JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 84/87

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE FORTE, J.A.

REGINA

VS.

HORACE HIBBERT

Horace Edwards, Q.C. A.J. Nicholson for applicant

Heather Dawn Hylton for the Crown

January 25 and February 10, 1988

WRIGHT, J.A.:

These are the reasons which we promised to put in writing when on January 25, 1988 we treated the application for leave to appeal as the hearing of the appeal which we dismissed and affirmed the conviction and sentence of death which was passed upon the appellant on May 20, 1987 by Gordon J.

The point at issue in this appeal is whether Section 34 of The Justices of the Peace Jurisdiction Act confers upon a trial judge a discretion as to whether he will admit into evidence the deposition of a witness who died since making the deposition. The relevant portion of the Section reads:

> "..... and if upon the trial of the person so accused as first aforesaid, it shall be proved by the oath or affirmation of any credible witness that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, or is absent from this Island or is not of competent understanding to give

> "evidence by reason of his being insane, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he, or his counsel or solicitor had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the Justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not, in fact, signed by the Justice purporting to sign the same:
>
> Provided, that no deposition of a person absent from the Island or insane shall be read in evidence under the powers of this section, save with the consent of the court before which the trial takes place".

No criticism was made of any aspect of the summing-up by the learned trial judge. Accordingly it should suffice briefly to out-line the evidence so as to put the issue in its true perspective.

Detective Sergeant Theodore Malcolm, the Sub-officer in charge of Crime, stationed at the Morant Bay Police Station, left the Station at about 10:45 p.m. on June 11, 1984 to the district of Prospect in search of Donovan Edwards who was wanted on a charge of Burglary and Larceny. He took with him the appellant, a Corporal in the Special Constabulary Force attached to the C.I.B., Morant Bay, Detective Sergeant Ellis (then Corporal Ellis) and Acting Corporal Clarke as well as a prisoner whom he took from the cells. Instead of Donovan Edwards, they found his brother, Byron Edwards at the home where they went. Byron took them to where he thought Donovan could be found but he was not there. Before going to this other place, Detective Sergeant Malcolm left the prisoner along with Acting Corporal Clarke at the car in which they had travelled. While Acting Corporal Clarke was by the car, he saw the deceased,

Maureen Robinson and her boy-friend Leroy Sutton who had just left Sutton's home nearby and he called to them. When they came to him he spoke to them and thereafter they sat on the ground beside the car while Acting Corporal Clarke stood beside the car. The prisoner was inside the car. Within five minutes of these two persons taking their seat on the ground, Detective Sergeant Malcolm and his party returned and, upon Acting Corporal Clarke accounting to him for their presence, he advised them to go back home because it was late (Sutton had intended to accompany Robinson to her home) after he had released Byron Edwards to return to his home. Of the persons mentioned so far, all except the prisoner who did not testify and the appellant, testified that they saw these two persons beside the car and that includes Detective Sergeant Ellis who testified on behalf of the appellant. Ellis not only saw them but heard Clarke speak to Malcolm about them and heard Malcolm tell them to go home. There was, however, this significant difference between Ellis and all the other witnesses on this point namely, that the appellant had not arrived at the car while the two persons were there. The appellant, he said was left about one chain behind. On the contrary, Malcolm said that after he spoke to the persons and they left, he opened the driver's door (he was the driver and the vehicle was a right hand drive) and was about to get into the car while the appellant was standing at the right rear door of the car. He suddenly heard an explosion behind him. He looked around and saw the appellant with his pistol in hand pointing down. Then he saw the appellant raise the pistol and fire two shots at the two persons who were then 5-7 yards away with their backs toward the car. Malcolm shouted "What is that" and the appellant responded pointing

in the direction of the two persons who had by then fallen to the ground "See a man fire after me deh". Malcolm saw no one but the two prostrate victims. Malcolm went up to them and saw them both bleeding from gunshot wounds. Both appeared dead. Both were put into the trunk of the car as bodies to be taken to the Princess Margaret Hospital - Robinson on top of Sutton, but the car failed to start.

Although Malcolm had heard only three shots he reported on his radio that there had been a shoot-out which report he said was based on what the appellant had said. The "bodies" were subsequently transferred to the trunk of a police car which responded to the radio call for help. But unknown to the police, there was life in Sutton's body though he could not move and he testified later that he heard what was going on before he was placed in the trunk of the first car. Arrived at the hospital, so he testified, the police told the porters they had two bodies for the dead house but Sutton saved himself from that destination then by calling out when he recognised the voice of a porter whom he knew. The porter announced "One of dem no dead He was then admitted to the hospital and survived to testify at a Preliminary Examination held on March 8, 1985 but died before the trial. The admission of his deposition into evidence at the trial is the subject-matter at the heart of this appeal. But more of this anon.

After leaving the "bodies" at the hospital, Detective Sergeant Malcolm returned to the Morant Bay Police Station where he took the appellants firearm from him. It had in 3 spent shells and 2 unexpended cartridges.

The evidence of Acting Corporal Clarke confirms the presence of the appellant at the time when Detective Sergeant Malcolm spoke to Sutton and Robinson and sent them off. He was seated beside the prisoner on the back seat of the car when he heard first one explosion and then two others in rapid succession in the direction where the two persons had left. He did not leave the car but when he looked through the car window he saw the two persons lying on the ground.

Byron Edwards testified that when he returned to the car in company with Malcolm, Ellis and the appellant he saw two persons kneeling beside the car and when he approached them in an effort to ascertain who they were, the appellant told him "to run, what was he looking for?" He took the advice and ran and when he had run off about one-half chain he heard a shot behind him so he drew to the bank on one side of the road. He heard another shot coming from the same direction. He did not hesitate any more but ran off home and heard a third shot from the same direction.

of Maureen Robinson

The cause of death/as ascertained from the deposition of Dr. Venugopaul which was admitted into evidence was shock and haemorrhage resulting from a bullet which had entered the left temporal region and which, after passing through the left frontal lobe of the brain, the base of the skull and the right parietal lobe of the brain was found lodged in the right parietal bone. Examination and comparison by Assistant Commissioner Wray proved that that bullet had been fired from the appellant's firearm.

The appellant testified in his own behalf and called Sergeant Ellis in support of his claim that he fired in self-defence, that is, in response to shots fired at the police from the direction in which the two bodies were retrieved. Further, at the time when he fired, he saw no one. Said he, the first time he set eyes on those persons was when the bodies were brought to the car. But as stated before even Sergeant Ellis admitted that when they returned to the car he saw the two persons sitting beside the car but he sought to aid the appellant by saying that the appellant did not return while the persons were there.

The lines were therefore clearly drawn and despite the overwhelming evidence of Detective Sergeant Malcolm, Acting Corporal Clarke and Byron Edwards that the appellant returned to the car while the two persons were sitting/ kneeling beside the car and as to what transpired thereafter, Mr. McBean thought it best to tender in evidence the deposition of Leroy Sutton and although Mr. Edwards raised an objection to its admission, the learned trial judge believing, as it turned out erroneously, that the Court of Appeal had held that he had no discretion where the witness had died, stopped him in his tracks. It is out of this ruling that this appeal found its genesis.

It will be seen from Section 34 (supra) that the prosecution cannot proceed without the Courts permission to read the deposition mentioned in the proviso viz. where the witness is absent from the island or is insane. The reasons are not far to seek. As regards these two instances the trial judge is very clearly given a discretion. On

this basis, therefore, it is inferential that a similar discretion does not exist regarding the other witnesses mentioned in the Section viz. the witness who has died since giving his deposition and the witness who is too ill to travel. It is noted that by the language "it shall be lawful to read", the Section makes the evidence admissible and the right to tender it at the trial is, without more, conferred upon the prosecution.

In a scholarly and very well researched judgment in Regina vs. Richard Scott and Dennis Walters SCCA 153 and 154/1980 (dealing with the admissibility of the deposition of a deceased witness) Carberry, J.A. traced the history of the judicial discretion in the Commonwealth both at Common Law and by statute from as far back as 1554 to the case of Sang v. The Queen (1979) 3 WLR 263 and so far as statute supports the claim that a discretion exists the judgment at page 49 states:

> "We are clearly of the view that the statutory provisions in our Act give no power to exclude the depositions where it is shown that the witness has died or become too ill to travel to court. Such discretion as the judge enjoys under the statute relates only to witnesses who are absent from the island or have become insane."

It is, however, recognised that quite apart from any statutory provisions the judge has the duty to ensure that an accused person has a fair trial according to law: Sang's Case. Considering Section 34 in the light of this Common Law principle Carberry, J.A. at p.55 states:

> "The Section in our judgment makes the depositions of witnesses who have died or are too ill to travel to court admissible without the consent of the Judge, whereas his consent is needed when it is a case of the witness being

> "absent from the island or affected by insanity. In the former case the Crown need only tender the deposition and the onus of successfully appealing to the judge to exercise his residual discretion to exclude it, lies on the accused and his Counsel. It is for the defence to establish the facts or factors that make it unfair for that evidence to be admitted and to persuade the judge to exclude it. On the other hand, in the two latter cases it will be for the prosecution under the statute to secure the judges consent to the admission of the deposition, and there will be therefore, an onus on them to secure that consent. The application of the residual discretion of the trial judge will apply to all cases but there will be important differences in the onus of proof and in its application depending upon which particular cause for admitting the deposition is being advanced."

This judgment which was delivered on December 20, 1982 states clearly that the trial judge when dealing with the question on May 18, 1987 undoubtedly had the discretion, which he disclaimed, to admit or exclude the deposition of Leroy Sutton. But the onus was upon the defence to persuade the judge to exclude it. Mr. Edwards is in the advantageous position of knowing exactly on what grounds appeal would have been made to the trial judge to exclude the deposition since he was Counsel for the defence at the trial. Responding to the Court's request to state what fact would make the trial unfair by admitting the deposition Mr. Edwards stated that fact to be that the defence would be denied the opportunity of cross-examining the witness. Supplementary to this, he contended that the deposition should not have been admitted because it contains matters not testified by the police witnesses e.g. that the appellant told the witness to run and that the first shot was fired between Leroy Sutton and Maureen Robinson. But there is nothing exceptional about such details. The witness, Byron Edwards

testified that the appellant told him to run before he ran off leaving the two persons whose identity the appellant had prevented him from ascertaining. No police witness gave such evidence. Further, Byron Edwards stated that the first shot which caused him to draw close to the bank as well as the other two shots were fired behind him. Accordingly, the deposition of Leroy Sutton did not in anyway introduce new matters which the appellant had no opportunity to challenge. Leroy Sutton was closely cross-examined at the Preliminary Examination by Counsel who represented the appellant.

The trial judge examined the deposition for the guidance of the jury pointing out such discrepancies as existed between that evidence and that of the police witnesses who, incidentally were all full of praises for the appellant. Importantly, too, he discussed the limitations of the evidence in the absence of the witness whom the jury would not have the opportunity of seeing for themselves. Without the deposition, therefore, the case for the prosecution would not have been seriously impaired and it is our judgment that no case has been made out for the exercise of such discretion as a trial judge has to exclude evidence in furtherance of his duty to secure a fair trial according to law. The fact that the witness is dead, and consequently cannot be available for cross-examination, is the basis of the statutory provision. However, the judge was obviously wrong in ruling that he does not have the discretion contended for by the defence. Accordingly, the point raised in the appeal was decided in favour of the appellant but we applied the proviso to Section 14(1) of the Judicature (Appellate Jurisdiction)

Act and dismissed the appeal as we considered that no substantial miscarriage of justice has actually occurred.