JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No.113/72

BEFORE: The Hon. President.
The Hon. Mr. Justice Smith, J.A.
The Hon. Mr. Justice Hercules, J.A.

ANDREL VASSELL v. REGINA No.2

N.L. Sang for Crown.

Enoch Blake for Applicant.

23rd, 24th, 25th, 26th January and
23rd February, 1973

HERCULES, J.A.:

This Applicant was convicted of Murder in the Home Circuit Court on 22nd June, 1972, before Lopez J. and a jury. On 26th January, 1973, after hearing submissions, we quashed the conviction, set aside the sentence and ordered a new trial. We promised then to put our reasons for so doing in writing. This we now do.

In view of the order we have made, it is undesirable to set out the facts in detail and we propose to deal with the evidence only so far as it relates to the grounds of appeal argued.

On the 26th October, 1969, about 9 p.m. the deceased Sidnal Wright and his brother Uriah were sitting on a bench under a mango tree in premises 37 Rousseau Road, Kingston. The Applicant went there and a fight ensued between Applicant and the deceased. It started in the yard and ended in the kitchen where the Applicant was seen to deal several stabs to the deceased. The medical evidence was that death was due to shock and haemorrhage secondary to multiple wounds. The motive for the killing was jealousy in that Applicant's lady friend had been dividing her affection between Applicant and the deceased.

The Applicant, in an unsworn statement, declared that, as he entered the premises, he was attacked by the deceased and the brother of the deceased Uriah. They overpowered Applicant and when Uriah struck blows with a machete intended for Applicant, Applicant used deceased as a shield and, in the

darkness of the kitchen, the blows fell upon the deceased. He said that when he went on the premises he saw no one, being merry and nice, and he referred to himself as an old water bird. After describing what took place in the kitchen, he said that he went to Halfway Tree Police Station where he showed a Corporal (this turned out to be Sgt. Isadore Hibbert) a cut on a thumb and the Corporal took him to Kingston Public Hospital.

Several grounds of appeal were filed, but many were withdrawn. We take notice however of only 3 of the grounds argued - the others were without any substance whatsoever.

To deal first with ground 1 which was worded as follows:-

"The Learned Trial Judge erred in law by excluding admissible evidence which was definitely in favour of the appellant."

At the trial, Mr. Blake, Attorney for the Defence, persisted in trying to get in evidence of statements of two witnesses, viz: Eloise Thompson and Mary Marshall, made in the absence of the Accused. Quite properly, on every occasion, the learned trial judge upheld the objection of the learned Crown Attorney. Mr. Blake argued before this Court that the learned trial judge should have admitted the evidence since it was in favour of the Applicant and although the statements were made in the absence of the Applicant, the evidence was admissible. This of course is hearsay evidence and as far back as 1912 in the case of William Arnold Thomson 7 Cr. App. R.276 it was clearly laid down that hearsay evidence cannot be admitted merely on the ground that it is tendered in favour of the defendant. This principle was reaffirmed in the more recent case of R. v. Sparks (1964) 2 W.L.R.566. At page 573 it was stated that "it is wiser and better that hearsay evidence should be excluded save in certain well defined and rather exceptional circumstances."

Mr. Blake also complained that the learned trial judge refused to allow the evidence of Samuel Brooks, given at the first trial on behalf of the defence, to be read to the jury. Samuel Brooks was not in attendance at the second trial. This was not a deposition and there was no question of seeking to establish a contradiction. Yet, without any authority whatsoever to support this application, Mr. Blake complained that the learned trial judge was in error in excluding the evidence given by Samuel Brooks at the first trial. In the absence of authority, the application seemed

strange and we were inclined to uphold the ruling of the learned trial judge, but after hearing the arguments, it came to our notice that this very point was recently considered by the Court of Appeal in England in R. v. Hall (Peter Barnabas) (1972) 3 W.L.R., 974 and according to the judgment therein it would appear that it was within the discretion of the learned trial judge to grant it. But we rest our final order in this matter on the conclusions we arrived at on the other two grounds dealt with hereinafter.

Next was the second supplementary ground which complained that:

"The Learned Trial Judge did not put the defence to the jury adequately or at all."

This complaint derived from the failure of the learned trial judge to remind the jury of the evidence of Det. Sgt. Hibbert and in particular the portion which is to be found at page 272 of the record as follows:-

"At about 9 p.m. I went to the guardroom, where I saw the Accused Andrel Vassell. He was bleeding from a wound at the back of his right thumb. I asked him what happened and he said words to this effect: I went to 37 Rousseau Road to look for my girl-friend; two men backed me up with a machete in a passage; one of the men chopped at me several times and the machete caught me on my thumb. I turned around one of the men and the machete caught him in his head; he was badly chopped; I don't know if he is dead. Accused was bleeding profusely and I took him in a police service vehicle to the Kingston Public Hospital."

Sgt. Hibbert was asked exactly what he saw and he replied that blood was spurting from the wound on the back of the hand.

Quite clearly objection could have been taken that the evidence as to what the Applicant told Sgt. Hibbert was self-serving. But since it was admitted it goes to show some consistency in the versions given by the Applicant at the first opportunity after the incident and at the trial. It is true that the Applicant also stated that the deceased was chopped by his brother Uriah, but arising out of the evidence was the issue of self-defence which was left to the jury with abundant directions. By highlighting the evidence of Sgt. Hibbert the jury may well have believed that the Applicant was really acting in self-defence from the fact that he did sustain a wound on a thumb. If they believed this or if they were in doubt, the Applicant would have been entitled to be acquitted. In our view, since the evidence was admitted, it should not have been ignored. The jury should have been

reminded of it and given an opportunity of deciding whether Sgt. Hibbert supported the Applicant on the issue of self-defence or whether there was any doubt. We do not accept learned Crown Attorney's submission that the omission of the learned trial judge was of no consequence. It amounted to a serious misdirection and substantiates the complaint that the defence was not adequately put to the jury.

Then Mr. Blake was granted leave to argue a new supplementary ground as follows:-

> "The Learned Trial Judge was wrong in directing the Jury that the phrases "I did not see no one being merry and nice going in" and "water birds" could be interpreted to mean the Appellant "charged himself with alcohol to give him sufficient courage to do the things he planned to do." In so doing the Learned Trial Judge introduced "drunkenness" which was not an issue in the case, directed the jury on this matter in a manner that was definitely against the Appellant and omitted to tell the jury the phrases could have an innocent explanation or were inconsistent with someone who got drunk in order to carry out his intention."

At page 361 of the record the learned trial judge directed the jury:-

> "Mr. Foreman and members of the jury, I refer to the excerpt from this unsworn and voluntary statement of the accused, who often times told you that he went to have a drink at Mr. Powell and another friend or friends; returned to 37 Rousseau Road some time after. Then he said upon his return to 37 Rousseau Road:- "I did not see no one being merry and nice going in". He also made mention of the fact that as old 'water-birds' they were able to get into the bar while it was not yet the legal opening hour. Well it is a matter for you whether you interpreted the expression as an 'old water bird' a suggestion to you that the accused is a person who likes to have a drink and usually does have a drink, is a matter of normal habit. And, that in pursuance of that normal habit he did go and have his drink that night and then came back feeling as he told you, merry and nice. But, having regard to all the facts in this particular case, it may be that you thought or you contemplate that he went out to the bar that night specially to drink in preparation for some undo' which he intended to pursue later that night. Which of these views you take is a matter entirely for you on the totality of the evidence before you. But, if you take the view that he went out deliberately to have himself charged with alcohol to give him sufficient courage to do the things he planned to do, then I will

tell you what the law has to say about a situation of this nature. I refer to paragraph 43 of the 36th Edition of Archbold. It is on page 20. This is what the law says:

"If a man, whilst sane and sober, forms an intention to kill and makes preparation for it, knowing it is a wrong thing to do, and then gets himself drunk so as to give him Dutch courage to do the killing, and while drunk carries out his intention, he cannot rely on this self-induced drunkenness as a defence to a charge of murder, nor even as reducing it to manslaughter. He cannot say that he got himself into such a state that he was incapable of an intention to kill. So, too, the wickedness of his mind before he got drunk is enough to condemn him coupled with the act which he intended to do".

In our view it was totally unnecessary to introduce the question of drunkenness to the jury, especially as there was no evidence on which the jury could find that Applicant was drunk. "Being merry and nice" and being "a water bird" could not necessarily mean that the Applicant was drunk. The Applicant never said he was and this was a wholly irrelevant matter. The jury needed no assistance on it and moreover by failing to deal with drunkenness as it affects the question of intention, the matter was left with the jury in a highly prejudicial manner. The law referred to by the learned trial judge is applicable where a person gets himself drunk to develop Dutch courage. There was no evidence that this is what Applicant did when he talked about being merry and nice. Moreover, even if it could be said that this was so, it is to be emphasized that there was an alternative innocent interpretation to be placed on this matter and the learned trial judge failed to point this out. (See R. v. Nina Vassileva 6 Cr. App. R. 228). Indeed, the position was somewhat aggravated when, at page 384 of the record, the learned trial judge had this to say:

"If on the evidence placed before you, you were to find that the accused on the 26th of October had a full knowledge that Eloise was sharing his affections with the deceased, and, in addition, in further aggravation of this situation, the deceased had also threatened to kill the accused that night, whereby the accused determined to carry out his threat of the previous day on the deceased, to out out the deceased, and in pursuance of that decision went out to drink with his friends in preparation or with the intention to kill the deceased, and if you were to find on the evidence adduced by the crown that it was the accused who did in fact kill the deceased

that night of the 26th of October, 1969, then, it is open to you to find the accused guilty of murder."

We repeat that it was totally unnecessary to deal with this matter and having dealt with it in a most unhappy manner, this constituted another serious misdirection.

With these two misdirections, we formed the view that there was merit in the application for leave to appeal and so we granted leave and treated the hearing of the application as hearing of the appeal. We allowed the appeal, quashed the conviction and set aside the sentence, and in the interests of justice ordered a new trial at the current session of the Home Circuit Court - the Appellant meanwhile to remain in custody.