JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 43/92

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A. (Ag.)

REGINA
vs.
ALEXANDER HUTTON

Lord Gifford, Q.C. and Mrs. Sharlene Suarez
for the appellant

Kent Pantry, Deputy Director of Public
Prosecutions, and Miss Carolyn Reid
for the Crown

November 24 & 25, 1993 and January 31, 1994

WRIGHT, J.A.:

This appellant seeks leave to appeal from conviction and sentence of death in the Home Circuit Court on April 1, 1992 before Wolfe, J. (as he then was) and a jury for the gunslaying of Rupert Taylor on August 7, 1991.

We treated the hearing of the application as the hearing of the appeal which we dismissed. The murder was classified as non-capital and accordingly we quashed the sentence of death and substituted a sentence of imprisonment for life with a recommendation that he be not eligible for parole before serving a period of twenty-five years. The promised reasons for our decision are set out hereunder.

The lone eyewitness for the prosecution, 18 year old Shelly-Ann Newton, testified that at about 9:00 p.m. on August 7, 1991, she returned from the Lobster Pot Club at Bull Bay to Pleasant View Lane in company with "Fat Head", Ruddy Sample, Bunny, Chappie and a girl named Patsy. They travelled on motor cycles. She was the pillion rider on Chappie's motor cycle.

When they arrived at Pleasant View Lane she saw the appellant "Colo", whom she had known since she was nine years of age, standing in the lane. The area was well lit. The appellant was standing under a street light and there was another street light about 20 feet away. The appellant had a spliff in one hand and in the other he had a "medium size gun" which she estimated to be about 18 inches long. Behind him stood another man whose name she did not state. Her company came to within 20 feet of the appellant and halted. She spoke to Bunny and when she looked again the appellant had disappeared. After an interval of about two minutes they were alerted by one Lavern, a girl who lives in the Lane - "We see her buss out" - and when she looked she observed that the appellant was then standing behind them and about arm's length from her. He pointed the gun at her chest and announced, "Hey gal, none of oonu don't move."

The appellant then called Bunny who went to him and after he had searched Bunny he declared, "That one yah clean" and ordered Bunny back to his position. He next called to the deceased Rupert Taylor ("Fat Head"), and as Taylor approached the appellant queried, "How you look so?" Taylor had been sitting about three yards away from the appellant and as he walked towards the appellant Taylor responded, "How me look, boss?" The appellant rejoined, "Where you coming from?" to which Taylor replied, "Boss mi is a working man and is work mi coming from." "What inna yuh bag?" was the appellant's next demand. "Nothing", replied Taylor, "is only mi wallet and comb." The savagery of the encounter is captured in the next sentence of her evidence:

> "By the time him go up to him, him use the gun to shub him in his right ears and the gun go off."

She heard an explosion which she described as "Blough" and Taylor fell to the ground. The appellant then pointed the gun at Bunny and she heard a click but no explosion. The appellant then backed away and ran down a nearby gully and while retreating he kept the gun pointed at them. She said Taylor's left ear was torn off.

She ran to her mother's church but apparently not finding her there she ran home and then went to the Bull Bay Police Station where she made a report. The Police escorted her back to the scene but by then Taylor's body had been removed. She spent the night at the Police Station and next day the Police accompanied her to her home to collect some clothes and she did not return to the area until three weeks later, that is, subsequent to the arrest of the appellant.

On the all-important question of identification, she said that she and the appellant grew up together in the area, she knew his mother, Miss Pearl, his step-father "Mannie", she knew their home and that the appellant once lived with them but latterly he was living at an address on the Bull Bay main road. She saw him every day, and indeed, she had seen him earlier on the day of the murder. More particularly at the time of the encounter in the Lane she said she saw his face "clear, clear" and that he had a grey and blue kerchief folded and tied around his forehead, and that she looked at him for about five minutes at first and then after he re-appeared behind them until he fled the scene she was looking at him for another seven minutes. On both occasions they were both under the street lights. His dress was a blue and black ganzie "with some dot dots" with grey on it and pepper seed pants.

Despite very strenuous efforts by defence counsel nothing of significance turned on the cross-examination except in so far as she was led to modify an aspect of her evidence relating to the number of persons present. She was challenged with her deposition in which she had stated that "the lane was full of plenty people gambling who ran away." In cross-examination, she said the Lane was not full because there were just about six persons gambling under the street light. Far from disputing her knowledge of the appellant, it was suggested that she had been his girlfriend as late as 1990. This she denied vehemently but on being questioned about one Beverley Forrest she admitted

she knew her to be the appellant's girlfriend and that she had come to her home seeking to induce her not to testify against him. She denied that she was motivated by malice, strongly rejoining:

> "Malice, that is a big lie; from I know that guy me and him never have anything, never."

To the question that she had lied on the appellant she responded:

> "Sir, I not telling a lie, he and my cousin used to deh, so I couldn't deh with him, she name Marva."

Dr. Royston Clifford, Consultant Forensic Pathologist, confirmed that the victim was shot at close range with a shot gun (in all probability a sawn-off shot gun). He found, on external examination:

> "A large gaping shot gun wound to the left ear completely shattering the ear as well as the underlying skull resulting in a large hole with protruding brain tissue. The plastic piston as well as several small lead pellets were recovered from the wound as well as the remaining brain. The cause of death was the shot gun wound to the head."

Corporal Lenford Mills of the Rockfort Police Station was present at the Bull Bay Police Station at about 9:30 p.m. when the incident was reported by a telephone caller. He arrived at the scene to find the body of the deceased on its back in a pool of blood. He observed the injury to the head then removed the body to the Kingston Public Hospital where death was certified.

He began investigations and on the next day obtained a warrant for the arrest of the appellant on the charge of murder. On August 18, 1991, he executed the warrant on the appellant whom he saw at the Bull Bay Police Station. Upon being cautioned the appellant replied, "A lie them a tell pon me, officer." The officer testified that the witness Shelly-Ann Newton attended at the Bull Bay Police Station on the night of August 7, 1991, and made a report to him.

The appellant made an unsworn statement and called as his witness one Veronica Hutchinson.

The gist of his statement is that at sometime in 1990 he had had a relationship with Miss Newton - not a very serious relationship - but after a while his girlfriend Beverley Forrest heard about it and the resultant fuss brought that relationship to an end. He said he was playing football one day while Miss Newton was passing and the ball got out of control and hit her in her face following which she said she would go to the Police Station and that she "must mek Police kill me."

On the night of the murder he was returning from vending fish in town on a minibus on which one Veronica Hutchinson was a passenger. Indeed, he had boarded the bus ahead of her and saved a seat for her because the bus was crowded. She came off at Seven Miles while he came off at Eight Miles where he saw a crowd and heard the people talking about the murder in the Lane and that no one knew who was the killer. He came into police custody when a bus on which he was travelling was stopped at a road block a few days later.

Veronica Hutchinson corroborated the bus trip and related that when she alighted from the bus at Seven Miles she heard of the murder from a group of people who were talking about it. She testified that it was about 7:30 p.m. that they boarded the bus.

In cross-examination she disclosed that she had heard of the appellant's arrest about two weeks after the incident but she did not reveal to the Police what she knew of his whereabouts at the relevant time. She said also that she had travelled with the appellant on the bus several times but she could not recall the last time she had done so prior to the day of the killing.

No complaint has been made in this appeal about the learned trial judge's directions on the live issue in the case, that is, visual identification and we ourselves have not discovered any ground which could give rise to any such complaint. However, the first of the two grounds of appeal sought leave to adduce fresh evidence on the issue of the identification of the appellant as the murderer. It was proposed to call three witnesses, viz:

Pearl Holding, the appellant's mother,

Delroy Brown (Bunny) and Michael Wells.

The affidavit of Pearl Holding discloses that she had attended the Preliminary Examination but she was not aware that Delroy Brown (Bunny) was implicated in the case and that it was on the last day of the trial that her husband informed her that Bunny's name had been called. Had she known of Bunny's implication she would have made efforts to find him before the trial. As it turned out it was about one year after the trial that Bunny came to her at the market and expressed his willingness to testify.

It is impossible for her to have been present at the Preliminary Examination and not have heard Bunny's name mentioned. Shelly-Ann Newton was never challenged that it was at the trial that she was mentioning Bunny's name for the first time. And, indeed, such a challenge could not have been made because the evidence is in her deposition. The trial lasted from March 30 to April 1, 1992. Shelly-Ann Newton began her testimony about 12:00 noon and on the very second page of her testimony she first mentioned Bunny's name and it was mentioned several times thereafter. Pearl Holding's evidence, however, would only lay the groundwork for introducing the evidence of the other two proposed witnesses.

The evidence proposed to be adduced through Delroy Brown is as follows:

> "1. That I reside and have my true place of abode at 56½ Anderson Road, Woodford Park in the parish of Kingston and my postal address is Mona P.O. Kingston 7 in the parish of St. Andrew and I am a cook.
>
> 2. That I am also called 'Bunny'.
>
> 3. That I have known the accused Alexander Hutton otherwise called 'Colo' for three (3) years before the night of the murder.
>
> 4. That I remember the night when Rupert Taylor, otherwise called 'Fathead' was killed at Boulevard Lane at Eight Miles, Bull Bay in the parish of St. Andrew.

"5. That about 6:30 - 7:30 p.m. that night, I was in a gambling house playing ludo with a number of other people in a lane across from Boulevard Lane at Eight Miles, Bull Bay in the parish of St. Andrew.

6. That while I was playing I heard a loud explosion coming from the direction of Boulevard lane.

7. That everyone started to run in the direction from which the explosion came.

8. That I jumped on my bike and rode up towards Boulevard Lane where I saw a body lying on the ground.

9. That I looked at the body and rode away because I did not want to become involved because I heard it was murder. I had seen the person lying on the ground, before and I knew him as 'Fathead'.

10. That I did not see Colo that night when I was gambling nor when I went to look at the body.

11. That I do not know Shelly Anne Newton.

12. That I did not visit a club with Shelly Anne Newton or Fathead, or Ruddy Sample, or Patsy on that night.

13. That Colo did not point a gun at me that night.

14. That I did not make a report to the Police Station at Bull Bay that night or at any other time in relation to the incident.

15. That after that night I did not return to Eight Miles until about one year later at which time I was informed and verily believed that Colo had been sentenced for the murder of Fathead.

16. That I was also informed that my name had been mentioned in Court in connection with the case.

17. That on hearing this I went to visit Colo's mother, Pearl Holding, in the market where she sells.

18. That I was not aware before this time that Colo had been arrested or convicted and sentenced for murder.

19. That during the year I was residing in Mona until I left for Wood-ford Park.

20. That Colo's mother informed me that she had tried locating me but was unsuc-cessful in her attempts.

"21. That I told Colo's mother I was prepared to give evidence as the evidence given by the main witness, whom I later learnt was Shelly Anne Newton, was false."

Michael Wells' affidavit reads:

"1. That I reside and have my true place of abode and postal address at Shooters Hill, Bull Bay P.O., in the parish of St. Andrew and I am a higgler.

2. That I know the accused person Alexander Hutton otherwise called 'Colo'.

3. That I remember August 7, 1991 as that was the night Fathead was killed.

4. That on that night at about 7:00 p.m. I was at Eight Miles, Bull Bay in the parish of St. Andrew in Pleasant View Lane watching football.

5. That I know Shelly Anne Newton.

6. That while watching football I saw Shelly Anne Newton in Pleasant View Lane watching a game of netball.

7. That while I was watching football I heard an explosion coming from the direction of Boulevard Lane, which is next to Pleasant View Lane.

8. That I ran to Boulevard Lane where I saw a number of people gathered.

9. That I saw a man lying on the ground I never recognised who it was but was later informed and verily believe it was Fathead.

10. That I saw Shelly Anne Newton running towards the lane when I was also running towards Boulevard Lane.

11. That after I left the scene I went to sit at the Eight Miles bus stop and was there for sometime when a bus stopped.

12. That two people alighted from the bus and then Colo came off the bus.

13. That I told him that a man had been killed and he asked me if it was the police who had killed him.

14. That Colo never entered Boulevard Lane where the body was that night. He went up the road in the direction of his home.

15. That the weekend after the incident I left Shooters Hill and went to Westmoreland to sell cosmetics.

"16. That I spent some months in Westmoreland selling my goods between Delfland, Little London and Top Hill.

17. That I returned to Kingston after my stock was exhausted, at which time I tried to contact 'Colo' as I had brought something for him.

18. That I was informed, and verily believed, by my cousin Carol Ferguson of Eight Miles that Colo was 'at condemn' for the murder of Fathead.

19. That I did not know before this time that Colo had been arrested for and convicted of murder.

20. That had I known I would have gone to Court to give evidence on his behalf.

21. That I am prepared to give evidence on his behalf."

The test which must be satisfied by evidence which it is sought to adduce as fresh evidence was stated by the Lord Chief Justice, Lord Parker of Waddington in **R. v. Parks** [1961] 46 Cr. App. Rep. 29 at page 32 and applied by this court in **R. v. Page** [1967] 11 W.I.R. 122 is as follows:

"The court, mindful of the principle which was laid down in the case of R. v. Parks, has considered the evidence given to the court today and asks itself whether that evidence conforms to the conditions under which a Court of Appeal would consider and act upon additional evidence. The important passage in the judgment of the Lord Chief Justice, LORD PARKER OF WADDINGTON in that case is to be found at (1961), 46 Cr. App. Rep. 29, p. 32):

'The reason, however, for granting leave to appeal in this case was that the court should consider whether certain statements which had been obtained since the trial from various witnesses should be given in evidence in this court. It is only rarely that this court allows further evidence to be called and it is quite clear that the principle upon which this court acts must be kept within narrow confines, otherwise in every case this court would in effect be asked to effect a new trial.

As the court understands it, the power under s. 9 of the Criminal Appeal Act 1907 is wide. It is left entirely to the discretion of the court but the

> " 'court in the course of years has decided principles upon which it should act in the exercise of that discretion. Those principles can be summarised in this way. First, the evidence that is sought to call must be evidence which was not available at the trial. Secondly, 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 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.' "

It is manifest that the proposed evidence cannot satisfy this test. Counsel who represented the appellant at the trial would have been aware of the persons, including Bunny, whom the witness Newton named and he was also aware that the prosecution was not calling any of them. He has not stated that he made efforts to secure their attendance which effort would necessarily have included an application to the court to have any witness subpoenaed. The proximity of Mona and Woodford Park to the court is well known and no witness would be thought credible who testified that he was within that area and did not know for over one year of the trial of the appellant. Both Bunny and Michael Wells place the killing some two hours earlier than the eyewitness made it. More to the point is the fact that the defence advanced was an alibi supported by Veronica Hutchinson who put the appellant at a bus stop down town at 7:30 p.m. which, be it noted, is much earlier than the time of the killing stated by the eyewitness who gave the time as after 9:00 p.m. The significant thing about the proposed evidence is that in any event it could not meet the third and fourth principle enunciated above. In the exercise of the court's discretion the application was refused.

The ground of appeal, ground 2, which was argued reads:

> "The learned trial Judge erred in law in withdrawing from the jury the possibility of accident (p. 43). On the evidence of the witness Shelly-Ann Newton (p. 14) the accused 'use the gun to shub him in his right ears and the gun go off.'
>
> In the context of the alleged encounter between the accused and the deceased the jury should have been directed to consider (a) whether the shooting was accidental; and/or (b) whether the accused was guilty of manslaughter by reason of gross negligence."

It is to Lord Gifford's credit that he did not waste the time of the court making submissions on this ground of appeal. He merely submitted that on the evidence of Shelly-Ann Newton it was not clear that the discharge of the gun was necessarily deliberate and seems rather to have been a show of authority.

No more need be said than that accident would have to be re-defined to accommodate so implausible a contention and the law relating to manslaughter would require refinements which have so far evaded keener minds. Needless to say we rejected this ground also and dealt with the case as earlier stated.

Finally, we must record our abhorrence and condemnation of this most callous, cruel and totally senseless killing which nevertheless entitles the murderer to his life.