

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 244 & 245/02

BEFORE: THE HON. MR. JUSTICE HARRISON, P
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MRS. JUSTICE MCCALLA, J.A.

R v OMAR CLARKE
NASSIVE HARRIOTT

Mr. Ravil Golding for the appellants
Miss Tara Reid and , Miss Maxine Jackson for the Crown

24th & 26th April, 2006 and June 22, 2007

SMITH, J.A.:

At about 11:00 p.m. on the 24th February, 2001 three men, two of whom were armed with guns, entered the Lime Tree Joint Bar at 10 Goffe Terrace, Kingston 11 and demanded money from the patrons in the bar. In pursuance of this demand they shot and killed Mudserven English, the deceased, who was a policeman.

As a consequence of this killing the appellants, Omar Clarke and Nassive Harriott, were indicted in the Home Circuit Court for capital murder. After a trial which commenced on November 11, 2002 and ended December 5, 2002 they were convicted of murder. Both were sentenced to life imprisonment with directions that they should serve 25

years and 30 years, respectively, before becoming eligible for parole. They were given leave to appeal by the single judge in chambers.

On the 24th and 26th April, 2006, this Court heard their appeals, and in an oral judgment, we allowed the appeal of Clarke, quashed his conviction and entered a verdict of acquittal. We dismissed the appeal of Harriott, affirmed his conviction and sentence. We ordered that his sentence should commence as of the 6th March, 2003. At that time we promised to put our reasons in writing. This we now do.

The Prosecution's Case

The prosecution relied mainly on the evidence of Miss Julie Walters, a bartender, and Mr. Owen Ogilvie a patron of Mrs. Catherine Rowe – the bar operator. The bar is attached to Mrs. Rowe's dwelling quarters. Miss Walters' evidence is to the following effect. On February 24, 2001 at about 11:00 p.m. she was at the Lime Tree Joint Bar. Also in the bar were the deceased and Mr. Ogilvie, whom she called "Mr. Amin". She was on the sellers' side of a counter in the bar. She was leaning on a freezer as she gazed outside of the bar through a door situated at the front. Mr. Ogilvie was "playing the race horse machine" on the customers' side of the counter in the bar. The deceased was seated at one end of the counter behind Ogilvie. Three men entered the bar. She recognized one of them, the appellant Clarke, whom she knew before as "Fatta". She had

last seen him the day before. Two of the three men had guns. The appellant Clarke, was not one of the two.

Before Clarke entered the bar with the gunmen, he had earlier made 3 or 4 trips to the bar. On the first occasion he came in the bar and asked for water. Then he left and returned about 2 to 3 minutes later. He asked the witness Mrs. Walters to put \$20 on a poker machine. He played the machine for about a minute or two then went out again. He returned the third time and stood behind the deceased for a couple of minutes and then went out again. He came back for the fourth time, but did not enter the bar; he stood at the door and looked in. When he returned on the fifth occasion, he was in the company of the two gunmen. He was actually behind the gunmen. One of the gunmen went up to Ms. Walters, pointed the gun at her and said: "Hey gal, gi mi the money whey you have." (This gunman was identified by Mr. Ogilvie as the appellant Harriott). She told him she had no money. The gunman went to the sellers' side of the counter where Ms. Walters was and stood behind her. The other gunman went into the bar, she said, leaving Clarke at the door. This other gunman went up to the deceased and pointed the gun at him. The deceased pushed him off and drew his firearm which was issued to him in his capacity as a police officer. They held on to each other. A struggle ensued. At this time, Ms. Walters had drawn out the till and taken out the money. She heard two explosions and ran from behind the

counter. She ran through Ms. Rowe's living room and down a passage through the kitchen into Ms. Rowe's bedroom and alerted her. The gunman, who had been standing behind her, was in hot pursuit. As Ms. Walters turned around to leave the room she bumped into the gunman who was chasing her. She immediately handed him the money. This gunman, having tried and failed to open a back door, ordered Ms. Walters to open it. She told him she could not. The gunman pointed the gun at Ms. Rowe and ordered her to open the door. She, at first, refused but eventually opened the door to the verandah. The gunman went out. Ms. Walters went back to the bar. She saw Ogilvie there. While in the bar she heard three explosions. Thereafter she went outside and saw the body of the deceased lying on the roadway. She did not see the appellant Clarke. Ms. Walters testified as to the opportunity she had to see the three men who came into the bar that night. The bar, she said, was well lit. She used to see the appellant Clarke about 3 to 5 times per week. She said Clarke used to do odd jobs for Ms. Rowe. She estimated the time that passed from the men entered the bar to when she ran from behind the counter to be 2-3 minutes. She did not know the appellant Harriott before. According to her evidence, he was the one who chased her. She saw his face in the bar and she also saw his face when she turned around in Miss Rowe's room and bumped into him. She saw his face again in the living room. She went on an identification parade in

which Harriott was, but failed to identify him. The next time she saw him was at the Half-Way-Tree Court where the preliminary enquiry was held.

Mr. Ogilvie testified that he was sitting close to the door. He heard someone using expletives while ordering him to put his hands in the air and face the wall. He looked around and saw three men at the door. He recognized one of them as the appellant Omar Clarke, whom he also called "Blacka". The other two, whom he did not know, had guns. The appellant Clarke, he said, was a regular visitor to the bar. He did as he was ordered. He said that the deceased, who was also seated, did not get up. One of the gunmen went up to the deceased and said "get up boy". Mr. Ogilvie said he heard an explosion. He saw the deceased and the gunman grappling. They wrestled from inside the bar, through the door to outside the bar. He saw blood at the back of the gunman's neck. He heard the gunman, who was grappling with the deceased, address the other gunman, who was at the time coming from Miss Rowe's house: "Star, the boy shot me yuh nuh, come help me nuh, yuh a go mek him kill me." He then heard explosions. During this time Mr. Ogilvie was in a corner of the bar. After a while he emerged from hiding and went outside the bar. He saw the deceased lying at the roadside. He also spoke of the opportunity he had to observe the gunman who, he said, went over the counter to Miss Walters. His evidence as to the conduct of the appellant Clarke earlier that night is consistent with Miss Walters'

evidence. He said the entire incident lasted about 15-20 minutes. On March 1, 2001, he pointed out the appellant Nassive Harriott on an identification parade as one of the gunmen who entered the bar that fateful night. He was cross-examined extensively by counsel for the appellants. Most of the cross-examination concerned the witness' identification evidence. Counsel had no complaint against the judge's directions on visual identification, accordingly it is not necessary to refer to the witness' evidence in this regard in detail.

Miss Catherine Rowe also gave evidence. She was, at the material time, in her living room watching the television. She heard screams; she saw Miss Walters being chased by a man into the kitchen. She saw the man with a gun. The gunman pointed the gun at her and told her to open the door. She did. She did not know this gunman before. She did not attend an identification parade. She next saw this gunman in Court. She testified that she knew the appellant Clarke very well. He lived next door to her.

Detective Dwayne Grant testified that on his arrival at the murder scene he was given certain instructions by Deputy Supt. Knight. He went to the home of the appellant Clarke. He told Clarke that Deputy Supt. Knight wanted to talk to him. He said Clarke co-operated and willingly went with him to 10 Goffe Terrace where Deputy Supt. Knight was. From there, he took the appellant Clarke to the Criminal Investigation Branch

office at the Hunts Bay Police Station. Later, Detective Grant went, with a party of policemen who took the appellant Clarke to Madden's funeral home. From there Clarke was escorted back to the police station.

Detective Inspector Michael Garrick, in his evidence, said that he also visited the crime scene during the night in question. There he saw and spoke with Clarke who was in a service vehicle with Detective Constable Grant. Later, he again saw and spoke with Clarke at the Hunts Bay Police Station. He recorded a statement from Clarke who told him that he was 16 years of age. During the recording of the statement the appellant's mother was immediately outside the office and, according to the police, could see and hear what was taking place in this office. After a **voir dire** the statement was received in evidence. We should add that during the **voir dire** the admissibility of the statement was challenged on several grounds. We will return to this later. The body of the statement is as follows:

"...On Saturday the 24th February, 2001, about 10:00 p.m. I was walking along Henry Morgan Road, going towards Budho's bar which is close to where I live and is along Goffe Terrace. As I reach near Budho's bar I saw two men on bicycles coming towards me from the direction of Spanish Town Road. I recognize both men. One was Steve who live at Binns Road, Kingston 11. While the other was Shawn who lives at Seaview Gardens. I know both men as gunmen and robbers. The men told me that they were going to lick Lime Tree Joint. I know they meant they were going to rob the bar. They told me to go inside and map out the bar for them and

come back . They also ask me to play the poker box while I was observing the bar. There were six people in the bar, five men and one woman. I went back and told them that there were the bartender and five other men. I then return inside the shop and about 11:15 p.m. the two men entered. I saw Steve with a gun in his hand and then saw the other going towards a man who was to a corner inside the bar. Steve said no one should move. I then saw Shawn and a man wrestling. Steve ran out the bar and I saw both men wrestling towards the gate. I then heard a loud explosion. I ran towards my house which is very near. I went straight into my house. I later heard a loud noise over Lime Tree Joint. I remain inside my house..."

Detective Sgt. Everald O'Neil testified that on the 26th February, 2001 he and other police officers took the appellant Harriott off a bus on the Spanish Town Road. He cautioned Harriott and told him that he was investigating the murder of Mr. English. Harriott's response was, "Officer, a no mi kill him sah, is Carlos, but mi did deh bout deh." Sgt. O'neil said that the appellant Harriott told him that people in the Waterhouse area informed him that the police were looking for him and advised him to "cool out and leave the area". Cpl. Wayne Raymond swabbed the hands of Harriott on the 26th February, 2001.

Miss Marcia Dunbar, a government analyst attached to the Forensic Science Laboratory, received the swabs from Cpl. Raymond. She carried out a chemical analysis of the swabs and found gunshot residue on them. She stated that gunshot residue can be detected on the hand of a person up to 72 hours after he had discharged a firearm. However, if the

hands were washed after the firearm was discharged, then gunpowder residue could be detected within 24 hours of the discharge.

Sergeant Isaiah Hamilton, on March 1, 2001, conducted the identification parade in which Harriott was identified by Mr. Ogilvie. An attorney-at-law represented the appellant on the parade. Also present was a Justice of the Peace.

Deputy Supt. Derrick Knight was the officer in charge of the investigation. He was at the scene of the crime shortly after the event. There, in the bar, he found a spent shell and an expended bullet. He gave instructions to Detective Cpl. Roydell Smith to take photographs of the scene. These photographs were put in evidence. He sent Detective Grant for the appellant Clarke. He questioned Clarke who began to say what he knew but was stopped and was taken to the Hunts Bay Police Station with a view to recording his statement. He instructed Inspector Garrick to record Clarke's statement. He also gave instructions for statements to be taken from potential witnesses. He was present at the post mortem examination of the body of the deceased. He spoke of receiving from the doctor a bullet which was removed from the body of the deceased. He eventually charged the appellants with the murder of the deceased.

At the close of the prosecution's case no-case submissions were made on behalf of the appellants. These were rejected by the learned judge.

The Defence

Omar Clarke, in an unsworn statement, said that he was taken from his house by the police, beaten and escorted to the Hunts Bay Police Station. There, he was questioned about his family. Nassive Harriott also made an unsworn statement. He said he was innocent and that he knew nothing about the killing of any policeman or about any robbery of a bar. He said he was on his way to school when a policeman held him and took him to the station. He had never fired a gun, he asserted.

Grounds of Appeal

Appellant Omar Clarke

Mr. Golding sought and obtained leave to argue the following supplementary grounds of appeal:

- (1) That the Learned Trial Judge fell into error when she ruled that the written Statement of the 2nd Appellant OMAR CLARKE was admissible in evidence despite the fact that:
 - (i) The said 2nd Appellant was a minor at the material time and no adult relative, Justice of the Peace or attorney-at-Law was present when reasonable steps could have been taken to get one;
 - (ii) The 2nd Appellant, on the Police Officer Garrick's own admission, was never cautioned; even though there was evidence before the officer which clearly indicated objectively that he was indeed a suspect.

(iii) On Officer Garrick's own admission he told the 2nd Appellant to sign the statement and go home, which amounted to an inducement in law.

2. The Learned trial Judge failed and or refused to exercise her residual discretion to exclude the statement having regard to the circumstances surrounding the taking of the said statement and the various breaches of the Judges' Rules adumbrated in Ground 1 above.

3. The sentence of the Court was manifestly excessive in that at the time of the commission of the offence, the 2nd Appellant OMAR CLARKE, a minor of very low intelligence had no firearm and played a minor part in the sequence of events that led to the murder of the Police Officer.

Ground 1

At the time of the taking of the statement from the appellant Clarke, he was 16 years of age. That would make him a young person. The evidence of Deputy Supt. Knight is that he instructed Inspector Garrick to take a statement from Clarke. He said that at the crime scene Clarke had begun to say what he knew but was stopped. DSP Knight said he stopped Clarke because he thought it was risky for him to make a statement then and there. According to the police, Clarke was being treated at that stage as a potential witness. During the **voir dire** it was suggested to the police officers that the appellant Clarke was removed from his house, beaten, and forced to sign the statement. Inspector Garrick was asked: "Do you recall telling Mr. Clarke 'Come sign the statement and go home.?'?" His answer was "I could have said that." The evidence of the police is that the mother of the appellant was not in the

room where the statement was taken. Inspector Garrick stated that she was seated outside the room not far from the door and could have seen what was taking place in the room. Inspector Garrick admitted that he did not, at any stage of recording the statement, caution the appellant.

Mr. Golding submitted, before the learned trial judge, that the statement ought not to be admitted. In this regard he referred to the following factors:

- (i) the appellant was a minor;
- (ii) the statement was not given voluntarily;
- (iii) the appellant was not cautioned after there was reason to suspect that he was involved in the murder.

It is not in dispute that the appellant at the material time, was a juvenile. In giving her ruling on this aspect of counsel's submission, the judge said that at all times during the taking of the statement the mother of the appellant Clarke was present albeit just outside and not in the room. Paragraph 4 of the Appendix B of the Administrative Directions On Interrogation And the Taking of Statements annexed to the Practice Note (Judges' Rules) [1964] 1W.L.R. 152 at page 157 provides in part:

"As far as practicable children (whether suspected of crime or not) should only be interviewed in the presence of a parent or guardian, or, in their absence, some person who is not a police officer and is of the same sex as the child."

On the evidence of Inspector Garrick it cannot be said that the statement was taken in the presence of the appellant's mother. The mother was not in the room. It is not enough that from where she was in the general office she "should be able to see" what was taking place. No good reason is given for not having the appellant's mother seated around the table in the C.I.B. office at which the appellant and Inspector Garrick were. In our view the learned judge erred in holding that the statement was taken in the presence of his mother.

In ***Peart v the Queen*** [2006] U.K.P.C. 5 and ***Ricardo Williams v the Queen*** P.C. Appeal No. 37 of 2005 delivered 25th April, 2006, their Lordships emphasized that the Judges' Rules, though not rules of law, possess considerable importance as embodying the standard of fairness which ought to be observed. However, their Lordships observed that a court may allow a prisoner's statement to be admitted notwithstanding a breach of the Judges' Rules. Their Lordships stated that the criterion for admission was fairness and that voluntariness was a major factor in determining fairness. The learned judge did not give consideration to the critical requirement of fairness in deciding whether to admit the statement.

The further complaint of Mr. Golding, that the appellant ought to have been cautioned after there was reason to suspect that he was involved in the murder, is valid. This failure constitutes a breach of Rule 2

of the Judges' Rules. There was no good reason for this breach. The learned judge did not make reference to this breach. She found that the statement was given voluntarily on the basis that the challenge by the defence was not supported by any evidence. The judge, in our view, was clearly in error. We cannot conclude in the light of these errors that it was fair to admit the statement.

The third complaint by Mr. Golding is that the appellant was induced to make the statement. Accordingly, he submitted, the judge erred in finding that it was given voluntarily. During cross-examination the following exchange took place:

Q:... so when the statement was completed now, what happened?

A: I went for the accused and asked him to sign his name.

Q: Did Mr. Clarke tell you that he wanted to go over it?

A: I cannot recall

Q: Do you recall telling Mr. Clarke "Come sign the statement and go home.

A: I could have said that.

Mr. Golding:You could have said that? Thank you very much, Detective Inspector Garrick, you have been very helpful."

In giving her ruling the judge stated:

"The purported inducements (sic) was to sign the statement he - had already given the statement

and could have opted not to sign it so such an inducement would go to show that at the time the only thing that could be operating in the officers (sic) mind was that this was a witness. In the ordinary course of things a witness would sign the statement and leave. Now this may be a reflection on the officers (sic) intelligence, not necessarily his honesty."

The judge, instead of advertng to the state of the appellant's mind when he signed the statement, directed her attention at the officer's state of mind and his intelligence and honesty. The officer's state of mind and his intelligence were completely irrelevant. The fact that the appellant was a young person of obviously poor intelligence was of great importance in determining whether his signing of the statement resulted from pressure and was not free and voluntary. The judge's failure in this regard alone is, in our judgment, fatal. The statement should have been excluded. Miss Reid, Counsel for the Crown, submitted that the statement apart, the evidence of Miss Walters and Mr. Ogilvie was sufficient to support the conviction and that the Court should apply the proviso. She submitted that even if the Court held that the statement was wrongly admitted the court should nevertheless uphold the conviction in light of the other evidence. We have given careful thought to this argument. We are not satisfied that the jury would inevitably have come to the same conclusion if the statement had not been received in evidence. Accordingly, Clarke's conviction cannot stand.

The Appellant Nassive Harriott

Mr. Golding told the Court that having examined the transcript of the evidence and the judge's summing-up, he could find nothing to argue on behalf of the appellant Harriott. He agreed with the views expressed by Mr. Robert Fletcher, of counsel, who, was prepared to represent the appellant. In a memorandum addressed to Mr. Golding, a copy of which was filed in the Registry, Mr. Fletcher referred to the following issues as arising for consideration:

- (1) The circumstances of identification by Mr. Owen Ogilvie;
- (2) The fairness of the identification parade;
- (3) The extent to which the evidence of gunpowder residue found on his hands was more prejudicial than probative.

Having stated the issues, Mr. Fletcher continued:

"Even though some inroads were made in challenging both the strength of the ID and the way the ID parade was conducted the learned trial judge left all the relevant issues and gave adequate directions to the jury as to how to assess the ID matters. I am of the opinion the admission of the gunpowder evidence was unduly prejudicial. However, since he was convicted of non-capital murder the issue of whether he shot Mr. English was not a relevant issue in his conviction. In other words, if he had been convicted of capital murder the issue would have been important on appeal. You will recall that submissions during the trial dealt with that issue.

Consequently after careful consideration of the matter I am of the opinion that there is nothing of legal significance that can be urged on Mr. Harriott's behalf..."

Crown Counsel Miss Reid was also of the view that the judge's directions were adequate and accurate. We have carefully examined the transcript of evidence and the judge's summing up in respect of the appellant Harriott. We can see no reason to differ from counsel. Accordingly, the appeal against Harriott is dismissed.

Conclusion (as stated at the outset) -Omar Clarke

In respect of Omar Clarke his appeal is allowed. His conviction is quashed and sentence set aside. A judgment and verdict of acquittal is entered.

Nassive Harriott

In respect of Nassive Harriott, his appeal is dismissed. The conviction and sentence are affirmed. Sentence is to commence as of the 5th March, 2003.