JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 35/95

COR: THE HON MR JUSTICE CAREY JA
THE HON MR JUSTICE FORTE JA
THE HON MR JUSTICE WOLFE JA

PETER McCLYMOUTH V REGINAM

Dennis Daly QC for appellant

Mrs Vinette Graham-Allen for Crown

13th, 14th November & 20th December 1995

CAREY JA

At a trial in the Circuit Court Division of the Gun Court held in Kingston between 9th and 15th March 1995, this appellant was convicted of the non-capital murder of Errol Flemmings. The matter comes before the court by leave of the single judge.

Three grounds of appeal were debated before us. The first challenged the ruling of the trial judge that there was a case to answer and in the alternative, it was said that the verdict was unreasonable and could not be supported having regard to the evidence. The second complained of a material irregularity occurring in the course of the trial when the no case submission was made in the presence of the jury to the prejudice of the appellant. The third charged that the trial judge exercised his discretion wrongly in refusing to discharge the jury when a prosecution witness made damaging allegations reflecting on the character of the appellant.

We need only give a resume of the facts in our consideration of these grounds. The circumstances of the murder come from the evidence of a solitary witness Anne-Marie Flemmings the sister of Errol Flemmings the slain man. On the 3rd August 1992 at about 10:00 p.m. she was at the corner of Wint Road and McKenley Crescent Olympic Way in St. Andrew

whiling away the time listening to music. The appellant was across from her, a matter of some six yards off, leaning against a motor car; she knows him by a pet name, "Berie." At this time her brother rode up on a bicycle and stopped about two feet from the appellant, who had come up to her brother. The appellant spoke to her brother but she did not hear what was said by him. But she did hear her brother use the words "Star, a wey oonu a deal wid?" The appellant immediately pulled a gun from his waist and discharged three shots at her brother who was running off. Her brother fell. She went off and informed her mother of the tragedy. Some five minutes after she returned home, the appellant came by and threatened that if he did not get his things he would personally kill her brother. Thereafter at about 1:00 a.m. she heard the sound of firing in a direction a considerable distance from the incident involving her brother. Subsequently, at about 3:00 a.m. the following morning on receiving a report, she went to Holt Road where she saw her brother all trussed up lying in a hand cart. He was dead. The medical evidence confirmed that the victim had been shot in the back by one bullet.

The defence was an alibi, the appellant testifying (an unusual event) that he was at home with his girlfriend and his nephew at a night club between 10:00 p.m. and 3:30 a.m. The appellant called no witnesses to support the alibi.

This was a recognition case. The appellant, a neighbour of the sole eyewitness knew him for approximately twelve years. The appellant admitted he was a neighbour and knew the family of the Flemmings. There is no question regarding the lighting available at the different times the witness had for observation and the distance for such observation was close enough not only at the scene of the crime but also at the witness' home after the shooting. Counsel for the appellant did not raise any issue as to the identification evidence nor seek to impugn the directions of the learned trial judge in that regard.

The first complaint related to what learned Queen's Counsel described as a hiatus in the evidence. There was, he said, no evidence that the victim had been bit by the bullet fired by the appellant because there was no sign of blood where he fell. Other shots, he said, had been fired during the night and the victim could have been hit by any one of those. Where the body of Errol Flemmings was recovered was some distance, which was not ascertained, from the location of the shooting.

The circumstantial evidence adduced by the prosecution established that the slain man was shot by a bullet fired from behind. The medical evidence was consistent with the circumstances of the killing by shooting i.e. he was killed by a bullet fired from behind. The appellant had fired at the victim from behind and he was seen to fall. When Anne-Marie Flemmings last saw her brother he had been shot at, and he had fallen to the ground. A very reasonable inference was that he fell because he had been shot. The fact of the body being seen at some other location in the community trussed up and lying in a wheel barrow was all of a piece with the violence and menace manifested in the course of the night and in the early hours of the morning, by the appellant towards the victim and members of the victim's family. We cannot therefore agree with Mr. Daly QC that there was any hiatus in the prosecution case which entitled the trial judge to accede to the no case submission.

As an alternative to those submissions, it was argued that the verdict was unreasonable and could not be supported having regard to the evidence. In considering this alternative ground for interference, the court is required to look at all the circumstances of the case including the defence of alibi which the appellant maintained before the jury. Mr. Daly returned to the theme of there being a gap in the prosecution case. There was, he urged, no evidence that the eyewitness made any attempt to see if he had been shot, and there was no physical evidence to establish

where he was killed. Finally, he said that there were inconsistencies in the evidence of the witness.

There was before the jury two mutually inconsistent tales. On the one side, a shooting of Errol Flemmings by a man, the appellant, who was well known to the witness, that same person the appellant visited the house of the slain man on two occasions within a comparatively short space of time to menace and threaten members of the deceased's family. On the other side, a tale by the appellant that at the material time he was at a night club - the House of Leo with his girlfriend and his nephew, neither of whom were called to support his story. The jury, it is clear from their verdict, did not believe his evidence. It was not argued before us that the eyewitness' evidence had been so destroyed by cross-examination that there was no evidence to go to a jury, nor was that approach taken before the trial judge. The argument pressed consistently both before us and the trial judge was that there was an unbridgeable lacuna in the case destroying any link between the appellant and the murder of Errol Flemmings.

In our view, there was ample evidence to support the verdict at which the jury arrived. There were discrepancies in the evidence but that as an occurrence in criminal trial is not altogether unusual. It is not however the occurrence of discrepancies which is crucial but whether the discrepancies identified are so fundamental that it can reasonably be said that the credit of the witness has been effectively destroyed or significantly eroded. In this case discrepancies were identified and the trial judge correctly gave directions as to the manner in which the jury should deal with them. That ground fails.

The next attack mounted by counsel for the appellant was in relation to what must now be accepted as an irregularity in the trial process. The Privy Council has now definitively laid it down that a no case submission must not be made in the presence of the jury. See

Crossdale v. R. [1995] 2 All E. R. 500. The practice in this jurisdiction prior to that ruling was for such submissions to be made in the presence of the jury. There was a school of thought among experienced defence counsel that that exercise before the jury allowed them two bites of the cherry, so to speak. The fact of the irregularity is not per se, however, fatal to the conviction. The Privy Council observed in **Crossdale** (supra):

> "This is not to say that in every instance where the jury has remained in court whilst a submission of this kind has been made and rejected, an appeal on this ground will be allowed."

Their Lordship went on to say:

> "Far from it. The appellate court may well conclude, after examining a transcript of what passed between the judge and counsel, that there was no harm serious enough to imperil the fairness of the verdict."

It is necessary therefore to examine the transcript to see what harm has resulted from this procedural breach. Mr. Daly QC submitted that there was prejudice to the appellant in that the jury would have heard arguments of those co-accused who, in the result were acquitted. In that case as Lord Mustill indicates, the arguments of the successful co-accused proceeded on the basis that the appellant had, in fact, shot the deceased. Learned Queen's Counsel argued that the facts in that case are indistinguishable from the instant case. Learned counsel for the Crown contended as we think, rightly, that none of the successful co-accused in the instant case argued that this appellant shot the victim of the crime. They all said whoever shot him, we were not engaged in any joint enterprise with that person. It is further to be noted that the transcript of the no case submissions by the different counsel who appeared at trial, is conspicuous for the absence of interruptions by the judge. Nothing therefore passed between judge and counsel which could possibly imperil the verdict. For these reasons, we conclude that no harm was occasioned to this appellant by the irregularity.

The final ground which was argued before us complains that the trial judge wrongly refused to discharge the jury when a prosecution witness made damaging allegations regarding the character of the appellant.

The matter arose in this way during cross-examination of the main prosecution witness by counsel who then appeared on behalf of the appellant : (p. 90-92)

> "Q: Why did you say at one time, having sworn on the Bible, say it was your mother and having sworn on the Bible here again say it is you/
>
> A: Because I didn't remember.
>
> Q: The truth is, I am suggesting that in fact you are telling a lie.
>
> A: I am not telling a lie.
>
> Yuh talking like seh is the first murder Levy commit and you stand up for him. This is the second murder but I didn't business with the first one [emphasis supplied]
>
> HIS LORDSHIP: Concentrate on this one.
>
> MR MITCHELL: M'Lord, might I just have a word with my learned friend.
>
> HIS LORDSHIP: Take two.
>
> MR. MITCHELL: M'Lord, we wonder whether perhaps it may be a useful exercise, indeed, I am applying, M'Lord that perhaps this might be a convenient time.
>
> HIS LORDSHIP: You are finished with this witness Mr. Mitchell?
>
> MR. MTICHELL: No, my Lord.
>
> HIS LORDSHIP: You have twenty minutes more, you can be finished in that time?
>
> MR. MITCHELL: We would need to be advised or certainly we would need to have dialogue with certain persons in relation to what was to happen in relation to that which has been blurted out.

> HIS LORDSHIP: To what, the out-burst? You want to confer among yourselves on that?
>
> MR. MITCHELL: We would not only like to confer among ourselves but perhaps with the learned trial judge.
>
> HIS LORDSHIP: About what?
>
> MR MITCHELL: That which just emanated from the witness.
>
> HIS LORDSHIP: I know exactly, it has to be dealt with.
>
> MR MITCHELL: It has to be dealt with in terms of advice and instructions.
>
> MR MITCHELL: My Lord, it is my considered view and considered submission, m'Lord, that the advice and instructions that perhaps Your Lordship contemplates.
>
> HIS LORDSHIP: What? Erase that which
>
> MR MITCHELL: My Lord, as I am saying, I am trying to say, really that this is a matter, if at all, it is possible and indeed, that somehow it's advisable, that perhaps we ought to speak about this matter.
>
> HIS LORDSHIP: You need fifteen minutes more than the normal lunch break?
>
> MR MITCHELL: No, m'Lord. Perhaps we ought to speak with Your Lordship in Chambers. I have been trying to be forensic and as careful as, but perhaps I am not at my eloquent best this morning, it being Monday morning. so, perhaps it'a a matter that we ought to deal with in Chambers."

Mr. Daly QC raised the like argument before us. Not only had damning comments been made in relation to the appellant but the character of his counsel was being equally tainted. What had occurred in this case was devastating. He relied on **R v Weaver** [1967] 1 All ER 277. The law applicable to circumstances such as eventuated in this case can, we think be easily stated:

> "...The decision whether or not to discharge the jury is one for the discretion of the trial judge on the particular facts, and the court will not lightly interfere with the exercise of that discretion. When that has been said, it

> follows, as is repeated time and again, that every case depends on its own facts. As also has been said time and time again, it thus depends on the nature of what has been admitted into evidence and the circumstances in which it has been admitted what, looking at the case as a whole, is the correct course. It is very far from being the rule that, in every case, where something of this nature gets into evidence through inadvertence, the jury must be discharged."

per Sachs LJ in **R v Weaver** at p. 280.

The court will be slow to interfere unless it feels that the applicant would be justified in saying that what occurred was devastating. The court must have regard to what was divulged, whether accidentally or deliberately, to appreciate whether it was perhaps a casual remark as the court found in **R v Coughlan** [1976] 63 Cr App R 33 or whether it was so prejudicial as to be not capable of curative action by the trial judge.

The difficulty lies not in stating the principle but in applying it. In the instant case, the matters blurted out reflected to a high degree not only on the character of the applicant viz that he had committed murder before but also on the character of his counsel. We do not think that this double punch could be cured by words of caution by the learned trial judge. It would be manifestly unfair to continue the trial of the applicant on a charge of murder in the face of the revelation that the applicant had previously been convicted of murder, that being the obvious inference, and had been defended by the same lawyer: the lawyer was as bad as his client. We do not think that such a view was so unreasonable that the jury could not have been adversely affected by it. In the trial of any offence which carries with it a heavy mandatory sentence, scrupulous fairness, it seems to us, must be observed. We do not think the fact that the evidence was blurted out perhaps because the witness had become exasperated by cross-examination should count for naught. The impact of that revelation on the jury would, we feel, be no less serious or devastating. For completion, it is right to add that the trial judge did warn

the jury to disregard the disclosure of the applicant's bad character but he did not refer to the implication on the character of his counsel who was not being portrayed in a favourable light. With all respect to the judge who plainly took the view that the disclosures ought not to be blown out of proportion and were nothing more than ill considered remarks, it seems to us that he did not give much weight to the fact that the remarks introduced a degree of prejudice. The case depended wholly on the evidence of this witness and on the credit of that witness. It would call for a remarkable mental agility on the part of any juror to divorce from his mind (an exercise not to be imposed on any jury) that this credible witness had not said that the applicant was a repeat murderer. The appeal accordingly succeeds on this point.

This conclusion obliges us to interfere with the conviction obtained in this manner. The appeal is accordingly allowed. The conviction is quashed, the sentence set aside, and in the interests of justice, we order a new trial in the next ensuing session of the Circuit Division of the Gun Court in Kingston.