**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NOS. 62, 63, 65, 66/94**

**COR: THE HON MR JUSTICE CAREY JA**
**THE HON MR JUSTICE FORTE JA**
**THE HON MR JUSTICE GORDON JA**

**REGINA VS: ANDREW PEART**
**JUNIOR RICHARDS**
**DAVE ROOKWOOD**
**DEVON LAWRENCE**

**Frank Phipps QC for Andrew Peart**

**Delroy Chuck for Junior Richards**

**Leonard Green for Devon Lawrence**

**Dave Rookwood not represented**

**Miss Audrey Clarke for Crown**

**24th & 31st July 1995**

**CAREY JA**

In the Circuit Court Division of the Gun Court in Kingston before Patterson J and a jury, all these applicants were convicted of manslaughter save Devon Lawrence who was convicted of non capital murder. They had all been indicted on a charge of the non capital murder of one Norman Barnett on 27th January 1992.

Two witnesses, Lloyd Barnett and Fay Barnett a brother and sister of the victim were called as eye witnesses to this murder. Lloyd Barnett told the judge

that while he was on the verandah of his house with his sister, Devon Lawrence and Andrew Peart approached his brother, (the victim) who was then by the gate. Both applicants were armed with hand guns. Devon Lawrence then shot his brother who had asked "wah dat fah?" At that moment, the other two applicants, both similarly armed came onto the verandah where he had been engaged in "picking out" a pair of trousers and menaced him with their weapons. Junior Richards used an expletive while Dave Rookwood calmed his colleague in the words - "allow him man. A likkle yout' dat." That prompted both himself and his sister to withdraw and seek safety beneath a bed. Subsequently, when he went out, he saw his brother lying on a baby, fatally shot.

His sister confirmed his version in her testimony before the jury.

Both witnesses were cross examined and the result of that exercise prompted the ground of appeal filed on behalf of Andrew Peart which we granted leave to argue. Other counsel gratefully accepted the arguments put forward by Mr. Frank Phipps QC, as their own and did not advance any submissions of their own.

The ground as formulated is hereunder:

> "The learned trial judge should have withdrawn the case from the jury and directed a verdict of not guilty.
>
> The two witnesses on whom the prosecution's case rested both gave previous statements inconsistent with their evidence at trial. Their statements recorded by the police were substantially and materially different from their testimony in relating the circumstances in which the deceased was killed.

> The verdict of the jury was unreasonable having regard to the evidence."

For convenience, we deal with the cross examination of Fay Barnett first. This revealed that the picture portrayed by this witness in examination in chief, was altogether different. Her previous statement was discrepant with her testimony in court. In that statement, the only name she mentioned was that of Devon Lawrence whom she referred to as Wayne. Curiously the police officer who took her statement, swore that prior to taking her statement, she gave him the names of the four applicants and a fifth person, named "Teddy." We have examined her statement which shows that although she said she saw "Wayne", that is Devon Lawrence enter the premises with a gun, she did not witness the actual shooting because she had, with some of her neighbours, fled in panic to her bedroom and hidden under the bed. When the inconsistencies were put to her, she denied that she had given any such information to the police. It seems to us plain beyond a peradventure that the evidence of this witness had been effectively destroyed. Charitably she could be regarded as a thoroughly unreliable witness.

With respect to Lloyd Barnett he also explained such inconsistencies between his previous statement to the police and his evidence by saying that he never gave any such information to the police. In his statement, the witness said :

> "... whilst on the verandah working on the pants, I suddenly heard the door behind me pulled open and I looked around and immediately saw four

> men whom I recognised to be Waynie, Noah, (Andrew Peart) Tribal (Junior Richards) and Teddy. All four men had short guns in their hands. ... Wayne then removed the gun from my ear and quickly pointed it to my brother and I heard a loud explosion. ... He slowly fell from his seat to the floor. The baby he was holding also fell on the floor and ... the four men then walked from the verandah to the gate and at this stage, I saw Fannen and Martin Luther (Dave Rookwood) with the three other men join in with them and began firing several shots in the air. ..."

These discrepancies are, in our view, substantial and material. There is a significant difference between a shooting in close proximity and one at a little distance, between a shooting on a verandah and that at a gate to mention just two of the inconsistencies, we have isolated. What is of no less significance, is how could these be explained in the manner given. It is to be noted that the statements were given to different police officers on different dates but each witness gave the identical reason. Be that as it may, the position was that at the end of the prosecution case, both witnesses had given a perfectly understandable uncomplicated tale in examination in which each had confirmed the story of the other but their statements taken shortly after the event itself provided a different picture in which only one had actually witnessed the crime.

The learned trial judge was not asked to consider any submissions of no case to answer. But that does not, we wish to make clear, relieve a trial judge of his responsibility to withdraw a case from the jury where there is no case for an accused to answer.

Mr. Phipps QC argued that there was no case for his client Andrew Peart to answer and his colleagues joined in that submission with respect to their clients.

We have already indicated our view that the evidence of Fay Barnett was of the order of zero and there can be little doubt that Lloyd Barnett's evidence was not of a much higher order. The result of that assessment leads us to the conclusion that at its highest, the Crown's case was tenuous because of the plain substantial and material inconsistencies. On that view, it was the trial judge's plain duty to stop the case. We refer to **R v Galbraith** [1981] 2 All ER 1060 and in particular the headnote which encapsules the guidelines to be followed in this area of the law.

Before parting with this case, we should state in fairness to this very experienced trial judge that he may very well have been misled by the fact that none of the four counsel, who between them are not without experience, made any no-case submissions nor did the very experienced and senior counsel for the Crown bring to his attention the fact that the witnesses had departed from their statements. No grounds of appeal were filed which in any way challenged the fairness or correctness of his directions in which he left all the issues including the matter of the discrepancies to the jury.

In the result, we treat these applications as the hearing. The appeals are allowed, the convictions quashed, the sentences set aside and verdicts and judgment of acquittal entered.