

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cr. App. No. 89 of 1996

BETWEEN

WENCESLAUS JAMES

APPELLANT

AND

THE STATE

RESPONDENT

PANEL

S. Sharma, C.J.
M. Warner, J.A.
S. John, J.A.

APPEARANCES

Mr. Desmond Allum, S.C. and Mr. Rajiv Persad
for the Appellant
Mrs. Carla Browne-Antoine for the State

DATE DELIVERED: 12th March, 2003

JUDGMENT

Delivered by S. John, J.A.

This matter comes before the Court pursuant to section 64(2)(a) of the Supreme Court of Judicature Act Chapter 4:01 as a consequence of a petition by the appellant to the President for the referral of his conviction to the Court of Appeal on the ground that fresh evidence is now available to the effect that he was not in any way responsible for the crime for which he was convicted. At the trial the appellant contended that he played no part in the killing.

At the hearing before this Court, leave was sought and granted to include an additional ground, namely, “the Learned Trial Judge directed the Jury on the doctrine of Joint Enterprise and felony/murder rule. This amounted to an error in law and must be considered a material irregularity. The said error was compounded by the absence of any adequate analysis of the relevant evidence. Such directions from the Learned Trial Judge it is submitted could only have served to misdirect and confuse the jury.”

On 21st June 1996 the appellant together with Anthony Briggs was convicted of the murder of Siewdath Ramkisson who was killed sometime during the period 5th to 9th August 1992. The Court of Appeal dismissed their appeals on 6th March 1997 and they petitioned the Privy Council for special leave to appeal on the ground that the judge erred by directing the jury in accordance with the felony/murder rule. At the hearing of the petition on 2nd October 1997 it was conceded that there had been a misdirection in that regard. However, notwithstanding the misdirection the Board dismissed their petitions.

THE PROSECUTION’S CASE

The deceased, Siewdath Ramkisson lived at Caparo with his parents. He owned a white Bluebird motor vehicle registration number PAO 1927 which was fitted with “mag rims”, “fat tyres”, black louvres on the rear windscreen and a powerful music system. He was employed at Caroni Limited but in his spare time plied his vehicle for hire from Caparo to Chaguanas. On Wednesday 5th August, 1992 he left his home around 12:15p.m. to ply

his vehicle. Around 3:00p.m. that afternoon his mother saw him on the main road in Caparo plying his vehicle.

He did not return home that evening and in fact was never seen alive again. The following day his father made a report at the San Raphael police station that his son was missing.

On Saturday 8th August his vehicle was discovered in a burnt condition off the main road in Las Lomas, not far from the junction. The “mag rims”, the “fat tyres”, the musical equipment and the black louvres from the rear glass were missing.

On 9th August 1992 his body was found floating in a ravine in the Heights of Guanapo. Dr. Ramnath Chandulal, a Forensic Pathologist subsequently performed an autopsy on the body and found that death was due to severe head injuries. The injuries were:

- (1) An oblique split wound on the right side of the forehead measuring 5 x 1 cm with oval fracture of the underlying skull.
- (2) A split wound on the right ear measuring 6 x 2 cm with fracture of the temporal bone and the right condyle of the lower jaw.
- (3) A split wound on the right lower jaw near the menti where the two halves of the lower jaw join together. This wound measured 7 x 2 cm with fracture of the lower jaw.
- (4) A vertical split wound on the back of the left ear measuring 4 x 7 x 1 cm.
- (5)&(6) Two split wounds on the back of the right side of the head measuring 4 x 2 cm each with a depressed fracture of the occipital bones with haemorrhage and laceration in the brain.
- (7) A split wound on the left parietal region of the head measuring 4 x 3 cm with fracture of the underlying bone.
- (8) The left side of the hyoid bone in the neck showed a fracture with localized injuries to the soft tissues.

Dr. Chandulal further testified that injuries 1-7 comprising the split wounds were caused by a blunt instrument with severe force such as a hammer.

Evidence was led at the trial that the appellant had hired the deceased to take him and his girlfriend to Arima. At Pinto Road Arima the appellant's girlfriend got out of the car and went to her home. The deceased and the appellant then went to a bar on Pinto Road where the appellant met Anthony Briggs. Briggs asked the appellant whether the deceased would take him to his girlfriend's home which the deceased agreed to do. All three men got into the car. Briggs gave directions to the deceased and the deceased drove to the Heights of Guanapo.

There, Briggs caused the vehicle to stop. He passed a hammer to the appellant, then held the deceased by the neck and the appellant struck the deceased with the hammer. They then pulled him out of the vehicle and struck him several times with the hammer.

He was then thrown down a precipice. The hammer was thrown into some bushes. The appellant and Briggs then left in the car with the appellant driving.

They returned to the bar on Pinto Road where they had some drinks and met a taxi driver, Winston Brown. Brown had known the appellant whom he called "Chinee" for about two years and Briggs for a much longer period. Brown described the Bluebird vehicle in which they came to the bar as having "fat tyres", tinted glass and louvres in the back. According to him, the appellant asked him if he wanted to buy some rims and tyres or a lens for his bumper. Brown declined, saying he had no money to buy the items.

Another witness, Mervyn Liverpool, an off-duty police officer came out of the bar and he too saw the Bluebird which he described in terms similar to those used by Brown. He too had known the appellant prior to that date but for a shorter period and he knew that he was called "Chinee". He had known Briggs for about eight years.

Later that evening both the appellant and Briggs went to the home of one James Phillip and asked him if he wanted to buy some music equipment for \$500.00. At the time they were in a white Bluebird. Phillip too had known both men before that evening.

Phillip agreed to purchase the music equipment and gave them \$300.00 promising to pay the balance at a later date. On the following day (6th August, 1992) Phillip was awaiting

transportation on Malabar Road, Arima. He got into a Bluebird vehicle driven by Gary Wiseman. He told Wiseman about the “mag rims” and tyres and Wiseman showed interest in them. As a consequence, he took him to Sean’s garage where they met the appellant and Briggs. They then drove to a house where the appellant showed Wiseman the four tyres and rims together with the black plastic louvres. They were asking \$1,800.00 for them but subsequently agreed to accept \$1,500.00.

Carl Edwards, a mason and the owner of a Datsun pickup vehicle which he used for transporting goods testified that he was at his home at Pinto Road, Arima when at about 9:30p.m. the appellant whom he had known before accompanied by Briggs came in a white Datsun Bluebird motorcar. The appellant told him that ‘he had a little work for him.’ Edwards told him he had no gas in his vehicle whereupon the appellant gave him \$100.00 and he (the appellant) told him to meet them at Las Lomas Junction. Edwards left and met them as arranged. He was told to return in fifteen minutes, which he did. Upon his return they placed four tyres into the tray of his van. He took the appellant to Wall Street where he (the appellant) unloaded the tyres.

The appellant was arrested on 21st August, 1992 at Mayo by Police Corporal Ruben Alexander who told him that he was wanted by the Arima Police in connection with a report of murder at San Raphael. On the way to the Gasparillo Police Station the appellant said to Corporal Alexander, **“Ruben, I will tell you what happened.”** Both men had known each other for several years. He then gave Corporal Alexander an account of how “Tallman” and “Rasman” had killed a man and stolen four tyres from his car which they later burnt.

Later that day Corporal John Daniel then attached to the Arima Police Station went to the Gasparillo Police Station to collect the appellant. He told him he was investigating the murder of the deceased and he cautioned him, whereupon the appellant said, **“Boss, let me tell you, it’s me and Tony take the car and kill the man.”** Upon his arrival at the Arima Police Station Corporal Daniel handed him over to Inspector Quashie.

Inspector Quashie identified himself to the appellant, told him of the allegation, cautioned him and he replied, ***“It’s me and Tony who killed the man.”*** The appellant subsequently agreed to give a written statement which was recorded by Inspector Quashie between 8:30p.m. and 11:00p.m. on the night of 21st August, 1992. The statement was authenticated by a Justice of the Peace who was present throughout the recording of the statement.

The written statement was inconsistent with the oral statement made by the appellant to Corporal Alexander. In it he said that he and his girlfriend hired a white Datsun Bluebird in Chaguanas to take them to Arima. On arrival, he and the driver went for a drink at a bar opposite Sean’s Garage on Pinto Road. There, “A” (Brigg’s name was covered), who the appellant knew as “Tallman”, called the appellant and told him that he wanted to go to his girlfriend’s. He remarked that the driver ***“had some nice tyres”***, and that he knew a man who wanted to buy some tyres. The driver agreed to take “A” to his girlfriend’s. “A” sat in the front and gave directions. They stopped at the roadside. “A” pulled on the handbrake and passed a small hammer and told him to hit the driver while he (“A”) held his neck. The statement continued:

“A” then tell me to come outside and I come out the car. He tell me to open the driver door and I do it. He push the man out through the driver door and he come out with the man who was bawling, oh gosh, what all you doing me.....’A’ ask me for the hammer and I see him take it up from the back seat of the car where I put it and he went to the back of the car with the driver and the hammer. I see ‘A’ hold the driver by he pants waist to the back and the back of his collar and throw him down an incline... After driving a short distance ‘A’ ask what to do with the hammer and I tell him to give it to me and he give me and I throw it in some bushes.”

The remainder of the statement gave an account of appellant’s movements, which was substantially – though not entirely – consistent with the evidence given by Brown, Liverpool, Phillip, Edwards and Wiseman.

Inspector Quashie showed the appellant the various parts from the car, which the appellant confirmed came from the Bluebird. Inspector Quashie and the appellant went to the Heights of Guanapo where the appellant showed him where the hammer was thrown and he identified the hammer (which had been found by members of the deceased's family near the place where the deceased's body was found).

THE CASE FOR THE DEFENCE

The appellant denied making the oral statements attributed to him by Corporals Alexander and Daniel and Inspector Quashie.

He also denied making the written statement. He said he had been drunk when he was arrested and had no recollection of being at the Gasparillo Police Station. He woke up around lunchtime the following day when he was told that he was at Arima Police Station and during the afternoon of 22nd August, 1992 he met Inspector Quashie for the first time.

THE FRESH EVIDENCE

Four affidavits were admitted into evidence. Gaitree Pargass and Christopher Lall swore affidavits on behalf of the appellant's case and Inspector Stephen Quashie and John Rougier an Assistant Commissioner of Prisons swore affidavits on behalf of the State.

Ms. Pargass gave evidence on oath before us and was cross-examined by Attorney for the State. Since she was the Attorney who had been asked by the English Firm of Solicitors acting on behalf of the appellant to visit Lall at the State Prison it is more convenient to deal with her evidence before Lall's.

She testified that she visited Lall on 16th March 1999 at the State Prison and advised him that she was acting on the instructions of Solicitors in London who represented the appellant. She interviewed him and took a statement from him and informed him that it would be forwarded to the Solicitors abroad. She also told him that it may become necessary depending on the advice given by Counsel in London for him to swear an affidavit. Lall, she said, indicated that before he swore any affidavit he wanted to have independent legal advice. The statement that she recorded from him was not signed as he had said to her very early in the interview that he was not going to sign any statement.

She forwarded the statement to the Solicitors in London. She then spoke to several Attorneys with a view to Lall being independently advised. Sometime during the month of September, 1999 she was informed by Mr. Ravi Rajcoomar, an Attorney at Law that he had visited and spoken to Lall.

She paid a second visit to Lall at the State Prison sometime after September 1999 and on that occasion he expressed his willingness to swear to an affidavit containing the information she had recorded in the earlier statement. She drafted the affidavit and on 19th October 1999 she attended the prison for him to swear to the affidavit. He read it and said that he was prepared to sign it. The affidavit was not sworn on that day as permission had to be sought from the Commissioner of Prisons. In January 2000 she was advised that the necessary permission had been granted and on 25th February, she attended the prison where he swore to the affidavit. The unsigned statement which was recorded on 16th March 1999 was by consent tendered into evidence at the hearing before us.

In his affidavit Lall deposed that sometime during the first week of August, 1999 he was introduced to Anthony Briggs by a person who he knew as "Pigeon" (now deceased). The introduction took place in front of the K.F.C. (Kentucky Fried Chicken) outlet in Chaguanas. It was agreed then that they would meet the following day at 6:30p.m. at the same location.

The following day "Pigeon" met him at the agreed location at about 6:10p.m. and told him "*de fellas would come just now*". At approximately 6:25p.m. a white Bluebird stopped in front of the K.F.C. outlet where both he and "Pigeon" were standing. He described the car as having broad tyres and a very good sound system. Anthony Briggs was the driver of the vehicle. There was another person sitting in the left front seat who he had not known before. That person was introduced to him as "Ras". They got into the car and Briggs drove off telling him that they were going to the "Congo" as they had some money to pick up. "Pigeon", he said, did not accompany them to the "Congo".

As they were approaching the “Congo” and ascending a hill the lid of the car trunk flew up. Anthony Briggs stepped on the brakes and he (Lall) realized that someone had either fallen out or jumped out of the trunk. He said that Briggs and “Ras” jumped out of the car and he followed. That was about 6:45p.m. to 7:00p.m. Briggs had a hammer in his hand.

When he came out of the car he saw a man tied and gagged on the road. The man was about five feet behind the car. Briggs and “Ras” went up to the man. He closed the trunk of the car and stood by the car. Briggs and “Ras” conferred in hushed tones for about 45 seconds and then he overheard “Ras” say to Briggs, *“Is better we fix the man”*. The man was trying to raise himself and was in a stooping sort of position. Briggs struck the man at the back of his head with the hammer, to the side of his face and twice on his throat. He (James) then walked up to the spot where the man was lying and recognized that the man was of East Indian descent and in his late thirties or early forties. The park lights of the car were on. The man wore a pair of black “Travel Fox” sneakers, a pair of black Levi jeans and a Dick Tracy jersey.

When they got back to the car, he said, Anthony Briggs told him, *“Doh study dat, dat is small ting”* and so he remained quiet. He said he was perplexed and scared. He was eventually dropped off in Arima close to the Sangre Grande taxi stand. As he was leaving the car Briggs said to him, *“Small man, if you say anything about that, jus as de man get fix you go get handle.”* He eventually got home shortly after 9:00p.m.

He said that he did not come forward before because, *“I was scared that I would be charged for murder even though I did not participate in anyway in what happened to the person who was attacked. However, I had it on my conscience that an innocent man had been condemned to hang for something I knew he did not do.”*

With respect to his coming forward as a witness at this stage this is what he said in his affidavit at paragraphs 10 and 11 and because of its importance we set in out in full:

“10. Sometime last year, I saw a newspaper report of a murder appeal where a witness had come forward long after the appellant had been convicted and

it appeared that his evidence was accepted. It was a long time since the incident but the witness came forward nevertheless. This gave me inspiration to come forward and I decided to try to contact Wenceslaus James to see how I could help him.

11. On or about 11th January 1999, I was taken to the State Prison, Port of Spain for a court appearance the following day. I made enquiries about where Wenceslaus James was being detained. I did not know Wenceslaus James but had seen photographs of him in the newspapers. I remained at the State Prison, Port of Spain until about 14th January, 1999 but did not speak with Wenceslaus James. I was again brought to the Port of Spain Prison about 17th January, 1999. On 18th January 1999 I had just returned from court and was passing by his cell. I called out to him. He asked me if I was the youth who was there at the time of the incident. I first told him that I did not know what he was talking about. He called me a dog and told me that I could assist him by speaking the truth. I said that I would see. A few days later I sent a message to him via a prison orderly saying, ***“if I don’t get in any trouble, it would not cost me anything to assist him”***. He sent back a message saying that he would inform his attorneys.”

The new evidence, if accepted would mean that the appellant was not present on 5th August 1992 at the time when Siewdath Ramkisson was killed and that Christopher Lall was there.

THE FUNCTION OF THE COURT OF APPEAL

A referral by the President may be made either under section 64(2)(a) or 64(2)(b) of the Supreme Court of Judicature Act Chapter 4:01. This provides as follows:

- (2) ***The President on the advice of the Minister on the consideration of any petition for the exercise of the President’s power of pardon having reference to the conviction of a person on indictment or to the sentence, other than sentence of death, passed on a person so convicted, may at any time:-***

- (a) refer the whole case to the Court of Appeal, and the case shall then be heard and determined by the Court as in the case of an appeal by a person convicted; or*
- (b) if he desires the assistance of the Court of Appeal on any point arising in the case with a view to the determination of the petition, refer that point to the Court for their opinion thereon, and the Court shall consider the point so referred and furnish the President with their opinion thereon accordingly.*

Where the President decides to act under 64(2)(a) the person whose case is the subject matter of the petition must be treated for all purposes as if he were a person upon whom there is conferred a general right of appeal under section 43 of the Supreme Court of Judicature Act. That is so because the words of paragraph (a) of sub section (2) are clear and unambiguous.

Section 64 is analogous to the provisions of section 17(1) of the Criminal Appeal Act 1968 (U.K.) where the Secretary of State may refer a matter to the Court of Appeal. That section provides:

“Where a person has been convicted on indictment.....the Secretary of State may, if he thinks fit, at any time....(a) refer the case to the Court of Appeal and the case shall then be treated for all purposes as an appeal to the Court by that person.”

In *R v Chard [1984] 78 Cr App Rep 106* Lord Diplock in considering the construction of section 17(1) said at page 111:

“As I have already indicated, the language of section 17(1)(a) is in my opinion capable of bearing one meaning only. If the Home Secretary decides to act under paragraph (a), rather than paragraph (b), in the case of a particular convicted person, it is the whole case and nothing less than the whole case of that person that the Home Secretary is empowered by the section to refer to the Court of Appeal. Upon receipt

of such a reference it then becomes the duty of the Court of Appeal to treat the case so referred for all purposes as an appeal to the Court by that person.”

A similar approach was followed by the Court of Appeal in England in the case of *Hugh Callaghan and others (1989) 88 Cr. App. R.40*.

In the light of those cases the appellant is not confined to the sole ground upon which the matter has been remitted.

The Court’s approach to an application to admit fresh evidence was enunciated in *Mario Pedro v The State Cr. App. No. 61 of 1995* and applied more recently in *Andrew Dottin and Kelvin Dial v The State Cr. Apps. Nos. 34, 35 of 1997*.

In the case of *Mario Pedro* de la Bastide C.J. in examining to what extent (if at all) the decisions in England based on the post 1966 law were relevant to our purposes said:

“My reading of the judgments which have been handed down by their Lordships in the Privy Council in appeals from Trinidad and Tobago suggest that they regard the test of whether a conviction is unsafe as being relevant in our jurisdiction, although I am not aware of any judgment in which they have expressly addressed the question whether the differences between the more recent English legislation and ours are purely linguistic or have a more material effect. This Court confronted the issue in Winston Solomon v The State (unreported) Crim. App. No. 28 of 1996. We reached the conclusion that there was no difference in substance between the two tests for determining whether a conviction should be quashed or not. Our reasoning was that in the final analysis both tests require the appellate court to consider whether there is a significant prospect that but for the irregularity, in cases in which one has occurred at the trial, or in the light of the new evidence in cases in which leave to adduce such evidence is given, the jury might have acquitted the appellant of the offence of which they found him guilty. If

there is such a prospect, then according to the English test the conviction would be regarded as ‘unsafe’, and applying the Trinidad and Tobago test a miscarriage of justice would have been established.”

On the question of credibility, the Learned Chief Justice had this to say a little later on in the same judgment:

“The Court of Appeal has in an appeal in which it receives new evidence, to come to some view as to the credibility of that evidence and its impact on the issue of the appellant’s guilt or innocence. The function of the Court in assessing the credibility of the new evidence is particularly important in cases in which the new evidence consists of the retraction by a key witness of the evidence which he gave at the trial, for in such cases it will not be feasible to have another jury decide which version of witness’s evidence they prefer.”

We feel that a similar approach should be followed in a situation where a witness comes forward long after the trial as in the instant case.

We have had the benefit both of considering at length the affidavits filed with particular reference to Lall’s and of hearing his testimony. Our first consideration must, therefore, be what weight should be given to the fresh evidence. It is only after that has been considered can the Court decide whether it would have affected the jury’s verdict.

SUBMISSIONS OF MR. ALLUM

Mr. Allum submitted that the our approach to the matter ought to be as enunciated in the case of *Mario Pedro* that is to say, the Court must first determine what, if any weight, it attaches to the fresh evidence. If the Court rejects the fresh evidence outright as being incapable of belief then the appeal must be dismissed. If, on the other hand, the Court thinks that it may be true then the Court must then go on to consider whether there has been a miscarriage of Justice.

He directed the Court’s attention to the two reasons advanced by Lall for coming forward after such a long time, firstly, to clear his conscience of something that was wrongfully

done to another person and secondly to correct a wrong that should have been corrected a long time ago and submitted that they were perfectly valid and plausible and he urged the Court to so find.

He further submitted that the Court should treat with Lall's evidence as being credible as it corroborated the State's case in certain important areas. He gave as an example Lall's testimony that the incident he witnessed took place between 6:45p.m. – 7:00p.m. on 5th August 1992.

His submission, as we understood it was, assuming Lall's testimony was true then it did not conflict with the State's case that at about 7:30p.m. the appellant was in company with Briggs in the vehicle.

He also submitted that the evidence of the State concerning James' participation in the sale of the vehicle's accessories barring the statements attributed to him could not mount a conviction for murder.

With respect to the description of the deceased as given by Lall Mr. Allum submitted that it was sufficiently close to that given by the State's witnesses to enable the Court to come to the conclusion that Lall was in fact referring to the deceased Siewdath Ramkissoon.

A similar submission was made with respect to the description of the car out of which the deceased fell that night.

With respect to why the witness Lall would have gone to collect money in the "Congo" with two persons he did not know and "Pigeon" whom he had known before and who was the person indebted to him did not go. Mr. Allum submitted that there was no inconsistency between that testimony and what Lall said in the written statement recorded by Ms. Pargass.

The Court directed Mr. Allum's attention to paragraph 11 of Lall's affidavit wherein he deposed to a conversation between the appellant and himself on a particular day when he was passing by his cell.

Mr. Allum whilst recognizing the importance of that evidence submitted that if the evidence on affidavit stood by itself the inescapable inference would be that Lall had in fact come face to face with the appellant. But he submitted the oral testimony of Lall proffered a valid explanation for what he had said on affidavit.

With respect to the second ground Mr. Allum submitted that under section 64 the President may remit the whole case or any point arising in the case for determination by the Court. Whilst conceding that the Trial Judge's misdirection with respect to the felony/murder rule had been raised and determined before the Board, he nevertheless sought to persuade us that as a consequence of the remit under section 64 the matter was at large and in any event the Board did not give written reasons for dismissing the appeal.

He further submitted that the matter having come before the Court from the President, the presidential authority overrides any decision of the Privy Council and clothed this Court with the requisite jurisdiction to revisit the matter. He was unable, however, to provide any legal authority to support that proposition.

SUBMISSIONS OF BROWNE-ANTOINE

She submitted that the Court ought to analyse Lall's evidence under three headings:

- (i) His reason for not coming forward with his story before;
- (ii) His reason for coming forward now; and
- (iii) Matters which go towards the plausibility/implausibility and reliability of his story and any matters which may corroborate it.

In dealing with ground (iii) she submitted that certain facts relating to the murder of the deceased were so well known that they fell into the realm of public knowledge. She therefore, submitted that the Court should not attach too much significance to the fact that Lall was able to testify about matters such as:-

- (i) He was introduced to a Anthony Briggs;
- (ii) A “white bluebird car” was used during the incident;
- (iii) The white bluebird car had “broad tyres” and “a very good sound system”;
- (iv) A person known as “Ras” was also involved in the events;
- (v) A place known as “the Congo” was mentioned in relation to some of the events;
- (vi) A hammer was used to inflict injuries to a man of East Indian descent;
- (vii) The injuries were inflicted mainly to the head of this person

She invited the Court to pay special regard to Lall’s testimony that he had spoken to no one save and except to his father. She submitted that when regard is had to that evidence and Lall’s testimony that the appellant had asked if he was the youth-man in the incident it made his evidence incredible.

She also submitted that the Court ought to consider that the appellant’s solicitors had ample opportunity to refer the matter to the authorities for investigation but they never availed themselves of the opportunity.

When considering the question why Lall did not come forward before she submitted that he timed his coming forward to a period after the execution of Anthony Briggs on 28th July 1999. She invited the Court to consider the facsimile sent in June 1999 from solicitors in London acting on behalf of the appellant advising him that the affidavit of Lall would have to be shown to Lall’s solicitors. Anthony Briggs was however, executed before Lall had sworn to the affidavit.

ANALYSIS OF LALL’S EVIDENCE

We are very conscious of the fact that a condemned prisoner as a last resort would try almost anything to save his life. After all, if Lall’s evidence is capable of belief the

appellant must be acquitted. We, therefore, must carefully analyze his evidence and give it our most careful consideration.

In so doing we have followed the approach of this Court in *Mario Pedro* and considered the evidence under three headings

- (i) His reason for not coming forward earlier
- (ii) His reason for now coming forward and his meeting with the appellant
- (iii) Is his evidence about the incident he allegedly witnessed capable of belief

His reason for not coming forward earlier

In his affidavit he said that he did not come forward before because he was scared that he would be charged for murder even though he did not participate in any way in the attack upon the deceased.

Before this Court he said that having witnessed the incident he was scared and he wanted to disabuse his mind of the entire incident. However, up to the time of giving evidence before us he still was not certain whether he could be charged for murder. In addition, he told us that he had been on the run from the police and it would have been inappropriate for him to go to the police in this matter.

Even when he had seen the appellant's picture in the newspaper at the time of his conviction for the murder he still did not come forward because as he said, "*It doesn't really bother my heart too much, I was just glad that somebody pay for it and it wasn't me.*"

When pressed by State Attorney why he did not come forward when he discovered that the appellant was not Ras he said that at the material time he was an inmate on the Carrera Island prison and did not know how to go about contacting anyone to report the matter.

It must be remembered that Lall was no new comer to prison. According to his own testimony he had been incarcerated at Golden Grove prison in 1990-1991; then again from 1993-1996 and was back in prison from 1997 to the present time. He must have been aware of the several lines of communication within the prison and if he seriously wanted to report this matter he had ample opportunity to do so.

Even though as he said letters written by inmates are censored by the prison authorities before dispatch, Lall ought to have had no fear of putting such information as he had into a letter if he really wanted to report the matter. Another reason advanced by him was that he was afraid of Briggs and if Briggs had gotten wind of what he had done he would have been killed in prison.

We were not at all impressed with the reasons he gave for not coming forward earlier.

His reason for now coming forward and his meeting with the appellant

According to his affidavit he had read a report in which a witness had come forward long after the person had been convicted and that prompted him into action.

Naturally, he was cross-examined about that newspaper report. He was not able to give the name of the convicted person, the victim nor the person who had come forward as the witness. When pressed by Mrs. Brown-Antoine for a name, all he could say was that it was an ice-pick murder somewhere in the East/West corridor between San Juan and Arima. He could not even recall when he had read the report save to say it might have been late 1997 or early 1998. He was unable to provide us with any useful information about that report.

I now turn to the alleged meeting with the appellant in prison. As indicated earlier in this judgment Lall deposed that he had been brought down to the State prison in Port of Spain on or about the 11th January, 1999 for a Court appearance and whilst there he made enquiries to ascertain exactly where, in that prison, the appellant was detained. He further deposed that on 18th January, 1999 he had just returned from Court and was passing by the appellant's cell when he (Lall) called out to the appellant. Thereupon, the

appellant enquired of him if he was the youth man who was there at the time of the incident.

Lall said he told him he did not know what he was talking about whereupon the appellant referred to him as a 'dog' and told him he could assist him by speaking the truth. Lall said he told the appellant he would see and a few days later he sent a message by a prison orderly to the appellant telling him, ***“If I don’t get in any trouble, it would not cost me anything to assist you”*** and the appellant sent back a message saying he would inform his attorneys.

There can be no doubt that on the account given in the affidavit Lall is referring to a direct encounter with the appellant as he passed his cell.

Before us, however, he said that on the day in question he, along with other prisoners was being escorted to the reception area of the prison to board a van to attend Court. He was walking along a 20-25ft. long corridor in an enclosed area and some condemned prisoners were housed in that area. He shouted out in a loud tone of voice ***“Wenceslaus James, Wenceslaus James”*** and a voice responded asking, if he was the small man who was there at the time of the incident and Lall answered in the negative. He also said one Prison Officer was in the front at a gate and another at the rear at another gate and that he was somewhere in the center among other prisoners.

Bearing in mind that Lall had never seen nor spoken to the appellant in his life and that he had never spoken to anyone about the incident save for his father who lived in the United States of America we found that evidence incredible for the following reasons:-

- (i) There could be no certainty that the person who responded to Lall’s call was the appellant;
- (ii) Assuming that it was the appellant who responded, how would he have known it was Lall calling him when according to Lall he did not identify himself and more importantly how would the appellant have known to respond saying, ***“are you the small man who was there at the time of the incident.”***

It is patently clear that his evidence on affidavit on that issue was quite different from what he said in his testimony before this Court.

The affidavit of John Rougier, Assistant Commissioner of Prisons was filed shortly before the hearing of this appeal began on 22nd January 2003. In answer to a question from the Court, Mr. Allum said that he had shown Lall Rougier's affidavit before the hearing began.

Having considered Rougier's affidavit and Lall's testimony, we have come to the conclusion that Lall tailored his oral evidence before us. Having regard to what Rougier was saying Lall was brought to the Port of Spain prison on the 7th and the 15th January 1999 and not on the 18th January as Lall had deposed. Rougier further deposed that in January 1999 the appellant was housed in 'H' Division and inmates coming into the prison from Court could not interact with condemned prisoners in that Division since such condemned person could not be seen. He admitted that although whilst it was possible for an inmate to shout to a condemned prisoner such a practice is frowned upon by the prison authorities.

We have no hesitation in accepting Mr. Rougier's version as to the date in which Lall had been at the State prison and also the place where the appellant was detained on 18th January. Apart from the fact that he was not cross-examined on that issue, he, having had access to the records would be more accurate than Lall.

Lall's evidence as to the alleged meeting is just not plausible for the reasons set out earlier. Accordingly, we reject the testimony that he had any encounter with the appellant on the way to or from Court on 18th January, 1999 or on any other date.

Is his evidence about the incident he allegedly witnessed capable of belief

A good starting point is the affidavit of Superintendent Stephen Quashie who conducted the investigations into the death of the deceased and who discovered the body.

Superintendent Quashie was not cross-examined. According to him that body was discovered in a ravine about 20-30ft off the Heights of Guanapo Road approximately two

miles North of the Eastern Main Road and it was neither bound nor gagged. He further said that the area where the body was found was approximately two and one-half miles east of the Congo.

According to Lall, when the man fell out of the car they were going towards the Congo to collect some money. The trunk lid flew open and when he came out he saw that the man was tied and gagged and he wore a 'Dick Tracy' jersey with the print at the back. We note, however, that in the statement recorded by Ms. Pargass he spoke of the print being in the front. When confronted with the two statements his response was, "***I still cannot remember if is exactly in the back or the front.***"

He said Briggs and Ras were the first to come out and Briggs had a hammer. Anthony Briggs and Ras went up to where the deceased had fallen. Whilst he remained by the car trunk he closed the trunk. He also said that Briggs and Ras conferred in 'hushed tones' for about a minute then Ras said "***is better we fix the man.***" Briggs struck the man on the back of his head with the hammer. He also struck him on the side of the face with the hammer and twice on the throat with the said hammer. However, the evidence of the Forensic Pathologist did not mention any injuries on the throat of the deceased.

Having earlier said both on affidavit and in his oral testimony that he had closed the lid of the car, the Court asked him, "***Why did you close the trunk***"? He said when he came out of the car he stood at the back and placed his hand on the trunk and the weight of his hand caused it to close.

Lall also told us that after Briggs had struck the deceased for the fifth time he (Lall) walked up to the spot where the deceased was lying. When asked why he had done so he said that he wanted to see the race of the person. It is strange that although he wanted to have nothing to do with this incident yet he went up to the body to ascertain the race of the man.. It is obvious that had he maintained his position 5ft away it would have been difficult for him to properly identify the deceased. We feel that he said that he went up to the body in order to be able to give evidence of his race.

Lall also said he had not known Briggs before that day nor did he know Ras. Pigeon who was known to him and who owed him some money encouraged him to go with these two strangers to collect some money. He could not say how much money was to be collected nor did he know how much he would receive. We find that story incredible.

There was also evidence on affidavit from Lall that the deceased wore a pair of black “Travel Fox” sneakers. When the body was discovered by Superintendent Quashie a right side of a black shoe was near the left foot and the other side was in the water near the body. The only person who wore Travel Fox sneakers that day was the appellant and he handed them over to Superintendent Quashie upon his arrest and told Superintendent Quashie that those were the sneakers he was wearing at the time. It followed, therefore, that Lall’s evidence about the deceased wearing ‘travel fox’ sneakers was not true.

CONCLUSION

As to the second ground, there is no dispute that before the Board, the appellant’s counsel submitted that the judge had erred in directing the jury on the felony/murder rule. Such a direction was clearly an error of law, see *Moses v State [1997] A.C. 53*. However, as Lord Mustill observed in *Moses* at page 69D, the fact that a direction given in accordance with the felony/murder rule must now be held to have been a misdirection need not inevitably lead to the quashing of the conviction. A careful analysis of the evidence may show that there was no miscarriage of justice, or at least that a verdict of manslaughter may properly be substituted, as was done in the case of *Giselle Stafford and Dave Carter v The State, Privy Council App. No. 7 of 1998*.

We, therefore, feel sure that the Privy Council would have taken that into consideration in dealing with the appellant’s appeal.

That, however, is not the end of the matter. The question arises, can this Court allow to be re-litigated a matter that has already been the subject of judicial scrutiny?

Some guidance can be found in the decision of the Privy Council in the case of *Indrani Ramjattan v The State [1999] 54 W.I.R.353*. There, the petitioner was seeking leave of the Board to adduce new evidence not previously relied upon.

Lord Hobhouse of Woodborough in delivering the reasons of the Board said at page 384:-

“Their Lordships’ Board has jurisdiction to hear further petitions in respect of the same matter notwithstanding the dismissal of earlier petitions. The jurisdiction will, however, only be exercised in exceptional cases where new grounds of appeal are raised of such a character and of sufficient merit to justify a second petition. A second petition will not be entertained where the proposed grounds are in substance the same as those argued on the earlier petition or grounds which should properly have been argued at that time.”

A fortiori, an appellant cannot in these proceedings seek to raise a ground, which in substance is the same as that raised before the Board in the very matter. There must be some degree of finality in the appellate process.

With respect to the new evidence in *Stafford and Luvalgio v D.P.P. (1974) 58, Cr. App. R 256* Lord Dilhorne said:

“While as I have said the Court of Appeal and this House may find it a convenient approach to consider what a jury might have done if they had heard the fresh evidence, the ultimate responsibility rests with them and them alone for deciding the question.”

Christopher Lall did not make a favourable impression upon us. We have carefully considered his affidavit and his oral testimony. His oral testimony contradicted and departed from the evidence on affidavit in very important areas. There were several unsatisfactory features about his evidence and I do not think that any reliance can be placed on his evidence that he was present when Siewdath Ramkisson was killed.

We are of the opinion that he has come forward at this stage for reasons best known to himself.

We are of the opinion that the swearing to the affidavit by Lall after the execution of Briggs was no mere coincidence. It is quite clear and we are satisfied that he timed his coming forward to give this account to a period after the execution of Anthony Briggs.

It must be remembered that Ms. Pargass had been to see him as early as March 1999 and he made it clear to her on that visit that he was not signing any statement. However, on her second visit in September, 1999 he was ready and willing to swear the affidavit. By that time, of course, Briggs had been executed.

We have no doubt about the falsity of Lall's evidence and we see no grounds for concluding that in the light of the new evidence the jury might reasonably have doubted the correctness of the verdict.

Accordingly, the appeal is dismissed and the conviction and sentence affirmed.

S. Sharma
Chief Justice

M. Warner
Justice of Appeal

S. John
Justice of Appeal