JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 166/2000

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE COOKE, J.A. (Ag.)

R.V. JOHN MITCHELL

Ravil Golding for appellant
Donald Bryan for the Crown

5TH May, and 16th October, 2003

SMITH, J.A.

On the 30th day of May 1996, the appellant, John Mitchell, was convicted in the Home Circuit Court for the capital murder of George Taylor on the 14th April, 1992, and sentenced to death. He appealed to this court and on December 1, 1997, his appeal was dismissed and the conviction and sentence were affirmed.

The appellant later appealed to the Judicial Committee of the Privy Council. The appeal was allowed, the conviction and sentence of death were quashed and the case was remitted to the local Court of Appeal in order for this court to determine whether there should be a retrial.

On the 23rd November 1999, this court ruled that there should be a retrial of the case at the earliest possible time. The retrial began before Mrs. Marva McIntosh, J. and a jury on the 25th September 2000. On the 3rd

October 2000 the appellant was convicted of capital murder and sentenced to suffer death. It is against this conviction and sentence that the appellant now seeks the leave of this court to appeal.

The prosecution's case

The prosecution called eight witnesses. The main witness for the prosecution was Cecil Robotham, known as Bevan, a pump operator with the National Water Commission at Crofts Hill in Clarendon.

Mr. Robotham told the court that on the 14th April, 1992 he went to his farm in Colonel Ridge. On his way home at about 12:30 p.m. he got a ride in a Volkswagen sales van which was travelling towards Pennants in Clarendon. The van was being driven by George Taylor, the deceased and with him was Mr. Donald Peart. The deceased sold "knicks Knacks" including lotion, lamps, lamp wicks, cigarettes, paper bags and wrapping paper. The van was heading towards Pennants in Clarendon and while negotiating a corner they encountered a huge rock and other debris in the roadway. The deceased stopped the van in order to clear the roadway when two masked men came out of nearby bushes in a gully on the right side of the road. There was an explosion which sounded like a gunshot. Each of the two masked men had a gun – one a double-barrel rifle and the other a short gun. Each man had a "stocking foot" over his face as a mask. Robotham said he recognised the man with the "pump

rifle" [double barrel rifle] as John Mitchell, the appellant whom he knew as "Corpie" at the time of the incident.

Robotham testified that the appellant came to the driver's door on the right side of the van and ordered Taylor to get out of the vehicle. The appellant walked to the back of the van. Taylor then came out of the van. By this time, the other man was at the left side of the van and ordered himself and the deceased's assistant Peart to come out of the vehicle. Taylor ran towards the right side of the road. The appellant who was holding the pump rifle chased Taylor into the gully. The man with the short gun then told Robotham and Peart to "get flat". Robotham was ignoring him and the man used the gun to hit him on the head.

According to Robotham the man with the short gun took some things from the van. Robotham had been observing the feet of the man with the short gun from the position where this man had put him to lie. Robotham watched this man's feet until he could no longer see them. He further testified that as he tried to escape from the scene of the hold up, he ran in the same direction which both the deceased and the appellant had taken. He saw Mitchell with rifle in hand pursuing the fleeing Taylor He then stood about one chain from both men and heard the deceased pleading for his life. He soon found a hiding spot and again heard the deceased pleading with the appellant "don't kill me, the money is in the back of the van." He then heard an explosion which sounded like a

gunshot. This explosion came from the same direction in which the deceased and the appellant had run. At this time, Robotham was standing roughly two chains from these two men. The deceased continued to plead with the appellant for his life. Then he heard what he described as "a sudden impact" after which there was "extreme silence." Robotham stood in hiding for about ten to fifteen minutes. While in hiding he heard voices up by the sales van. One of he men said:

> "Wha' you do with the boy Bevan, you no kill him? Him a go identify me you know."

Robotham said that he knew the appellant for about four or five years before the date of the murder. He would see the appellant at Turtle Pond district during the time he worked at Kellits pump station. The appellant was a friend of one of Robotham's co-workers, Pusey, and would visit the latter's workplace regularly. Robotham saw the appellant almost every day as he would visit the compound of the pump station. The appellant would stay at a "regular spot for a while" after he took a bath in the river nearby.

Robotham testified that when he first recognised him, the appellant was standing about three yards from the back of the sales van. Robotham had been looking through the rear-view mirror on the driver's side of the vehicle. He saw "all of him" (the appellant)"from head to toe." (page 31). According to Robotham, he saw the appellant in full and even though he (the appellant) was masked Robotham recognised

the appellant whom he described as "... somebody weh me used to and see – me see a lot ... a stocking foot couldn't avoid me from recognise him" (page 31). Robotham told the court that he saw the appellant again when he came out of the van and was running after the deceased. This time he only saw the back of the appellant's head. He next saw the deceased, Taylor, on the roadway after his body had been removed from the gully by residents in the area. He appeared to be dead and his pockets were turned out.

The next prosecution witness was Donald Peart, the deceased's assistant. His evidence as to the hold-up was similar to that of Robotham. However, he was unable to identify any of them. He saw when the two men came from the right side of the road with guns in their hands. Peart said that when the man with the double-barrel rifle ordered Taylor out of the vehicle, the deceased took Robotham's machete and tried to chop at the gunman. The gunman responded " ... me a go kill you, you know. You no respect gunman. Me a murderer you know." Taylor ran down the gully. One of the gunmen said to the other "cover them two yah, mi a go run down dah one deh and kll him because him have the money."

The prosecution then called Adella Gardener. Ms Gardener told the court that on the day of the incident she was walking along the Friendship main road in the company of her common-law husband, Talbert Francis. At about 1 p.m. she saw a man coming out of the bushes

in the direction of the area from which the victim's body was retrieved. She saw the man as he took out a bundle of paper money from his pocket, looked at it and put the money back in his pocket. This man came on to the roadway where she had been standing and pointed a long gun at her. She identified the gunman as Corpie. He had a blue coloured stocking foot over his head but his face was not covered. She could see the appellant from his face down. She saw his face for about two or three minutes. The appellant was wearing a white shirt with marks that looked like blood stains on it. She saw the "blood stains" as the appellant came closer to her, pulled the stocking foot over his face and took off the shirt which he used to cover the gun. The appellant greeted them "Hail dread, hail daughter" and ran "up the road."

Ms Gardener testified that she knew the appellant about two years before the incident. She would see him some Mondays but "almost every Friday" when they travelled "on the Clipper bus" to the Spanish Town market. She told the court that the appellant is the same man whom she had seen on the road on the day of the crime. She had last seen the appellant about two weeks before this incident at Turtle Pond Square at about 6 o'clock in the morning. The vehicle in which she was travelling had stopped to pick up passengers and the appellant was standing at a shop about five yards from the bus. She was looking at him "front way"

and saw "all of him." He was not wearing anything on his head at that time and she saw him for about two minutes.

The next prosecution witness, Talbert Francis, gave an account of the incident similar to Ms Gardener's testimony. The relevant additional evidence is as follows. On the 14th day of April 1992, he and Miss Gardener were at home in Friendship when a car stopped at his gate. The driver of the car spoke to Miss Gardener. They then decided to walk up the road from his home. He had walked about one-quarter of a chain along the roadway when he saw the appellant under a mango tree in the bush near the same area from which the body of the deceased was removed. The appellant took a bundle of money from his pocket and counted it. He saw what looked like blood stains on the money. He watched the appellant counting the money for about five minutes. The appellant was standing about three yards from Mr. Francis with a pump rifle in his hand. The appellant came as close as three inches to Mr. Francis. After he had pointed the gun at Mr. Francis and Ms. Gardener, the appellant stood in the road for about three minutes before he pulled off his shirt, covered his gun and turned up the road.

Mr. Francis had seen the appellant several times before the incident. He had last seen him about "one month" or "three weeks" (page 193) before the murder, on the Clipper bus, at about 7 o'clock in the evening. The appellant sat in the seat beside Francis for nearly one

hour. There was light in the bus and he saw the appellant's face and his body. Mr. Francis said when Corpie stopped the bus in Turtle Pond, his house keys fell from him. Mr. Francis testified that he took up the appellant's house keys and gave them to him along with an orange.

Sergeant Lincoln Grant and Detective Sergeant Dolphie Graveney who were stationed at the May Pen Police Station at the time of the incident were the other prosecution witnesses. Sergeant Grant told the court that on the 11th May 1992, he along with Detective Sergeant Forrester conducted an identification parade. Three witnesses Cecil Robotham, Talbert Francis and Adella Gardener positively identified the appellant as the person they had seen on the day of the incident. Mitchell had been standing at positions number two, six and eight respectively when he was picked out by these witnesses.

Detective Sergeant Graveney said on the 24th April 1992, he was in the Criminal Investigation Bureau ("CIB") office when the appellant was brought there by Detective Inspector Ivor Cowan. Detective Inspector Cowan took the appellant to the inner room at the CIB office and cautioned him. The appellant first denied any knowledge of the murder. However the appellant then told the police that he knew the lady had seen him so he would tell him "how it go." The appellant gave a caution statement. The prosecution tendered into evidence the statement made by the appellant.

Detective Sergeant Dolphie Graveney who signed as a witness to the statement, read the appellant's caution statement. In the statement appellant placed himself at the scene of the robbery and murder. The appellant said he had a rusty 45 gun which could not discharge a bullet – pages 246-7. He said three of them were involved. Detective Sergeant Graveney further testified that the appellant told him that the guns were buried in a hut near his home at Turtle Pond. The appellant accompanied a team of police personnel to the area about 3:30 a.m. on the 25th April 1992 where they retrieved a crate containing three cartons of "Craven A" and two packs of Matterhorn cigarettes. The appellant said "a dem mi get from di van weh mi rob:" (page 252) The crate and its contents were tendered into evidence as exhibits.

The prosecution then called Dr. Victor Lindo. Dr. Lindo told the court that on the 24th April 1992, he conducted the post mortem examination on the body of George Taylor. The body was identified by Maria Taylor, sister of the deceased. He testified that on external examination he found a small entry gunshot wound on the head behind the right ear of the deceased. There were four lacerations on the top of the head and a compound fracture of the skull. There were also two lacerations at the back of the head with compound fractures of the skull. The internal examination revealed extensive fractures of the base of the skull. There were compound comminuted fractures of the vault of the skull

to the right and posterior. There were lacerations of the brain. Dr. Lindo further told the court that these injuries were caused partly by a bullet and partly by a blunt object such as the butt of a rifle. Dr. Lindo said death was caused by the fractures of the base of the skull due to a bullet wound.

The Defence

In an unsworn statement to the court, the appellant raised an alibi defence and denied all the allegations made against him. Mitchell told the court that he lived at Turtle Pond. He did farming and electrical installation for a living. Mitchell said on the 14th April, 1992, he was at home with his family. On the 24th of April he was on his way to Halsall when he stopped at a shop. While at the shop, he was apprehended by a police team and brought to the May Pen Police Station. He was taken to the CIB office. Mitchell complained that he was beaten by the police. He denied having made any caution statement. He did not take any police to his home and there was no hut on the property on which he farmed. The appellant denied any knowledge of the crime and described himself as a "hardworking and decent citizen of the country."

Grounds of Appeal

The original grounds of appeal are as follows:

1. Miscarriage of Justice
2. Insufficient evidence to warrant conviction.
3. Prejudice

Defence counsel, Ravil Golding, sought and obtained the leave of this Court to argue the following supplementary grounds of appeal:

1. That the learned trial judge erred in law when she failed to withdraw from the jury's consideration the offence of capital murder. The learned judge erred in that:

   (a) There was no direct evidence or other evidence from which it could inescapably be inferred that the appellant by his own act inflicted any injury to the deceased person that caused his death.

   (b) The only evidence linking the appellant to the offence of capital murder was that of the witness, Cecil Robotham, who claimed to have visually identified/recognised the appellant. That the visual identification evidence of Cecil Robotham was so grossly unsatisfactory that it should not have been left for the jury's consideration or if left, the learned trial judge should have pointed out to the jury the defectiveness in the quality of the visual identification evidence.

   (c) The fact that the witness Robotham did not disclose to the police the name or alias of the appellant whom he claimed he knew before the incident, at the first

opportunity, clearly demonstrates that the witness had doubts as to the identity of the appellant.

(d) The learned trial judge failed to point out to the jury that the firearm injury on the body of the deceased was inconsistent with (that which could have been) inflicted by weapon with which the appellant was alleged to have been armed.

2. The mandatory sentence of death imposed on the appellant for the offence of capital murder is unconstitutional.

Ground 1

Mr. Golding submitted that there is no sufficient evidence linking the appellant as the actual perpetrator of the murder. The visual identification or recognition evidence of Mr. Cecil Robotham was so poor that the charge of capital murder should have been withdrawn, he contended. He submitted that the learned trial judge did not highlight the areas of weakness in the Crown's evidence. He further contended that the trial judge failed to give the jury adequate directions on and assistance with circumstantial evidence.

Mr. Bryan for the Crown argued that the judge gave the jury correct direction on the proper approach to evidence of visual identification. However he conceded that the judge did not adequately assist the jury

with circumstantial evidence although proper directions on the relevant law were given.

Capital Murder

Section 2 –(1)(d)(i) of the Offences against the Person Act provides:

> "2 – (1) Subject to subsection (2) murder committed in the following circumstances is capital murder, that is to say –
>
> (a) ...
> (d) any murder committed by a person in the course or furtherance of -
> (i) robbery;
> ...

Section 2(2) provides:

> (2) If in the case of any murder referred to in subsection (1) (not being a murder referred to in paragraph (e) of that subsection), two or more persons are guilty of that murder, it shall be capital murder in the case of any of them who by his own act caused the death of, or inflicted or attempted to inflict grievous bodily harm on the person murdered, or who himself used violence on that person in the course or furtherance of an attack on that person; but the murder shall not be capital murder in the case of any other of the persons guilty of it.
>
> (3) ..."

The fact that the deceased was killed in the course or furtherance of robbery was not challenged in this Court by the appellant. This appeal therefore involves two main issues:

1. The first is whether the evidence is sufficient to establish that the appellant:

(a) by his own act caused the death of George Taylor or;

(b) inflicted or attempted to inflict grievous bodily harm on the deceased or;

(c) used violence on the deceased in the course or furtherance of an attack on him.

2. If the answer to the above is in the affirmative then the second issue is whether or not the judge's directions to the jury were adequate.

Was there a prima facie case of capital murder?

To answer the question we must examine the evidence of Mr. Robothan, Ms. Gardener, Mr. Francis and Dr. Lindo as well as the caution statement which was exhibited. Mr. Robotham's identification of the appellant by itself is clearly unreliable. According to Mr. Robotham he was sitting in the front of the van between the deceased and Mr. Peart, when he saw the person, whom he identified as the appellant, through the rear view mirror of the van. That person was about 15 feet behind the van when he recognised him. He had a stocking foot over his face. He said he saw him for seconds. His evidence at page 32 is:

"Q. For how many seconds?

A. I would not have no idea. I just glance and as me glance at him me recognise him."

In examination in chief, Mr. Robotham said he knew the appellant by the

name "Corpie" before the day of the murder. However, under cross-examination he said that he did not know his name before and he admitted that in his written statement to the police he had stated that it was after the identification parade that he "recognised the appellant as Corpie" (page 52). Mr. Robotham also testified that he saw the appellant pursuing the deceased, however he explained that he only saw the back of the head of the person who chased the deceased as he ran down the gully. To compound this he admitted under cross-examination that at the Preliminary Enquiry he had said "I did not see the back of the persons who ran down the gully. I did not actually see them run down the gully but I know where they ran." There can be no doubt that Mr. Robotham's evidence is unreliable.

However there is the evidence of Miss Gardener and Mr. Francis. Their evidence is to the effect that about 1:00 p.m. on the 14th April 1992 they saw the appellant, whom they knew very well before coming out of the bushes from the gully. The appellant took money from his pocket, counted it and replaced it in his pocket. The appellant had a long gun. He had a blue stocking over his head but his face was not covered. Miss Gardener said she saw what looked like blood stain on his shirt. Mr. Francis said he saw blood on the money. The appellant greeted them and then ran up the road. The appellant in his caution statement placed himself at the scene of the crime.

From the evidence of those witnesses the following facts may be found:

1. Mr. Robotham and Mr. Peart saw two masked men, one armed with a rifle and the other with a hand gun.

2. After the deceased had run down the gully into the bushes, Mr. Peart heard one of the gunmen tell the other to "cover them two yah mi a go run down dah one deh and kill him because him have the money."

3. Thereafter the man with the rifle chased the deceased into the bushes.

4. When the man with the hand gun had apparently left, Mr. Robotham ran towards the gully. He heard the deceased pleading for his life and heard an explosion and "the sudden impact."

5. Approximately 30 minutes after the start of the robbery, Ms Gardener and Mr. Fancis saw the appellant coming out of the bushes from the direction of the gully. He had a rifle (long gun). What appeared to be blood stains were seen on the appellant's shirt and on the paper money he was seen counting.

6. The body of the deceased was found in the bushes in the gully.

7. In the doctor's opinion the injuries he found on the body of the deceased were caused partly by a bullet and partly by a blunt object such as the butt of a rifle.

In this state of the evidence we do not think that there was a prima facie case that the appellant was the person who fired the fatal shot. This is so because (a) the whereabouts of the other gunman at the material time was unknown and (b) there is no evidence to indicate from which firearm the fatal bullet was discharged.

However in the light of the doctor's evidence that the injuries other than the bullet wound could have been caused by the butt of a rifle then on the basis of the evidence already outlined a jury properly directed could reasonably have come to the conclusion that the appellant was one of the persons who inflicted grievous bodily harm on the deceased. Accordingly, if they so found, the requirement of section 2(2) would have been satisfied in relation to the appellant.

It is therefore our opinion that there was sufficient evidence to establish the charge of capital murder. Having so found we must go on to consider the second question.

Were the directions and the assistance given to the jury adequate?

Counsel for the appellant complained that the trial judge failed to highlight the weaknesses in the identification evidence of Mr. Robotham. Even if this were so, and we do not say it is, this would not be a material misdirection because the prosecution's case did not depend wholly or even substantially upon the correctness of the identification evidence of Mr. Robotham. We have already referred to some of the many strands in

the composite whole on which the prosecution's case rests. Among these strands are the statement of the appellant which placed him on the scene and the positive identification evidence of Ms. Gardener and Mr. Francis. This complaint therefore fails.

Counsel also complained that the trial judge failed to assist the jury to apply the directions on circumstantial evidence to the offence charged and to the evidence adduced. Counsel for the appellant contended that properly assisted the jury might have returned a verdict of guilty of non-capital murder.

We do not find it necessary to examine this complaint because of the view we take of the learned judge's failure to place before the jury a possible conclusion which was open to them in the light of the appellant's caution statement.

The caution statement reads (pages 246 – 249):

> "Tuesday the 14th of April, 1992, about 7:30 a.m. I was at my house at Turtle Pond looking after my breakfast when Derrick otherwise known as 'Walkathon' come and tell me that he is going down by Shakeland Road to see if can look some money for the holiday. I turn to him and ask him what plan them under, he said that the cake car a come up and him going to see if him can take some money off the boy. I ask him who and who a go, him tell me that Coconut Head going. I ask him where was Coconut Head and him tell me that him gone fi di gun them. I tell him alright mi a drink mi tea and come. I drink mi tea and lock up the house and Derrick walk to Bull Head. We reach down to Shake Hand Corner about after 11:00. When we reach down

there we see Coconut Head because him did gone ahead of us. Derrick and me change off wi clothes. Derrick give me a old rusty 45 gun that can't fire and he had a Remington shotgun with two live rounds and Coconut Head have a home made gun with a live round. We line up some stones at the banking side to use and block the road. I go up on the topside to doo-doo then them say if I see anything coming I must shout to them. Meanwhile mi a doo-doo I see a van coming and I shout to them block the road. I know that the gun that they gave me don't have in no shot and I don't know if gunman in the sales vehicle. I don't go down same time. I see the driver chop after Coconut Head. Three man was in the van including the driver and them order them to come out of the van. The driver make to run, I held unto his shirt, he is a strong man and I could not hold him and he get away from me and ran. Same time 'Walkathon' come around and said to me, you mek the man run weh wid di money. He said all right stay with the rest a man and then him turn down in the bush after the man that ran. I heard the man down in the gully t'ief, oh t'ief oh thief. About a minute after I hear the gun go off down there. Walkathon did burs a shot before the man run in the gully. Walkathon was in the gully for a period of time and I shout to him and ask what happen, he replied the boy say the money in the van in a biscuit box. I turn back and go up which part the van was and I di not see the next two passengers that were in the van. I ask Coconut Head where the men them deh and he said he tell them to run and them run gone.

Little after now I hear a passenger van coming I know it was a van call English. The driver for it name Vincent Reeves. I then tell Coconut Head that I gone because the road block and them know me. He said he can't leave Walkathon because he was still in the gully. I told him I was going away. As I was about to leave I see a dread locks and him woman. They live near to

> where the robbery take place. When I saw them and realise say them see mi I was so frightened so I fled the scene and went home. I reach home about 3:00 p.m. before the rain start to fall. About 9:00 p.m. Walkathon and Coconut Head come to my house and ask me what type of business that how me run leave them. I turn to Coconut Head and said to him you nuh hear when mi tell you seh a woman see mi and know mi so mi gone, mi naw stand up. They were quarrelling with me and then them say them going to go and kill the woman because she a go give them away. I tell them not to do it because a mi see she, they persisted to go and kill her, but I talk them out of it. They give me three carton and two packs of Craven "A" and Matterhorn cigarettes and one hundred and forty dollars. I ask them how much money them got and them say it look like the man fling weh the money in the bush because them no find more than five hundred dollars. That is how it happen."

The learned trial judge's general directions to the jury in respect of the caution statement were in our view unobjectionable (pages 318 – 320 and 382). However it is clear to us that if the jury found that the appellant made the statement and that it contained the truth then it would have been open to them to find him not guilty of capital murder but guilty of non-capital murder on the basis that although he was a party to the murder he did not by his own act cause the death of Mr. Taylor or inflict or attempt to inflict grievous bodily harm on him or use violence on him in the course or furtherance of an attack. It was the duty of the learned trial judge to place before the jury all the possible conclusions which might be open to them on the evidence presented. See **Alexander Von Stark v The**

Queen Privy Council Appeal No. 22 of 1991 delivered 28th February, 2000 which was applied in **R.v. Andre Jarrett** S.C.C.A. No. 130 of 2001 delivered March 4, 2003. This was not done in relation to the caution statement. The trial judge's failure to do so deprived the appellant of the chance of being convicted for the lesser offence. Accordingly the conviction for capital murder cannot stand and the sentence of death must be set aside. We have treated the application for leave as the hearing of the appeal. The appeal is allowed, a conviction for non-capital murder is substituted for that of capital murder.

Mr. Golding informed the Court that the appellant had been in custody for about 11 years. He suggested an additional 10 years as being appropriate.

This is a very heinous offence. The fact that Mr. Taylor was murdered in the furtherance of robbery must not be overlooked. The punitive part of the sentence must, we think, reflect the seriousness of the offence and the denunciation of the conduct of the appellant.

The sentence of this court is that the appellant be imprisoned for life and be not eligible for parole until he has served 25 years. The sentence to commence as of the 3rd of January 2001.