JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 70/92

BEFORE: THE HON. MR. JUSTICE RATTRAY, PRESIDENT
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.

REGINA vs. EDWARD CAMPBELL

Dennis Morrison for the applicant

Miss Paula Llewellyn, Deputy Director of Public Prosecutions, and Miss Gina Morley for the Crown

December 7 and 20, 1993

WOLFE, J.A.:

This applicant was tried in the Hanover Circuit Court on June 8 & 9, 1992 before Smith, J. sitting with a jury. He was indicted for the offence of murder arising out of the death of Corbert Brissett. He was found guilty as charged and sentenced to suffer death in the manner authorised by law.

Leave was sought and granted to argue one ground of appeal. That ground is set out hereunder:

> "That the learned trial judge erred in law when he directed the jury on the value of the applicant's unsworn statement as follows:
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> > '...in considering your verdict you should give the accused's unsworn statement only such weight as you think it deserves. So members of the jury, an unsworn statement, not tested by cross-examination, has less cogency and weight than sworn evidence'." **[Emphasis supplied to indicate the area of complaint]**

The nature of the complaint makes it unnecessary to set out in any detail the evidence adduced at the trial. Suffice it to say that on the 3rd October, 1991 the deceased,

Corbert Brissett, was chopped to death with a machete by the applicant at Chambers Pen in the parish of Hanover. The sole eyewitness for the prosecution, Miss Ivy Murray, swore that the victim was chopped as he was walking away from the applicant with his back turned to the applicant.

Dr. Ronald Brown, who performed the port mortem examination, found a 15 centimetre long, very deep laceration through the skin subcutaneous tissue, facial and temporal bones of the left side of the skull to involve the left cerebral hemisphere of the brain. The laceration commenced from the left angle of the mouth and extended in a cephalad direction upwards, above the pinna of the left ear. The skull bones were opened apart. On dissection there was seen a large intra-cerebral haemorrhage on the left side of the brain, associated with compound fractures of the left facial and temporal bones. The laceration which was seen externally extended below the skull bone to expose the brain and below that incised wound was a very large haemorrhage, bleeding. A very large clot was present and this involved the left side of the brain. In the opinion of the doctor, death was occasioned as a result of haemorrhagic shock, left intra-cerebral haemorrhage and a large laceration to the left side of the face and head. The injury, he opined, was caused by a great degree of force.

The applicant, in an unsworn statement, said that the deceased rushed at him with a machete and he, the applicant, flashed his machete at him because he was afraid. He called a witness, in support of his unsworn statement, and the witness, Steadman Noble, did in fact support him.

Before proceeding to deal with the issue raised in this application, it must be noted that Mr. Morrison, with his usual candour, expressed the view that but for the complaint made the learned trial judge dealt properly with all the issues raised on the evidence in his summation to the jury.

Mr. Morrison complained that the direction referred to above was capable of conveying to the jury that an unsworn statement was to be given less weight than sworn testimony. With this interpretation we must disagree. The direction must be read and seen as a whole. The learned trial judge made it abundantly clear to the jury that in the consideration of the unsworn statement they as judges of the facts were entitled to give to it only such weight as in their view it deserved. It may very well be that after they have assessed the unsworn statement they may attach to it greater weight than the sworn testimony in the case. However, it is our view that common sense would dictate that until the jury concludes otherwise the sworn testimony of a witness, who has been willing to expose himself or herself to the rigours of cross-examination, would be regarded as more cogent and weighty than unsworn testimony. This is the risk which an accused person who seeks the shelter of the dock takes upon himself. The Judges of Her Majesty's Privy Council were not unmindful of this risk when in **Solomon Beckford v. The Queen** they said:

> "Before parting with this appeal there is one further matter upon which their Lordships wish to comment. The appellant chose not to give evidence but to make a statement from the dock which, because it cannot be tested by cross-examination, is acknowledged not to carry the weight of sworn or affirmed testimony. Their Lordships were informed, to their surprise, by counsel for the prosecution, that it is now the practice, rather than the exception, in Jamaica for an accused to decline to give evidence in his own defence and to rely upon a statement from the dock; a privilege abolished in this country by section 72 of the Criminal Justice Act 1982. Now that it has been established that self-defence depends upon a subjective test their Lordships trust that those who are responsible for conducting the defence will bear in mind that there is an obvious danger that a jury may be unwilling to accept that an accused held an 'honest' belief if he is not prepared to assert it in the witness box and subject it to the test of cross-examination."
>
> **[Emphasis supplied]**

The disputed portion of the direction given by the learned judge has become hallowed in the course of time. In **R. v. Coughlan** 64 C A R page 11 at page 18 Shaw, L J , in treating with the unsworn statement, said:

> "The controversial question is in the end reduced to mere logomachy. Whatever status may be assigned to an unsworn statement, it can hardly vie with sworn evidence in cogency and weight."

Counsel sought to rely upon the dictum of Kerr, J A in **R. v. Hart** 27 W I R 229 at 234 where the learned judge said:

> "In cases such as **Coughlan's** (2) where there are two or more accused and it is necessary to make it clear to the jury what is the effect of the unsworn statement of one accused upon the position of the other, the direction there may be in order. But in the ordinary case a trial judge should avoid the **Coughlan** (2) prescription, which as worded seems to go too far and to go beyond the context of that case.
>
> The judge in the ordinary case should follow the 'guidance on the objective evidential value of an unsworn statement' as authoritatively advocated in **D.P.P. v. Walker** (1)."

The words which form the basis of the complaint do not fall within the "Coughlan's prescription". These words clearly could not have conveyed to the jury the impression that the unsworn statement had no evidential value as was said in **Hart's** (supra) case. In our view the complaint lacks merit.

We too have examined with great care the transcript of the proceedings and have concluded that the verdict of the jury is unassailable. The learned trial judge was at pains to leave the issues fairly to the jury. His directions on the law were accurate. For these reasons we refused the application for leave to appeal.

In accordance with the amendment to the Offences against the Person Act, 1992, which came into effect on the 14th October, 1992, section 7(1), we have adjudged the offence to be non-capital murder. Consequently, the sentence of death

which was imposed at the time of conviction is ordered to be set aside and the sentence of life imprisonment is hereby substituted. In keeping with section 7(2)(c) of the said Act, we hereby recommend that a period of eight years be served by the applicant before he be considered eligible for parole.