JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 119 & 120/82

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A. (AG.)

ATHLEE SWABY
PHILBERT TRENCHFIELD

V.

REGINA

Mr. Frank Phipps, Q.C. and Mrs. N. Hamilton for Swaby.

Mr. Earl Delisser and Miss Kathleen Phipps for Trenchfield.

Mr. G.R. Andrade, Deputy Director of Public Prosecutions and Mrs. Marva McIntosh for the Prosecution.

November 1 - 3, 1982

KERR, J.A.:

These appeals were from convictions in the Court Martial on February 10, 1981, for offences under the Defence Act. On November 3, 1982, we allowed the appeals, quashed the convictions and entered judgments and verdicts of acquittal. We now set out herein our reasons for so doing.

The appellant Swaby was convicted for -

(1) Conduct to the prejudice of good order and military discipline contrary to Section 75 of the Defence Act that on divers dates between 1st April, 1980, and 22nd June, 1980, he took part with other members of the Jamaica Defence Force and civilians in discussions of matters likely to create breaches of discipline of a service nature.

(2) Incitement to mutiny with violence contrary to Section 41(1) of the Defence Act that on divers dates during the same period he incited officers and soldiers of the Jamaica Defence Force to take part in a mutiny involving violence to the Chief of Staff and their officers of the Jamaica Defence Force and to overthrow the lawful authority in Her Majesty's Forces.

(3) With failing to report a mutiny contrary to Section 42(b) of the Defence Act for that he during the said period knowing that soldiers of the Jamaica Defence Force intended to mutiny ..... failed to report the intended mutiny without delay.

Trenchfield was convicted on charges similar to (1) and (3) above.

Swaby and Trenchfield were charged and tried with seven other members of the Jamaica Defence Force. Five, Sergeant Farquharson, Corporal Brown, Lance Corporal Charleston Reid, Private Gallimore and Private Kelson were acquitted at the end of the prosecution's case in response to submissions of no case to answer, while Lieutenant Carlton Reid and Sergeant Isaac Jagnarine were acquitted at the end of the trial. Swaby alone was charged with incitement to mutiny.

For the capital city of Kingston "it was the worst of times." The general election was clearly imminent and factional political fervour manifested itself in unprecedented violence often with fatal results. It was a time of fearful apprehensions and dark surmises and a report that a coup d'etat had been nipped in the bug undoubtedly carried an aura of conviction. It was alleged that a plan devised by a H. Charles Johnson, President of the Jamaica United Party - a minor political party - involved an overthrow of the Government by force of arms provided by mutinous members of the Jamaica Defence Force to be recruited by appellant Swaby and that Trenchfield was an early convert to the cause.

In addition to the charges before the Court Martial, there was at the same time pending before the Supreme Court an indictment charging both appellants, Charles Johnson and other members of the Jamaica Defence Force with Treason Felony.

It is agreed on all sides that the fulcrum of the charges both in the Supreme Court and in the Court Martial rested on the evidence of Roy Manning a Corporal in the Jamaica Defence Force.

As the main ground of appeal argued before us is to the effect that the verdicts are unreasonable and cannot be supported having regard to the evidence, an analytical examination of that evidence is deferred to deal with two questions of a preliminary nature.

First, an application by Mr. Phipps to permit the tendering for the consideration of the Court the testimony of Corporal Manning as set out in the summary of evidence upon which the charges were drawn. The grounds for this application were that in the "summary" the evidence differed considerably in certain vital aspects from that given at the Court Martial. He conceded that this would not fall within the category of "fresh evidence" but contended that the Court had power under Section 28(a) of the Judicature (Appellate Jurisdiction) Act to grant this application and in the instant case ought to do so in the interest of justice.

Section 28(a) reads:

> "For the purposes of Part IV and Part V, the Court may, if they think it necessary or expedient in the interest of justice -
>
> (a) order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to them necessary for the determination of the case."

Part IV deals with "Appellate Criminal Jurisdiction" (Supreme Court).

The Court unhesitatingly refused this novel application. Indeed, what was being sought was an opportunity to discredit the witness on the basis of inconsistency between his statements on a previous occasion with the evidence given at the Court Martial without confronting him with the earlier evidence in the manner provided by the Evidence Act, Sections 16 and 17. To do so would be manifestly unfair to the witness who would have had no opportunity of denying or admitting and/or explaining such

inconsistency as may exist and would be contrary to the established procedure. In any event, we are of the view that the course advocated by Counsel was not within the contemplation of Section 28 of the Judicature (Appellate Jurisdiction) Act in the light of the specific provisions of the Evidence Act.

The second question was more complex. It transpired that at the Court Martial the witness Manning had given evidence on affirmation while on previous occasions including the preliminary examination on the treason felony charges he had given evidence on oath and subsequently at the trial in the Supreme Court he had also given evidence on oath. Mr. Phipps submitted in effect that evidence on affirmation was only admissible in the circumstances contemplated in Section 107 of the Defence Act. These circumstances did not exist in the instant case and therefore the whole of Manning's evidence was not admissible.

To assess the circumstances we considerd the following amongst other passages from the transcript of the evidence:

"Corporal Manning called and affirmed:

Mr. Phipps: Did he have the Bible in his hand when he took the oath?

President: He affirmed."

There was no more on this until during the course of cross-examination thus:

"Mr. Phipps: May I have the original now, sir? This may be a convenient time. When you gave evidence at the summary, you gave evidence on oath, sworn to speak the truth, am I right?

A: Pardon, me, sir.

Q: When you gave evidence at the summary, did you take an oath on the Bible that you are going to speak the truth?

" A: I don't remember if I took an oath.

Mr. Phipps: Let me go back to this. You don't remember if at the summary you took an oath on the Bible? You remember at Half Way Tree?

Cpl. Manning: I remember at Half Way Tree.

Q: I take it since then you have changed your religious affirmation?

A: I did not.

Q: Then why did you refuse to take an oath at this tribunal?

A: I just wanted not to take an oath and I don't take it.

Q: Do you believe in taking an oath, sir?

A: No, I don't see the necessity in taking an oath, sir.

Q: You believe in the sanctity of an oath? Now, when you take an oath you are obliged to speak the truth.

President: Could you rephrase that in simpler words for him; he may not understand the meaning of sanctity.

Mr. Phipps: Do you believe the binding force of an oath, the necessity to speak the truth when you take an oath?

A: You can speak the truth without taking an oath.

Q: Would you please answer my question?

A: Is men write the Bible.

Mr. Phipps: Mr. President, I am asking for an answer.

President: Corporal Manning, the question is to be answered. You have not answered the question.

A: I do not know about the legal proceedings. I would like to be enlightened, sir.

Judge/ Advocate: Corporal Manning, the question which the Commander has asked you is very simple. Do you believe that when you take an oath to give evidence that it is your duty to speak the truth?

A: If I believe, sir?

"Judge/ Advocate: Yes, that is the question. Do you believe?

A: Yes, sir, I always believe in what I say.

Judge/ Advocate: That is the question you were asked and that is what you should answer.

Mr. Phipps: The answer is, you always speak the truth. I am talking about when you hold God's Bible in your hand, you are obliged to speak the truth and you must not lie. Do you appreciate that or you don't understand it.

A: I don't understand.

Q: Mr. President, Officers, and Members of the Court, I am going to make a request of the Court that the Court goes into the question of the whole competence of this witness. I am sorry I did not make it before because I did not know that I would get these answers. We know that at least, to put it at its lowest - do you wish to confer? Before you rule on my application I probably should take it one step further on the evidence. You affirmed yesterday before giving your testimony?

Cpl. Manning: I would just like to make a request, sir, I would like one minute to go to the bath room.

President: We are going to allow the witness to answer the call of nature. Sergeant Major, escort the witness to the appropriate point."

(SHORT BREAK)

ON RESUMPTION:

"Mr. Phipps: I think I was on the point, Mr. Manning, where I was bringing to your attention, in the commencement of your testimony you made an affirmation.

A: I don't understand the word, affirmation.

Q: You did not take an oath on the Bible?

A: I did not recall whether I take an oath or not, sir.

Q: I am talking about yesterday.

A: You mean yesterday, sir.

Q: Yes.

"A: I did not take an oath yesterday.

Q: And I heard you to say earlier that is man write the Bible.

A: Yes, is men write it.

Q: Do I understand you to mean that you do not accept the sanctity of what is written therein?

A: I accept some of it, sir.

Q: That is a new approach to your religion?

A: From I know myself I reading the Bible, sir.

Q: But you don't think that when you are about to give evidence, you don't think that you should take an oath?

A: I don't think it is necessary sir.

Q: You don't think it is necessary?

A: No. sir.

Q: And if you take an oath on the Bible, there is no special obligation to speak the truth?

A: If there is special obligation....

Q: ... to speak the truth when you take an oath on the Bible?

A: Not from my point of view, sir.

Q: From his point of view, sir, there is no special obligation to speak the truth."

Then on the close of the prosecution's case, the question of the admissibility of Manning's evidence was raised by Mr. Phipps as part of his submission of "no case to answer" in the following manner:

> "The submission is that, regardless of whether the evidence is reliable or unreliable, the submission at this stage I make, with respect to Cpl. Manning, is that he has in effect given no evidence at all, and everything that he has said should be completely disregarded. In other words, the court, in my submission, is left in a position where the Prosecution's case is presented without Cpl. Manning having attended and spoken one word. I repeat, this is not on the point of credibility, and the reason I advance, for the court's consideration, for that

> "submission is that his evidence was not given on oath. I don't think I need argue the proposition that all evidence must be given on oath or by solemn affirmation. I refer to Phippson on Evidence, 10th Edition, page 572, paragraph 149(1) and 149(2). This submission is that M'Lord, that every witness must be sworn on oath before he gives evidence, irrespective of the nature of the oath which may vary according to his particular religious belief, he must be sworn. A witness must be permitted to make a solemn affirmation in two circumstances and two circumstances only. One, where he has no religious belief, and in as much as I might be tempted to say that Mr. Manning has no religious belief, he himself did not say so, or two, where his religious belief precludes him from taking an oath."

Then and there as before us he quoted in support dicta from R. v. Hines & King (1971) 17 W.I.R. p. 326.

The learned judge/advocate with scholarly industry, in addition to the judgment in R. v. Hines (supra), inter alia, considered the history of oaths in the common law, R. v. Clarke (1962) 1 W.L.R. 180, and cases of respectable antiquity such as the Queen v. Moore (1892) 8 T.L.R. p. 237 and Baxter v. Langley (1868) 38 L.J.M.C. 1 and Section 21(1) & (5) of the Constitution of Jamaica and the definitions of "Religion" and "Belief" in Chamber's 20th Century Dictionary and concluded:

> "In the examination of the provisions of Section 21 of the Constitution, there is much that commends the view that a more liberal understanding of cultural and social development in Jamaica in the century which has elapsed since the fundamentalism of the 19th Century has permitted not only the recognition of a universal freedom of conscience, but also the necessity to protect it.
>
> I am therefore constrained to think that having regard to the provisions of Section 21(5) of the Constitution, it seems reasonable to postulate that since 1962, the request of the choice by a witness in Jamaica to be permitted to affirm ought to be accepted as implying that he objects to take an oath because it is contrary to his religion or to his belief, or that the manner in which an oath is required to be taken is contrary to either his religion or his belief. Consequently, enquiry by the President of the witness whether he wished to affirm or to take an oath on the Bible appears to me to be a wholly civilised approach to the question, particularly because the individual obligation and criminal liabilities incurred by the witness

> "or other person remains precisely the same whether the testimony is given on oath or by affirmation."

Our approach to the question was to consider the existing statutory provisions because if they are clear and unambiguous, there would be no need to seek external aids to interpret them.

Section 98 (2) provides:

> "Every witness before a court-martial shall be examined on oath."

[There follows a proviso permitting children of tender years to give unsworn testimony].

> "(3) An oath required to be administered under this section shall be in the prescribed form and shall be administered at the prescribed time by the prescribed person and in the prescribed manner."

Section 107:

"If -

(a) a person required by virtue of this Act to take an oath for the purposes of proceedings before a court-martial objects to being sworn, and states as the ground of his objection either that he has no religious belief or that the taking of an oath is contrary to his religious belief; or

(b) it is not reasonably practicable to administer an oath to such a person as aforesaid in the manner appropriate to his religious belief,

he shall be required to make a solemn affirmation in the prescribed form instead of taking an oath."

In The Constitution of Jamaica under Chapter 3 - "Fundamental Rights and Freedoms" - Section 21 provides:

> "(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this section the said freedom includes freedom of thought and of religion, freedom to change his religion or belief, and freedom, either alone or in community with others, and both in public and private to manifest and propagate his religion or belief in worship, teaching, practice and observance.

(2) .....

(3) .....

(4) .....

(5) No person shall be compelled to take any oath which is contrary to his religion or belief or to take any oath in a manner which is contrary to his religion or belief."

Mr. Andrade adverted attention to the difference in wording between Section 21(5) of The Constitution which speaks of "religion or belief" and Section 107 of the Defence Act of "religious belief."

The Defence Act came into effect on 31st July, 1962, and the the relevant portion of The Constitution immediately before August 6, 1962. The difference as far as the practicalities are concerned is of no moment. Religion is itself a belief. The Constitution in its wisdom has "religion or belief" and thereby precludes any argument as to whether or not a particular belief is a religion. The following definition of religion and belief quoted from the dictionary (supra) by the learned judge/advocate:

"Religion: belief in, recognition of, or an awakened sense of, a higher unseen controlling power or powers with the emotion and morality connected therewith; rites or worship; any system of such belief or worship.

Belief: persuasion of the truth of anything; faith, the opinion or doctrine believed; intuition; natural judgment,"

fortifies our reconciliation of the intendment of the Constitution with the words of the Statute.

Nor is there any conflict between the provisions of the Constitution and Sections 98 and 107 of the Defence Act. Section 21(1) and (5) are concerned with freedom of conscience which clearly and expressly embraced a freedom to choose the form of oath which a deponent considers binding on his conscience or to object to taking any oath either in form or substance that is contrary to his religion or belief.

On the other hand Section 98 of the Defence Act makes the taking of an oath the primary prerequisite for the acceptance of oral testimony (subject ofcourse to the express statutory exception in the proviso).

Section 107 on the other hand purposefully provides a secondary alternative in the circumstances described or contemplated therein so as not to exclude persons who in the exercise of their "freedom of conscience" object to the taking of an oath. The provisions are clear and unambiguous. With due deference to the learned judge/advocate there is no justification for the liberal interpretation implicit in the reasons for his ruling on this question. The freedom to select one's oath or to object to the taking of an oath in form or nature as enshrined in the Constitution does not in any way confer on a witness an untrammelled freedom to prefer an affirmation to oath in the giving of oral testimony in a Court. The grounds for administering an affirmation in lieu of an oath at a Court Martial must fall within the ambit and scope of Section 107 of the Defence Act. Here there can be no repeal of the Statute by implication as the two forms of legislation deal with different subject matters; The Constitution with the freedom of conscience in relation to oaths; the Defence Act the order of precedence in respect to an oath vis-a-vis an affirmation in giving oral testimony. Nor do the cases of R. v. Moore (supra) and R. v. Hines (supra) support the liberal interpretation of the learned judge/advocate.

In R. v. Hines (supra) the appellants were tried by jury on an indictment containing three counts charging them jointly with assault, robbery with aggravation and malicious damage to a motor bus. They were acquitted of robbery with aggravation but convicted on the other counts. At the close of the case for the prosecution King had given sworn testimony

in his own defence which was an alibi. Hines then elected to give evidence on oath but declined to be sworn in the form prescribed by the Oaths Act. His reason for refusal was that he professed the Rastafarian faith and would only consider himself bound by an oath in the form commencing "I swear by Almighty God, King Rastafari." The trial judge refused to permit him to be sworn in a form other than that prescribed by the Oaths Act, stating that, as far as he knew, an oath taken in the form in which Hines wished to take it was not lawful. Hines thereupon rested his case. On appeal, it was held that the judge erred in refusing Hines to be sworn in a form which he declared to be binding on his conscience and in so doing deprived him of his right to give sworn testimony in his defence, and his convictions therefore could not stand.

In giving the judgment of the Court and en route to his conclusion, Luckoo, J.A. made a comparative analysis of the statutory provisions as to the administering of oaths and the form prescribed here by current legislation with that in England and concluded at p. 329.

> "It will therefore be seen that so far as these statutory enactments go the position in England and in Jamaica in relation to the administration and taking of an oath or making an affirmation (apart from the difference already noted which is not germane to the issue in this case) appears to be the same. [The difference noted was that where in the English Act the words 'shall hold the New Testament or in the case of a Jew, the Old Testament' appear, the Jamaican Act reads simply 'shall hold the Bible'].'"

He then considered inter alia dicta in Omichund v. Barker (1774) 1 Atk. p. 27 and the Privy Council case of Lala Indar Prasad and Another v. Lala Jagmohan Das and Another (1927) 43 T.L.R. p. 536. Then at p. 333 said:

> "Before leaving Hines' case it ought to be noticed that the trial judge was also in error in enquiring of Hines whether he wished to affirm. Once a witness does not object to the taking of an oath on the ground that he has no religious belief he is not to be permitted to affirm."

This passage on which the appellant so strongly relied is clearly obiter since the judgment was concerned with freedom of choice in relation to the form of the oath. It does however, support the interpretation that the taking of an affirmation instead of being sworn is not a simple choice or preference for the witness to exercise at his pleasure.

In his reasons for his decision the learned judge/advocate in reviewing R. v. Moore (supra) cited with apparent approval Mr. Justice Willes' categorising of the essential requirements in order that evidence on affirmation may be acceptable:

> "(1) That the witness objects to being sworn.
>
> (2) That he had a religious objection to take an oath or
>
> (3) He had no religious belief."

Having done so, it is surprising that in his pursuit of a liberal interpretation he erred and strayed from the established path by declaring:

> "That having regard to Section 21(5) of the Constitution it seems reasonable to postulate that since 1962, the request or choice by a witness in Jamaica to be permitted to affirm ought to be accepted as implying that he objects to take an oath because it is contrary to his religion or belief or that the manner in which an oath is required is contrary to either his religion or belief."

This conclusion overlooks the fact that the Constitution makes no provision for the giving of evidence on affirmation and Section 21(5) thereof is concerned implicitly with freedom of choice in relation to the form of the oath to be taken by a deponent and expressly with the right to object to the taking of any oath or the form of an oath when such is contrary to his religion or belief. The authority to permit evidence on affirmation must be sought elsewhere. For the purpose of this case, such authority exists in Section 107 of the Defence Act.

It is therefore necessary to consider whether the circumstances in the instant case are such, that it was proper to admit evidence on affirmation.

The transcript is silent as to Manning's objection to the taking of an oath but the ruling of the learned judge/advocate makes it clear:

> "When Corporal Manning was called to testify, the officer assigned to swear in, offered him a Bible and the witness was asked by the President whether he wished to testify on oath or to affirm."

This is clearly offering the witness a choice. It would be naive to interpret this as an objection to being sworn. No objection was taken by the defence to the procedure then and no enquiries were instituted to ascertain the reason for the witness' preference. But the matter did not end there. Cross-examination as quoted above elicited information to the effect that he clearly did not consider that there lay on a person taking an oath, a special and solemn obligation to speak the truth. It is manifest from the very words of the oath that the aim was to impose upon the taker a solemn obligation binding him in conscience to speak the truth. This is so in principle notwithstanding that this aim is on occasions not achieved, because a deponent pays but lying lip-service to the oath. It would indeed be pointless and absurd to administer an oath to a witness who has clearly indicated that he does not believe the taking of an oath imposes any solemn obligation on him to speak the truth. Accordingly, whether or not he had any religious belief, any belief which he had, clearly did not embrace the belief in the binding /of an oath. Therefore, for all practical purposes, as far as he was concerned, he had no belief in its solemn purpose. Accordingly, evidence on affirmation was permissible. We agree with the view of learned judge/advocate that as the witness appreciated that the occasion demanded of him an obligation to speak the truth and the affirmation, by its terms and tenor, imposes on him such an obligation he would be liable to conviction for perjury for giving false evidence in a material particular. We are of the view that irrespective

of the form of the oral undertaking, the essential requirement is that the witness must consider himself by reason of his undertaking to be under a binding obligation to speak the truth. In the circumstances, we agree that the witness was competent to give evidence on affirmation and his evidence was properly admitted for consideration of the Court.

Notwithstanding this conclusion, the conduct of the witness Manning and his cavalier attitude towards the obligation of an oath are matters to be considered in assessing his general credibility as a witness. He is the key witness for the prosecution. It is he who described in detail the plot to overthrow the Government and gave particulars of Swaby's endeavour to recruit certain members of the Jamaica Defence Force. According to him, Swaby first bruited the matter to him at the Workers Bank at Up Park Camp in the following words: "Suppose I tell you that there is a plan to overthrow the Government, would you be prepared to join us?" He thereupon contacted Military Intelligence to which he was then temporarily assigned for instructions. Subsequently on May 1, by arrangement, he met H. Charles Johnson at 49 Old Hope Road where Swaby introduced him to Johnson and gave a progress report on the recruitment drive. Then he told of a journey on June 5 to New Castle in a car driven by Johnson and in company of Swaby, Private Gallimore and Lieutenant Reid and of Sergeant Jagnarine joining them on the return journey. Jagnarine according to Swaby was introduced as one having specialised training in guerilla tactics and Jagnarine in turn, undertook to take over the New Castle area as soon as he was informed by radio or telephone. That Swaby subsequently told him that "D day" would be June 23, and would begin with seizing the internal Duty Officer, obtaining from him the keys to the stores and the issue of weapons to the mutineers. Two or three armoured vehicles would be used in the operation - one to take the Duty Officer as decoy to capture and make hostages of the Chief of Staff and his family and the other to do likewise with the Prime Minister and

his family. The Prime Minister would be forced by threats to his life to broadcast the fall of his Government and then H. Charles Johnson would come forth and announce he was in control. Airports would be closed and assistance would be sought of U.S.A., if Cuba intervened. This plan, Manning said, was outlined to Trenchfield in the Barracks Room.

The other witnesses for the prosecution who gave evidence concerning the plot were Private Brown and Captain Douglas, and Constable Kensworth Pinnock.

Brown's evidence was to the effect that on a day in April, 1980, at the R.J.R. Sports Club he was introduced to H. Charles Johnson by Swaby. In the course of conversation Johnson bemoaned the economic condition of Jamaica and said only a change of Government could solve the situation and Swaby then said he would sacrifice his life. Swaby, however, declined to disclose the strength of the Jamaica Defence Force. Swaby later told him "Johnson wanted to do a thing". That Swaby in May came to his home, spoke about the overthrow of the Government and asked if he would motivate the soldiers at Moneague and to get rid of Swaby, he answered in the affirmative. He then made a report to his company Sergeant Major Thorpe who took him to his officer in command, Major Simmonds, to whom he made a further report. The following day Swaby gave him the details of the plan.

Douglas' evidence was to the effect that Swaby in April, 1980 spoke to him on the cricket field at Up Park Camp telling him that the crime rate was high and it seemed that the Commissioner of Police and the Chief of Staff were not doing anything about it and further, he needed some confidential men to overthrow the Government. He made no reports about these talks to his superiors and it was only when he was in custody as a suspect he gave a statement and he would not have done so were he not in custody.

Constable Kensworth Pinnock said that on May 22, 1980, at the R.J.R. Sports Club - he met and spoke with H. Charles Johnson and about eight days later at the Mobile Reserve where he was stationed, three men came there in a motor car and Swaby, who was one of them, spoke to him and Trenchfield who was one of the other two, nodded as if approving of what Swaby was saying. Swaby told him that the army had plans to overthrow the Government and the man whom he met at the R.J.R. Sports Club would be the next Prime Minister. However, when he was asked to make a dock identification of Trenchfield, from the records he seemed to be confused. He said that he subsequently met Swaby who told him there would be a meeting at the Archway Club of the soldiers who "would be taking part". He made no official report of the matter until in his statement of 27th August.

A number of senior officers gave evidence of not receiving any reports of any intended mutiny from any of the soldiers charged. In the light of the nature and conduct of the defence this evidence was a mere formality.

The appellant Swaby who was a Sergeant in the Jamaica Defence Force gave evidence on oath denying in general that there was any plan to overthrow the Government by violence or any mutinous plot. He had met Johnson who had expressed his concern for the economic state of the country, had solicited his aid in canvassing votes and in response to his request he had done so. At no time either at the R.J.R. Sports Club or at the office at Old Hope Road or on the visit to New Castle was there any talk of a plan to overthrow the Government; he had not spoken to anyone of any such plot nor sought to recruit anyone to such a cause. Specifically Morrell's message from Reid he interpreted as a warning to cease his political canvassing as he was referred to by his colleagues as a

"politician." His invitation to Pinnock was to a food and drink fete at the Turn Table Club.

Trenchfield gave evidence on oath denying the allegations that any plan was ever communicated to him by Swaby. He denied being at anytime in the company of Pinnock and Swaby together during the relevant period. The first time he was seeing Pinnock was at the Half-Way-Tree Court House during the hearing of the preliminary examination.

In support of the contention that the verdict was unreasonable and cannot be supported having regard to the evidence, it was submitted that the evidence of the prosecution was totally discredited. In the challenge to the credibility of the witness Manning we were asked to consider inter alia the following factors:

(1) His mental instability which rendered him unreliable.

(2) The inconsistencies and uncertainties in his evidence.

(3) His indifference to the truth.

Manning was cross-examined as to receiving psychiatric treatment. He was so evasive and inconsistent that he had to be confronted with his previous statement at the preliminary examination before he admitted that he had been seen by Dr. Thessigar, a psychiatrist, having been referred to him, by Dr. Anglin. Dr. Anglin, a Captain in the Defence Force was called by the defence. His evidence was to the effect that Manning on July 1, 1980, was in detention at Red Fence at Up Park Camp. He had been called in to examine him because in his room a sheet was discovered tied to the rafters in a manner suggestive of an intention by the occupant to commit suicide. Manning, ofcourse, denied any such intention to Anglin. Anglin said he evaluated him on the basis of his examination and his history as known to him and referred him to a psychiatrist.

He had been seeing him from June 1979 and between then and July 1980 he had seen him some fifteen times. In July 1979, Manning complained of auditory hallucination and on that occasion he had recommended him to Dr. Thessigar. Flowing from the 1980 referral Dr. Thessigar provided a report.

In regard to this report, there was a surprising turn of events. The prosecution sought to tender this report. The defence objected on the grounds that the report was inadmissible in that it was contrary to the hearsay rules.

The objection was overruled and the original report put in evidence. The defence relying on this ruling, did not call Dr. Thessigar. Mr. Phipps when asked by the President if he was calling Dr. Thessigar said:

> ".... and in as far as Dr. Thessigar is concerned a section of the Court having seen a photocopy of his report and my understanding is that the Crown proposes to tender the original in evidence [your] decision as to whether or not to call Dr. Thessigar will depend on whether that report is received in evidence."

Then followed a comedy of errors. Counsel for the crown applied to recall Dr. Anglin who had been released from further attendance. Then the application was withdrawn and instead an application was made to call Dr. Thessigar. The judge/advocate then reminded counsel for the prosecution that the defence was in progress. Counsel then withdrew his application. Mr. Phipps sought clarification from the Court; he was desirous to know whether despite his objections Dr. Thessigar's report would be admitted. He pointed out that the statutory procedure for facilitating proof by admitting doctors certificates was not applicable.

Strange to relate the report having been admitted in the face of these objections, the learned judge/advocate in his address to the Court withdrew consideration of the contents of Dr. Thessigar's report on the basis that it was not admissible

for the truth of the matters therein contained. This was an unhapppy turn for the defence who, in our view, correctly maintained that the report was inadmissible as being in breach of the hearsay rule.

Be that as it may, the lerrned judge/advocate correctly addressed the Court as to the general purpose for which Dr. Anglin's evidence was tendered by quoting with approval the following passage from Toohey v. Metropolitan Police Commissioner [1965] 1 All E. R. 506 at p. 512:

> "Medical evidence is admissible to show that a witness suffers from some disease or defect or abnormality of mind that affects the reliability of his evidence. Such evidence is not confined to a general opinion of the unreliability of the witness, but may give all the matters necessary to show not only the foundation of and reasons for the diagnosis but also the extent to which the credibility of the witness is affected."

What however would have been more to the point is assuming Dr. Anglin's protrayal is accurate, the effect that detention, in the circumstances, would have on Manning as a reliable witness. Indeed Manning was closely cross-examined by the defence attorneys and numerous inconsistencies resulted. In his address, the learned judge/advocate accurately observed "in cross-examination, Corporal Manning did make several inconsistencies....." There were indeed inexplicable inconsistencies. We do not propose to catalogue them. It is enough to say that he is inconsistent as to the very details of the plot, of the circumstances under which statements allegedly made by Swaby were made and as to persons who made certain statements. As to his indifference to the truth the following is illustrative:

> "Mr. Phipps: You are a gentleman who would lie to get yourself out of any difficult sttuation, aren't you?
>
> Cpl. Manning: That is just normal human behaviour."

Mr. Andrade in a forlorn attempt at a salvage from the wreck of the crown's case submitted that even if Manning has been discredited, there is evidence from the other witnesses sufficient to support a verdict of guilty.

From an objective view point without Manning's evidence, the very existence of a plot would be in doubt as the other witnesses were either nebulous or in conflict as to the details. However, in deference to the submissions of counsel for the crown we considered the evidence of Pinnock, Brown and Douglas.

Pinnock, was unable to identify Trenchfield at the trial. According to him Trenchfield indicated his agreement and his involvement by an affirmative nod to Swaby's proposal. He seemed to have been hopelessly mixed up about the identity of the defendants in the dock. He was uncertain as to the dates or occasions on which he spoke with Swaby and his account of the first conversation with Swaby differed from the statement he gave the police.

The witness Brown whose statement was given after he was arrested and detained in connection with this matter, was inexplicably inconsistent as to the sequence of his meetings with Swaby. In the "summary" he said all, but the one meeting at the Betting Shop, was at his home, while at the trial he said one meeting was at Swaby's home. At the Court Martial, he added important details which were not in the "summary". He admitted that he was wrongly detained and was anxious to be free. He too was referred by Dr. Anglin to the psychiatrist Dr. Thessigar.

Nor was Corporal Edward Douglas' evidence of much help to the prosecution. His evidence was of a conversation with Swaby, which differed from the plot as given by Manning and was lacking in details. Douglas was in detention on similar charges when he gave a statement. He admits that he had told no one of the conversation with Swaby and he would not have given a statement had he not been in custody.

Both Brown and Douglas were persons with an interest to serve in that they only came forward as potential witnesses when they were detained as suspects. Brown's evidence had unexplained inconsistencies, while Douglas was too nebulous for a positive finding that there really existed a plot to overthrow the Government by force of arms.

But of equal concern to us, is the submission that in the subsequent trial in the Supreme Court, the same witnesses giving evidence in the treason felony case of the same events, were found to be unworthy of credit.

Before evidence was led at the Court Martial, an application was made to the Court that the trial be deferred pending the conclusion of the trial on indictment in the Supreme Court. The Court Martial was not obliged to give way, as the charges were different in nature and essentials from those on indictment in the Supreme Court and was specifically cognizable by the Court Martial. However, it is regrettable that the practicalities of the plea were ignored. It certainly would have avoided an anomalous situation of one Court accepting the witnesses as so reliable as to rest a verdict of guilty on their evidence and another finding them unworthy of credit. The appellants and others were charged in the Supreme Court on indictment containing two counts for treason felony. The particulars read:

COUNT I

"La Rue Hyde, Issac Jagnarine, Henry Charles Johnson, Athle Swaby and Philbert Trenchfield, being persons in the parishes of Kingston and Saint Andrew, on divers days between 30th April and 23rd June, 1980, devised and intended to excite insurrection against the Government by law established in order by force or constraint to intimidate and overawe either or both Houses of Parliament.

OVERT ACTS

Namely that La Rue Hyde, Issac Jagnarine, Henry Charles Johnson, Athle Swaby and Philbert Trenchfield conspired together and with other

"persons unknown in the parishes of Kingston and Saint Andrew to abduct the Prime Minister and other members of Parliament as well as the Chief of Staff of the Jamaica Defence Force.

AND

Further that the aforesaid La Rue Hyde, Issac Jagnarine, Henry Charles Johnson, Athle Swaby and Philbert Trenchfield conspired together and with other persons unknown in the parishes of Kingston and Saint Andrew to take over the Jamaica Defence Force and its armoury.

COUNT 2

Henry Charles Johnson and Athle Swaby on divers days between 30th April and 23rd June, 1980, being persons in the parishes of Kingston and Saint Andrew, maliciously and advisedly endeavoured to excite or stir up Private Norman Brown, Corporal Edward Douglas, Corporal Roy Manning and Constable Kenworth Pinnock and others unknown to engage in a conspiracy by unlawful means to intimidate the Senate and House of Representatives."

It is clear that the overt acts alleged were of the same incidents and transactions upon which the charges before the Court Martial were founded and the witnesses were the same witnesses.

The trial in the Supreme Court was before the learned Chief Justice and a jury. At the end of the crown's case, moved by submissions of no case to answer, the learned Chief Justice, after a careful analysis of the evidence, ruled that there was no case to answer on the basis that the witnesses had been discredited to the extent that no reasonable jury on that evidence would convict.

In the course of his analysis he said:

"It cannot be doubted that in proof of this charge Corporal Manning is the central figure in the case. He is the mainstay or hub of the prosecution's case and all the other witnesses called, as I see the case, go towards supporting what Corporal Manning alleges in his evidence. It is he who, if his evidence is to be believed, establishes the main nexus between Mr. Johnson and Corporal Swaby. Apart from him, the only other witness who does it is Constable Pinnock, if I am correct."

and later:

> "Now, if the case depended entirely or depended solely on the evidence of Corporal Manning, in my judgment, no reasonable jury could feel sure that Corporal Swaby - in the light of that contradiction on the occasion at Lathbury Barracks, - said what Mr. Manning said he said in circumstances where on another occasion he said those words were said by somebody else on a different occasion entirely, and didn't say that Corporal used those words at all. So, if that was all the evidence in the case, it seems to me that no reasonable jury could feel sure that Corporal Swaby used the words at all and that the charge against Corporal Swaby will have to go.
>
> As I see it, Corporal Manning is the central figure in the case and a lot of evidence was given by him about other meetings between Mr. Johnson and Corporal Swaby; but what was said at Lathbury Barracks is, as I have said obviously what the overt acts were based on."

He then went on to consider Private Brown's evidence:

> "But apart from that, the evidence of Private Brown is not unblemished evidence. His evidence also has been contradictory, as has been proved in more than one respect. So, if reliance was going to be placed on his evidence alone there would be the question of whether his evidence is reliable evidence, one upon which the jury would feel sure about in order to establish the prosecution's case."

He reviewed the inconsistencies in Brown's evidence and concluded:

> "As I see it, the main plan upon which it is sought to prove this is unreliable to the extent where, in my judgment, no reasonable jury could accept that Corporal Swaby told to Cpl. Manning what Corporal Manning said he was told at Lathbury Barracks. As I have indicated, in my judgment, Corporal Manning is the mainstay of the Prosecution's case and if he is shaken, then the entire case is shaken and it is my view that it is shaken beyond redemption."

As at the Court Martial, Constable Pinnock so far as his identification of Trenchfield was concerned, was completely unreliable.

We are of the view that the inconsistency in the finding of the two Courts as to the credit and credibility of the same witnesses testifying to the same facts is an inconstancy that is not only undesirable but serves ill the interest of justice and ought

not to be allowed to stand.

In arriving at this conclusion, we adopt an approach similar to the Court of Appeal of England in The Queen Against Warner (1966) 50 Cr. App. R. 291. In that case, the appellant was tried at the same Sessions - the Inner London Sessions - first on an indictment for taking and driving away a motor vehicle, on which he was convicted, and shortly afterwards, on another indictment for driving the same vehicle while disqualified, on which he was acquitted. On each trial, apart from formal evidence to prove the disqualification on the second trial, the evidence for the prosecution was the same and rested on identification of the appellant as the driver by a police officer. On each trial the appellant was unrepresented and applied for an adjournment.

In giving the judgment of the Court, Veale, J. said:

> "This court is therefore faced with the position that within a fortnight, two juries, each after a very short deliberation indeed, have returned a verdict of Guilty and a verdict of Not Guilty on substantially the same evidence for the prosecution..... There are there, therefore, these two inconsistent verdicts and at neither trial was the accused represented by counsel and at each trial he had applied for an adjournment which was refused. In all the circumstances this court has come to the conclusion that the verdict of guilty cannot be allowed to stand, and the appellant's conviction for taking and driving away the motor car must be quashed."

There would be no reasonable explanation or justification for this Court to maintain the credibility of the witnesses in the Court Martial / trial, especially where they were giving evidence of the same facts and there were similar inconsistencies and uncertainties in their evidence at both trials.

For these reasons we allowed the appeals, quashed the convictions and entered judgments and verdicts of acquittal.