

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

**Cr. App. Nos. 34, 35 of 1997**

**BETWEEN**

**ANDREW DOTTIN  
KELVIN DIAL                      APPELLANTS**

**VS**

**THE STATE                      RESPONDENT**

**PANEL:**

M.A. de la Bastide C.J.  
R. Hamel-Smith, J.A.  
L. Jones, J.A

**APPEARANCES:**

**MR. D. ALLUM , S.C. and MR. R. PERSAD**  
appeared on behalf of the **APPELLANT**

**MS. C. BROWN-ANTOINE** appeared on behalf of the **RESPONDENT**

**DATE DELIVERED:**

**July 6<sup>th</sup>, 2001.**

# **JUDGMENT**

## **Judgment Delivered by M.A. de la Bastide C.J.**

Kelvin Dial and Andrew Dottin, the hearing of your appeal is, in fact, over. Instructions were given to bring you from prison yesterday but we are told that there was no transport available and today transport apparently was only available to bring you here late.

At any rate, the matter has been fully argued on your behalf by your counsel, and the additional evidence on which you rely has been introduced and the witnesses have been cross-examined. So that your arrival in fact coincides with the decision in the case.

We have come to a clear decision in this matter, and we, therefore, see no reason to delay giving it. I will explain briefly why we have reached that decision and if, as is likely, there is an appeal to the Privy Council, we will give full reasons in writing.

Our decision is that the appeal is dismissed and the conviction and sentences are affirmed. I will say, as I promised, briefly why we have reached that decision. We have directed ourselves on the law in accordance with the judgment given by this Court in **Mario Pedro v The State**, as we have been urged to do by counsel on both sides. In accordance with the principles enunciated in that judgment, we have to consider the fresh evidence which we have admitted and determine whether in the light of that evidence we have any doubt, any reasonable doubt, as to the guilt of the appellants.

Having considered that evidence, we have come clearly to the conclusion that the retraction of his evidence by Shawn Baptiste is not genuine. We have considered the evidence from the point of view of the reasons he gave for having allegedly lied when he incriminated the appellants both in his statements to the police and in his evidence at the trial. He has given reasons which are quite different in his evidence yesterday from those which he gave in his affidavit. In particular, while in his affidavit he said that he was induced to lie on the appellants by the threat of the police to prosecute him on a charge of being in unlawful possession of the gun which was found in his apartment, and of shooting his brother and girl-friend, no mention of this was made at any time in his evidence yesterday, although he was a very voluble witness.

Also, insofar as he claimed that he was affected by threats made against him by persons who were anxious that he should give evidence against the appellants, we reject that evidence as palpably untrue. It is obvious that the threats which undoubtedly he received and admittedly reported to the police, were threats of

what might happen to him if he gave evidence against the appellants. In fact, he accepted in his oral evidence that such threats were made. Particulars of them are to be found in the affidavit of Inspector Carrington in a paragraph in which he records a report made to him by Shawn Baptiste.

Yesterday he introduced as an additional reason for giving false evidence against the appellants, the fact that the police had convinced him that the men who shot his brother were the appellants. He also introduced as a reason the fact that he thought that it was the right thing to do and he did not want to disappoint his mother who expected him to do the right thing. These were nowhere mentioned in his affidavit. In any case, they are extremely unlikely explanations for his falsely incriminating two men whom he himself was unable to identify.

But the important point in time on which we should focus is when he gave his statement to the police, that is, his first statement, because it was at that time that he established the account which he was to repeat in his evidence, firstly, before the Magistrate and then before the Judge and Jury. He made a general claim in his oral evidence that he gave the statement in the form in which he did, under pressure from the police. In fact, he testified that he really never gave the statement at all but the statement was made up by Sergeant James in collaboration with Inspector Carrington, and he was pressured into signing it. Of all the witnesses we were most impressed by PC James. There was really no attempt to shake him in cross-examination, and certainly insofar as there was any, it did not succeed. His evidence was that he had no prior connection with the investigation of this incident until at about 3 o'clock on the afternoon of the killing, that is, the 20<sup>th</sup> of February, 1995, Shawn Baptiste came into the Besson Street Police Station and said that he wanted to see Sergeant Carrington in order to give a statement. PC James testified that he then took it upon himself to take the statement, record it and have it signed by the witness, Shawn Baptiste. We accept his evidence as true and, therefore, there is no question of Shawn Baptiste having been pressured by anyone to give that statement or of the statement having been produced otherwise than as a result of what Shawn Baptiste himself said.

Another matter which in accordance with the judgment in **Mario Pedro** we have to look at, is whether there is any corroboration in the evidence of the new version which the witness, Shawn Baptiste, is offering to the Court. Counsel for the appellants suggested that there were three matters which provide such corroboration. One we can dispose of quickly, and that is the evidence of Alicia Henry. What is referred to is the affidavit which she swore for the purpose of this appeal. In that affidavit she gave an account which was somewhat different from the account of the incident which she gave at the trial, but when she was cross-examined before us, she made it perfectly clear that what she said at all stages, both to the police and to the Court, was the truth, and in that sense she retracted her retraction. In any event, her new version is seriously out of kilter with the version given by Shawn Baptiste both now and previously.

I must say that for reasons which one can infer, the thrust of the evidence of both Baptiste and Henry has been to establish (a) that only one of the men had a gun; and (b) that only one of them fired at the deceased and Henry; and (c) that there was no struggle between Shawn Baptiste and one of the intruders.

The second matter which was relied upon by way of corroboration was the report of Mr. Burns, a firearms' expert from England. His report establishes quite conclusively that the .44 revolver which was found later that morning in the room where the shooting took place was not used in the shooting. It contained in its chamber bullets which could not be fired from that gun. This, however, does not provide any corroboration of Shawn Baptiste having been induced by the police to lie in the account which he gave of the incident. The evidence of the policeman, PC Seepersad, who found the gun, was that it was found under the sheet on the mattress on which the deceased was lying when he was shot. Now, the link with the shooting was really made by Shawn Baptiste who in his evidence said that the gun was found not on the mattress under the sheet but on the floor, and moreover testified that in the struggle which he had with one of the intruders, the man's gun had fallen on the ground and he identified the gun as being probably the gun which the intruder had been holding.

That evidence of Shawn Baptiste is, in our view, clearly untrue, but there is a ready explanation of it which has nothing to do with his being pressured by the police; it is that he wanted to find an innocent explanation for the presence of the gun in his premises. So that there is no corroboration to be found there.

I would also mention, as I did in argument, that the introduction of the gun into evidence did not in any way assist the Prosecution's case. In fact, the evidence by Shawn Baptiste tending to suggest that it had been used in the course of the shooting would have damaged the Prosecution's case by casting doubt on the credibility of the case as a whole.

The last matter was the omission from the record made in the station diary of the report by officers who had been at the hospital that morning and who interviewed Shawn Baptiste, of any mention of Shawn Baptiste having identified the two men who shot his brother and his girlfriend. Now, that does indeed provide cause for concern as one would have thought that Shawn Baptiste would have taken the opportunity when speaking to the police, even although he would have been quite traumatised at the time, of telling them who the shooters were. One would also have expected that that was a matter of sufficient importance to find a place in the report of the officers and in the record made of that report by the sentry in the station diary.

On the other hand, one must put this in the context of Shawn Baptiste having come to the station a few hours later, that is, at 3 o'clock the same day, and having identified these men in a statement which we have no doubt was voluntarily given by him on his own initiative, to PC James.

In our view, in these circumstances, the omission in the station diary does not provide any support for Shawn Baptiste's present claim that he was somehow induced or pressured into falsely stating that he recognised the intruders as the appellants. It is a matter that might have been used at the trial to test the veracity of his evidence, but we have no doubt that that evidence represented the spontaneous account given by Shawn Baptiste of the incident a few hours after the incident occurred.

Moreover, that report in the station diary (or, at least, a copy of it) was made available to the lawyers who were representing the appellants when they applied to the Privy Council for special leave to appeal against their conviction the first time. But despite that, the Privy Council dismissed the application for leave. Clearly, it was not regarded as something which could support an allegation that there had been a miscarriage of justice.

As it turns out, I have given a fairly full statement of how we regarded the evidence in this case. I would also mention, although it is hardly necessary to do so, that we have also taken into account the manner and demeanour of the witnesses, in particular, Shawn Baptiste who did not make a favourable impression on us at all.

On the other hand, as I have said, we were particularly impressed by PC James. In relation to the criticisms that were made of the failure of the police to keep and preserve their personal diaries and the station diary, even after it was known that these documents were of interest to the appellants' lawyers, these criticisms appear to have some substance. Our experience is that records of this type are not preserved as carefully as they should be in this country. Hopefully, this is a deficiency which is being remedied by the authorities, and I refer here to the police and the Director of Public Prosecutions. But whatever relevance the failure to keep those documents may have had at the trial, we do not feel in anyway inhibited by the absence of those records from coming to the clear conclusions that we have.

The convictions and sentences are affirmed.

(PROCEEDINGS CONCLUDED AT 12:20 P.M.)