

WML

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 33 & 34/97

**BEFORE: THE HON. MR. JUSTICE RATTRAY, P
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.**

**R. V. MARLON MITCHELL
ANDREW GUTHRIE**

L.H. Bunny-McLean for Guthrie

Karen W. Gray for Mitchell

**Kent Pantry, Q. C. Senior Deputy Director of Public Prosecutions &
Lisa Palmer for Crown**

**7th, 8th July 22nd, 23rd September 1998
& 12th February 1999**

RATTRAY, P.

On the 6th March, 1997 in a trial in the Home Circuit Court presided over by Walker, J and a jury the appellants were found guilty of non-capital murder of one Steve Cordwell and sentenced to life imprisonment as the law mandates.

The sole eye-witness to the murder was one Rohan Richards who died between the taking of his deposition at a preliminary enquiry held on the 21st July 1994 by a Resident Magistrate at the Gun Court, and the time the case against the appellant came on for trial.

The trial judge admitted the transcript of the deposition into evidence as provided for by section 34 of the Justice of the Peace Jurisdiction Act which reads inter alia:

"34. ...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: ..."

It has been well established in our jurisdiction that the trial judge has a discretion to determine whether or not he will admit the deposition (See *Dockery v. R* [1963] 5 W.I.R. 369 at p. 374 A-B).

The discretion is not to be found in the wording of the Jamaican Statute but rather rests upon the discretion at common law to admit such evidence if the interests of a fair trial demand such admission in the circumstances of the particular case: (*Scott v. R* [1989] 2 W.L.R. 924,) a Privy Council decision from Jamaica "It is the quality of the evidence in the deposition that is the crucial factor that should determine the exercise of the discretion." (per Lord Griffith p. 934).

The evidence of the death of the deponent Rohan Richards was given by Marlene Brown the mother of Richards and who also was the mother of Steve Cordwell o/c "Chippy" the deceased in respect of whose death the appellants were charged for murder. Her evidence not only established the death of the witness but stated the circumstances under which the witness died. He had been shot and killed in her presence by a man named Barry.

The facts and circumstances surrounding the murder of Steve Cordwell as gleaned from the deposition of Rohan Richards taken at the preliminary examination revealed that Cordwell was gunned down on Paradise Street, Kingston at about 1.30

p.m. on the 8th March 1994. Three men were allegedly involved in the killing, the appellant Marlon Mitchell, referred to as "Mullo", a man referred to as "Kunda" who was not before the Court, and the appellant Andrew Guthrie referred to as "Kiah". The deceased and Kunda were talking on the street. To quote from the deposition - "Mullo" (i.e. Mitchell) was carrying a gun - the size that police usually carry. Gun was pointing at Chippy who was still on his bicycle. Mullo came up close to Chippy and start to fire at Chippy. Kunda took out a gun from his waist and start to fire at Chippy. When shot did a fire I see Kiah (Andrew Guthrie) appear from no where with a barrel gun like police use in his hand pointing. Chippy jump off the bicycle and start to run and then him drop. At first Kiah point gun at both accused as he was coming out of yard then he point it at Chippy. When Chippy drop Kunda take up the bicycle and head fi down Paradise Street. The two accused then start to run down Paradise Street." The underlined is an obvious error since Kiah (Guthrie) was one of the accused. (My emphasis)

The deponent knew both appellants before the incident Mullo (Marlon Mitchell) for about a year and Kiah (Guthrie) for about 4 to 5 years.

The deponent was cross-examined and from this it emerged that the witness was about 44 yards away from where the deceased and Kunda were speaking. The deposition continued - "The gun that Kunda had was not barrel gun it was a 'matic'." Further, "Mullo came out of yard with gun in his hand. Mullo had a matic in his hand. It was black. Three of them gun was black." ... "Only matic alone fire not barrel gun."

The preliminary examination had commenced on the 21st July, 1994 and on the 19th September 1994 the witness was recalled for further cross-examination. On this occasion he stated:

"I was about 70 metres from where my brother was when I first saw him."

He also stated:

"True I told court on last occasion that Kiah came on scene after Chippy jumped off bicycle started to run and fell. Now say that Chippy never drop yet."

Further:

"Never said that I saw Kiah point gun but never fire. I said on last occasion that Kiah did fire. Not say that barrel and matic gun fire that day. I made mistake on 21/7/94 I knew difference between matic and barrel gun." (My emphasis)

On the 17th March, 1994 the investigating police officer Det. Sgt. Wilbert Sterling was a member of a police raiding party in the Rae Town area of Kingston. Some 25 men were taken into custody and brought to the Criminal Investigation Bureau office at Elletson Road. The deponent Richards attended there and pointed at the two appellants. No identification parade was held.

The main Grounds of Appeal urged before us by Counsel for the appellant Mitchell, Miss Karen Gray and for the appellant Guthrie Mr. L.H. McLean challenged:

1. The verdict as unreasonable having regard to the evidence;
2. the trial judges summing-up in respect of identification;
3. the admission by the trial judge of the evidence of Marlene Brown the mother of the deceased Steve Cordwell and the respondent Rohan Richards as it related to the circumstances of the killing of Rohan Richards the witness;
4. the quality and content of the Judge's summing-up as failing to meet the requirements of a fair and balanced direction to the jury.

The statutory provisions of section 34 of the Justice of the Peace Jurisdiction Act allow the depositions of the witness to be admitted if it is proved that the witness is dead. The manner and circumstances of the death of the witness are not relevant to the admission of the deposition especially in circumstances such as found in the instant case where despite judicial warning the manner and circumstances are inherently highly prejudicial to the obtaining of a fair trial.

In dealing with the evidence of Marlene Brown, which was only relevant to establish the death of the witness Rohan Richards for the purpose of admitting his deposition into evidence, the trial judge said:

"You heard the evidence of the witness Marlene Brown, she is the mother of Steve Cordwell whose death forms the subject matter of this charge that you are trying. She is also the mother of Rohan Richards who was a witness in this case. Cordwell and Richards were brothers, and Miss Brown told you that Rohan Richards was killed before her very eyes by a man named Barry whilst he was a witness in this case. So she has lost two sons, and you may feel great sympathy for her. What you must not do is to allow that sympathy to influence you in any way in coming to your judgment in this case."

And further:

"...and one thing I warn you that you must not do is to assume that Rohan Richards was killed because he was a witness in this case, and you should not assume that the killing of Rohan Richards in any way indicates the guilt of any of these two defendants now before the Court.

You may be tempted to think and to wonder, you know, I wonder if Richards was killed because of the fact that he was a witness in this case, and you might even go further to wonder whether, if he was killed for that reason, whether it does not point to the guilt of one or other of these two defendants. You must not go that road at all. That would be wrong."

Later in the summing-up the trial judge continued:

"Come the 26 of November, 1994 same year, Rohan Richards is gunned down before her very eyes. Rohan was otherwise called Winjy. He was 19 years old at the time of his death and he was a witness in this case involving the death of Steve Cordwell. She said that Rohan was killed on Brae Street in Kingston. He was killed by a man named Barry. Rohan Richards was shot to death by Barry. Up to the time of his death Rohan was also living with her.

So Rohan did not survive, members of the jury to give evidence before you."

In our view the circumstances of the death of Rohan Richards as distinct from the fact of his death was inadmissible evidence which despite the warnings of the trial judge would have been gravely prejudicial to the appellants. Indeed no warnings would

have been necessary if the proper course had been followed, that is the adducing of proof only of the death of Rohan Richards.

The next issue to be examined relates to the direction given by the trial judge with regard to how the jury should treat the admitted evidence contained in the deposition of the dead witness. The circumstances required the clearest instruction from the learned trial judge to the jury of the disadvantages inherent in the assessment of the evidence of a witness who had not personally given evidence before the jury and whose demeanour therefore they did not have an opportunity of noting as a component of the determination of that assessment. Although the standard of proof remains the same in every criminal trial which is that the adjudicator of fact must be sure or put another way satisfied beyond reasonable doubt, the cogency of that evidentiary material must be assessed bearing in mind the seriousness of the particular criminal offence charged. It is even more so when the crucial evidence is put in by way of a deposition; and which contains the only evidence of identification linking the persons charged with the committal of the offence. The trial judge gave the following general direction:

"Try to recall the demeanour of the witness as the witness gave evidence from the witness box. You should take into account the level of a witness' intelligence and the witness' ability to put into words what he or she has seen. You should take into account the powers of observation of the witness and any defects that the witness may have".

Both appellants gave unsworn statements from the dock and in dealing with these unsworn statements the trial judge stated:

"Neither of these two appellants was a witness in this case. Neither of them came into the witness box and gave evidence like the other witnesses. Each of them made unsworn statements from the dock. He had a right to do so. In such circumstances where a defendant makes an unsworn statement from the dock nobody can ask him any question. You saw the other witnesses. They gave evidence and they open themselves to questions both examination and cross-examination."
[Emphasis added]

The general reference to the evidence of "the other witnesses" and the jury seeing "the other witnesses" was of course inaccurate in relation to the evidence of Rohan Richards.

There were several references in the summing-up to what Rohan Richards said or "is saying" or "what he told you" which would have confused the jury since these were the very words also used with reference to the evidence of those witnesses who had given their evidence under oath in the presence of the jury. The starkness of a statement by the judge that "Rohan Richards said he was there and saw what happened" could not have been without an effect greatly adverse to the appellants.

The learned trial judge however, did tell the jury -

"I wish to remind you in relation to Rohan Richards that the fact of the matter is that you have not had the benefit of hearing Richards' evidence tested before you. That is something that you will have to take into consideration when you come to consider how far you can safely rely on the evidence of Richards which is contained in that deposition, Exhibit one. You saw all the other witnesses in this case.. You didn't see him. So remember that."

Not once however, in the summing-up did he tell the jury that they were at a disadvantage in not having an opportunity to assess the demeanour of the witness Rohan Richards.

In suggesting to the jury "some of the questions that you can ask yourselves when you come to determine and decide upon this critical question of identification" the trial judge stated inter alia:

"So the first question you are to consider is whether the witness Rohan Richards impresses you as an honest witness"

And later in respect of the distance between Richards and the place where the shooting took place:

"Richards again told you the distance was some 70 metres away from where he stood on Windward Road at the intersection of Windward Road and Paradise Street".

In our view the directions by the trial judge on the evidence of the deceased Rohan Richards, the only eye-witness, admitted in evidence through his deposition did not meet the standard of care required by the circumstances of the case.

There was another unsatisfactory aspect of the summing-up to which we will refer without expanding. There was no identification parade held with respect to the appellants and the jury received no guidance in this regard. The trial judge directed as follows:

"You heard the evidence of Detective Sergeant Sterling of a raid that they carried out, and they seemed to have scraped up at least 25 men from the Rae Town area, and they had all of the men at the station, and Detective Sterling said that Rohan Richards came there and pointed out these two men out of the whole crowd who were at the C.I.B., in the C.I.B. building, as two of the men who had killed his brother."

One final area comes for examination. The deposition of Rohan Richards with respect to the weapons the appellants used to commit the murder and to part of which I have already referred recorded as follows:

" 'Mullo' (Marlon Mitchell) was carrying a gun the size that police usually carry. ... Mullo came up close to Chippy and start to fire at Chippy. Kunda took out a gun from his waist and start to fire at Chippy. When shot did a fire I see Kiah (Andrew Guthrie) appear from no where with a barrel gun like police use in his hand pointing. ... the gun that Kunda had was not barrel gun it was a 'matic'. ... Mullo came out of the yard with gun in his hand. Mullo had a 'matic in his hand it was black. ... Mullo first fire can't say how many shots. Only matic alone fire not barrel gun. When Mullo first fire Chippy already a turn and then Kunda pulled his gun and both of them fire into Chippy's back."

This part of the deposition was given on the 21st July, 1994. On the 19th of September, 1994 the witness was recalled for further cross-examination. On that occasion he deponed:

"I now say I hear the barrel gun fire. ... I don't know from who shot fire but I know they both were firing. ... I see Kiah with short barrel gun ... I don't remember

telling Court I saw Kiah come from no where after shooting. Chippy started to jump off bicycle when Kunda draw gun out of his waist. When he jump off bicycle he got one shot already he turned to run the rest of shot then start to fire on him backways. He dropped soon after on his face. True I told Court on last occasion that Kiah came on scene after Chippy jumped off bicycle started to run and fell. Now say that Chippy never dropped yet. Never said that I saw Kiah point gun but never fire. I said on last occasion Kiah did fire. Now say that barrel and matic gun fire that day. I made mistake on the 21st July, 1994. I know difference between matic and barrel gun."

No direction was given by the trial judge to the jury in relation to the fact that the witness had said one thing when he first deponed at the preliminary enquiry and after that date at the adjourned hearing, had withdrawn and changed his evidence from what he said on that occasion.

The relevance of the evidence cited is highlighted by the fact that on the evidence of Sergeant Sterling, the investigating officer, no spent shells were recovered from the scene. The bullet taken from the body of Steve Cordwell was a .38 Calibre bullet. The evidence of the firearm expert was that a "matic" which refers to a semi-automatic 9mm pistol, ejects the spent cartridge case but the .38 revolver retains the fired catridge case in the chamber.

The trial judge made no comment on the conflict in the evidence of Richards on the first day that he deponed as against his deposition taken after the adjourned hearing as to the type of weapons being carried and by whom. Indeed, his emphasis was as follows:

"Remember the evidence members of the jury of Richards about the guns that he saw the men with. Gun like police carry. He said he saw Guthrie with a barrel gun like police use. He also talked about seeing a matic meaning automatic. Well, the evidence in this case is that Sergeant Sterling found no cartridge cases at the scene of the incident. Asst. Commissioner Wray's evidence is that where the Smith & Wesson revolver was used the cartridge cases are retained in the weapon they are not ejected, so you would not find anything on the ground if a .38

Calibre weapon is used, you would find empty cartridge cases if an automatic weapon is used because those cartridge cases are ejected after the cartridge is fired. Rohan Richards said Mitchell was carrying a gun the size that police usually carry and the witness Wray tells you the police use .38 Smith & Wesson revolver. So, according to Richards both Guthrie and Mitchell were sporting, if I can use those words guns which look to him like the type that the police used - it is for you to say whether those guns were of that type, whether you can draw the inference from all the evidence that you have heard in this case that the guns were .38 Calibre guns, if you find that there were any guns at all."

The learned trial judge however made no reference to the fact that in the deposition the witness Richards in relation to the guns and what took place had retracted what he had said on the first day of giving his deposition.

In our view therefore the admission of the evidence of the circumstances under which the deponent Rohan Richards met his death as well as the deficiencies in the summing up to which we have referred provide sufficient reasons to allow the appeal; set aside the conviction and sentence and enter a verdict of acquittal.