# JAMAICA

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEALS NOS. 72 & 73/2004**

**BEFORE: THE HON. MR. JUSTICE PANTON, J.A.**
**THE HON. MR. JUSTICE SMITH, J.A.**
**THE HON. MRS. JUSTICE McCALLA, J.A**

**BRIAN RANKIN**
**and**
**CARL McHARGH**

**V. REGINA**

**Earle deLisser for the appellant Brian Rankin.**

**Frank Phipps, Q.C., and Miss Kathryn Phipps for the appellant Carl McHargh.**

**Miss Paula Llewellyn, Miss Icolin Reid and Michael Deans for the Crown.**

**November 9, 10, 11, 2005, May 31, and July 28, 2006**

**PANTON, J.A.**

1. These appellants were convicted on March 11, 2004, on two counts of murder arising from the deaths of Jason Eldridge and Tahj Burrell. The trial lasted twelve days in the Circuit Court Division of the Gun Court, sitting at King

St., Kingston, presided over by Reid, J. with a jury of twelve . On the first count, they were each sentenced to life imprisonment with a specification that they would not be eligible for parole before serving thirty years. In respect of the second count, they were sentenced to suffer death in the manner authorized by law.

2. Both deceased persons died from multiple gunshot wounds. They were attacked in Northside Plaza, St. Andrew, on July 25, 1999, at about 7.00 p.m. They, along with Miss Janice Maxwell and her son, then aged two years, had just arrived at the plaza with a view to having a bite at a restaurant known as Pizza Delite. They had earlier gone to another establishment a few miles away but seeing that it was closed, they decided to go Pizza Delite. After the party had alighted from Miss Maxwell's car which was driven by Eldridge, Miss Maxwell started to lead the way. She soon realized that the rest were not following. She turned back and noticed that Burrell and her son were standing at the rear of the car, but she did not see Eldridge. She joined them at the rear of the car, and after inquiring as to Eldridge's whereabouts, she saw him standing by a wall on the premises. At that point she noticed a man who stepped from between two cars that were parked beside her car, and that man pointed a gun at Burrell's head and fired. She ran and crouched between two cars. The man fired several shots at Burrell who had fallen to the ground, and then he ran in the direction of Old Hope Road, that is, towards the exit from the plaza. Miss Maxwell then noticed another man running past her. That man was coming from the direction

in which she had seen Eldridge, and although she did not observe anything in that man's hands, Eldridge, like Burrell, had fallen mortally wounded.

3. The police were soon on the scene. Miss Maxwell went to the nearby Matilda's Corner police station where she remained for several hours. While there she made a telephone call to the home of the appellant McHargh whom she had met in 1996 and for whom, in 1997, she bore the son referred to earlier. In January, 1999, they had made plans to marry on December 4, 1999, at Hope United Church. However, by July, 1999, not only had they decided that there would be no wedding bells, but also that they would no longer be "in a relationship", according to Miss Maxwell. Incidentally, it was during the said month of the tragedy that Miss Maxwell met both deceased persons. She described her relationship with them as "casual". McHargh, referred to as 'Omar' by his family and close friends, was not at home at the time of Miss Maxwell's telephone call, he having left earlier for Cockburn Pen. However, he later called the police station by means of the telephonic feature known as "star 69". He spoke with Miss Maxwell who informed him of the tragedy. He, in turn, enquired as to the safety of herself and their son. He then proceeded to the police station where he remained for a while trying to comfort Miss Maxwell.

4. According to Miss Maxwell, there was no animosity between her and McHargh despite the permanent cancellation of their altar plans. However, a few days before the murders, McHargh had removed some appliances from Miss

Maxwell's dwelling-house, apparently due to a perceived snub in his not being invited to their son's birthday party. This party lasted until the next day, and the deceased Burrell, who was a guest thereat, remained at Miss Maxwell's house throughout the period until 10 a.m. The appliances were subsequently returned. Miss Maxwell saw the deceased Burrell several times during the following week at her place of work as well as at her home. Burrell was also with her on one occasion when she had gone to collect her son from the residence of McHargh. She was alone, however, when she collected her son from McHargh on the afternoon of July 25, 1999, a few hours before the murders.

5. Miss Maxwell attended an identification parade but failed to point out anyone on it as being involved in the commission of these murders. As a result, the prosecution's case did not have the benefit of an eye-witness. The case presented against McHargh consisted primarily of the deposition of one Clarence Salmon, a witness who had testified on November 23, 1999, at the preliminary examination held into the charges of murder preferred against McHargh who was then the sole accused person. The witness claimed to have rented a Nissan motor car on Friday July 23, 1999, to McHargh in the presence of other men. The car should have been returned on Saturday night but it was kept for another day, and was returned on Sunday night at about 9.30 o'clock. When the car was returned, McHargh was with the said men. There was an argument among them in respect of money. They were also jeering McHargh saying that after they had killed someone, McHargh had "got coward". The deponent said that on

confronting McHargh about this apparent "baiting up" of the car, McHargh said that after he had trailed the people to the plaza, he had turned back and parked the car on the side of the road. In addition to the deposition, the prosecution put in evidence for the jury's consideration a statement and a further statement dated September 14, 1999, and another further statement dated September 28, 1999, all by the said Clarence Salmon.

6. In respect of the appellant Rankin, the deposition and statements of Salmon as well as a verbal admission were put forward as proof of the offences charged. So far as the admission is concerned, the prosecution called a private investigator, Jason McKay, who testified that Rankin told him on March 18, 2003, that although he (Rankin) was present at the time of the killings, he had not participated in the acts. Rankin, he said, named McHargh and two other persons as the killers.

7. Both appellants made the traditional unsworn statements to the jury. Each denied that he had participated in the killing of the deceased men. It is puzzling that in Jamaica in this day and age the law allows persons accused of serious crimes such as murder to make unsworn statements. Seeing that there is absolutely no way of testing the credibility of the makers of such statements, they may well be written and passed up to the jury without the accused having to open his mouth. McHargh, in his statement, said that he was at Cockburn Pen playing pool and having drinks in a bar between 7 p.m. and 9 p.m.. He denied

renting a car from Salmon, and called a witness, Nigel Casserly, to support his alibi.

8. Rankin, in his statement to the jury, said that he received a telephone call from a man who said that he had received money "from foreign" for him. Thinking that the money may have been coming from his mother, Rankin arranged to meet the caller at Tastee's. As he arrived at the meeting place, he was held at gunpoint by the police. He inquired the reason for this turn of events and was told that he would find out when they arrived at the Central Police Satation. On the way to the police station, he said that the man whom he had met (McKay) kept telling him that the person they really wanted to hold was McHargh. Rankin told him that he did not know anyone by that name. At the police station, McKay asked him if he was called Marlon. He responded in the negative. He said that McKay called other names to him, and said that they (the persons bearing those names) had told him (McKay) that it was he (Rankin) who had killed Burrell. According to Rankin, he was told by McKay that if he did not co-operate with him, he was going to charge him. Rankin said that he did not know anything about the killing. He called no witness.

**Grounds of Appeal – McHargh**

9. Leave was granted to the appellant McHargh to argue six grounds, namely:

> "(1) The verdict was unreasonable and cannot be supported having regard to the evidence;

(2) The three police statements of Christopher Salmon were inadmissible as evidence in the case against McHargh;

(3) The deposition of Christopher Salmon was inadmissible at trial to identify McHargh;

(4) The learned trial judge was in error to have allowed the statements and deposition of Christopher Salmon as competent and reliable evidence to be considered by the jury;

(5) The evidence to account for the unavailability of Christopher Salmon to testify at the trial was insufficient; and

(6) The second trial that included Rankin as a co-accused was unfair where evidence in Salmon's three statements that were not admissible at the first trial for McHargh alone were now adduced at the second trial because of the presence of Rankin."

**Ground 3 - The evidence of identification of McHargh was inadmissible**

10. Mr. Frank Phipps, Q.C. submitted that there was no proper evidence of identification in respect of McHargh at this trial. According to learned Queen's Counsel, Salmon's deposition identifying McHargh at committal proceedings is not the same as identification of the person in the dock before the jury at trial. The jury, he said, needed to be satisfied that the person charged was properly identified at the trial as the person referred to in the respective documents as being involved in the criminal activity alleged against him. He continued by

saying that it could not be said that the judge's direction at trial on identification was sufficient and appropriate for the identification that took place at committal proceedings. The identification cannot be proved "by testimony in a piece of paper", he said.

11. In considering this ground of appeal, it is very important to bear in mind that Christopher Salmon gave evidence in the presence of the appellant McHargh at the preliminary examination. At that time, he gave the Resident Magistrate an account of events involving one Omar. Salmon identified the appellant McHargh as the person he was referring to as Omar. At page 473 of the record, lines 5 to 7, Salmon is recorded as saying:

> "I see this Omar in court who was introduced to me by Marlon and Oddy. He is sitting in the dock."

The record (lines 7 and 8) then shows that McHargh stood and gave his name. So, there is no doubt that there was evidence before the Resident Magistrate identifying the appellant McHargh as one of the characters who featured in the events narrated by Salmon. At the trial, Salmon's deposition was admitted in evidence on the basis of evidence given by Mr. Kenneth Ferguson, attorney-at-law. Mr. Ferguson was the Clerk of the Courts who represented the prosecution at the preliminary examination. At page 466 (lines 6 to 19) of the transcript, the following extract is relevant to this question of identification:

> "Q. And did you marshall the evidence of a witness by the name of Clarence Salmon ?

A. I, yes I did.

Q. ... on that day? And when you marshaled the evidence of the said Mr. Salmon was Mr. Carl McHargh present in court on that day?

A. Mr. McHargh was present and so was his attorney at the time, Mr. Richard Small.

Q. Do you see Mr. McHargh here in court today?

A. Yes, I see Mr. McHargh here today.

Q. Would you point to him, please?

A. He is the accused man in the dock in the white shirt and the blue jacket."

The result of all this is that Mr. Salmon identified McHargh at the preliminary examination at which Mr. Ferguson was present. At the trial, the jury had the evidence of Mr. Ferguson that Salmon had pointed out McHargh to the Resident Magistrate at the preliminary examination.

12. Mr. Phipps, while saying that identification was important in the case, submitted that where a written document is being adduced at a trial and identification arises in that document, the document should not be left for the consideration of the jury, if that is the only evidence in the case. Hence, in this case against McHargh, the documentary evidence being the only evidence in the case against McHargh, the documentary evidence should be withdrawn from the jury if identification was an issue. Mr. Phipps classified the identification issue as being strictly one of dock identification. There not having been an identification

parade, he maintained that the identification at the preliminary examination was in the nature of a dock identification and there had been no directions thereon.

13. The evidence put forward by the prosecution shows that the witness and McHargh were introduced to each other on the Friday, and that they saw each other again on the Sunday, after the murders had been committed. A dock identification occurs where a witness had never seen the offender prior to the incident which is the subject of the complaint, and the said witness made no purported identification of the individual until the day of the Court hearing. In other words, the only times that the witness had seen the offender were at the time of the incident and in Court, no identification parade having been held. In the circumstances of this case, the witness is supposed to have met the appellant McHargh before the date of the murders, so there would have been no need for an identification parade. This was clearly not a case of a dock identification, so there was no need for the judge to have given any directions thereon.

**Ground 2 – Salmon's three police statements were inadmissible**

14. The prosecution, acting under the provisions of section 31D of the Evidence Act, put in evidence Salmon's deposition as well as the three statements that he gave to the police. The complaint in this ground is that the learned trial judge erred in admitting into evidence all these documents

emanating from one source, that is, Salmon. According to Mr. Phipps, Salmon's statements were "self-corroborating of the testimony of the maker in the deposition which was admitted at the trial". He submitted that "section 31D of the Evidence Act should not be used to adduce into evidence untested testimony on paper for the same purpose, as an adminicle for testimony in a deposition given on oath, made in the presence of the accused, and tested by cross-examination". The previous statement by a witness, he said, can only be used to impeach the credibility of the witness and the previous statement does not become evidence. In the instant case, the statements were used to support the deposition, and the learned judge even invited the jury to make comparisons between the deposition and the statements (see page 791 of the record).

15. Miss Llewellyn, for the Crown, conceded that the material in the deposition is generally similar to that in the statements. She attempted to justify the admission of the documents into evidence by submitting that given the nature of the antecedents of the witness Salmon, it was necessary for the jury to have had sight of "all and any material evidentially speaking coming from the witness, for them to decide on his credibility". The issue of interest to serve, and the particeps criminis principle required that the material be put in evidence, she said.

16. The rule against self-corroboration is that the evidence of a witness cannot be corroborated by proof of statements to the same effect made by the

same witness. The application of this rule is demonstrated in the case **R. V. Beattie** (1989) 89 Cr. App. R. 302. In that case, the complainant made two statements to the police alleging a sexual relationship with her father, the appellant, starting from she was only seven or eight years old. When he was interviewed by the police, the appellant denied the allegation. At his trial for incest and indecent assault, he denied any sexual activity with the complainant. The cross-examination of the complainant was confined to two limited matters. Nevertheless, there emerged evidence which differed markedly from the account given in her first statement to the police. The second statement corrected the inconsistency which had surfaced. Both statements were admitted in their entirety as exhibits, copied and given to the jury. The appellant, having been convicted, appealed to the English Court of Appeal on the basis that there had been a material irregularity in the course of the trial in respect of the admission of the statements in their entirety. The Court agreed that there had been a material irregularity, allowed the appeal, quashed the conviction and entered a verdict of acquittal. In delivering the judgment of the Court, the Lord Chief Justice of England said at page 306:

> "The general well-known rule is that it is not competent for a party calling a witness to put to that witness a statement made by the witness consistent with his testimony before the Court in order to lend weight to the evidence. There are three well-known exceptions to that rule. The first one is where it has been suggested to the witness that the evidence he

> or she has given on oath is a recent invention, that the witness has just made it up. If that suggestion is made, then it is obviously a rule of common sense as well as law, that a previous consistent statement can be shown in order to demonstrate that the evidence has not recently been fabricated. The second exception is complaints made in sexual cases, complaints which are made at the first opportunity, are admissible in order to show consistency. Finally, a matter which has nothing to do with this case, where the statement forms part of the actual events in issue, sometimes known as the **res gestae** rule."

16A. This Court has, in recent times, dealt with this issue. Two such instances were in **Wallace et al v. R.** (SCCA 42, 33 and 40/03) (delivered on December 20, 2004) and **Richard Brown v. R.** (SCCA 28/03) (delivered on March 11, 2005). In the former, the Court had this to say:

> "We have examined the statements, and cannot say that the second statement was aimed at providing corroboration for the first. It is a fact that there are certain similar details in both; however, the striking feature of the second statement is that it refers to a meeting on July 27 when certain matters were discussed, but the follow-up that was anticipated, based on those discussions, did not materialize. That meeting, it should be noted, was not mentioned in the other statement. There was no question of the statements being put forward because of their

> consistency with each other. We do not think that the learned judge was in error in admitting both statements. Indeed, the admission of both statements seems to have provided healthy fodder for the defence as, in their addresses to the jury, they sought to exploit the differences and discrepancies therein.... We cannot agree that given the context of events in this case that the second statement was put forward "for the purpose of sustaining his (Shem Rowe's) credit". It seems that it was put forward simply as a full narrative of that which he claimed to have witnessed;" (para, 21)

In **Brown,** the date of death stated in the indictment for murder differed from the dates in the deposition and the statement. The witness, having given evidence at the preliminary examination, died before the trial. His deposition was admitted in evidence under section 34 of the Justices of the Peace Jurisdiction Act, whereas the written statement was admitted by virtue of section 31D of the Evidence Act. McCalla, J.A. (Ag.) (as she then was) said:

> "Having regard to the differing dates in the deposition and statement, as well as the suggestions made to the witness at the preliminary inquiry, the prosecution was obliged to place before the jury the statement which it contended the witness had given to the police. The purpose must have been to seek to show that the witness could have been mistaken as to the date of the incident." (para. 28)

17. In the instant case, in addition to the deposition, the deponent's statement and two further statements were admitted in evidence. The statement contains all the details that are in the deposition, as well as some other details. In a lengthy exchange between Bench and Bar during the voir dire, at pages 418 to 446, agreement was arrived at in respect of the editing of the statements. However, during the reading of the first statement to the jury, there was an error as editing that ought to have been done had not been done, and the jury was told of McHargh having taken two other persons to a yard where Burrell was expected to have been. The jury was immediately sent out of hearing, and on their return, the letter 'X' was substituted for McHargh's name, and the narrative continued. (See page 566 lines 1 to 14; and page 577 line 20 to 579 line 13). As Mr. Tavares-Finson, who then appeared for McHargh, pointed out in the absence of the jury.... "it has been already read to the jury" (page 576 lines 5-6). In this situation, it is clear that a material irregularity occurred in two respects – firstly, in relation to the admission of the deposition and the statements, their contents being substantially the same, and secondly, in respect of the reading of the first statement in its unedited form to the jury although it had been agreed that editing was necessary. Had the only irregularity been the latter infraction, there might have been room for the contemplation of yet another retrial. However, when consideration is given to the irregularity complained of in the ground of appeal, we find that, there is merit in the complaint. It is clear that the statements were put forward as support for the

deposition of the witness. Indeed, the learned judge invited the jury to compare them in testing the credibility of the absent maker. This was impermissible in the circumstances of the case. As happened in **Beattie** (above), the convictions ought to be quashed and verdicts of acquittal entered, there being no other evidence from any other source.

**Ground 5 – the evidence to account for the unavailability of Salmon to testify at the trial was insufficient**

18. Section 31D of the Evidence Act reads:

> "Subject to section 31G, a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if it is proved to the satisfaction of the court that such person –
>
> (a) is dead;
>
> (b) is unfit, by reason of his bodily or mental condition, to attend as a witness;
>
> (c) is outside of Jamaica and it is not reasonably practicable to secure his attendance;
>
> (d) cannot be found after all reasonable steps have been taken to find him; or
>
> (e) is kept away from the proceedings by threats of bodily harm and no reasonable steps can be taken to protect the person."

18A. The Evidence Act, by this provision, has carefully set out the circumstances that must obtain for a statement or deposition to be admitted in evidence and read at a trial, without the maker being present for cross-examination. Prior to this provision, the only comparable provision that existed in our law was section 34 of the Justices of the Peace Jurisdiction Act. In view of the fact that the witness is not available for visual assessment by the jury, it has to be stressed that great care has to be taken to ensure that the requirements of the legislation are met before permission is sought, or granted, for the documents to be read into evidence. In respect of paragraph (d) of section 31D of the Evidence Act, it is imperative that **all** reasonable steps be taken to find the witness. However, as Smith, J.A. said in a recent case:

> "As to whether all reasonable steps have been taken must be assessed on the particular circumstances of each case."

**R. v. O'Niel Smith** SCCA No. 113/2003 (unreported) - delivered on December 20, 2004 page 11. The taking of all reasonable steps does not mean that every hospital and lockup in the country should be checked. What it means is that checks should be made at the places with which the witness has a contemporary connection, and contact made with known relatives or friends with whom he would have been reasonably expected to be in touch.

19. The complaint in relation to this ground is that no proper foundation was laid for Salmon's deposition and statements to be admitted in evidence.

Mr. Phipps contended that the evidence presented was insufficient to satisfy the conditions prescribed by either the Evidence Act or the Justices of the Peace Jurisdiction Act. The witness Salmon, he said, was a fugitive from justice, yet his surety was not contacted by the police. Further, the witness' mother was only contacted during the course of the trial and could give only tenuous evidence of Salmon's whereabouts, Mr. Phipps said. On the other hand, Ms. Llewellyn, for the Crown, submitted that there was an abundance of evidence to show that reasonable steps had been taken to secure the attendance of Salmon. The evidence, she said, shows that at the time of the trial he was outside the country.

20. There is no dispute that the prosecution relied on section 31D(d) of the Evidence Act for the admission of Salmon's deposition and statements of Salmon. The question for determination by the learned trial judge was therefore whether all reasonable steps had been taken to find the witness Salmon. To this effect, as indicated earlier, a voir dire was conducted. The evidence which the judge had for consideration came from the witnesses Jason McKay, Trevor Chin, Wilbert Sterling, Veronica Simpson and Vernice Wellington. It falls for this Court to now consider whether the learned judge was correct in deciding that the requirements of the law had been met.

21. Jason McKay, a private investigator, was specifically engaged to locate witnesses in the case and serve subpoena on them. He was successful, he said,

with all the witnesses except Salmon. His evidence indicates that he placed advertisements in the Daily Gleaner newspaper on June 2, 5 and 6, 2002, March, 2003, and July 5, 6 and 7, 2003, but up to February 24, 2004, he had not received a response from Salmon. He said that he also visited number 33 Grant's Pen Road, and Cockburn Pen in the Corporate Area, Golf in Gregory Park, Saint Catherine and Windsor Castle in Portland in search of Salmon. He said that in his quest he never checked with Salmon's mother nor the Immigration Department. Although he was aware that Salmon had been in custody on gun charges in November, 1999 (at the time of the preliminary examination), he never checked the records of the Gun Court to obtain any assistance in locating Salmon.

22. Superintendent Trevor Chin (now retired), the lead investigator in the case, met Salmon at the Greater Portmore Police Station on September 13, 1999. The introduction was done by Senior Superintendent Anthony Hewitt who himself has also retired. Salmon was a prisoner at the time. After the introduction, Salmon referred to the murders, and said he could assist. He then proceeded to give a statement which lasted from about 10.00 p.m. until 4.00 a.m. on the next day. Superintendent Chin was unable to give any idea of how Salmon had come to be with Superintendent Hewitt, who never gave evidence, and as to what may have motivated Salmon to give the statements. At the time of the preliminary examination, Salmon was in custody, and the last time that Superintendent Chin saw him was at the conclusion of those proceedings. The superintendent confirmed that Salmon was granted bail subsequent to the preliminary

examination. Superintendent Chin was involved in trying to locate the witness, but due to the pressure of other responsibilities, he delegated this task to Detective Sgt. Sterling. There is also evidence that Superintendent Chin was indisposed for a long period during which he had a surgical operation.

23. The evidence of Sterling indicates that he commenced his search for Salmon about 2001, and continued same up to the time of the trial. He checked at several hospitals as well as at the Horizon Adult Correctional Facility, and there was no record of Salmon at those institutions. He also checked at number 33 Grant's Pen Road on several occasions. That was the only residential address that he visited in his search. He never spoke to anyone at the Gun Court, nor did he check the records there. The registrar of the Gun Court, Mrs. Veronica Simpson, gave evidence that on April 5, 2000, Salmon was offered bail on the charges before the Gun Court. He accepted the offer on May 19, 2000, but subsequently failed to honour his bond. This resulted in the ordering of a warrant for his arrest and the escheating of the bond on August 17, 2000. There is no record of the bond having been paid by the surety Sonia Thompson who gave her address as 14A Red Hills Road, St. Andrew. Salmon's address, as stated on the warrant that was sent by the Gun Court to the police, was 443 Portmore Villa, Gregory Park. On the CIB Form 4, Salmon's address was noted as Windsor Castle, Portland. There was a condition that Salmon should report to the Gregory Park Police Station every day.

24. The final witness of importance called on the voir dire was Salmon's mother, Vernice Wellington. She gave her address as 474 Portmore Villa. Prior to that, she said she lived at 416 Grant's Pen Road. She had also at one stage lived at 41 Grant's Pen Road. She saw her son in August, 1999, while he was in custody at the Greater Portmore Police Station. She next saw him after he had been granted bail, and that was nine months after she had seen him at the police station. She said that her son should have reported at the Caymanas Police Station but had not been doing so, so she had reminded him. He became upset at being reminded, and had since disappeared. She said he telephoned her on Mothers' Day in 2000, and that he had said that he was in St. Thomas. She received another telephone call from him in December, 2000. At that time, he told her that he was in Mexico and would not be returning to Court in connection with the charges for which he was on bail. He did not tell her that he was a witness in the instant case. She said that he sometimes lied, and she did not know whether he was lying when he said he was in Mexico. No police officer had checked with her prior to the start of the trial as to the whereabouts of her son.

25. In determining whether the evidence was admissible, it was necessary for the learned judge to be satisfied that Salmon could not be found after all reasonable steps had been taken to find him. Were the steps taken reasonable? In the instant case, it would have been required that due note be taken that the witness Salmon was not an ordinary witness who had witnessed the killings. He

was an accused person who was on bail and under an obligation to report daily to the Gregory Park police station. Efforts to locate him should therefore have involved contact being made with, and enquiries being made of, his surety and the officers at the Gregory Park police station. There is no dispute whatsoever that none of this was done. In the absence of evidence to the contrary, it has to be assumed that there had been verification of the authenticity of the surety and her address. In that situation, it seems strange that no effort was made to find Salmon through her. So far as reporting to the Gregory Park police station is concerned, the records at the station ought to show the name of the person reporting and the address from which he came. The bail documents at the Gun Court show Salmon's address as 443 Portmore Villa, Gregory Park. That address was not checked in the search for him. His mother, Vernice Wellington, gave her address as 474 Portmore Villa, Gregory Park. That address was also not checked. Indeed, there was no contact with Salmon's mother until the trial was well under way.

26. Mrs. Wellington said that in her last conversation with her son, he had indicated that he was in Mexico. It is clear that the lack of contact between her and the authorities would have been one of the factors that prevented her from communicating that information to the police. There is also the possibility that, as a mother, she may not have been eager to give information on the whereabouts of her son. However, it cannot be ignored that the information in

relation to Mexico was never checked with the immigration authorities here or in Mexico.

27. In looking at the undisputed facts, it is unreasonable to conclude that all reasonable steps had been taken to locate Salmon when:

(i) the Portmore address that he gave to the Gun Court as his address was not checked;

(ii) his surety was not contacted;

(iii) the police to whom he was required to report were not interviewed;

(iv) his mother who lived near to his Portmore address was not contacted until the very moment efforts were being made to have his deposition and statements admitted in evidence; and

(v) the information provided by his mother as to his being in Mexico was not checked.

27A. It is of utmost importance that all trials should be conducted in a fair manner. Where statements or depositions are the backbone of the prosecution's case, the requirement of fairness is in no way diminished. Lord Griffiths of the Privy Council reminded us in a case from this jurisdiction, **Scott and Another v. Regina** (1989) 89 Cr. App. R. 153, that in criminal cases where depositions are admitted in evidence, the judge has a responsibility to "ensure a fair trial". And

in **R. v. Michael Patrick Cole** (1990) 90 Cr. App. R. 478 at 486, Ralph Gibson, L.J., in considering legislation similar to section 31D of the Evidence Act, said:

> "The overall purpose of the provisions was to widen the power of the court to admit hearsay evidence while ensuring that the accused receives a fair trial. In judging how to achieve the fairness of the trial a balance must on occasions be struck between the interests of the public, in enabling the prosecution case to be properly presented and the interest of a particular defendant in not being put in a disadvantageous position.... The public of course also has a direct interest in the proper protection of the individual accused. The point of balance, as directed by Parliament, is set out in the sections."

28. The legislature has provided that the statement of a witness may be read. That statement may even be the only evidence adduced against an accused person. A conviction recorded in such circumstances would not be faulty, if the conditions set out in the legislation have been faithfully fulfilled. In the instant situation, the conditions have not been satisfied to allow the statements or deposition of the witness Salmon to be read. There is no proper evidence that he is outside Jamaica, to permit the admission of the evidence. That fact seems to have been conceded by the Crown at the trial as there was no attempt to invoke section 31D(c ) of the Evidence Act (quoted above), or the Justices of the Peace Jurisdiction Act which allow for the reading of evidence where a witness is off the island. The Crown explicitly relied on section 31D (d) of the Evidence Act which provides for the reading of a statement where a witness cannot be found after "all reasonable steps have been taken to find him". However, as has been

demonstrated, the reasonable steps that should have been taken to find this witness were not taken. In the final analysis, Salmon on whom so much depended was not a witness to the killings. He was a reporter of a conversation he said he had overheard, and of a statement allegedly made to him by McHargh. The person who witnessed the killings did not identify anyone on the identification parade. The inability to have on the parade, or to identify, any of the individuals who committed the murders is the main reason for the prosecution's failure to put before the jury evidence that might have reached the standard of proof beyond reasonable doubt.

**Grounds of Appeal - Rankin**

29. Ten grounds of appeal were filed on behalf of the appellant Rankin. They are as follows:

> "(1) The verdict was unreasonable and cannot be supported having regard to the evidence;
>
> (2) The learned trial judge erred in law in admitting the statement of Clarence Salmon as evidence in that:
>
> (a) there was no proper search for the witness
>
> (b) the witness was a fleeing felon
>
> (3) The deposition of the witness Clarence Salmon was wrongfully tendered in evidence as the conditions of the Justice of the Peace Jurisdiction Act were not satisfied in that the appellant was neither present nor represented at the preliminary hearing.

(4) The use of the combination of the statements of Clarence Salmon and his deposition was in essence using a previous statement to corroborate sworn testimony which is regarded as 'self-serving'.

(5) The learned trial judge erred in law in giving the jury the impression that the defence was mainly concerned about the manner in which the statements of Clarence Salmon were taken and not the substance, which undermined the entire defence.

(6) The learned trial judge failed to properly explain to the jury that the witness Clarence Salmon could be regarded as an accessory after the fact to murder and the proper consequences of that fact.

(7) The unexplained absence of Superintendent Hewitt who called Deputy Superintendent Chin to inform him that a witness wanted to speak to him made it impossible for the learned trial judge to consider the weight to be given to the statements.

(8) The admittance of the car as exhibit 5 into evidence was done without proper foundation more so by the fact that the presence of the vehicle at Portmore Police Station was unexplained.

(9) The learned trial judge did not deal adequately with the defence of an alibi and did not relate it to the facts of the case.

(10) The alleged oral statement of the appellant to Jason McKay was in breach of the Judges Rules in that no caution was administered and the statement made which invoked the response was a veiled threat."

30. Grounds (ii) and (iv) were dealt with in respect of the appeal by McHargh. Ground (iii) does not merit discussion as there was no attempt to have Salmon's statement admitted under the Justices of the Peace Jurisdiction Act. So far as ground (v) is concerned, Mr. deLisser's complaint was in respect of the following words at page 814, lines 7 to 10:

> "You may consider that the challenge was not so much as to the statement but the manner in which the statement was taken – the circumstances."

However, if one looks at the sentence that immediately followed these quoted words, it will be seen that Mr. deLisser has grossly exaggerated the situation. The learned judge did go on to say:

> "But more important still, you will remember I told you the caution that you need to exercise as regards a statement from someone who would have been in custody at the time."

In any event, as Miss Llewellyn pointed out, in relation to this ground as well as ground (ix), the defence was adequately dealt with on pages 771 and 772 of the transcript.

31. Ground (vi), as outlined above, complains that the judge failed to properly explain to the jury that the witness Clarence Salmon could be regarded as an accessory after the fact to murder and the consequences of that fact. Mr. deLisser, in this regard, cited the unreported decision of this Court in **R. v. Orville Fitzgerald** (SCCA 220/01 – delivered on July 30, 2004). That case may easily be distinguished from the present as there the judge had failed to direct

the jury on the need to be cautious in considering the matter. The Court did not agree that the witness was an accomplice; rather, it considered him a witness with an interest to serve, and as such the jury should have been instructed on the need for caution. It should be added that the judge had also given the jury a time limit for the return of their verdict. That was a material irregularity which prompted this Court to order a new trial. In the instant case, the learned judge was not stinting in his warning to the jury. However, considering that there was no proper search for Salmon, this ground is really of no moment.

32. The evidence of Jason McKay is very important in considering the appeal by Rankin as that evidence contains the added dimension of an oral statement made by Rankin to McKay. It will be recalled that McKay described himself as a private investigator. His services were retained "to carry out certain activities for prosecution counsel in the trial matter relating to the murders..." (p.496 lines 4-6). The activities included "looking for various prosecution witnesses" (p.496 line 10). McKay regarded his search as being fruitful for the most part. However, it is known that he did not produce Salmon, nor did he produce any useful information in respect of his whereabouts. He made contact with Rankin, apparently based on information that he had received from persons who had been incarcerated at the Horizon remand centre or from other individuals who had been in communication with such persons. As a result, on March 18, 2003, he met Rankin who was immediately arrested by police officers who had been in hiding nearby. At that time, McKay had been pretending to be an American

tourist who had received money to deliver to Rankin. The police "spirited" them to Central CIB, where both men (McKay and Rankin) found themselves seated on a couch in the office of Deputy Superintendent of Police Walker. McKay told Rankin he was investigating the murders of Burrell and Eldridge, whereupon Rankin said: "Me did deh deh but me never kill nobody. A Eugene kill him". McKay told Rankin that he had information that it was he Rankin who had done the killing. Rankin replied, "Boss, me only go because dem say me could a get good paper, me never kill nobody. Me can dead fi wha me a tell you. A Omar, Huddy and Eugene do it. Mi never mash dat work deh". According to McKay, DSP Walker then entered the office and asked Rankin if his name was Marlon. Rankin replied that it was not. McKay then left the room.

33. In respect of Ground 10, Mr. deLisser complained that no caution was administered to Rankin. He said that at the trial it had been conceded by the prosecution that McKay was a person in authority, and given the information that Superintendent Chin had received from Salmon, it was necessary for McKay to have administered a caution. Rule 2 of the Judges' Rules reads thus:

> "As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence. The caution shall be in the following terms:-
>
> > 'You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence.'

> When after being cautioned a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any such questioning or statement began and ended and of the persons present."

On the basis of this Rule, the fact that the police had already received Salmon's statement and McKay himself had received information which he told to Rankin, made it obligatory for a caution to have been administered to Rankin. There is therefore merit in Mr. deLisser's submission.

34. That having been said, it cannot be ignored that since **R. v. Sang** (1979) 2 All E.R. 1222, it has been the position that, despite a breach of the Judges' Rules, a judge has a discretion whether to admit a statement by an accused person. In the instant case, the learned judge having exercised his discretion in allowing the oral statement by Rankin into evidence, it must now be considered whether that statement amounts to a confession of murder. To repeat, this is what Rankin is alleged to have said:

> "Me did deh deh but me never kill nobody.
>
> A Eugene kill him"; AND
>
> "Boss, me only go because dem say me could a get a good paper, me never kill nobody. Me can dead fi wha me a tell you. A Omar, Huddy and Eugene do it. Mi never mash dat work deh."

This statement at best seems to be indicating mere presence. There is no indication that the maker either planned or participated in the offence of murder.

35. In the circumstances, the convictions cannot stand. The appeals are allowed, convictions quashed and the sentences set aside. Judgments and verdicts of acquittal are accordingly entered.