JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 68/97

BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE WALKER, J.A.

REGINA vs. CLARENCE PECK

Cecil J. Mitchell, Esq., for the appellant

David Fraser for the Crown

July 7, 8 and November 1, 1999

RATTRAY, P.:

The appellant was convicted on the 22nd May, 1997, in the Home Circuit Court of the offence of non-capital murder of Dorian McLean and sentenced to life imprisonment with an order that he be not eligible for parole before serving twenty-five years imprisonment.

The evidence presented by the prosecution came firstly from Miss Florence Morris, the mother of the deceased, Dorian McLean. She testified that on the 11th February, 1995, she was sitting at her gateway at Crescent Road, St. Andrew, selling at about 7:00 p.m. when she heard shots firing. She saw people running down the road. She left the goods she was selling and, "I draw inside the yard". She was still hearing shots [illegible] was night, but the streetlight was on.

She went behind her fence inside her yard. Whilst behind her gate four men passed going up the road. "... after they gone through the lane the people come out back where them hide up and thing." After the men went up the road, a man called out her name. She ran out of her yard and saw her son lying dead "at the shop door where him was when the shot was firing." She had seen the four men after she heard the explosion. The evidence reads as follows:

> "Q: Now you were behind this gate. Tell me where were you looking to be able to see the men?
>
> A: When them coming up.
>
> Q: Yes. How were you able to see them? Where were you looking?
>
> A: Peeping through the gate, through the hole of the gate.
>
> Q: How many holes you were peeping through?
>
> A: The fence is pure holes, so you can look through anywhere.
>
> Q: I want to know where you look through?
>
> A: Behind the gate.
>
> Q: The hole that you look through...
>
> A: Behind the gate, ma'am.
>
> Q: About how big is this hole?
>
> A: A big enough hole."

As later emerged, it was a zinc fence with holes in it through which she said she was looking. She saw two other men with guns. She pointed out the distance

assessed at about four to five yards away when she first saw the men. She was in the yard and they were outside. The nearest of the four passed within a yard of her when she was behind the fence and they were walking on the sidewalk. She had seen one of the men who had a gun before. She pointed out the accused in the dock. Although she went to the venue of the identification parade, she was not called in to identify the person whom she saw.

In her cross-examination, she was asked:

> "Q: You were thinking about your safety when you went inside the yard?
>
> A: Everybody do the same thing, running, because is shot, people running looking place to hide."

She had run inside and left her goods outside. She knew the appellant by the name of "Bargie". Counsel suggested that she told the judge at the preliminary enquiry that "I had not seen him before that day but I see his mother after the occasion." The trial judge intervened:

> "**HER LADYSHIP:** The lawyer asked you say if you did tell the judge that you never see Clarence Peck before that day? That is the day of the shooting. Did you or did you not tell the judge that?
>
> **WITNESS:** I never see him until that time. I never see him until after the occurdance, after the killing. Is that I tell the judge at Gun Court."

In addressing counsel, the trial judge said:

> "**HER LADYSHIP:** There is no need to put it to her she has agreed with you."

Counsel for the accused, however, would not leave well alone. He again pursued this line of cross-examination:

> "**Q:** Miss Morris, did you tell the judge in answer to a question asked you by the lawyer, when is the first time you saw the accused? Did you tell the judge, 'Is the first time I see him when I come to court today?' Did you tell the judge that?
>
> **WITNESS:** Say is the first time I see him when I come to courthouse?
>
> **Q:** Today is the day when you answer that?
>
> **A:** I see him before.
>
> **Q:** Did you tell the judge?
>
> **A:** When I went to the courthouse after they arrest him I never see him again until they come and call me to come there.
>
> **Q:** Did you tell the judge, 'The first time I see him is when I come to court today.'?
>
> **A:** That mean I never know him before?
>
> **Q:** Did you say that?
>
> **A:** I didn't tell the judge that."

This led the trial judge to rationalize as follows:

> "**HER LADYSHIP:** This is why it is important that we have Shorthand Writers because they can take down exactly what the witness is saying, because she is saying she did say so but she is saying, I did say is the first time I see him when I come to court. But she is saying that is from the occurdance."

Asked by the trial judge how much time passed "from the time you heard the last explosion to the time you first see dem, ..." the witness ultimately replied:

> "A: I never have any estimate of time because I never ah look if is my son. Through everybody fast I was looking. I see dem pass come up and the little time I get to see dem, - that is why I say is five minutes. So is only pass dem pass when I see dem."

It is clear that the identification would have been under very difficult circumstances. Hearing the gunshots she ran into her yard leaving her goods on the sidewalk. She went behind a zinc fence in which there were holes. She peeped through the holes, she must have been very frightened. Thus she purported to be able to make an identification in those very difficult circumstances. Although she was present at the venue of the identification parade, she was never called upon to point out the appellant in the identification parade and in fact she only pointed him out in the dock at the preliminary enquiry. Furthermore, at the preliminary enquiry she had told the judge that she had never seen him before and it was only after the court "occurdance" that she saw him. Was there then any further evidence on which the jury could have relied in order to come to the conclusion that the appellant was one of the men who was present at the time when the deceased was shot?

A witness Sharon Bennett who had not given evidence at the preliminary enquiry but who at the time of the preliminary enquiry had given a statement to

the police but had died between the holding of the preliminary enquiry and the trial of the appellant, had in that written statement said as follows:

> "Sharon Bennett states:
>
> I am a 24 year old higgler and reside at fifty-nine and a quarter Crescent Road, Kingston 13. I have known one Everton o/c Skin Teeth for about twelve years now. He used to live along St. Joseph Road, Kingston 13, before but have removed from that location about four years now. He frequents the St. Joseph Road area where he also does mechanic work in a yard near to the clinic.
>
> I also know his mother Miss Jean and sister Joan who both live in the Portmore area. Everton is about five feet seven to eight inches tall, clear complexion, slim built, tall face, small head, buff teeth, mouth always open and low trim. I also know one Pullus for a very long time. You can say that we both were born and grown in the area. I know his mother Miss Elsie who sells matches downtown Kingston. His sister is Jackie, Pansy, Mitzie, Tanisha, brothers Mickey and Harry are all known to me. They all live in a little lane that runs behind St. Joseph Road. Pullus is about five feet tall, dark complexion, thick built, round face, full eyes, thick lips, large mouth and trimmed low.
>
> I also know one Shabba, o/c Newell for about eight years now. He lives along St. Joseph Road, Kingston 13, with his mother Miss Dawn, sisters Sudie, Charmaine, Kissie, and brother Buppie. Shabba is about five feet seven to eight inches tall, dark, slim built, straight face, small eyes, big lips and trimmed very low.
>
> I also know Bargie for about one and a half years now. I do not know any relative of his but he lives along St. Joseph Road, Kingston 13. He is about five feet eight inches tall, clear complexion, thick built, broad face, broad base nose, small eyes and is mostly dressed in merino and short pants. I know all the abovenamed men, [illegible] are friends and walk

together. They mostly hang out in the yard that Everton do his mechanic work along St. Joseph Road.

On Saturday, 11th of February, 1995, about 9 p.m., I got out of my yard along Crescent Road and was about to enter another yard when I heard three loud explosions sounding like gunshots. On hearing these explosions, I ran into a nearby passageway where there is also a gate leading into a yard and hid myself there. While there a lady came out of the yard behind me and I told her not to push me out in the light because shots were firing. This lady then ran back into her yard. I then got out of the passageway and went in the direction of a lane that runs behind Crescent Road in the direction where I heard the shots. I looked through the lane and saw Everton, Pullus, Shabba and Bargie, all with short hand guns in their hands running down the lane. They turned in a passageway that leads back to Crescent Road and I ran back to the little passageway where I hid myself first and saw all four men ran back on to Crescent Road and into Powder shop. I then heard two more loud explosions sounding like gunshots, and all four men ran from the shop on to Crescent Road and ran into my direction. All four ran passed me through a small dirt field towards St. Joseph Road. I know all four men very well. I was able to see them very clearly because of J.P.S. light poles which are situated along Crescent Road with lights which shone brightly, also lights are situated in the lane. I then heard a man saying that one Topey who lives along Crescent Road was shot in Powder's shop. I ran up to Powder's shop and saw Topey lying on his right side with his left hand to the side of his face. I could see a large hole to the left side of his head with blood coming from same. Topey was placed in an open back van which left to the K.P.H. I then left to the Hunts Bay Police Station along with his mother Miss Bunting. While at the station I heard from the police that Topey was pronounced dead."

This statement was given on Saturday 11th February, 1995, at Hunts Bay Police Station.

On the 10th March, 1995, after attending an identification parade where she pointed out the appellant, she gave the following statement:

> "**WITNESS:** Sharon Bennett further states: On Friday the 10th of March, 1995, at about 2:00 p.m., I attended the Hunts Bay Police Station to identify one of the men who shot and killed Dorian McLean, otherwise Topey, along Crescent Road Kingston 11. On the night of the 11th of February, 1995, I was called on the identification parade, told of my rights, given certain instructions by the police officer. I walked up the line of nine men, each with a number over their heads and saw Bargie standing under the number five. I shouted out loud, 'Number five is Bargie, one of the men that shot and killed Topey on the night of the 11th of March, 1995, along Crescent Road, Kingston 11. The officer called him to the little hole and told him that I pointed him out and he said nothing. On Friday the 10th of March, 1995, at about 5:20 p.m., I gave this further statement to the police. It was read over to me and I signed to its correctness. Signed: Sharon Bennett, Date: 10/3/95".

These statements were admitted in evidence under the provisions of the Evidence (Amendment) Act, 1995, which, though not in existence at the time the statements were taken, had come into existence at the time of the trial. The relevant section reads as follows:

> "**31(D)** Subject to section 31(G), a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if it is proved to the satisfaction of the court that such person (a) is dead..."

Section 31(G), to which section 31(D) is subject, deals with a statement contained in a document produced by computer. The prosecution was, therefore, required

to prove that the witness Sharon Bennett was dead. They proceeded to do so through the evidence of Sergeant Thompson who told the court that he knew of his own personal knowledge that she was deceased because he saw her body at the morgue. This was on Tuesday the 24th April, 1997. Then Crown Counsel asked:

> "**Q:** Do you know officer, the circumstances surrounding her death? Do you know how she came to be dead?
>
> **A:** Yes, miss."

Later:

> "**HER LADYSHIP:** That's exactly why you were asked if you knew from your personal knowledge how she died.
>
> **Q:** How?
>
> **A:** She was shot in cross fire between police and gunmen in the Riverton City area."

Under cross-examination it emerged that although he was the investigating officer he did not record the statement of the witness. He could not recall the year he gave evidence in the preliminary enquiry and asked permission to refresh his memory. This was refused by the trial judge at which the witness said:

> "**WITNESS:** M'Lady, could I be permitted to say something.
>
> **HER LADYSHIP:** What is it?
>
> **WITNESS:** I am doing at any one time over fifteen murders, I am not in a position to remember

> everything that's why I asked to refresh my memory."

Constable Kenneth Chambers who took the statement from Sharon Bennett, therefore gave evidence of having taken the statement and Miss Bennett having signed it and it being witnessed by his signature. He was then asked:

> "Q: Do you know the circumstances surrounding her death?
>
> A: Yes, miss,
>
> Q: From your own personal knowledge?
>
> A: Yes, miss.
>
> Q: Can you tell us how she died?
>
> A: She was shot in cross fire in a shooting between gunmen in the Riverton City area."

The evidence of how Sharon Bennett met her death was not in any way relevant to the admissibility of her statement. On the other hand, it would have been gravely prejudicial in an atmosphere in which a person was on trial for a murder by shooting and in a country in which the murder rate has in fact over several years been of some cause for great concern. Furthermore, the gratuitous evidence of Sergeant Thompson of "doing at any one time over fifteen murders" must have been prejudicial to the appellant and of no probative effect.

The admissibility of any evidence in criminal proceedings has to be determined by the trial judge.

In my view, in a case where a statement is being admitted in the absence of the person who made the statement and with the removal of the possibility of cross-examination of the witness on that statement and of the ability of the jury to take note of the demeanour of the witness, the trial judge should be very careful that no extraneous material is let in before the jury, which would in any way influence them adversely against the person on trial, for example in relation to how the witness came to meet her death. This evidence solicited by counsel for the prosecution must have been gravely prejudicial and militated against the obtaining of a fair trial. Thus, we have a case in which the two areas of evidence against the convicted person came from **(1)** the mother of the deceased in very difficult circumstances and indeed who had not given evidence at the preliminary enquiry and **(2)** the witness who had not given evidence at the preliminary enquiry but who had given a statement to the police. This was further aggravated by the unwarranted admission of the evidence of the circumstances under which that witness met her death.

The Identification Evidence

There can be no doubt that the identification by the mother of the deceased must be looked at very carefully. It was her son who was murdered and her evidence was not without grave discrepancies. It was made in very difficult circumstances and the opportunity for a proper identification in more careful circumstances did not exist. The learned trial judge stated to the jury the purpose of cross-examination to be:

> "...to ferret out conflicts in the evidence and to provide material for the suggestion that the witnesses are not speaking the truth."

She could have added, and perhaps should, that it may also result in a clarification of the evidence which would assist them in determining where the truth lies.

The jurisprudence which has developed in relation to identification evidence has by now been too well-established to require detailed repetition. That jurisprudence is the same in Jamaica as it is in England. As was stated in the opinion of the Board by Lord Ackner in ***Reid, Dennis & Whylie v. R.*** [1989] 37 W.I.R. 346 at page 354:

> "Their Lordships have no doubt that the direction of Lord Widgery CJ that -
>
> > 'when, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the judge should then withdraw the case from the jury and direct an acquittal, unless there is other evidence which goes to support the correctness of the identification.'
>
> applies with full force and effect to criminal proceedings in Jamaica."

Was there other evidence which went to support the correctness of the identification of the mother? The written statement of the witness who neither gave evidence at the preliminary enquiry and is not able now to give evidence at the trial, because she has since died, what would be the additional evidence.

How much weight does this evidence carry, since it is completely untested either at a preliminary enquiry or at the trial? Furthermore, how much prejudice has been generated by virtue of the fact that evidence is allowed to be given as to the manner of her meeting her death which has nothing at all to do with the case or the accused but must be highly prejudicial to him?

The legislation by Parliament of the admissibility of statements sworn by and signed to by someone who has not given evidence does not take away from the trial judge the duty to see whether the prejudicial effect of this evidence outweighs its probative effect. It is not admitted as of course. Furthermore, in this case there is nothing to indicate that in determining that the statement be admitted, the learned trial judge weighed these factors properly or at all and came to a correct determination.

The case, therefore, rests solely, in my view, on the identification evidence of the mother, flawed as it was, with little if anything in terms of weight added by the statement of the deceased witness and the trial judge should have withdrawn the case from the jury. In the circumstances, I would allow the appeal and quash the conviction and enter a verdict of acquittal.

BINGHAM, J.A.:

WALKER, J.A.:

Having read in draft the judgment of the learned President in this matter, we are entirely in agreement that, given the prejudicial nature of the evidence elicited at the trial relating to the circumstances of the death of the witness Sharon Bennett, the conviction cannot stand and ought to be set aside.

We do not, however, agree with the decision of the learned President to enter a judgment and verdict of acquittal. In our view, despite such inherent weaknesses as may appear in the evidence of the sole eyewitness, Florence Morris, which, standing by itself and given the ***Turnbull*** guidelines, would have warranted such a course as proposed by the learned President being adopted, her evidence does not stand alone. It is supported by the evidence contained in the statement of the deceased Sharon Bennett, which, despite its limited weight, is, by virtue of section 31D of the Evidence Act, legally receivable at a trial. Provided that the trial judge takes the necessary steps to ensure that the hearing is conducted in an atmosphere of fairness where only relevant evidence is admitted, there exists in the evidence of Florence Morris, and that contained in the statement of Sharon Bennett, sufficient evidence upon which a jury, properly directed, could arrive at a

verdict of guilty of murder. For this reason, we are of the view that the ultimate decision on the appellant's fate ought to be left to a jury.

We would in the circumstances and in the interests of justice order a new trial.

RATTRAY, P.:

Order

By unanimous decision, appeal allowed, conviction and sentence set aside.

By a majority (Rattray, P., dissenting) new trial ordered in the interests of justice.