JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 34/84

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A.
THE HON. MR. JUSTICE DOWNER, J.A. (Ag.)

REGINA

VS.

LENFORD HAMILTON

Mr. Delroy Chuck for the appellant

Mr. Eme Usim for the Crown

6th and 29th July, 1987

DOWNER, J.A. (Ag.):

We treated this application for leave to appeal as the hearing of the appeal and set aside the conviction of murder and entered a verdict of acquittal. The appellant Lenford Hamilton who was also known as Sata John was charged jointly with Donald Gonzales for the murder of Hyacinth Brown. The allegation was that the murder took place on 20th June, 1980 in the parish of St. Catherine. They were tried by Gordon J and a jury on 8th, 9th and 12th March, 1984 in the Home Circuit Court at the end of which the appellant was found guilty of murder and the mandatory sentence of death imposed. Gonzales was freed at the end of the Crown's case as there was no evidence preferred against him.

The principal eyewitness for the Crown was Velmina Beckford who told the Court that the appellant and Paulus entered her house at around 2 o'clock in the early

morning of 20th June, 1980. She turned up her lamp and recognised Sata John whom she had known for eighteen months. Sata John was armed with a long gun. Paulus whom she knew was also armed. It is of significance that both were attired in blue overalls and they announced themselves as police officers. The fact that they were accompanied by four others outside similarly attired reinforced the Crown's case that all six were there with a common intention. Everald Douglas, the boyfriend of Velmina Beckford was dragged outside and he was shot up and later had to be taken to the hospital for treatment. Furthermore he was chased by the appellant and Paulus to a nearby school and back. Velmina Beckford further recounted that she took both her children and ran to a house on the same street for refuge. She was accompanied by Hyacinth Brown who returned for her children and when Miss Beckford heard a cry for help she went and found Hyacinth lying wounded outside their home. She died shortly afterwards in the hospital. Velmina Beckford had a good opportunity to identify the appellant as he had assaulted her and she also saw him when he returned after chasing Douglas.

There was no direct evidence as to who shot Hyacinth Brown, so the Crown based its case on common design. The Crown relied on the fact that all six men were dressed in blue police overalls and that the two who entered shouted out that they were police officers. The time of the incident also pointed to a common purpose as well as the fact that two of them Sata John and Paulus chased Douglas to the school and back. It was on the basis of such facts that the learned judge directed the jury that all six men were implicated in the murder.

The doctor's evidence was that Hyacinth Brown's

death was due to a gunshot wound to the neck and the resulting shock and haemorrhage. The appellant gave an unsworn statement which amounted to an alibi. He further explained that there was bitter political rivalry between the area in which he resided and where Velmina Beckford lived and it was because of the resulting antagonism that she gave false evidence against him.

Mr. Chuck for the appellant criticized the learned trial judge for failing to give any directions on circumstantial evidence and further that his directions on common design was inadequate in that they failed to relate the concept of common design to the circumstances of the case. It is unnecessary to refute those submissions as in response to intimations from the bench he formulated an additional ground which was determinative of this appeal. That ground stated that the trial judge failed to direct the jury on the discrepancy between the evidence of Velmina Beckford who testified that the appellant was there that night and that of Everald Douglas who said he was not. It is pertinent to point out that Douglas was also the brother of the deceased. Also germane was the fact that he was under a sentence of death while giving evidence. In the light of this conflict concerning the presence of the appellant that night, the jury could only properly have returned a verdict of guilty if they had rejected the evidence of Douglas. It was therefore necessary for the learned trial judge to direct them carefully on the conflict in the evidence regarding the important issue of identity.

An examination of the transcript reveals why this serious error took place. At page 26 of the transcript the following passage appears:

> "MISS HYLTON: May it please you, m'Lord, I have no evidence to offer in respect of Gonzalez. I think your Lordship understands why. I need not go into any details.
>
> HIS LORDSHIP: Madam Foreman and members of the jury, learned Crown Counsel has indicated that she has no further evidence to offer in respect of the accused Gonzalez. It may be that she had hoped to get evidence from the last witness that came. You saw his attitude; he remembers nothing. He gives names with which we are not familiar. In the circumstances I must direct you to say that the Crown is unable to adduce evidence to satisfy you so that you feel sure of the guilt of the accused, Gonzalez, and to return a verdict of not guilty in respect of Gonzalez."

In his summing-up the learned judge treated the matter thus at page 45:

> "I would like you to understand that when the Prosecution puts a witness in that box the Prosecutor is not guaranteeing that everything the witness tells you is true. What the Prosecutor guarantees is that that witness can give evidence which is truthful. Whether he gives evidence that is truthful is another matter. It's only determined by the witness himself and you can assess whether what he has said is truth or not. This person who was there could give evidence capable of belief and if he fails, and in this case he did fail in one respect, the Prosecution took only the action that could be taken then and offerred no further evidence against Gonzalez."

The learned judge directed the jury on the effect of Douglas' evidence on the fate of Gonzales, but he failed to direct them on how to treat his evidence with regard to the appellant whom he denied seeing that night. Under oath he described the accused as Prodigal and Devon and told the Court that the men who were there that night were Tony and Vincent and that they were on the street and not in the dock. Further he admitted that he went to a Preliminary Examination but that he could not recall what he said there.

It is therefore important to point out that the Crown could have sought permission to treat Douglas as a

hostile witness and in those circumstances his deposition with his testimony at the preliminary enquiry would have been put to him and tendered in evidence. If he had conveniently altered his testimony the judge would then be able to direct the jury that his testimony did not constitute evidence upon which they could act - see R. v. Golder [1960] 1 W.L.R. 1160. As the Crown did not take that course it was necessary for the trial judge to direct the jury that they could only return a verdict of guilty if they rejected the evidence of Douglas and the judge would have been obliged to explain that his evidence could throw doubt on Velmina's evidence regarding the issue of identity. Moreover the only direction the learned trial judge gave on discrepancy compounded the flaw in the summing-up. It was on page 51 of the transcript and it was as follows:

> "Now in all cases differences in the evidence or the testimony of witnesses are to be expected. The occurrence of this disparity recognises that in observation, recollection and expression the ability of individuals vary. It is for you, Madam Foreman and your members, to say what you make of the discrepancy, whether you consider the discrepancy to be so serious that you cannot attach any weight to the evidence of the witnesses in so far as this discrepancy is concerned. The discrepancy to which I refer is that of distance to the school. Remember the officer who gave evidence, Detective Corporal Williams, said that from the home of the deceased to the school was in his estimation about ten chains. The witness, Beckford, said that from her home to the school towards which Douglas ran, the distance she said is about two chains. She went on to qualify by saying she could stay at her home and call to people at the school. That discrepancy was mentioned by Counsel for the Defence. That discrepancy was mentioned by Counsel for the Prosecution and I bring it to your attention for you to say whether this is so serious a discrepancy so that it would affect the weight you place on the testimony of the witnesses."

In the light of this direction the jury could well have been led to think that the manifest discrepancy with regard to the issue of identity was of no importance and returned a verdict on that basis. The failure to give specific directions on the effect of Douglas' evidence as indicated above was therefore fatal and on that basis we allowed the appeal.