JAMAICA

IN THE COURT OF APPEAL

CRIMINAL APPEAL No. 21/1973

BEFORE: The Hon. President.
The Hon. Mr. Justice Hercules, J.A.
The Hon. Mr. Justice Robinson, J.A.(ag.).

R. v. LESLIE HARPER

Mr. Henderson Downer for Crown.

Mrs. Margaret Forte and Mr. R.I. McIntosh for Applicant.

10th, 11th October and
16th November 1973

HERCULES, J.A.:

This application was based entirely on the complaint of a procedural lapse on the part of Robotham J. Complaint was also made that the lapse was aggravated during the course of an otherwise admirable summing-up.

At the end of the hearing, when we ordered a new trial, we promised to put our reasons for so doing in writing. In view of the order aforesaid, we consider it undesirable to discuss the evidence in any detail in giving these reasons.

The Applicant was convicted in the St. Mary Circuit Court on 20th February, 1973, of 2 counts: (1) Burglary and (2) Office breaking and Larceny. The only evidence identifying the Applicant as the intruder in the dwelling-house of Joseph Pollock and in the adjoining Brainerd Post Office on the night of 22/23 September 1972, was that of the Postmaster, Monica Francis. The defence was mistaken identity and alibi, as to which the Applicant called 3 witnesses including Mr. Ted Harris.

The Cross-examination of Monica Francis, taken from page 8/9 of the transcript, proceeded as follows:-

Q. Haven't you known Mr. Ted Harris for many years now?

A. Yes Sir.

Q. You have been to his home?

A. Yes Sir.

Q. You have been there when his wife is at home?

A. Yes Sir.

Q. At Richmond Road?

A. Yes Sir.

Q. You have stayed there?

A. Yes Sir.

Q. And you don't know that Mr. Harris has a shop? (Witness had said earlier on that she didn't know Harris had a shop).

His Lordship: What is the relevance of this?

Defence Attorney: The relevance will emerge in a little while from now.

His Lordship: I hope you are not just pulling straws out of the air you know.

Defence Attorney: No Sir, I would never do that.

His Lordship: Whatever you are going to do I take it you can back it up.

Defence Attorney: I have never done nor do I intend to pull straws out of the air. You regard Mr. Harris as a good friend of yours?

A. Yes Sir.

Q. After this incident did you meet Mr. Harris and his wife at your father's house?

A. No Sir.

Q. Did you see him at your father's house after this incident?

A. Yes Sir, I saw Mr. Harris.

Q. There?

A. Yes Sir.

Q. And you spoke to him?

A. Yes Sir.

Q. And you spoke to him about this case?

A. Yes Sir.

Q. Now I am putting it to you that you, when you were talking to Mr. Harris at your father's house you began to cry?

A. I didn't cry.

Q. And that you told him .....

His Lordship: No, hearsay is hearsay.

Defence Attorney: In certain circumstances.

His Lordship: No circumstance at all. I have always maintained that unless it falls within one of the recognised exceptions it is hearsay. Was the Accused present?

A. No Sir.

His Lordship: Well it is hearsay.

At this stage, obviously in deference to the ruling of the learned trial judge, Defence Attorney desisted from trying to get from the star witness Monica Francis what she told Ted Harris. Be it remembered that Ted Harris was called as a witness for the defence, presumably for the purpose of affording the backing up about which the learned trial judge appeared somewhat apprehensive. However, since Monica Francis was prevented from giving the evidence, there was nothing for the witness Harris to back up. So the damage was done when Monica Francis was being cross-examined, but in order to complete the record, we shall advert at once to what happened when Harris gave evidence-in-chief at page 15 of the transcript:-

Q. Do you know one Monica Francis?

A. Yes Sir.

Q. After this date, after this day you are talking about did you see her at all anywhere?

A. Yes Sir.

Q. Where you saw her?

A. I saw Miss Francis at her father's house in Platfield in the parish of St. Mary.

Q. When was this?

A. This was the Sunday.

Q. After Harper's arrest or after the breaking?

A. The Sunday morning after the incident.

Q. You saw her at Platfield at her father's house. You spoke to her?

A. Yes Sir.

Q. She spoke to you?

A. Yes Sir.

Q. She spoke to you concerning this case?

A. Yes Sir.

Q. What did she say to you?

Crown Attorney: Object.

His Lordship: Remember that I warned you of this yesterday, Mr. McIntosh?

Defence Counsel: M'lord, I would submit that it goes to the credit of the witness Francis. However you and she had a conversation, Mr. Harris?

A. Yes Sir.

Q. And during this conversation, did anything happen?

A. Yes, she started crying.

Again Defence Attorney desisted from trying to get evidence of what Monica Francis told Harris, in deference to the ruling of the learned trial judge.

The learned trial judge was moved merely by the general principles relating to the exclusion of hearsay evidence. Two of the reasons for excluding such evidence are (1) The Accused was not present and (2) It did not come within one of the recognised exceptions. (See Archbold Criminal Pleading Evidence and Practice 1071, 37th Edition). But Glanville Williams in his 3rd Edition of "The Proof of Guilt" at page 209 is apposite at this juncture:- "A discretion to exclude remote and insubstantial evidence is necessary for any tribunal. But opinion is hardening that the technical English rules of hearsay, which may have the effect of excluding evidence of the greatest persuasiveness, are neither necessary nor easily workable."

As mentioned in the first paragraph of these reasons, complaint was also made that the learned trial judge aggravated the exclusion of part of the evidence of Monica Francis and Ted Harris when he stated, in dealing with the latter's evidence in the summing-up at page 18:-

> "He knows Monica Francis and he said he saw her at her house at Platfield the Sunday after the incident. They spoke concerning the case and she started to cry and he left. Well, you don't speculate as to what was said because what was said - you heard me stop counsel from trying to lead it. You can't speculate because what was said in the absence of the Accused is not evidence that can properly be put forward, so don't indulge in any speculation as to what was said or why she was crying."

Several cases were referred to by Mrs. Forte and Mr. Downer on the ruling of the learned trial judge. But apart from the fact that most of those cases can be distinguished from the instant case, we do not need elucidation

for the clear and unambiguous provisions of Section 17 of the Evidence Law, Chapter 118. That Section reads as follows:-

> "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."

What Defence Attorney was seeking to do when he was cross-examining Monica Francis and when he was examining Ted Harris in chief was entirely in keeping with the provisions of that Section. The prerequisites were all fulfilled, the ground was prepared and the learned trial judge fell into error by relying on general principles for excluding hearsay when he ruled to exclude the evidence. The ruling could well be said to have been in breach of the statutory rights of the Accused. It is unfortunate that no reminder was forthcoming from Defence Attorney or even from the Crown Attorney to the learned trial judge as to the true position i.e., that the provisions of Section 17 of the Evidence Law were being invoked.

In the case of Richard Charles Hart (1958) 42 Cr. App. R. 47 the headnote sufficiently identifies the position under consideration:-

> "The principle established statutorily by s.4 of the Criminal Procedure Act, 1865, that if a witness gives evidence of a fact directly relevant to the issue (as distinct from a matter going only to credit), it can be put to him that he has on some previous occasion made a contradictory statement to another person, and that if he denies it, that other person can be called to give affirmative evidence of the statement, applies to statements of every kind and is not confined to statements on oath or by way of depositions or in writing."

Indeed it is to be noted that Section 17 of the Evidence Law, Chapter 118, bears the identical wording of Section 4 of the Criminal Procedure Act, 1865.

What happened in the case of Hart (supra) was that the appellant had been convicted of wounding with intent to do grievous bodily harm. At the trial, a witness for the prosecution denied in cross-examination that

the victim had been holding a bottle at the time of the incident. The trial judge refused to allow the defence to call a witness to give evidence of a former statement made to him by the witness for the prosecution which was contradictory to that witness's evidence at the trial. The Court of Criminal Appeal held that the exclusion of this evidence was wrong, since it was admissible under Section 4 of the Criminal Procedure Act, 1865, as evidence of a fact relevant to the crime. The proviso was applied however and the appeal was dismissed.

Unfortunately, the learned trial judge did not get any assistance from the Attorneys in the case and he proceeded to apply the general principles of the hearsay rule rather rigidly and prematurely. In so doing he not only breached the Applicant's statutory rights but he also (Mrs. Forte's word) 'amputated' the defence of mistaken identity and alibi. We therefore yielded to Applicant's sole ground

> "That the learned trial judge erred when he disallowed evidence of a conversation between the Complainant Monica Francis and a witness for the Defence Ted Harris in which certain admissions were made by the Complainant as to the identity of the perpetrator of the crime and thereby prevented the applicant from adequately putting forward his defence."

There is no knowing what view the jury would have taken of the missing evidence. We agreed with Mrs. Forte that this case, unlike the case of Hart (supra), is not a proper case for the application of the proviso. But we could not see our way to enter an acquittal.

In the result we granted the application for leave to appeal and treated the hearing of the application as an appeal. We allowed the appeal, quashed the conviction and in the interests of justice, ordered a new trial at the next sitting of the St. Mary Circuit Court - the Appellant meanwhile to be kept in custody.