JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 31/83 - GOVERNOR-GENERAL'S REFERENCE

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A. (AG.)

REGINA

VS.

DELROY PRINCE

Mr. Ian Ramsay for the Appellant

Mr. Garth McBean for the Crown

February 25 and May 8, 1987

KERR J.A.:

The appellant was convicted for murder in the Home Circuit Court on the 8th March, 1983 before Smith C.J. and a jury and sentenced to death.

On the 25th July, 1985 his appeal was dismissed and the conviction and sentence affirmed. We were informed by Mr. Ramsay that a petition for special leave to Her Majesty was not now being pursued. The matter again comes before us on a reference from the Governor-General pursuant to Section 29(1)(a) of the Judicature (Appellate Jurisdiction) Act.

The Governor-General was moved to make the reference by statements taken by the police and submitted to him through the Ministry of Justice. The statements were from Desrine Douglas, Barrington Burnett, Desrine Brown and Patricia Butler. The contents of the statements of Douglas, Brown and Butler were reduced to affidavit and tendered. These

witnesses attended Court. Burnett neither executed an affidavit nor attended Court.

The facts of the case were summarised in the first appeal and that summary is quoted hereunder for easy reference:

> " The case for the prosecution rested on the evidence of Michael Davis, a mechanical engineer apprentice. The deceased was his girlfriend of sixteen years of age and was his next door neighbour.
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> On the night of the 15th of August, 1980 about ten o'clock, Davis and deceased having left the home of the deceased for a restaurant on Fernandez Avenue were then en route walking along Langston Road, St. Andrew. At or near premises known as Campbell's Garage four gunmen rushed from the gully, accused Davis of being a socialist and threatened to kill Davis and his girlfriend. The deceased then pleaded with the gunmen that instead of killing them they be taken to 'Kojak.' The accused Howell is known as Kojak. In response the gunmen took them to the house of Kojak at Jacques Road and handed them over. Davis' graphic account of what happened thereafter was a narrative of the commission of an atrocious murder. The expected aid and comfort from Kojak was not to be. According to Davis, Kojak got a rope and said he was going to kill Davis as he had wanted his cousin Roland Murray and could not get him. The accused Peart known to the witness, as 'Goatie' then left and quickly returned with about four other men including one Tony, who was not before the Court, the accused, Gladstone Francis known to him as 'Gorgon' and the appellant nicknamed, Cobra. Tony took charge of the proceedings. He then felled Davis with a blow from his gun, tied Davis' hands and feet and gagged him. Kojak then pulled the rope off Davis' feet and used it to tie Davis and the deceased together. It was elicited in cross-examination that the deceased was also accused of being a political spy. From the house Davis and the deceased were marched along the road by a squad consisting of five men, the four accused and Tony. They were apparently being taken to a place of execution. Gorgon led off from the yard at Jacques Road calling on the others to follow. None of the original four men formed this procession. Of the five men only the appellant and Tony were armed with guns. Kojak held the rope that bound the witness and the deceased together. The route taken led through a gully to Mountain View Avenue.
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> As they entered Mountain View Avenue the order was Gorgon in front then Kojak with the lead rope, Cobra (Appellant) with gun pointed at the head of the deceased, Tony with gun pointed at Davis and Goatie in the rear. On Mountain view Avenue a motor vehicle with bright lights came along. Gorgon had then crossed the road. Tony then said 'Mek we do it now.' Davis was suddenly pulled to the ground by the deceased and he

"heard the explosions of shots being fired. He fell on top of Donna; he rolled off and then he saw the appellant and Tony firing shots. He remained still pretending to be dead, and they left him lying there. About half-an-hour after the police came and cut him loose from the deceased. He then saw what apparently were portions of her brain coming from a wound in her head. He received wounds to his elbow but he was unable to say how he got them. He then took the police to Kojak's house at Jacques Road. The police took two accused from that house and two from another house nearby. He identified them as four of the men who took deceased and himself to Mountain View Avenue to kill them. Where the shooting took place the street was well lit with fluorescent lamps. There was also light in the house at Jacques Road. To cross-examination of appellant's counsel he said he knew the appellant for about four years, he had often seen him on Langston Road. He had never been to Kojak's house before that night but he used to work at No. 2F Jacques Road with Lorenzo Pennant, a radio technician for two years up to 1976. On the journey from Jacques Road to Mountain View Avenue deceased and himself fell more than once. In cross-examination by Kojak's attorney he said that it was Tony who directed Kojak to tie him.

Dr. Mariappu Ramu who performed the post-mortem on the body of the deceased in evidence said that he found:

(1) A firearm entry wound to the back and inside the left forearm; the bullet passed through the arm making its exit at the front.

(2) A firearm entry wound to the right temporal region of the head passing into and lacerating the brain.

(3) A firearm entry wound to the right buttock.

In his opinion death was due to shock and haemorrhage from gun-shot wounds mainly to the head. The absence of burning, blackening and tattooing around the entry wounds indicated that the firearm was discharged at a distance of more than eighteen inches from the body of the deceased.

Howell's (Kojak's) defence as indicated in cross-examination and as averred in his statement from the dock was duress. According to him Tony and other gunmen, the witness Davis, and the deceased came to his home. Davis and deceased were tied up. He was ordered to walk with them. A van came along. The tied up persons fell in the road and then Tony said 'mek we finish them here,' he ran off and went to his home. In a statement to the police he admitted tying the witness Davis and the deceased on the instructions of Tony.

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"Peart's defence was that he was a mere on-looker. In his statement from the dock he said he was standing in a crowd and saw the witness Davis and the deceased with a 'set of men'.

Gladstone Francis in his statement from the dock, said on the night in question he was at his gate, when the gunmen escorting Davis and the deceased came to him and asked where 'Kojak' lived. He saw the gunmen tie up Davis and deceased and led them away.

The appellant's defence was an alibi. In his statement from the dock he denied knowing anything about the affair. He was sleeping at home with his baby mother when soldiers broke into the house and started to beat him up. He became unconscious and recovered consciousness at the Elletson Road Police Station. There he was questioned and beaten. Inspector Thomas beat him with a cricket bat. Thomas brought him a paper to sign and as he could not stand the beating he signed it.

The admissibility of that statement was hotly contested. After a trial within a trial in the absence of the jury the learned Chief Justice ruled the statement admissible.

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In that statement the appellant had said that he saw Tony, one David, and accused Kojak, coming along Jacques Road with a woman and a man tied together. They were going towards Mountain View Avenue. Tony asked him to come with them and he followed. On reaching Mountain View Avenue, he saw David and Tony firing shots and the woman and man fell. They all then ran."

Desrine Douglas, a 29 year old student of the Jamaica Institute of Management, and residing at 63 Mountain View Avenue, Kingston 2, in her affidavit, stated that she knew of the appellant being arrested and charged with the murder of Donna Henry on Mountain View Avenue in 1980 and that before the case came up for trial Anthony Blake otherwise called Tony, came to her home and threatened her: "..... if you engage in any argument with me I will kill you like I killed the girl down Mountain View Avenue, and a man is in jail for that Murder." He again in August 1985 threatened to kill her and her family. She knew that Blake was shot and killed by police later that month. She did not give a statement to the police before that of October 29, 1986 because she was afraid of Blake.

Now, apart from the fact that the purported confession of Blake was inadmissible hearsay, Miss Douglas' affidavit took the matter no further and was completely unhelpful. That Blake was one of the men in the shooting party or that he was armed with a firearm and he actually fired at the deceased as she lay prostrate bound to the witness Michael Davis was no longer in issue. From her own knowledge she knew nothing of this murderous affair at Mountain View or of the role played by any of the parties there that night. She gave no credible reason for Blake's spontaneous confession to her nor for her silence even after Blake's death.

Desrine Brown, a Machine Operator, of 54 Mountain View Avenue, stated that on the night of August 1980, attracted by loud talking, she left her house for a shop in front of the premises and there through a mesh wire she saw Anthony Blake standing in Mountain View over some people with a gun in his hand. The gun was about seven inches long. About three minutes after she heard two explosions coming from where Blake was. The light of an approaching car was then on him. Blake then ran across a fence in the direction of Jacques Road. Shortly after when the police came she went out on Mountain View where she saw the body of the deceased, Donna Henry, lying in the road. She knew of the arrest for murder of the appellant but did not then give any statement to the police, nor did she say anything to anyone about this matter before because she was afraid of Anthony Blake. She knew Blake was shot and killed at Jacques Road in 1995. In October 1986 she heard the appellant was to be executed and she gave this statement on the 29th October. In cross-examination she admitted when she visited the scene the police were making enquiries but she was afraid that the notorious Tony Blake would burn down her house. When the shooting occurred she was about twelve chains away but although there were other persons there she could not recognize anyone else. She was unable to say whether the other persons with Tony were men or women or if any other person there had a gun. In re-examination she pointed the distance where Blake ran by her (about two chains).

This witness was vague, vacillating and uncertain when asked to give simple particulars. It is remarkable that she could make out Tony and the gun in his hand but unable to say whether the others in the group were men or women or that anyone else had a gun. As to the position or part played by the appellant that night she had no knowledge. Her evidence was no more than of facts which by now would have been generally known in the area. She was thoroughly unconvincing.

The witness Patricia Butler, a factory worker, now 26 years of age, at the time of the incident lived at 16 Jacques Road, Kingston 2. She stated in her affidavit that on the night of the murder she was at the house of the appellant who was her boyfriend. His home is on the same road (No. 9). While there a boy came in the yard and told appellant Tony wanted him and as a result the appellant left the house and went to the gate. She followed him; there she saw Tony with a gun pointing at the appellant. Others were with Tony but she did not recognize any of them. At gun point, Tony ordered the appellant to tie up two persons standing by the gate and when the appellant refused Tony threatened to put a shot in his head. Tony threatened her and because she was afraid she left and returned to the house. As she was leaving she saw the group including the appellant and the persons to be tied walking away. While in the house she heard gunshots, then foot-steps running towards the house and the appellant asking her to open the door. This she did and the appellant then told her that Tony "carry the girl and the boy and kill them". Later she heard Tony outside threatening to kill Delroy and his family if he talked.

About 8 a.m. that same morning Tony came to her house, boxed her and hit her in her head with his gun and threatened to kill her if she say anything. She had been intimate friend of the appellant for three months before. She was so afraid of Tony that she moved to Jackson Road, Kingston 2. She returned to Jacques Road when she learnt of Tony's death in August 1985. She offered to give this statement on October 29, 1986, when she heard the appellant was to be executed for the murder.

In cross-examination she said she was afraid of Tony and after his death, of his friends, but she made up her mind to give a statement on October 29. She knew when the appellant was being tried, she knew of his conviction and sentence but she was afraid to go to the police or even contact the appellant's lawyers. She spoke to no one of the threats. She visited the appellant when in prison but she was so afraid she would not talk. She admitted that she knew that the appellant had a "baby-mother" girlfriend who visited him at Jacques Road but she did not know her name. Nevertheless, she intended to sleep with the appellant that night at his home. If his baby-mother was there that night she must have come there after she left. She now says that Tony forced the appellant and two others to tie up the deceased and Davis. She denied that that night appellant slept with his baby-mother.

Now, the obvious intent of this evidence was to raise the issue of duress. It is inconsistent with the statement that the appellant gave to the police and wholly incompatible with the defence at the trial. At his trial the defence was an alibi. As regards the caution statement which the police took from appellant that night, he firstly challenged the voluntariness of it and secondly that it was a fabrication - he denied making any such statement. It is significant that of the four accused men he was the only one who challenged the identification evidence of Michael Davis. Davis' evidence on this aspect of the case was to the effect that he was well-acquainted with everyone in the party and he even knew each man by his nick-name. The appellant he knew as 'Cobra'. The caution statement obviously placed the appellant on the horns of a dilemma because by the time the case came on for hearing or certainly at the trial, he knew that the witness Davis was saying that of the five men who took him (Davis) and the deceased to Mountain View, only the appellant and the absent Tony were armed and actually fired at him and his deceased girlfriend. In such circumstances, the defence of duress would not be open to him as a co-principal in the first degree. The jury's verdict of guilty against him

and the acquittal of the other three co-accused was explicable only on the basis that they accepted the evidence of Michael Davis that of the five only Tony and the appellant were armed. The witness, Patricia Butler, was therefore endeavouring to say for the appellant what he had never said for himself.

Notwithstanding, we gave due consideration to her evidence. She was at the time of the incident but no more than 20 years of age. We found it remarkable that without giving any thought to the fact that the appellant's 'baby-mother', whom she did not know, was in the habit of visiting and sleeping with him, she had gone to the appellant's house to sleep with him, and that in the wee hours of the morning he returned from the shooting and told her of what happened but she was not there when the police came; instead it was the 'baby-mother' who was at home. In addition to the conflicts with the stories of the appellant, her evidence is also inconsistent with the hitherto unchallenged evidence at the trial that the tying up of the deceased and her boyfriend was done at Kojak's home and that it was from Kojak's home that the party set out for the place of execution. We are of the view that her evidence was false in every important material particular. Hers was a patent fabriciation.

Mr. Ramsay submitted that although the evidence was not "fresh evidence" in the strict sense, this Court, consistent with its approach to further evidence tendered on appeal by way of a Governor-General's Reference as stated in such cases as R. v. Roosevelt Edwards, Supreme Court Criminal Appeal No. 12/75 delivered December 5, 1985 and R. v. Barrington Housen, Supreme Court Criminal No. 278/77 - delivered July 5, 1985, should give due consideration to the evidence tendered and in assessing that evidence consideration should also be given to the fact that the evidence came to light by the police themselves undertaking the investigations and not from any suggestion or prompting from the defence. This evidence, he said, was sufficiently credible to merit consideration by a jury and, accordingly, the appeal should be allowed and a new trial ordered.

We are indeed mindful of the accepted liberal approach by this Court to evidence of this nature and that the object of a reference such as this is, was to assist the Governor-General in respect of his exercise of the prerogative of mercy.

However, we are firmly of the view that such of the evidence as we indicated was relevant, we found not worthy of credit and clearly fabricated to save the appellant from capital punishment.

For these reasons we dismiss this further appeal and re-affirm the conviction and sentence.