JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 83/95

COR: **THE HON MR JUSTICE RATTRAY, PRESIDENT**
THE HON MR JUSTICE DOWNER, J A
THE HON MR JUSTICE HARRISON, J A (AG.)

R. v. PETER ROBERTS

Paul Ashley for applicant

Hugh Wildman, Deputy Director of Public Prosecutions for the Crown

25th March & 8th July, 1996

RATTRAY, P

On the 14th of June, 1995 the applicant Peter Roberts was convicted of the offence of murder of one Dennis Thomas in the Home Circuit Court and sentenced to imprisonment for life with the requirement that he serve a term of imprisonment of 20 years before being eligible for parole.

The chief witness for the prosecution was one Hervkiel Thomas, a 12 year old school boy and the son of the deceased Dennis Thomas. He gave sworn evidence of witnessing his father shot to death by the applicant at the corner of Pouyatt and Livingston streets, Kingston.

Further evidence was provided by one Patricia Taylor, who immediately after the shooting saw the deceased seriously injured being pushed in a handcart. She asked

the deceased what happened to him and he said "Peter shoot me up." The summing up continues in relation to her evidence as follows:

> "I said to him, 'What you and him have', and he said, 'Nothing more than I at the corner selling and him come up and said - used an expletive, 'a long time you fi dead'."

She said the deceased told her that he ran off and ran into a yard and Peter ran behind him. He ran into a lady's house and he took up a baby to scare Peter from shooting him and Peter shot him. This evidence of what the deceased told Patricia Taylor was admitted as a dying declaration. This admission by the trial judge created the first ground of appeal urged upon us by Counsel for the applicant.

In his summing-up the trial judge had directed the jury in respect of this evidence as follows:

> "Ordinarily, that evidence, evidence of this nature which the deceased told her, would normally be regarded as hearsay and therefore not admissible, can't be given in evidence in a criminal case. This particular statement that the deceased made to her in this conversation, these statements were admitted into evidence, one, being narrative, as being a dying declaration. Now, it is an exception to what is known as the hearsay rule, and the reason for it is not far to find. It is said that provided a number of conditions are satisfied, evidence of this nature can be admitted in evidence as to the truth of the facts about which the declarant, that is the deceased person, has spoken, and why the statement was admitted into evidence by me as a statement called dying declaration, this is because if a man say that he believes he is going to die and he wants to say something before he dies, this evidence is an exception to the hearsay rule; it is not evidence that was given on oath like the evidence of the other witnesses. All the other witnesses in this case, as you

remember, took an oath before they gave evidence, but this evidence of what was said by Mr. Dennis Thomas wasn't said by him alone.

Now, the general principle in law on which evidence of this nature is admitted is that there are declarations made in extremity, the Latin is, 'in extremitas.' When the party making the declaration is at the point of death - remember what the witness said, Miss Taylor - the deceased eyes were turning over, he was speaking, he had shortness of breath, and when he was through speaking he said they must hurry up and take him to the hospital because he don't think he is going to make it, that was what he said, the statement, that he clearly had a settled and hopeless expectation of death.

When the party making the declaration is at the point of death, when the party making the declaration, that means Mr. Thomas says something in circumstances in which all hope of the world is gone, his mind is no longer here, he is looking to the new Jerusalem if he is a christian. The party knows he is going to die, and his mind is induced and this is most important, by the most powerful considerations to speak the truth. As it has been said, a man in those circumstances, in that situation is not going to die with a lie on his lips. As it is put, a situation which is so solemn and is considered by law as creating an obligation equally to that imposed by a positive oath administered in court. So a dying declaration is equated to the declaration of a person who comes and swears on the Bible. So the prosecution is permitted to bring evidence of a dying declaration before you the members of the jury.

The first thing you have to consider is this: Do you believe Patricia Taylor that Mr. Thomas really said all these things? That is the first thing. If you don't believe Dennis Thomas said it, if you believe that Patricia, as the defence is suggesting, is lying or

making a mistake, or if you have any doubt as to whether Dennis Thomas said it, said that or not, that is an end of the matter. You reject that declaration and you consider this case without it. That means you go on to consider the case based on the evidence of HervKiel Thomas. You only use the declaration if you are satisfied to the extent that you feel sure that Dennis Thomas really told Patricia Taylor those words. If you feel satisfied to the extent that you feel sure that Dennis Thomas said it, then you ask yourselves, now, how does this affect the case, what weight can you attach to this declaration.

Remember I told you Patricia Taylor did not know the accused. She said yesterday was the second time she was seeing him. The first time was at the Gun Court. So when she heard the deceased speak then, mentioning the name Peter, clearly she couldn't know which Peter the deceased was talking about. That assumes some significance when you come to consider Hervkiel Thomas. But remember I told you, if you believe Thomas and you warn yourself and you are prepared to act on his evidence despite the warning I give you, you don't need to look any further in the case. But you might well say to yourselves, if you believe Thomas, that maybe it is some coincidence that Thomas is also talking about a Peter.

So where I leave you on this question of dying declaration, it has its shortcomings and you know why, because unlike the witnesses who came for the crown, the other witnesses, what the deceased spoke of, he is not there so that he can be subjected to cross-examination. So that this declaration, these statements made by him can be tested by cross-examination, and that is really a matter now that has to be put in the scales and weighed in the balance in determining just what weight you can attach to this declaration. Of course, if you don't believe Hervkiel Thomas, it would be very difficult for you to act on the

> declaratory statements alone because of the shortcomings I told you, because of the fact that Patricia Taylor did not know the accused and all that will be left is this reference to Peter which could be referring on any one of a number of 'Peters' who might be living in the same area."

Counsel for the applicant submitted that the evidence did not establish that there was a settled and hopeless expectation of death in the deceased when he made the statement admitted into evidence as a dying declaration. He relies for the contention upon the deceased's request that they must hurry up and take him to the hospital to indicate that hope still existed. We cannot agree with counsel in this regard. The deceased saying "they must hurry up and take him to the hospital" cannot be examined without considering the words following immediately "because he don't think he is going to make it." In the context of everything said by the deceased at the time the settled and hopeless expectation of death in the deceased was established.

Counsel for the applicant expanded this submission by maintaining that the evidence formed part of the res gestae and the trial judge did not give any directions to the jury as to how to treat the evidence as part of the res gestae. In this regard, he relied upon the judgment of the Court of Appeal delivered by Forte, J A on the 30th November, 1992 in **R. v. Aston Williams** SCCA 16/91. In our view, the circumstances of **R. v. Aston Williams** are distinguishable from the facts of the instant case. In that case a witness "was a t home just about to have a bath when he heard the voice of Huzel Facey whose voice he had known before, and could identify, saying 'Lumsie, you kill me." The voice came from across the road. He nevertheless, had his bath, and thereafter came out of his house and in the area from which the voice had

come, he observed Huzel Facey, lying on the street apparently dead and with 'cuts all over his body.' There was evidence that the appellant was known in the area as 'Lumsie'.

The trial judge admitted the evidence as a dying declaration and gave the classic directions with regard to dying declaration. The words spoken by the deceased to his assailant at the time of the attack were part of the res gestae and appropriately admissible as such rather than as a dying declaration. The failure of the trial judge to appreciate the true category of the evidence into which the words of the deceased fell, so as to give the appropriate directions in those circumstances resulted in a new trial being ordered. In the instant case the evidence of Patricia Taylor relating what was said to her by the deceased shortly after the shooting fell properly within the category of a dying declaration and was admitted on that basis. It was not therefore appropriate for the trial judge to give the directions as were required in **R. v. Aston Williams** on matters like the opportunity for concoction or the question of whether the deceased could have been activated by malice when he made the statement. This ground of appeal must therefore fail.

Counsel for the applicant however had another string to his bow. He submitted that the trial judge had erred in law when he gave directions to the jury to approach the evidence of the witness Hervkiel Thomas, a boy of twelve years of age with caution, which he exampled by the following analogy:

> "Caution does not mean that you toss the evidence through the window and say not guilty. All it means is that you approach the evidence carefully, sifting through it just like you are going through Flat Bridge around the gorge with hazards, but he is not prepared to go all through Sligoville. With its hazards you are prepared to skip your way pass that dangerous section where the

> rocks overhang, not for very far, not even a mile. I don't think it is even more than a mile and a half, and this is how you approach the case. You proceed very carefully, cautiously, bearing in mind this warning of which - this young child, susceptible to influence on the one hand but also the type of individual from generally how you would hear the truth spoken - witness with an interest to serve because he is related to the deceased and therefore, you approach his evidence with caution because of the possibility of an exaggeration on the part of witnesses of that nature. And thirdly, you will approach his evidence with caution and I need to give you a special warning because this young man is a sole eye witness as to this incident and there is always ever lurking, the possibility or the danger of a mistaken identification."

The learned trial judge then continued to give the requisite directions in terms of mistaken identification and no complaint is made of his formulation in this regard.

However, Counsel relies upon the statement in the judgment in **R v. Devon Laidley, Everton Allen and Anthony Whyte** SCCA Nos 83, 85 & 86/91 delivered on the 1st of April 1993 by Forte J A to attack the use of the analogy: The statement reads:

> "... the use of an analogy in cases of visual identification can result in misleading the jury as to the approach to be taken in assessing the evidence. The word caution is a simple English word which needs no explanation as it is capable of unassisted understanding. Alternative words such as careful or dangerous to convict would be equally acceptable, such words not being exhaustive as to the manner in which the jury should approach such evidence. Trial judges should therefore refrain from creating analogies so as to attempt to bring an easier understanding to jurors as such an approach may well mislead the jury in

> the manner advanced here by learned counsel for the appellants. Instead it is sufficient to indicate to the jury that caution must be exercised in assessing evidence in visual identification and the reasons for such caution."

The determination however, in **Laidley's** case really rested upon the fact that the trial judge did not in dealing with identification evidence give to the jury the benefit of judicial experience "which would demonstrate effectively the real reason why they ought to exercise great caution in acting upon such testimony." That flaw does not exist in the instant case. Indeed the analogy here was used not in respect of the identification by the deceased's son of the person who shot his father, but in respect of the caution with which the jury should approach evidence given by a young boy who is a son of the deceased and therefore may have an interest to serve.

In the circumstances it does not appear to us that the use of the analogy could have in any way misled the jury as to the nature and purpose of a caution.

Consequently, we find that there is also no merit in this ground of appeal.

We therefore treated the application for leave to appeal as the hearing of the appeal, which is dismissed. The conviction and the sentence of the Court below is affirmed.