JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 12/75

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE ROWE, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A. (A.C.)

REGINA V. ROOSEVELT EDWARDS

Mr. F.M.C. Phipps, Q.C. and Miss D. Lightbourne for appellant instructed by Mr. A.A. Lazarus, of Livingston, Alexander and Levy.

Mr. Lloyd Hibbert and Miss E. Walker for the Crown.

October 13, 15, 19; and December 3, 1982

KERR, J.A.:

The appellant was convicted of the murder of one Percival Wiltshire in the Home Circuit Court, Kingston before White, J. and a jury and sentenced to death on January 22, 1975. His appeal to this Court from this conviction was dismissed on May 14, 1976. A petition on his behalf was presented to His Excellency, the Governor-General on September 28, 1982. The Governor-General in exercise of the powers conferred by Section 29(1)(a) of the Judicature (Appellate Jurisdiction) Act referred the case to the Court of Appeal.

At the trial, the evidence from the witnesses for the prosecution - Lindberg Watson, Nuckmoy Chin and acting Corporal of Police Rupert Neita was to the effect that on Friday, March 15, 1974, at about 10:00 a.m. they were walking along Spanish Town Road at or near the junction of that Road and Regent Street, Kingston when the appellant riding along Spanish Town Road fired shots from a revolver at them. Watson was shot and wounded and a boy who was pushing a cart along Regent Street was fatally shot. That boy the prosecution aver was Percival Wiltshire. The witnesses Watson and Chin said they knew

the appellant before. Neita made a dock identification. In defence in addition to the challenge to the evidence of identification by cross-examination of the prosecution witnesses, the appellant in his unsworn statement set up an alibi. In a brief, bald and apparently unconvincing statement he said he was a port-worker and lived at 23 Seaga Boulevard, Kingston 14. On March 15, 1974, he was not riding a bicycle; he didn't shoot anyone; he had gone to look for his father and when he came back, he heard something and went to the Station to make enquiries. Corporal Asphall who arrested him on a warrant for murder of Percival Wiltshire on April 9, at Denham Town Police Station said that on being cautioned, the appellant said, "me hear seh Brother B shoot him sah". No witnesses were called on behalf of the appellant.

In the appeal of 1976 Mr. Dennis Daly, an experienced attorney, appeared for the appellant. The Court dealt with two grounds of appeal. The first was to the effect that the verdict was unreasonable and cannot be supported having regard to the evidence. In dealing with this aspect of the appeal, Hercules, J.A. who delivered the judgment of the Court said:

> "Mr. Daly submitted that the evidence of Watson and Chin was unsatisfactory and unsafe to support a conviction. He also adverted to the dock identification of Cpl. Rupert Neita, who also purported to be an eye-witness. If Neita's evidence happened to be the sole evidence in the case, having regard to the manner in which the trial judge dealt with it, there would have been some substance in Mr. Daly's contention. But we consider that there was abundant credible evidence from Watson and Chin on which the jury could act."

The second was based upon the assessment of "fresh evidence" tendered by leave of the Court. The witness was one William Barnett whose evidence was to the effect that he saw the shooting at the corner of Spanish Town Road and Regent Street and the gunman was one Brother B. In considering this evidence the Court commented:

> "Barnett saw Watson and Chin on the scene. He even testified that Watson was wounded by the first shot fired by the gunman. But so far as Barnett was concerned the gunman was not Applicant but one Brother B who died soon after the incident. Although Barnett passed the Denham Town Station regularly on his way to and from work, he never thought he should go and report what he had seen to the Police. He kept the secret until after the death of Brother B and even after Applicant had been convicted."

The approach taken by the Court to this "fresh evidence" was as advocated in R. v. Flowers (1966) 1 Q.B. page 146 at page 149:

> "When this court gives leave to call fresh evidence which appears at the time of the application for leave to be credible, it is still the duty of the court to consider and assess the reliability of that evidence when the witness appears and is cross-examined, and this is particularly true where evidence is called in rebuttal before this court. Having heard the fresh evidence and considered the reliability of the witness, this court may take one of three views with regard to it. First, if satisfied that the fresh evidence is true and that it is conclusive of the appeal, the court can, and no doubt ordinarily would, quash the conviction. Alternatively, if not satisfied that the evidence is conclusive, the court may order a new trial so that a jury can consider the fresh evidence alongside that given at the original trial. The second possibility is that the court is not satisfied that the fresh evidence is true but nevertheless thinks that it might be acceptable to, and believed by, a jury in which case as a general proposition the court would no doubt be inclined to order a new trial so that that evidence could be considered by the jury, assuming the weight of the fresh evidence would justify that course. Then there is a third possibility, namely, that this court, having heard the evidence, positively disbelieves it and is satisfied that the witness is not speaking the truth. In that event, and speaking generally again, no new trial is called for because the fresh evidence is treated as worthless, and the court will then proceed to deal with the appeal as though the fresh evidence had not been tendered."

The Court held after hearing Barnett and "paying the most careful attention to his demeanour" that the evidence fell within the 3rd category in R. v. Flowers (supra).

Mr. Phipps quite properly did not seek before us to re-open or ask for a reconsideration of these questions to which the Court had given full and careful consideration. However, he took advantage of the provisions of Section 29(1)(a) of the Judicature (Appellate Jurisdiction) Act which provides:

> "The Governor-General on the consideratoon of any petition for the exercise of Her Majesty's mercy or of any representation made by any other person having reference to the conviction of a person on indictment or as otherwise referred to in subsection (2) of section 13 or by a Resident Magistrate in virtue of his special statutory summary jurisdiction or to the sentence (other than sentence of death) passed on a person so convicted, may, if he thinks fit at any time, either -
>
> (a) refer the whole case to the Court and the case shall then be heard and determined by the Court as in the case of an appeal by a person convicted."

and argued in addition to the matters contained in the Governor-General's reference the following ground of appeal:

> "(c) That the Learned Trial Judge wrongly rejected the No Case submission made at the end of the Crown's case. It is submitted that the prosecution failed to establish a Nexus vital to its case between the victim of the shooting at Spanish Town Road on the one hand and the person on whom the postmortem was performed 7 days later (Vide 112 of 77 - R. v. Florence Bish)."

He submitted that there was no evidence to prove that the person shot at Regent Street was Percival Wiltshire on whose body Dr. Ramu performed a postmortem examination; a fortiori such evidence as there was tended to prove that they were not the same. In any event, the learned trial judge failed to adequately direct the jury on this vital aspect of the case.

Surprisingly although this point was raised at the trial in a submission of "no case to answer", it was not made a ground of appeal by Mr. Daly in 1976.

Now at the trial the witnesses to the incident described the person who was shot as "boy" or "little boy". Dr. Ramu gave the height of the body as five feet ten inches and his age

at about twenty years while Loretta Deer who identified the body to the doctor said Percival Wiltshire her nephew at the time of his death was eighteen years of age.

In R. v. Florence Bish (supra) the appellant was convicted for the murder of Norman Watson. The prosecution witnesses, Stanford Scott and Derworth Gayle said that the appellant who apparently was quarrelling with a man, took from her bosom what turned out to be a knife wrapped in cloth and stabbed him in the chest. The wounded man was removed in an ambulance. Neither witness knew who he was nor where he was taken. On November 2, at the Kingston Public Hospital Morgue, a postmortem was performed by a Dr. DePass on a body identified by Louis Lloyd to be that of his brother Norman Watson. Sergeant Grant also gave evidence to the effect that he saw a man whom he did not know at the Kingston Public Hospital with a wound in his left chest and later saw his dead body but he did not attend the postmortem examination.

The learned trial judge appreciated that there arose the question of corpus delicti and adverted the jury's attention to the necessity of being satisfied that the body upon which the postmortem examination was performed was the man who was stabbed by the appellant. However in the course of his directions to the jury, he had misinterpreted the evidence by telling them that it was Louis Lloyd who had visited the hospital and had seen his brother in the casualty ward with a wound in his chest and at a time which would have coincided with the time when the incident occurred. In fact there was no such evidence. Lloyd did see his brother on the 31st but it was before the incident. On appeal it was submitted on behalf of Bish, that there was no evidential link between the injured man and Norman Watson, deceased. In giving the reasons of the Court for allowing the appeal and quashing the conviction, Rowe, J.A. (ag.) said:

"We are clearly of the opinion that had the learned Chief Justice correctly appreciated the evidence of Louis Lloyd he would have withdrawn the case from the jury. For the guidance of prosecutors we can do no better than to quote a passage from the 3rd Edition of Wilkenson's Road Traffic Offences at p. 114:

> 'The prosecution should be careful to see that there is evidence of the death of the actual victim, i.e., it may not suffice for a police witness to say that John Smith was knocked down by a car on a Sunday and removed to hospital and then for a doctor to say that John Smith died there on Monday. There must be evidence to show that the two John Smiths are the same person'."

In our view the instant case on the facts is clearly distinguishable from R. v. Bish. The deceased Wiltshire worked in a store at the corner of Spanish Town Road and Regent Street. Constable Neita who was stationed at nearby Denham Town Police Station knew the person shot as "Wiltshire". He accompanied the wounded Wiltshire to the Kingston Public Hospital. The evidence pointed indubitably to the fact that he had been shot in the head. Shortly after Corporal Asphall acting on information he received, visited the hospital and saw Percival Wiltshire wounded in the head and on the following day saw his dead body in the morgue. On March 22, he attended the postmoretem performed by Dr. Ramu. On examination Dr. Ramu said he saw a bullet entry wound on the left side of the head in the imminent region. The bullet passed through the left parietal bone, the brain substance and was found embedded in the right side of the brain on its lowest surface. Death which was due to haemorrhage and shock occurred at about 2:35 p.m. on March 16.

In the totality this evidence was sufficient to leave for the consideration of the jury the issue whether or not Percival Wiltshire on whose body Dr. Ramu performed the post-mortem examination was the person shot at the corner of Spanish Town Road and Regent Street on the morning of March 15.

From the weight of the body, 135 lbs., Percival Wiltshire was of slender built. We consider the appellation 'boy' a 'little boy' the popular tendency to so designate a youth pushing a hand-cart along the Spanish Town Road. Counsel for the Crown described this as a "sociological factor."

In his summing-up the learned trial judge referred to Counsel's submissions in relation to this question and said inter alia:

> "You will recall that Mrs. McIntosh submitted strongly to you that the Crown has not proven that Percival Wiltshire, first of all, was the person who was shot and that it was the accused who shot him. And she drew strong support for this submission by Mr. Watson when he said, "I saw a little boy on the ground." Compare that, she says, with the evidence that Mr. Wiltshire, according to the doctor, was twenty years of age and according to Miss Deer, was eighteen years of age. Now then can you be saying that Mr. Wiltshire and the little boy are the same persons? Mr. Foreman and members of the jury, if that is a problem, you are the ones who can solve it. It may be that you won't give that submission much consideration at all but it has been made to you as a serious matter for your consideration and you will have to weigh it. If you accept what Mrs. McIntosh told you as a reasonable and proper interpretation of the facts as you have heard them in evidence, well, by all means you will give it the credit it deserves."

and again:

> "There again she [Chin] speaks of a little boy. You will have to know; you will have to decide what you make of it. Does it help you to identify the person who the Crown says was shot? And she told you that when she turned back after running and calling out she saw the boy bleeding from his head."

and later in reviewing the evidence of Corporal Neita:

> "He said he spun around in time to see Watson going to the ground and immediately he saw a man in front of him riding a bicycle and that man pointed a gun at him and he identified that man as the accused, Roosevelt Edwards. He said he threw himself to the ground and while there, two more shots were fired from the revolver which the accused had in his hand. He rode the bicycle and went out of his sight and he told you that while he was on the ground, a little boy who was standing beside him fell on the ground. He was pushing a handcart at the time and he couldn't tell you what direction the boy was coming from

> "but he said he noticed that the boy was bleeding from his head and tossing up and down on the ground. He gave you the surname of that boy as Wiltshire, whom he later saw at the Kingston Public Hospital lying on a stretcher. And he make the point about the height of the deceased, Mrs. McIntosh asked the witness his height and he said he, Acting Corporal Neita, is five feet ten inches tall. Well, that is a matter for you to consider. You have very practical evidence of what five feet ten inches means and you will have to use that in evaluating the evidence."

We are of the view that consistent with his general directions on the essential elements constituting the offence and the burden and standard of proof which rested on the prosecution the learned trial judge adverted the jury to the necessity at the very outset to be satisfied that the deceased Percival Wiltshire was the person shot at the corner of Spanish Town Road and Regent Street and that he died as a result of the injury he then received.

Accordingly, this ground of appeal failed.

The other ground argued before us reads:

> "(a) The verdict of the Jury was unreasonable in the light of the evidence available to the Court from the following witnesses:-
>
> (i) Royell Berry
>
> (ii) Laurel Facey
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> It is submitted that the sworn testimony of these witnesses is credible."

The Governor-General's reference included a petition which referred to and exhibited affidavits of the evidence which the witnesses Berry and Facey who were not called at the trial proposed to give before this Court. We indicated that as this evidence formed part of the reference the Court would hear the evidence if tendered regardless whether or not it was "fresh evidence" strictu senso. Notwithstanding, as the question had not risen before and there was no authoritative pronouncement from this Court, at the request of Counsel for the Crown we entertained in limine arguments on this point. Crown

Counsel submitted in effect that in view of the provisions of Section 29(1)(a) of the Judicature (Appellate Jurisdiction) Act enjoining the Court to hear and determine the case as an appeal, the general considerations as to granting leave to call fresh evidence would apply. Further that in the circumstances leave to call fresh evidence would have to be sought and that the Court ought not in the instant case to grant such leave as it had not been shown that the evidence was unavailable at the trial and consequently it was not "fresh evidence". He cited in support R. v. Thomas (1979) 2 All E.R. page 142:

Research confirmed the correctness of our initial opinion. In R. v. McGrath (1949) 2 All E.R. page 495:

> "The appellant was convicted of receiving stolen goods, his defence, an alibi, having been rejected by the jury. His appeal against conviction, when first before the court, was dismissed on the ground that there was evidence before the jury on which they could properly have reached their verdict, and that the trial had been properly conducted. The Home Secretary later caused further inquiries to be made, which tended to establish the alibi set up by the appellant. He, therefore, referred the matter to the court under s. 19 of the Criminal Appeal Act, 1907, for further consideration."

Section 19 of the Criminal Appeal Act, 1907, is similar in wording and effect to Section 29(1)(a) supra]. It was held that:

> "Different considerations applied when a case was referred to the court by the Home Secretary from those which applied when an appeal came before the court in the ordinary way. In the latter case the court would not usurp the function of the jury when the trial had been properly conducted, nor would it hear further evidence unless it were shown that the proposed witnesses had not been available to give evidence at the trial or that some point which could not have been foreseen arose on which the evidence would have been material, but the object of a reference to the court by the Home Secretary was to assist him in respect of the exercise of the royal prerogative, and any evidence could be considered which might achieve that object."

The same view is expressed with concise lucidity in the headnote to R. v. Sparkes (1956) Cr. Appeal R. p. 83:

> "In a reference to the court under Section 19 (a) of the Criminal Appeal Act, 1907, the court is not bound by the ordinary rule of practice relating to appeals not to receive fresh evidence unless it is shown that the evidence could not have been produced at the trial, or that some point which could not have been foreseen arose at the trial on which the evidence would have been material. Each case must be decided on its own merits, and the court will not treat itself as bound by the rule of practice if there is reason to think that to do so might lead to injustice or the appearance of injustice."

We hold that these cases express the correct approach to references under Section 29(1)(a) of the Judicature (Appellate Jurisdiction) Act.

Now before critically analysing the evidence tendered there are certain matters urged in the petition that are directly concerned with the tendering of the evidence and upon which we were addressed by the appellant's attorney.

The petition to the Governor-General was signed by Mr. Afeef A. Lazarus, attorney-at-law, on behalf of the appellant. In it was a complaint to the effect that Mrs. Marva McIntosh, attorney for the appellant at the trial. was inexperienced and it was on her advice and without full consultation that the appellant gave an unsworn statement; that therefore the Court was never called upon to consider the details of the alibi and the witnesses Royell Berry and Laurel Facey who were willing to give evidence on his behalf were through no fault of his not called. These allegations were not supported by affidavit as they ought to have been but from the particulars it is reasonable to assume they were supplied by the appellant.

There is no presumption that counsel learned in the law is incompetent. On the contrary it is to be presumed that counsel's advice and conduct of the case would be based upon such instructions as were given and such evidence as was

available. We have had the benefit of reading the transcript of the trial and we are of the view that counsel conducted the defence with commendable competence. We are fortified in this view because as shown by her affidavit filed by the Crown she then had five years at the Bar and her experience included being Clerk of the Courts from 1970 - 72 and we have seen the proofs which she had in the form of statements from the proposed witness Royell Berry and one Errol Davis. It will be necessary to refer in detail to this statement of Berry in considering the credibility of his evidence before us. It is enough to say here that these statements did not support the alibi which the applicant offered at his trial. According to those statements the appellant left Guy's Hill for Kingston on a Thursday whereas the shooting was on a Friday.

The first witness Facey gave evidence before us that appellant and himself in 1974 worked at Esso Dry Dock; that he knew he was arrested for murder and he had given a statement to an attorney Mr. Dabdoub. He and appellant had ridden on his motor-cycle to Guy's Hill leaving Kingston on the Thursday. They first went to the home of the appellant's father at Carron Hall, then to the home of Royell Berry otherwise called Cutter at Ragsville, Guy's Hill, arriving there at 3 - 4 p.m. They slept there that night and left there at about 10:30 - 11:00 a.m. Friday. On arriving at Queen's Theatre news came over the radio that appellant was wanted for murder. Shortly after, he left Kingston because of violence and went to live at his mother's yard at Dover in St. Catherine. He was cross-examined at length. He said his mother at the time was in England but where he went was where she used to live but no one was living in the house at the time. He knew he would be wanted to give evidence but no one contacted him. He knew where appellant lived and he knew his girlfriend. He had heard that a barrister other than Dabdoub was representing the appellant.

He knew Errol Davis otherwise called Sambo - he was with appellant, Cutter and himself on the Thursday at Guy's Hill drinking beer.

The other witness was Royell Berry otherwise called Cutter. He gave evidence that Facey and appellant came to Guy's Hill, St. Catherine on a Thursday and he and they and one Davis were in a bar drinking beers. Facey and appellant slept with him at his father's house at Ragville, and they left for Kingston Friday afternoon. Appellant returned about 5:00 p.m. and told him that when he arrived in Town he heard he was wanted for murder for shooting a man. He went to Mrs, McIntosh but she did not take a statement from him. As he could not recall the date of the visit, she said she could not use him. In cross-examination he said it was Facey who told him he was wanted to give a statement to the lawyer. Facey he said was then living at Tivoli, Kingston and Facey and appellant had come to Guy's Hill on a motor-cycle more than once. He maintained it was not a Wednesday they came, nor was it a Thursday they left.

In his affidavit filed with the petition and in his evidence in chief and again in the early part of his cross-examination he categorically denied giving a statement in writing to Mrs. McIntosh. However upon further cross-examination he was confronted with a statement given to Mrs. McIntosh and his signature thereon. After much hesitation he acknowledged his signature and grudgingly admitted he gave the statement. That statement differed from his affidavit and from the evidence he had then given before us in a number of important material particulars. It is of great significance that that statement was given and signed by him on November 4, 1974 and contained these specific statments:

(1) That it was a Wednesday evening, and it was the appellant and Sambo (Errol Davis) who came to Guy's Hill and after having drinks they left to look for appellant's father.

(2) That it was a Thursday morning appellant and Sambo returned to Guy's Hill and left for Kingston.

(3) That it was the following Friday that appellant returned to Guy's Hill and told him that there was an alarm out.

His endeavours to explain the inconsistences were wholly unsatisfactory. He could not recall if when giving the statement he said "Roosevelt and Sambo came to Guy's Hill." He could not recall if he had said it was "a Wednesday they came." He admitted that he did say "on Thursday morning Roosevelt and Sambo came back to Guy's Hill" but this was because he could not then recall the day. He maintained notwithstanding the statement that it was Facey who came with appellant. Finally under pressure from Crown Counsel he admitted that he did say in his statement to Mrs. McIntosh what is recorded in Paragraph 1 thereof:

> "On Wednesday evening at about 3 - 4 p.m. Roosevelt and Sambo came to Guy's Hill (I cannot recall the date) Roosevelt and Sambo and I were at a bar having some drink after that Roosevelt said he was going to look for his father."

With respect to Facey in his affidavit filed with the petition he swore:

> "That on one occasion I did try to find out about Roosevelt Edwards' case and to see whether I was needed to give evidence. However, when I got to Tivoli Gardens, I learnt that his girlfriend was the one responsible for his case and that she had got a Lawyer. However, she had moved out of the area and I was unable to locate her. Also I was not able to find out the name of the Lawyer who was representing Roosevelt Edwards. I therefore returned to the Country. His said girlfriend would not have known where to locate me, as I did not leave my address. Thereafter I heard nothing more about Roosevelt Edwards' trial."

Errol Davis also gave a statement to Mrs. McIntosh. That atatement was dated "5/11/74." to

From the proof which Mrs. McIntosh had, Facey's name did not appear and she could not be expected to call him. Indeed according to the statement of Berry it was Davis who had accompanied the appellant and Davis had given her a statement.

However, the records show that pursuant to his application for leave to appeal in 1975 there was an application dated 27th January, 1975 and filed by the appellant in person to call as fresh evidence "Mr. Lloyd Facey, Sangster Crescent, Building 5 Tivoli Gardens. He was not examined at any time I don't know why. He will state that when the incident took place both of us were at Guy's Hill in St. Catherine where we spent the night with a fellow name Sambo and Gutter (Sic)." This contradicts Facey's assertion that at the time he was living in the country and unaware of the trial and so unavailable to the defence.

Although a successful application to tender fresh evidence was made in 1976 in respect to William Barnett his attorney did not see fit to pursue the application in respect of Facey.

With respect to Royell Berry, he was caught in the tangled web of his own fabrication and presented a pathetic figure in the witness box.

We have given this evidence tendered careful consideration and unhesitatingly we place it in the 3rd category as described in R. v. Flowers (supra). Having seen and heard the witnesses we positively disbelieve their evidence. They were thoroughly unconvincing in demeanour and clearly the truth was not in them.

For these reasons, the appeal as constituted by the reference to this Court was dismissed.