JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS. 135,136 AND 137/00

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

REGINA V. ONEIL HAMILTON
MARLON JOHNSON
MICHAEL ALLISON

Lord Gifford, Q.C., and Philip Dayle for Oneil Hamilton

Delano Harrison, Q.C., for Marlon Johnson and Michael Allison

Ms. Kathy Pyke and Ms. Christine Morris for the Crown

October 7, 8 and 9 and November 7, 2002

PANTON, J.A.

1. The applicants were each convicted on three counts of murder in the Circuit Court Division of the Gun Court on the 21st July, 2000, after a trial that lasted nine days. On Counts 1 and 2, they were sentenced to be imprisoned for life, whereas on Count 3 each was sentenced "to suffer death in the manner prescribed by law".

On the 9th October, 2002, having heard their applications for leave to appeal against conviction and sentence, we granted the applications and treated same as the hearing of the appeals. We allowed the appeals, quashed the convictions and set aside the sentences, but in the interests of justice we ordered a new trial which we expect will take place as early as possible.

2. The indictment charged the applicants and three other men in respect of the killing of Desreen Meghoo, Latanya McDonald and Oliver Lawrence in one incident at 28 Swallow Road, St. Andrew, on the 15th April, 1998. The other three men were acquitted on a no case submission. The prosecution alleged that the applicants, armed with guns, invaded the bedroom of Veandrist McKenzie at about 9.15 p.m. The applicants discharged their guns, resulting in the killing of the aforementioned persons.

3. At the trial, the main witness for the prosecution was Veandrist McKenzie. The prosecution had hoped that his evidence would have been supported by two other witnesses, Lenford Barrett and Yolander McDonald, who were at the scene of the anguish. However, that was not to be as those witnesses ended up being treated as hostile to the prosecution's cause. The witness Barrett told the jury in examination-in-chief that he had not seen the face of anyone on the night in question as the men were masked. He also said that he had not seen them with guns. However, he admitted that in a written statement to the police, he had called the name of Michael Allison as one of the men he had seen, and that Allison and another man named Micky had short guns which they fired at the deceased. The statement was produced and the witness verified its contents. So far as his reference to names was concerned, Mr. Barrett said he had done so on the basis of hearsay. The other hostile witness, Yolander McDonald, while identifying Allison as one of the gunmen, qualified this identification by saying that he had only heard that it was Allison as he was unable to recognize his face

as he had on a tam which obscured his vision of his eyes. In his statement, Yolander McDonald had not made any reference to a tam and at the preliminary enquiry he had said that he had seen the applicants with guns. This witness also said that Veandrist McKenzie (the prosecution's only real eye witness) was under the bed during the incident.

4. The dramatic turn of events created by the posture of Barrett and McDonald necessitated the giving of full and proper directions to the jury on how they were to deal with the evidence of these hostile witnesses. The learned trial judge attempted to fulfill this obligation by saying to the jury as follows:

> "Now, a hostile witness is one who people would say turn coat. He comes to give evidence for one side and he ends up giving evidence against the side that calls him and you will remember some of the explanation they gave that is Mr. Barrett and Mr. McDonald and he said yes, when he was at the preliminary enquiry he told them that he saw Tripe and that when he said that he was speaking the truth but he also said that he saw one man, one man and he remember that it came down to his eyes. He could only see the mouth and nose and he said he couldn't see, yet he went to the preliminary and said that he saw Tripe and he also went on the identification parade and pointed out Tripe. So, Mr. Foreman and members of the jury, your duty is to look at those parts of Mr. McDonald's statement, the statement which is the one he gave, or the deposition that is when he was at the preliminary Court, I think it was at Half-Way-Tree where that is and his evidence departed from what he said earlier and you will have to decide for yourselves whether you can accept anything or any part of his evidence which Mr. McDonald gave in this Court". (page 503, line 9 to page 504 line 7 of the record).

He continued:

> "If you decide that there is a serious conflict between the evidence and the statement on the depositions previously made, you may think that you should reject his evidence. But, it is a matter for you whether you accept some or reject all of it or whatever you do with it I cannot tell you. You saw him and you heard the points and he was treated as hostile and he abandoned the Crown who called him and the Crown abandoned him. So, those are the circumstances that you would take into your consideration, whether you are satisfied so that you feel sure that McKenzie recognized the accused men". (page 504 lines 8 to 20).

The learned judge, after informing the jury that three of the accused men had been acquitted earlier in the trial due to the fact that Barrett and McDonald had "turned around their evidence", said:

> "However, Mr. Foreman and members of the jury, notwithstanding the fact that Mr. Barrett and Mr. Yolander McDonald gave evidence contrary to what the Crown exhibited, as I have said before, you will have to look at what was said here and remember that each of them had before giving evidence here, given written statement to the police and had gone to the preliminary Court at Half-Way-Tree and had given evidence there which was in conflict with what was said here. So, it's a matter for you to decide in your own mind, what part, if any, of the evidence of Mr. Barrett and Mr. McDonald you can accept". (page 505 line 15 to page 506 line 2).

5. Several supplementary grounds of appeal were argued by Lord Gifford, Q.C. for the applicant Hamilton, and by Mr. Delano Harrison, Q.C. for the applicants Johnson and Allison. We found merit in one of those grounds. On behalf of O'Neil Hamilton, that ground was expressed thus:

> "The learned judge erred in law in his direction to the jury on how they were to consider hostile witnesses, of which there were two; and in particular:
>
> (a) he failed to direct the jury that the previous statement of the hostile witnesses did not constitute evidence upon which they could act."

In the case of the other applicants, the ground was couched as follows:

> "The learned trial judge failed to give the jury appropriate directions respecting the approach to the evidence of prosecution witnesses Lenford Barrett and Yolanda McDonald who were treated as hostile witnesses."

6. As seen earlier, from the portions of the transcript that have been quoted, the learned trial judge made references to the statements made to the police and the depositions given at the preliminary enquiry, by the hostile witnesses. He was bound to do so as the earlier statements had been referred to in detail during the process of the challenge by the Crown as to the veracity of the witnesses. However, the judge did not do all that was required of him in the instant situation. He should have instructed the jury that the statements and the depositions were not to be considered at all by them in arriving at a verdict. This, he did not do. It may well have been an oversight, but the fact is that there was a serious deficiency. Indeed, his instructions to them may even be viewed as being to the contrary.

7. The English Court of Criminal Appeal addressed this matter in two cases in the 1960s, and the position stated therein has at least been partially approved by the House of Lords. In **R. v. Golder, Jones and Porritt** (1960) 3 All E.R. 457,

the three appellants were convicted at West Suffolk Quarter Sessions of the offence of burglary and larceny. The prosecution frankly admitted that apart from the evidence of a Mrs. Taylor, they would have been hard put to present a convincing case. Mrs. Taylor swore before the committing magistrates that the appellant Golder had brought her a gold watch which was in fact part of the stolen property. At the trial, she retracted and counsel for the prosecution obtained leave to treat her as an adverse witness and cross-examined her. However, he did not succeed in extracting from her an admission that her deposition was true. During the summing-up, the learned deputy chairman dealt with the question of Mrs. Taylor in a way which indicated to the jury that it was open to them to act on the evidence contained in her deposition notwithstanding her repudiation of it. The entire deposition was read to them when they returned for further direction.

In delivering the judgment of the Court, Lord Parker, C.J., said:

> "...when a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial, the jury should not merely be directed that the evidence given at the trial should be regarded as unreliable; they should also be directed that the previous statements, whether sworn or unsworn, do not constitute evidence on which they can act." (page 459 H-I)

The Court concluded that it had no alternative but to quash the convictions.

In **R. v. Oliva** (1965) 3 All E.R.116, the appellant was convicted at the Central Criminal Court of wounding one Brian Routledge with intent to do him grievous bodily harm. The complainant, who apparently was not in a good

position to see his attacker, gave evidence implicating the appellant before the committing magistrates; he then went to a solicitor and declared that he had given false evidence at the committal proceedings. He went back before the magistrates and formally withdrew the evidence he had given. Another witness who had given a statement to the police implicating the appellant also withdrew same in a declaration to his solicitor and then, on oath, confirmed the withdrawal when he testified at the committal proceedings. The names of both witnesses were endorsed on the back of the indictment. At the trial, the learned judge never gave the jury any guidance as to how they were to approach the evidence of the complainant given in the witness box, coupled with the evidence that he first gave to the committing magistrates, the retraction and the statements made previously to the police. There was no direction that anything said to the police in the absence of the appellant was not evidence of the truth of the facts contained in that statement, nor was there any direction to the effect that they must not substitute for the evidence given in the witness box the evidence given before the committing magistrates. This neglect was classified as a serious non-direction. However, it should be mentioned that there was independent evidence from three young female eye witnesses who implicated the appellant. As a result, the proviso to section 4 of the Criminal Appeal Act 1907 was applied and the appeal dismissed.

In **Alves v Director of Public Prosecutions and another** (1992) 4 All E.R. 787, the statement of Lord Parker in **Golder** quoted above was considered, and at 792 h-j, Lord Goff of Chieveley had this to say:

> "In any event, as appears from the context in both **R. v. Golder and R.v. Oliva,** the burden of Lord Parker CJ's statement is to be found in the second part of it, under which the jury is to be directed that the witness' previous statement will not as such be evidence upon which the jury can act."

8. That there was a serious non-direction in this case was obvious. Miss Pyke for the prosecution conceded on this point. However, she submitted that due to the fact that the learned judge gave proper directions in relation to how the evidence of the chief witness Veandrist McKenzie should be assessed, the non-direction though serious was not fatal to the convictions. Consequently, the proviso, she said, ought to be applied. We do not share this view. The jury not having been given the appropriate directions were clearly left with the impression that they could have considered and acted on the previous statements given by the two hostile witnesses. In such a situation, we are of the opinion that it is highly likely that the jury used the evidence contained therein to bolster the evidence of identification given by Veandrist McKenzie. In our view, this resulted in flawed convictions which we could not have allowed to stand. At the new trial, the prosecution will have the opportunity to present a case devoid of the complications that arose from the hostility of Messrs Lenford Barrett and Yolander McDonald to its cause.