JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 65/2006

BEFORE: THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE MORRISON, J.A.
THE HON. MISS JUSTICE G. SMITH, J.A (AG.)

DALTON REID v R

Mr. Ernest Davis for the applicant
Mr. Kenneth Ferguson for the Crown

28, 29 July and 21 November, 2008

MORRISON, J.A.

1. At the conclusion of the hearing of the application for leave to appeal in this matter on 29 July 2008, the application was granted, the hearing of the application treated as the hearing of the appeal and the appeal allowed. As a result, the applicant's conviction and sentence for murder were quashed and a new trial ordered in the interests of justice at the next sitting of the Home Circuit Court. These are the promised reasons for that decision.

2. In the light of the disposal of the appeal, a brief outline of the facts of the case is all that is necessary. The applicant was charged with the murder of Miss Sheryl Powell, who was shot in her bedroom at her home in Succaba Pen in the parish of St. Catherine on 17 February 2002.

Mortally wounded, Miss Powell subsequently died at the Spanish Town Hospital. The case for the prosecution was based entirely on the evidence of Detective Constable Christopher Royal as to contents of a statement allegedly made to him by Miss Powell as she lay in bed dying at the hospital. This statement was admitted at the trial as a dying declaration. In that statement Miss Powell purported to identify the applicant as one of two men who had attacked and shot her. She referred to him by a nickname, by which Constable Royal testified that the applicant had been known to him before this incident. The applicant, who gave sworn evidence in his defence, set up an alibi, denied being one of Miss Powell's attackers on the night in question and also denied that he was known by the nickname in question.

3. After a trial before Norma McIntosh J and a jury in the Home Circuit Court, the applicant was on 26 March 2006 convicted of murder and sentenced to imprisonment for life, with the court specifying a period of 30 years to be served before eligibility for parole.

4. Mr. Ernest Davis, who appeared for the applicant in this court, as he had at the trial, argued three of the original grounds of appeal filed by the applicant himself and was also given leave to argue five supplemental grounds.

5. Taken together, the grounds argued covered the issues of the admissibility of the dying declaration, the adequacy of the learned trial

judge's directions on it, the identification of the applicant, the admissibility of evidence of a statement allegedly made by the applicant during the police investigation and the reasonableness of the verdict of the jury having regard to the evidence.

6. While this court was of the view that the conditions of admissibility of the alleged dying declaration had been adequately established on the evidence adduced by the prosecution, we nevertheless entertained some doubt as to whether the judge's directions as to how to approach what was contained in the declaration itself could have provided sufficient assistance to the jury. Given the fact that the correctness of the identification of the applicant turned as much on the contents of the untested dying declaration itself, as it did on the ascription by Constable Royal of the nickname used by the deceased to the applicant, very careful directions were clearly called for to the jury on both aspects of the matter. So on the issue of identification, a full **Turnbull** direction was required as to the circumstances in which the deceased purported to be able to identify the applicant, while with regard to Constable Royal's evidence, its significance as providing the critical link in the chain of identification on the Crown's case needed to be specially highlighted.

7. In this case, we came to the view (and counsel for the Crown, to his credit, did not contend otherwise) that the directions of the learned trial judge, though adequate in general terms, were not sufficiently focused

on the wholly unusual circumstances and features of the identification evidence. In this regard the approach of Smith CJ as trial judge in ***Nembhard v R*** [1982] 1 All ER 183, which attracted the specific approval of the Privy Council, still merits careful attention.

8. The alleged dying declaration in this case also contained a reference which was potentially highly prejudicial to the applicant and which, as Mr. Ferguson also very properly conceded, ought either to have been completely excised beforehand or been the subject of a specific warning from the learned trial judge to the jury to disregard it entirely.

9. One other unsatisfactory feature of the trial in this case took place when counsel for the Crown embarked on an exercise during cross examination of the applicant with a view to eliciting evidence of statements allegedly made by him to the police during the course of the investigation (which had not been made part of the Crown's case at the trial). Although this excursion (which drew the comment from the learned judge that "I don't know what the Prosecution is doing") was eventually abandoned, it is worth reiterating what this court held in ***R. v. DaSilva*** (1985) 22 JLR 49, which is that cross examination directed at an accused person on the basis that he has made an admission to the police as to any important element of the prosecution's case is improper and unfair, unless such a statement has in fact been formally admitted in keeping

with the usual safeguards as part of the prosecution's case (see especially per Ross JA at page 56).

10. The learned trial judge was left at the end of the day with the difficult decision to make as to what to tell the jury about this unfortunate and completely unnecessary episode, albeit that nothing ultimately came of it. Although one of Mr. Davis' grounds related specifically to this matter, we do not think that any complaint can properly be made about how the learned judge chose to deal with it, which was to tell the jury that there was no evidence before them that the applicant had said anything to the police and that they should "throw it entirely" out of their minds.

11. In the result, for the reasons summarized at paragraphs 6, 7 and 8 above, we made the order set at paragraph 1 of this judgment.