JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 76/97

COR: THE HON. MR. JUSTICE RATTRAY, P
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.

R. V. MICHAEL BARRETT

Delano Harrison & Fara Brown for appellant

Hugh Wildman, Deputy Director of Public Prosecutions & **Dawn Eaton**, Crown Counsel for Crown

18th, 19th May & 31st July, 1998

RATTRAY, P.

The appellant was found guilty in the Home Circuit Court on two charges of murder with count 1 of the indictment being in respect of the murder of one Lynette Smeikle and count 2 the murder of one Lewin McPherson

The Crown's case was that the deceased were shot at a bar at 51 Maxfield Avenue shortly after 10.00 p.m. on the 19th May, 1992.

In order to establish its case against the appellant, the Crown relied upon a statement given by one Herbert Brady and taken down in writing by Det. Inspector Ivanhoe Thompson on the very night of the shooting. That statement was handed by him to Det. Corporal Trevor Davidson, the police officer in charge of the investigation. Consequently, Det. Corporal Davidson obtained a warrant for the arrest of Mr. Michael Barrett, alias 'Barros' a person whom he knew before.

The further evidence relied upon by the Crown came from Cons. Daley, who on the 25th of May attended the University Hospital where he saw the appellant in a wheelchair in the Casualty Department. He had known the appellant before and

referred to him as "Michael Barrett otherwise called 'Barros'. " He spoke to the appellant who said to him - "Dem kill Precious and mi nuh business what waa happen to me."

Det. Corporal Davidson saw the appellant in the lock up at Hunts Bay Police Station after he had got the warrants for his arrest. His evidence was that I identified myself to him and cautioned him. Then I told him I am investigating two counts of murder of Lynette Smeikle and Lewin McPherson on the night of the 19th May, 1992 at Maxfield Avenue. And I also told him of the warrants I had for his arrest.

Q. Now, did the accused man say anything at that stage?

A. Yes ma'am.

Q. What did he say?

A. He said 'Dem kill me baby mother and me no see nothing a gwaan.'

Mr. Herbert Brady gave evidence at the Preliminary Enquiry at the Gun Court. However, he did not give evidence at the trial. He did not attend the Home Circuit Court on the several occasions that the case came on for trial.

Corporal Davidson gave evidence that he made unsuccessful efforts to find Mr. Brady. That evidence was that he made enquiries from Mr. Brady's son "Anthony and other people". He was unable to locate Herbert Brady. He looked for him in the Portmore area, Sundown Crescent and Weymouth Drive but without success.

On the basis of Corporal Davidson's evidence in this regard it was sought to put in evidence by the Crown, not the deposition given by Mr. Herbert Brady at the preliminary enquiry but the statement which he had given to Det. Corporal Davidson. After strenuous objection by the defence the trial judge admitted Mr. Brady's statement.

The main ground of appeal challenges the judge's admission of Mr. Brady's statement on the following grounds (a) that the statutory conditions precedent to the reception into evidence of the statement had not been met; (b) that the judge

did not exercise properly his common law discretion to exclude the statement and consequently the appellant did not receive a fair trial.

The trial judge admitted the statement by virtue of the provisions of section 31D(d) of the Evidence (Amendment) Act 1995 which reads:

> "... a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if it is proved to the satisfaction of the court that such person -
>
> (a) - (c) ...
>
> (d) cannot be found after all reasonable steps have been taken to find him."

Despite the legislative provision the admissibility of a statement is first determined by the trial judge who must decide whether in all the circumstances it is fair that this statement should be admitted. The trial judge listened to the objections and made his ruling that it was admissible. He would have concluded therefore that the pre-condition of reliance as to admissibility on the failure to find Mr. Brady that "all reasonable steps have been taken to find him" had been satisfied. He would also have had to consider that this evidence, that is the contents of the statement, was the only evidence which connected the appellant to the commission of the crime.

We are therefore concerned in these circumstances with whether the evidence given as to efforts to find Mr. Brady were sufficiently cogent to satisfy the judge that they were reasonable. In our view the requirement of <u>all</u> (emphasis mine) reasonable steps being taken to find the maker of the statement as a pre-condition to its admissibility were not met in the perfunctory evidence of such efforts given by the Crown witness and without any indication of what information could have led the police to carry out the search in the areas which they indicated and from what sources the information was obtained. Indeed Anthony Brady, Mr. Herbert Brady's son was not called as a witness.

The other two statements purportedly made by the appellant orally could not also in our view amount to any admission on his part of his presence on the scene of the murders and his commission of the offences. In **Henriques and Carr v R** [1991] 31 W.I.R. 253 the question being considered by the Judicial Committee of the Privy Council was the admissibility of deposition evidence given at the preliminary enquiry by a witness absent from the Island at the time of trial. Lord Jauncey of Tulichettle stated at page 258:

> "A judge, faced with an application to admit the deposition of an absent witness, should weigh up all the factors relevant to its grant and refusal before reaching a decision, which should seek as far as possible to do justice between the parties and ensure a fair trial. The importance of the evidence to be given and the availability within a reasonable time of the witness to give it are clearly relevant factors ... ".

Further,

> "In his summing-up the judge directed the jury that they could disregard the evidence of the doctor if they did not think that it sounded right. However, he did not warn the jury that deposition evidence was not necessarily of the same weight as evidence which they had heard tested before them by cross-examination. Their Lordships consider that this was a regrettable omission. When a judge allows deposition evidence to be admitted he should as a matter of course warn the jury that they have neither had the benefit of seeing the deponent nor of hearing his evidence tested in cross-examination and that they must take this into consideration when evaluating the reliability of his evidence."

The learned trial judge therefore in determining the admissibility of the statement was required to take into account (1) that it is the only material which identifies the accused as being the perpetrator of the crime or even being present on the occasion of the crime; (2) that the jury would not have had the opportunity of determining the credibility of the maker of the statement, not only in respect what he stated but also by an assessment of his demeanor; (3) that the witness would not be available for cross-examination; (4) that the efforts stated in terms of attempts to

locate him were not concrete enough or detailed enough to satisfy a judge that "all reasonable steps" had been taken in this regard, bearing in mind that a consequence of a failure of these efforts would be an ingredient upon which it could be determined that this crucial evidence would be admissible in a paper document, and would indeed be , if admitted the only evidence of identification in the case.

The warnings given in relation to deposition evidence need to be stronger in relation to evidence admitted under this amendment of the Evidence Act, since in deposition evidence the witness has come before the examining Resident Magistrate and an opportunity was offered therefore at that stage for cross-examination. That evidence too would have been given under oath. The mere police statement received none of these protections.

The fact that Parliament has passed a law permitting a written statement to be admitted in evidence if certain pre-conditions are met does not remove from the trial judge his duty to ensure fairness in the conduct of the trial. The danger of identification evidence has been highlighted by the Judicial Committee of the Privy Council in many cases from our jurisdiction. In charges similar to the present, it is difficult to see how a recitation of these warnings could have any meaningful impact on a jury when the only evidence of identification is a statement taken by the police from a person who has not given evidence at the trial.

The summing-up of the trial judge to the jury was less than satisfactory. In dealing with the absence of Mr. Brady he stated:

> "You are not here to speculate, although it may well be a matter of common sense why Mr. Brady is not here, Mr. Herbert Brady."

He thus negatives his warning against speculation by inviting them to use common sense and therefore indeed to speculate. He directed the jury:

> "You pay close attention to what is known as demeanor of each witness. Demeanor means, in other words, while they are testifying, you look at them and you use the criteria I just mentioned and decide in relation to

> each witness, 'Just how much of this witness' testimony we accept. How much, if any, we reject"

He did not take the opportunity of pointing out in relation to this statement that they had been denied the opportunity of seeing the person who made that statement and therefore were in no position to determine demeanor in relation to him.

Although the jury was properly sent out during a no case submission the trial judge had this to say in his summing-up:

> "At the close of the case for the Crown, a submission in law - you were sent out and a submission in law was made to me. Well, I overruled that submission, but I think it is fair for you to know, to point out to you that the fact that I overruled that submission in law made to me does not mean that I consider the accused man guilty. The question of his guilt or otherwise is always a question for the jury. I overruled that submission and I say that there is evidence for you to consider. That is as far as it goes.
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> You are not to infer from my so ruling that this accused man is guilty. You decide his guilt or innocence on the basis of the evidence that you have heard."

The trial judge having sent out the jury during a no case submission should have omitted any reference in his summing-up to the fact that a no case submission had been made which he had ruled against. Any new warning that he gave does not negate the impact of this on a juror's mind. It might well have impacted on the trial judge that he had erred in this regard when he said later:

> "Again I had also told you that during the hearing yesterday I had listened to an application that there was no case for the accused man to answer based on the evidence adduced at the stage where the Crown had closed its case. I am sure I had also reminded you that that was not to be construed by you as any indication that I think that the accused man is guilty. But in spite of that reminder, I am going to ask you now to eliminate from your minds the matter that I had referred to of a no case submission on behalf of the accused having been overruled by me; eliminate that altogether from your mind, although I am certain that I had told you that the question of his guilt or innocence is exclusively for you."

The intention may well have been good but the damage had already been done and was further compounded by this reminder. Then in referring to the statement of Mr. Brady admitted in evidence, he said:

> "So what has been criticised or has been submitted to you as paper evidence, bear in mind that Parliament has passed legislation which allows for both of these documents being admitted. You are here as judges of fact and also to return a verdict according to the evidence and you are, no matter how critical you may be of the provisions of the law, you are in no position to discard it, because provision is made in the Firearms Act and in the Evidence Act for both these documents being admitted."

The other document admitted under the Firearms Act was the forensic report. This report in no way inculpated the appellant in the commission of the offence. To merge his directions on both as though they were of the same genus was in our view most unfortunate.

In his statement Herbert Brady stated "that Barros is about 5' 4" tall, short, stout built, black, walk hip-shotted about 30 plus." In his summing-up the learned trial judge said:

> "... you might well wish to consider Madam Foreman and members of the jury, that in at least one respect, there may well be more, the unsworn statement made by the accused person would tend to strengthen and confirm the evidence given by Mr. Brady that the accused person was in his thirties. The statement given by the witness Brady, was to the effect that the accused man was in his thirties at the time and the accused man comes along and says that he is now thirty-seven years of age."

It appears that the trial judge was searching for material on which he could maintain that there was some support for Mr. Brady's statement and he found that, quite wrongly, in the unsworn statement of the appellant.

Finally, the trial judge stated:

> "I have pointed out to you that the real issues in this case are the issues of identification. In relation to that particular, importance has to be attached to the assessment of the statement of Mr. Herbert Brady.

> Again, I remind you that that statement has not been tested.
>
> Again, I remind you that that statement, provisions are made for it in law if you are satisfied that all reasonable efforts have been made without success to locate Mr. Herbert Brady and have him here to give evidence and to be cross-examined."

The determination of the taking of all reasonable steps to find Mr. Brady is one for the trial judge in deciding admissibility, not one for the jury. The jury's function is to determine the weight to be given to the statement once it is admitted.

This misdirection is in no way cured when he directed as follows:

> "Cross-examination is important, but at least you have heard that efforts were made at certain addresses to locate him. Efforts were made on more than one occasion without success. Perhaps, if it had been on one occasion, then an attack on the police-officer would have been to criticize him on the basis that he tried once and once only, but because he tried several times, you heard that - he is being criticized. Every way you turn, you know how it goes. If you go once attack, if you go several times, attack, but either, I have examined the statement and I ruled that it ought to be put before you for your consideration and your determination. When I come to look at that statement with you, then I will go in greater detail into it. You decide what weight or what significance it has in relation to the guilt or otherwise of the accused man."

In relation to the opportunity for Mr. Brady to make a proper identification he directed:

> "Well, in the instant case, Mr. Brady hadn't given any estimate in terms of seconds as to how long he had this accused man, if you find that the person was the accused, under observation, but he has given an account as to what took place."

Having reminded the jury of what took place according to Mr. Brady's statement he continued:

> "So, the period of time is open to you to estimate having heard what took place. How long do you think this incident lasted? Because after firing, the men ran away. Another factor you could consider is any report that was made after the incident.
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> There is evidence that a warrant was drawn up for the arresting of the accused man on the basis of

> information received. Naturally, if the arrest takes place weeks or months or the drawing of the warrant takes place a long time after the alleged incident, then it would carry less weight than if it took place the next day, the day after, the same week, because the police was acting on the basis of information received. So, the quicker they draw up a warrant, the quicker you reasonably can draw reasonable inference that the person named in the warrant is the person about whom they had information."

The trial judge's decision to admit the statement compounded by the nature of his summing-up denied the appellant of a fair trial and we consequently allowed the appeal for the reasons now stated.