

14/85

ON APPEAL
FROM THE COURT OF APPEAL OF JAMAICA

BETWEEN :

FRANK ROBINSON

Appellant

- and -

THE QUEEN

Respondent

CASE FOR THE APPELLANT

Record

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1. This is an Appeal, by Order of the Judicial Committee granting Special Leave to Appeal as a poor person, from the Judgment of the Court of Appeal of Jamaica dated 18th March, 1983, refusing (without giving reasons) the Appellant's application for leave to appeal against his conviction and sentence for murder in the Home Circuit Court at Kingston on 2nd April, 1981, (Parnell J. with a jury) when he was sentenced to death.

pp.188-189
p.187

pp.176-178

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2. The Appellant was charged with murder, together with one Anthony Gibson, in that on the 22nd day of August, 1978, in the parish of Saint Andrew, he murdered Massington Reid.

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3. The case for the prosecution was entirely based on the evidence of one witness: Wilbert Irving. He testified that both accused, whom he had known for some 8 months, called at his room at 4.30 a.m. on 21st August 1978 and he allowed the accused Gibson to leave his motor bicycle there as it had run out of gas. The deceased lived in an adjoining room. On the same day at about 6 p.m. when the witness was returning home from work he saw Gibson who told him that the police had gone to his room, broken the door and took the motor bicycle away. Irving went to his room and discovered that this was true. At about 6 a.m. on the 22nd August, 1978, Gibson and the Appellant called again at Irving's room. Irving was asked by the Appellant to go and sit on a chair in the

pp.11-28

pp.52-87

Record

deceased's room. The deceased was in bed. The Appellant then asked Irving which of the two of them (i.e. Irving or deceased) informed the police about the motor bike. The deceased replied from his bed "I do not business with other people's business". The Appellant then said "Shoot the boy dem inna dem bumbo cloth". The witness then said he saw the accused Gibson pointing a gun at him and he fired but it missed him. The deceased attempted to get up and the accused Gibson shot him. Then the accused Gibson shot at Irving and wounded him. Gibson then took a knife which was on the deceased's bed and threw it to the Appellant saying "Bring the boy come". The Appellant then made an attempt to stab the witness and it caught him in the wrist. There followed a fight between the Appellant and the witness, after which the witness went to the Police Station.

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p.2-p.6
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4. The trial commenced at 11.55 a.m. on the 30th March, 1981. Miss Hylton appeared for the Crown and Mr. Jarrett for the Accused Gibson. No one appeared for the Appellant, although the Court was informed that the Appellant would be represented by Mr. Neita leading Mr. Soutar. Despite the Appellant's objections that he did not understand what was going on and that he wanted to see his Counsel, the jury was empanelled. The Court then adjourned at 12.40 p.m., Mr. Jarrett undertaking to get in touch with Mr. Neita or Mr. Soutar.

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p.6 1.8

When the Court resumed sitting at 2.25 p.m., Mr. Jarrett informed the Court that he had been in touch with Mr. Soutar who had undertaken to get in touch with Mr. Neita who would be in Court the following morning. The learned Judge, nevertheless, took the view that the trial could start that afternoon.

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p.8 1.30-
p.10

5. The prosecution then called a Mr. Stanley Reid who merely identified the deceased's body. That witness was neither cross-examined by Mr. Jarrett nor by the Appellant.

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p.11-p.28

6. The prosecution then called Wilbert Irving, their principal witness, at 2.46 p.m. He was examined in chief by Miss Hylton until 3.27 p.m. when the Court adjourned till the following morning. No Counsel appeared for the Appellant during that afternoon session.

p.29-p.33
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7. That in the morning of the 31st March, 1981, Mr. Jarrett informed the Judge that Messrs. Soutar and Neita were outside the Court, that Mr. Neita was not robed and wished to make an application in Chambers.

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	Shortly thereafter Mr. Soutar appeared in Court and made the same application. After some discussion, His Lordship adjourned at 10.45 a.m. and returned at 10.58 a.m. Mr. Neita did not appear. Mr. Soutar then informed His Lordship that "the benefactors" of the Appellant had not been able to pay, that the "retainer" was not completed, that "Counsel's instructions" were not completed, that Mr. Neita was not in a position to conduct the defence of the Appellant, and that he wished to apply for Mr. Neita and for himself as Mr. Neita's junior, to withdraw. In the circumstances, he also requested his Lordship to allow the accused man time in order that a legal aid assignment for another Counsel be made, especially that the accused was charged with the most serious of offences.	<u>Record</u> p.33 1.13- p.36 1.24
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20	8. In a long Ruling, the learned Judge referred to the history of the case and to previous adjournments, to Section 6 of the Criminal Justice (Administration) Act and to the Legal Profession Act and the Legal Profession (Canons of Professional Ethics) Rules; and then refused both applications made by Mr. Soutar.	p.36 1.24- p.40 1.32
30	9. Mr. Soutar then asked for a further short adjournment to contact Mr. Neita and inform him of the Ruling. It was then 11.30 a.m. and the Court adjourned till 12.30 p.m. The Court resumed at 12.38 p.m. Neither Mr. Soutar nor Mr. Neita was present and the Court adjourned again until 2.00 p.m.	p.40 1.33- p.45 1.8
	10. The Court resumed at 2.00 p.m. when Mr. Soutar informed His Lordship that he had appraised Mr. Neita of the Ruling but that Mr. Neita had left with the impression that he (Mr. Neita) had been allowed to withdraw. The record then discloses the following:-	p.65 1.9
	"HIS LORDSHIP: He left with the impression?	p.46 1.42
	MR. SOUTAR: Yes M'Lord	p.48 1.21
40	HIS LORDSHIP: Now, let me explain what happened under this ruling because it may affect you too. What this means is this: As I had pointed out this morning, the rules under the Canon Four deal with two situations: one where an Attorney may withdraw and one in which an Attorney must withdraw. I will give you an example. If a client insists upon a defence on a complaint that the Counsel in his conscience can't put it up and the man insists that you do it, then, you withdraw.	

Record

Of course that would be in Court and you would tell the Judge why.

If you charge a thousand dollars and you think eight hundred not good enough, then, you may withdraw and it would be better if you ask the Court's permission. Now, permission having been asked for this morning and I refused doesn't mean that he stays away or you leaving and leaving the man there. That would be in contempt. It does not mean that it would be an order for contempt but it is for the purpose of the record - the Judge showing his view of the whole thing. He doesn't agree with the move or the move in those circumstances, but I can't tie him or you there but the records will show that the Judge doesn't agree with the move. In other words, as far as you are concerned, you are junior. It doesn't mean (what I am saying) that if you think, in the circumstances, you should withdraw too, that I can tie you. Can't work, you understand?"

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MR. SOUTAR: I understand M'Lord, for my part M'Lord, I am in the invidious position.

HIS LORDSHIP: You follow the leader?

MR. SOUTAR: I am here physically but I have to follow the leader because I would not have been here at all but for the leader.

HIS LORDSHIP: Right. So where your leader is you go too?

MR. SOUTAR: Not exactly; insofar as that is concerned I have to follow his footsteps.

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HIS LORDSHIP: So you can let him know we are going to continue with the case.

MISS HYLTON: May it please you, M'Lord, I wish to tell Your Lordship that, subject to what Your Lordship has to say, and with no objection from the defence, I propose to interpose the doctor. (Dr. Henry, please) I had arranged with him to be here at 2.00 sharp and he was here five minutes before.

HIS LORDSHIP: Yes. Certainly"

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11. It appears that Mr. Soutar left the Court at that stage and no Counsel appeared for the Appellant for the rest of the trial.

Record

12. Dr. Percival Henry gave evidence in chief but was not cross examined either by Mr. Jarrett or the Appellant.

p.48 1.22-
p.51

13. At 2.26 p.m. the witness Wilbert Irving was recalled and completed his evidence in chief at 2.59 p.m.

p.52-
p.66 1.29

14. At the completion of his evidence in chief, the witness was examined by the Court, and then His Lordship asked the Appellant if he wished to ask him questions to which the Appellant replied "No, M'Lord"

p.66 1.30-
p.68 1.30

15. The witness was then cross-examined by Mr. Jarrett, re-examined by Miss Hylton and then examined again by the Court.

p.69-p.87

16. The trial was continued on the following day the 1st of April, 1981. The prosecution called Donald McInnis, the Detective Corporal who investigated the case. At the end of his evidence in chief the record discloses the following:-

p.89

"Q. Would one have to go by way of Andrews Pen Lane, or could one go by way of Andrews Pen Lane?

p.99 1.31-
p.100 1.13

HIS LORDSHIP: I think we are going into the Realms of speculation.

MIS HYLTON: Your Lordship pleases.

HIS LORDSHIP: Several areas you can go to find one's body. Just a second. Robinson, is there any question which you wish to ask this officer?

2.21 p.m.

MR. ROBINSON: I dont know what him talking about.

HIS LORDSHIP: You dont know what him talking 'bout.

No cross-examination. Anything, Mr. Jarrett?"

The witness was then cross-examined by Mr. Jarrett, re-examined by Miss Hylton and then examined by the Court.

p.100 1.4-
p.109 1.4

17. The prosecution then closed its case and His Lordship told the Appellant:-

"HIS LORDSHIP: The prosecution has closed its case. There are three courses open to

p.109 1.15-
p.110

Record

you. First of all you can go there and give evidence, in the witness box, in which case you will be liable to be cross-examined by Miss Hylton, asked questions by Mr. Jarrett and I can ask questions too, or you can stay from where you are and make a statement, nobody can ask you any questions from there but it hasn't got the strength as if you had gone there, or you may keep quiet, that means to say you can say you have nothing to say.

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And you are also entitled after you have done any of these three things to call witnesses that you wish to support what you have said. Now, what do you wish to do?

MR. ROBINSON: I don't do nothing sir.

HIS LORDSHIP: Eh?

MR. ROBINSON: I don't know the procedure.

MIS HYLTON: He says "I don't know the procedure"

HIS LORDSHIP: You don't understand English?
Eh? Mr. Jarrett?

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MR. JARRETT: M'Lord.

HIS LORDSHIP: You, apparently, you will be able to communicate better than I can.

(Mr. Jarrett speaks with accused) You understand what Mr. Jarrett tell you now?

MR. ROBINSON: Yes, Sir.

HIS LORDSHIP: Well, all right! What you going do?

MR. JARRETT: M'Lord, he says he will make an unsworn statement.

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HIS LORDSHIP: Unsworn statement?

MR. JARRETT: From the dock.

HIS LORDSHIP: Thank you very much.

All right! Just wait."

p.111-p.112
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18. The Appellant then made an unsworn statement from the dock in which he basically said that he was at home and that his mother will say so. The

Record

Appellant's mother Joyce Robinson was then called and questioned by the Judge and Miss Hylton. She basically supported the alibi defence. The Judge did not ask the Appellant if he wished to re-examine his mother.

p.112 1.12-
p.132

19. At the end of the cases for the defence, the trial Judge explained to the Appellant that on the following day Miss Hylton would make her final address, followed by him, followed by Mr. Jarrett.

p.145 1s.24-
p.146

10 20. In the morning of the 2nd April, 1981, Miss Hylton addressed the jury for 43 minutes, the Appellant for 3 minutes and Mr. Jarrett for 39 minutes.

p.147
1s. 1-6

21. In his summing up to the jury the learned trial Judge referred to the matter of non-representation of the Appellant as follows:-

20 "Now before I go any further, let me for the purposes of the record briefly remind you of a certain incident. You remember when the case started on Monday when it took us some time before we started the case, we were told Mr. Churchill Neita, one of the senior/junior counsel, that is, he has been practising for some years, appeared for the accused Robinson. We were also advised and it wasn't challenged that Mr. Neita was seen dressed in the habit of a barrister, that is like how counsel there is dressed ready to address the judge, 30 parading outside the corridors of the No. 1 Court, but when the case was called up it was Mr. Jarrett who told us that he was appearing with Miss Linton who is off the island - she went to London to argue a big matter - both were appearing for Gibson. In the absence of his leader, Miss Linton, he held on: that is to say he will man the fort for Gibson; and then he told us that 40 Mr. Neita didn't get all the instructions necessary to carry on the defence of Robinson, that the judge should be so advised and in the end what it really meant was, an application was being made asking for the case to be adjourned until such time as further instructions or full instructions could be given to him. This was weighed against what was told to me that the case was coming up for the twentieth time - 50 nineteen previous occasions the case had been called up - six of those occasions had been fixed for trial - but on each of those

p.149 1.18-
p.150 -
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Record

occasions the Prosecution just couldn't move because the chief witness Mr. Irving who was here on Monday couldn't be located. Eventually the police found him, so I gather, over and above the call of duty in the investigation. If there were going to be a further adjournment, we wouldn't see him again. So the case stopped; so we were in that position.

An application was made then for an adjournment mainly on the ground, what it really amounts to is that Mr. Neita didn't get all his money. That is what it was in plain Jamaican language, so I refused it. In the refusal I need not go over it, I quoted Canons that guide the legal profession in Jamaica and I quoted a certain section of the Criminal Justice (Administration) Act and I relied also on the point that counsel cannot at the last minute, particularly in a case of murder, who was privately retained, come and just ask for an adjournment and expect to leave his client unrepresented. So I explained to Robinson the case would be going on. At first he appeared to have been a little concerned, but you notice that he took part. He didn't cross-examine Irving, he didn't cross-examine the policemen, but he made a statement from the dock. He called his mother in support of the alibi which he has raised and he addressed you for three minutes and he made the point which I shall stress later on, the point to that has been made by Gibson's Counsel - the fact that I have called my mother, because it is my mother who supported the point that I was home, that it is not the truth. That is the point. He told the point from a logical stand-point and from other practical reasoning. So that is how the case went, with Mr. Jarrett in his usual style defended Gibson. So that is how the case was conducted before you."

22. With regard to the matter of representation of the Appellant by Counsel, it is respectfully submitted that the Appellant was denied the substance of a fair hearing in the following respects:-

(1) the learned trial Judge erred in empanelling the jury and commencing the trial in the morning of 30th March 1981

despite the Appellant's objections that he did not understand what was going on and that he wanted to see his lawyers.

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(2) the learned trial Judge erred in allowing the trial to proceed in the afternoon of the same day and erred in particular to allow the evidence of the principal witness for the prosecution to be given in the absence of Counsel for the Appellant, when he knew that the question of the Appellant's representation by Counsel had not been resolved.

(3) the learned trial Judge erred when both Mr. Neita and Mr. Soutar applied to withdraw, to accede to the application of Mr. Soutar for an adjournment to allow a legal aid assignment to be made for another counsel. In this connection:

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(i) the fact that there were several adjournments before was no fault of the defence - it was due to the fact that the principal prosecution witness could not be found.

(ii) the learned Judge ought to have granted an adjournment to allow a legal aid assignment under the Poor Person's Defence Law 1961;

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(iii) The Appellant found himself without representation through no fault of his own.

(iv) the learned Judge disregarded the provisions of S. 20(6) of the Constitution of Jamaica and especially paragraph (b) and (c) thereof, viz:-

"20. (6) Every person who is charged with a criminal offence :-

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(b) shall be given adequate time and facilities for the preparation of his defence;

(c) shall be permitted to defend himself in person or by a legal representative of his own choice."

(4) Once the learned Judge decided that the trial should continue without the Appellant being represented by Counsel, it is submitted

Record

that it was the duty of the learned trial Judge to assist the Appellant in the conduct of his case. In this connection, and particularly in this type of case, it was insufficient for the trial Judge merely to explain to the Appellant his rights in general terms. Nor was it sufficient merely to ask the Appellant if he wanted to ask questions of the prosecution witnesses. He should have specifically advised the Appellant that if his case was factually different (as it was) from the prosecution case, he should specifically challenge the witnesses on those points which incriminated him, especially in regard to the evidence of Wilbert Irving. It is further submitted that on many occasions where the learned trial Judge did take up the questioning himself, those questions were directed at assisting the prosecution rather than the defence case. Finally, it is submitted that the learned Judge's continuous and repeated interruptions, inhibited the proper development and presentation of a proper defence by a lay person.

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23. The learned trial Judge erred further in failing to direct the jury properly on the issue of mistaken identity. Although the testimony of Wilbert Irving on whose evidence of identification the whole case depended, was exhaustively dealt with in the summing-up, there was nowhere a warning to the jury of the special need for caution, the reasons for the caution and the quality of the identification, as laid down in R v Turnbull [1976] 3 W.L.R. 445 and R v Oliver Whyllie (1977) - 15 J.L.R. 163.

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24. The learned trial Judge erred further in his summing up to properly direct the jury on the question of causation and common intention. It was common ground that the shooting of the deceased was by Gibson and not the Appellant. In those circumstances it is submitted that a very careful direction was required on the issue of common intention. The learned judge said this:-

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p.160 1.19-
p.171 1.23

"Now, as I have already told you, I read the indictment to you. The indictment charges murder. Murder is committed where there is an intentional and unprovoked killing of a human being, without just cause or any lawful excuse. And intentional there means an intention to kill or to cause such serious injury likely to result in death.

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That is a simple wording of the definition.

Record

10 What is alleged is this: Is that the fire-
arm and according to Mr. McInnis likely to
be a .38 revolver from the spent bullet he
saw in the room - a fire-arm was used to
shoot the deceased in his head; and
according to the witness who survived,
Irving, you may have to call it at 'point-
blank range'. For a weapon like a .38,
anywhere here in the Court, and you don't
need an expert to come and tell you this.
From here, at one man in this Court room,
to fire at a man point-blank it would kill
him, and to fire at a spot... he is gone.
So the prosecution is saying that in those
circumstances it must have been an intention
to kill the man; the weapon used, the spot
where the wound was, the purpose behind it.
Then the prosecution says don't forget that
20 when one man was fighting, that is the one
on the bed, and then the other man now, when
the gun failed to go off - so that would be
further evidence, if you accept it, to show
what the intention was, to use a latter-day
term to liquidate them. Well, if you accept
that, Mr. Foreman and members of the jury,
that that was the intention, either to kill
or to cause severe injury likely to cause
death for the reason that the Crown has
30 suggested and you have no reasonable doubt
about it then it is murder then in full,
because the evidence shows, if you accept
it, that both were working hand in glove.
And the common sense view is that where two
or more persons are acting together in
pursuance of a common purpose, each man
playing his part, doing the part that is
allotted to him then the act of one is the
act of all. And in the case where we have
40 two or three men, one have a gun and the other
two or three are there assisting him, helping,
counselling, their purpose is to help him if
he runs into trouble, and the object is to
kill, then it doesn't matter who pulls the
trigger, all would be equally guilty. That
is how the prosecution has put its case."

25. The learned trial Judge failed to tell the
jury that on one interpretation of the evidence
the Appellant did not necessarily have a common
50 intention with Gibson to kill or to do grievous
harm to the deceased; and that if they were so
satisfied or had doubts about the matter, then the
Appellant would not be guilty of murder.

Record

p.179

p.187

26. The Appellant applied for Leave to Appeal to the Court of Appeal against conviction and sentence. On the 18th March 1983, the said Court, it is submitted wrongly, refused the applications without giving reasons.

27. The Appellant respectfully submits that this appeal should be allowed and that his conviction for murder should be quashed and the sentence of death imposed on him should be set aside for the following among other

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R E A S O N S

1. BECAUSE the Appellant was denied the substance of a fair trial by the Judge's insistence to commence and continue the trial without representation of the Appellant by Counsel, and more particularly for the reasons set out in paragraph 22 herein.
2. BECAUSE the learned trial Judge failed to direct the jury properly on the issue of mistaken identity.
3. BECAUSE the learned trial Judge failed to properly direct the jury on the question of causation and common intention.
4. BECAUSE the Court of Appeal wrongly rejected the Appellant's application for leave to appeal without giving reasons.

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EUGENE COTRAN

LEONARD WOODLEY

No. 3 of 1984
IN THE PRIVY COUNCIL

O N A P P E A L
FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N :

FRANK ROBINSON Appellant

- and -

THE QUEEN Respondent

CASE FOR THE APPELLANT

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