered pursuant to the reference and which evidence included that of witnesses other than those mentioned in the Petition.

At the outset, Mr. Noel Edwards had expressly conceded that on the evidence at the trial the verdict of the jury was unassailable, that the dismissal of the appeal by the Court of Appeal "was one in which he concurred" and that the subsequent dismissal of the appellant's Petition by the Judicial Committee "was consistent in all the circumstances". However, he would tender for the consideration of the Court, oral testimony of the witnesses who had outlined in their affidavits the nature of the evidence they intended to give and he would ask that should this evidence be found credible, that the conviction be quashed. We did not so find the evidence, and dismissed the appeal. As promised we now set out herein our reasons for so doing.

Before reviewing the evidence tendered before us, it is convenient to outline the theory of the prosecution case

and the evidence tendered in support of it, as well as the nature and conduct of the defence and the evidence in support at the trial before judge and jury.

In the district of Adelphi in the parish of St. James, there is a shop known as "Miss B's". There on the night of February 5, 1977, four men were playing dominoes in front of the shop when at about 9:00 - 10:00 o'clock a shot rang out followed by a fusillade of four or more. The deceased Sydney Hemmings, one of the players, was shot and killed. Other persons were wounded including Constantine Crooks, a spectator at the game. The appellant was charged for the murder of Hemmings and after a trial lasting several days, the jury after retiring for twenty-three minutes brought in their verdict of guilty as charged.

The vital issue at the trial was identity. In that regard the evidence against the appellant came from two witnesses - Constantine Crooks and one Lucille Higgins. Crooks said that after the first shot he looked and saw the appellant by the near bank of the road in front of the shop, with gun pointing at them and from which he saw flashes of fire and heard explosions. There were in all about five shots.

He had known the appellant about two years before. He lived at Irwin, the same district as the witness. The appellant at the time was about thirteen feet six inches away. There were three other men by the farther bank of the road. The area was well lit by lights from the shop by which the men were playing dominoes and by street lights, the nearest to the appellant being about eighteen feet. Lengthy and close examination only tended to make him more impressive as he then gave graphic details including the position of the dominoes players, the colour of the clothes the appellant was wearing as black, that the gun was a "short gun" and that

one of the three men by the farther bank was 'Tony' Griffiths.

Lucille Higgins also of Irwin was at the time in a bamboo shed adjoining the shop building but through an opening saw when the appellant jumped from the nearby common into the road and came in front of a parked car and she saw flashes of fire and heard explosions from the black thing in his hand and which was pointing towards the shop. She knew the appellant from the December before; he was called 'Tony'.

In cross-examination she described the clothes he was wearing and said they were dark in colour. She saw Griffiths about half an hour after the shooting. He was a different person from the appellant. One Dawkins was with Griffiths then.

The appellant was taken into custody from Crawford Street, Mt. Salem, three days after by Detective Corporal Miguel Spence, who then and there told him he was wanted in connection with the case of murder at Irwin. Spence knew him some six months before as 'Tony'. He also knew Anthony Griffiths who was killed sometime after in a shoot-out with the police at Wales about seven miles from Irwin. Sergeant Sterling who formally arrested the appellant on February 13, said that Griffiths was killed about four days after the incident at Miss B's shop. On arrest the appellant had said, "A nuh me kill him sir, the man who shoot him dead".

The appellant gave an unsworn statement from the dock. It was brief and bare of details. It was to the effect that his name was not 'Tony' and that he kept telling the police he knew nothing about the murder. He was at his yard at Mt. Salem "on the night when time the incident happened". He was at his yard playing dominoes and he never left there.

The defence called a number of witnesses:
Claudius Williams, who was inside the shop at the time of the shooting and who got shot. He said he did not know the man

who fired the shot. The gunman was dressed in black. Detective Fitzroy Smith who was at the shoot-out when Griffiths was killed took from Griffiths a Mauser pistol. Dawkins was still alive. Miss Dianne Jobson, who visited the locus in quo described the lay of the land and the position of bullet holes in the shop. Deputy Superintendent Wray, the Ballistic Expert, whose unchallenged opinion was that a shell found at the scene was ejected from the Mauser pistol taken from the body of Anthony Griffiths. It is clear that as an additional and important plinth in the defence it was being put forward that the murder had been committed by Anthony Griffiths.

On Appeal, Carberry, J.A., who delivered the judgment of the Court, after a full and careful review of the evidence dealt with the specific Ground of Appeal which complained that the directions on alibi were inadequate. After referring to several relevant passages in the summing-up and the plausible arguments of Counsel the judgment concluded:

> "But be that as it may, it seems to us that the learned trial judge's summing-up in this matter cannot be attacked. He put the case for the accused very fairly to the jury. The question as to whether the deceased, Anthony Griffiths may have been the gunman, in as much as the gun was found on him, which had fired a shell at the fatal scene that day, was adequately left to the jury. There was evidence on which the jury could find the accused guilty. They could accept the identification evidence and they did accept the identification evidence. And it appears to us that there is no ground on which we can or ought to allow the appeal in this matter and the application for leave to appeal against the accused's conviction for murder is refused".

Now the first witness called on this reference was Aubrey Brown, a truck driver of Mount Salem. He said he had been engaged by Edwin McFarlane, to remove his family consisting of his common-law wife Catherine Grant and children, including the appellant and Sonia McFarlane and that the

transportation of the family and household effects took place on Saturday, February 5, 1977, leaving Irwin at 6:30 p.m. and arriving at Crawford Street sometime before 7:00 p.m. The unloading was completed about 7:00 p.m. when he left there. He did not decide to give evidence before because McFarlane had not paid him for the removal. In cross-examination he said public transportation from Mt. Salem by way of Barnett Street, Montego Bay to Irwin would take twenty-five minutes. He knew that appellant was charged and convicted of a murder occurring that night but he did nothing about it. It was only when he was offered to be paid that he signed the affidavit (affidavit dated 9th January, 1985). It was Mrs. Wisdom, the Justice of the Peace before whom he swore the affidavit, who paid him $50.00.

Although his evidence clearly did not cover the relevant period, what faith could be put in the evidence of a man who would set another man's life in the balance against $50.00? For that sum it would cause no qualms of conscience to transpose the day of the removal. In that regard we note that in the appellant's statement from the dock no mention was made of so significant an event as a change of residence on the night in question.

Celeste Robinson, domestic helper, of thirty-seven years of age, said at the time she was residing in the premises at Crawford Street, when Catherine Grant and her family including appellant moved there from Irwin on the night of February 5, 1977. She helped the family in cooking and later played dominoes with Catherine Grant, Edwin McFarlane and appellant. She left them for bed at 1:00 a.m. She was at home when police took away appellant. Catherine Grant, Gayle Kerr and herself had journeyed to Kingston to give evidence but arrived at the Home Circuit Court late having

been to the Gun Court in error. She had given a statement to the attorneys for the appellant. In cross-examination she said she remembered the date because she was pregnant. She could not, however, remember the date that child was born - not even the month. She knew three days after that he was charged for the murder committed that night.

In the affidavits submitted with the appellant's petition to the Governor General, this witness as well as Sonia McFarlane swore they did not know when appellant Housen was being tried. She sought to explain the inconsistency in a subsequent affidavit that the mistake was due to lapse of memory. It is clear from the evidence of Sylvester Morris that the three witnesses did indeed arrive late for Court on 28th November, 1977. We, therefore, view this blatant inconsistency as indicative of a willingness to swear to any statement that would help the appellant's cause without regard for truth or accuracy. It is clear to us that this witness was programmed to give this evidence.

Sylvester Morris, the attorney for the appellant at the trial said that in the conduct of the defence he was assisted by Miss Dianne Jobson. The trial commenced on the 23rd November, 1977 and on the 25th he sought and was granted an adjournment to visit the locus in quo and make certain enquiries. So he did on the following day. Among the persons interviewed were Catherine Grant, Gayle Kerr, Celeste Robinson and Aubrey Brown. He made arrangements for Grant, Kerr and Robinson to attend Court on Monday, November 28, as he was of opinion they could give evidence of some significance. He advanced money to cover their transportation by diesel and gave specific directions. When they did not arrive in time he had personally made enquiries at the Railway Station but the witnesses were not seen there and up to 2:30 p.m. they had not arrived. About 4:00 p.m. after the adjournment he saw them in

the corridors of the Court. By then the case for the defence had closed and addresses to the jury had been delivered. He could not find the proof he had taken from the witnesses. In cross-examination he said he did not detect any zeal on the part of the witnesses who were apparently afraid of coming to Kingston. He believed he had told Mr. Bertham McCaulay who had argued the appeal for the appellant about the existence of the witnesses who had not been called. The summing-up did not start the evening of the 28th November. It was his frank opinion that there were areas in the statements of the witnesses that did not sufficiently account for the movements of the appellant for the relevant period and this was the main reason why he had no hesitation in closing the case for the defence. Even if they had arrived in time, possibly he would have called one but not all.

The records confirmed Mr. Sylvester Morris' evidence. At about noon on Monday, November 28, the learned trial judge enquired about the witnesses from Mt. Salem and Mr. Morris advised that his junior had gone to look for them. The adjournment was then taken and the Court resumed at 12:39 p.m. and to the learned trial judge's: "Where are the persons from Montego bay? Miss Jobson replied:

> "Mr. Morris in his absence is making endeavours to see - M'lord, in any event, after Mr. Wray has come and there are no further witnesses, I am almost sure that we will then close the defence and will not encroach on the court's time any further, because they were given every opportunity and indeed even money being given to them as to transportation over here, to take a diesel - cheapest mode of transport - they would not arrive before twelve o'clock. Mini bus or some other type of vehicle, they should have been able to catch the early one and be here by ten o'clock".

A further adjournment was then taken at 12:41 p.m. and the Court resumed at 2:10 p.m. After Superintendent Wray gave evidence - the defence closed its case.

Addresses by Counsel on both sides ended at 4:15 p.m. when the adjournment was taken, the judge advising the jury that summing-up would commence on the morrow.

Notwithstanding that Mr. Morris was called on behalf of the appellant Mr. Noel Edwards critised his evidence and his conduct of the defence. "Why did Morris not detain the witnesses overnight and seek permission to reopen the case?", he rhetorically asked in his final address.

Not unto us, but unto Morris should those questions be addressed, but it would be obviously impolitic to put such questions after the witness had expressed his opinion on the want of cogency in the adducible evidence from the witnesses whose statements he had taken.

Catherine Grant, the mother of the appellant, now living at Comfort District in Clarendon said that it was on Febr ary 5, 1977 the family moved from Irwin to M . Salem in Aubrey Brown's truck and that after Brown left there was cooking in which Celeste Robinson assisted. After eating, the appellant, McFarlane, Robinson and herself played dominoes. Appellant remained at home throughout the night. She recalled Mr. Sylvester Morris and Miss Jobson speaking with her but they took no statement from her because she was sick. Kerr, Robinson, and herself journeyed to Kingston. Mr. Morris had given $40.00 and they took minibus to Kingston and in error went to the Gun Court arriving there at about 9:30 a.m.

In cross-examination, she knew Constantine Crooks. Appellant did not father a child by Crooks' sister. She did not know that Crooks gave evidence in the case against the appellant. At first she said she could not say if Crooks was friendly with any of her daughters but when pressed said she believed he had been friendly with her daughter, Sonia McFarlane. Crooks and appellant never "had anything". The notorious

Dennis Dawkins was Sonia's boyfriend. He could not be mistaken for appellant. He was a small brown man - appellant a stout black man. She was told the day after he was detained by Detective Miguel Spence that appellant was charged with murder but to her query, "when" Spence merely said, "stay there". McFarlane left Mt. Salem that same month and went to live in Clarendon. She joined him there later but could not remember the date of the month. She gave no statements to the police but she spoke to Mrs. Wisdom.

In his final address to us, Mr. Noel Edwards described Catherine Grant as "a pathetic and tragic figure whose lack of learning made her a prey of calamitous confusion". In our view, it was not mere want of intelligence that made her so unconvincing. It is more due to her lacking the ability of the good liar to recount the details of a story and in sequence and the memory to be accurate and consistent. It is understandable that with a mother's unceasing tender care for the son she bore she was making this forlorn but false endeavour to save him from this grave impending sentence.

Hope Sterling, a teacher trained at the Mico College, of Sudbury All Age and living at Paisley, St. James (about six miles from Irwin) gave evidence of overhearing confessions to the killing of the deceased by the notorious gunman Dennis Dawkins, on two occasions: the first, in a conversation with one Asquith Williams alias Fitzroy on the morning after the murder and the second a death-bed confession one year later.

Although no formal objections to this evidence were made, nevertheless, Mr. Howard Cooke, before commencing his cross-examination, made the following pertinent observations:

(i) That the evidence of the conversation between Williams and Dawkins was hearsay and therefore inadmissible as evidence of the truth of the matters

therein contained and

(ii) That as regards the alleged death-bed confession, there was not sufficient foundation to make it admissible as a dying declaration. Notwithstanding, Mr. Cooke said he would cross-examine as to credit.

In R. v. Roosevelt Edwards (supra) this Court approved of the liberal approach advocated in R. v. McGrath (supra) and, being mindful that the object of a reference to the Court was to assist the Governor General in respect of his exercise of the Prerogative of Mercy, would consider any evidence which might achieve that object.

In the instant case, although the conversation between Asquith Williams (also deceased) and Dennis Dawkins under the exclusionary "Hearsay Rule" would be inadmissible in proof of the matters therein contained, yet we are of the view that the circumstances and the nature of the disclosures then made and the reaction of the witness Hope Sterling would together be relevant in assessing her credit which is in issue.

With respect to the death-bed confession of Dawkins, if his condition was as described by her, a trained teacher and nurse then although "hope springs eternal from the human breast", it would be abnormal if the dying man did not appreciate that death was imminent. According to her there was coming from him the sort of rasping breath of the dying and maggots had infested the grievous wounds in his head. However, his death was not "the subject of the charge" so as to render his statement a dying declaration stricto sensu. Notwithstanding, it was relevant in the sense that if her evidence as to the making of those statements was credible that would be a factor favourable to the credibility of the evidence of the witnesses called in support of the alibi.

Accordingly, as was said of appeals by way of reference under statutory provisions similar to our own in

R. v. Sparkes [1956] 40 Cr. App. Report p. 92:

> "Each case must, therefore, be decided on its merits, though the Court will not treat itself as bound by the rule of practice if there is reason to think that to do so might lead to injustice or the appearance of injustice".

In that light we considered the evidence of Hope Sterling. In addition to her duties as a teacher, Hope Sterling said she is a Seventh-Day Adventist, Superintendent of the Sabbath School and Youth Leader and Counsellor in the Pathfinders Club.

According to her, Asquith Williams was her next door neighbour and on the morning after the shooting about 10:00 a.m. she was on her verandah when Dawkins visited Williams. The conversation took place about five yards from her and she was plainly to be seen. Dawkins then and there confessed to shooting Hemmings because he was "fooling around his woman" and that when running from the scene, to involve the appellant, he shouted out his name because the appellant disapproved of his friendship with his sister. He also showed Williams the firearm he used and said it belonged to Anthony Griffiths. She knew Sydney Hemmings and the girlfriend of Dawkins, who was the appellant's sister Sonia. She had often seen Dawkins and Sonia together in Montego Bay. In cross-examination she said, this startling information she kept to herself, disclosed it to no one. She made no enquiries as to whether anyone was charged. She never heard that anyone had been arrested and charged until Mrs. Wisdom, the Justice of the Peace spoke with her in November, 1984. She was aware that as part of her social and civic responsibility she should do all in her power to assist in preventing wrong-doing. She was aware that confidential information could be given to the police but because of Dawkins' notoriety as a gunman and his affiliation with a soldier in the army she kept silent. She

did not go to the Police after Dawkins' death because it was of the past. She never expected to be called upon to remember the conversation between Williams and Dawkins.

On February 6, 1978, one year after, she was visiting relatives at the Cornwall Regional Hospital and was attracted to the crowded bedside of the dying Dennis Dawkins who in response to questions from persons in the crowd confessed that all his killings save one were for money. The exception being that of Hemmings who was fooling around his woman and he was not found out because he then called the appellant's name.

What we found astounding was the manner in which she recounted these confessions after over six years. Not only were they given in direct speech, but in rendering the conversations (especially the one with Williams), each party's contribution was given, with accent, inflexion and characteristic speech pattern, that conveyed the impression that we were seeing the performance of a well rehearsed play with the witness acting the role of the several dramatis personae. It was a stellar performance by an intelligent and ingenious fabricator of outstanding histrionic ability.

She endeavoured to explain her remarkable memory by saying she was trained to remember. Yet it was noted that she did not remember the surname of the appellant's sister, who was one of the witnesses from Mt. Salem, referring to her as Sonia McLaughlin until corrected. When tested she remembered that the first question in cross-examination concerned her hearing but she was unable to recall the sequence of the opening questions in examination-in-chief.

Commenting on her evidence, Mr. Noel Edwards said it fitted into "the frame of reference" in relation to certain facts in the transcript of the evidence given at the trial,

including the opinion of the Ballistic Expert that the spent shell found at the scene was fired by the gun taken from Anthony Griffiths.

Our view is that her evidence was tailored to fit facts which were either notorious or had emerged at the trial. If ever there was a false witness, Hope Sterling was one.

Sonia McFarlane, the sister of the appellant said that Dennis Dawkins was at the time her boyfriend. She met him in 1976 when she was about seventeen years of age. The appellant was so much against her talking to Dawkins, whom he said was a murderer, that he beat her. She recalled the night February 5, 1977, when they removed from Irwin to Crawford Street, Mt. Salem, their arrival at the new home at 7:00 p.m., the unloading of the truck, the cooking in which Celeste Robinson assisted and the playing of dominoes until 1:00 a.m. and that the appellant was with them throughout the night.

In cross-examination, she said she knew Constantine Crooks had given evidence against the appellant. Crooks and herself had been friends before Dawkins. At the time of the trial she was living at Crawford Street. She was present when police detained appellant and she heard from policeman Miguel Spence the following day that he was charged for killing Sydney Hemmings. She had told Spence that appellant was at home that night. She knew that her evidence could have saved her brother but she gave no statement to the police.

She knew Sydney Hemmings, deceased. He had asked her to be friends. Dawkins had once seen Hemmings pushing her. She knew Hope Sterling - she had never seen her in Montego Bay. She saw her for the first time on 5th November, 1984 when she went to the Sudbury School. It was Detective Miguel Spence who took her to Reform School in 1976 because she was living

in house with Dawkins. She was not living with him in February 1977. The friendship had been broken.

Mrs. Delsie Wisdom, the Justice of the Peace before whom the affidavits submitted to the Governor General, were sworn and who figured so prominently in the making of these representations, was called by the Crown. She said it was in 1978 that Catherine Grant spoke with her. After discussions with members of the family she went to Hope Sterling. She had heard that there was a teacher at Dawkins' bedside when he confessed and a Mr. Bailey, a taxi driver, gave her certain information and took her to Paisley where two school boys led her to Hope Sterling. She could not remember if when she spoke with Sterling she told her of the information she had from the family. She had not sought the help of the police in investigating the matter. She knew that Dawkins had confessed, but to what, she was unaware.

The affidavits of 5th November, 1984 were drafted by a lawyer in Montego Bay to whom she took the deponents. The affidavits were read over to the witnesses who agreed with the contents, and signed their names.

We were of the view that philanthropic Mrs. Wisdom was clearly a beguiled and misguided enthusiast. Of motherly mien and well meaning intent, she would fain have us share her beguilement. On the other hand, we were impressed by the commendable candour of Mr. Sylvester Morris. His visiting the locus in quo, making enquiries and taking statements of potential witnesses and advancing conduct money to cover their travelling expenses, are indicative of his earnest endeavours to present a full and credible defence as the circumstances permitted. From the records we are of the view that the defence was conducted with commendable competence. We accept as a frank and fair assessment his opinion that in the adducible evidence from the witnesses in relation to the alibi there were areas of such weakness that he had no hesitation in closing the case when

they did not appear.

Having seen and heard the witnesses we were firmly of the opinion that their evidence was unworthy of credit.

For these reasons we dismissed the appeal and affirmed the conviction and sentence.