JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 7/2001

BEFORE: THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

SHAWN ALLEN V. R.

Mrs. Jacqueline Samuels-Brown and
Miss Thalia Maragh for the applicant

Miss Tricia Hutchinson, Crown Counsel, for the Crown

March 18, 19, 20 and 22, 2002

PANTON, J.A.

The applicant was convicted in the Circuit Court Division of the Gun Court held at King Street, Kingston, on the 14th December, 2000, of the offence of murder and sentenced to life imprisonment with a specification that he should serve nine years before becoming eligible for parole.

The prosecution alleged that the applicant, having had a dispute with the deceased some days earlier, shot and killed the deceased at about 1.30 a.m. on the 20th April, 1999. The applicant raised an alibi in his defence. There were two witnesses who claimed to have been walking with the

deceased at the time of the shooting. A report was made to the police that night, but a written statement was not recorded from these witnesses until the 28th April, 1999. A very important point in the case was whether the civilian witnesses had, at the time of making the report, informed the police that the applicant was the man who shot the deceased.

At the hearing of an application for leave to appeal, we heard an application for fresh evidence to be adduced in the form of an entry in a book kept by the police.

In considering an application for the admission of fresh evidence, this Court is guided by the principles stated in **R. v. Parks** [1961] 3 All E.R. 633 at 634:

> "First, the evidence that it is sought to call must be evidence which was not available at the trial. Secondly, and this goes without saying, it must be evidence relevant to the issues. Thirdly, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this court to decide whether it is to be believed or not, but it must be evidence which is capable of belief. Fourthly, the court will after considering that evidence go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial".

These principles have been consistently applied by this Court. See, for example, **Brian Bernal v. The Queen** (Resident Magistrate's Court

Criminal Appeal Nos. 30 and 31/95-Motion No.1/96- delivered on November 6, 1997).

In the instant case, the application is based on affidavits sworn to and filed by the attorneys-at-law for the applicant. The combined effect of the affidavits is the revelation that there is a "crime book" at the Spanish Town Police station which contains an entry which the applicant claims is of relevance to his case; but, at the time of the trial, the applicant was unaware of the existence of this book. It is a book that is kept by the police and is not routinely made available to persons in the position of the applicant or his legal advisers, notwithstanding that it may contain information of vital importance to such persons.

During cross-examination of the investigating officer at the trial, it was stated that he had made an entry of the report he had received of the crime in the crime diary. That report, he said, contained information as to the name of the perpetrator of the murder. He further said that he had made a notation of the name in the crime diary. No effort was made by the cross-examiner to have the crime diary produced for examination. Subsequent to the conviction of the applicant, the crime diary was sought by Mrs. Samuels-Brown (who was not the cross-examiner). As happens every now and then, the crime diary cannot be found. It is believed, according to one Inspector

Walker, that both the crime diary and the station diary were inadvertently destroyed during the course of renovations that were carried out at the Spanish Town station during the year 2000. Instead, the crime book was made available to her. Now, there had not been any specific reference at the trial to this book, and there is no known reason for the applicant or his legal advisers to have been aware of the existence of such a book. On that basis, it seems that the applicant has successfully passed the first test of showing that the crime book was not available at the trial. It was definitely not available to him as he never knew of its existence.

That the entry is relevant is easily seen as there is confirmation that it contains a note of the report made to the investigating officer. The entry is also signed by the investigating officer and describes the perpetrator of the murder. The third ingredient, that is, that it must be credible evidence does not require discussion as it goes without saying.

The fourth and final ingredient requires consideration as to whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the applicant if that entry in the crime book had been made available to them together with the other evidence at the trial. In that respect, Miss Hutchinson for the Crown submitted that the jury's verdict would have been no different had they been aware of what is recorded in the crime book. She

made reference to the case **R. v. Jones and White** (1976) 15 J.L.R. 20, with emphasis on the passage at page 22D :

> "A police station diary is not a public document. Evidence as to the contents of an entry in a station diary cannot, therefore, be led to establish the truth of such contents but only to establish the fact that such an entry was made. The fact that the entry was made can generally be relevant only as to the credit of the person who made it and evidence of that fact must, therefore, come from that person".

Miss Hutchinson contends that the evidence of the two eyewitnesses would therefore not be affected by this entry by the investigating officer. The crime book, she said, cannot impeach the credibility of the civilian witnesses.

We are not in a position to be as positive as Miss Hutchinson in this regard. The entry by the officer speaks of "a lone man on foot armed with a handgun". It gives no name, in a situation in which the officer claims that he was given a name. It follows that the applicant has a right to challenge the officer in respect of his claim to have been given a name. Further, this may well affect the evidence of the civilian witnesses as to whether they gave any name to the officer. In short, it is not only the officer whose credibility would be in question, but also that of the civilian witnesses. However, the determination of that question would be a matter for the jury, after a proper direction in that respect, from the trial judge.

In the circumstances, the application for leave to adduce fresh evidence is well founded, and is hereby granted. Due to the decision we have arrived at, there is no need to comment on, or to make a decision in respect of the other arguments advanced before us. The application for leave to appeal is granted. The appeal is allowed. The conviction is quashed and the sentence set aside. However, in the interests of justice, a new trial is ordered to take place at the next sitting of the Circuit Court Division of the Gun Court to be held in Kingston. The applicant shall remain in custody.