

Nmes

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS. 93, 94 and 95/2001

**BEFORE: THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE SMITH, J.A.**

**REGINA
V.
ROBERT DRUMMOND
COURTNEY WILLIAMS
DWIGHT DENTON**

**Dr. Randolph Williams for Robert Drummond
and Courtney Williams;
Pamela Shoucair-Gayle for Dwight Denton
Kathy Pyke, Assistant Director of Public Prosecutions for the Crown**

June 9, 10, 11 and July 31, 2003

BINGHAM, J.A.

The applicants were tried and convicted in the Home Circuit Court on an Indictment which charged them with the murder of McKenzie Allen (Count 1) and the murder of Keith Myrie (Count 2), both offences committed on 27th March, 1998, in the parish of Saint Andrew. They were each sentenced to imprisonment for life and recommended to serve 25 years, 18 years and 18 years respectively before parole on Count 1. On Count 2 they were each sentenced to suffer death in a manner authorized by law.

Following upon these convictions they appealed and these applications were heard by this Court. Having considered the matter which included the hearing of fresh evidence from several witnesses in respect of the applicant Dwight Denton, we granted the applications for leave to appeal, and treated them as the hearing of the appeals which we allowed. We quashed the convictions and set aside the sentences.

In respect of Dwight Denton a judgment and verdict of acquittal was entered. In respect of Robert Drummond and Courtney Williams, in the interests of justice we ordered a new trial to take place at the earliest opportunity. ~~We promised at that time to reduce our reasons into writing~~ at a later date. This is now a fulfilment of that promise.

As there will have to be a retrial of the Indictment in relation to Robert Drummond and Courtney Williams, reference to the facts out of which these charges arose will of necessity be brief.

On 27th March, 1998, in the morning hours, Keith Myrie who lives with other members of his family at 6 ½ Wellington Road left his home to go to a shop. He elected, however, to stop opposite to his home at the gate of 9 Wellington Road where he stood talking with Otis Allen, McKenzie Allen, and Steve Gayle all occupants at the latter address. These premises consist of a big yard in which are several houses and also include a goat pen. Charmaine Allen, the sister of Otis and McKenzie Allen, was by the step of her house washing dishes. Over at 6½ Wellington Road, Karen

Myrie the sister of Keith Myrie was in the house and in a pregnant condition.

As Charmaine Allen was washing, some eight to nine men approached from the bottom of the yard walked past the goat pen and passed close to where she was standing. She knew all the men, some of them by name. Five to six of them had guns. One Christene who lived in the same premises called to her and she went to Christene's house.

Miss Allen next saw the gunmen hold four of the group who were at the gate which included Keith Myrie, Otis Allen, McKenzie Allen and Steve Gayle at gun point and march them into the yard.

One of the nine men known to her as "Duba" then gave the orders to start the shooting following which she saw one of the gunmen shoot Steve Gayle. While in the sanctuary of Christene's home, she then heard a barrage of shots. She saw McKenzie Allen lying face downwards in the yard bleeding from his head. She spoke to her mother. On going outside later on she observed that the gunmen and their party had gone. Earlier during the shooting, Otis Allen had taken refuge in Christene's home. He was suffering from a gunshot wound to the abdomen.

Over at 6½ Wellington Road, Karen Myrie also heard gunshots coming from the direction of 9 Wellington Road. She then went onto their verandah, and saw her brother, Keith Myrie, walking, coming from the direction of number 9. On enquiring from him he told her that he had

been shot. While offering to take him to get medical attention she saw Robert Drummond otherwise called "Papa" enter the yard. He had a gun. He ordered her to go back inside and when she enquired what her brother had done, he shot at her, the bullet missed her and entered the wall behind her. She rushed back inside the house and while there she heard several shots coming from outside. On returning to the verandah she saw Robert Drummond still outside in the yard and her brother lying on the ground beside a tree. She was again ordered by Drummond to go back inside the house and when she refused to do so, he fired another shot at her, which missed her and went through a chair. Another member of the party then came into the yard and announced that Keith Myrie appeared to be dead. At that stage Drummond then left the scene.

Apart from Karen Myrie, Otis and Charmaine Allen also testified to seeing Robert Drummond among the eight or nine men who took an active part in the incident that morning. Otis Allen and Steve Gayle also identified Courtney Williams, otherwise called "Patchaman" among the group.

Otis Allen and Charmaine Allen testified to seeing Dwight Denton and Courtney Williams, among the nine men. They were not among the group that took McKenzie Allen, Steve Gayle, Keith Myrie and Otis Allen from the gate of 9 Wellington Road into the yard before the shooting

began. Both men were seen standing on either side of the gate at the entrance to the premises with their hands in their pockets.

Charmaine Allen testified to knowing Dwight Denton for many years before the incident. She swore that they both had attended Whitfield All Age school together for five years and that they were in the same class at that school.

The Court on an application by learned Counsel for the applicant Dwight Denton in exercise of its discretion by virtue of its powers under section 28(a) of the Judicature (Appellate Jurisdiction) Act heard evidence from the principal of the Whitfield All Age School. Having searched the School Register for the relevant period he testified that it disclosed that Charmaine Allen was admitted as a student at that school in September 1979. The School Register, however, had no record of Dwight Denton as having gone to that school.

Dwight Denton at the trial below had testified on oath that he never went to school with Charmaine Allen. He recalled going to Melrose All Age School being admitted as a student there in 1982 and attending that school for several years. The principal of that Institution in her testimony having searched the School Register testified that it disclosed that Dwight Denton did in fact attend the school. The search for the name Charmaine Allen however revealed that no child by that name was

enrolled there during the period that Dwight Denton attended that Institution.

In our view this evidence when examined, given the very serious nature of the charges brought against Dwight Denton, amounted to a contradiction of the gravest kind which materially affected the credibility of the witness Charrnaine Allen as to place her testimony beyond recall, and to render it worthless.

The only other witness who sought to place Dwight Denton at the scene of the incident was Otis Allen. While there was no issue that Dwight Denton was someone who had lived in the area and was well known to persons living there, he had testified to being at work at the Tastee Limited in Cross Roads, St. Andrew at the time of the incident. This alibi was supported by the sworn testimony of a supervisor at that Plant who had deposed at the Preliminary Enquiry held into the charges of murder against all these applicants in the Resident Magistrate's Court. This deponent died following the Preliminary Enquiry and before the trial was held. Although section 34 of the Justices of the Peace (Jurisdiction) Act provides for the reading into evidence of that deposition in those circumstances, for some strange reason no attempt was made by the Attorney-at-law representing the applicant Dwight Denton, to take that course. Having examined the deposition, we were firmly of the view that it went to support the testimony of the applicant Denton that he was at

work on or around the time that the incident at Wellington Road was taking place.

This then calls into question the account of Otis Allen who had testified to seeing Dwight Denton and Courtney Williams by the gate at the entrance to 9 Wellington Road and among the nine men who formed the party that took part in the incident. Although testifying to seeing Dwight Denton at the time of the incident, Otis Allen in a written statement given to the Police shortly after the incident, failed to mention Denton who was well known to him. This omission went a far way towards affecting the credibility of the witness Otis Allen. The credibility and/or reliability of his testimony was further eroded by the fact that although he had identified Dwight Denton on an identification parade shortly after the incident, at trial he was unable to recall the person whom he had pointed out at the parade.

It was in the light of our assessment of the testimony of these two witnesses, whose brother was one of the victims of the incident on that fateful morning, that we decided to adopt the course that was taken.

There were several grounds of complaint filed by Dr. Williams in support of the applications on behalf of Robert Drummond and Courtney Williams. Of these it will be necessary to refer to only one, viz: Ground 5A. This ground reads:

"the learned judge misdirected the jury on the possible verdicts by not leaving the verdicts of "not guilty" (see page 462 lines 21 – 24).

In his charge to the jury, given the respective roles played by the men, engaged in the joint enterprise which resulted in the death of the two men, the learned trial judge left the offences of murder and manslaughter for the consideration of the jury. After soliciting the comments of Counsel for the Crown and the Defence he ended on this note: (pages 462-3).

"So now, Mr. Foreman and members of the jury, the time has come for you to retire and for you to consider and come to a true verdict according to the evidence and when you have done so you come back and tell me what that verdict is. In respect of each accused man, I am leaving two verdicts to you, guilty of murder or guilty of Manslaughter, in respect of each of the accused men. Okay? Would you like to retire now or would you like to hear something more from me before you go? I don't have anything else to say unless there is a query from you and if there is and you feel inclined to put a query, please don't feel afraid at all. Just ask and I shall answer you as best as I can. Will you retire now, please?"

The effect of this final charge to the jury was that the learned judge omitted to leave to the jury the possible verdict of "not guilty."

In our view, this amounted to a serious omission so material in nature as to render the convictions bad.

In the light of the above, learned counsel for the Crown did not seek to support the convictions. She submitted that as there was ample

evidence which on a proper direction may have resulted in an adverse verdict against the applicants, Robert Drummond and Courtney Williams, in the interests of justice a new trial ought to be ordered in the matter. Dr. Williams did not seek to argue to the contrary.

It is in taking these factors into consideration and for the reasons set out that we came to the conclusion and made the orders which are set out at the commencement of this judgment.