JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 117 of 1974

BEFORE: The Hon. Mr. Justice Graham-Perkins, J.A.

The Hon. Mr. Justice Swaby, J.A.

The Hon. Mr. Justice Robinson, J.A.

R. v. CURTIS IRVING

C. L. Liba for the applicant.

M. Jackson for the Crown.

February 27, March 31,
April 9, 1975

GRAHAM-PERKINS, J.A.:

The applicant was, on May 31, 1974, convicted before Henry, J., of the murder of Cleveland Taylor and sentenced to death. This was the third occasion on which the applicant had been put on trial on this charge. His first trial ended in a conviction. His appeal therefrom was successful and the Court ordered a new trial. On the occasion of the second trial the jury failed to reach unanimity. In the result he faced a third trial which, like the first, ended in a conviction. It is from that conviction that this application for leave to appeal arises.

The case advanced by the prosecution rested entirely on the evidence of a Mr. Dennis Simpson who claimed to have been an eye-witness to Taylor's death. This death was due, the Crown alleged, to a wound on the neck of the deceased inflicted by a cutlass wielded by the applicant. Simpson said that he lived in a wooden house at the back of the Tavares Market in Kingston. Facing this house was a shed. There was a passage between this shed and the

market. On August 1, 1971 Simpson retired to bed sometime after 8.00p.m. At about 1.30 a.m. the following day he was awakened by what he described as a "swishing" sound - the sound of a cutlass hitting zinc. It is not clear whether the zinc here referred to was the zinc that formed the roof or two sides of the shed, or the zinc of the fence between the shed and the market. On hearing this swishing sound, however, Simpson looked through a crevice in the wood on that side of his house that faced the shed. He saw the deceased lying down at the door of the shed. He saw the applicant standing at the door of the shed. The applicant had a cutlass. He saw the applicant chop the deceased. He did not say if the applicant delivered more than one blow- the deceased suffered three wounds, the fatal one to the neck and one on the lower third of each leg. Next, he "heard something out there blowing like a hog". He then saw the applicant leave the shed and disappear in the passage between the shed and the market. At this point Simpson left his house and went to his sister's home on the same compound. He spent the remainder of the morning there. He did not awaken his sister. In fact, he said he went to sleep. Later that day he awoke and returned to his home.

In cross-examination he placed the deceased inside the shed, not at the door, and the applicant at the door. He saw them at the same time. Later, in cross-examination, he admitted saying in evidence at the preliminary enquiry that when he saw the deceased in the shed he did not see the applicant. To further questions in pursuance of this admission he said that he had said at the preliminary enquiry that he heard "swishing" and, for a second time, admitted that he had said that he had not seen the applicant when he saw the deceased in the shed. Almost immediately he swore that he had not told the truth at the preliminary enquiry. He now said that he saw the applicant with a cutlass in his hand - not that he saw him chop the deceased. Next, he admitted that having seen this incident he went to his sister's home and, as noted earlier, went off to sleep. The deceased was his friend but he told no one about what he had seen. Nor did he go to see what had happened to the deceased after the applicant had left the scene. He was again questioned about what he had seen when he looked through the crevice in the wood that

formed one side of his house. He now admitted that at the preliminary enquiry he had sworn that he saw the deceased lying in the yard in front of his house - not in the shed - and that he saw the applicant in the yard and not at the door of the shed. He said that that evidence was true. Immediately thereafter, however, he swore that he had seen the deceased in the shed and the applicant "outside in the yard". Further cross-examination revealed several other areas of conflict between his testimony and his evidence at the preliminary enquiry which we need not dwell on here.

Simpson was then re-examined with a view to having him explain some at least of the many contradictions and admitted untruths in his evidence at the preliminary enquiry, as also the remarkably large number of contradictions in his evidence in cross-examination. It does not appear that this exercise met with any success and, no doubt because of this, Henry, J., was constrained, at the end of the re-examination, to cause Simpson's deposition to be read to the jury. This deposition revealed no assertion by the witness that he had seen the applicant chop the deceased at any time.

In his summing-up the learned judge said:

> "... in this particular case, members of the jury, there is one omission from the deposition .... I refer to the omission of any indication of the witness having said that on the occasion when he saw (the deceased) lying in the shed and he saw the accused man standing over him, he saw this accused man chopping at (the deceased). Nowhere in the deposition does that appear. The witness at the trial, of course, told you that he did in fact see the accused man chopping at (the deceased) while (the deceased) lay in the shed. He does not appear to have said so at the preliminary enquiry. At any rate, if he said so, the magistrate did not take that down and whereas, as I say, an omission is not ordinarily regarded, in so far as I am concerned, as an inconsistency, that omission, in my view, is an inconsistency because one can well realize that this is a significant part of the evidence and one would have thought that if the witness had in fact said so at the preliminary enquiry, certainly this is something which the magistrate would have taken down and recorded as his having said. So that omission, to my mind, is an inconsistency and it is not an inconsistency which has been explained unless, of course, you accept the evidence of the witness that he did indeed say so and the magistrate failed to record it".

Later in his summing-up the judge said:

> "There are other inconsistencies which, to my mind, he has not explained."

That was, perhaps, a somewhat charitable understatement by Henry, J. We are of the firm view that if ever a witness could be said to have been completely discredited this man Dennis Simpson was. By virtue of the incomprehensible maze of admitted untruths and blatant and unexplained contradictions and inconsistencies in the evidence of Simpson we find it quite impossible to understand how any reasonable jury could have returned a verdict adverse to the applicant. If the learned trial judge had taken the view that the evidence of Simpson had been so discredited by cross-examination and thus rendered so manifestly unreliable that no reasonable tribunal could safely act on it we apprehend he would have been perfectly well justified. Perhaps he thought j he should be guided by the following dicta of Wooding, C.J., in R. v. Daken, (1964) 7 W.I.R. at p. 444, (approved by this Court in R. v. Bernard - Supreme Court Criminal Appeal No. 26 of 1973, November 2, 1973):

> "No general principle can be enunciated except that it should never be forgotten that in the final analysis questions of fact are to be decided by a jury and not by the presiding judge. The judge may, and in cases such as we are now considering we think it is his duty to,give such directions as will assist the jury in assessing the credit-worthiness of the evidence given by the witness whose credibility has been attacked, but it can be but seldom that the circumstances will warrant his going beyond that.

We think, however, that the circumstances of this case fairly warranted Henry, J., going beyond giving directions with a view to assisting the jury in assessing the credit-worthiness of Simpson whose credibility had been so successfully attacked. This was no more matter of an apparent contradiction as in R. v. Bernard (supra). This was a case of a self-confessed liar who claimed to have seen the applicant commit an act of murder and, at the same time, admitted that he had not seen any such thing.

Section 13 (1) of the Judicature (Appellate Jurisdiction) Law, 1962, imposes on this Court a duty to allow an appeal if it thinks "that the verdict of the jury should be set aside on the ground that it is unreasonable ..." We have not the least hesitation in holding that the verdict of guilty in this

case was patently unreasonable. Accordingly, we treat the application for leave to appeal as the appeal which we allow. The conviction and sentence are set aside. The interests of justice do not, in our view, require us to order that the applicant undergo another trial. We add that having regard to the conclusion at which we have arrived we find it unnecessary to deal with the other grounds argued by Mr. Leiba.