C.A. CRIMINAL LAW – Murder – Applicant undefended – prejudicial evidence – duty of judge. [Applicant not represented by counsel for part of trial; Evidence highly prejudicial to applicant inadvertently given by witness during questioning by judge – attempts by judge in summation to disabuse jury's minds of any 'prejudice'] Duty of judge to inform applicant that he had a right to apply for the discharge of the jury – whether in state of irregularity, evidence such that jury could not have arrived at any other conclusion other than the guilt of the applicant – whether proviso (Sec 14(1) Judicature (Appellate Jurisdiction) Act) should be applied. Appeal allowed – conviction quashed – sentence set aside – New Trial Ordered.

Cases referred to:
R v Featherstone (1942) 2 All ER 672
R v Weaver & Weaver (1967) 51 Cr App R 77
R v Forte (1938) 3 All ER 783

EVIDENCE
CRIMINAL

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 38/88

BEFORE: The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Forte, J.A.

R. v. NORRIS TAYLOR

Mr. C.J. Mitchell for Applicant

Mr. Lancelot Clarke Jnr. for Crown

July 4 & 27, 1988

FORTE, J.A.:

The applicant was convicted of the offence of murder in the Home Circuit Court on the 5th February, 1988. On his case coming on for trial, counsel whom he wished to represent him was not properly retained and consequently made no appearance on his behalf. Two other counsel who had kindly consented to represent him, through the legal aid system, asked and were given permission by the Court to withdraw, after the applicant expressed disagreement with their continuing representation. The case therefore proceeded without the applicant being represented by counsel.

During the course of the trial the following discussion occurred between the learned trial judge and a witness, the investigating officer in relation to Dermot Harris, who was alleged to have been one of the persons with whom the applicant acted in the commission of the offence:

"His Lordship: You said Dermot Harris stood at the door with a gun?

Witness: Yes sir.

His Lordship: You say he is dead now?

Witness: Yes sir.

His Lordship: You know when he died?

Witness: Yes sir.

His Lordship: When?

Witness: He died sometime last year

His Lordship: You know under what circumstances he died?

Witness: Yes sir.

His Lordship: How?

Witness: He was killed by the said accused M'Lord.

His Lordship: You heard that?

Witness: Yes M'Lord

In the course of his summation to the jury, the learned trial judge attempted to disabuse the minds of the jury of any prejudice which may have been caused by the evidence which inadvertently came out in the course of the above questions. He stated thus:

"Now, another point that I would like to bring to your attention is this, you heard the police constable, the principal eye-witness for the crown, Special Constable Scott said that he heard that this man shot Dermot Harris, and I told you then and there, dont pay any attention to it, and I am repeating it to you now, don't.

He did'nt see anything, he said he heard that, it is hearsay, and so you don't take that into account. He heard, Dermott Harris is not here, don't concern yourselves about that, he is not here, and don't in fact let it enter into your minds that this man shot him, because the Special constable said he heard that it is he who shot Dermot Harris, so ignore that altogether in your deliberations."

At the hearing of this appeal, Mr. Mitchell for the applicant argued that the evidence which was inadvertently given in answer to the questions of the learned trial judge was highly prejudicial and that in these circumstances where the appellant was not represented by counsel, the trial judge had a duty to inform the applicant of his right to apply to have the trial stopped at that stage. Instead, he continued the case, without informing the applicant of this right, and obviously did not address his own mind to the question whether the trial should have been aborted. He contended that the words of caution given to the jury in the summation were not sufficient to erase the prejudicial effect that the evidence would have had in the minds of the jury.

The incident out of which the offence for which the applicant was being tried, occurred in September, 1983. Consequently, the allegation that the applicant killed Dermot Harris "some time last year" was obviously not a reference to the same incident, this trial having taken place in February, 1988. It cannot then be disputed that the evidence was indeed highly prejudicial. It is evidence which revealed that the applicant had killed another man, and could, in our view, adversely affect the minds of the jurors in their determination of whether the applicant was a party to the killing for which he was being tried.

The duty of a trial judge in circumstances such as these, is in our opinion, accurately stated in the dicta of Viscount Caldecote, L.C.J. in the case of R. v. Featherstone (1942) 2 All E.R. 672 at page 674 as follows:

> "In cases where a person charged is not defended, and an irregularity of this character takes place, we think that it is the duty of the judge to inform the prisoner that he has an opportunity and a right to submit that the trial should not proceed and that he should make the application there and then if he wishes to do so. It by no means follows that in every case a person charged would desire to apply for a new trial, but if an application is made to that effect, it is the duty of the judge to decide upon the application according to the circumstances. But at any rate, we think that an accused person who is undefended

> "should be given the information by the judge that he may apply for the jury to be discharged, and for the trial to begin again, and what happens after that is a question for the judge who knows the circumstances."

When the application is made, however, it is for the judge in the exercise of his discretion to determine whether the trial should proceed. We are supported in this view by Lord Justice Sachs in his judgment in R. v. Weaver & Weaver (1967) 51 Cr. App. R. 77 at page 83:

> "..... As already stated, the modern practice evolved in the light of these cases is that in essence, as has now often been said ..... whether or not to discharge the jury is for the discretion of the trial judge on the particular facts and the court will not lightly interfere with the exercise of that discretion."

In the instant case, the learned trial judge did not inform the applicant that he had the right to apply for the discharge of the jury. Not having done so, we cannot conclude that he addressed his mind to the question of whether the jury should have been discharged and the trial terminated.

Mr. Lancelot Clarke Jnr., for the crown, conceded in argument that in the circumstances the learned trial judge had a duty to inform the appellant of his right and that indeed he did not do so.

However, in asking this Court to apply the proviso by virtue of Section 14 (1) of the Judicature (Appellate Jurisdiction) Act, he submitted that in spite of the irregularity, the evidence in the case was such that the jury could not have arrived at any other conclusion other than the guilt of the appellant. For this proposition he relied upon the dicta of Viscount Caldecote L.C.J. in R. v. Featherstone (supra) in which there was a reference to the statement of Lord Hewart in R. v. Firth (1938) 3 All E.R. 783 as follows:

> "It is not very profitable or useful to enter into a speculation as to what effect might be produced in the minds of the jury, still more in the minds of a collection of jurors on hearing this piece of evidence. If an incident of that kind takes place then there ought to be an end of the trial, unless it is plain that the jury would inevitably have arrived at the same conclusion notwithstanding that irregularity." (emphasis mine)

We have given anxious consideration to the submissions of Mr. Clarke, but cannot, having regard to the content of the prejudicial evidence, and the corresponding nature of the offence for which the appellant was tried, conclude that the jury would have arrived at the same conclusion notwithstanding the irregularity.

The appeal is therefore allowed, the conviction quashed and the sentence set aside. In the interest of justice, a new trial is ordered.