IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 104 & 106/86

BEFORE: The Hon. Mr. Justice Rowe - President
The Hon. Mr. Justice Carberry, J.A.
The Hon. Mr. Justice White, J.A.

REGINA vs. CLEVELAND SMITH
DUDLEY BROWN

C.D. Morrison for Appellants

Miss Marcia Hughes for Crown

July 15, 16 & 17, 1987

CARBERRY J.A.

The appellants were tried between 3rd December, 1986 and 9th December, 1986 in the Home Circuit Court, Kingston, for the murder of Herman Millwood between the 25th and 26th May, 1983, in the parish of St. Thomas. They were tried before Walker J., and a common jury, found guilty and sentenced to death.

After hearing arguments on their applications for leave to appeal we treated the applications as the hearing of the appeals. We allowed the appeals. The convictions for murder were quashed and the sentences set aside, and verdicts of acquittal were directed to be entered.

This was in fact a re-trial: the two accused had been tried on the same charge before the St. Thomas circuit held in Morant Bay in March of 1984. The jury had failed to agree and a re-trial had been ordered. Oddly enough that first trial had been conducted before Walker J., and on the commencement of this re-trial before the Home Circuit Court counsel representing the two appellants earnestly prayed that Walker J., send the matter to be tried before another judge in view of his earlier connection with the case in presiding over the first trial. Counsel before Walker J., supported their request by referring to R. v. Quinn & R v. Bloom (1962) 2 Q.B. 245. In that case the appellants who were proprietors of clubs

which provided for patrons what are called "strip-tease" shows, had been prosecuted for keeping a disorderly house.

In one such case the jury had disagreed and a re-trial had been ordered by the Chairman of the County of London Sessions. The Chairman had presided at the hearing of the re-trial, and in argument before the Court of Appeal it was suggested that this was undesirable, and that he should have sent the re-trial to be heard by one of his deputies. In the Court of Criminal Appeal, Ashworth J., presiding, expressed the view that it would have been better if the re-trial had taken place before one of the deputy chairmen but observed that no such request had been made at the re-trial before the chairman, and the matter was left at large. As far as we can see there was no intention to lay down any rule of law to the effect that the judge who presided at an aborted trial was thereby disqualified from presiding at any subsequent re-trial. It may be desirable, if it can be arranged without inconvenience, to have a different and fresh mind presiding at the re-trial: but it is easy to see that circumstances may make this impossible or difficult, it may be desirable to have the case completed before the circuit ends instead of postponing it. Witnesses may be difficult to secure on another occasion, and it may be unfair to the accused to be remanded in custody for yet a further period subject to the strain of a capital charge hanging over him. Though this complaint was raised in Ground 1 of the Supplementary Grounds of Appeal, it was not pressed and it is not necessary to say any more about it, save to observe that there may be persons ill minded enough to think that when the judge insists on presiding over the re-trial he means no good to the accused. There were other and more substantial grounds of appeal, but in order to appreciate them it is necessary to say something about the facts of this case.

It was in many respects an odd case. The evidence, as put forward by the defence, not without some support from the police witnesses, suggested that the deceased Herman Millwood, better known as Bobby, was a thorn in the flesh of the residents of a little district called Mt. Sinai in the parish of St. Thomas. Bobby lived in Kingston and commuted between the district and Kingston, and it was suggested that be visited the district only to use it as a base for carrying out raids on the livestock and farm products of farmers in the area. In fact it was suggested that at the time of his death the police were looking for him to assist them in the course of their investigations, to use a time honoured phrase. Be that as it may, it appears that he had allies in the district, prepared (apart from his family) to afford him shelter, and one of them named Roland Campbell was the principal and practically sole witness for the Crown.

On the 26th May, 1983 Bobby's body was discovered in a track in the district. He had been hacked and stoned to death. The pathologist, Dr. Mariappa Ramu, who conducted the post mortem examination on Bobby, listed no less than ten injuries to the body of this man, whom he described as 5 foot 10 inches in height, and 150 lbs weight. The injuries were not all of the same nature, but some three or four were incised wounds made by a sharp instrument such as a machete, and two of these were very serious and fatal, one being a chop to the neck which cut through the windpipe and jugular vein, and another to the front and outer aspect of the right arm, and similar wounds to the head (nose, left cheek, and left forehead). Others of the injuries appeared to have been made by stones or blunt instruments, and there was subdural bleeding in the skull. Some of the wounds would have bled profusely. Death was not instantaneous, but would have occurred in minutes. There was a travelling bag with clothes of deceased resting on the body. The evidence of Det. Inspector Martin who investigated the murder was that there was much blood where the body was found. Incidentally, for some reason not apparent the head and upper chest

had been covered with stones, leaving the rest of the body exposed to view. The inspector followed a trail of blood which led from the body back to the yard of the principal witness Roland Campbell, a bee Farmer aged 53. The trail seemed to commence close to the hut in which he processed his honey.

Inspector Martin made enquiries of Campbell, but got at that time no satisfactory answers: Campbell told him that he knew nothing about the matter. Sometime after he had been lodged in the police cells at Yallahs and later at Morant Bay, Campbell gave the Inspector some information, in substance the story that he gave in evidence, and on the basis of it some several hours later the Inspector and his party returned to the district. They interviewed and detained the appellant Smith. According to the Inspector he asked Smith what part he played in the killing of Herman Millwood, and Smith replied:

> "Lockye ne sir, (the deceased was) a boy come from town all the while come broke me house and him come back last night fe do the same thing, and we go for him."

Asked who was the "we", Smith said it was his brother-in-law Jack Brown (**i.e.** the accused Dudley Brown).

Acting on this information the police party went to the home of the accused Brown. However he saw the party approaching and ran away. He was not detained then, but was detained early next morning when the police returned to the district.

When brought to Inspector Martin he is alleged to have remarked:

> "A me brother-in-law get me in a this!"

Either then or later he is reported to have told Inspector Martin that the reason he had run away the previous evening was that he had a little ganja on him.

What then was the story Campbell revealed to the police and which he subsequently gave evidence about? It was a story which incidentally secured his release from being a murder suspect after five days spent in the Morant Bay Police cells.

In effect Campbell said that Bobby had spent the night of the 24th at his yard, sleeping in his "bee-house". On the morning of the 25th he, Campbell, had gone down a track to get water for his household use from the Yallahs river nearby. On the way he had passed Cleveland Smith and Dudley Brown. They were burning charcoal. Smith had asked him if he had seen Bobby. He had replied (untruthfully) no. Smith had accused Bobby of breaking (into) his house several times and of threatening to burn it down, and added that he was coming for him tonight. The inference was that Smith knew Bobby had been at Campbell's yard last night, and was threatening to come for him. The appellant Brown was present, but took no part in the conversation. Campbell returned home with his water and this information, but oddly enough he seems to have made no effort to find Bobby and warn him of this threat. He says he did not then know where Bobby was. Bobby had slept there the previous night and had moved on.

Campbell alleges that he went to bed at about 8.00 p.m. and that later that night his father woke him up and told him something. He went out into the yard but saw nothing. After he went to his gate he saw Smith and Brown coming up the road or track. Both had machetes. "Smith said that <u>they</u> had killed Bobby". He asked where Bobby was, Smith replied down the road, and asked did Campbell want to see him. Campbell said yes. Smith then turned back, and he Campbell, followed Smith and Brown for some little distance till they came on the body of Bobby lying in the track. Incidentally when questioned as to the "they" who had killed Bobby, Campbell made it clear that Smith had said that he (Smith) killed Bobby. Brown had been present throughout this conversation and encounter, but had said or done nothing. Campbell had found Bobby lying on his back, with stones covering his head and upper chest.

Campbell's evidence was that after this "viewing" of the body Smith had said come, and that many more were left to go like him. (This presumably meant that he was saying that suspected or actual praedial thieves should all be killed in like fashion).

Smith accompanied Campbell back to the latter's yard, and indicated a spot near his gate as being the place at which he had killed Bobby. This would have meant having to lift or drag the body to the place some distance away where it was found. The pathologist found no sign of Bobby's body having been dragged.

Having returned to Campbell's yard, Smith went to the bee-house, picked up Bobby's travelling bag and clothes, (so he had returned there that night), and he and Brown departed. The bag and clothes were found on top the body by the police next morning.

Before Smith departed that night, Campbell says that he said to him, in effect, when you kill the man in my yard, tomorrow morning when the police and everybody come down what am I going to tell them? He states that Smith replied "I mustn't business with it. If anybody ask me any question all I have to tell them is that I dont know".

It was for that reason, or following that advice, that Campbell says that when Inspector Martin first questioned him he said he didnt know and did not then reveal his story. Whether it is likely that that was the reason is a matter for speculation. What is clear is that under pressure at the police station Campbell told his story implicating Smith and Brown, and principally Smith, for Brown was merely present, said nothing and as far as Campbell testified did nothing.

It may be convenient to look at the defence version of events at this point.

There are two preliminary things to note. The first is that a no case submission was made on behalf of Brown, and the learned trial judge called on the Crown Counsel to satisfy him that Brown had a case to answer. Crown Counsel replied, the Judge reserved his decision on this point overnight, and next morning ruled that Brown did have a case to answer.

The second thing is that from a very early stage in the case starting with the cross examination of Campbell by the defence, defence counsel had been trying to secure the admission in evidence of the deposition of one Lorenzo Campbell, the father of the witness Campbell. It appears that Lorenzo gave a deposition at the preliminary examination, but was not called at the 1st trial (which produced the hung jury) and that he had since died. It will be remembered that Campbell had stated that his father woke him and that he then went out in the yard and had the encounter which resulted in Smith confessing to him the murder of Bobby. Apparently something in the father's deposition contradicted Campbell on some part of his testimony. We do not know exactly how or what, as we ourselves have never seen the deposition. What is clear is that the trial judge was aware of the deposition and that he made it abundantly clear on several occasions that on his construction of section 34 of the Justice of the Peace Act, which provides for the admission in evidence of a witnesses deposition where certain conditions are established, i.e. that the witness is dead or unavailable to give evidence, and that the authenticity of the deposition (i.e. suitably witnessed by the Justice of the Peace etc.) has been otherwise established, and that the accused had an opportunity for cross-examining the deponent when the deposition was taken. The judge's view was that only the Crown or the prosecution had the privilege of putting in the deposition of an absent witness.

We will return to these two points later, but to resume the narrative, the appellant Cleveland Smith elected to give evidence on oath. His story was that on the fatal night of the 25th May, 1983 he was peacefully at home with wife and children, when he heard the avoice of Bobby outside abusing him, calling him a police informer and threatening him and then stoning the house. Some of the stones broke his glass windows and came to rest on his bed, but he and his wife and children had prudently gone under the bed for shelter. Smith bawled out for murder, and presently heard the voice of Dudley Brown, his brother-in-law (Smith lives with Brown's sister) calling out and apparently stoning the person or persons who had been attacking his home. Bobby ran off, pursued by Brown and others in the community, but made good his escape. Meantime Smith emerged from the siege of his house and spoke to Brown and one Butler who had come to his rescue. Smith had heard further noise of a chase, but had taken no part as his wife had insisted he stay home and protect them lest Bobby return. Accordingly he had never left his house that night, and had gone about his farming peacefully next day unaware of Bobby's death, until his girl-friend had told him of a rumour and he had been detained that afternoon by Inspector Martin. At that stage he became aware of the death or murder and that he had been detained because of something that Campbell had told the Inspector. It appears that the Inspector took Smith's clothes and also his machete, presumably to test them for blood. They have never been returned or put in evidence and so would seem to have proved negative.

Smith's evidence was that on reaching the jail or police lock-up and finding Campbell in the adjoining cell, he asked him how he had come to mix up Smith's name in the matter. Smith has Campbell as giving him a long account to the effect that Campbell and Bobby had gone goat stealing, but the goat stolen had made noise and they had been chased by the angry home owner. He Campbell had managed to escape but the chase had continued and he had seen the pursuers stoning Smith's house and later they must have caught Bobby. He Campbell had however managed to escape and get home safely.

Smith describes Campbell as an "enemy" and that Campbell disliked him because he had once intervened in a matter where Campbell had stolen a donkey and sold it to another man, and he Smith had helped the owner recover it. Smith admitted that it had not occurred to him to tell the police the story that Campbell had told him in the cells.

Dudley Brown, the second appellant made an unsworn statement from the dock. In general he supported Smith's story of intervening when Smith's house was being attacked, of chasing the attackers, but not catching them. Of returning to the scene and being shown by Smith how his house had been stoned. He knew nothing of the murder of Bobby.

As a general comment it would possibly be difficult to judge which was the more unlikely story, that of Campbell saying that Smith had come to him and told him he had killed Bobby and showing him the body, or that of Smith saying that Campbell had confessed to having gone goat stealing with Bobby and having been chased by the goat owner, who by inference had caught and killed Bobby.

There was however an important difference: the police had believed Campbell, though there was no supporting evidence against Smith, no bloodstained clothes or machete etc., In the situation that existed counsel for the appellant complains in ground 4:

> "That the learned trial judge erred in law in failing to warn the jury of the dangers of acting on the uncorroborated evidence of the witness Roland Campbell, either on the basis that on the evidence there was evidence from which the jury might infer that he was an accomplice or on the basis that he was a witness who had an interest to serve."

We think that the complaint is well founded. Both men were suspect. The police had first arrested Campbell, and it is clear that to save himself he came out with this story. The jury should have been warned to view his evidence with some reserve and caution, no such warning was given, and reading the summing-up as a whole it seems clear that the learned trial judge accepted Campbell as a witness of truth and so advised the jury repeatedly.

Failure to point out that there was no corroboration of Campbell's evidence and that he at least had an interest to serve were serious nondirections

It is clear that the whole of the Crown's case rested on the evidence of Campbell, though there was alleged to be some support from Inspector Martin's account as to what the accused had told him on being detained.

In these circumstances it was therefore of great importance to defence counsel to be able to find some flaw or contradiction which would affect the credibility of Campbell's evidence and perhaps go further and establish a discrepancy. They claimed to have found such a weapon in the deposition of Campbell's father. We do not know what in fact would have been revealed had it been admitted in evidence, but we must assume that it would have had the effect claimed for it. Clearly the judge ruled that under section 34 of the Justice of the Peace Act the defence cannot put in a deposition of an absent witness, that this is only open to the Crown. The relevant portions of section 34 read thus:

> "and if upon the trial of the person so accused as first aforesaid, it shall be proved by the oath or affirmation of any credible witness that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel or is absent from this island or is not of competent understanding to give evidence by reason of his being insane, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he, or his counsel or solicitor had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the Justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not, in fact, signed by the Justice purporting to sign the same:
>
> Provided, that no deposition of a person absent from the Island or insane shall be read in evidence under the powers of this section, save with the consent of the court before which the trial takes place." (emphasis supplied)

There is absolutely nothing in the section which limits the right to put in a deposition to the Crown or prosecution. The section having described the conditions under which a deposition may be used, says,

> "..... it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof ....."

In day to day practice it is not at all uncommon for depositions to be put in by the defence; usually this is because they are being tendered as evidence that a witness said something different from his evidence at the trial and the deposition is put in to show that he said something materially different on the previous occasion. What I think upset the judge was that in this case the deposition was being put in simpliciter. It was not the deposition of Campbell being put in to contradict him, but the deposition of his father being put in for that purpose.

Admittedly it does not happen very often, but there is no reason in law or common sense why the defence should not be able to put in a deposition provided that the statutory conditions are satisfied. In R. v. Richard Scott and Dennis Walters S.C.C.A. 153 & 154/80;(delivered 17th December, 1982) the effect of section 34 of The Justice of the Peace Act was fully explored and explained, and the nature of the discretion of the trial judge in the various circumstances was explained. It is not necessary to repeat all that was there said, inasmuch as the Court was not there dealing with the right of the defence to put in a deposition. But it may be useful to point out that the discretion of the judge that is being discussed there is a discretion to reject the deposition on the ground that its use might be unfair to the accused. It is therefore a little surprising that the discretion should here have been exercised to reject a deposition that the defence wanted to put in. It may also be useful to quote a sentence taken from Scott & Walters at page 55, it reads:

> "The section (34) in our judgment makes the depositions of witnesses who have died or are too ill to travel admissible without the consent of the judge, whereas his consent is needed when it is a case of the witness being absent from the island or affected by insanity...."

Scott & Walters has since been followed and applied in R. v. Dalton Sheppy & Delroy Jones S.C.C.A. 1 & 3/83, delivered 26th September, 1985.

There is an interesting and comparable case in which the defence were allowed to put in a transcript of evidence given at a previous trial, the court equating the use of such a transcript with the use of a deposition taken at a preliminary enquiry, see R. v. Peter Barnabas Hall (1973) 1 All E.R. (1973) 1 Q.B. 496.

It was a case in which the defence wanted to put in the transcript of a witness who had given evidence at the earlier trial but had since died. They sought to prove that that person was the real culprit, and that his evidence and denials were evasive. The trial judge refused to allow the evidence. It is sufficient for the present purpose to quote a section of the headnote in the Queens Bench Reports:

> "Held, allowing the appeal, that at common law the deposition of a witness who had died before trial was admissible in evidence and, since both a deposition and a transcript of evidence given at a trial recorded the sworn evidence of a witness given in the presence of the defendant and that evidence had been subject to cross-examination, there was no reason in principle to distinguish a deposition from a transcript provided that the latter had been duly authenticated and, in the exercise of the judges discretion, the transcript was admissible in evidence. Accordingly the judge had wrongly ruled that the transcript of R's evidence was inadmissible."

It will be noted that the case shows that even at common law, apart from any statutory authority, the deposition of a witness who had died was admissible in-evidence, and secondly that the discretion to reject it arose only if the judge thought that its reception would be unfair to the accused.

In the event then we are of the view that the appellants succeed on grounds 2 and 3 of the supplementary grounds of appeal, which read:

> "2. That the learned trial judge erred in law in his ruling that a deposition of a deceased witness who had given evidence at the preliminary enquiry can only be placed before the jury at the trial pursuant to section 34 of the Justices of the Peace Jurisdiction Act at the instance of the Crown.(see page 104 of the transcript).
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> 3. In the alternative to (2) above, that the learned trial judge erred in law in failing to exercise his discretion to permit the deposition of the deceased witness Lorenza Campbell to be read to the jury as part of the case for the Defence (see pages 140-145 of the transcript."

Finally some three grounds of appeal related particularly to the appellant Dudley Brown. It will be remembered that even accepting the evidence of Campbell, Brown was a silent observer who never spoke and was never shown to have participated in the events relating to the death of Bobby. We refer only to grounds 5 and 6. They read:

> "5. That the learned trial judge erred in law in calling upon the applicant Dudley Brown to answer the charges against him since, at the close of the Crown's case no prima facie case had been made out against him.
>
> 6. That the learned trial judge erred in repeatedly inviting the jury to have regard to the silence of the applicant Dudley Brown and/or his presence in the company of the applicant Cleveland Smith as facts which might give rise to an inference of his guilt on a charge of murder."

We have carefully read the transcript in this case and we are of the view that the complaints made in grounds 5 and 6 are justified. There was not sufficient evidence to establish common design, nor enough to establish a case for him to answer.

In all the circumstances of this case the applications for leave to appeal are treated as the hearing of the appeals, the appeals of both appellants are allowed their convictions are quashed, and sentences set aside and we direct that verdicts of acquittal be entered.