

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CRIMINAL APPEAL No. 2 of 1990

BETWEEN:

EVERETTE BYERS

- Appellant

and

THE QUEEN

- Respondent

Before: The Honourable Mr. Justice Byron, President, (Acting)
The Honourable Dr. Nicholas Liverpool, J.A.
The Honourable Mr. Justice Satrohan Singh, J.A.

Appearances: Mr. J. Fuller for the Appellant
Mr. Lloyd Luckhoo, Q.C., and Mr. L. Osborne for the
Respondent

1992: Nov. 24, 26, 27.

JUDGMENT

LIVERPOOL, J.A.

The appellant was tried before Mitchell J. and a jury and was on the 2nd day of April, 1990 convicted of murder and sentenced to death by hanging.

When this matter came up for hearing on Tuesday 24th November 1992, Mr. J. Fuller, Counsel for the appellant questioned the accuracy of the record. He referred this Court to an affidavit filed by Mr. Ralph Alexander Francis who had appeared as Counsel for the appellant at the trial. In his affidavit which was filed on 20th November 1992, Mr. Francis swore inter alia to the following:

- (a) He had made a written transcript of the evidence of the witnesses who gave evidence for the prosecution at the trial, and also during the trial judge's direction to the jury.
- (b) He wrote to the Registrar enquiring when the record of appeal would be ready, and he was told inter alia that, "...all the relevant Notes of evidence had been typed and

had been sent to the judge who presided over the trial for checking."

- (c) He subsequently obtained from the Registrar a copy of the typewritten transcript of the notes containing corrections, deletions and additions which were made in handwritten script. (A copy of this transcript was attached to Mr. Francis' affidavit).
- (d) He examined Volume III of the record and found that it was not an accurate reflection of the trial judge's directions to the jury.
- (e) Upon further examination of the record with his notes he observed an inaccuracy in Volume I of the record which contained the notes of the witnesses; and another inaccuracy in Volume II which contained a transcript of his address to the jury. (The inaccuracies were specified).
- (f) He therefore concluded that the deletions and additions made to the transcript of the judge's directions to the jury constituted fundamental changes to that which was told to the jury, and that consequently the use of Volume III of the transcript would be seriously prejudicial to the appellant if used at the hearing of his appeal.

Mr. Fuller referred the court to Rule 48 of the Court of Appeal Rules, 1968 and requested the Court to use the summation of the trial Judge in its unamended form for the purposes of the appeal. He pointed out that the statutory declaration verifying the transcript did not form part of the record and cited the case of **R v KLUCZYNSKI AND R v STEFANOWICZ (1973) All E.R. 401**; and paragraph 636 of Volume I of the 4th Edition of Halsbury's Laws of England, in support of his application for a retrial.

Learned counsel for the Queen accepted that there should be a proper record before the Court, and that the relevant statutory declaration had not been filed; and submitted that this was a case in which a report from the trial Judge should be requested. He went on to point out that according to his notes which were taken at the trial, the trial Judge's summary of the evidence to the jury of five witnesses who gave evidence for the prosecution seemed also to have been omitted from the record.

The Court heard evidence on oath from Mrs. Hyacinth Lewis who,

at the material time, was employed as one of the Court stenographers. She testified, that the unamended typed version of the Judge's summing up was prepared by her and was an accurate record of the proceedings as reflected by a taped recording of the proceeding. The tapes had been handed to her for typing at the end of the trial. She stated that the tapes were clear to her but that she had not typed the summing up which formed part of the record of appeal; and that although she had typed the final copy of the notes of evidence which formed part of the appeal record; she did not do so from the Judge's note book, but from a typed draft which had contained handwritten alterations.

The Court sought and obtained the trial Judge's notes, placed them at the disposal of Counsel on both sides and urged them to agree on the notes which should form part of the record, but they were unable to do so. In addition to the missing parts which contained the summary of the Judge's evidence of the five witnesses, Counsel could not agree on a crucial sentence of Virginia Issava's evidence; an account of the no case submission which had been made and overruled; and a part of the evidence of a witness, Tim Hector.

In our view, the ends of justice, particularly as this is a capital offence, requires that as accurate a record as is possible of the proceeding in the Court below be made available to all parties. This is not the case as matters now stand.

We would therefore rule that the hearing be adjourned to the next sitting of the Court in order that -

- (a) the stenographer Mrs. Lewis may make the statutory declaration of the typed version of the summing up attached to the affidavit sworn by Mr. Francis in its unamended form;
- (b) the Judge's notes of the evidence be typed from the Judge's note book, and the appropriate statutory declaration be sworn to;

leaving it to either side to swear to affidavits as to any variations or omissions which are still claimed to exist.

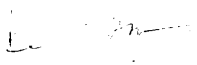
In conclusion this Court would like to thank learned counsel on both sides for their assistance in this matter. We would also adopt the closing words of **Roskill L.J.** in **R v KLUCZYNSKI AND STEFANOWICZ**. These words were uttered in reference to a case where a Judge had revised his notes in England where the rules are

similar. He stated on page 404 that -

"The onerous task of the shorthand-writers and the work of this court would be quite impossible and this statutory verification cannot be fulfilled if the trial judge seeks to revise the draft of a transcript of a summing-up and this court has never heard of this being done before. What the court requires to know is what the shorthand-writer takes down in open court as the direction which the judge gave to the jury. They do not wish to know what the judge thinks he ought to have said to the jury or may with hindsight subsequently wish he had said to the jury. This was quite wrong and this court ventures to emphasise this in the hope that this will not recur".

And we would add "in any court within this jurisdiction."


N.J.O. LIVERPOOL,
Justice of Appeal


C.M.D. BYRON,
President (Acting)


Sgd. (Satrohan Singh).

SATROHAN SINGH,
Justice of Appeal