JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL # 89/85

COR: The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice White, J.A.
The Hon. Mr. Justice Downer, J.A. (Ag.)

COLIN JOHNSON V. REGINAM

Mr. Wentworth Charles for applicant

Mr. Canute Brown for Crown

20th May & 19th June, 1987

CAREY, J.A.:

In the Home Circuit Court on 26th September, 1985 before Walker J., and a jury, the applicant was convicted of the murder of Winston Davidson and sentenced to death. We heard his application for leave to appeal that conviction on 20th May and refused it after hearing submissions from Mr. Charles on his behalf. These are our reasons.

The facts upon which the conviction is based, are straightforward enough and regrettably common place. On the 23rd March, 1984 at about 11:15 a.m., Kenneth Morrison, the principal witness for the Crown said he was by his usual stand, on Olympic Way where he vends fish, "cooking up some fish tea". His cousin, Winston Davidson, came by pausing long enough to 'touch' him for the fare to get to work. He saw him walk from Olympic Way wending his way along Carnaltes Terrace and onto Venables Crescent. Shortly thereafter, he heard the sound of three to four gun shots from the direction his cousin had gone. As he raised his head from

the fish-tea which he was stirring, he noticed Davidson racing in the direction of his home on Cling Cling Avenue, from Condell Terrace, a street which fronts his stall. He was vomitting blood, and pursued by the applicant, gun in hand, while the brother and sister of the applicant brought up the rear. However, when the applicant and his relatives reached within a half chain of his stall, they halted and then beat a retreat.

Morrison explained that his cousin in his injured condition, could not make it to his home, but fell to the ground by the corner of Olympic Way and Cling Cling Avenue. By the time he arrived at this spot, his cousin had been placed in a car to be driven to the hospital. The witness and the applicant were well known to each other. Indeed it was suggested to Morrison, but denied, that the reason for his fabricating this tissue of lies against the applicant, was the ill-feelings he harboured against the applicant. It was not until 5th April that Morrison made a report to the Police. He explained the delay by saying that he had to wait until the applicant was held, because he feared for his life. The medical evidence disclosed that the slain man had been shot three times in his back; the fatal bullet passing through his lung.

On the 5th April, the applicant was picked up by the police: Told that they had reason to believe he was wanted for a murder committed in the Cling Cling Avenue, he replied, having been cautioned, in these words: "Mr. Cassell, ah the bwoy first shoot at me first."

The applicant made an unsworn statement in the course of which he denied the comment ascribed to him by the Police officer prior to his apprehension. He identified the basis of the ill-motive towards him by the chief Crown witness Morrison. He said that the witness who had been implicated in the sale of material from a work-site on which both men worked, and had accordingly been fired, blamed him for the dismissal. He was not in any way involved in the shooting. In point of fact, he was not

even in the area of the incident at the material point. He called a witness, Wesley Suckoo who testified that he was the driver of the car which took the injured man to the hospital. He spoke to the injured man who told him the name of the person responsible for his condition; that person was not the applicant. He had communicated that information to the police officer in the case, Sergeant Lloyd Haley, the very day of the incident. Although he learnt of the applicant's arrest, he did not think it was his duty to advise the police that a mistake was made, for the reason that he had previously spoken to them.

A number of grounds of appeal were argued before us and we propose to deal with them seriatim. Ground 1 was formulated in this way:

> "1. The Learned Trial Judge failed to direct the Jury adequately as to the significance of the statement allegedly made by the appellant to witness Corporal Linton Cassell, 'Ah the boy shoot at me first'. Nowhere was there a direction for the jury to consider whether this statement related to an entirely different incident, especially when Corporal Cassell had stated '..... murder committed in the Cling Cling Avenue area sometime ago'.
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> The Learned Trial Judge directed the jury to the effect that they could find that the statement by the appellant that 'ah the bwoy first shoot at me sah', amounted to an admission, but failed to indicate that the said statement carried with it the element of self-defence, an issue which had been specifically withdrawn from the jury. (See pages 136-138 of the record) (See page 159 of the record) (See also page 188 of the record)."

As we understood the thrust of the submissions, learned counsel was really urging that the implication of this statement by the police, was that self-defence was being raised and, necessarily, there was a duty on the learned trial judge to leave that issue for the jury's consideration. He cited R. v. Badjan [1966] 50 Cr. App. R. 141, the relevance of which, to this case, is far to seek. We need only refer to the headnote which states as follows:

> "Where a cardinal line of defence [e.g., self-defence] has been placed before the jury, but has not been referred to at all in the summing-up, it is in general impossible for the Court of Criminal Appeal to apply the proviso to section 4 (1) of the Criminal Appeal Act 1907 and refrain from quashing the conviction."

The cardinal line of defence in the instant case was an alibi which was clearly left to the jury by the learned trial judge. Plainly, this case is no authority for saying that where an accused person makes some exculpatory statement in response to Police interrogation, inconsistent with the defence raised at trial, the statement is transmuted into a cardinal line of defence, and therefore casts a duty on a trial judge to leave that issue to be determined by the jury.

Our attention was also directed to R. v. Vassell, 12 J.L.R. 656, where this Court, approving dicta in R. v. Porritt [1961] 3 All E.R. 463; Bullard v. R. [1957] A.C. 635 held that "these cases make it clear that an accused is entitled to have put to the jury every defence which fairly arises from the evidence either directly or indirectly." We suspect that the implication of self-defence, it is being said, arises fairly and indirectly and accordingly, qualified itself as an issue to be left to the jury.

In our view, an issue which may be said to be raised indirectly is illustrated by R. v. Vassell (supra) where the issues of self-defence and provocation were said by the Court to have arisen on the defence case. Self-defence would represent the cardinal line of defence, for strategically that would lead to an absolute acquittal. But the jury might be induced to think by such facts as they accepted, that self-defence was to be rejected, and that the accused reaction was due to provocation. Sometimes provocation often masquerades as self-defence. In such circumstances, the issue of provocation may be said to arise indirectly. This Court made this point in R. v. Neath & ors. (unreported) SCCA 57-60/81, 14th March, 1985, where it was said at page 4:

> "There is an undoubted duty on a trial judge to leave for the jury's consideration any issue which fairly arises on the facts as part of his responsibility to ensure a fair trial. The duty cannot and does not depend on a defence being expressly raised by counsel. The occasions are legion when counsel from a tactical point of view raise for example the defence of self-defence but hope that a verdict of manslaughter may result. The circumstances are usually such as to show that provocation is the real issue. Provocation sometimes masquerades as self-defence."

We do not suggest that there are not other examples of a defence arising indirectly, but the authorities do not support the submission of counsel. Indeed, in the instant case, we are not in the least doubt that self-defence did not, at all events, arise for consideration. The statement made by the applicant was self-serving and exculpatory. Its significance lay in the fact that it amounted to an admission of shooting Davidson, not that he, in shooting at Davidson, was defending himself. We think that the law is correctly stated by Lawton L.J., in R. v. Sparrow [1973] 2 All E.R. 129 at page 132 where he made the following observations:

> "The trial judge had a difficult task in summing-up that part of the case which concerned the appellant. First, he had to try to get the jury to understand that the appellant's exculpatory statement to the police after arrest, which he had not verified in the witness box was not evidence of the facts in it save in so far as it contained admissions. Many lawyers find difficulty in grasping this principle of the law of evidence. What juries make of it is a matter of surmise, but the probabilities are that they make very little."

And at page 136:

> "The interests of justice required that the trial judge should get the jury to understand that an exculpatory statement, unverified on oath, such as the appellant had made after arrest, was not evidence save in so far as it contained admissions."

Kerr, J.A., spoke for the Court in R. v. Delroy Prince (unreported) SCCA 31/83, 14th October, 1985 thus at page 15:

> "It is not unusual that an extra-judicial statement put in by the prosecution contains an embryonic exculpatory issue. Where, however, the defence not only fails to develop the issue but virtually kills it by raising a defence wholly incompatible with the exculpatory parts of the statement, then that issue is no longer a 'live one' meriting the jury's consideration."

We can now examine the directions of the learned trial judge which appear at pages 137-138:

> "But if you believe it was said, if you believe the policeman is speaking the truth, then you ask yourselves the question, what does this statement mean? What was this accused man really saying? Here is a police officer who is telling him that he has information that he is wanted for murder, he tells him where the alleged murder is committed and the accused man said, 'Is the boy shoot at me first, sir.' If he really said that, what does he mean. One interpretation is, the boy shoot at me first and I shoot at him after. That is an interpretation that you can place on that statement, if you find that that statement was made. If you believe there is any other interpretation that you can place on it, if you find that that statement was really made, then you are free to interpret it in the way you think it should be interpreted. But it seems to me, that is one of the interpretations that can be placed on that statement and I repeat, if you find that it was made, that what he is telling the police officer is, yes, I shot him, but he was shooting at me first. So, if that is the interpretation that you are prepared to place on that statement, Mr. Foreman and Members of the Jury, if you find that it was made, then it would mean that this accused man was admitting that he really shot him, but saying that the boy had shot at him the accused first.
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> The prosecution is saying that he did make that statement and they are saying that the interpretation, the ordinary and natural interpretation to place on the statement is that he is admitting that he shot him.

At pages 159-160 he returned to this aspect of the case in the same vein -

> "Mr. Cassells told you the actual words of the caution that used to the accused, and he said the accused said, 'Mr. Cassells, ah the boy first shoot at me, sir'. I have already told you that what is important in this case, you have to decide whether Mr. Cassells is really speaking the truth when he said this accused man told him that. If you believe this accused man told him this then you must interpret it and say what it means. You must say what interpretation you are going to place on it, 'ah the boy first shoot me, sir'.

> "If you don't believe it was said or if you have any doubt as to whether it was said or you reject this evidence of Detective Corporal Cassells, then you decide the case without him. If you believe the evidence it is open to you to find that this accused man is really saying that he shot Winston Davidson, but that Winston Davidson shot at him first. If you believe that this accused man when he was held by Cassells, told Cassells 'Ah the boy first shoot at me, sir', and you are prepared to place that interpretation upon it, which means that what he was saying was I shot him but he first shot at me, how is it in court he is now saying that when this incident happened, he was away hustling to earn money for his baby mother and children, he was no where in the area, how could that be? You decide."

As we have said, the significance of the exculpatory statement of the applicant was no more than an admission. It was an admission of shooting Davidson; it was not evidence that he was defending himself when he fired. The directions therefore went further than was necessary to make the jury understood clearly the limits of that statement. But the learned trial judge cannot be criticised for declining to say that the statement contained an element of self-defence, which became an issue to be determined by the jury.

Mr. Charles founded these submissions, really, on a decision of this Court - R. v. Talbot & Kerr 12 J.L.R. 1667, in which the facts may be summarised as follows: The accused were charged inter alia with shooting with intent at some police officers. The allegation was that Kerr was the one who had actually fired at the officer from a car while it could be inferred that Talbot was the driver of the car at the time. When Talbot was arrested, he gave a written statement under caution in which he alleged that he was acting under duress. That statement was put in on behalf of the prosecution, but when he gave evidence, his defence was an alibi. Their Lordships held that the trial judge should have left the issue of duress to the jury.

At page 1670 Luckhoo P.(Ag.) having cited the extracts noted earlier in this judgment from R. v. Sparrow, reasoned thus:

> "That a statement not made on oath is not evidence of the facts in it (save in so far as it contains admissions) is not open to doubt. However, this must not be confused with a situation where a statement not on oath is made by an accused person and admitted at the trial during the case for the prosecution or for the defence. The jury are entitled ot give what weight they think fit to the contents of such a statement even though the statement is not evidence of the facts in it. It behoves the trial judge to give the appropriate directions to the jury on whatever 'defences' might be raised by the contents of such a statement."

He applied the principle which he had gleaned from that case to the facts before him and said this at page 1671:

> "Returning to the applicant's statement, he was asserting that while he was present in and driving the taxi at the time of the incident he was not doing so voluntary but was doing so under fear of death. If the jury accepted the truth of this assertion or had any reasonable doubt that this was so the appellant would be entitled to be acquitted on the indictment. There was nothing in the other evidence adduced by the prosecution that was inconsistent with such an assertion. Had the jury been directed on this issue they may have come to the conclusion that the applicant Talbot was indeed acting under duress at all material times and in those circumstances the applicant Talbot would have been entitled to an acquittal. Such a result would follow even if the applicant were legally represented at the trial for the principle is one of general application."

With all respect, the out of court exculpatory statement by an accused is not evidence of the contents thereof, except to the limited extent that it contains an admission against his interest. The weight or value therefore, which the jury can be directed to accord it, is that only that part of the statement which admits an aspect of the case against the accused is to be regarded by them. Unless the accused gives evidence in his defence on the basis of his exculpatory statement, the exculpatory aspect disappears from the case. R. v. Delroy Prince (supra). We, accordingly, differ from the bold assertion that "the jury are entitled to give what weight they think fit to the contents of the statement." It cannot be sound for it is contrary to the very authority cited in support. In our view, the reasoning in R. v. Talbot & Kerr (supra) is supported neither by authority nor principle and ought not to be followed.

In the second ground argued, Mr. Charles was critical of the learned trial judge's treatment of the defence, which he said disparaged the defence witness, was neither fair, objective, nor impartial, and its effect was to deprive the applicant of the opportunity of having his defence fairly considered. We were referred to the following passage at pages 156-157:

> "Now, Mr. Foreman and members of the jury, when Mr. Suckoo gave evidence, Mr. Morrison had already given evidence in this case and was sitting in the court and the crown had closed its case. When Mr. Morrison was giving evidence and when he was asked about the driver of the car which took the injured man to the hospital, the defence could have given him the opportunity of looking at Mr. Wesley Suckoo if they wanted to. He says, 'I know it is a man name Wesley, but I don't know his right name. The defence could have called Mr. Wesley Suckoo to court and say to Mr. Morrison, 'Look at that man and then tell us if that is the Wesley that you are talking about' and Mr. Morrison would have had an opportunity to say yes or no, but they did not give him that opportunity. Whether it was by a deliberate tactical manoeuvre or an oversight of counsel for the defence, I don't know, but what we know is that Mr. Morrison never had a chance of looking at Mr. Suckoo to tell you whether he was the driver of the car or not and he could have had that opportunity it seems to me, if defence wished. So where are you now? Mr. Morrison may be talking about another Wesley and not Mr. Wesley Suckoo because it is important in this case, Mr. Foreman and members of the jury, for you to decide whether Mr. Suckoo, Mr. Wesley Suckoo, is the Wesley that Mr. Morrison is talking about because Mr. Wesley Suckoo told you of a statement made to him by the injured man in that motorcar, which is important. If Mr. Wesley Suckoo wasn't the driver of the car in which that man was, then it means that man would have had no opportunity to talk to him in any car and it means Mr. Suckoo would be a liar."

The trial judge has an undoubted right to express his views of the facts in the case to the jury and to do so strongly, if the circumstances warrant it. But he may not, and ought not to use this right to give an unbalanced view of the case to the jury, for the judge's primary function is to ensure a fair trial. But having examined this passage with the greatest care, we have no hesitation in saying that the criticism is wholly unjustified as we will shortly demonstrate.

Another passage from the summing-up which comes within the ambit of learned counsel's criticism must now be quoted. At pages 166-167 the learned trial judge was recorded as saying:

> "When Sergeant Haley gave evidence he was asked about a name. 'Do you know a man named Wesley Suckoo? Have you ever heard that name?' He said, 'I can't say I do.' So, Mr. Suckoo could have been called into court so that Mr. Haley could look at him, because, Mr. Foreman and Members of the Jury, how often hasn't it happened in your experience where somebody say to you, Do you know Thomas Jones, and you say no, and when you see the face of the person you say, my gosh, I have known that person for a long time but I really didn't realise that he was Thomas Jones. When you look at the face you can fit the face to the name because sometines names don't mean anything to you. So when Sergeant Haley was in the witness-box the defence could have called in Mr. Suckoo and said, look at this man, if it was so important - if it is true that Mr. Suckoo went down to the police station the very same day and told Mr. Haley about a conversation that he had with the deceased in the car while he was taking him to the hospital. Because he says what the man told him was that somebody else had shot him, not this accused man. But Mr. Suckoo was not called into court, and it is just left like that. So all we have is Sergeant Haley saying, I cannot say I do, and then Mr. Suckoo comes to court after that and says, 'That is the man', and Mr. Haley had no opportunity to say yea or nay.
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> Well, again one has to ask the question, was that a deliberate tactical manoeuvre on the part of defence counsel, or an oversight? It could have helped you, Mr. Foreman and Members of the Jury, if Sergeant Haley had been able to look at Mr. Suckoo, because he could say, yes, that man did come to the station and made a report to me, or he could have said no. But he could have been given an opportunity, but he wasn't, so you are left in this position where Mr. Haley is saying, 'I can't say I know anybody by that name'."

It was a matter of fact that when Mr. Morrison was being cross-examined by Mr. Charles, the witness Suckoo was not called into court. A similar situation arose in the latter extract in the case of Sergeant Haley, in respect of the same witness Suckoo. The reasons for the failure could either be inadvertence on the part of the two experienced counsel who appeared at the trial (Mr. Charles being one) or a deliberate strategy on their part. Mr. Charles did not suggest in any way that these alternatives were far-fetched or incorrect. It is plain that the comment, based as it was on the realities of the trial, can only be considered as fair

comment and eminently proper in the circumstances. It must also not be forgotten that the omission of counsel occurred not once, but twice in the same trial. Inadvertence or incompetence on the part of the defence has not, so far as we are aware, been used as a ground of appeal. The trial judge was well aware, that counsel's action was governed by his fear that the witness might, in each case, say that Suckoo was not the man.

It was the duty of the trial judge to put the issues fairly for the jury's consideration. The credit of Suckoo was important in determining whether the defence denial of responsibility in the crime was to be accepted. It was essential therefore, for the witness' evidence to be put in its proper perspective, so that the significance of that evidence might be properly assessed. Far from depriving the applicant of having his defence fairly considered, the learned trial judge was most anxious to ensure that that objective was attained. That ground must fail.

Finally, two other grounds were argued, but the only ground which we propose to deal at any length is ground 4 which was in the following form:

> "That the learned trial judge deprived the appellant of the chance of an acquittal when he directed the jury that 'in life, all things are possible, but you have to decide criminal cases on evidence, on the evidence that you have. You cannot say it is possible that another man could have shot him'. Such a direction amounted to a usurpation of the function of the jury when on the evidence, the possibility of some other person committing the crime could not be eliminated. The effect therefore, was that once the jury found that the appellant was seen running behind the deceased, in the circumstances narrated by the witness Kenneth Morrison, the appellant was guilty of murder."

The argument being advanced was that those directions constituted a usurpation of the jury's function. But directions should not be taken out of context. The learned trial judge having made the comments which are under challenge, continued by saying this at pages 160-161:

> "The evidence that you have heard in court is that at the time of the incident, shortly after these shots were heard, only one man was seen with a gun. The defence is saying that you may also draw the inference that somebody else shot him. Would that be a reasonable inference for you to draw when the evidence in the case is that only one man had a gun? You decide whether that is a reasonable inference that you could draw in this case. It would seem to me to be quite unreasonable, but the drawing of inferences is a matter for you. If this were a case where several men were seen with guns then that would be a different matter. If nobody saw who fired the shots, then you could say anyone of several men that had guns, could have done it; but when only one man has a gun, how are you going to draw an inference that somebody else could have shot the deceased man? Would that be a reasonable inference to draw? You can only draw inferences which are reasonable in a criminal case. You decide whether it is a reasonable inference to draw. If you believe it is a reasonable inference and you are prepared to draw that inference that somebody else could have shot the deceased man, then obviously your verdict in this case would be one of not guilty. If you think that on the evidence which you have heard in this case, it would not be reasonable, then you look at the whole evidence in the case to see whether the prosecution has proved its case against this accused man. The prosecution is saying he is the man who shot Winston Davidson, and I will tell you shortly about circumstantial evidence."

He later dealt with circumstantial evidence and no adverse comments have been attempted to be leveled by Mr. Charles in that regard. It seems to us quite clear that the trial judge was putting forward the contending views as to the interpretation of the facts which had been advanced in addresses to the court by counsel for the defence and the prosecution. Taken in the context in which it appears, the impugned directions, in our judgment, did not usurp the function of the jury. Inferences, they were properly told, were a matter for them.

There was some faint argument regarding descrepancies, but as the descrepancies identified, related to peripheral matters, we do not think they merit any attention in this judgment. It is sufficient to say they were without vestige of merit.