

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 69/69

BEFORE: The Hon. President, Mr. Justice Henriques  
Mr. Justice Shelley  
Mr. Justice Eccleston

R. v. DONOVAN JONES

Mr. F. M. Phipps, Q.C. for the Appellant

Mr. A. S. Allen for the Crown

15th January, 1970 and  
February, 1970

HON. PRESIDENT,

The appellant was convicted at the St. Catherine Circuit Court on the 8th day of May 1969 of the offences of Shooting with intent and Wounding with intent and sentenced to seven years Hard Labour on each count, the sentences to run concurrently. He appealed against his convictions and sentences and the matter came on for hearing before the Court on the 15th day of January 1970 when the Court after argument quashed the convictions and sentences and ordered verdicts of acquittal to be entered. We then stated that we would put our reasons in writing at a later date. This we now proceed to do.

The appellant had been charged on an indictment containing seven counts, but verdicts adverse to him were returned only in respect of two. The appellant was first tried on the indictment at the St. Catherine Circuit Court on the 1st May 1968, but the trial was prematurely determined and the jury discharged. He was tried again on the 16th July 1968 at the same Circuit Court and again the trial was again prematurely determined and the jury discharged.

This third trial on the indictment took place on the 8th May 1969 and resulted in his convictions and sentences.

The case against the appellant arose out of an incident which took place in Kingston on the 1st July 1966, and only three witnesses gave evidence at the trial, Ruddy Sullivan, the complainant; Dr. Roy Saunders and a Detective Levers. When Ruddy Sullivan was in the witness box, Mr. Wilton Hill, who then appeared for the Defence, and who then was cross-examining him proceeded to make use of a transcript of the witness's evidence in one of the previous trials when the learned trial judge intervened and the following dialogue took place between Counsel and the Bench.

" HIS LORDSHIP: Are you examining him now on the proceedings taken at the Circuit Court trial on the 5th of July, Circuit Court proceedings?

DEFENCE COUNSEL: I am examining him on what happened at the trial.

HIS LORDSHIP: Do you have a copy of the notes taken at that trial?

DEFENCE COUNSEL: I do.

HIS LORDSHIP: What is your authority to get the notes to examine him on what happened at that trial?

DEFENCE COUNSEL: I need no authority to get the proceedings of what happened at that trial.

HIS LORDSHIP: You need no authority?

DEFENCE COUNSEL: I paid the Government £5. 8. 4d to get it.

HIS LORDSHIP: So you applied for a copy to the Registrar, you got it and that is sufficient authority for you to use it to cross-examine?

DEFENCE COUNSEL: Quite separate and apart from that you didn't ask if I was cross-examining from it, you asked if I had it.

HIS LORDSHIP: And you are using it to cross-examine the witness?

DEFENCE COUNSEL: I appeared at the trial in addition to that and I have my notes.

HIS LORDSHIP: Are you going to give evidence to contradict him?

DEFENCE COUNSEL: I can call the Shorthand Writer.

HIS LORDSHIP: I want to see how much time we are going to waste in this case.

DEFENCE COUNSEL: At the moment I am not the one who is wasting time.

HIS LORDSHIP: Yes?

DEFENCE COUNSEL: You remember my asking you this question - now, let me see if I can understand your story correctly. After you came out of the bar you took up your bicycle?

HIS LORDSHIP: Once again, Mr. Hill, are you reading from the transcript of notes of evidence in this case?

DEFENCE COUNSEL: I am not going to answer that question.

HIS LORDSHIP: Well, please answer it. Well, please take a careful note of this. Under the Court of Appeal Rules of 1962, published in the Jamaica Gazette Supplement dated 11th October, 1962, proceedings taken before the Circuit Court in a criminal case may only be supplied or produced where there is an appeal. The party who is interested in an appeal may obtain from the Registrar a copy of the transcript as it relates to the appeal and no person is entitled to a copy of the shorthand transcript taken at a criminal trial in pursuance of Court of Appeal Law for their use in cross-examination in a subsequent trial unless there is statutory authority for this to be done. The case of Ramlochan v. the Queen, 1956 (3) Weekly Law Reports pages 117 to 121 is quoted, also reported in 1956 Appeal Cases page 479.

" The court also refers to Rules 47 and 48 of the Court of Appeal Rules. I rule that you may not use the notes of evidence of the transcript taken at a previous trial for the purpose of cross-examining this witness on three grounds.

- (1) You have no right to get it, you should not have had it;
- (2) There is no means - because even this morning you were nebulous on it - as to whether or not what this witness is saying is correct; and
- (3) There is no statutory authority for this to be done as in the case of notes taken by a Resident Magistrate in pursuance of Section 27 of Chap. 179.

This is my ruling Mr. Hill and this can be tested elsewhere. Please continue your cross-examination. "

It was in respect of the ruling by the learned trial judge that the appellant appealed. His ground of appeal was: That the learned trial judge erred in ruling that Counsel could not use the transcript of the notes of evidence in a previous trial for the same offences to cross-examine the Crown witness. Counsel for the appellant submitted that the case for the appellant had been seriously prejudiced by the ruling of the learned trial judge, and that as a result a substantial miscarriage of justice had taken place. This was a case where the only material witness was the complainant; and the jury were entitled to have his credit tested before them in order that they might properly assess his evidence. He argued that any verdict they might return in circumstances where the defence was not permitted to test such credit could not be accounted a proper verdict. He referred to sections 17 and 18 of the Evidence Law, Cap. 118. Section 17 is to the following effect -

" 17. If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement."

and section 18 is as follows -

" 18. A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject matter of the cause, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him:

Provided always, that it shall be competent for the Judge at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purpose of the trial as he shall think fit."

Counsel's conduct was, he submitted, embraced by the terms of the statute. When invited to address the Court, learned Counsel for the Crown stated that he conceded the point.

It seemed to us that the learned trial judge in his ruling was labouring under a misconception when he considered the vital matter was the manner in which Counsel for the defence had obtained the transcript of the notes of evidence. It might be useful to point out that there is authority for the obtaining of the notes of evidence in a previous trial in the particular circumstances of this case. The Judicature (Supreme Court) Law, Cap. 180 as amended by Law 10 of 1960 contains the following provisions:-

" 12A (2). Shorthand notes shall be taken of the proceedings at the trial of any person on indictment in the High Court, and a transcript of the notes or any part thereof shall -

- (a) on any appeal or application for leave to appeal be made and furnished to the Registrar if he so directs; and
- (b) be made and furnished to any party interested upon the payment of such charges as may be fixed by Rules of Court whether the person tried was or was not convicted, or in any case where the jury were discharged before verdict."

The question of the obtaining of the notes was, to our mind, something quite immaterial when considering the question whether Counsel was embarking on a course of conduct which was permissible by the law. The provisions of sections 17 and 18 are perfectly clear, and it is unfortunate that they were not drawn to the attention of the learned trial judge. Counsel for the defence was in our view well within his rights when while cross-examining the complainant he referred to the notes of evidence in the previous trial and the ruling of the learned trial judge which prevented him from pursuing this course with a view to testing the credit of the witness had resulted in a miscarriage of justice.

We accordingly allowed the appeal and ordered the convictions to be quashed and the sentences set aside.