

11/11/98

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 102/98

**BEFORE: THE HON. MR. JUSTICE FORTE, P.
 THE HON. MR. JUSTICE HARRISON, J.A.
 THE HON. MR. JUSTICE LANGRIN, J.A.**

R. V. ANTHONY TAYLOR

Dennis Morrison, Q.C. for Applicant

**Bryan Sykes, (Ag.) Senior Deputy Director of Public
Prosecutions and Marjorie Moyston for the Crown**

19th November, 2001 and March 11, 2002

FORTE, P:

The applicant was convicted in the St. James Circuit Court on the 30th September, 1998 for the murder of Kevin Cummings on the 4th April 1997. He was sentenced to life imprisonment. On the 19th November, 2001 we refused application for leave to appeal against conviction, but granted leave to appeal against sentence and varied the sentence to mandate that the applicant must serve 23 years imprisonment instead of 25 years set by the learned trial judge before becoming eligible for parole.

On the 4th April 1997 the body of Mr. Cummings was found on the road by his taxi-cab at Spring Farm. The road was a dead-end road. The body was found by Ms. Benieve Scarlett and others. He had a bullet wound to his head. When the body was seen by the Doctor "on location" it was decomposed and "full of maggots". The postmortem examination revealed one entry wound on the forehead measuring about one and a half centimeter. There was no exit wound. In the doctor's opinion, death was due to the gunshot injury to the head. A piece of "metallic foreign body" was retrieved from within the brain and handed over to the investigating officer. The latter, however, in his evidence described the doctor's "metallic foreign body" as two small fragments of a bullet. The officer's description was confirmed by Mr. Daniel Wray, the Ballistic Expert whose evidence will be later recorded. At the scene the officer had also recovered a .22 cartridge, which was about 17 feet from the car. Also in that area were bloodstains and a pair of sunglasses.

The deceased was last seen before his death, by a Mr. Bertram Wellington at about 1.35 p.m. on the 1st April 1997. He next saw him when he saw his body on the road at Spring Farm, on the 4th April.

Mr. Wellington who was the cousin of the deceased, testified to knowing the deceased's car. He described a special device which was peculiar to the car. The driver's door had to be closed and then you press the disarm button on the key ring and then sink the clutch before the car would start. This bit of evidence, no doubt, had some significance when the

caution statement of the applicant came to be considered, a significance which will be referred to later.

After the 1st April, the deceased became missing. Mr. Wellington saw the applicant on the 2nd April and enquired of him if he had seen the deceased on the 1st of April. The applicant answered saying that he had seen him but when asked if he had gone out with the deceased he said no, because "the girl had changed her mind." The applicant told Mr. Wellington that the deceased "drove under the basement and went out."

Ms. Beneive Scarlett who lived with the deceased, testified that he had left home on the 1st April 1997 between 8:00 and 8:30 a.m. driving his taxi, a Corolla motor car. She next saw him 3 days later at Spring Farm where she saw his body which was clothed in the same clothing in which he had left home on the 1st April. He was still wearing his watch, chaperritta, rings and a chain.

Mr. Michael Willy, himself a taxi operator, also spoke to having a conversation with the applicant on the 2nd April in which the applicant admitted to having seen the deceased on the 1st April at Bay West Plaza. The deceased had been engaged to take Claudine Tenfa a friend of the applicant on an assignment. The applicant told Mr. Willy that when the deceased arrived, he (the applicant) told him that the trip was cancelled and that the deceased had driven off leaving the applicant at the Plaza.

The small fragment of .22 firearm bullet taken from the head of the deceased was subsequently examined by the government Ballistic Expert, who testified that it was a fragment of a bullet discharged from the under

barrel of a .22 pistol which was recovered from the home of the father of the co-accused who was tried with the applicant and acquitted by the jury. It is necessary to state, however for better understanding, that the co-accused had maintained in his defence that he had loaned the pistol to the applicant on the understanding that the applicant was going to use it to "frighten" someone. This defence, by their verdict, the jury apparently accepted.

The prosecution in proof of its case, relied substantially on a caution statement given by the applicant which was admitted into evidence after the holding of a *voire dire*. It is therefore necessary to set out that statement in full:

"I know one Richard Solomon. He is the Manager of Tyre King in Montego Bay. I used to go to his place to get my car washed. I refer to Teresa's car. While I was visiting this car wash place I came to know Richard. Richard has a girlfriend in West Green. She lives near to my friend Teresa. On Monday the 31st March which was Easter Monday, my wife drove and dropped me off at Tyre King about 10:00 a.m. the morning. I saw Richard when I went there.

Richard told me that he wanted me to do something. He said he wanted me to call my friend that drive the Corolla and ask him to come and pick up Claudine down by Bay West plaza.

He then started doing his paper work. After he was finished he took me in his car and dropped me at my home at Rocket Club. Richard told me he would meet me at Bay West one o'clock the next day which was Tuesday. He said he leaves his office at one o'clock and so I should give him about fifteen minutes. On Tuesday which was the next day, Teresa came to my home at the Rocket Club and picked me up in her car. Wendy was already gone to work.

Teresa then dropped me off at Bay West, close to 12 midday. I went into McDonald's to get something to eat and then I went up to Yours Young World which is Claudine's shop. Claudine was there as also her sister. I told Claudine I was going to call Kevin to carry her somewhere. I then called Kevin and went downstairs by myself to see if Kevin reached but he was not there so I went back upstairs to the shop and Claudine's sister said that Claudine went downstairs looking for me. I went back downstairs to check for her and check if Kevin came. I did not see her or Kevin so I started to go back upstairs and I met Claudine coming down. I told her to go back up. I went back to the basement and I saw Richard's car, parked in the parking lot. Richard's car is a volvo. I looked and saw Kevin's car under the basement in the parking lot near the entrance. Kevin called to me and I went over to him. I got into the front seat of Kevin's car and I told him I want to go to Spring Farm to see a piece of land a friend told me about. Kevin drove off under the basement but before we exited I saw Richard. I told Kevin he is a friend of mine he should pick him up. Kevin stopped and Richard got into the back seat behind him. I told him to drive up to Spring Farm. He already knew because I told him when I got into the car. I put in a cassette when I just entered the car. The cassette had a mixture of American and Jamaican music. This cassette has an artist name Tupac, Shakur, remix, Little Kim and Bounty Killer. When we reached Spring Farm and reached the actual location before Kevin shut off the car, Richard shot him twice in his head. He then came out and took the body out and put it to the side of the road. I shifted over to the drivers seat and tried to start the car after shutting it off. The car didn't start. Richard and I look under the bonnett and went back to start the car but it still wouldn't start. We left the area, walked down to the main road and took a taxi back to Bay West. I went back up to Claudine's shop and Richard went to fix a puncture when I went up to the shop I called Conrad and told him to come pick me up and take me to West Green which he did. I was there for a while but Teresa wasn't there. I came out and was talking to some boys and girls. I stayed there for a while and then I called Conrad to

come pick me back up and carry me to a restaurant. He came back and took me to the restaurant. I was at the restaurant for about fifteen minutes and I called Teresa to come and pick me up later that evening at my house. Conrad took me to my house and later that evening Teresa picked me up and I went down to West Green. Richard came to West Green and I went with him to his house at Kemshot there he put the gun back in his (sic) father's house. This was a point .22 revolver. Richard then burnt his clothes in front of a garage. These were a blue jeans and a green T-shirt they had blood on them. Richard's mother was in the house but his father was not there. His father and mother are separated. So they live in two different houses on the said premises.

It was Richard's father's house in which he put the gun but I did not see where in the house. Richard then came out and took me back home to the Rocket Club. When Richard first told me how he wanted me to call Kevin to Bay West he told me that he wanted to get Kevin's car to sell it in parts. The following day I told my wife Wendy that we have to leave the Rocket Club. I told her of the situation that Richard had put me in. That same Wednesday, Wendy moved to her parents' house and I went to Teresa's place in West Green. In the evening of that day at about 9:30 p.m. I saw Teresa and told her I wanted to stay for about a week and she said okay. Earlier that day I saw Richard at West Green and told me what to tell Claudine.

That said evening at about 9:30 p.m. I told Teresa that people are looking for me so I needed a place to stay. I also told her that I am in trouble and the police may be looking for me.

On Wednesday the 2nd of April while I was staying at West Green, Teresa took me to Kingston to my aunt-in-laws house where I spent a night. I was trying to get a letter as I did not have my passport or birth certificate. I went to the U.S. embassy the Thursday but I never got a letter so I couldn't travel. I called my wife and told her to come pick me up to bring me back down. She came for me Thursday night and took me back down and left me at West Green. Teresa was there. It was after that I went to Lilliput. I was at Lilliput until two

days ago whilst I had purchased a ticket in order to leave the country.

At the Airport I was detained on the plane. This is done I just want to add something. I just want you to understand that the only reason I was leaving was because I was in fear that Richard was looking for me to hurt me. This was the reason I was trying to leave on both occasions."

The applicant was subsequently arrested at the Montego Bay Airport while he was boarding a flight to leave Jamaica destined for New York.

In his defence, the applicant on oath denied that he was at Spring Farm at the time the deceased was killed. There was no "bad blood" between the deceased Cummings and himself. He testified that on the 1st April, 1997 he went to Bay West Shopping Centre where he saw Claudine Tenfa at "Yours Young World". She told him that she had made arrangements with the deceased to pick her up and carry her to a beauty salon. He saw the deceased at the plaza, and went and told him that Ms. Tenfa had changed her plans, after which the deceased drove away. He went back upstairs to Ms. Tenfa and at 3.00 p.m. he was still there. On the following day he began receiving threatening telephone calls, as a result he temporarily relocated his family. He heard the police were looking for him and fearing the "Jamaican Police" he boarded a flight to leave Jamaica. The police however took him off the plane.

He testified that anything in the tendered statement which said that he was at Spring Farm is not true. He made the statement because he was frustrated and very afraid that he had been kept in isolation.

Before us the applicant through his counsel, Mr. Dennis Morrison, Q.C. argued three grounds of appeal.

The first challenged the quality of the "circumstantial" evidence against the applicant, the learned trial judge having left the jury to consider the principles of circumstantial evidence as it applied to the facts in the case. Mr. Morrison, Q.C. maintained that the learned trial judge erred in leaving the case for the prosecution on the footing of circumstantial evidence as none of the items thereof relied on by the prosecution was sufficiently probative to provide a reliable link in the chain of circumstances.

In our view this was not a case upon which the conviction of the applicant relied upon circumstantial evidence. The case for the prosecution totally depended on the acceptance as true, the content of the statement allegedly taken from the applicant. Such other evidence as there was did nothing more than to establish that the applicant was in contact with the deceased on the day of his death, and demonstrated that if the applicant's statement was true then he lied when he said he had not left the Plaza in the car of the deceased. However, the directions of the learned trial judge on circumstantial evidence was not such as would divert the jury from assessing the evidence on a whole and in particular the statement of the applicant, upon which they received detailed directions.

The second ground of appeal complained that:

"the learned trial judge erred in his directions to the jury as to how they should approach the caution statement attributed to the applicant in particular with regard to the role of voluntariness or not."

The passages complained of are as follows:

"Now, so far as that statement by the accused man Taylor maybe viewed as some form of confession I am to tell you that it cannot be used as evidence against him unless it is free and voluntary, that is to say it must not have been extracted or induced by any sort of threat or obtained by any promise of favour or by the exertion of any improper influence on him."

And

"You the jury, you have to decide whether the statement was made by him. Did he make it? If he made it, was it free and voluntary. If you find that he made the statement freely and voluntarily you have to decide what you understand from it. What does it mean? You have to decide what weight and value you place on it. You consider all the versions surrounding its making."

Counsel for the applicant points out that voluntariness is a question of admissibility for the judge on the *voire dire*, so that inviting the jury to determine whether the statement was free and voluntary the learned trial judge "may have diverted the jury from their true role." While it is correct that the question of voluntariness is a matter for the trial judge in determining the admissibility of a cautioned statement, it is still incumbent on the jury, in concluding what weight, if any, should be put on it, to examine the circumstances under which the statement was taken. Certainly, a determination of that factor in favour of involuntariness, would affect the weight a jury would place on such a statement. The invitation to the jury to determine whether the statement is voluntary or not, given in the context of their determination as to what weight can be placed on it, in our view would not be in error. However, in the instant case, the learned trial judge did tell the jury that unless the statement is free and voluntary, it could not be used as evidence against him. This is incorrect. The error nonetheless was one

favourable to the applicant and the jury's verdict indicated quite clearly that they acted upon the content of the statement which they no doubt accepted as being given "freely and voluntarily." Given the totality of the directions on this subject matter we cannot conclude, as we are asked to do, that the jury was diverted from its true role. This ground also fails.

Lastly, the applicant contended that the verdict is unreasonable having regard to the "circumstances of the case and cannot be supported in the light of the evidence."

The major thrust of the argument in this ground was that the contents of the caution statement of the applicant upon which the prosecution primarily relied did not form a basis upon which to conclude that he was involved in a common design to kill or cause grievous bodily harm to the deceased.

In so far as the actual occurrence is concerned, it is appropriate to re-state that part of the caution statement in order to determine the merit of the submission:

"I got into the front seat of Kevin's car and I told him I want to go to Spring Farm to see a piece of land a friend told me about. ... before we exited I saw Richard. I told Kevin he is a friend of mine he should pick him up. Kevin stopped and Richard got into the back seat behind him. I told him to drive up to Spring Farm. ... When we reached Spring Farm and reached the actual location before Kevin shut off the car, Richard shot him twice in his head. He then came out and took the body out and put it to the side of the road.

I shifted over to the driver's seat and tried to start the car after shutting it off. The car didn't start. Richard and I look under the bonnet and went back to start the car but it still wouldn't start. We left

the area, walked down to the main road and took a taxi back to Bay West."

This part of the statement discloses that it was the applicant who instructed the deceased to "pick-up" Richard. He was present when Richard shot the deceased and made no outcry. In fact, he immediately tried to start the car so that they could exit the venue. Unfortunately, the special system for starting the car was unknown to him, and so he failed to get it started. This statement by the applicant of his failure confirms that he was in that car. After the deceased was shot, and taken from the car, and he unsuccessfully tried to start the car, he left the scene in the company of Richard and went back to Claudine's shop. He made no report of the incident to the police, but instead, on hearing that the police was looking for him, he made attempts to leave the island. All of this, prefaced by the fact that it was he who arranged with the deceased to come to the Plaza on the appointed day, could reasonably lead the jury to conclude that he was in a plot to go with the deceased in his taxi and to commit the offence. In our view there was ample evidence that the applicant played an active part in the murder of the deceased.

It was also submitted that the verdict of guilty against the applicant was inconsistent with the acquittal of the co-accused Richard Salmon. In our view the jury could have found as they seem to have, that the co-accused spoke the truth when he said that he merely loaned the gun to the applicant in the belief that the applicant would only use it to scare someone. In so finding, it was also open to them to conclude based on his statement, and his subsequent conduct in lying as to the fact that he left the Plaza with the

applicant, and trying to flee the country, that he committed the act either by himself or with some other person.

For these reasons, we concluded that the application for leave to appeal conviction should fail and consequently refused leave to appeal.

Sentence

The appellant appealed against sentence on the basis that the learned trial judge did not apply all appropriate considerations in making a recommendation as to the length of time the appellant should serve in prison before being eligible for parole. The learned trial judge had mandated that the appellant should serve 25 years imprisonment before being eligible for parole. It appeared that the complaint was valid. Having considered all the circumstances, we ordered that the period should be reduced to 23 years.