JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 87/2000

BEFORE: **THE HON. MR. JUSTICE HARRISON, P. (AG.)**
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE WALKER, J.A.

REGINA VS. KINO MITCHELL

Lloyd Sheckleford for appellant

Paula Llewellyn Acting Senior Deputy Director of Public Prosecutions for Crown

19th May & 12th June, 2003

HARRISON, P. (AG.)

This appellant was convicted on an indictment in the High Court Division of the Gun Court on 3rd April 2000 of the offences of (1) illegal possession of firearm and (2) wounding with intent by His Lordship Mr. Justice McIntosh and sentenced on 14th April 2000 to fifteen (15) years imprisonment at hard labour on each of the said counts to run concurrently.

From the outset the Court enquired of counsel for the Crown whether or not the conviction could be supported. Miss Llewellyn commendably admitted that she could not do so, but invited the Court to consider ordering a new trial.

We agreed with the view of counsel for the Crown, allowed the appeal, quashed the conviction and set aside the sentence. In the interests of justice, we ordered that a new trial take place within the current term.

These are our reasons in writing, mindful of the fact of the upcoming new trial.

The short relevant facts on the Crown's case are that on the 14th of September 1998 at about 4.00 p.m. the complainant Harold Cooper was standing in front of a shop on Tower Street in the parish of Kingston when the appellant dressed in underpants only and standing on the said street, allegedly pointed a firearm at him and fired it. The complainant was shot in the right upper arm. He ran into the shop bleeding from his wound. He received medical attention at the Kingston Public Hospital and later that day gave a statement to the police at the Elletson Road Police Station. A warrant dated 15th September 1998 was issued for the arrest of the appellant. On 7th December 1998 he pointed out the appellant to the police at the Elletson Road Police Station. The appellant said nothing. On that day the complainant gave a further statement to the police. The appellant had been known to the complainant for about 3 years. He would see him daily in the area where they lived. The appellant was arrested on the 7th December 1998 on the said warrant. When cautioned he said:

> "A lie the old man a tell, a fi him son a fire big gun down deh."

On the date of the trial the complainant was dead. The investigating officer Cons. Terrence Tingling testified that on 7th June 1999 he saw the body of

the complainant with multiple gunshot wounds to the chest, shoulder and right side lying in an area in the Rae Town fishing village behind the General Penitentiary. He attended a post mortem examination on the body of the deceased Harold Cooper at the Spanish Town Hospital morgue on 12th August 1999.

Consequently, at the said trial of the appellant, the eye witness' account of the incident led by the prosecution was contained in the statement of Harold Cooper dated 14th September 1998 and tendered in evidence under the provisions of section 31D(a) of the Evidence Act.

The appellant, giving his statement from the dock at the trial, said that he knew the complainant since he the appellant was seven years old. The complainant was like a father to him. The complainant's son who is a member of a gang fired a shot at the appellant's brother causing the former to be in custody. It was people who told the complainant to report to the police that he the appellant was "firing shot". They say that he is an informer and "every day dem complain at the station and say that I fire shot but it is lie."

The learned trial judge dealt adequately with the fact that the prosecution's case relied on the two statements given by the complainant who was deceased at the time of the trial, the fact that the court was deprived of the opportunity to observe the demeanour of the witness and the fact that the witness was not cross-examined. The learned trial judge went on, commenting on the statement of the appellant at page 37 of the record, said:

> "He says a lot of things but he has not even said that he did not shoot Mr. Cooper. So, there is nothing in the accused man's statement which actually questions or does in any way belittle the lie or impact on negatively the credibility of the complainant, Harold Cooper. So as far as the statement is concerned, apart from the statements made by the prosecution witnesses I place little weight on it noting the fact that it does not exonerate the accused." (Emphasis added)

This comment of the learned trial judge is less than accurate, because the appellant did say, in his statement "people" call him an informer and untruthfully encouraged the complainant to say that he fired shots. The appellant was alleging malice and bias, albeit ~~in~~ his ~~unsworn~~ statement.

Further, the learned trial judge on page 37, said:

> "Now, as I intimated to Defence Counsel when he made the submissions earlier in respect to this statement the two things which Crown Counsel admitted into evidence, even without the statement being admitted there would be certainly at least a prima facie case made out against the accused because the bottom line is that on the 8th day of December, 1998, the accused man, Mr. Kino Mitchell, was at the Elletson Road Police Station. The complainant, Mr. Harold Cooper, was at the Elletson Road Police Station in the presence and hearing of Corporal Herfa Beckford the complainant identified the accused man as being the man who shot and wounded him. That by itself would be sufficient for a prima facie case and it is, as far as this court is concerned very significant that the accused man now face to face with his accuser, a man who on his statement, he reflects as a father; he made no statement, he asked no questions and he did not in any way indicate that the complainant was not speaking the truth. As far as this court is concerned, on that evidence without more, that is the evidence that the complainant was shot. The evidence is that

> when the accused was faced by the complainant who said he shot him he, the accused, said nothing. This court would on that evidence find the accused man guilty as charged ...". (Emphasis added)

Although the learned trial judge seems to be basing his comments on the silence of the appellant on the fact that it may be a case of "persons" speaking on even terms", he however failed to take into consideration the further fact that the appellant was then in custody and that on the prosecution's case there was no accompanying adverse conduct on the part of the appellant. There was a clear denial of the charge when the appellant after arrest and caution said:

> "A lie the old man a tell, a fi him son a fire big gun down deh." (See **Parkes v. R** 64 Cr. App. R. 25 PC)

In that context, the issue of credibility would have to be considered.

Additionally, although this is a case of recognition in that, the complainant knew the appellant for three years before the incident and also knew his relatives as well as being known by the appellant, the issue of identification arose for treatment by the learned trial judge. The statement of the complainant is silent as to any period of time that he was able to see his assailant prior to or after the shot was fired. Although the incident is alleged to have occurred at 4.00 p.m. it was undoubtedly a brief sighting. The requirement for a ***Turnbull*** [1977] Q.B. 244 warning, even in recognition cases was confirmed by the Judicial Committee of the Privy Council in ***Beckford et al v. Regina*** (1993) 42 WIR 291. The headnote at page 291 reads:

> "Where the substantial issue in a case is the credibility of an identifying witness, a general warning

> must be given by the trial judge to the jury concerning the danger of relying on identification evidence; such warning is as important where the case is one concerning recognition as it is in cases concerning the identification of a stranger. The failure to give any such warning will nearly always by itself be fatal to a conviction based on identification evidence."

Giving an example of one of the circumstances where a warning may not be necessary, Lord Lowry, giving the opinion of the Board at pages 298 - 299 said:

> "The need to give the general warning even in recognition cases where the main challenge is to the truthfulness of the witness should be obvious. The first question for the jury is whether the witness is honest. If the answer to that question is 'Yes', the next question is the same as that which must be ~~asked~~ concerning every ~~honest~~ witness who purports to make an identification, namely is he right or could be mistaken?
> Of course no rule is absolutely universal. If, for example, the witness's identification evidence is that the accused was his workmate whom he has known for twenty years and that he was conversing with him for half-an-hour face to face in the same room and the witness is sane and sober, then, if credibility is the issue, it will be the only issue. But cases like that will constitute a very rare exception to a strong general rule."

The learned trial judge at no time sought to advert his mind to the issue of identification and in that respect we are of the view that he was in error.

A further issue to which the learned trial judge adverted his mind was the circumstance in which the statement of the complainant was utilized by the prosecution in proof of its case, under the provisions of the Evidence Act. At page 39 he said:

> "This court accepts that the law under which the statements are allowed into evidence was one which was thought necessary because of the level of violence in our country. Unfortunately witnesses are killed before they come to court to give evidence and clearly this is one such case where the witness was killed so as to prevent him giving evidence in this case, so that when Defence Attorney says that this court could have had other witnesses it seems that the fact that this man, the complainant, Harold Cooper, made a report, there must have been reasons why he was killed and it certainly would have been a terror to any other person in the community coming forward. On the statement of the complainant he regards the accused as a gunman, one who fires gun for no reason at all other than firing gun and he says the community is scared of him. Clearly no witness would have come forward and clearly this witness only came forward because he was actually shot: and having come forward it has cost him his life." (Emphasis added)

It is sufficient to say that there was no evidence before the learned trial judge to support his assertion that the witness was killed because of the fact that he was a witness in the case concerning the appellant. To come to such a conclusion in the absence of any evidence was less than fair to the appellant and may have created a prejudice to him.

Finally, the said statement of the deceased witness contained several hearsay and prejudicial statements. Unedited as they were, the learned trial judge, should have demonstrated in his summation that he did not take them into consideration, in determining the guilt of the appellant. Repeating as he did on page 40 of the transcript:

> "On the statement of the complainant he regards the accused as a gunman, one who fires gun for no reason at all other than firing gun and he says the community is scared of him."

is a clear indication that the opinion of the witness and the alleged reputation of the appellant were wrongly taken into account.

We examined the principles which govern the consideration of the Court of Appeal when it seeks to determine whether or not to order a new trial (**Reid v. R** [1979] 2 All E.R. 904). We are of the view that in all the circumstances of the case and the nature of the evidence it is proper to do so.

For the above reasons we made the orders referred to above.