JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 70/1970

BEFORE: The Hon. Mr. Justice Shelley, Presiding
The Hon. Mr. Justice Luckhoo J.A.
The Hon. Mr. Justice Fox J.A.

R. v. GLENFORD PUSEY

Mr. F.M. Phipps, Q.C. and Mr. R. Small for the applicant

Mr. R.O.C. White, Q.C. and Mr. Carl Patterson for the Crown

October 1, 2, 5, 6, 16, 1970
6 Nov 70

LUCKHOO J.A.

On October 16, 1970, we refused this application for leave to appeal and stated that we would deliver our reasons in writing at a later date. We now do so.

On June 19, 1970, the applicant Glenford Pusey was convicted in the Home Circuit Court of the murder, on November 26, 1968, of Anthony George Lowe after trial by jury.

The case for the prosecution was to the effect that Lowe, a Chinese shopkeeper, carried on his business at premises at the corner of Duff Street and Hamilton Street in the parish of St. Andrew. In the early evening of November 26, 1968, at the end of the day's business Lowe was sitting on a stool at the cash register in the shop. The cash register was housed within a three sided cage constructed of wood and wire mesh. Lowe's assistant, Maisie McLaren, was sweeping some rubbish out onto the sidewalk when the applicant and another man known as Skiba entered the shop with robbery as their motive. The applicant, who was armed with a revolver, shot Lowe in the right groin and in the lower back damaging the liver and right lung. The applicant and Skiba made off with Lowe's cash register. On being shot Lowe fell to the ground within the cage and died as a result of injury to his liver and lung. The cash register was later recovered abandoned some distance away from Lowe's premises. On December 30, 1968, a police party under Superintendent

of Police Marston went to premises on the Spanish Town Road where they saw the applicant sitting on a box. Upon the approach of the police party the applicant sprang up, pulled a revolver from his waist and fired at the police party who returned the fire. The applicant then ran off and turning suddenly fired at the police party once again. Superintendent of Police Marston then fired at and wounded the applicant who fell to the ground. The applicant's revolver also fell to the ground and was discovered to be a .38 calibre Smith and Wesson revolver. This revolver was later examined and tested by Mr. Jack Morris who testified at the trial as a ballistics expert. Mr. Morris also examined and compared the markings on a bullet recovered by the Police from within the cage which had housed the cash register at Lowe's shop with the markings on test bullets fired from the Smith and Wesson revolver and came to the conclusion that the former, a .38 bullet, had been fired from that revolver. The bullet found in Lowe's shop had been discovered by the police lying on the floor within the position which Lowe's body occupied before its removal.

Pauline Evans who lived on Duff Street testified that on November 26, 1968, she was on her way home after visiting her child who was a patient in the Children's Hospital when on walking along a lane in the vicinity of Duff Street she saw the applicant, Skiba, a little boy and two other men known as Sonah-Sonah and Coppa walking together along that lane. She had been Skiba's paramour at one time and had thereby come to know the applicant and the other men who were friends of Skiba. Being afraid of Skiba she ran into a yard on the lane and concealed herself from the men though she was in a position to see them and hear what they said. She overheard a conversation between the applicant and Skiba planning "to hold up the Chinaman out a Duff Street and Nathan Street corner" in the course of which Skiba asked the applicant if his gun was good and the applicant replied "It kinda sticking you nuh" whereupon Skiba offered the applicant the use of his gun but this offer the applicant declined. The little boy was then sent by the applicant to see if the shop was locked up and later the boy returned and said that the shop was not yet locked up because he had seen a woman inside sweeping. The applicant went off to get a car and returned some time later announcing to the other men that he had arranged that a car should go to the White

Street bridge to wait there. The applicant then said that they would "make a slide now" and he and the others left. Pauline Evans said that after they left she ran through the lane and went up Hamilton Street towards the corner of Duff and Hamilton Streets. She heard first the sound of one gunshot and then another and saw Sonah-Sonah and Coppa standing outside one Bailey's shop at the corner of Duff and Nathan Streets and also saw the boy standing nearby. She then saw the applicant and Skiba carrying a cash register away from Lowe's shop.

Pauline Evans had given a statement to the police in December, 1968, even before the applicant was apprehended, and although it was clear from her statement that she knew the applicant for some considerable time before the incident, for some inexplicable reason she was called to an identification parade held on January 22, 1969 with the applicant thereon as a suspect. Unfortunately the officer who conducted the identification parade, Inspector of Police Banton, was off the Island when the trial took place and so it could not be ascertained from him how this came about. When Pauline Evans was called on the parade she was crying and did not point out anyone. At the trial it was suggested to her by the applicant who conducted his defence in person that she had been told by the officer not to be afraid as no one was going to eat her and that she then said that the police were forcing her to identify the applicant but this latter she denied giving as her explanation for not identifying the applicant the fact that she was afraid that the applicant would cause his friends to shoot her.

Maisie McLaren testified that she had just swept out Lowe's shop and was about re-entering the shop when she heard the sound of an explosion coming from inside the shop and saw Lowe fall off his stool behind the cash register. She saw two men in the shop - the applicant with a gun in his hand pointing towards Lowe and the other man climbing over into the cage. She then ran out of the shop into Hamilton Street and saw the men go down Duff Street, one carrying the cash register and the other carrying a gun in his hand.

Maisie McLaren had also attended the identification parade on January 22, 1969. She apparently pointed out someone other than the applicant as the person in whose hand she said she saw the revolver at the time of the incident and when cross-examined by the applicant said

that as the men on parade all looked alike she could not say whether it was the applicant or someone else whom she had pointed out.

The case for the applicant was in effect an alibi with the allegation that he was told by Detective Corporal Simpson that McLaren and Evans having failed to identify him at the identification parade (which the applicant alleged was really held in respect of the alleged murder on Duff Street of another person referred to as the "beefman") he would charge him with the murder of the Chinese man (Lowe). The applicant also denied that he was ever in possession of the .38 calibre Smith and Wesson revolver or had shot at the police party at the time of his apprehension.

Two main grounds of appeal have been argued, the remaining grounds filed having been abandoned at the hearing of this application.

It was first submitted that the applicant was deprived of his constitutional right to be defended by a legal representative of his choice in breach of article 20(6)(c) of the Constitution of Jamaica which provides as follows -

> "Every person who is charged with a criminal offence
>
> .....
>
> (c) shall be permitted to defend himself in person or by a legal representative of his own choice."

This provision in fact reiterates the position that obtains at common law. In addition there is the statutory right under the Poor Prisoners' Defence Law, 1961, given prisoners who qualify therefor to have counsel assigned in their defence. This statutory provision the applicant invoked and Mr. Heslop Harris was assigned as counsel in his defence on November 20, 1969, 11 months after the applicant had been charged with the offence of murdering Lowe. Mr. Harris duly interviewed the applicant who ever since his apprehension on December 30, 1968, has been in custody. Mr. Harris took instructions from the applicant in the preparation of his defence. Before that the matter had already been called on for trial on November 17, 1969 and was taken out of the list because counsel had not yet been assigned to conduct the defence. On December 8, 1969, the matter was again called on for trial and on the application of the Crown was again taken out of the list, this time because two of the witnesses for the prosecution, Maisie McLaren and Pauline Evans, were absent. Eventually on May 21, 1970

Mr. Harris wrote the Director of Public Prosecutions complaining that the applicant had been in custody for a very long time, alleging that the applicant's constitutional rights were being trampled on and requesting that trial of the applicant be arranged before the end of that term. Apparently it was not possible to arrange for trial in that term because of the difficulty in getting Mr. Jack Morris to come to Jamaica. Mr. Morris resided in the United States of America and as is well known testifies as an expert in ballistics in many jurisdictions overseas. Eventually the trial was fixed for Monday, June 15, 1970. About a fortnight before that date overtures had been made by some of the applicant's friends to Mr. C. Neita to have him appear for the applicant at the trial but nothing came of that interview. On Thursday, June 11, 1970 just four days before the date fixed for the trial a friend of the applicant again contacted Mr. Neita with a view to Mr. Neita appearing for the applicant at the trial. Mr. Neita agreed to appear if the trial did not proceed on Monday June 15 as he would not otherwise have sufficient time in the interval to take instructions and prepare the applicant's defence and be paid his fee in full. He was paid a small sum as retainer. It would appear that Mr. Neita had in mind the previous difficulty experienced by the prosecution in getting all of their witnesses to attend court and felt that if a similar difficulty arose on June 15 he would thereby be afforded enough time within which to prepare the applicant's defence and to collect the balance of his fee. On June 15, when the matter was called on for trial Mr. Neita did not appear. Mr. Harris was in court ready and willing to conduct the defence. He had been told by Mr. Neita that he (Mr. Neita) had been approached a fortnight before by some friends of the applicant with a view to Mr. Neita undertaking the defence but was not aware of what had transpired on Thursday June 11 between Mr. Neita and the applicant's friend. The applicant informed the trial judge that he did not wish to have Mr. Harris' services and that he had retained the services of Mr. Neita paying him an amount which he said represented one quarter of the fee fixed. He said that Mr. Neita did not know that he was in court for trial on that day and asked to be allowed to contact Mr. Neita. After counsel for the Crown had referred to the fact that the applicant had been committed for trial since April 9, 1969 and to the difficulty in getting together the

witnesses whom the prosecution wished to call the trial judge granted an adjournment which lasted for some 43 minutes for the purpose of Mr. Neita being contacted by counsel for the Crown. Counsel for the Crown contacted Mr. Neita by telephone. Mr. Neita was then appearing as counsel at the Resident Magistrate's Court at Half Way Tree. He informed counsel for the Crown of what had taken place between the applicant's friends and himself and said that in the circumstances he was prepared to return the retainer fee (which he said was only £10) he had received on the previous Thursday. He requested counsel for the Crown to convey to the trial judge his apology for not being present in Court as he was then engaged in a preliminary enquiry at Half Way Tree Court.

Mr. Harris after informing the trial judge that the applicant had never expressed to him a wish to be defended by someone else asked that the trial judge release him from his assignment to defend the applicant as he felt that the applicant should have complete confidence in the person undertaking his defence. After some discussion as to the difficulties the Crown was experiencing in getting the witnesses to attend Court the trial judge requested Mr. Harris to reconsider his request and the luncheon adjournment was then taken. On the resumption the trial judge addressed the applicant and what transpired is recorded as hereunder:-

" HIS LORDSHIP: Well, Pusey, the position is this, that Mr. Harris has been assigned as your counsel to defend you from the 22nd of November 1969. During the period between that date and now he has on several occasions interviewed you at the General Penitentiary to take instructions. No time have you objected to his retainer or assignment and the case is now ready to proceed and as the matter now stands he is the counsel on record to defend you in this matter. Do you wish to have him defend you?

ACCUSED: I have already told my Lord.

HIS LORDSHIP: You will answer the question I ask. You wish to have him defend you?

ACCUSED: No, my Lord.

HIS LORDSHIP: Well you will have to defend yourself. Mr. Harris, you are released. Thank you very much, you may consult the Registrar in due course. "

Counsel for the applicant has urged that in the light of the foregoing the applicant was denied the right to be defended by counsel of his own choice and has contended that the trial ought to have been adjourned to enable

the applicant to engage the services of counsel other than Mr. Neita if Mr. Neita no longer wished to defend him. While we fully appreciate that the Constitution of Jamaica enjoins that every person who is charged with a criminal offence must be permitted to defend himself by a legal representative of his own choice if he so desires, yet the trial of an accused person cannot be delayed indefinitely in the hope that he will by himself or otherwise be able to raise at some indeterminate time in the future money sufficient to retain the services of counsel. In this case the applicant as late as November, 1969 had invoked the aid of the Poor Prisoners' Defence Law to secure the services of counsel and only a few weeks before June 15, counsel assigned, Mr. Harris, had protested the failure to bring on the trial. The applicant having rejected the services of Mr. Harris after the investigation which had taken place and having no tangible means of retaining other counsel he cannot fairly complain that he was deprived of any of the Constitutional rights guaranteed him under s.20(6)(c) of the Constitution of Jamaica.

It was further submitted on behalf of the applicant that in contravention of s.20(6)(b) of the Constitution of Jamaica he was not given adequate time and facilities for the preparation of his defence once he had to defend himself in person the moreso as he was not in possession of a copy of the depositions taken at the preliminary examination or copies of the statements made to the police by Pauline Evans and Mr. Morris who were not available to testify at the preliminary examination. The applicant had asked the trial judge to give him an opportunity to study the depositions and the trial judge is recorded as having said - "You will hear Crown Counsel's opening and the witnesses will give evidence one by one and if the evidence is short and you have not had an opportunity to study the depositions I shall give you the opportunity to do it." It was urged that the trial judge ought to have adjourned the trial to enable the applicant to study the depositions.

The word "if" in that passage might well be an error in reporting for the word "as" in which case there was in fact no denial of opportunity to the applicant to study the depositions. But we shall consider the submission in the light of the passage as printed in the record. In deciding whether there is substance in the submission made on the

applicant's behalf in this regard it must be borne in mind that the applicant had had the benefit of Mr. Harris' services in the preparation of his defence and so did not have as it were to start from scratch. The evidence for the prosecution was within a narrow compass and apart from Mr. Morris' scientific testimony was easy of grasp to a person of the applicant's intelligence. The trial judge's offer to give the applicant an opportunity to study the depositions brought no later complaint during the trial from the applicant that he did not in fact have an opportunity to study the depositions nor request to be permitted to do so. Indeed the nature and quality of the applicant's cross-examination of the witnesses (he did not cross examine Mr. Morris and the formal witnesses) go to show how well he grasped the significance of their evidence and this with the fact that his cross examination of the first witness called to testify, Maisie McLaren, lasted a total of 1 hour 54 minutes clearly shows that the applicant was in no way handicapped by not being sooner in possession of a copy of the depositions. It is true that he did not cross-examine the ballistics expert, Mr. Morris but this was hardly surprising for his defence was an alibi and a complete denial of possession of the revolver when he was apprehended. In any event a prisoner defending himself in person would even with the depositions in his possession for months before trial have been in no better position to cross examine on scientific testimony adduced and it seems fair to assume from the fact that no suggestion was made at the trial by the applicant that he desired an opportunity to adduce scientific evidence that even Mr. Harris had not intended to challenge this scientific testimony not at any rate by adducing evidence to the contrary as part of the case for the defence. We are of the opinion that the submission of counsel for the applicant on this point is without substance.

It was next submitted that the true facts concerning one or more identification parades involving the applicant and the witnesses Pauline Evans and Maisie McLaren were never fully presented at the trial and the circumstances were such that improper prejudice resulted to the applicant. We may dispose of this point very shortly by reference to our inspection with counsel's consent of the statement, contained in the police files, of Inspector of Police Banton who conducted the identification parade

held on January 22, 1970. That statement disclosed that the applicant was suspected of the commission of a number of crimes involving violence and had been put on an identification parade attended by several persons in relation to all of those crimes. These persons came on the parade one after the other and there never was more than one identification parade held. It was never part of the Crown's case that there was a separate identification parade held in respect of the murder of the man described in the evidence as the "beefman". The suggestion that the witnesses McLaren and Evans went on a parade to identify the person who killed "the beefman" came from the applicant and was denied by the witnesses.

Lastly, it was submitted that the learned trial judge failed to put the defence of the applicant adequately to the jury in that he did not direct them on how to assess the evidence relating to the identification parade or parades. We think that in view of the failure of the Crown to lead positive evidence as to whether or not Maisie McLaren identified some person other than the applicant at the identification parade, the learned trial judge ought to have directed the jury in a manner which would have clearly brought home to them that the evidence of Maisie McLaren at the trial identifying the applicant as one of the two men at the scene was of negligible weight and that the only evidence of identity of the deceased's attackers came from the witnesses Pauline Evans and Jack Morris. However, the jury were entitled to accept Pauline Evans' explanation of her failure to point out the applicant at the identification parade and to accept and act on her evidence implicating the applicant if they believed it. In addition the evidence of Jack Morris if accepted though perhaps not in itself sufficient to ground a conclusion that it was the appellant who had shot the deceased was evidence which went to strengthen and confirm the testimony of Pauline Evans. Once the jury rejected the alibi put forward by the applicant an overwhelming case was made out against him. The learned trial judge gave a careful and accurate direction as to the approach the jury should take in consideration of a defence of alibi and it is clear by their verdict that

the jury rejected that defence. In the circumstances we came to the conclusion that despite the failure of the trial judge to give the appropriate direction in respect of the evidence of Maisie McLaren no substantial miscarriage of justice resulted.

We therefore refused the application.