JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 43/ 98

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE COOKE, J.A. (Ag.)

NEV SMITH v. REGINA

Mrs. Pamela Gayle for the appellant

David Fraser for the Crown

June 19 and November 27, 2000

PANTON, J.A.:

This convicted man was granted leave by the single judge to appeal against the sentence of eighteen (18) years imprisonment at hard labour imposed on him on the 31st March, 1998, in the Clarendon Circuit Court for the offence of wounding with intent. The sentence was imposed by Donald McIntosh, J. who presided at this jury trial.

The appellant had been charged jointly with his brothers Marshall Smith and Devon Smith. The jury acquitted the said brothers, while convicting the appellant. The learned judge did not agree with the verdict, and he did not hide his feelings. This is how he delivered himself:

> "Members of the jury, I find your verdict preposterous. I am certain it is a travesty of your oath. Marshall and Devon, you are free to go. The jury have found you not guilty. You have done your duty Mr. Foreman and

> members of the jury to your God and country, you may go."

After the appellant, who had represented himself, had indicated to the learned judge that he had nothing to say on the matter of sentence, this is what is recorded as having been said:

> "HIS LORDSHIP: Eighteen years. There are no mitigating factors in this matter. **I find this was a vicious attack by three of you on this man.** Take him down, please."

It is clear from this record of the proceedings that the learned judge not only found the verdict preposterous, as he said, but he also ignored it. The jury had only minutes earlier stated in unmistakable language that the appellant's brothers were not guilty; yet, the learned judge in passing sentence referred to **his** finding of guilt in them. Our system of justice does not permit a judge to substitute his finding in place of a jury's in a situation such as this. In the circumstances, the sentence has to be set aside as it is clear that the learned judge acted on a wrong principle in imposing it. He did not give due consideration to the verdict of the jury.

The grounds of appeal relied on by the appellant read thus:

1. The sentence of the court was manifestly excessive and based upon a consideration contrary to the jury's finding.

2. The conduct of the trial was unfair to the appellant as he was not allowed the assistance of counsel. The court's assistance was insufficient and in fact, permitted procedural irregularities detrimental to the appellant.

3. The co-accused's prejudicial statement upon caution ought not to have been admitted as its prejudicial effect outweighed its probative value. Further the learned trial judge failed to direct the jury that they ought not to

> consider the accused's statement adversely to the appellant.
>
> 4. A high (sic) prejudicial statement was made referring to an arrest for subsequent murderous violence by the appellant on the complainant.

Ground 1 as already indicated, is well-founded.

So far as ground 2 is concerned, it is very surprising that Mrs. Gayle, for the appellant, found the courage to advance arguments complaining of the lack of legal representation for the appellant. Mrs. Gayle was the attorney-at-law who had conduct of the matter. She assisted in settling the date for the trial. When that day arrived, she was absent without a proper excuse. In being absent, she was in clear breach of the canons that bind her as an attorney-at-law. There is no duty on the court to postpone a trial willy-nilly because an attorney chooses not to attend a hearing on a date agreed to, or suggested by the attorney. Were it otherwise, the court would be constantly held hostage by attorneys. There is no merit whatsoever in this ground.

Ground 3 - When the co-accused Devon Smith was arrested and cautioned, he is reported to have said: "a no me, a mi brother". It will be recalled that the appellant had been charged with two of his brothers. This is how the learned judge dealt with this statement in his summation to the jury:

> "Now what is important about this, if it is said, is that Devon at this stage did not say at first opportunity, did not say, ' I was not there'. He was indicating that not only was he there, but he knew who did the chopping, 'it was my brother', because that is the only way he could know who did the chopping, unless he said somebody said is my brother, which he never said. But you also need to bear in mind that we Jamaicans don't speak precisely. Possibly, he meant something else, because he never said which brother, so we don't know whether it was Marshall or Nev, he never said which brother so we don't know which brother was

> there at the time, and it could be speculation to think that because Nev was not present and he admits saying at that stage is Nev because he had disappeared. But these are matters that you will have to decide Mr. Foreman and members of the jury."

The above passage was all that the learned judge said to the jury in respect of this damning out of court statement made by a co-accused against the appellant. Although the co-accused did not specify that he was referring to the appellant, it is impossible not to so construe it considering that the appellant was the only accused convicted by the jury. In the passage, the learned judge invited the jury to determine which brother was being referred to. In doing so, the learned judge fell into grave error as he clearly gave the jury the impression that the words used by Devon Smith were capable of being used as evidence against the appellant.

It is well settled that a statement made by an accused out of court, in the absence of a co-accused but implicating the latter, is not, and cannot be, evidence against him. Whenever an accused person makes a statement, it may be evidence against the maker but is not evidence against a co-accused. In this situation, the jury has to be directed in unmistakably clear language as to the effect of that statement. A failure to do so where the statement is a damaging one will no doubt result in the quashing of any conviction which results.

In **Gunewardene** (1952) 35 Cr. App.R. 80, the statement of a co-accused "incriminated the appellant in a high degree". The Lord Chief Justice, Goddard, in delivering the judgment of the Court of Criminal Appeal in England, said this:

> "....it is the duty of the Judge to impress on the jury that the statement of the one prisoner not made on oath in the course of the trial is not evidence against the other and must be entirely disregarded..."

This statement of the law was not new. A few years earlier, Humphreys, J., while sitting with the said Lord Chief Justice and Birkett, J.in **Leonard Rudd** (1948) 32 Cr. App. R. 138, said at 140:

> "Ever since this Court was established it has been the invariable rule to state the law... that, while a statement made in the absence of the accused person by one of his co-defendants cannot be evidence against him, if a co-defendant goes into the witness-box and gives evidence in the course of a joint trial, then what he says becomes evidence for all the purposes of the case including the purpose of being evidence against his co-defendant".

In the instant case, the co-defendant's alleged statement did not come from the witness-box. It was not evidence against the appellant, and the jury should have been so instructed.

Ground 4 relates to the evidence of Miss Veronica Dempster, a sister of the deceased. During the examination-in-chief by the learned attorney-at-law for the Crown, the transcript reveals the following questions and answers :

> **"Q.** Now, after, you know where Nev Smith lives, you know the house that he lives in?
>
> **A.** Yes, ma'am.
>
> **Q.** Did you see him in Bucknor District after the day of this incident?
>
> **A.** No, he run whey from long time.
>
> **Q.** When next you saw him, if you remember?
>
> **A.** **I saw him when time them hold him on the murder of my brother.**"

This last quoted response would have conveyed to the jury the clear impression that the appellant had murdered the brother of the witness. However, the learned trial judge did

not advert to this situation in his summing up of the case to the jury. The case **Peter McClymouth v. Reginam** [Supreme Court Civil Appeal No. 35/95-(unreported) delivered on December 20, 1995] is of assistance in this respect. There, the main witness for the Crown, during cross-examination, blurted as follows:

> **"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."**

The trial judge in **McClymouth's** case warned the jury "to disregard the disclosure of the applicant's bad character". This Court held that the judge "did not give much weight to the fact that the remarks introduced a degree of prejudice". The Court went on to say :

> "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."

In the instant case, there is no doubt that Miss Dempster is the main witness for the prosecution. Her response had no evidential value so far as the Crown's case goes. It was, instead, most prejudicial to the fair trial of the appellant. Quite apart from the nature of it, there is the fact that the learned trial judge did not think that it was worthy of attention in his summing up. In that respect, he erred. In any event, even if he had instructed the jury on the status of the response, the instruction may well have proven insufficient to prevent a quashing of the conviction given the seriousness of the prejudice.

In view of the conclusions arrived at in respect of grounds 3 and 4, the conviction is unsustainable. Accordingly, the appeal is allowed, the conviction quashed and the sentence set aside. In the interests of justice, as urged by Mr. Fraser for the Crown and as

happened in the **McClymouth** case (referred to above), a new trial is hereby ordered to take place at the next session of the Clarendon Circuit Court.