JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 8 of 1991

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

REGINA vs. FLOYD HOWELL

Robin Smith for the applicant

Bryan Clarke for the Crown

March 31 and April 9, 1992

WRIGHT, J.A.:

This is an application for leave to appeal against conviction and sentence of death in the Home Circuit Court on July 11, 1991, before Theobalds, J. and a jury for the gun-slaying of nineteen year old Howard Dennis on February 22, 1990.

Because of the course which we propose to take in dealing with this application, it will not be necessary to examine the evidence in detail beyond the necessity to demonstrate the basis for our decision.

Evidence of the killing was given by Lascelles Dennis, the nineteen year old brother of the deceased. He testified that at about 6:30 p.m. on February 22, 1990, he was on Mediterranean Pathway, Seaview Gardens, in a group of six or seven men who were discussing the merits of a sound system being prepared for use when he saw the applicant whom he had been accustomed to seeing in the community over a period of seven years and two other men approaching them with their hands in their pockets. The trio passed them then separated. Two stood at the intersection of the Pathway and a lane while the third, the applicant, walked

into the lane and confronted the deceased. When the witness looked he saw the applicant talking to the deceased while pointing a gun at the chest of the deceased. The witness moved off and then he heard two explosions and when he looked again he observed the deceased on the ground mortally wounded in the chest. He secured the services of a car and had the deceased taken to the Kingston Public Hospital where he was pronounced dead.

Detective Acting Corporal Robert Arscott of the Hunts Bay Police Station received a report of the incident about 8:45 p.m. and visited the scene where he saw a trail of blood and thence he went to the Kingston Public Hospital where he saw the body of the deceased. For some inexplicable reason counsel for the Crown elicited from this witness that he also saw and spoke with Christopher Frame and Floyd Lester who were both suffering from gunshot injuries. The mischief created by this irrelevant piece of evidence did not become apparent until counsel for the defence began his cross-examination at that very point because then counsel for the Crown objected that it was irrelevant. During the absence of the jury, the matter was discussed and the trial judge yielded to defence counsel's urging that the course he sought to pursue was consistent with his instructions. The questions were allowed and the witness testified that after speaking with the two injured persons he issued warrants for the arrest of one Morgan and Peter Lawrence, the two men whom Lascelles Dennis said accompanied the applicant, for the murder of the same deceased Howard Dennis.

The three grounds of appeal filed in respect of this applicant did not deal with this aspect of the case. Indeed, the first ground, complaining that the verdict was unreasonable and cannot be supported having regard to the evidence, was abandoned. Ground 2, which criticised the trial judge for not dealing with the defence, which was a denial of any knowledge of the charge, in an "analytic way", was not in any way articulated

and ground 3, which took issue with the trial judge's direction that the unsworn statement of the applicant has no probative value and that "its potential effect was at most persuasive", hardly went beyond the statement of the ground. However, on a closer reading of the record, the Court discovered that the irrelevant evidence had been left as given by the witness. The trial judge had omitted in his summing-up to make any mention of it so the jury was left with the possible impression that the applicant was just one of the three murderers. There was here a misreception of evidence which was of a highly prejudicial nature and it is on this basis that we have decided that this conviction cannot be allowed to stand.

In **R. v. Hamilton** (1963) J.L.R. 136 the appellant had been charged with wounding with intent. The charge arose out of a brawl in a bar as a result of which one man was killed and another seriously wounded. One Francis had been charged for the murder and he had been duly tried, convicted and executed prior to the trial of the appellant. During the trial of the appellant a crown witness accidentally disclosed Francis' fate. It was conceded that such evidence was inadmissible and highly prejudicial to the appellant as it portrayed him as a close associate of a man of a violent character.

The appeal was allowed, the conviction quashed and the sentence set aside. Because of the nature of the evidence, a re-trial was not ordered.

In the instant case, we are persuaded to the view that it is impossible to determine the effect of this prejudicial evidence on the mind of the jury the moreso that they were given no direction by way of assistance thereon. However, in concluding that the conviction cannot stand, we note that the evidence warrants a determination by the jury. Accordingly, we quash the conviction, set aside the sentence and in the interest of justice order a re-trial of the case in the next session of the Home Circuit Court.