Privy Council Appeal No. 14 of 1996

Trevor Palmer *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, Delivered the 16th June 1997

Present at the hearing:-

Lord Browne-Wilkinson
Lord Slynn of Hadley
Lord Nicholls of Birkenhead
Lord Steyn
Lord Hutton

*[Delivered by **Lord Steyn**]*

In the afternoon of 26th March 1990, and in the parish of Manchester, Godfrey Lindsay was murdered during the course of a robbery. On 5th February 1991 after a trial in the Manchester Circuit Court before a judge and a jury the appellant was convicted of the murder and sentenced to death. On 30th May 1994 the Court of Appeal of Jamaica dismissed the appellant's application for leave to appeal. The present appeal is against the decision of the Court of Appeal.

The setting of the murder.

The deceased was engaged in the business of buying yams from farmers for resale. He used a truck to pick up the yams. He had to pay the farmers for the yams. He either had significant sums of money with him during the course of picking up yams or would have been believed to be carrying money. In an area plagued with armed robberies he was therefore a target.

On the afternoon of 26th March 1990 the deceased, accompanied by Trevor Wallace, went to pick up yams at Hope Property, Blue Mountain. Kenneth Pommells, a yam farmer, and his son Cleveland Pommells met them. The truck stopped in an orange grove near a yam field. The loading started. Cleveland Pommells was in the back of the truck receiving and packing the yams. Trevor Wallace passed the yams to Cleveland Pommells. The deceased was standing a few yards away. Three men passed close by the truck and went into the orange grove. Suddenly, two or three men rushed back. They demanded money. One of the robbers shot the deceased. The robbers then fled from the scene.

The prosecution case.

There was a strong prosecution case. Four witnesses gave evidence which connected the appellant with the robbery and the shooting of the deceased. The first witness was Cleveland Pommells. He described how three men walked past the truck and how all three came back. They demanded money. He said two of the men had guns. One man pointed his gun at him. The appellant was the other robber with a gun. He heard a shot and the robbers ran off. He said that, although he did not know the appellant, he recognised him by "liver spots all over his face". He had identified the appellant at an identification parade held in August 1990.

Wallace then described the robbery. He said that three men passed the truck. Then all three came back. They demanded money. He said that the appellant had a gun. The appellant shot the deceased. He said he recognised the appellant by a liver spot on his face. He had also identified the deceased at an identification parade held in August 1990.

Emmanuel Collins, who knew the appellant well, also gave evidence for the Crown. He said that on the day of the robbery he saw three men at Hope Property. The appellant was one. He said the appellant and the other men asked him about the truck.

The defence had challenged the evidence of Pommells and Wallace: it was suggested in cross-examination that the appellant was not involved in the killing of the deceased. But the evidence of Collins was left unchallenged.

Detective Constable Barrington Daley gave evidence of an unrecorded statement allegedly made by the appellant after he was arrested and charged with the murder on 4th August 1990. The officer said that the appellant said: "So what 'bout the other two?" The officer accepted that a written statement (called a "caution statement") had been taken from the appellant. (That had taken place on 15th July 1990.) Counsel for the appellant asked the following question in cross-examination of the officer:-

"And would you agree with me that that caution statement completely exonerated this man from the murder?"

The judge intervened and directed the witness not to answer this question.

The unsworn statement of the appellant.

The appellant made a brief unsworn statement. The transcript reads as follows:-

"ACCUSED:	I give Mr. Daley the statement already.
ACCUSED:	Mr. -- Detective
HIS LORDSHIP:	Mr. Detective Daley a statement?
ACCUSED:	Yes.
HIS LORDSHIP:	Yes?
ACCUSED:	I don't kill any man.
HIS LORDSHIP:	Eeeh?
ACCUSED:	I don't murder any man.
HIS LORDSHIP:	I don't murder any man. Yes?
ACCUSED:	I don't know anything about it.
HIS LORDSHIP:	Yes?
ACCUSED:	Yes, sir.
HIS LORDSHIP:	You finish?
ACCUSED:	Yes, sir."

The appellant was obviously referring to the written statement which had been taken from him on 15th July 1990. The prosecution had not adduced that statement in evidence. It was not before the jury.

The summing up and verdict.

The judge left the case to the jury on the basis that the Crown case was that the appellant was the gunman who shot the deceased. It was left as a case of murder or nothing. The judge did not give directions which would have been necessary if the Crown case had depended on joint enterprise. Moreover, the judge repeatedly said that the case was that three men participated in the robbery.

The judge summed up the prosecution case in detail. He summarised the evidence of the two eye witnesses. Throughout

he emphasised that on the prosecution case there were three robbers, the appellant being the one who fired the shot. The judge explained the importance of the unchallenged evidence of Collins. He emphasised the importance of the oral admission. He reminded the jury of the appellant's unsworn statement. Then the judge turned to the written statement taken from the appellant. The judge said:-

> "... I don't know what is in the caution statement, you don't know and I am going to ask you and tell you that you mustn't speculate or guess as to what was in it. But, quite clearly, if it was consistent with the Crown's case and I can make this comment, even if it was consistent with the Crown's case, I am going to put it as low as that, if you believe the two witnesses, Pommells and Wallace, if you believe the unchallenged evidence of Emmanuel Collins and if you believe the statement made or attributed to the accused by Detective Constable Daley, what more do you need in determining whether the accused is guilty or not guilty? Can it take the case for the Crown any further?"

The picture placed before the jury was of an overwhelming prosecution case and a bare denial in an unsworn statement by the appellant.

The summing up lasted I hour and 54 minutes. The jury retired for four minutes. They returned a unanimous verdict of guilty of murder.

The grounds of appeal.

Their Lordships propose to discuss only the principal grounds of appeal in this case. Those grounds can be examined under the following headings:-

(1) The admission of the oral statement of the appellant and the exclusion of his written statement.

(2) The judge's comment on the written statement.

(3) The Crown's failure to disclose the initial statements of Pommells and Wallace.

None of these grounds were advanced in the Court of Appeal but it has to be added that statements mentioned in (3) only became available after the hearing in the Court of Appeal.

The written and oral statements.

The written statement was made and signed before a magistrate on 15th July 1990. It is not easy to follow the detail of the

appellant's explanation in that statement. But it is tolerably clear that the appellant explained that he met two men near the scene of the murder and that he gave the name of one: that at least one of them had a gun; that they threatened him; that they told him to wait some distance from the truck; that he heard a shot; that the two men came running back to him; and that he had to show them a short cut to enable them to run away. Three points stand out: (1) the appellant was saying that he acted under duress; (2) on this account he did not go to the truck; (3) and he did not do the shooting or participate in the robbery. Taken at face value the statement tends to exculpate the appellant. On the other hand, the statement places him in the company of the other two men near the scene of the murder. It is therefore a mixed statement.

On any view it is strange that the Crown did not adduce the statement in evidence. But, taken in isolation, their Lordships would not regard that omission as irregular. The judge also stopped defence counsel from eliciting the favourable part of the statement through cross-examination. The judge was right to do so. But the judge observed that "It (the statement) can only come in through the Crown". Counsel did not submit that the written statement ought to be admitted. And the judge had no occasion to consider the position in depth or to make any formal ruling.

So far nothing unfair has been related. But it is not the whole story. A little more than two weeks after the written statement was taken, and upon being charged, the appellant said to Detective Constable Daley: "So what 'bout the other two?". Interpreted against the background of the appellant's account in his written statement two weeks earlier it seems likely that he was referring to the two other men whom he had described in his written statement. That link between the oral and written statements is arguably capable of drawing much sting from his otherwise incriminating oral statement. Was it fair and proper for the prosecution to introduce the oral statement without the written statement? Their Lordships are satisfied that in the result a misleading picture as to the appellant's admission was placed before the jury. A similar point arose in *Reg. v. Pearce* (1979) 69 Cr.App.R. 365. In that case a trial judge had admitted only some incriminating parts of a series of interviews. Holding that this was unfair and irregular, Lord Widgery L.C.J. started his judgment as follows (at page 368):-

> "The case raises an unusual question. It has been the practice to admit in evidence all unwritten and most written statements made by an accused person to the police whether they contain admissions or whether they contain denials of guilt. The only exception which readily comes

> to mind is the exclusion of any admission of a previous conviction. In this case however the judge has excluded two voluntary statements and part of an interview on the grounds that they are self-serving statements and as such are not admissible. If the judge is right it would mean that the practice of the courts over the last fifty years or more has been erroneous."

The Lord Chief Justice then enunciated a number of principles including the following principle (at pages 369-370):-

> "A statement that is not in itself an admission is admissible if it is made in the same context as an admission, whether in the course of an interview, or in the form of a voluntary statement. It would be unfair to admit only the statements against interest while excluding part of the same interview or series of interviews. It is the duty of the prosecution to present the case fairly to the jury; to exclude answers which are favourable to the accused while admitting those unfavourable would be misleading."

He concluded at page 370 by reaffirming that the practice described in the first quotation is sound. The present case is a classic illustration of the unfairness which can result if the prosecution is allowed to pick out from amongst a defendant's statements, written or oral, only those which are incriminating without regard to the potentially misleading impression being created by such selectivity. The prosecution should have introduced both the written statement and the oral statement or neither. Instead a misleading impression was created by the introduction of only the oral statement. The judge should not have allowed this position to arise. It is true that the judge said in his summing up that he was unaware of the content of the written statement. That is surprising. He should have familiarised himself with it in order to conduct the trial properly and to protect the appellant against unfairness. In the result the appellant has been able to point to a clear irregularity on this ground alone.

But the need to admit the written statement or to invite the jury to disregard the oral statement became even clearer after the close of the prosecution case. It seems plain from the appellant's unsworn statement, and his reference to his written statement, that he was intending to refer the judge and the jury to this written statement. No other sensible explanation of the words of this inarticulate man suggests itself. The appellant's assumption was wrong. Contrary to his expectation, neither the judge nor the jury ever saw his written statement. Their Lordships do not propose to dwell on the failure of the defence counsel or of prosecuting counsel, who is after all a minister of justice, to deal with the unfair position that had arisen. In the meantime, as their

Lordships have already observed, the trial judge took no action: he was unaware of the content of the written statement which spelt out the appellant's defence.

Taking stock of the position so far their Lordships are of the opinion (1) that a misleading picture as to what the appellant had admitted was placed before the jury and (2) that his expectation that he could refer the judge and jury to his written statement was in the result simply ignored.

The judge's comment on the written statement.

Their Lordships have already quoted *in extenso* the judge's comments about the appellant's written statement. Their Lordships are well aware of the strains under which the trial judges have to work. And a considerable latitude in summing up must be allowed. But the judge's remarks were unfortunate. The judge placed before the jury one possibility only, namely that the statement was consistent with the prosecution case. In truth the statement, implausible as it might have been, was inconsistent with the prosecution case. The judge should have been aware of that fact but he had not read the statement. In the result the judge placed a misleading and prejudicial comment about the written statement before the jury. And that comment was made about a statement which, in the circumstances of the admission of the oral statement, the jury should have seen. Not only was the jury left in the dark about the explanation in the written statement but they were given a wrong and unfair impression about the content of the written statement.

Non-disclosure of witnesses' statements.

It will be recalled that Pommells and Wallace were the two eye witnesses to the robbery and killing. Plainly they were vital witnesses. At the trial they both testified that three men returned to the truck: two had guns. Wallace said that he saw the appellant shooting the deceased. Pommells said that the appellant had a gun; the other gunman pointed his gun at him (Pommells); then he heard a shot. This stark picture is somewhat at variance with what these witnesses independently said in their first statements which were taken within hours of the shooting. In their first statements they both said that only two men returned to the truck. While they both said that the appellant had a gun neither professed to have seen the shooting. These statements would have been of assistance to counsel for the appellant, particularly if the appellant's written statement had been admitted, inasmuch as the witnesses' statements were consistent with the appellant's version that only two men went to the truck.

The legal position regarding disclosure in Jamaica must now be considered. In 1992, in an appeal from the Court of Appeal of Jamaica, the Privy Council dealt with certain aspects of the duty of disclosure of the Crown: *Berry v. The Queen* [1992] 2 A.C. 364. The focus of that case was the duty of the Crown to disclose previous inconsistent statements of witnesses. The emphasis was on the duty of a prosecutor to disclose such statements where he anticipated that a witness would or might depart from his earlier statement. That is, of course, a continuing duty of the prosecution before and during trial. And it does not depend on a defence request for documents. But importantly the Privy Council made clear in *Berry* that this particular duty is only part of the general principle requiring fairness to the accused, see pages 373H-374A; 376H-377A. Lord Lowry observed at page 373 that "In relation to the disclosure to the defence of material in the possession of the prosecution, the key is fairness to the accused". Fairness to an accused requires disclosure to him before trial of witnesses' statements which in a material sense undermine or weaken the prosecution case or strengthen the defence case. And inevitably that principle must apply whether or not there has been a defence request for disclosure.

Applying the general principle of fairness their Lordships are satisfied that the initial statements of Pommells and Wallace ought to have been disclosed by the Crown to the defence. The failure to do so was a material irregularity.

The disposal of the appeal.

The prosecution case was strong. If the trial had been conducted properly and fairly a conviction was likely. That is, however, not enough to sustain the conviction. The prosecution case was unfairly conducted by adducing the oral statement without the linked written statement. The appellant's defence as set out in the written statement was, contrary to his expectations, not placed before the jury. Instead the judge commented on his statement in an unfair fashion. Moreover, the prosecution failed to disclose statements of two eye-witnesses which contained significant material helpful to the defence. Their Lordships take into account the cumulative effect of these departures from established practice and procedure. In the result their Lordships conclude that the appellant was deprived of the substance of a fair trial and will humbly advise Her Majesty that the appeal ought to be allowed and the conviction quashed.

Given the lapse of time since the shooting and trial their Lordships do not consider that this is a case where a retrial needs to be considered by the Court of Appeal of Jamaica.