JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 148/88

COR: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA

VS.

DENNIS LOBBAN

R.L. Williams for applicant

Kent Pantry for Crown

14th May & 4th June, 1990

CAREY, J.A.:

We now give our reasons for refusing this application for leave to appeal. On 17th June, 1988 after a trial which began on 13th June, in the Home Circuit Court before Patterson J and a jury, the applicant was convicted on an indictment charging the murder of three persons on 11th September, 1987. Count one alleged the murder of Wilton Brown; count two related to Winston McIntosh which is the real name of Peter Tosh, the internationally known "Reggae" singer; count three was in connection with the death of Free I Jasi Ani Kabakajirai, the Rastafarian nomenclature of Jeff Dixon, a well-known broadcaster and disc-jockey.

The prosecution led evidence that at about 7:30 p.m. on the 11th September Peter Tosh, his common-law wife Marlene Brown and their visitors Michael Robinson, Wilton Brown and Santa Davis were enjoying a quiet evening in the privacy of their living room at their home at Plymouth Avenue, Barbican

in St. Andrew. One of the guests let in the applicant whom he knew before and two other men who had arrived with the applicant. Their interest was not to watch the television programme by satellite in which the other visitors were engaged. These intruders brandished guns. Householders and visitors alike were peremptorily ordered to lie face downwards on the floor. The command was "belly it," hardly English or Jamaican English, but menacing and strikingly clear in its purport. The applicant as leader demanded money and they were told by Tosh and indeed by his wife Marlene Brown that they had none. But this was incomprehensible because Tosh had just returned from a tour abroad with United States currency. Nor did the applicant take kindly to Marlene Brown's explanation for this regrettable state of affairs. She advised that the applicant's brother had visited earlier in the week and had been given money. He expressed the view that she was wholly to blame for Peter Tosh's financial incapacity to maintain "we", meaning presumably anyone who came by and asked. Her continual explanation appeared to irritate and anger the applicant who then turned his attention to Tosh himself demanding to know whether he had given his wife so much authority over them, that he threatened to kick him.

These proceedings were interrupted by a knock. Thereafter, Free I Jasi Ani Kabakajirai also known as Jeff Dixon and his wife were ushered into the room and ordered to lie face downwards on the floor. Mr. Dixon was unwilling to comply despite the menace of guns and jabs from the gun of one of the intruders. Eventually he responded to the advice of Marlene Brown. Thereafter persons in the room were robbed of jewellery and one of the men, having found a machete some where in the house used it to beat Marlene Brown. She was

forced to the ground and shot, she said, in her head, the bullet fortunately for her, only grazing her skull. She was thus able to be alive to recount these events.

After this first shot, there was a barrage of shots. All the men must have fired. Everyone lying on the floor was shot, three of them fatally each of whom formed the basis of a count in the indictment.

Another witness who lived to tell the tale was Michael Robinson. He too was well acquainted with the applicant. The widow of Jeff Dixon did not know the applicant before and it does not appear that she was invited to attend an identification parade. None of the witnesses to the incident were acquainted with the other two gun men.

The defence was an alibi. The applicant, unusually in this jurisdiction, gave evidence on oath and called a witness in support. He acknowledged that he knew both witnesses on whose eye-witness account the prosecution relied and asserted that both were actuated by feelings of ill-will towards him. In the case of Marlene Brown, he related a discussion between himself, Peter Tosh and the witness in which she referred to him as a "f..... liar and news carrier for Peter Tosh. It seemed that the witnesses' brother while driving Peter Tosh's car, had been involved in a motor vehicle accident and the applicant had brought this to the attention of Peter Tosh. He also explained in the course of his evidence, that although the relationship between himself and this witness cooled, he nevertheless continued to visit and eat what she had prepared.

With regard to the other witness Michael Robinson, the applicant related that during his last visit to the Tosh's before the incident, he had been given $1,000 by his

benefactor who had also given Michael Robinson an amount of $500. Robinson was less than happy with his offering and intimated that he was entitled to more. But Tosh said that he was not in funds at the time and suggested to Robinson that he should contact him later. Peter Tosh further informed Robinson that the applicant, who is also called "Leppo," was his "brethen." All of this made Robinson quite unhappy because on the following day when he met Robinson and greeted him, he received no response.

The jury were required then to consider on the one hand, the identification evidence of two of the eye-witnesses namely, that of Marlene Brown and that of Michael Robinson. On the other hand, they had to take into account the alibi of the applicant and his witness. The identification evidence was, in our view, more than satisfactory. Witnesses and applicant were known to each other. The lighting was adequate; the opportunity for observing lengthy, proximity for viewing the applicant was close. So far as the directions on the important issue of identification of the trial judge went, no complaint has been levelled by counsel for the applicant. We ourselves are satisfied that the learned trial judge gave directions which were adequate, clear and accurate. The jury having rejected the alibi had powerful evidence on which they were entitled to return the verdict they did.

Learned counsel for the applicant put forward three grounds to support his application for leave to appeal. We set them out:

> "1. The learned trial judge erred in principle in refusing the application that the caution statement of the co-accused be edited. As a result hearsay evidence was admitted for the purpose of identifying the appellant.

"2. The inadmissible statement was highly prejudicial to the appellant and went to the root of the case.

3. In the circumstances, notwithstanding the trial judge's direction in the summing up, there was a distinct danger that the jury was influenced by the inadmissible evidence in arriving at their verdict."

The caution statement to which reference is being made, was provided to the police by the applicant's co-accused. That statement was tendered without any objection from that co-accused's counsel, who expressly stated (p. 170) that the co-accused was entitled to have the entire statement put in as part of his defence. Objection was however taken by counsel for the applicant to the last sentence in that statement. He wished to have that sentence edited out of the statement on the basis that "its prejudicial effect outweighed its probative value." The prejudice affected the applicant. The learned trial judge denied counsel's objection and the statement was admitted in its entirety. Those objections form the basis of these grounds.

In the cautioned statement, the co-accused stated that he did transport three men to Tosh's house at the material time. He had not known these men before and had been requested by the watchman at his workplace to assist some of his friends. These persons in turn asked him to take them to Barbican. He mentioned the flurry of shooting, the men returning to his van and his driving off and being warned to be silent. That very night he learnt of the murder of Peter Tosh. He later saw a photograph of a man in the Star newspaper - and his statement then continued -

".....and I recognised the photograph as one of the men who I

> "drove in the van to Peter Tosh house. He sat in the back. He was the man who I saw with the gun when we were coming from the house. The name below the photograph was Dennis Lobban otherwise called Leppo."

To this underlined sentence, counsel took objection.

The practice of editing the statement of an accused person which the prosecution seek to tender, is usually done where the statement contains an admission of a previous conviction or shows other matter reflecting on his character. See for instance the observation of Lord Goddard, C.J. in Turner v. Underwood (1948) 1 All E.R. 859 at p. 860. Mr. Williams also referred us to Barnes & Ors. v. R; Scott & Anor. v. R (1989) 2 All E.R. 305 where Lord Griffiths made observations with respect to editing depositions. The learned Law Lord said this at p. 313 -

> "The deposition must of course be scrutinized by the judge to ensure that it does not contain inadmissible matters such as hearsay or matter that is prejudicial rather than probative and any such material should be excluded from the deposition before it is read to the jury."

Again it is plain that the editing under reference, relates to a deposition which affects the accused named therein.

In the case where one co-accused makes statements implicating his co-accused, we are not aware of any rule requiring a trial judge to edit such a statement. Indeed, in our judgment, it would be wholly unfair to the maker of the statement who would be entitled to have the statement in its entirety placed before the jury. A trial judge has an undoubted duty to ensure a fair trial but that cannot mean fair to one, and unfair to a co-accused. His responsibility is to both. We have already observed that defence counsel for the co-accused in the instant case, intimated that the whole statement was

necessary for his defence, and provided reasons therefor. We fail to see how the learned trial judge could have acted otherwise than he did. We think the principle is conveniently set out in the head note in R. v. Gunewardene 35 Cr. App. R. 80 -

> "Where a prisoner has made a statement implicating a co-accused who is tried jointly with him, it is the duty of the Judge to impress on the jury that the statement is not evidence against the co-prisoner and must be entirely disregarded for that purpose; but counsel for the prosecution, in putting in the statement, is not under any duty to select certain passages and leave out others."

The duty of the trial judge in these circumstances is, we emphasize, to impress upon the jury that the statement implicating the co-accused is to be entirely disregarded. In our view, the learned trial judge discharged his responsibility correctly and with the utmost fairness. He directed the jury in these terms - (at p. 366) -

> ".....In particular, I must warn you that the statement of the second accused which was admitted in evidence and read to you, it was tendered and admitted as evidence only against the maker, that is, the second accused, and at no time was it evidence against this accused man, and I am going to tell you to discard that statement entirely.
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> In no way can it be used to further the case for the prosecution against this first accused man. Forget entirely that you heard that statement. Nothing from it, nothing said in it must colour your judgment against this accused man. There is nothing that was said in that statement that can be used by you against this accused man, now sitting in the dock. I want that to be very clear and for you to bear it in mind."

We are satisfied that those directions cannot be faulted. This is not a situation where evidence was wrongly admitted and the question is therefore whether that

inadmissible evidence turned the scales against the applicant. The statement of the co-accused was admitted in proof of the prosecution's case against that co-accused, and the judge was constrained to leave both the inculpatory and the exculpatory portion for the jury's consideration. At all events, we cannot agree with Mr. Williams that the portion of the evidence implicating the applicant, tipped the scales against him. In our view, and we repeat - a powerful case was made out against the applicant which fully supported his conviction on each of the three counts of murder. In the result, we came to the conclusion that there was no merit in the grounds argued before us.