JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 90 OF 2002

BEFORE: **THE HON. MR JUSTICE HARRISON, J.A.**
THE HON MR. JUSTICE WALKER ,J.A.
THE HON. MR. JUSTICE HARRISON, J.A. (Ag.)

REGINA
V
BRISTON SCARLETT

Patrick Atkinson for the Appellant

Anthony Armstrong, Crown Counsel for the Crown

July 6, 7 8 and December 20, 2004

HARRISON, J.A. (Ag.):

On April 17, 2002 in the St. James Circuit Court the appellant was convicted for capital murder having been tried on an indictment which charged that Briston Scarlett on the 7th day of October, 1997 in the Parish of Trelawny murdered Shauna Morgan in the course or furtherance of arson in relation to a dwelling house.

Following his conviction the appellant was sentenced to death. He now appeals his conviction and sentence.

The Facts

The case for the prosecution was that for some time prior to September 30, 1997, the appellant had repeatedly made sexual advances towards Barbara Benjamin, who refused to yield to him. On the 30th September 1997, at about 5:30 a.m. the appellant rode a bicycle past Miss Benjamin on the road as she walked home accompanied by her boyfriend Mr. Lennox Nickel. On her arrival home Miss Benjamin and Mr. Nickel went into a room where Shauna Morgan lay on a bed. Shortly afterwards Miss Benjamin smelt gas and observed fire coming from under the door leading into the room from outside. Upon looking through a window of the room she saw the appellant in her yard. She called out to him asking him what he was doing in her yard. After calling out to him he threw a bottle with" fire on it" through the window. Everyone in the room was set ablaze. They sustained serious burn injuries for which they were all hospitalized. On October 7, 1997 Shauna Morgan succumbed to her injuries and the appellant was charged with capital murder as a result of her death.

Janet Dunbar, a witness for the prosecution, and who was a neighbour of Miss Benjamin, gave evidence of having seen the appellant on Miss Benjamin's premises on the 29th September, at about 10:00 p.m. She saw when he "peeped" through a window, then left the yard and went on his bicycle. The following day she saw him talking to a woman named Charmaine and she overheard Charmaine telling him that he was "wicked" to have burnt the girl. He replied and said he did not want to hurt the brown one but it was the black one he wanted to hurt because she always "diss" him. When he was apprehended,

and after being cautioned by Det. Sgt. Calvin Bowen, the appellant said "mi never mean to hurt nobody". There was also evidence that Sgt. Bowen had seen burn injuries to the dorsal aspect of the appellant's right hand.

The appellant's defence was one of alibi. He made an unsworn statement from the dock and denied setting the place on fire.

The argued grounds of appeal

Ground 2

Mr. Atkinson submitted that the learned trial judge misdirected the jury by telling them that the deceased died from injuries as a result of the fire allegedly caused by the appellant when no such evidence was adduced. Counsel contended that the learned trial judge erred when he allowed the prosecution to adduce the evidence of Det. Sgt. Bowen regarding the deceased's burn injuries. There was also a complaint in this ground that the learned trial judge ought to have withdrawn the murder charge from the jury since there was no evidence as to the cause of death.

We now turn to examine the complaints. We have observed from the transcript that the Doctor who performed the post-mortem examination on the body of the deceased left the Island and returned to Cuba. That being so, she was not available to testify at the trial. Sgt. Calbert Bowen testified however, that on the 30th September 1997, he visited the home of the victims at about 7:00 a:m and observed that the house was burnt out. He saw the deceased in hospital that said morning, and noticed that she had "severe burns" to approximately 95% of her body. He said he also attended the post-mortem

examination on the 7th October 1987, and saw "extensive burn injuries" on the body of the deceased. When he was cross-examined he said the victims were in a "very, very bad condition" and he was aware of the possibility that one or all three could die from the burn injuries. This was the evidence that the jury had to consider in order to determine whether the prosecution had discharged its burden in establishing the cause of death.

The authorities have clearly established that the absence of medical evidence is not necessarily fatal to a prosecution for murder if there is other credible evidence from which the cause of death can be reasonably inferred: See ***R v Douglas Christie*** (1989) 26 JLR 233 and ***R v Roy Bantin*** SCCA109/88 (un-reported) delivered on the 13th March 1989. It is settled law that an injured person is under no duty to mitigate his injury. If an original injury is an operative cause of death, the law will not receive any intervening and additional cause with the object of apportioning the degree to which the original injury, taken alone, was responsible for death: See ***R v Frances Dove*** (1982) 19 JLR 447.

In the instant case, there was evidence of the serious burn injuries that the deceased sustained. She died within days of receiving those injuries. It seems to us, after a careful perusal of the transcript that the cause of death was not really a live issue at the trial. The question that the jury had to decide was whether the appellant was the person who caused the injuries. In our judgment, there was sufficient evidence for the jury to draw the necessary inference as to the cause of death. A reasonable jury would not, in all the circumstances, have

had the slightest difficulty in coming to a conclusion as to the cause of death. This ground is therefore without merit.

Ground 3

Mr. Atkinson submitted that the learned trial judge failed to adequately direct the jury how they should treat the unsworn statement of the appellant. This, he said, amounted to a mis-direction.

Very early in the summing-up of the case, the learned trial judge directed the jury on the nature of an unsworn statement. At pages 278 – 279 of the transcript the learned trial judge stated inter alia:

> "The accused man gave a statement from where he stood. You remember Counsel for the Defence telling you that he had three options; that is so, bearing in mind that he has no duty to prove anything. You will have to look at what he said. ....you Mr. Foreman and members of the jury, would have to look at his statement nonetheless and to see whether or not you will attach any weight to it and if so, how much weight you will attach to it."

At page 286 of the transcript, the learned trial judge once more directed the jury how to approach the un-sworn statement. He said:

> "... Now bearing in mind what I told you about the statement and how to treat it, if his statement leaves you in a state of doubt as to whether or not he was there then you will have to give him the benefit of the doubt and acquit him. If you disbelieve the statement and reject it completely, then what you will have to do is go back to the Crown's case to see whether or not the Crown has satisfied you, so that you feel sure that he did it."

Counsel complained that the directions given by the learned trial judge were incomplete since he ought to have directed the jury also that it was open to them to accept the unsworn statement as true. He referred us to ***R v Michael Salmon*** (1992) 29 JLR 32 and at page 33 where Gordon J.A stated:

> "The statement of the accused is his defence and it is the jury's function in considering their verdict to give it "such weight as they may think it deserves."

Gordon, J.A. then went on to state that the statement may:

> "a) convince them of the innocence of the accused, or
> b) cause them to doubt, in which case the defendant is entitled to an acquittal, or
> c) it may and sometimes does strengthen the case for the prosecution. ***R v Lobell*** [1957] 1 Q.B 547"

In ***Salmon's*** case (supra) the learned trial judge had directed the jury that the un-sworn statement of the appellant was of no probative value whatever. The Court of Appeal held that those directions were wrong. Gordon, J.A. stated:

> "In our law an accused has a right to make an un-sworn statement in his defence and in ***Director of Public Prosecutions v Leary Walker*** [1974] 12 JLR 1369 Lord Salmon directed at page 1373:
>
> > "...The jury should always be told that it is exclusively for them to make up their minds whether an un-sworn statement has any value, and if so, what weight should be attached to it; that it is for them to decide whether the evidence for the prosecution has satisfied them of the accused's guilt beyond reasonable doubt, and that in considering their verdict, they should give the accused's statement only such weight as they think it deserves."

We agree with Crown Counsel that the case of ***R v Salmon*** (supra) is distinguishable from the instant case. The learned trial judge in ***Salmon's*** case directed the jury that the un-sworn statement had no probative value whatever whereas, in this case the learned trial judge correctly explained the nature and effect of the un-sworn statement. He did not parrot the language of the learned Law Lord in Walker's case, but he used language by which the jury would have had no difficulty understanding how they were to treat the unsworn statement. Although this Court has constantly repeated that the trial judge should faithfully adhere to the guidelines laid down by the Privy Council in ***Walker's*** case, it has also stated that these guidelines should be tailored to fit the facts of the particular case: See ***R v Bailey (Ian)*** (1996) reported at 54 WIR 348.

In our judgment, the learned trial judge founded himself squarely on the guidelines as enunciated by Lord Salmon and cannot be faulted. We conclude therefore, that this ground also has no merit.

Ground 4

Counsel submitted on behalf of the appellant that the learned trial judge failed to assist the jury when they sought further directions. This, he contended, was a non-direction amounting to a misdirection. The problem arose this way. The jury had retired at 2:57 p.m., and at 3:53 p.m. they returned to the courtroom. When the Registrar asked the foreman if they had arrived at a verdict, he answered in the affirmative. He was further asked if the verdict was unanimous and he said, it was not. At this point, the learned trial judge

intervened and proceeded to ask the foreman certain questions. Pages 295-297 of the transcript record the following dialogue between the learned trial judge and the foreman:

> "His Lordship: Now, I am not able to take a divided verdict in any matter under one hour, you would have had to retire and discuss amongst yourselves for at least one hour. You went out at 2:57 and you came at 3:53, so you need to retire again to consider, to further consider your verdict. Now, if there is any particular area of law or just facts, is it law or facts? Mr. Foreman, any particular area that is bothering you and the jurors?
>
> Foreman: Not me.
>
> His Lordship: Any of the jurors, there is disagreement, something...don't tell me what it is?
>
> Panel: Yes sir.
>
> His Lordship: Is it about the law or about the evidence, Mr. Foreman, what area? Don't answer what area, is it about the law or the evidence?
>
> Foreman: The evidence.
>
> His Lordship: So what am I going to do, is there any assistance that I can give or is it that you need to discuss it further?
>
> Foreman: Yes sir.
>
> His Lordship: I am just going to ask you then to retire and have further discussions and let us know what happens in your deliberations ..."

The gravamen of Mr. Atkinson's complaint is that the learned trial judge should have sought to discover in relation to the evidence what was the specific problem, in order to give the jury some assistance in this regard. He submitted

that the foreman's answer; "Yes sir" was ambiguous since he could have been referring to the need for assistance or the need to discuss the evidence. Mr. Atkinson referred us to ***Berry v R*** [1992] 2 A.C 364 and ***R v McKnight*** SCCA 18/92 (un-reported) delivered March 3, 1994 as authorities in support of his submission.

The cases of ***Berry*** and ***McKnight*** are well known and they state the principle that the jury is entitled at any stage of the proceedings to the judge's help on the facts as well as on the law. See also ***R v Dwight Hylton*** SCCA 28/00 (un-reported) delivered on December 20 2002, where this Court re-iterated the principle. The judgment of Lord Lowry at page 283 in ***Berry*** (supra) reads as follows:

> "The jury are entitled at any stage to the judge's help on the facts as well as on the law. To withhold that assistance constitutes an irregularity which may be material depending on the circumstances, since, if the jury return a guilty verdict, one cannot tell whether some misconception or irrelevance has played a part. If the judge fears that the foreman may unwittingly say something harmful, he should obtain the query from him in writing, read it, let counsel see it and then give openly such direction as he sees fit. If he has decided not to read out the enquiry as it was written, he must ensure that it becomes part of the record. Failure to clear up a problem which is or may be legal will usually be fatal, unless the facts admit of only one answer, because it will mean that the jury may not have understood their legal duty. The effect of failure to resolve a factual problem will vary with the circumstances, but their Lordships need not decide how in this case they would have viewed such failure, seen in isolation".

Two questions, therefore, arise for consideration. Firstly, was it obligatory for the trial judge to have ascertained from the foreman which of the two parts of the question posed by him it was that the foreman's answer "yes sir" referred to? Secondly, if that was so, how material was the irregularity which resulted from the trial judge's failure to make the necessary enquiry?

Mr. Atkinson contends that the evidential issues in this case concerned both identity and credibility so, unlike the situation in ***McKnight's*** case where the sole issue was identity, the learned trial judge ought to have ascertained from the foreman whether the problem related to a need for further assistance or whether it was that they needed more time to deliberate. Crown Counsel, on the other hand, submitted that the sole issue in the case was identification and that the learned trial judge's directions in that area could not be faulted. He further submitted that credibility was "tied up" with the identification issue so, even if no further assistance was given to the jury, this could not amount to a miscarriage of justice.

We are, indeed, in agreement with Counsel for the appellant that credibility of the witnesses was an issue the jury had to consider. It is abundantly clear from the transcript that the learned trial judge was very much aware of this, and directed the jury how they should treat the evidence of the witnesses. At page 200 of the transcript he said this:

> "You do not, as jurors, have to decide on every point which is raised. You decide only on matters that will enable you to say whether the charge laid against the defendant has been proven and you

> will do so, Mr. Foreman and members of the jury, by having regard to the whole of the evidence, because what you do is to consider all of the evidence and determine whether or not on the basis of all of the evidence you find that the charge has been made out against this accused man. In doing this, you were told that you have to listen to the witnesses and you were told that you are to observe them and come to your conclusion as to whether or not these witnesses are truthful and reliable."

At page 214, the learned trial judge said:

> "...Mr. Foreman and members of the jury, what you might well think to be the only contested real issue of this case is identification. Now I must give you a warning in relation to identification ..."

After warning the jury how possible it is for witnesses to make mistakes in identification cases he continued and said:

> "...I must advise you or warn you to be careful when you look at the evidence of identification. Because an honest and apparently reliable witness who comes before you and gives what you might regard as very good evidence might still be mistaken. It is not that they are lying, but they can make mistakes, therefore, what you will have to do is to look at the circumstances under which the identification was made. And you will have to look at the circumstances; in other words, for you to make up your minds whether or not the evidence of identification is of such a quality that you can accept it as truthful and reliable"

We are of the view that the answer given by the foreman to the question posed by the learned trial judge was clearly related to the second limb of the question, that is, whether they needed time to discuss the case further. As it seems to us this is the inescapable inference to be drawn from the fact that

immediately following the exchange between bench and jury, without further ado, the jury retired for a second time to consider their verdict. We think that in the particular circumstances of this case there was no duty cast on the learned trial judge to have ascertained a second time from the jury whether they needed further assistance. This ground of appeal therefore fails.

Ground 5

Counsel for the appellant argued that the learned trial judge erred when he focused the jury's minds on mistake when the real issue in the case was the credibility of the identifying witnesses. He submitted that even if it could be said that credibility was not raised as an issue by the defence in the Crown's case, once it emerges from the case of the defence, it was incumbent on the trial judge to leave that issue to the jury.

Mr. Atkinson further submitted that a direction placing identification as the real crux of the case had the effect of bolstering the credibility of the main Crown witnesses Benjamin and Nickle. He argued that the defence outlined in the unsworn statement of the appellant had shown that the witnesses were lying and, notwithstanding the directions on identification, discrepancies, and burden of proof, the particular focus on identification unfairly diverted the attention of the jury away from those issues.

The evidence revealed where it was suggested to the witness Benjamin that she was making up a story against the appellant about him throwing the bottle with fire into the house. She denied this. It was also suggested to the

witness that she was making up all of this after the appellant was locked up. Again she denied the suggestion. It was therefore the case for the defence that the witness Benjamin was lying.

This Court has constantly held that the warning given to the jury in identification cases is mandatory whether the witness is making an honest or a deliberate mistake. In the present case it was suggested that the unreliability of the evidence was due to deliberate falsehood. In such a case, the jury should be told that the credibility of the witness or witnesses having been challenged, the reasons put forward as the motive for lying, must be scrutinized with care: See ***R v Carl Peart*** SCCA 108/88 (unreported) delivered on February 7, 1990.

How did the learned trial judge sum up the case to the jury in respect of the identity and credibility issues? At page 200 the learned trial judge said:

> "You do not as jurors have to decide on every point which is raised. You decide only on matters that will enable you to say whether the charge laid against the defendant has been proven and you will do so, Mr. Foreman and members of the jury, by having regard to the whole of the evidence and determine whether or not on the basis of all the evidence you find that the charge has been made out against this accused man. In doing this, you were told that you have to listen to the witnesses and you were told that you are to observe them and come to your conclusion as to whether or not these witnesses are truthful and reliable."

Then, the learned trial judge said to the jury:

> "...what you might consider to be the real crux of the case and the area of this case which was really challenged that the prosecution must satisfy you that this accused man was the person who did all of what they said he did, who set fire to the house unlawfully and deliberately."

At page 240 of the transcript the learned trial judge said in relation to the evidence of Benjamin:

> "Now it was suggested to her that she is not speaking the truth when she says the accused passed her gate; she said it is the truth. It was suggested she was not speaking the truth when she said he was in the yard; she said it was the truth. It was suggested that she was not speaking the truth when she said she saw him with the bottle; she said it is the truth. She also said it was the truth that he threw the bottle inside the yard...."

The learned trial judge also directed the jurors on the statements given by Benjamin to the police and said at page 240:

> "She said the police took two statements from her, one on the 1st of October that is the day after she got her injuries and the other was the 8th of February 1998. She did not in the first statement tell the police that she saw Scarlett in her yard. Remember the Defence told you this is most important because what the Defence is saying is this, if she saw Scarlett in her yard and he threw the bottle, the Defence is saying that is the first thing she would tell the police, but she said that she did tell the police about that in her first statement and she gives an explanation.
>
> The explanation she gives, Mr. Foreman and members of the jury is this, that she couldn't see. She describes her condition that she was in agony, pain, she could hardly talk. Police couldn't even hear her. So that is the explanation she gives you. You will have to look at it to see what you make of it, but let me go further. She said she didn't tell them that she saw him with a bottle, she said she told him this in the first statement. It was suggested to her that she didn't tell the police that because it didn't happen, she said no, that was not the reason, the reason is because of her condition."

At page 242 the learned trial judge continued:

> "She said when she gave the second statement she didn't know that they locked up the accused; the police didn't tell her. She said she is not making up a story against this accused. She said in the first statement "I don't remember telling the police that I told Lennox and Shawna I smell gasoline, when I suddenly saw a ball of fire which exploded in my room and then set us on fire, along with the bed and furniture. She said she don't remember telling the police that in the first statement. Now, you will have to look at it and see what you make of it. When you are looking at the discrepancy and inconsistency as to whether or not a witness remembers anything, you look at the circumstances under which this statement was given, she said she can't remember saying this to the police.
>
> Now, this was the 1st October 1997, nearly five years ago. You have to look at her condition, whether or not she recalls exactly what she told the police in those circumstances. All these you will have to take into consideration to say whether or not you accept the defence's suggestion that she is making up a story and telling lies against the accused man."
>
> (Emphasis supplied)

In relation to the witness Nickle, the learned trial judge said at page 251:

> "... He said he cannot remember if in the first statement he told the police that Petal went to the window; he said he didn't see it in the statement. He said he told the police that shortly after entering the room and closing the door he heard Petal remark "I smell gas". Immediately there was an explosion in the room and fire all over the room on all of them and the bed and clothing. He said he agree that there was nothing in the first statement about Petal saying "Sandocan, what you a do inna mi yard?" He said the reason was, he was just coming from intensive care ...

> You will have to determine having seen him and observed him whether or not you can accept this explanation from him bearing in mind the Defence is saying that all of these were things subsequently made up in order to make out a case against the accused man."

The issue to be decided in the instant appeal is whether the learned trial judge really focused the jury's minds on mistake when, according to Mr. Atkinson, the real issue in the case was the credibility of the identifying witnesses. It is abundantly clear from the directions outlined above that although the learned trial judge reminded the jury that the crux of the case was one of identity, he, nevertheless, gave extensive directions how they should deal with the credibility of the identifying witnesses. We are of the view that the learned trial judge was very careful in his directions to the jury how they should evaluate the evidence of the witnesses. He did remind the jury about the suggestions made by the Defence as to the witnesses making up a story against the appellant and telling lies on him. In his charge to the jury, the learned trial judge was at pains to inform the jury that they would have listened to the witnesses; they would have observed them and it was for them to decide whether or not they were truthful and reliable. We therefore find no fault in the directions given by the learned trial judge. This ground of appeal also fails.

Ground 6

It was argued by Counsel for the appellant that the learned trial judge projected himself in the trial excessively by interpreting questions asked in cross-

examination and by assisting the witnesses in the way of reminding them what they had previously stated on the issue. Counsel submitted that these interventions on the part of the learned trial judge resulted in an impermissible disadvantage to the appellant and influenced the jury to return a guilty verdict.

Counsel for the appellant referred us to several pages in the transcript in order to substantiate the complaint. He submitted that any one of the interventions pointed out, may by itself be explained and may not be a basis for complaint but when such interventions occurred "steadily and consistently" throughout the trial the cumulative effect was to erode the fairness of the trial.

The well-established principles expressed in ***R v Hulusi and Purvis*** (1973) 58 Cr App. R. 378, ***R v Matthews*** (1983) 78 Cr App. R. 23, and ***R v Whybrow and Saunders*** (1994) 144 New Law Journal 124, demonstrate that a trial judge in a criminal trial should not descend into the arena and give the impression that he is acting as an advocate. This conduct is not only wrong, but a judge can often do more harm than good in not leaving it to experienced counsel to conduct his case as counsel sees fit. When a Court of Appeal is considering whether to quash a conviction because of the interventions of a judge, the essential question is whether there may have been a denial of justice. Answering the question involves an evaluation not only of the degree of the interventions but also of their quality, as well as an assessment of their purpose and their possible effect on the trial. In ***Jacob (Benedict) v R*** (1997) 56 WIR 255 Chief Justice Byron stated:

> "The type of interventions that may operate to cause a verdict to be quashed would include: those which invite the jury to disbelieve the evidence for the defence in such strong terms that the mischief cannot be cured by telling the jury that the facts are for them, and they are entitled to disagree with what the judge has said; those which make it impossible or extremely difficult for counsel for the defence to develop the case for the defence in a proper and lucid manner; and those which have the effect of preventing the accused from doing himself justice and telling his story in his own way".

After a careful perusal of the transcript we conclude that the trial judge's interventions were appropriate and were aimed at clearing up ambiguities, thus enabling the judge to make an accurate note of the evidence.

For the foregoing reasons, having treated the application for leave to appeal as the hearing of the appeal, we conclude that this appeal against conviction should be dismissed. However, in view of the Privy Council decision in ***Lambert Watson v R*** the appeal against sentence is allowed. The sentence of death imposed on the appellant is set aside and the case is remitted to the Supreme Court for a decision as to the appropriate sentence in the circumstances of the case.