JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 177/81

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE WHITE, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A. (AG.)

REGINA

VS.

ROBERT REID

Mr. Berthan Macaulay, Q.C. and Mr. E. U. Alcott for the appellant.

Mr. F. A. Smith, Deputy Director of Public Prosecutions and Mrs. J. Strawn for the Crown.

November 28 & 29; March 9, 1984

KERR, J.A.:

The hearing of this application for leave to appeal from a conviction for murder in the Home Circuit Court on 3rd December, 1981, before Orr, J. and a jury was treated as the hearing of the appeal; the appeal was allowed, the conviction quashed and in the interest of justice a new trial was ordered. Herein are the reasons for so doing.

On April 28, 1980 about 2:30 a.m., five gunmen entered the Hannah Town Police Station, Kingston, and shot and killed acting Corporal of Police Owen Bruce and Everald Steer a watchman who apparently was a visitor at the time.

The prosecution's case was that the appellant was one of the gunmen. It rested entirely on the evidence of Horace Bennett, a District Constable. The deceased Bruce was on station guard duty in the guard-room and the witness Bennett, who was on reserve had retired to sleep in the office of the Criminal Investigating Bureau

which adjoins the guard-room. He was awakened by the sound of gunshots coming from the guard-room. He ran to the door adjoining the guard-room and looking through an opening in the door, caused by a missing pane, he saw five men each armed with a firearm, leaving the guard-room by way of a front verandah and on to the drive way. The guard-room and the verandah were well lit with electric lights. According to Bennett he recognised the five men as persons he had known before and the appellant was one of the five. He had a clear view of their faces which were turned to him as they were leaving. After the men left, he went into the guard-room where he saw Bruce sitting in a chair with gunshot wounds to head and chest and Steer on a bench with gunshot wounds to the head. Both men appeared to be dead. About a month after, he saw the appellant whom he had known as "Shaggy Boy" on Church Street and made a report to Detective Sergeant Levene. He next saw him in the guard-room at Denham Town Police Station on June 5 when he identified him as one of the five men. The appellant was then formally arrested and charged on warrants which the police had obtained from May 1.

The defence was solely by way of challenging the evidence of identification, as on rejection of a submission of no case to answer, the defence rested.

In the course of the trial after long and fruitless cross-examination of the witness Bennett, defence counsel in the fashion of Mr. Striver in Dickens' "Tale of Two Cities", produced in Court the appellant's twin brother.

What transpired then is the subject of appeal and will be dealt with later. It is enough to say here that the witness said he knew them differently as the twin brother had often begged him and received thereby small sums of money. He had known him for about thirteen years.

Mr. Macaulay prefaced his submission by saying that if the jury believed the witness Bennett there was ample evidence to support the conviction. However, he argued that the cumulative effect of misdirections and non-directions by the learned trial judge on three important aspects of the trial were such as to deprive the accused of the substance of a fair trial and a fair chance of acquittal which was open to him.

The first, was to the effect that in the circumstances in which Bennett accused the appellant at the Denham Town Police Station it was absolutely vital for the learned trial judge to direct the jury as to the appellant's "right of silence" and that no inference adverse to the appellant should be drawn from such silence; instead, he left it open to the jury to draw such an inference. He cited in support amongst others, passages from Dennis Hall v. R. (1970) 12 J.L.R. at p. 243.

The relevant circumstances are that on June 5, Detective Corporal Owen Roberts about 1:45 p.m. while in the Charles Street/ Barry Street area of Kingston saw the appellant, informed him that there was a warrant for his arrest for murder, took him into custody and escorted him to the Denham Town Police Station. There according to Detective Tom Levene, the witness Bennett in the presence and hearing of the appellant said "This is one of the men I saw at the Denham Town Police Station with guns on the 28th April when Bruce was killed." To that the appellant said nothing. The Detective Sergeant then read the warrants to him, formally arrested and cautioned him. The appellant then said: "Whey oonuh a fight mi dung fa, and oonuh kill the killa, Spechie Corn a'ready." On his silence when confronted by Bennett, the learned trial judge directed the jury thus:

> "When a statement is made in the presence of an accused person in circumstances where you expect a reply, you can take into account the fact that he did not make any answer. Here, he told you that the accused man said nothing. Of course, it may occur to you that if the accused man was not there as he said, he might have said, I don't know anything at all about it. The fact that he said nothing is a matter for you to consider, whether he was frightened. The defence is, I was not there."

In Dennis Hall v. R. (1970) 12 J.L.R. 240 - the Privy Council (Lord Diplock, Lord Devlin and Viscount Dilhorne) quoted with approval at p. 242 the following passage dealing with "the silence of the accused" thus:

> "In dealing with this question, the Court of Appeal cited the following paragraph from Archbold, Criminal Pleading Evidence and Practice:
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> > 'A statement made in the presence of an accused person, accusing him of a crime, upon an occasion which may be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated, save in so far as he accepts the statement so as to make it in effect his own. If he accepts the statement in part only, then to that extent alone does it become his statement. He may accept the statement by word or conduct, action or demeanour, and it is the function of the jury which tries the case to determine whether his words, action, conduct or demeanour at the time when the statement was made amount to an acceptance of it in whole or in part.'
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> This statement in their Lordships' view states the law accurately. It is a citation from the speech of Lord Atkinson in R. v. Christie ([1914] A.C. at p. 554)."

The Privy Council however, was of the view that the Court of Appeal did not correctly apply the principle in Hall's case. The facts are important: A search was made of a two-roomed building said to be occupied by the appellant and two women, D.G. and D.T. In D.G.'s room packets of ganja were found in a grip and brief case. D.G. admitted the grip was hers but denied knowledge of the ganja found in it. Packets of ganja were also found in a shopping bag in D.T.'s room. D.T. said that the shopping bag had been brought there by the appellant.

The appellant was not on the premises when the search was in progress but he was brought there shortly afterwards by another police officer. He was told by the police officer who had conducted the search that D.T. had said that the ganja belonged to him. He made no comment and remained silent. The appellant and the two women were subsequently charged for possession of ganja. At the conclusion of the prosecution's case it was submitted on behalf of the appellant that the evidence disclosed there was no case to answer. The Resident Magistrate overruled this submission. The defendants gave no evidence and called no witnesses. The appellant and D.T. made statements from the dock denying all knowledge of the matter and D.G. said that she wished to say nothing at all. The Resident Magistrate found all three defendants guilty.

All three defendants appealed to the Court of Appeal. The appeal of D.T. was allowed upon the grounds that it was not established beyond reasonable doubt that she knew what was in the shopping bag, and furthermore she had immediately disclaimed ownership of the bag. The appeals of D.G. and the appellant were dismissed. The Court of Appeal held that although there was some evidence of joint occupancy of the house if the matter rested on that alone the conviction would be unsafe. That Court held, however, that the appellant's silence when told of the accusation made against him by D.T. amounted to an acknowledgment by him of the truth of the statement which D.T. had made.

In delivering the judgment of the Board, allowing the appeal of D.H., Lord Diplock said:

> "It is not suggested in the instant case that the appellant's acceptance of the suggestion of Daphne Thompson which was repeated to him by the police constable was shewn by word or by any positive conduct, action or demeanour. All that is relied upon is his mere silence.
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> It is a clear and widely known principle of the common law in Jamaica, as in England, that a person is entitled to refrain from answering a question put to him for the purpose of discovering whether he

> "has committed a criminal offence. A fortiori he is under no obligation to comment when he is informed that someone else has accused him of an offence. It may be that in very exceptional circumstances an inference may be drawn from a failure to give an explanation or a disclaimer, but in their Lordships' view silence alone on being informed by a police officer that someone else has made an accusation against him cannot give rise to an inference that the person to whom this information is communicated accepts the truth of the accusation."

Hall's case arose for consideration by this Court in R. v. Donald Parkes (1974) 12 J.L.R. p. 1509. In that case the applicant was charged on indictment with the offence of murder. The evidence led by the prosecution in support of this charge was entirely circumstantial. Part of that evidence was that shortly after the deceased was seen with a stab wound in her chest her mother went to the appellant and asked him why he had stabbed her daughter. The applicant remained silent and the mother repeated the question. Again the applicant said nothing. The trial judge directed the jury that the applicant's silence could not by itself be regarded as an admission of guilt but could be regarded as one of the circumstances in the chain of circumstantial evidence upon which the Crown relied in proof of his guilt, if his explanation at the trial for his silence was rejected. On appeal against conviction it was contended, inter alia, on the basis of Hall v. R. that this direction was wrong.

The Court at p. 1511 referred to the following passage from R. v. Mitchell (1892) 17 Cox C.C. per Cave J. at p. 508:

> "Now the whole admissibility of statements of this kind rests upon the consideration that if a charge is made against a person in that person's presence it is reasonable to expect that he or she will immediately deny it, and that the absence of such a denial is some evidence of an admission on the part of the person charged, and of the truth of the charge. Undoubtedly, when persons are speaking on even terms, and a charge is made, and the person charged says nothing, and expresses no indignation, and does nothing to repel the charge, that is some evidence to show that he admits the charge to be true."

and then distinguished Hall's case thus:

> "Stress was laid upon the fact that the Privy Council's opinion in Hall v. R. related to the accused's silence when informed that someone else had accused him of an offence and that it was not a case where there was an accusation made direct to the accused person. We are of the view that this is indeed a valid point of distinction between Hall v. R. and the instant case, and that this case falls within the ambit of the passage appearing in Archbold's Criminal Pleading, Evidence and Practice (37th edn.), paragraph 1126 cited with approval by the Privy Council in Hall v. R. It was open to the jury to conclude that the applicant's silence in the face of the deceaseds mother's accusation was conduct (albeit conduct of a negative kind) or demeanour which amounted to an acceptance of it. Indeed the learned trial judge in his directions to the jury said that silence could not by itself be regarded as an admission of guilt but could be regarded as one of the circumstances in the chain of circumstantial evidence upon which the Crown relied in proof of the applicant's guilt, if the applicant's explanation at the trial for his silence were rejected. Such a direction we think to be more favourable to the applicant than it need have been. We think that the submissions made on this ground fail."

There was a further appeal to the Privy Council - Parkes v. The Queen (1976) 3 All E.R. 380. In giving the judgment of the Board, Lord Diplock referred to the passage in Hall's case (ante) and then went on to say:

> "As appears from this passage itself, it was concerned with a case where the person by whom the accusation was communicated to the accused was a police constable whom he knew was engaged in investigating a drug offence. There was no evidence of the accused's demeanour or conduct when the accusation was made other than the mere fact that he failed to reply to the constable. The passage cited had been preceded by a quotation from a speech of Lord Atkinson in R v Christie, in which it was said that when a statement is made in the presence of an accused person -
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> > 'He may accept the statement by word or conduct, action or demeanour, and it is the function of the jury which tries the case to determine whether his words, action, conduct or demeanour at the time when the statement was made amount to an acceptance of it in the whole or in part.'

> "In the instant case, there is no question of an accusation being made by or in the presence of a police officer or any other person in authority or charged with the investigation of the crime. It was a spontaneous charge made by a mother about an injury done to her daughter. In circumstances such as these, their Lordships agree with the Court of Appeal of Jamaica that the direction given by Cave J in R v Mitchell (to which their Lordships have supplied the emphasis) is applicable."

and concluded thus:

> "Smith, CJ was perfectly entitled to instruct the jury that the appellant's reaction to the accusation including his silence were matters which they could take into account along with other evidence in deciding whether the appellant in fact committed the act with which he was charged."

Implicit in the judgment of the Privy Council in Parkes' case, is that that passage in Hall's case (ante) must be considered as applicable to analogous circumstances.

In the instant case, the proper approach would have been to treat what occurred at the Denham Town Police Station as one such occasion and to have dealt with it comprehensively because the arrest and formal charge followed immediately upon the confrontation and upon being arrested and cautioned the appellant in fact made a statement. Be that as it may, we are firmly of the view that in the circumstances existing in this case the parties could not be said to be on equal terms nor that the appellant in fact said nothing. Accordingly, although the trial judge in isolating his silence, as a favourable alternative did leave for the consideration of the jury that the appellant's silence may have been due to his being frightened, nevertheless he erred in not advising them that in the circumstances he was not obliged to say anything and no inference of guilt could be founded on his silence alone.

But of greater concern is the second instance of which complaint was made. It transpired in this way. Richard Reid was brought into Court for observation by the witness and sent out and the cross-examination proceeded thus:

"Q: What are you saying about those two?

A: They are twins, but I know Robert. That one beg me a money and I give it to him.

HIS LORDSHIP: Which one is that?

A: That one that go outside, m'lud, he may see me on the street and say, what happen, officer, and I put my hand in my pocket and I give him a money.

Q: Do you know them better than the mother?

HIS LORDSHIP: These are the people that you make comments to, not the witness. You told the court before that there is nobody else that looks like him, didn't you say that?

(NO ANSWER)

Q: I am putting it to you that you are completely and entirely mistaken as to who it was that you saw at that place on that night?

A: No, sir.

Q: I am putting it to you that you could not identify any person, not one of the persons that were there that night?

A: I could identify all the persons.

Q: And that is the reason why the others are not here?

A: I could identify all five, sir.

RE:EXAMINATION BY CROWN COUNSEL:

Q: You say you know the person who came into this courtroom?

A: Yes.

Q: You know him differently from this person?

A: Yes, sir.

Q: You know them both?

A: Yes, sir.

"Q: And you are able to recognise them both?

A: Yes, sir.

Q: And if you see them separately, you can recongise them?

A: Yes, sir.

Q: If you see them together, you know who is who?

A: That one (pointing), his teeth has a rot, and the next one don't have it.

Q: vc You say you know them, over what period of time have you known them? Are you talking about months or years?

A: About thirteen years now, sir.

HIS LORDSHIP: Both of them?

A: Yes, m'lud.

Q: During that time, is that you see them a few times, many times, frequently or what?

A: Many times, but I did not know their names, sir.

HIS LORDSHIP: Many times, where?

A: In the Western Kingston area, m'lud.

HIS LORDSHIP: When was the last time that you saw this one before that night, can you remember, the night before the shooting?

A: Yes, m'lud.

HIS LORDSHIP: How long?

A: About a month or so.

HIS LORDSHIP: And the twin brother, when was the last time that you saw him?

A: I saw him all the while, because it is just after the incident.

HIS LORDSHIP: Thank you."

There seemed to have been some difference of opinion between Counsel on both sides as to whom Bennett referred as the one with the rotten teeth because on the following day Defence Counsel sought from the judge his interpretation of the evidence as contained in his notes. According to the judge from his notes the evidence was to

the effect that it was the prisoner who had the rotten teeth. Counsel for the defence then recalled the witness who then said that he had said that it was Richard who had the rotten teeth.

The Court Reporter who took the notes was not available and another essayed to interpret her notes. The interpretation was as the record shows accurate except it omitted the word "(pointing)."

The witness was again recalled for further cross-examination. After cross-talk between Bench and Bar Mr. Alcott for the accused confined his question to:

> "Q: On that night, on the night in question, were you able to see the teeth of anyone of these five people out there?
>
> A: No, sir."

Thereupon the judge put the following questions:

> "HIS LORDSHIP: Anyway, you are saying that it is not this accused who had the rotten tooth?
>
> WITNESS: No. M'Lord, I knew them before.
>
> HIS LORDSHIP: Apart from the fact that one had a rotten tooth, you know them differently?
>
> WITNESS: I know them differently, sir.
>
> HIS LORDSHIP: Let us clear up this matter once and for all. Show us your teeth."

The record there does not disclose the effect but as gleaned from the treatment of the incident by the judge in his summation the prisoner was not the one with the rotten teeth.

Mr. Macaulay submitted that the records supported the judge's interpretation of the evidence given in re-examination as to the brother who had the rotten teeth and further although the witness professed to know the appellant differently from his brother no evidence was given as to the difference.

On this aspect of the matter he submitted the learned trial judge failed to give the jury proper guidance as to how to treat this evidence if they found the witness was being inconsistent.

In our view if there was a misinterpretation by the judge of the witness' evidence then his credit would be unsullied. If on the other hand the judge's interpretation was correct and the witness subsequently changed his evidence then this was a substantial inconsistency on an important aspect of the case.

Unfortunately, the learned trial judge gave no directions to the jury as to how to treat inconsistencies. In addition the witness was not properly confronted with his earlier evidence nor was the proper Court Reporter called to prove the inconsistency. Therefore, the witness was not discredited in the face of the jury.

The jury had the opportunity of seeing both the prisoner and his brother and although no evidence of other distinguishing features were given on general appearance the prisoner may be clearly distinguishable from his brother.

In any event it is clear to us that this important aspect of the case was not adequately aired before the jury nor were proper directions given as to how to treat this bit of evidence should they find that there was in fact an inconsistency. We are unable to say that had this been done the jury would inevitably have come to the same conclusion.

Accordingly, we were of the view that the conviction could not stand but as the witness was not discredited in the interest of justice a new trial was the appropriate order.

Because of this decision the third complaint will be briefly treated. It concerns the learned trial judge's directions concerning the statement made by the appellant after formal arrest. On that the judge said:

> "Sergeant Levine told you that he read both warrants to the accused before arresting him and charged him for the murder of Corporal Owen Bruce and Everald Steer. He said he cautioned the accused. The caution tells the accused person that he is not obliged to say anything, but that whatever he says will be taken down in writing and may be used in evidence against him. The accused man said,

> "'Whey unno a fight me down for and unnoo kill specie corn already?' Remember I told you about the argument concerning this man Speshie Corn. You must say what interpretation you are going to put on this statement.
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> Sergeant Levine told us that this man Spechie Corn was killed by the security forces in a Hannah Town incident. Of course, we don't know what were the circumstances in which he was killed. One of the interpretations that were put to you concerning the statement made by the accused man is this, that when he made the statement, the accused man knew as a fact, not merely from hearsay that Speshie Corn was killed because he himself was present at the time. Another interpretation that has been put to you is, he is only saying why are you troubling me only and they have killed Speshie Corn already? When you have different interpretations that you can draw from, it is a matter for you in the light of all the evidence, which interpretation you are going to draw. I must remind you that where you have a doubt as to which interpretation you should draw, you will resolve that doubt in favour of the accused man, and of course, you will draw the more favourable interpretation, but it is enirely a matter for you."

Mr. Macaulay submitted that in so directing, the trial judge wrongly left to the jury as a possible inference that the applicant was present and was one of the killers and failed to direct them that mere knowledge as to the identity of the killer did not necessarily imply presence at the scene of the crime.

There has been no challenge to admissibility of the statement made after caution. In this regard therefore it is enough for us to say that the statement by itself does not amount to a confession. It is only capable of an inculpatory or adverse interpretation if the jury accepted the evidence of Bennett.

As was said in R. v. Warwar (1969) 15 W.I.R. p. 306, clearly the correct interpretation to be placed on the statement (of the accused) would depend upon which of two conflicting sets of fact the jury accepted. In the instant case the jury were made aware that the case for the prosecution rested on Bennett's evidence and the trial judge left to them the interpretation to be placed upon this statement. Accordingly we do not agree in the circumstances that these directions were unfair or would in any way affect the jury's consideration of the vital issue of identity which rested entirely on the evidence of Bennett.

For the reasons set out herein the appeal was allowed, the conviction quashed and a new trial ordered.