NMLS

# JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 22/95

COR: THE HON. MR. JUSTICE RATTRAY, P
THE HON. MR. JUSTICE FORTE,J.A.
THE HON. MR. JUSTICE GORDON, J.A.

ONIEL WILLIAMS V R

Lord Gifford Q.C. and Everton Bird for Appellant

Lloyd Hibbert Q.C., Deputy Director of Public Prosecutions and Lorraine Smith for Crown

January 27, 1998 and February 23, 1998

GORDON, J.A.

On December 16, 1997, their Lordships of the Privy Council advised that the appeal herein be allowed the conviction quashed and the matter remitted to the Court of Appeal to determine whether there ought to be a retrial.

We considered the referral on January 27, 1998 and applying the principles enunciated in ***Reid v The Queen*** [1979] 2 All E.R.904 we ordered a new trial. We considered it desirable to place on record the reasons for our decision especially as the appeal was allowed by their Lordships because the learned trial judge fell in error in his directions to the jury. We do not find it necessary to refer in any detail to the facts in the case, suffice it to say that there was one witness to the crime of capital murder and she identified the appellant one year and nine months after the

crime was committed. The evidence was uncorroborated. The trial judge in his summing-up dealt with the issue of identification adequately and this issue, although it was raised in the appeal to this court on November 20, 1995, was not canvassed before the Privy Council.

Lord Gifford Q.C. urged that a new trial should not be ordered because the weakness inherent in the identification evidence has been inevitably aggravated by the passage of time which would make it difficult for a judge and jury to do justice.

Mr. Hibbert Q.C. submitted:

a) that it was in the interest of justice that a a final verdict should be by a jury;

b) the witnesses were available;

c) if there is a change in the quality of the evidence, it would enure to the benefit of the appellant.

Accepting Mr. Hibbert's submission and in ordering a new trial we are guided by the wisdom of the Privy Council:

a) murder is a serious and prevalent offence;

b) "The interest of justice that is served by the power to order a new trial is the interest of the public of Jamaica that those persons who are guilty of serious crimes should be brought to justice and should not escape it merely because of some technical blunder by the judge in the conduct of the trial or his summing-up to the jury", per Lord Diplock in ***Reid v the Queen*** (supra) at p.905d.

I now turn to a consideration of the statement the appellant made in his defence from the dock and the comments of the trial judge on this statement and the decision of their Lordships of the Privy Council:

The appellant said:

> " Members of the jury, I would like to say that on that day I can't remember where I was on that day but one thing for sure, I did not kill anybody".

The trial judge in his charge to the jury on the defence said:

> "This defendant, Mr. Foreman and Members of the Jury, gave a very short defence. He said that on the day of this incident he couldn't remember where he was. One thing was sure he did not kill anybody. And that was it. That is the end of it. It's a short statement but I suggest to you it is pregnant with meaning. It is for you to interpret that statement that he made. What has he said? He has said he can't remember where he was on the day in question. He has not said he was not at Rochester Avenue, he has said I cannot remember where I was. What he is sure of he killed nobody. So what is he saying? He is saying it is possible that he could have been at Rochester Avenue that day but that he didn't kill anybody? Is that a possible interpretation? It is a matter for you.
>
> Counsel for the defence has remarked that it is difficult for people to remember where they are, you know, on a particular day, if you are asked to remember a long time afterwards, and you may think that that is true. If I said to any of you. Members of the Jury, where were you on the 15th of February, 1992, I will bet none, if any, of you could tell me where you were that day. I know I couldn't tell you where I was. But that is one thing. I can't tell you where I was, but if anybody suggested to me that I was in the presence, I was on the scene where a man was murdered I could tell you I was not there. You may think a person might not be able to tell you where he was but he can tell you where he was not. Well, in this case this defendant has not told you that he was not at Rochester Avenue, he has said I can't remember where I was. So, It is for you to interpret this statement and decide what it means".

Lord Steyn in his opinion of this passage said:

> "A new theory had occurred to the judge, namely that the unsworn statement properly interpreted might

> mean that the appellant denied murder but admitted his presence at the murder scene".

This passage their Lordships called the "first passage", Lord Steyn continued:

> "The judge subsequently returned to the interpretation of the unsworn statement".

The judge said to the jury:

> "I have already told you that it is for you to interpret this statement to decide what it means. If you think it means that he did not go to Rochester Avenue on the 15th February, 1992, and did not kill anybody, there, you must find him not guilty of this charge of capital murder. If you think he went to Rochester Avenue, but didn't kill anybody there, again you should find him not guilty of this charge of capital murder. It is the prosecution's case not only that he went there but that he did the killing. That is what the prosecution is saying. The prosecution is saying it was done in the course of robbery which makes him guilty of capital murder. So I direct you that if you interpret it to mean, I will repeat, that he did not go to Rochester Avenue on that day and did not kill anybody, he's not guilty. If you think he went there but did not kill anybody, again your verdict should be not guilty. In other words, you could only find him guilty of this charge of capital murder if you believe and you are sure that he did go there and he did kill Ainsworth McBean; if you are sure that he was the man with the gun that day".

Lord Steyn continued:

> "Counsel for the appellant concentrated in his oral argument on the judge's observation on the interpretation of the appellant's unsworn statement as reflected in the first and second passages quoted from the summing up. His point is simple and straightforward. He says that in context the unsworn statement was not capable of being interpreted in the way put forward by the judge in the first passage. Relying on the appellant's consistent denials of any complicity in the events that led to the murder and the way in which the defence was conducted counsel submitted that the judge's interpretation was wholly unrealistic. More important, in his unsworn statement

> the appellant said that he could not remember where he was on that day. If he had been at the murder scene he would have remembered that. It follows as a matter of common sense that he did not intend to admit presence at the scene. Their Lordships are satisfied that these submissions are correct.
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> Their Lordships do not think that the second passage cures the first passage. On the contrary, it reinforces the misinterpretation of the unsworn statement placed before the jury by the judge.(emphasis supplied).
>
> Their Lordships are satisfied that the risk of the jury being unfairly prejudiced by the judge's comments was great. The judge's comments made it impossible for the appellant to receive the substance of a fair trial".

In summing - up a judge generally does go through and comment upon the evidence which has been given. In a complicated and lengthy case it is incumbent on the judge to assist the jury by dealing with the salient features of the evidence Archbold 1992 Edn, 4-387 (emphasis supplied). He should remind the jury of the evidence for the defence.

The statement from the dock is provided for by section 9(h) of the Evidence Act. It is a right of the accused that is created by statute. So prevalent has been the exercise of this right in the Criminal Courts in Jamaica that this Court sought the guidance of the Privy Council on the "objective evidential value of an unsworn statement". This guidance was sought and given in ***Director of Public Prosecutions v Walker*** [1974] 12 JLR 1369:

> "The Court of Appeal has indicated that it would be in the public interest if this Board were to give some guidance on the "objective evidential value of an unsworn statement " by an accused, since it has for some time been the standard practice in Jamaica to keep the accused out of the witness box. Much depends on the particular circumstances of each case. In the present case, for example, even on the approach that everything the respondent said in his unsworn statement was true, no jury (unless perverse) could

> have acquitted him on the ground of self-defence. There are however, cases in which the accused makes an unsworn statement in which he seeks to contradict or explain away evidence which has been given against him or inferences as to his intent or state of mind which would be justified by that evidence. In such cases (and their Lordships stress that they are speaking only of such cases) the judge should in plain and simple language make it clear to the jury that the accused was not obliged to go into the witness box but that he had a completely free choice either to do so or to make an unsworn statement or to say nothing. The judge could quite properly go on to say to the jury that they may perhaps be wondering why the accused had elected to make an unsworn statement; that it could not be because he had any conscientious objection to taking the oath since, if he had, he could affirm. Could it be that the accused was reluctant to put his evidence to the test of cross-examination?, If so, why? He had nothing to fear from unfair questions because he would be fully protected from these by his own counsel and by the court. The jury should always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value, and, if so, what weight should be attached to it; that it is for them to decide whether the evidence for the prosecution has satisfied them of the accused's guilt beyond reasonable doubt, and that in considering their verdict they should give the accused's unsworn statement only such weight as they think it deserves". (emphasis added)

Despite this clear direction, trial judges have continued to find it difficult to deal with the unsworn statement in their summing-up. By reviewing the statement and referring to the possible interpretations and/or inferences they in effect elevate this statement to the category of evidence. Indeed in ***R v Hart*** [1978] 27 W.I.R. 229 Kerr J.A. held:

> 1) it is unnecessary and often undesirable to categorise an unsworn statement as evidence or non-evidence.

2) In the ordinary case a summing up should follow the guidance on the objective evidential value of an unsworn statement advocated in ***Director of Public Prosecutions vs Leary Walker.***

In ***Hart*** (supra) Kerr J.A. referred to ***R v Coughland*** [1976] 74 Cr. App. R. 11 and the judgment of Shaw L.J where in speaking on the unsworn statement he said:

> "it is perhaps unnecessary to tell the jury whether or not it is evidence in the strict sense. It is material in the case. It is right however, that the jury should be told that a statement not sworn to and not tested by cross-examination has less cogency and weight than sworn evidence". (emphasis supplied).

In ***Mills and others vs R*** [1995] 3 All E.R. 865 the sufficiency of the trial judge's direction on the defence of alibi contained in an unsworn statement was questioned. This Court in its judgment delivered on 26th June, 1990 observed "where an accused makes an unsworn statement, no such directions [about the impact of the rejection of the alibi] can or should be given. The jury is told to accord to such statement such weight as they fully consider it deserves". (Insertion in brackets supplied).

Counsel for ***Mills*** submitted before their Lordships' Board that the Court of Appeal erred. He said that there is no reason why the observation of Lord Chief Justice Widgery in ***R v Turnbull*** [1977] Q.B 224 "about the impact of a rejection by the jury of an alibi defence raised by oral evidence should not be equally applicable to such a defence put forward in an unsworn statement". Their Lordships - per Lord Steyn, observed that the right of an accused to make an unsworn statement in England was abolished by the Criminal Justice Act of 1982 and that the Lord Chief Justice in ***Turnbull*** did not have in mind an alibi defence raised in an unsworn

statement. "After all", observed Lord Steyn, " in the late seventies and early eighties, the right to make an unsworn statement was already regarded in England as an historical anomaly".

Lord Steyn then quoted the guidance given by Lord Salmon in ***Walker's*** case (supra) and continuing he observed:

> "Even before ***Turnbull*** was decided the Privy Council elucidated the evidential status of an unsworn statement in terms which qualitatively treated it as significantly inferior to oral evidence and permitted trial judges to direct juries to explain the inferior quality of an unsworn statement in explicit terms. That guidance has been understood by the Court of Appeal of Jamaica as comprehensively describing what a trial judge generally needs to say to a jury in directing them about the value of an unsworn statement. Their Lordships agree with the interpretation of the Court of Appeal of Jamaica about the effect of the decision in ***DPP v. Walker.*** Moreover, their Lordships would add that, taking into account the interests of justice to the Crown and the defence, it would be unwise, and needlessly complicate the task of trial judges, now to introduce a new and further direction about unsworn statements. Their Lordships regard the guidance given in ***DPP v. Walker*** about unsworn statements as requiring no qualifications. It governs the present case." (emphasis supplied).

The problem posed by the unsworn statement was considered by this Court in SCCA 65 & 73/96 Michael Fairclough and Elvis Thomas (unreported) delivered 31st July, 1997. This Court held that the trial judge told the jury to take into account the unsworn statement in determining whether the prosecution had discharged the burden of proof. The jury were given the ***Leary Walker*** directions on the weight to be given to an unsworn statement. The Court per Rattray P. observed:

> "Decisions of the Judicial Committee of the Privy Council are binding on the Court of Appeal of Jamaica and we are not entitled to disregard the law as stated by

> the Board on a specific issue, especially when the determination of the Judicial Committee was in respect of an appeal coming from this jurisdiction as indeed was ***R v. Mills*** (supra). The authority of ***Mills*** is therefore binding and we are obliged to follow it."

One cannot fail to observe that nowhere in their Lordships' opinions is the statement from the dock referred to as evidence. It is referred to as statement or "unsworn statement" thus emphasizing its inferiority to "evidence" which is sworn testimony. It therefore emphasizes that when a trial judge in his summing up reviews the unsworn statement, directing as to possible inferences that may be drawn therefrom or likely interpretations that may be placed thereon he elevates in the minds of the jury a statement, which is of acknowledged inferiority, to something which ranks on par with the evidence adduced by the prosecution. Too much emphasis cannot be placed on the need for judges to heed and apply the guidance given in ***Walker's*** case.

The judge in the instant case enlarged and commented on the statement from the dock thus earning the disapproval of their Lordships' Board.

It is instructive to draw on the wisdom of Lord Hailsham L.C. as enunciated in ***R v Lawrence*** [1982] A.C. 510 at 519 FH. A judge in his summing-up is required to "include a succint but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides, and a correct statement of inferences which a jury are entitled to draw from their particular conclusions about primary facts". (emphasis supplied).

Facts are established by evidence and inferences are drawn from proven facts. The unsworn statement is "qualitatively treated as significantly inferior to

oral evidence". No facts can therefore be established by an unsworn statement and no inferences can be drawn from it. Where the accused in his unsworn statement states his defence such as accident, or self defence or alibi the judge must give the jury general directions in law on these defences. He should never lose sight of the fact that issues are raised on the evidence and he should not fail to give the ***Walker*** direction:

> "The jury should always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value, and if so, what weight should be attached to it; that it is for them to decide whether the evidence for the prosecution has satisfied them of the accused's guilt beyond reasonable doubt and in considering their verdict they should give the accused's unsworn statement **only** such weight as they may think it deserves".

Further authoritative support for the propositions hereinbefore stated is found in the unreported decision in Privy Council Appeal No.19 of 1995 ***Cedric Gordon vs The Queen*** delivered on June 24, 1996. The appellant in a statement from the dock suggested that a witness, Brown, had a motive for untruthfully implicating him in the murder. Counsel for the appellant embarked on cross examination of the witness on lines the trial judge ruled irrelevant. In his opinion Lord Keith of Kinkel said:

> "The appellant's counsel did not submit that the questions were relevant as being related to what the appellant was going to say in his unsworn statement, nor did he put directly or indirectly to Brown the motive for lying which was going to be suggested by the appellant. The trial judge in his summing up did not remind the jury of what the appellant had said on this matter in his unsworn statement. It was not, however, incumbent upon him to do so, and counsel for the appellant before the Board did not seek to place any reliance on this aspect of the case." (emphasis supplied).

Here we have it on the highest authority that it is not incumbent on a trial judge to remind the jury of what the accused person said in his unsworn statement. This case went to the Privy Council on appeal from this Court. The appeal was dismissed. The authority of this case is binding on our courts. This principle of 'stare decisis' mentioned in the judgment in ***R v Fairclough & Thomas*** [supra] is stated in ***Margaret Simmonds v R.*** 2W.I.R. 209 and emphasized by the House of Lords in ***Cassell & Company Ltd. vs Broome*** [1972] 1 All ER 801 at p. 809 per Lord Hailsham;

> "The fact is and I hope it will never be necessary to say so again, that, in the hierarchial system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal to accept loyally the decisions of the higher tiers' - per Lord Hailsham of St. Marylebone L.C."

Lord Diplock at p 874 said:

> "The judicial system only works if someone is allowed to have the last word and if that last word, once spoken, is loyally accepted".