

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 27/1972

BEFORE: The Hon. President.
The Hon. Mr. Justice Smith, J.A.
The Hon. Mr. Justice Hercules, J.A.

REGINA v. CURTIS IRVING

P.T. Harrison and M.A. Reckord for the Crown.
C.L. Leiba for the Applicant.

23rd and 24th October and
10th November 1972

HERCULES, J.A.:

This Applicant was convicted of the murder of one Cleveland Taylor on 9th February, 1972, before Marsh J. and a jury. On the 24th October, 1972, we quashed the conviction, set aside the sentence and ordered a new trial. We promised then to put our reasons for so doing in writing. This we now do.

In view of the decision at which we arrived, it is neither necessary nor desirable to discuss the evidence at the trial.

Suffice it to say that the only evidence that connected the Applicant with the charge was that of one Dennis Simpson. The one ground on appeal argued was:

"The learned Trial Judge erred in law in that he failed to direct the Jury at all as to how they should regard the evidence of the witness Dennis Simpson whose deposition at the preliminary inquiry contradicted his evidence at the trial."

It was conceded by the learned Crown Attorney that there were several serious discrepancies going to the credit of the witness Dennis Simpson. These discrepancies involved his evidence as to precisely what the Applicant did and precisely where - was it for instance inside or outside of a shed? The witness was saying one thing at the trial and admitted saying something diametrically opposed thereto at the Preliminary Enquiry. No satisfactory

explanation therefor indeed no explanation at all was given, so the credit of this witness was a momentous issue in the case.

At page 95 of the record the learned trial judge gave some general directions on the matter of discrepancies in the following terms:-

"Inevitably in every case, you will find that there are discrepancies and contradictory statements. This is so because human memory is not a precision instrument. People remember what they regard as important and they forget what they do not regard as important, and not simply because you have discrepancies that you must disregard the testimony of the witness. If, of course, you find discrepancies of such an order, so many or so glaring that you do not believe the witness at all, then you would have to disregard the testimony entirely. You are also free, of course, to decide that on a particular matter this witness is not to be relied on. This is the way you would approach ordinary everyday matters, and this is the manner in which you should approach the evidence here."

Then at page 97 in dealing with the evidence of the witness the learned judge purported to deal with two of the most serious discrepancies in the following manner:-

"Now, there was some dispute as to whether or not he actually saw the accused chopping the deceased but he admitted that whatever he might have said at Halfway Tree - he put it another way - whereas he might have said here that he saw the accused chop the deceased, at Halfway Tree he did not say that, he said that he just said that he saw the accused with a machete. There is also the question of whether or not he saw this incident inside the shed or outside the shed. - Now, you have seen the witness and you will, I think, consider - it is a matter for you - that he is not a particularly intelligent person. Not, of course, because he is unintelligent that you must disregard his testimony, you will have to weigh it and assess it having regard to your own assessment of his intelligence. You have to decide whether in the essentials of the case he is fabricating a story."

The directions at pages 95 and 97 quoted above are the only directions in the summing-up on the question of discrepancies. Far from even alerting the jury to the questionable nature of the credit of the witness, when the learned judge came to deal with the specific issues, he actually sought, apparently ex mero motu to explain away the discrepancies on the basis that

the witness was "not a particularly intelligent person".

Paragraph 1352 of the 36th Edition of Archbold Criminal Pleading, Evidence and Practice reads as follows:-

"The character of a witness for habitual veracity is an essential ingredient in his credibility; for a man who is capable of uttering a deliberate falsehood is in most cases capable of doing so under the solemn sanction of an oath. If, therefore, it appears that he has formerly said or written the contrary of that which he has now sworn (unless the reason of his having done so is satisfactorily accounted for), his evidence should not have much weight with a jury; and if he has formerly sworn the contrary, the fact (although no objection to his competency) is almost conclusive against his credibility: R. v. Teal, 11 East 309; R. v. Harris 20 Cr. App. R. 144."

In the circumstances of the case it was vital that the jury should have received from the learned judge a very careful and thorough review of the evidence of the witness Dennis Simpson. There should also have been adequate guidance as to how his evidence should be treated, having regard to the several discrepancies which showed that he had formerly sworn the contrary to what he swore at the trial.

We upheld Mr. Leiba's submission that the learned trial judge failed to give the necessary directions concerning Dennis Simpson's evidence.

In the end the position was that both the learned Attorney for the Crown and the learned Attorney for the Applicant were agreed that there were several discrepancies which the learned judge failed to deal with properly and both sides were requesting that a new trial be ordered.

There was no hesitation in acceding to the request. In the result we treated the hearing of the application as the hearing of the appeal and we allowed the appeal, quashed the conviction and set aside the sentence of death, but as the interests of justice required, we ordered a new trial to take place during the current sessions of the Home Circuit Court, the Appellant to remain in custody pending the new trial.