

NM 18

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 118/2003

BEFORE:

**THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE COOKE, J.A.**

GEORGE BURKE

**V
REGINA**

Ravil Golding for Applicant

Donald Bryan for Crown

May 31, June 1 and October 28, 2004

COOKE, J.A.

Richard Shaw and Alrick Robinson, two young men, were murdered on the 12th of April, 1998. At about 10:40 a.m. on that day Detective Sergeant Headley Ruddock while at the Elletson Road Police Station, having received a radio message from Police control, went to an area known as McIntyre Villa Housing Scheme. At the corner of White and William Street he saw the bodies of both deceased two feet from each other on the sidewalk "riddled with bullets". Both deceased had been the recipient of multiple gunshot injuries which resulted in their death.

The applicant on the 3rd of June 2003 was convicted in the Home Circuit Court of both murders and sentenced to "suffer death in the manner authorized

by law". The only evidence adduced by the prosecution was a statement given by the applicant under caution. This statement, the learned trial judge had ruled as admissible having held a voir dire and determined that the test of voluntariness had been satisfied. This statement was taken on the 14th of April, 1998.

This statement was taken by Detective Inspector Grant and witnessed by Detective Inspector Michael Garrick. In the voir dire both gave evidence as to the voluntariness of the statement. The applicant in this voir dire contended that he was taken to Grant's office by a policeman. He was given a seat and a bottle of soda after which Grant entered his office and seated himself behind his desk. The applicant said he was then questioned by Grant as to:

- (a) where he lived
- (b) mother's name
- (c) uncles' name
- (d) who he lived with, and
- (e) his girlfriend's name.

Answers, given by the applicant were written down on a piece of blank paper. This having been done, the policeman who had taken him to Grant's office left with the paper which now had the information given by the applicant written on it. Some forty-five minutes later that same policeman returned with "different paper staple together." There was "a lot of writing" on the "papers dem" The applicant said he was told by Grant that if he wanted "to go home"

he should sign his name wherever an "x" was placed on the papers. This he did as he wished to "go home". So, the applicant's stance was that he was pressured to sign to a document which was a fabrication. This statement is as follows:

"Me born ah Jubilee Hospital and grow up at Ashley Road off Maxfield Avenue. And then me goh live at 32 Coral Way Harbour View with mi grandmother, Miss Brown. Me "also live at Bayshore Heights, beside Harbour View with mi girlfriend, Tracey-ann Crawford. Me clown ah Dunkirk, off Windward Road. Some ah me friend dem ah Dunkirk ah 'Stamma', Brando, 'Nukie'. Dem call him 'Nukie' because something wrong with one of hand. Mi also have a friend name 'Eleven-mile'. Him live at 32 Coral Way wid me, but sometime him go ah country. Me know 'Eleven-mile' about four years. Now, me and him spar together. 'Stamma' and Brando and me ah good friends. We also spar. Mi have another friend name 'Manga'. Yuh waan see, Sunday gone, me 'Manga', 'Stamma' innah one yard, Number 28 Wild Street in Dunkirk. It was in the morning about 10 o'clock, me see two youth walk up de road like dem ah goh up ah site up ah de housing scheme. Same time, 'Stamma' seh to me and 'Manga', ah – oonu ah nuh . . ."

Patois.

"... ah nuh see seh ah dem two youth de kill mi cousin, 'Diepoo' innah Dunkirk."

Excuse me. Could I read it again?

"Ah nuh seh ah dem two youth de kill mi cousin 'Diepoo' innah Cockbourne Pen. 'Stamma' ask 'Manga', weh de gun dem deh. 'Manga' seh up de road. 'Stamma' tell 'Manga' fe goh fe de gun dem. Manga walk off goh fe de gun dem. Him come back wid two guns. One Taurus automatic and a Tech-9. 'Manga' give me de Taurus and 'Stamma' de Tech-9."

'Stamma' and me walk up de road and when we reach a point, 'Stamma' seh me fe stop and mek him goh look fe de two youths. 'Stamma' seh me and him ah goh kill de two youth dem – de two youth dem "and me seh, 'All right.' 'Stamma' walk further up de road and turn right in another road. 'Stamma' come back and seh to me. 'See de bwoy dem 'round yah soh.' Me and 'Stamma' walk goh 'round de road weh de two youth dem deh. One ah de youth sit down pon a chair in de pathway of the housing scheme and the other one stand up. Me and 'Stamma' back we gun dem. 'Stamma' stick up de one dat sit down and me stick up de one dat stand up. 'Stamma'- 'Stamma' seh to de youth, 'Hey bwoy, ah oonu kill mi cousin'."

Sometimes . . .

"... and oonu kill mi cousin.' Same time 'Stamma' shot de one sitting on de chair and ..."

Him

"...me start shoot de one dat was standing up. De one sitting on de chair drop same place, but de one dat me shoot run off and den drop. Me and 'Stamma' walk back goh down ah Number 28 Wild Street. When we reach down deh, 'Stamma' seh to me, Youth we have fe – we have fe – youth we have lock off dem guns yah, because police ah goh come in de area. 'Stamma' tek de Taurus gun from me and walk goh down de road. 'Stamma' come little later innah different clothing. Him change off him shirt and pants; When me shoot de youth dem 'Stamma' was . . ."

. . . aware of. ... ah wear black mesh merina and black jeans. Me was ah wear a cut-off foot black jeans and white T-shirt. 'Stamma' said to me mek we lef' de area. 'So, me and him walk down Wild Street goh de bus stop and me tek a bus goh ah mi yard ah Harbour View. Me left 'Stamma' at de bus stop. Ah just so dem bwoy de dead.

There is no complaint that the caution statement, if accepted by the jury as true, did not provide evidence which could lead to a verdict of guilty. Further there is no complaint that the learned trial judge is to be faulted in his directions to the jury as to how the jury should assess the contents of this caution statement. The supplementary grounds of appeal filed on behalf of the applicant are now set out below. The original grounds were abandoned:

"1. The Learned Trial Judge fell into error when he admitted the caution statement into evidence in that:-

a) From the evidence of Detective Inspector Garrick the Applicant would have been in police custody at the time of the murders which took place at McIntyre Villa on April 12, 1998 at about 10:30 a.m., since the said officer deposed that he took the Applicant into police custody at 5:30 a.m. on April 12, 1998.

b) From the empirical evidence of Detective Inspector Garrick and from the line of cross examination of prosecuting Counsel during the voir dire, even if the Applicant made the said caution statement he would of necessity be lying on himself as it would have been physically impossible for him to commit the murders at McIntyre Villa whilst in police custody at the Central Police Station or at the Criminal Investigation Branch at 230 Spanish Town Road.

c) The contents of the caution statement were the only evidence against the Applicant, therefore the circumstances under which the statement was allegedly given, were of the utmost importance, such circumstances, as the length of time the Applicant was in police custody prior to the statement being given, the absence or presence of an independent person such as a Justice of the Peace were crucial factors which were not sufficiently or properly examined in the instant case.

2. That the mandatory nature of the sentence of death provided for by Section 3 1(A) of the Offences Against the Person's Act and imposed on the Applicant violate the right to life and the right to the protection of law granted by Sections 13, 14 and 20 of the Constitution of Jamaica and the protection afforded by Section 17 against cruel and inhumane punishment or treatment.

3. That the Mandatory nature of the death penalty violates the doctrine of the Separation of powers in that it deprives the judiciary of the functions of determining whether a punishment which is final, absolute and irreversible should be imposed in a particular case."

The evidence of Detective Inspector Garrick to which the applicant speaks in ground 1 (a) is now reproduced from the transcript:

"Q. Detective Inspector Garrick, you said you knew Mr. Burke before?

A. Yes, I saw him.

Q. In 1998?

A. Yes, sir.

Q. How did you come to know him?

A. I was a part of an operation when he was apprehended on the 16th of April.

Q. When?

A. 16th of April, I believe it was the 16th of April, yes - - sorry, the 12th of April

Q. And where was this?

A. It was at Bay Shore Park in St. Andrew.

Q. And when you said the operation in which he was apprehended on the 12th of April, that was in what year?

A. That was in the Kingston Eastern Area, Harbour View.

Q. What I am asking you, Inspector, that was what year, the 12th of April of what year?

A. 1998. I think you said what area

Q. And that operation was carried out at about what time?

A. About 5:00 to 9.30 a.m."

The line of cross-examination of the applicant by prosecuting counsel during the voir dire referred to in ground 1(b) is also reproduced from the transcript:

"Q. Suggesting to you that it is not true that you were picked up at your home on the 14th of April, 1998, that is not true, you were picked up on the 12th of April.

A. I was picked up on the 14th of April, that was on a Tuesday mi and mi girlfriend and mi brother-in-law, that is true.

Q. I am suggesting to you, Mr. Burke, that it was two days after you were picked up, you were picked up on the 12th, it was two days after that you were taken to Homicide Branch on Spanish Town Road?

A. No, same day. I get pick up on the 14th of April. I was taken to the homicide on that same day."

Some comments would now be appropriate. Firstly there was uncertainty on the part of Garrick as to the date of the apprehension of the

applicant. This is understandable since five years had elapsed since the said apprehension of the applicant and the trial. Secondly, in respect of the cross-examination by prosecuting counsel the applicant was adamant that he was taken into custody on the 14th April 1998. Thirdly, after the voir dire was completed, and the proceedings resumed in the presence of the jury there was never any issue as to whether or not the applicant gave the caution statement on the same day that he was apprehended - the 14th April, 1998.

The test of the admissibility of a caution statement is whether or not such statement was voluntarily made: **Ajodha vs The State** [1982] A.C. 204 (P.C.)). At this stage where the issue of voluntariness is the sole concern of the court the question of the truthfulness of the contents of that statement is not in issue. Paragraphs (a) and (b) of ground 1 speak to truthfulness.

Accordingly, it cannot be said that the learned trial judge was in error in that he did not consider whether in the caution statement made by the applicant the latter was "lying on himself". Having admitted the caution statement, it would then be for the jury to determine if reliance could be placed on its contents. In his summing up to the jury the learned trial judge did not advert to the evidence given by Garrick on the voir dire. He could not. He could only deal with evidence which was before the jury. Such evidence as was then pertinent to the relevant date of the applicant's apprehension was the 14th April 1998. The 12th of April, 1998, an obvious error had become entirely irrelevant.

Paragraph (c) of ground 1 sets out two "crucial factors which were not sufficiently or properly examined" by the learned trial judge in deciding whether or not to admit the caution statement. The two factors which have been identified were never raised by the applicant, either through cross-examination or by way of any submission to the court. As to the length of time the applicant was in custody prior to the taking of the statement, he by his evidence in the voir dire completely undermined this aspect of the complaint. In respect of "the absence or presence of an independent person such as a Justice of the Peace," there is no legal obligation for the presence of any such person. The Judges Rules, which provide guidance to police officers in the taking of caution statements do not stipulate any such requirement. The presence say, of a Justice of the Peace may well provide added authenticity to the integrity of the process whereby a caution statement is taken. However, such absence will not necessarily detract from the genuineness of the evidence of voluntariness. It all depends on the circumstances of each particular case. In this case there is nothing to suggest that the absence of an "independent person" was in anyway inimical to the interest of the applicant. Ground 1 therefore fails.

Grounds 2 and 3 challenged the constitutionality of the mandatory death sentence. Since this case was heard the Judicial Committee of the Privy Council has determined in **Lambert Watson v. R** (Privy Council Appeal No. 36 of 2003) that the mandatory death sentence was unconstitutional.

In the event applications for leave to appeal convictions are refused. Following the advice of their Lordships' Board, the application for leave to appeal sentence granted. The application is treated as the hearing of the appeal. Appeal against sentence is allowed. The sentence is set aside. The case is now remitted to the Supreme Court for a decision as to what sentences should be pronounced for the applicant's crimes.